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A Treatise on the Powers and Duties of the Justices of the Peace in the State of Michigan, under Chapter Ninety-Three of the Revised Statutes of 1846, Being Chapter Thirty-Four of the Compiled Laws of 1897; with Practical Forms and an Appendix Containing the Justice Court Acts of Those Cities Having Provisions Differing Materially from the General Justice Court Act.

Alexander R. Tiffany

Victor H. Lane

University of Michigan Law School

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A treatise on the powers and duties of the justices of the peace in the state of Michigan, under chapter ninety-three of the revised statutes of 1846, being chapter thirty-four of the compiled laws of 1897; with practical forms and an appendix containing the justice court acts of those cities having provisions differing materially from the general Justice court act, by Alexander R. Tiffany

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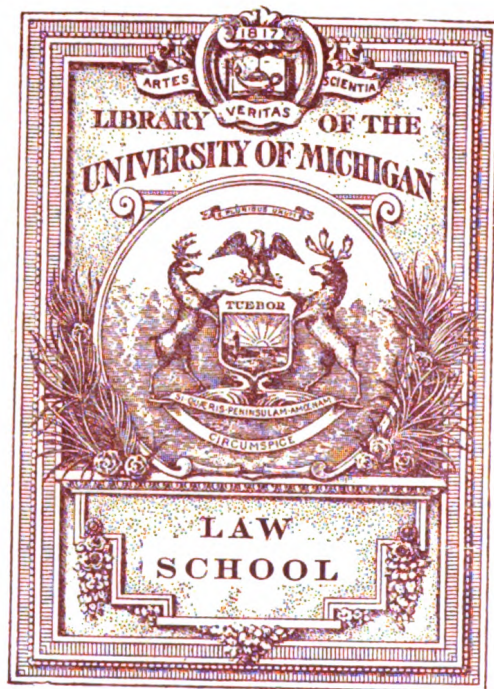


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A TREATISE
ON THE
POWERS AND DUTIES
OF
JUSTICES OF THE PEACE

IN THE
STATE OF MICHIGAN

UNDER CHAPTER NINETY-THREE OF THE REVISED STATUTES OF
1846, BEING CHAPTER THIRTY-FOUR OF THE
COMPILED LAWS OF 1897

2
WITH PRACTICAL FORMS

AND AN APPENDIX CONTAINING THE JUSTICE COURT ACTS OF
THOSE CITIES HAVING PROVISIONS DIFFERING MATERIALLY
FROM THE GENERAL JUSTICE COURT ACT

By ALEXANDER R. TIFFANY
COUNSELOR AT LAW

TENTH EDITION

By VICTOR H. LANE
PROFESSOR OF LAW IN THE UNIVERSITY OF MICHIGAN

CHICAGO
CALLAGHAN & COMPANY
1905

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PREFACE TO THE TENTH EDITION

Judge Alexander R. Tiffany, its author, put out the first edition of this work in 1849. In the years 1851, 1858 and 1866, he put out the second, third and fourth editions, respectively. The fifth edition was published in 1873 with Judge Andrew Howell as its editor and he edited the succeeding editions to the ninth inclusive, which were published in 1875, 1879, 1886 and 1894, respectively.

The editorship of the present edition has been undertaken at the request of the family of Judge Tiffany, and while the editor is persuaded that better can be done, yet it is hoped that the present edition may share the favor so long shown to this work by the bench and bar of Michigan.

There seems to be little occasion now to go outside the decisions of our own courts for assistance in the construction of our Justice Court Statutes, and while the older cases with some exceptions are retained, few cases from the courts of other states will be found among the new citations.

The citations of cases have been brought down to the 100th Northwestern Reporter and to the 132nd Michigan Reports. The Reporter citations are added for all cases since the beginning of the Reporter system.

Citations to statutes are to the Compiled Laws of 1897 and to the Session Laws of 1899, 1901 and 1903. A Table of Cases Cited has been added, the Table of Contents largely increased and the Justice Court Acts of those cities having provisions materially different from those of the general statute are found in an appendix. Some matter found in older editions is omitted and new material added in the text of this. There has been considerable rearrangement of matter, notably in collecting the forms in an appendix, thus removing them from the body of the text, and in its mechanical aspects a new face has been given to the book.

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PART I.

The Powers and Duties of Justices of the Peace, in General.

TIFFANY'S JUSTICE GUIDE

CHAPTER I.

OF THE JUSTICE AND JURISDICTION OF JUSTICES' COURTS.

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OF THE JUSTICE.

§ 1. **Essential qualifications—Residence.**—The justice must reside in the township where he was elected. "Whenever a justice of the peace shall remove from the township in which he was elected, or by a change of boundaries of such township shall be placed without the same, he shall be deemed to have vacated his office."¹

1—Const., Art. 6, § 22. The power of justices of the peace to try civil causes is so fixed by the constitution that they are absolutely necessary magistrates in cities as well as elsewhere: *Allor v. Wayne Auditors*, 43 Mich., 100; 4 N. W., 492. The justice must reside in the township where elected: *People v. Geddes*, 3 Mich., 70. A suit pending before a justice at the time of his removal from the township where he was elected will abate unless properly transferred to some other justice: *Kidder v. Merryhew*, 32 Mich., 470. The justice is

regarded as a local officer for many purposes, and the laws have always gone on that theory. But in exercising his judicial powers he represents the state rather than his township, and his officers may be any constable of the county as well as the sheriff, and his juries may be summoned from the county at large. There is nothing in the constitution which requires a justice to do all his business at his residence or at any fixed office. Neither the constitution nor the statute has ever required a justice to hold courts always at one place. He holds them,

§ 2. **Interest and relationship.**—A magistrate cannot act in his own cause.² And the statutes provide, "That no judge of any court can sit as such in any cause to which he is a party, or in which he is interested, or in which he would be excluded from being a juror, by reason of consanguinity or affinity to either of the parties."³ Nor can any judge decide or take part in the decision of any question which shall have been argued in the court when he was not present and sitting therein as a judge.

And further, that "No justice shall take cognizance of any cause, or do any judicial act, when he shall be related within the fourth degree of affinity or consanguinity to either party in any such matter, or shall have been of counsel, or shall be directly or indirectly interested in such cause or matter, unless the parties interested in such cause, or their agents or attorneys, shall, with full knowledge of such disability, expressly consent that such justice may take cognizance of such cause or do such act."⁴

In fact, sometimes in one place and sometimes in another, according to temporary convenience. And there is nothing in any settled policy of the constitution or laws which would prevent the legislature, at least, from allowing him to hold courts outside of his township: *Faulks v. People*, 39 Mich., 200.

2—1 Coke's Inst., 377; *Place v. Butternuts*, 28 Barb., 503. A note sent to a justice for collection, and indorsed to him thus, "Pay to Volney Reynolds, J. P., or order, for collection," transfers the legal title of the note to him, and makes him the agent of the indorser for its collection; and so long as the note remains thus indorsed and held by him, a suit cannot be maintained before him to collect the note by reason of his interest in it: *West v. Wheeler*, 40 Mich., 505; 13 N. W., 836; *Moon v. Stevens*, 53 Mich., 144; 18 N. W. 600. But a justice to whom a claim is sent for collection, with instructions merely to notify the debtor that it will be sued if not paid, is not thereby disqualified, as an interested party, from entertaining a suit upon the demand: *Moon v. Stevens*, 53 Mich., 144; 18 N. W. 600.

3—C. L., § 1109, as amended by act 245, 1893. And the statute extends

to a justice sitting on the trial of a civil cause: *Foot v. Morgan*, 1 Hill, 654; see *Hasceig v. Tripp*, 20 Mich., 216; *People v. Whitney*, 105 Mich., 627; 63 N. W., 765. In which last case it is held that a justice is not disqualified because in a prosecution under a local option law, his brother-in-law, who is the prosecuting officer, makes the complaint. The maxim is deeply rooted in the common law that "no man shall be a judge in his own cause:" *Peninsular Ry. Co. v. Howard*, 20 Mich., 18; *Stockwell v. Township Board*, 22 Mich., 341. This doctrine is not applicable to administrative acts which are public and not between private parties: *Clement v. Everest*, 29 Mich., 19.

4—C. L., § 711; *Hasceig v. Tripp*, 20 Mich., 216, 218. Where a proceeding against a party for fraudulently concealing his property, etc., was brought before a justice who was attorney for the plaintiffs in a pending replevin suit involving the title to the property charged to have been concealed, held, that the justice was an interested party and thereby disqualified to act: *Clark v. Mikesell*, 81 Mich., 45; 45 N. W., 377. And, although not interested when the proceeding was commenced, any subse-

A judgment pronounced by a justice who is disqualified is void and may be attacked collaterally.⁵

A justice cannot, without such consent, take cognizance of a cause, though prosecuted in the name of another, in which a relative, within the degrees prohibited by this section, is the plaintiff in interest; and if he render judgment in the cause, it will be absolutely void.⁶ And such would be the consequence in relation to any case in which he had been of counsel,⁷ or is directly or indirectly interested in the case.⁸

To enable a justice to try a cause in which any of the objections mentioned in the preceding section (§711) exist, it will not be sufficient that the parties appear and make no objection, for they may not be aware of the disability. But it must clearly appear that the opposite party had full knowledge of the disability of the justice to try the cause, and with such knowledge there must be an express assent that the justice may try the cause notwithstanding the existence of the objection, or the proceeding will be absolutely void, and utterly unavailing for the protection of the party or the justice.⁹

And a justice ought never to grant process for the trial of a cause where his opinion has been sought and expressed in relation to the matter in controversy, nor even where the party has made a statement of facts, and taken from him any directions whatever concerning them, though it be merely as to a course of proceeding to obtain redress.¹⁰

To ascertain the degree of relationship in which the justice

quent interest acquired by him in the proceeding would oust him of jurisdiction. *Ibid.* A justice cannot be both magistrate and counsel in the case: *Stensrud v. Delamater*, 56 Mich., 144; 22 N. W., 272; see also *People v. Whitney*, 105 Mich., 627; 63 N. W., 785.

5—*Horton v. Howard*, 79 Mich., 642; 44 N. W., 1112, and cases cited in the opinion.

6—*Foot v. Morgan*, 1 Hill, 654; *Horton v. Howard*, 79 Mich., 642; 44 N. W., 1112, and cases cited.

7—*Carrington v. Andrews*, 12 Abb., 348.

8—Therefore, where a justice is a stockholder in a corporation, he cannot entertain a suit in which the corpora-

tion is a party: *Washington Ins. Co. v. Price*, 1 Hopkins, 1. And so held where a brother of the justice was a stockholder in the defendant's corporation. *Place v. Butternuts, &c., Man'f. Co.*, 28 Barb., 503; see also *Peninsular Ry. Co. v. Howard*, 20 Mich., 18.

9—If the justice has inadvertently issued process or proceeded in a cause where he is related by consanguinity or affinity to one of the parties, it is his duty, when the fact comes to his notice, to withdraw himself from the cause. He cannot even render judgment of nonsuit, or for costs in the case; such judgment would be void: *Edwards v. Russell*, 21 Wend., 63.

10—*Cowen's Treatise*, 2d ed., 878.

stands in reference to a party to a cause, the computation is to be according to the rule of the *common* law, which in some respects differs from that of the *civil* law.

Affinity is a connection formed by marriage, which places the husband in the same degree of nominal propinquity to the relations of the wife, as that in which she herself stands towards them, and gives to the wife the same reciprocal connection with the relations of the husband. The degrees of affinity are computed in the same way as those of consanguinity.¹¹

Consanguinity is the relation existing among all the different persons descending from the same stock, or common ancestor. Some portion of the blood of the common ancestor flows in the veins of all his descendants, and though mixed with the blood flowing from many other families, yet it constitutes the kindred or alliance by blood between any two of the individuals. The relation by blood is of two kinds, lineal and collateral.

Lineal consanguinity is that relation which exists among persons, where one is descended from the other, as between the son and the father, or the grandfather, and so upwards in a direct ascending line; and between the father and the son, or the grandson, and so downwards in a direct descending line. Every generation in this direct course makes a degree, computing either in the ascending or descending line. This being the natural mode of computing the degrees, it has been adopted by the civil, the canon, and the common law.

Collateral consanguinity is the relation subsisting among persons who descend from the same common ancestor, but not from each other. It is essential, to constitute this relation, that they spring from the same common root, or stock, but in different branches. The mode of computing the degree, is to discover the common ancestor; to begin with him to reckon downwards, and the degree the two persons, or the more remote of them, is distant from the ancestor, is the degree of kindred subsisting between them. For instance, two brothers are related to each other in the first degree, because, from the father to each of them is one degree. An uncle and a nephew are related to each other in the second degree, because the nephew is two degrees from the common ancestor, and the rule of computa-

11—Bouv. Law Dic., "Affinity."

tion is extended to the remotest degree of collateral relationship. This is the mode of computation by the *common* and *canon* law.

The method of computing by the *civil* law, is to begin at either of the persons in question, and count up to the common ancestor, and then downwards to the other person—calling it a degree for each person—both ascending and descending, and the degrees they stand from each other is the degree in which they stand related. Thus, from a nephew to his father is one degree; to the grandfather, two degrees, and then to the uncle, three, which points out the relationship. The mode of the *civil* law points out the actual degree of kindred in all cases; by the mode adopted by the common law, different relations may stand in the same degree. The uncle and nephew stand related in the second degree by the common law, and so are two first cousins, or two sons of two brothers; but by the civil law the uncle and nephew are in the third degree, and the cousins are in the fourth.¹²

Affinity—to constitute a valid objection, must be subsisting; if the marriage has been dissolved by death, the objection is removed, unless there has been issue of the marriage.¹³

The husband is related by affinity to all the *consanguinei* of his wife, and *vice versa*, the wife to the husband's *consanguinei*; for the husband and wife being considered one flesh, those who are related to the one by *blood* are related to the other by *affinity*. But the *consanguinei* of the husband are not at all related to the *consanguinei* of the wife. Therefore, where the brother of the justice was the husband of the plaintiff's sister, it was held that the justice was not disqualified to act; although the justice was related by affinity to the plaintiff's sister, there was no such relation between him and the plaintiff.¹⁴

12—Bouv. Law Dic., "Consanguinity."

13—2 Bla. Com., 435, n.; Carman v. Newell, 1 Denio, 25. If there is issue of the marriage remaining alive, the affinity remains: Cain v. Ingham, 7 Cow., 478, n. (a).

14—Higbee v. Leonard, 1 Denio, 186. And the blood relatives of the wife, while the marriage tie continues, stand in the same *degree* of affinity to the husband as they do in consanguinity

to her, and so the blood relatives of the husband stand in the same degree of affinity to her: Paddock v. Wells, 2 Barb. Ch., 331.

In the following cases the justice was held to be disqualified by his relationship to the party. Where the justice and plaintiff were cousins: Edwards v. Russell, 21 Wend., 63. Where the justice and defendant were second cousins: Randall v. Hall; Laller's Sup. to Hill & Denio, 230. Where

§ 3. **Where prohibited from holding court.**—"No justice of the peace shall hold any court in any bar-room or grocery, or any other place where any intoxicating liquors shall be sold."¹⁵

Nor should a justice undertake to decide upon the constitutionality of any act of the legislature.¹⁶

§ 4. **Responsibility for his acts.**—The capacity in which justices act is either ministerial or judicial. They act ministerially in issuing process in the first instance, in issuing subpoenas or writs of execution, and in making returns to appeals and writs of *certiorari*, and in taking security thereon, and generally, in doing those things which pertain to the office of a clerk rather than to that of a judge.¹⁷

They act judicially in rendering judgments, and in exercising those powers confided to them to be performed according to their judgment and discretion.¹⁸

For his ministerial acts, the justice is liable to an action at the suit of the party injured, if he acts illegally; and even where he commits an error while so acting, by which a party

the justice and plaintiff were second cousins: *Post v. Plack*, 5 Denio, 66. Where the plaintiff was a nominal party having no interest, the suit being for the benefit of one who had married a sister of the justice's wife, both wives being alive: *Foot v. Morgan*, 1 Hill, 654, and see *Place v. Butternuts*, 28 Barb., 503.

Judgment void. A judgment rendered by a justice related to either of the parties, within the degrees prohibited by the statute, there being no consent with full knowledge of the fact, that he might try the cause, is not merely erroneous, it is void: *Schoonmaker v. Clearwater*, 41 Barb., 200; *Horton v. Howard*, 79 Mich., 642; 44 N. W., 1112, and cases cited in opinion.

Upon Appeal or Certiorari the fact of the relationship of the justice to the party, may be shown by the return of the justice, though the matter was not proved, admitted, or even objected on the trial: *Post v. Black*, 5 Denio, 66.

15—C. L., § 710. Where on the day of trial the cause was called in the bar-room of a tavern, and adjourned

to an adjoining room in the same house, but the justice had no knowledge that intoxicating liquors were sold there, and no proof of such fact being offered on the trial, the court on appeal refused to reverse the judgment: *Savler v. Chipman*, 1 Mich., 116. As to whether the court will presume that liquors are sold in a bar-room, see *Ibid.*, *Faulks v. People*, 39 Mich., 201.

16—*Ortman v. Greenman*, 4 Mich., 291. But see a discussion of this question in note 1, p. 230, *Cooley's Constitutional Limitations*, edition seven.

17—*Tompkins v. Sands*, 8 Wend., 462; *Houghton v. Swartout*, 1 Denio, 589; *Percival v. Jones*, 2 Johnston's Cases, 49; *Rogers v. Mullner*, 6 Wend., 601-2-3. The issuing of a summons by a justice is a ministerial act merely: *Smith v. Ihling*, 47 Mich., 614; 11 N. W., 408.

18—*Wall v. Trumbull*, 16 Mich., 228; *Tompkins v. Sands*, 8 Wend., 462. A justice may refuse to open a case after he has heard the parties and announced his conclusion: *Chivers v. Lytle*, 97 Mich., 477; 56 N. W., 862.

is injured, he is liable, although no corrupt motives are charged.¹⁹

But a justice is not liable in a civil suit for any judicial act.²⁰ "No public officer is responsible, in a civil suit, for judicial determination, however erroneous it may be, and however malicious the motive which produced it; such acts, when corrupt, may be punished criminally; but the law will not allow malice and corruption to be charged in a civil suit against such an officer, for what he does in the performance of a judicial duty. The rule extends to judges from the highest to the lowest; to jurors and all public officers, whatever name they may bear, in the exercise of judicial power. It, of course, applies only when the judge or officer having jurisdiction of the particular case, was authorized to determine it. If he transcends the limits of his authority, he necessarily ceases, in the particular case, to act as a judge, and is responsible for all the consequences; but with these limitations, the principle of irresponsibility, so far as respects a civil remedy, is as old as the common law."²¹ "Unless the duty of the magistrate is simply and purely ministerial, he cannot be made liable to an action for a mistake in doing or avoiding to do anything in execution of that duty, unless he can be fixed with malice."²²

If a justice, from corrupt and malicious motives, act partially or oppressively, or with intent to pervert the due course

19—*Ibid.*; and *Houghton v. Swartout*, 1 Deno, 589; see, *Heald v. Bennett*, 1 Doug., Mich., 513; *Welch v. Frost*, 1 Mich., 30. A justice will be liable to a private individual for his failure to perform any ministerial duty in which such individual has a special and direct interest: *Raynsford v. Phelps*, 43 Mich., 344; 5 N. W., 403.

20—*Moor v. Ames*, 3 Calnes, 170; *Cunningham v. Bucklin*, 8 Cow., 178, 183. No action will lie against a judicial officer for anything done by him in his judicial capacity: *Morton v. Crane*, 39 Mich., 530; *Raynsford v. Phelps*, 43 Mich., 344; 5 N. W. 403.

21—*Weaver v. Deavendorf*, 3 Deno, 117; *Tompkins v. Sands*, 8 Wend., 462; *Gordon v. Farrar*, 2 Doug. Mich., 411.

22—*Linford v. Fitzroy*, 13 Ad. & Ell., N. S., 247; *Wall v. Trumbull*, 16 Mich., 235. Thus, a justice acts judicially in determining whether an attorney who appears for a party in his absence, is authorized to do so; and is not liable for an erroneous determination. When jurisdiction depends upon facts which are to be found by the magistrate himself, his finding in favor of jurisdiction is a complete protection, even though it prove to be erroneous. But, if a justice assumes jurisdiction when the law gives him none, he will not be protected, for in such a case he would falsely assume a judicial character he did not possess: *Morton v. Crane*, 39 Mich., 526. And so, if he acts maliciously: *Raynsford v. Phelps*, 43 Mich., 345; 5 N. W., 403.

of law and justice, he is liable to punishment by indictment or information.²³

§ 5. Of the duties and liabilities of justices and constables.—

“No constable shall ask or receive any money or other valuable thing from a defendant or other person, as a consideration, reward or inducement for omitting to arrest any delinquent, or to carry him before any justice, or for delaying to take any party to prison, or for postponing the sale of any property under any execution, or for omitting or delaying the execution of any duty pertaining to his office.”²⁴

“No justice of the peace or constable shall, directly or indirectly, buy or be interested in buying, any bond, note, or other demand or cause of action, for the purpose of commencing any suit thereon before a justice; nor shall any justice or constable, either before or after suit brought, lend or advance, or agree to lend or advance, or procure to be lent or advanced, any money or valuable thing, to any person in consideration of, or as a reward for, or inducement to, the placing or having placed in the hands of such justice or constable, any debt, demand or cause of action whatever, for prosecution or collection.”²⁵

“No justice of the peace shall purchase, directly or indirectly, or be interested in the purchase of any judgment rendered by him.”²⁶

“Every justice or constable, offending against either of the provisions of the three last preceding sections, shall be deemed guilty of a misdemeanor, and on conviction thereof, shall be punished by a fine not exceeding five hundred dollars, or imprisonment in the county jail not exceeding six months, or both such fine and imprisonment, in the discretion of the court;

23—1 Chlt. Cr. Law, 873, 874; People v. Coon, 15 Wend., 277; Jenkins v. Waldron, 11 Johns., 127.

A ministerial officer has a line of conduct marked out for him, and has nothing to do but to follow it; and he must be held liable for any failure to do so which results in the injury of another. A judicial officer, on the other hand, has certain powers confided to him to be exercised according to his judgment or discretion; and the law would be oppressive which should compel him to decide correctly at his

peril. It is, accordingly, a rule of very great antiquity, that no action will lie against a judicial officer for any act done by him in the exercise of his judicial functions, provided the act, though done mistakenly, were within the scope of his jurisdiction. This principle of protection is not confined to courts of record, but applies as well to inferior jurisdictions: Wall v. Trumbull, 16 Mich., 235.

24—C. L., § 953.

25—C. L., § 954.

26—C. L., § 955.

and every such conviction shall operate as a forfeiture of the office of the justice or constable so convicted.”²⁷

OF JURISDICTION.

The jurisdiction of the justice of the peace in civil suits depends wholly upon statute law.²⁸

§ 6. *In general.*—By statute, it is provided in regard to courts held by justices of the peace, that “Each of said courts is hereby vested with all such powers, for the purpose of exercising jurisdiction conferred by this chapter,²⁹ as are usual in courts of record, except the power of setting aside a verdict and arresting judgment thereon.”³⁰

Jurisdiction is the power to hear and determine the subject matter in controversy between the parties to a suit.³¹ The term “jurisdiction” pertains either to the *subject matter* or to the *parties*. The jurisdiction of courts as to subject matter is conferred by law, and in no case by the consent of parties.³² Justice’s courts are courts of inferior and limited jurisdiction, and are confined strictly to the powers conferred upon them by the statute.³³ They have no jurisdiction by implication merely.³⁴

27—C. L., § 956.

28—Wight v. Warner, 1 Doug. (Mich.), 384; Clark v. Holmes, *Ibid.*, 390; Hartford Fire Ins. Co. v. Owen, 30 Mich., 441.

29—Chapter 34, C. L., 1897.

30—C. L., § 706; and see, Phelps v. Town, 14 Mich., 374, 381; Van Sickle v. Kellogg, 19 Mich., 49-54. A justice’s court possesses the same general powers for the exercise of jurisdiction as do courts of record, except the power of setting aside verdicts and arresting judgments: Hodges v. Bagg, 81 Mich., 243; 45 N. W., 841; Wagner v. Kellogg, 92 Mich., 616; 52 N. W., 1017. A justice may disregard a void judgment rendered by him and proceed as though it had never been rendered: Hodges v. Bagg, 81 Mich., 243; 45 N. W., 841. He may order a jury though it is expressly waived by the parties: Van Sickle v. Kellogg, 19 Mich., 49.

31—People v. Sturtevant, 5 Selden, 263-266; Cooley Const. Lim., 575, Ed. 7; see also Constitution of Michigan, art. vi. § 18, and notes to this section in Comp. Laws, 1897.

32—Burcke v. Eckhart, 3 Const., 137; Spear v. Carter, 1 Mich., 19-23. Nor can want of jurisdiction over the subject matter be waived by the parties: Moore v. Ellis, 18 Mich., 77; Farrand v. Bentley, 6 Mich., 282; Allen v. Carpenter, 15 Mich., 32; Att’y Gen. v. Mollter, 26 Mich., 444; Thompson v. Mich. Mutual Benefit Association, 52 Mich., 522; 18 N. W., 247. Nor can a court acquire jurisdiction by a false assertion of facts upon which jurisdiction depends: Noyes v. Butler, 6 Barb., 613; Harrington v. People, *Ibid.*, 607.

33—Wight v. Warner, 1 Doug. Mich., 384; Clark v. Holmes, *Ibid.*, 390; Spear v. Carter, 1 Mich., 19. Justices of the peace have no common law jurisdiction in civil cases. They are confined strictly to the authority which the statute has conferred, and can take nothing by implication: Bronson J. in Hoose v. Sherrill, 16 Wend., 38.

34—Wight v. Warner, 1 Doug. Mich., 384.

Our constitution does not regard them as courts exercising special and

This, however, is to be understood with the qualification, that wherever jurisdiction is given by the statute, all those incidental powers necessary to make it effectual or requisite to attain the end, are also impliedly conferred thereby.³⁵

In all actions before justices of the peace, everything necessary to confer jurisdiction must appear affirmatively upon the face of the proceedings; nothing will be presumed in favor of their authority to hear and determine the matter.³⁶

§ 7. Jurisdiction as to parties.—As a general rule, a justice has jurisdiction of every person found in the county, whether a resident or not, who sues or is sued, in his own right.

School districts.—“Justices of the peace shall have jurisdiction in all cases of assumpsit, debt, covenant and trespass on the case, against school districts, when the amount claimed, or matter in controversy, shall not exceed one hundred dollars; and the parties shall have the same right of appeal as in other cases.”³⁷

Corporations.—“All actions against corporations, except municipal corporations, shall be cognizable before a justice of the peace, in like manner and with the like restrictions as the same are or may be by law before a justice of the peace when brought against an individual.”³⁸

limited powers in the strict sense, but fixes in such courts an exclusive jurisdiction in civil cases to one hundred dollars, and a concurrent one to three hundred dollars, except as it may be otherwise provided by statute. They are for such purposes the ordinary tribunals of justice. All courts are bound, judicially to know the extent of their powers, and their authority is in no sense contrary to the course of the common law, any more than that of the circuit courts: *Goodsell v. Leonard*, 23 Mich., 374.

35—*Stief v. Hart*, 1 Comst., 30; *Robbins v. Gorham*, 25 N. Y., 594; *Voorhees v. Martin*, 21 Barb., 508; *Goodsell v. Leonard*, 23 Mich., 374.

36—*Spear v. Carter*, 1 Mich., 21; *Wall v. Trumbull*, 16 Mich., 235; *Saunders v. Tloga Mfg. Co.*, 27 Mich., 520.

Nothing is to be presumed for the purpose of giving the justice jurisdiction in the first instance—such juris-

diction must be shown; but after jurisdiction of the cause and parties is once made to appear, and the question is whether it had afterward been lost, it will be presumed in support of his judgment that jurisdiction continued, and that his acts were regular and valid unless the contrary appears: *Saunders v. Tloga Mfg. Co.*, 27 Mich., 520.

And so of all courts, in special proceedings not according to the course of the common law: *Wight v. Warner*, 1 Doug., 384, 390; *Chandler v. Nash*, 5 Mich., 416; *Elliot v. Dudley*, 8 Mich., 64; *Platt v. Stewart*, 10 Mich., 260; *Allen v. Carpenter*, 15 Mich., 25, 32; *Wall v. Trumbull*, 16 Mich., 228, 235.

37—C. L., § 4721. See *Thompson v. Crockery School District*, 25 Mich., 483.

38—C. L., § 753; *Root v. Mayor, etc.*, of Ann Arbor, 3 Mich., 433. The provision in a city charter, that the corporation may sue and be sued in all

Unincorporated voluntary associations.—Whenever any unincorporated voluntary association, club, or society, shall be formed in this state, composed of five members or more, having some distinguishing name, actions at law or in chancery may be brought by or against such association, club, or society, by the name by which it is known: *Provided*, that this act shall not take away the right of the litigant to proceed against all the members of such association, club, or society, if such litigant shall so elect to proceed.³⁹

Executors and Administrators.—“No justice of the peace shall have cognizance of * * * actions against executors and administrators, as such, except in the cases specially provided by law.”⁴⁰

courts of law, etc., does not confer upon justices jurisdiction in actions against the city; therefore, a plaintiff suing such a corporation in the circuit court on a demand less than one hundred dollars, is entitled to his costs if he recover judgment. *Gurney v. Mayor of St. Clair*, 11 Mich., 202; see *Brigham v. Eglinton*, 7 Mich., 291. Justices have no jurisdiction in suits against municipal corporations: *Eaton Rapids v. Houpt*, 63 Mich., 371; 29 N. W., 860; *Com'r of Highways v. Supervisors*, 77 Mich., 228; 43 N. W., 870. Although this § 753 prohibits municipal corporations from being sued before justices of the peace, yet suits may be brought by such corporations before those officers: *Hart v. Township of Port Huron*, 46 Mich., 428; 9 N. W., 481; see, *Eaton Rapids v. Houpt*, 63 Mich., 371; 29 N. W., 860.

A commissioner of highways is regarded under C. L., §§ 10476-10483, as a municipal corporation, and a justice of the peace has no jurisdiction of suits against such an officer, unless conferred by the amendment of 1887 to § 10482; see, *Com'r of Highways v. Supervisors*, 77 Mich., 228; 43 N. W., 870. See as to the jurisdiction of justices of the peace in actions for damages resulting from obstructions to highways: C. L., § 704, and *Knorr v. Circuit Judge*, 78 Mich., 168; 43 N. W., 1090.

Foreign Corporations. Express companies incorporated under the laws of other states and doing business within

this state, may be sued before justices of the peace in counties where they are doing business. C. L., § 5263; *Gallagher v. American Express Co.*, 56 Mich., 13; 22 N. W., 96. See, also, *Eaton Rapids v. Houpt*, 63 Mich., 373; *Jebb v. Chicago and Grand C. Ry. Co.*, 67 Mich., 162; 34 N. W., 538.

But as to Foreign Insurance Companies, see C. L., §§ 10015-10021, and *Hartford Fire Ins. Co. v. Owen*, 30 Mich., 441. This case holds that the statute referred to providing for service of process on foreign insurance companies is not applicable to justice's courts.

39—C. L., § 10025. This act held constitutional in *United States Heater Co. v. Iron Moulders Union of N. A.*, 129 Mich., 354; 88 N. W., 889. Recovery may be had in such an action by such a plaintiff though individual members appear in court and say they do not want the action to proceed: *Detroit L. G. B. v. First Michigan Ind. I.*, — Mich., —; 96 N. W., 934 (Oct., 1903).

40—C. L., § 704. This statute has limited the general jurisdiction of justices of the peace by specifying certain cases or classes of cases in which they shall have no jurisdiction: *Basom v. Taylor*, 39 Mich., 684. And it denies to justices any jurisdiction in suits against executors and administrators as such: *Ibid.* But a justice, upon the authority of § 9381, C. L., 1897, is held to have jurisdiction of an action of replevin against an adminis-

§ 8. Jurisdiction as affected by residence of parties.—The jurisdiction of justices of the peace is in some measure controlled by the residence of the parties. The statute provides that,

“Every action commenced in such court shall be brought before some justice of the peace of the city or township where:

First, The plaintiffs or any of them reside; or,

Second, Where the defendants or any of them reside; or,

Third, Before some justice of another township or city, in the same county, next adjoining the residence of the plaintiff or defendant, or one of the plaintiffs or defendants: *Provided*, however, That no justice of the peace of any of the townships in the county of Wayne shall have jurisdiction over any cause or proceeding, where both parties to the same or one or more of the plaintiffs and one or more of the defendants reside in the city of Detroit at the time of the commencement of the proceeding or cause, nor in case where the original cause of action existed in favor of a plaintiff and against a defendant, both residents of said city, and has been assigned to a non-resident of said city; or,

Fourth, Before some justice of a city in the same county, formed from a township or townships next adjoining the residence of the plaintiff or defendant, or one of the plaintiffs or defendants: *Provided*, That nothing herein contained shall change or limit the jurisdiction of a justice of the peace where the same has been prescribed by the charter of an incorporated city.”⁴¹

“But if a defendant shall have absconded from his residence, such action may be brought before any justice of the township or city in which such defendant or his property may be; and if the plaintiffs be all non-residents of the county, or if the defendant be a non-resident of the county, then such action may

trator: *Singer Mfg. Co. v. Benjamin*, 55 Mich., 330; 21 N. W., 358; 23 N. W., 25.

41—C. L., § 707.

Towns cornering upon each other and contiguous at the corners merely are adjoining towns within the meaning of the statute: *Holmes v. Carley*, 31 N. Y., 289; *Jebb v. Chicago & Grand*

Trunk Ry. Co., 67 Mich., 160; 34 N. W., 538. Where both parties are residents of the county but neither are residents of the township where the justice resides nor of an adjoining township the justice has no jurisdiction: *Burlingame v. Marble*, 95 Mich., 5; 54 N. W., 695.

be brought before any justice of the township or city where such plaintiffs or defendants, or either of them, may be."⁴²

Under the provisions of the preceding sections, if the plaintiff be a non-resident of the county, the action may be brought before any justice in the county. In such case it is not necessary that the plaintiff should be personally present in the township where the justice resides. The expression in relation to non-resident plaintiffs, that they may bring their actions before any justice of the township or city where such plaintiffs, or either of them, *may be*, was to exclude all the restrictions before imposed, and to authorize them to apply to any justice in the county, at their option.⁴³

If the plaintiff is a resident of the county, and the defendant a non-resident, an action may be brought before a justice of the township in which the defendant is *at the time*, or before a justice of the township where the plaintiff resides, or the next adjoining township.

The question of residence is to be confined to the parties to the record. The fact that the demand belongs to an assignee, who is a non-resident of the county, would not authorize the bringing of a suit in any other than the township in which the plaintiff or defendant resided, or the next adjoining township,⁴⁴ unless brought in the name of the assignee, as it may be in most cases.⁴⁵

§ 9. Jurisdiction, as affected by the character of the action and amount involved.—"Every justice of the peace elected in any township or city of this state, and duly qualified according to law, shall have original jurisdiction of all civil actions wherein the debt or damages do not exceed the sum of one hundred dollars; and concurrent jurisdiction in all civil actions upon contract, express or implied, wherein the debt or damages do not exceed three hundred dollars, except as provided in the

42—C. L., § 708. A justice has no jurisdiction of the person where neither of the parties resides in his county: *Hall v. Shank*, 57 Mich., 36; 23 N. W., 478. Where the plaintiff is a non-resident of the county, the defendant being a resident of the county but not a resident of the township where the justice resides, it is not necessary that it appear that either was present in the township when the summons was issued: *Weaver v. Rix*, 109 Mich., 697; 67 N. W., 970.

43—*Hunter v. Burtis*, 10 Wend., 538; *Weaver v. Rix*, 109 Mich., 697; 67 N. W., 970.

44—*Harley v. Row*, 7 Wend., 452.

45—C. L., § 10054.

next section, and to hear, try and determine the same according to law."⁴⁶

§ 10. Actions of which the justice is denied jurisdiction.

—"No justice of the peace shall have cognizance of real actions, actions for a disturbance of a right of way or other easement, actions for libel or slander, or for malicious prosecutions, and actions against executors or administrators, as such, except in the cases specially provided by law, nor where the title to real

46—C. L., § 703; see, 3 Mich., 139.

By the Constitution, in civil cases, justices have exclusive jurisdiction to the amount of one hundred dollars: Const., Art. 6, § 18; Raymond v. Hinkson, 15 Mich., 113; Phelps v. Town, 14 Mich., 381. They have exclusive jurisdiction in assumpsit where the damages do not exceed one hundred dollars: Stortz v. Judge of Ingham County, 38 Mich., 243. But they have no civil jurisdiction beyond three hundred dollars: Bishop v. Freeman, 42 Mich., 533; 4 N. W., 290.

Where jurisdiction depends on the amount of the demand, it is determined by the *sum claimed* in the writ or declaration, and that will be regarded as the test, so far as to give the court jurisdiction: Strong v. Daniels, 3 Mich., 466; Inkster v. Carver, 16 Mich., 487; Tower v. Lamb, 6 Mich., 362; Merrill v. Butler, 18 Mich., 294. The amount claimed in the *ad damnum* clause in the declaration determines the jurisdiction of the justice in assumpsit. If the amount claimed in the writ and declaration is within the jurisdiction of the justice the plaintiff will be entitled to recover that amount, although the amount proved as actually due may exceed the sum so claimed in the declaration. It is competent for the plaintiff to release or abandon all of his demand except so much as the justice has jurisdiction to render judgment for: Cilley v. Van Patten, 68 Mich., 80; 35 N. W., 831.

Justices have no jurisdiction in actions founded on tort where the damages claimed exceed one hundred dollars: Wells v. Scott, 4 Mich., 347.

If a verdict for \$100 is obtained in an action *ex-delicto* where double damages are allowed by statute, doubling

such verdict will not oust the justice of jurisdiction: Roosevelt v. Hanold, 65 Mich., 414; 32 N. W., 443.

Although the demand sued upon may in fact exceed the justice's jurisdiction, yet if plaintiff claims such amount only as is within his jurisdiction, he may try the cause, and the plaintiff will be deemed to have abandoned all of his demand except the amount claimed in the suit: Bowditch v. Salisbury, 9 John, 365; Inhabitants, &c., v. Colfax, 1 Halstead, 115.

In replevin, where the plaintiff alleged the property to be worth ninety-nine dollars, but the evidence on trial showed it to be worth one hundred and twenty-five dollars, the supreme court say: "The right of a justice to dispose of a cause on its merits, so far as any objection founded on the value of the property is concerned, is complete when the parties proceed to trial on the general issue, if not before. If the question of jurisdiction as depending on value, is not closed by the affidavit for a writ, it is certainly not open under the general issue. That plea is to the merits, and by going to trial on it without objection, the defendant admits the justice's authority to investigate the matter": Henderson v. Desborough, 28 Mich., 170. See Sager v. Shutts, 53 Mich., 116; 18 N. W., 580; Humphrey v. Bayn, 45 Mich., 565; 8 N. W., 556; Chilson v. Jennison, 60 Mich., 235; 26 N. W., 859.

In the case last cited it was held that judgment in replevin before a justice may be taken for the value of property in issue though it may amount to five hundred dollars, the constitutional limit.

Where plaintiff in the circuit court claims in his writ sufficient to give

estate shall come in question, except as hereinafter mentioned: *Provided*, That justices of the peace may have jurisdiction in actions for damages resulting from obstructions to highways, subject to the restrictions prescribed in section 1 of this chapter.'⁴⁷

§ 11. **On confession of judgment.**—"If any debtor shall appear before a justice of the peace without process, and confess in writing, signed by him in the presence of the justice, that he is indebted to another upon contract in a certain specified sum, it shall be lawful for such justice, with the consent of the creditor, to enter judgment on such confession against the debtor for any sum not exceeding three hundred dollars."⁴⁸

§ 12. **In covenant on bond.**—"When there shall be a bond with a penalty exceeding one hundred and fifty dollars, with condition for the payment of a sum of money not exceeding one hundred and fifty dollars, or for the payment of several sums of money by installments, the aggregate of which installments shall not exceed one hundred and fifty dollars, an action of covenant may be maintained on such condition in a justice's

that court jurisdiction, but recovers only an amount within the exclusive jurisdiction of a justice's court, costs will be given to the defendant: C. L., § 11257; *Strong v. Daniels*, 3 Mich., 466; *Ladd v. Duncan*, 23 Mich., 285; *Read v. Horner*, 90 Mich., 158; 51 N. W., 207.

47—C. L., § 704.

Have no jurisdiction in actions for the disturbance of right of way: *Fowler v. Hyland*, 48 Mich., 179; 12 N. W., 26. Nor where the title to real estate shall come in question: *Stout v. Keyes*, 2 Doug., 184; *Brooks v. Delrymple*, 1 Mich., 145. *Riggs v. Sterling*, 51 Mich., 159; 16 N. W., 320; *Highway Commissioners v. Withney*, 52 Mich., 50; 17 N. W., 272. As to when title will be deemed in question, etc., *Gay v. Hults*, 55 Mich., 327; 21 N. W., 357; *Labeau v. Labeau*, 61 Mich., 81; 27 N. W., 861; *Ostrom v. Potter*, 71 Mich., 44; 38 N. W., 670. And when not: *Schlatterer v. Nickodemus*, 50 Mich., 315; 15 N. W., 489. Disturbance of easement: *Williamson v. Haskell*, 50 Mich., 361; 15 N. W., 512; *Dolahanty v. Lucey*, 101 Mich., 113; 59 N. W., 415.

The provision with reference to actions for disturbance of a highway gives jurisdiction to justices in this class of actions concurrent with the circuit courts: *Knorr v. Judge*, 78 Mich., 170; 43 N. W., 1099.

48—C. L., § 705. *Beach v. Botsford*, 1 Doug. Mich., 202; *Spear v. Carter*, 1 Mich., 22. The confession must be in writing and signed in the presence of the justice by the defendant: *Willson v. Davis*, 1 Mich., 156; *Clark v. Holmes*, 1 Doug. Mich., 390; *Cox v. Crippen*, 13 Mich., 509. Judgment against two is not warranted by the confession of one: *Clark v. Holmes*, *supra*; nor is a judgment against a partnership justified by the confession of one partner: *Soper v. Fry*, 37 Mich., 236.

The treasurer of a corporation, as such, has no implied power to consent to a judgment against the corporation without the institution of a suit: *Stevens v. Carp River Iron Co.*, 57 Mich., 427; 24 N. W., 160. See, *Jones v. Avery*, 50 Mich., 326; 15 N. W., 494. Whether a president of a corporation has, *ex officio*, such authority. *quære*: *Jones v. Avery*, 50 Mich., 326; 15 N.

court, and a recovery of either of such installments shall not bar a subsequent suit for either installments which shall become due after the commencement of the former suit.''⁴⁹

§ 13. **In replevin.**—The jurisdiction of justices in actions of replevin extends to all cases where the value of the property to be replevied shall not exceed one hundred dollars, as shown by the affidavit for the writ.¹

§ 14. **In actions for penalties and forfeitures.**—“Justices of the peace shall have jurisdiction of all actions for the recovery of penalties or forfeitures, where the amount of the penalty or forfeiture shall not exceed one hundred dollars.”²

§ 15. **In tort.**—But justices of the peace have no jurisdiction in actions founded on tort, where the damages exceed one hundred dollars.³

§ 16. **Jurisdiction, as affected by the question of whether the action is local or transitory.**—Actions are either local or transitory; when local, they must be tried in the county in which the cause of action arose, or the injury was really committed. By the common law, actions occasioned by injuries to

W., 494. The docket entries must show every statutory requisite: *Spear v. Carter*, 1 Mich., 19; *Allen v. Carpenter*, 15 Mich., 32; *Hollister v. Giddings*, 24 Mich., 501.

49—C. L., § 709. This section is confined to money bonds, and to amounts not exceeding one hundred and fifty dollars: *Bishop v. Freeman*, 42 Mich., 533; 4 N. W., 290. See, *Gray v. Stafford*, 52 Mich., 497; 18 N. W., 235. It is the amount claimed and not the amount of the penalty which determines jurisdiction on an ordinary money bond. *Durfee v. Dean*, 52 Mich., 387; 18 N. W., 118. As to actions on official bonds the rule is *contra*: *Township of Richland v. Cliff*, 131 Mich., 628; 92 N. W., 285, and cases cited.

1—C. L., § 748. *Singer Mfg. Co. v. Benjamin*, 55 Mich., 330; 21 N. W., 358; 23 N. W., 25; *Pistorius v. Swartout*, 67 Mich., 186; 34 N. W. 547; *Dayo v. Provinski*, 90 Mich., 351; 51 N. W., 514. If the affidavit for the writ is such as to give the justice jurisdiction he may give judgment for value of the property though it amount

to the constitutional limit of five hundred dollars: *Chilson v. Jennison*, 60 Mich., 235; 26 N. W., 859.

2—C. L., § 9799.

This section does not authorize the collection of fines and forfeitures by civil suit before justices in cases where the statute, in addition to the penalty or forfeiture, imposes a further requirement of the defendant, such as the giving of bail for good behavior.

Thus, proceedings under C. L., § 5935, to punish for keeping billiard tables, are criminal in character; the judgment provided for being both a fine and security for good behavior, is an entirety, and no right is given to prosecute separately for the fine. Such a compound judgment is peculiar to criminal remedies, and neither § 9799 nor § 723 of C. L., 1897, warrant the recovery of such a judgment in a civil suit: *Pardee v. Smith*, 27 Mich., 33.

3—*Wells v. Scott*, 4 Mich., 347. But in such actions, before justices, if the damages claimed, or the value of the property converted, is alleged to exceed one hundred dollars in value, and no objection to the jurisdiction is

real property are local, as trespass, or case for nuisances, or waste, etc., to houses, lands, water courses, or other real property.⁴

By statute, "Actions for the recovery of any real estate, or for the recovery of the possession of real estate; actions for trespass on land, and actions of trespass on the case, for injuries to real estate, shall be tried in the county where the subject of the action shall be situated;" and "actions for slander, for libels, and all other actions for wrongs, and upon contracts, shall be tried in the county where one of the parties shall reside at the time of commencing such action, unless the court shall deem it necessary for the convenience of the parties and their witnesses, or the purposes of a fair and impartial trial, to order any such issues to be tried in some other county; in which case the same shall be tried in the county so designated."⁵

But by a statute subsequently enacted, it is provided, "That all cases of trespass on lands, and in all cases of trespass upon the case, for direct or consequential damages, on account of injury to personal property, when the defendant is not an actual resident of the county in which such lands are situate, or where such personal property was situated at the time of such injury, or when such county is unorganized at the time of committing such trespass or injury, may be prosecuted and maintained at law in any county where such defendant may be found, as fully and effectually in all respects as if commenced and prosecuted in the county where such trespass or injury to personal property was committed."⁶

taken before the justice, or on appeal, it cannot be made available in the supreme court: *Ibid*.

4—Watts v. Kinney, 23 Wend., 484. And replevin has been held to be local: Bouv. Law Dic., "Action." Trover intransitory: Greeley v. Stilson, 27 Mich., 153.

Personal actions which seek nothing more than the recovery of money or personal chattels, of any kind, are in most cases *transitory*, whether they are founded on tort or on contract: Bouv. Law Dic., "Action."

5—C. L., § 10216; see, Morse v. Dunham, 48 Mich., 590; 12 N. W., 865. Graham v. Smith, 62 Mich., 147; 28 N. W., 769. Transitory actions

against non-residents of the state may be brought in any county where service can be had: Atkins v. Barstler, 46 Mich., 552; 9 N. W., 850; Cofrode v. Judge, 79 Mich., 339; 44 N. W., 623.

Where an action on the case was brought in the circuit court for the county of Saginaw, for obstructing the navigation of a stream by a dam in Tuscola county: Held, that an action on the case for obstructing a navigable stream, though local at the common law, is transitory under the statute: Barnard v. Hinkley, 10 Mich., 458. Trover for the cutting and carrying away of trees is transitory. Greeley v. Stilson, 27 Mich., 153.

6—C. L., § 10217. This section ap-

In a recent case in New York, it was decided that an action of trespass *quare clausum* might be brought in a justice's court of a different county from that in which the land was situated.⁷ The reasoning of the court in this case, as also in *Sumner v. Finnegan*,⁸ would seem to justify the doctrine, that in respect to justice's courts no actions are local.⁹

§ 17. **Actions against public officers, where to be brought.**—"In suits against public officers, or against any person specially appointed to execute the duties of such officers, for any act done by them by virtue of their offices respectively, and in suits against other persons, who, by the command of such officers, or in their aid or assistance, do anything touching the duties of such office, which are required by law to be laid in the county where the fact happened, if it shall not appear on the trial that the cause of such action arose within the county where such trial is had, the jury shall be discharged, and judgment of discontinuance shall be rendered against the plaintiff."¹⁰

It has been held that a statute like this applies only to acts done by an officer *by virtue* of his office, and not to those done under *color* of it; in the latter case he is not protected by it, where the act is of such a nature that his office gives him no authority to do it; but when, in doing an act within the limits of his authority, he exercises that authority improperly, or abuses the confidences the law reposes in him, to such cases the statute extends.¹¹

It applies only to *affirmative acts*, and not to *mere omissions*

plies as well to persons by whose authorized agents and servants the trespass may have been committed, as to the person manually committing it. The statute was directly aimed at non-resident employers: *Smith v. Webster*, 23 Mich., 298; see, *Haywood v. Johnson*, 41 Mich., 604; 2 N. W., 926.

7—*Graves v. McKeon*, 2 Deno., 639. And if the land be out of the state the plaintiff has no remedy in the courts of the state: *Ibid.*

8—15 Mass., 280.

9—*Pitman v. Flint*, 10 Pick., 504; 1 Cow. Treat., 2d ed., 27.

In an action on the case in the circuit court in this state, for expelling the plaintiff from a railroad train in

Canada, it was held that the locality of the trespass did not oust the court of jurisdiction where it had obtained control of the parties: *The Great Western Ry. Co. v. Miller*, 19 Mich., 305.

10—C. L., § 10218; see, *Morse v. Dunham*, 48 Mich., 590; 12 N. W., 865; *Graham v. Smith*, 62 Mich., 147; 28 N. W., 769.

11—*Seeley v. Birdsall*, 15 John., 267, 270. But it seems to have been held in this state, that this section covers cases where an officer acts under color of official duty, although the process he is attempting to execute may be defective. And it is for the court, and not for the jury, to determine whether

to discharge an official duty;¹² also, to entitle him to the protection of this section, he must act in obedience to his process. He cannot have the benefit of it if he acts upon a legal warrant beyond the jurisdiction of the court or magistrate issuing it.¹³ The provision was designed for the convenience of public officers, to prevent them from being harassed by suits at a distance from home; if, therefore, the officer change his residence and move into another county, he may be sued in the latter county.¹⁴

§ 18. Of proceedings without jurisdiction.—Inferior courts of special and limited jurisdiction are confined strictly to the powers conferred upon them, and their proceedings must appear to be within those powers. They must have jurisdiction of the person by means of the proper process for appearance of the party, as well as of the subject matter of the suit; and when they have thus jurisdiction of the person and the cause, if in the further proceedings they commit error, the proceedings are not void, but only voidable; but on the contrary, when they have no such jurisdiction of the cause and person, their proceedings are absolutely void, and cannot support a claim of jurisdiction or afford any protection, and they become trespassers who attempt by any act to enforce them.¹⁵

the defendant assumed to act officially under his process: *Morse v. Dunham*, 48 Mich., 590; 12 N. W., 865.

12—*Elliott v. Cronk*, 13 Wend., 35, 265.

13—*Green v. Rumsey*, 2 Wend., 611.

14—*Hopkins v. Haywood*, 13 Wend., 265.

15—*Clark v. Holmes*, 1 Doug., 390, 393, 394.

Courts and officers of special and limited jurisdiction must observe, at their peril, the boundaries of their power: *Shadbolt v. Bronson*, 1 Mich., 85, 89.

If a court of limited jurisdiction issues a process which is illegal and not merely erroneous, or undertakes to hold cognizance of a cause, without having gained jurisdiction of the person by having him before them, in the manner required by law, the proceedings are void, and the magistrate attempting to enforce a proceeding founded on any judgment, sentence or

conviction, in such a case, becomes a trespasser: *Bigelow v. Stearns*, 19 Johns, 39; *Colvin v. Luther*, 9 Cow., 61; *Reynolds v. Orvis*, 7 Cow., 269.

And if an execution is issued on the judgment, and the person of defendant is taken or his property sold, the plaintiff will also be liable as a trespasser: *Rogers v. Mulliner*, 6 Wend., 597; *Harriot v. Van Cott*, 5 Hill, 285.

So, a justice is liable as a trespasser, for voluntarily issuing execution against the body of a defendant who was exempt from arrest on such execution: *Perceval v. Jones*, 2 Johns. Cases, 49; and see, *Rogers v. Mulliner*, 6 Wend., 597.

But it is said, that if a justice has jurisdiction of the subject matter of the action and would have jurisdiction of the person of the defendant, if proper process were issued, a mere mistake in the kind of process issued, would not make him a trespasser if he acted

The consequences would be the same, even if the process were regular, or the party appeared, and even confessed judgment, if the court had no jurisdiction of the cause of action.¹⁶ And nothing will be presumed for the purpose of conferring jurisdiction upon the justice in the first instance; but such jurisdiction must be shown upon the face of his proceedings. He can take nothing by implication. Consent of parties will not confer jurisdiction as to the subject matter to be determined. Nor can want of jurisdiction over the subject matter be waived by the parties, in any case where it has not been given by the statute. But where the court has jurisdiction of the subject matter of the suit, but some proof or proceeding is wanting, which is necessary to give it jurisdiction to act in the particular case, the acts of the court may, in a measure, be rendered valid. Thus, an attachment issued without any, or an insufficient affidavit, would not justify the court or the party, but they would be trespassers;¹⁷ if, however, the defendants should appear in the suit, and, without questioning the irregularity in issuing the process, should plead to the action or confess it, the subsequent proceedings in the case would be valid.¹⁸

in good faith: *Hoose v. Sherrill*, 16 Wend., 33; *Rogers v. Mulliner*, 6 Wend., 597.

16—*Coffin v. Tracy*, 3 Calnes, 129.
17—*Wight v. Warner*, 1 Doug. Mich., 384; see *Thompson v. Thomas*, 11 Mich., 274; *King v. Harrington*, 14 Mich., 532.

If an affidavit is necessary to be made and delivered to the justice as a preliminary step to the issuing of a warrant, he will be a trespasser if he issues the warrant without such an affidavit. For, without such affidavit there is no authority to issue the process: *Whitney v. Shufelt*, 1 Denio, 502; *Everston v. Sutton*, 5 Wend., 281; *Vosburgh v. Welch*, 11 John., 175.

18—*Dewey v. Greene*, 4 Denio, 93.

When jurisdiction of the subject and person is required as a prerequisite to judicial action, a defendant may waive any irregularities in the mode by which his person is sought to be subjected to the jurisdiction of the court, by a voluntary appearance. He may dispense with service of process, as he may waive any other personal privi-

lege: *Burckle v. Eckhart*, 3 Comst., 137.

Where a justice has no jurisdiction, his acts are as void as if he were not a justice. If he has jurisdiction, but errs in exercising it, then his acts are not void, but voidable only. In the former case he is personally liable. In the latter not: *Savage J.*, in *Adkins v. Brewer*, 3 Cow., 209.

Pleading to the merits will not waive defects in an affidavit for a warrant to arrest, if before pleading, the defendant has moved to quash the proceedings on that ground, and the motion has been denied: *Warren v. Crane*, 50 Mich., 300; 15 N. W., 465.

Nor will giving bail, or procuring an adjournment before proceeding, by a party arrested on a warrant, waive any right to object to the proceedings upon which the arrest was founded: *Brown v. Kelley*, 20 Mich., 27.

See, *Gunn Hardware Co. v. Denison*, 83 Mich., 40, 42; 46 N. W., 940.

Upon the subject of jurisdiction in attachment see the subject of "Attachments and Proceedings Thereon," *post*, chap. III.

CHAPTER II.

OF THE COMMENCEMENT OF SUITS BY SUMMONS AND WARRANT, AND THE SERVICE AND RETURN OF SAME.

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OF THE COMMENCEMENT OF SUITS.

§ 19. **How commenced.**—"Suits may be instituted before a justice, either by the voluntary appearance of the parties or by process; and when by process, it shall be either a summons, a warrant, an attachment, or a writ of replevin; but no process shall contain the names of the defendants in more than one action."¹

1—C. L., § 712. A party may give jurisdiction by a voluntary appearance after a void service of process: Dalley v. Kennedy, 64 Mich., 211; 31 N. W., 125. A service of process to be valid must be made in the county where is-

§ 20. **When deemed commenced.**—"Suits shall be considered as commenced at the times following:

1.—Upon process by warrant, at time of the arrest of the defendant;

2.—Upon process by attachment, writ of replevin or summons, on the day when process shall be delivered to the constable; but if two or more suits be commenced by summons or attachment, on the same day, the suit in which the process was first served shall be deemed to have been first commenced.

3.—When the suit is instituted without process, at the time when the parties shall appear before the justice and join issue."

OF A SUMMONS.

§ 21. **Essentials of the summons.**—"The first process, except as hereinafter directed, shall be a summons directed to any constable of the county in which the justice resides, commanding him to summon the defendant to appear before the justice who issued the same, at a time and place to be named in such summons, not less than six nor more than twelve days from the date of the same, except as hereinafter provided, to

sued: *Hartford Fire Ins. Co. v. Owen*, 30 Mich., 441. Upon the question of void service because of privilege from service, see, *Letherby v. Shaver*, 73 Mich., 500; 41 N. W., 677.

2—C. L., § 714. The exceptions to the rule that a writ of summons shall be the first process are the attachment, writ of replevin and warrant. The *short* summons is an exceptional writ though a summons: *Borland v. Kingsbury*, 65 Mich., 59; 31 N. W., 620. It seems that § 754, C. L., 1897, as amended by Act 68, 1901, providing that a summons shall be the first process against a corporation excludes the use of any other process against them: *Hewett v. Wagar Lumber Co.*, 38 Mich., 704.

A summons may be issued on a legal holiday. It is a ministerial act merely, and is not forbidden by the statute: *Smith v. Ihling*, 47 Mich., 614; 11 N. W., 408. The mere filling out of a summons, which is then left in the office of the justice until the return day, or is retained by the plaintiff in his own custody, is not the

commencement of suit. A summons is not issued while it remains in the hands of the plaintiff: *Howell v. Shepard*, 48 Mich., 472; 12 N. W., 661.

Should it be important to show on the trial, the time when the suit was commenced by the delivery of the process to the constable, that fact may be proved in the same manner as any other material fact; but the justice cannot act upon his own knowledge as to the time when the process was delivered to the officer for service; he can only act upon legal evidence adduced before him. In the absence of any other evidence, the action will be deemed to have commenced at the time the process was served as shown by the officer's return: *Cornell v. Moulton*, 3 Denio, 12; *McGraw v. Walker*, 2 Hilt., 404. Nor would the officer's endorsement on the process, of the time when he received it, be legal evidence of the time when it was delivered to him, for such entry is not required by the law: *Wardwell v. Patrick*, 1 Bosw., 406.

answer the plaintiff in a plea in the same summons to be mentioned.”³

“If the plaintiff shall be a non-resident of the county, a summons may be made returnable not less than two nor more than six days from the date thereof, and shall be served at least two days from the time of the appearance mentioned therein.”⁴

“If the defendant shall be a non-resident of the county, a summons shall be made returnable and be served, as prescribed by the preceding section.”⁵

3—C. L., § 715. It is now held that in counting the time for the return of the summons, the day of the date of issue of the summons is to be excluded; and the day of the return included; thus, a long summons issued on the 12th may be made returnable on the 18th of the month: *Chaddock v. Barry*, 93 Mich., 542; 53 N. W., 785. In this case the prior cases on this question are reviewed. See, *Warren v. Slade*, 23 Mich., 1; *Powers' Appeal*, 29 Mich., 504, and *post*, § 34, and notes. It seems that process from a justice of the peace cannot run to, or be served in, any county except that where the justice resides: *Hartford Fire Ins. Co. v. Owen*, 30 Mich., 441.

The provision in this section (§ 715) for a long summons, construed with § 718 and § 719, is confined to cases where both plaintiff and defendant are residents of the county. If both are residents of the county, the long summons, only, is authorized: *Allen v. Mills*, 26 Mich., 125. And it is said that, if there be joint debtors, one of whom resides in and the other without the county, a long summons is a proper process: *Burghardt v. Rice*, 2 Denio, 95; *Kavanagh v. Mooney*, 2 Sandf., 288. But a different rule has been held to prevail where the debt is *several*, or *joint and several*: *Harriott v. Van Cott*, 5 Hill, 285-6.

An objection that a suit was improperly commenced by a long summons, will be waived by joining issue upon the merits: *Hart v. Blake*, 31 Mich., 278.

4—C. L., § 718. When the plaintiff is a non-resident of the county, he may

proceed by a short summons, or by the ordinary long summons: *Ackerman v. Finch*, 15 Wend., 652. It was formerly said in this state, that if either the plaintiff or defendant was a non-resident of the county, a short summons only, was authorized: See, *Allen v. Mills*, 26 Mich., 125. But it is now held, that this § 718 is not imperative that a short summons shall be used when the *plaintiff* is a non-resident, but is permissive merely; or, in other words, a non-resident plaintiff may commence by either a long or short summons: *Moore v. Vrooman*, 32 Mich., 526. Unless the defendant is a non-resident of the county, in which case a short summons must be issued: *Barnes v. Harris*, 4 Comst., 375.

The suit of a non-resident plaintiff may be commenced against a corporation by short summons: *Gallagher v. American Express Co.*, 56 Mich., 13; 22 N. W., 96.

5—C. L., § 719. The language of this section imperatively requires a short summons when the defendant is a non-resident of the county: *Gallagher v. American Express Co.*, 56 Mich., 13; 22 N. W., 96; *Langtry v. Wayne Circuit Judge*, 68 Mich., 453; 36 N. W., 211.

There must be two full days between the date and the return day of a short summons, and the same length of time, also, between the day of service and the return day: *Evarts et al. v. Fiske*, 44 Mich., 515; 7 N. W., 81; *Platt v. Highway Com'rs*, 38 Mich., 248. And Sunday is not to be counted in the two days in which a short summons from a justice's court may be

Before issuing process in favor of a non-resident plaintiff, security for costs must be given.⁶

The first process against a corporation must be a summons,⁷ and when any suit shall be brought against a school district, it shall be commenced by summons.⁸

§ 22. In cases where plaintiff sues in a particular character.—If the plaintiff sues in a particular character, it will be proper, though not absolutely necessary, that it should be mentioned in the process. The omission to state in the process the character in which the plaintiff sues, will not preclude him from declaring in such special character. If, however, the special character of the plaintiff be set forth in the process, the declaration must correspond with the process in that respect, or it will be set aside for that reason.

§ 23. By public officers.—“In all cases not otherwise provided by law, actions may be brought by the board of supervisors of a county; by county superintendents of the poor; by supervisors of townships; by directors of the poor of the several townships; by inspectors of primary schools, and commissioners of highways of the several townships, and by assessors of school districts, upon any contract lawfully made with them or their predecessors in their official character, or to enforce

made returnable: *Simonson v. Durfee*, 50 Mich., 80; 14 N. W., 706; *Caupfield v. Cook*, 92 Mich., 627; 52 N. W., 1031; see, *Platt v. Commissioners of Clay*, 38 Mich., 247.

While the statute (C. L., §§ 715, 718, 719) has made the residence or non-residence the test, whether the summons shall be long or short, it has made no provision for the proof of the fact before the justice, as a prerequisite to the issuing of a long or short summons; nor has it required the statement of the fact, one way or the other, to be entered on the docket, or to appear among the files: *Allen v. Mills*, 28 Mich., 127. A presumption arises from the issuing of a long summons that the defendant is a resident of the county in which the justice resides: *Segar v. Shingle & Lumber Co.*, 81 Mich., 344; 45 N. W., 982.

Short summons need not recite the that the defendant is a non-

resident: *Stoll v. Padley*, 98 Mich., 13; 56 N. W., 1042. Where a short summons has been used defendant is entitled to an order dismissing the case on making it appear that its use in the case was not justified: *Stoll v. Padley*, *supra*.

6—C. L., § 713. The justice will have jurisdiction, although security be not given before process issue. Such security may be given at any time during the progress of the cause, if required: *Park v. Goodwin*, 1 Doug., 56; *Gray v. Willcox*, 56 Mich., 58; 22 N. W., 109; *Harris v. Doyle*, 130 Mich., 470; 90 N. W., 293.

7—C. L., § 754, Amended 1901, Public Acts, p. 101. *Hewitt v. Wagar Lumber Co.*, 38 Mich., 704. But in case of foreign insurance companies, see *Hartford Fire Ins. Co. v. Owen*, 30 Mich., 441.

8—C. L., § 4722, Amended P. A., 1901, p. 228.

any liability, or any duty enjoined by law, to such officers or the body which they represent, and to recover damages for any injuries done to the property or rights of such officers, or of the bodies represented by them.”⁹

“Such actions, when brought by any board of supervisors, shall be in the name of such board as provided by law; when brought by any supervisor in behalf of his township, they shall be brought in the name of such township; when brought by superintendents of the poor, inspectors of primary schools, commissioners of highways, or directors of the poor, or by any other officers authorized to sue in their name of office, they shall be brought in the name of their respective offices, without naming the persons holding the same, and when brought by the assessor or other person representing a school district, they shall be brought in the name of such district.”¹⁰

“Such actions may be brought by such officers, notwithstanding the contract or obligation on which the same is founded may have been made with or to any predecessors of such officers, and notwithstanding any right of action may have accrued previous to the time when the officers commencing such suit entered upon the execution of the duties of their office.”¹¹

§ 24. By partners.—They must sue in their individual names; they cannot sue in the name of the firm.¹² But by statute, “In all cases where a suit is commenced for or against

9—C. L., § 10476. This statute does not authorize a Com'r of Highways to bring an action for liability to the township: *Buckeye Twp. v. Clark*, 90 Mich., 434; 51 N. W., 528. See *Highway Com'r. v. Martin*, 4 Mich., 557, and *Com'r of Highways v. Supervisor*, 77 Mich., 230; 43 N. W., 870.

10—C. L., § 10477.

This statute requires suits brought by commissioners of highways to be brought by their name of office, and does not allow their individual names to be used. The statute treats them in this respect as a corporation, the suits not being effected by change of incumbents, the record not showing who the incumbents are: *Highway Com'rs of Port Huron v. Stockman*, 5 Mich., 528. See, also, *Johr v. Supervisors*, 38 Mich., 532.

The overseers of two adjoining road districts cannot join as plaintiffs in a suit for an injury to a bridge which is partly in each district: *Ibid.* *Highway Com'rs of Pt. Huron v. Stockman*, 5 Mich., 528.

When two school districts are united, the newly formed district succeeds to the credits due to both, and must be named as plaintiff in any suit to recover such demands, and is likewise liable for the former individual debts of each: *Brewer v. Palmer*, 13 Mich., 104, 109.

11—C. L., § 10478.

12—*Smith v. Canfield and another*, 8 Mich., 493; *Barber v. Smith*, 41 Mich., 138; 1 N. W., 992; *McGowan v. Lamb*, 66 Mich., 615; 33 N. W., 331.

a copartnership, and the names of all the several partners are not known, such suit may be commenced in the partnership name of said plaintiffs or defendants; and the plaintiffs or defendants shall have the right, at any time before the pleadings are closed, to amend the same, by inserting the names of the parties composing such copartnership."¹³ After the death of one of two partners, a suit upon a cause of action which survives, must be brought in the name of the survivor alone, as plaintiff.¹⁴

§ 25. **By assignees.**—Where a contract has been assigned, and suit is brought in the name of the promisee *for the use of* the assignee, naming him, the promisee is the legal plaintiff.¹⁵ The assignment of a non-negotiable demand, does not, at common law, entitle the assignee to sue upon it in his own name. But by statute¹⁶ this may now be done in all cases; this statute, however, is only permissive in its provisions, and the assignee is still at liberty to sue in the name of the person contracting.¹⁷

13—C. L., § 764. See, *post*, § 29.

14—Teller v. Wetherel, 9 Mich., 464.

The surviving partner has the entire legal title to all the partnership assets. He has a right, acting honestly and with reasonable discretion and diligence, to dispose of them as he pleases, to settle all debts against the concern, to make any compromise he may deem necessary, and to turn the assets into an available and distributable form: Barry v. Briggs, 22 Mich., 201. Until the partnership affairs have been settled by the survivor, and all the debts paid, the representatives of the deceased partner have but an equitable interest in the partnership property, which though in equity it may make them tenants in common, subject to the debts of the firm and a final settlement, does not constitute them tenants in common at law; and until such settlement, and payment of all debts, at least, they have no right of possession; and the right of action at law for any trespass upon, or injury to, the property, is vested solely in the surviving partner: Pfeffer v. Steiner, 27 Mich., 537.

Surviving partners may recover in their own names for goods of the

firm sold by them after the decease of their copartner, and it is not necessary for this purpose that they should organize themselves into a new firm or obtain an assignment from the representatives of the deceased: Bassett v. Miller, 39 Mich., 133; see, Merritt v. Dickey, 38 Mich., 41. For other cases upon the powers, duties and liabilities of surviving partners, see, Way v. Stebbins, 47 Mich., 296; 11 N. W., 166; Roberts v. Kelsey, 38 Mich., 602; Loomis v. Armstrong, 49 Mich., 521; 14 N. W., 505; Blodgett v. Muskegon, 60 Mich., 580; 27 N. W., 686; Brown v. Watson, 66 Mich., 223; 33 N. W., 493.

15—Farwell v. Dewey, 12 Mich., 436. And proof of the assignment is not necessary to the maintenance of the suit, although where the interest of the defendant may be affected by the ownership, as, where he claims payment or set-offs, such proof as to the transfer may become necessary, as the validity of the defense may depend on the *time* of the transfer, and when the knowledge of it came to the defendant: *Ibid*.

16—C. L., § 10054; Cook v. Bell, 18 Mich., 387.

17—Sisson v. C. & T. R. R. Co., 14 Mich., 496.

But without an assignment, A. cannot maintain a suit in his own name on a judgment in favor of B., even though it be averred and proved that the judgment was rendered in A.'s favor, by the name of B., by mistake.¹⁸

§ 26. By infants, persons under guardianship, executors and administrators.—In actions by infants and others who appear by guardian, the name of the infant and that of the guardian should be so stated as to show the capacity in which each stands. Executors and administrators should state their names and that of the person whom they represent.

§ 27. The plaintiff, how named.—The name of the plaintiff should be given accurately and in full, both the christian and surname. The law, however, recognizes only one christian name, therefore the addition or omission of a middle name or its initial letter will not be regarded.¹⁹

Description of plaintiff in process in a suit in favor:

Of husband and wife: "to answer James Roe and Mary Roe his wife, in a plea of," etc.

Of an administrator: "to answer A. B., as administrator of all and singular the goods and chattels, rights and credits, which were of C. D., deceased, in a plea," etc.

Of an executor: "to answer A. B., as executor of the last will and testament of C. D., deceased," etc.

Of a sheriff: "to answer A. B., sheriff of the county of in," etc.

Of a corporation: "to answer (insert the precise name by

A declaration by an assignee upon a conditional note not negotiable, need not aver any formal assignment, but is sufficient if it avers the plaintiff to be the owner and holder; as a parol assignment would be as valid at law as it would be in equity: *Draper v. Fletcher*, 26 Mich., 154; see *Herbstreit v. Beckwith*, 35 Mich., 93, 510. See, *Morrill v. Bissell*, 99 Mich., 410; 58 N. W., 324; *Robinson v. Watson*, 101 Mich., 466; 59 N. W., 811; *Guerold v. Holtz*, 103 Mich., 118; 61 N. W., 278.

18—*Gilbert v. Hanford*, 13 Mich., 40.

19—*Franklin v. Talmage*, 5 Johns., 84; *Rosevelt v. Gardiner*, 2 Cow., 463; *Milk v. Christie*, 1 Hill, 102. The person commencing an action is supposed to know the correct name of the plaintiff, but if he does not he cannot for that reason proceed by a wrong name, or by the initials of the christian or first name: *Fisher v. Northrup*, 79 Mich., 287; 44 N. W., 610. But see, *Barber v. Smith*, 41 Mich., 138; 1 N. W., 992, where it is held that other circumstances may make the use of christian name unnecessary.

which it is incorporated) a corporation created under the laws of (name the state or country) in a plea," etc.

Of a surviving partner, or other joint creditor: "to answer A. B., survivor of himself and C. D.," etc.

Of an infant: "to answer A. B., who prosecutes by C. D., who is appointed to prosecute for the said A. B., who is an infant within the age of twenty-one years, as the next friend of the said A. B., in a plea," etc.

§ 28. **The defendant, how named, etc.**—The true name of the defendant should be inserted in the process, if known. The omission of the middle name or of its initial letter, as, naming the defendant John Doe, when the actual name is *John R. Doe*, is immaterial.²⁰

§ 29. **When name unknown.**—"When the name of any defendant shall not be known to the plaintiff, he may be described in the process and proceedings by a fictitious name; and if a plea in abatement be interposed by such defendant, or his name be otherwise ascertained, the justice before whom the suit is pending shall amend the proceedings according to the truth of the matter, and shall thereafter proceed therein, in like manner as if the defendant had been sued by his right name."²¹ In such case, the command of the summons may be, "To summon John Doe, the real name of the defendant being unknown to the plaintiff." In *Donnelly v. Foote* the plaintiff commenced an action, by *capias*, against James Plant, Edward Plant and *James Dorset*; James Plant only was arrested and gave bail. The plaintiff declared, and commenced his declaration by stating that the plaintiff "Complains of James Plant, Edward Plant and *John W. Dorset*, defendants in this suit, the said *John W. Dorset*, whose name not being known to the said plaintiff, when the process by which this suit was commenced was issued, was sued by name of *James Dorset*," etc. Judgment was obtained, and an action was brought against the bail, who moved to be discharged on the ground that they were released when the plaintiff declared against *John W.* instead of *James Dorset*. *By the Court:* This case comes within the statute. The plaintiff not knowing the christian name of Dorset,

20—See, note 19, *supra*, and *McDonough v. Heyman*, 35 Mich., 334.

21—C. L., § 765.

one of the defendants, issued process against him in the fictitious name of *James*. Before declaring, the true name was ascertained to be *John*, and then the plaintiff declared against him by that name, with an averment in the declaration stating the ground for departing from the process. This was entirely regular. The statute must not receive such a construction as will render it entirely nugatory. The plaintiff is not bound to stop with the issuing of process, but he may follow it up with a judgment; and neither the bail nor any other third person can be allowed to make an objection which would not be available to the party sued. If the plaintiff had pursued his remedy against Dorset by the fictitious name mentioned in the process, there would have been no variance, and no foundation for this motion. It cannot be that he has lost anything by inserting the true name, when discovered, and explaining the whole matter on the record.²² In a previous case, one of the defendants, *not arrested*, was misnamed, and on that ground the plaintiff was nonsuited, and the nonsuit was holden to be right. The declaration contained no allegation of the plaintiff's want of knowledge of the defendant's true name, and that, therefore, a fictitious name was used. When the parties are served with the process, no difficulty can arise, as the defendant must plead the misnomer, and then the plaintiff might amend, or, to such a plea he might reply, and show that the defendant's name was not known to him; and that would be equivalent to a replication that the defendant was known as well by the name used, as by his real name furnished by the plea.²³ The only embarrassment is when the defendant, misnamed, is not served with process; in such cases it would seem necessary to set forth in the declaration, that the name of such defendant was unknown to the plaintiff, and therefore the fictitious name was used. The statute in this state has the words "Or his name is otherwise ascertained," which are not in the statute upon which the above decisions were made; perhaps these words would, in a case like the above, authorize an amendment in case it appeared in evidence that the name was inserted in the process by reason of the plaintiff's ignorance of the defendant's true name.

22—19 Wend., 148.

23—*Waterbury v. Mather*, 16 Wend., 611.

Copartners may also be sued by their firm name, where all the names of the several partners are not known.²⁴

§ 30. Designation by initial letter.—"In all actions on promissory notes or other instruments in writing, any of the parties to which are designated by the initial letter or letters, or contraction of the christian or first name or names, it shall be sufficient in any affidavit to arrest or obtain an attachment, and in any process or declaration, to designate such persons by the same initial letter or letters, or contraction of the christian or first name or names, instead of stating the christian or first name or names in full."²⁵ When, in such cases, an affidavit is necessary to obtain process, or an attachment or warrant, the manner in which the note was signed must be stated in the affidavit; and, in all such cases, it must be stated in the declaration why the full names of the persons who executed the note or other writing is not given. If the action is on a note signed "J. Stiles," in the declaration, after setting forth the making of the note, it must say, "therein described as J. Stiles," or as the case may be.²⁶ Describing a party to a suit *not upon a written instrument* by the initials of a christian name, is misnomer.²⁷ The statute does not apply to such a case.

§ 31. Against public officers.—Actions against any of the officers or bodies named in § 10477 of the Compiled Laws, "Shall be brought against them by the same name in which such officers or bodies are respectively authorized to sue, and such actions may be commenced and prosecuted to final judgment, in the same manner, as near as may be, as actions against individuals, except as otherwise is or shall be provided by law."²⁸

24—C. L., § 764. See, the provision in full, *ante*, § 24; Barber v. Smith, 41 Mich., 142; 1 N. W., 992. McGowan v. Lamb, 66 Mich., 620; 33 N. W., 881.

In case any copartner or joint debtor shall have compromised and paid his proportion or share of the joint indebtedness, and shall have obtained from the creditor a release, it will not be necessary to make him a defendant with the other joint debtors in a suit to recover the balance of the debt. Nor can he be so sued after his discharge: C. L., §§ 10449-10453.

25—C. L., § 763; Shaw v. Fortine, 98 Mich., 254; 57 N. W., 128; Bennett v. Ilbhart, 27 Mich., 489; Campbell v. Wallace, 46 Mich., 321; 9 N. W., 432; Fewlass v. Abbott, 28 Mich., 270; Fisher v. Northrup, 79 Mich., 287; 44 N. W., 610; Stever v. Brown, 119 Mich., 196; 77 N. W., 704.

26—Esdalle v. Maclean, 15 M. & W., 277.

27—Rust v. Kennedy, 4 M. & W., 586.

28—C. L., § 10479; see § 10477, in full, *ante*, § 23. But as to the jurisdiction of justices in suits against

§ 32. **Mistake in name of a party.**—If the plaintiff's christian or surname be omitted or mistaken in the summons, the defendant may plead the omission or misnomer in abatement. And in declaring, the name of the plaintiff must be the same as in the process; and if it is mistaken there, it cannot be corrected in the declaration.²⁹ But a mistake in the summons, as to the name of a party, may be amended; thus, where a plaintiff was wrongly named Joseph S., the summons was amended by inserting Jasper S., the correct name.³⁰

§ 33. **The return day.**—If the day of the week and of the month are mentioned in fixing the return day of the summons, and they do not correspond with each other, the variance will be fatal. A notice of sale of real estate, by order was for "Friday, the seventeenth day of," etc., when Friday was the fifteenth day of the month. The court said: "The mistake made in advertising the sale is sufficient to render it void. There is the utmost necessity of precision in transactions of this nature."³¹

The time and place when and where the defendant is required to appear must be particularly specified in the summons.³² The

school districts and corporations, see, *ante*, § 7. The omission to sue a municipal officer by his official title is not a substantial objection if his liability is shown. *Hart v. Township of Port Huron*, 40 Mich., 428; 9 N. W., 481.

29—2 Cow. Treat., 2d ed., 585; *Willard v. Missani*, 1 Cow. Rep., 37. See, *Fisher v. Northrup*, 79 Mich., 287; 44 N. W., 610.

30—*Brace v. Benson*, 10 Wend., 213. A court of record has power to amend process as to the name of a party. Thus by amendment the defendant's name was changed from Absalom Baxter to Absalom Backus in the summons: *Final v. Backus*, 18 Mich., 218. For the purpose of exercising their jurisdiction, justices' courts have the same powers as are usual in courts of record, excepting the power of setting aside verdicts and arresting judgment: See C. L., § 706; *Phelps v. Town*, 14 Mich., 374, 381; *Van Sickle v. Kellogg*, 19 Mich., 49, 54. A justice has the power of amendment, in

the same manner as a court of record, before judgment: *Near v. Van Alstyne*, 14 Wend., 230. But where a defendant is sued by a wrong name, but appears by his right name, he may be declared against by the latter, for by appearing he admits himself to be the person sued, and so the variance is immaterial: *Willard v. Missani*, 1 Cow., 37.

31—*Wellman v. Lawrence*, 15 Mass., 326. But where a Master's summons required the parties to appear before him on *Wednesday, the 7th day of Dec.*, Wednesday being the 8th, the court held that the day of the month, and not the day of the week, must govern when they fall on different days, and that, if the mistake had been in naming the day of the week that part of the summons might be rejected as surplusage, and the summons still be good, unless the party had been misled by it: *Ingersoll v. Kirby*, Walk. Mich., Ch. R., 27.

32—*Stewart v. Smith*, 17 Wend., 517.

justice must not only state the day and hour of appearance in the process, but he must observe it, and cannot call the suit before that hour.³³

§ 34. **Time of return.**—A long summons may be made returnable not less than six nor more than twelve days from its date.¹ A short summons may be made returnable not less than two nor more than six days from its date.² The cases of Chaddock v. Barry,³ Crozier v. Allen⁴ and Lemon v. Hampton,⁵ seem to have settled, for this state, a somewhat uncertain condition of the law as to the computation of time for the return and service of the summons. The rule established by the cases referred to requires that in fixing the return day the day of issuing is excluded and the day of appearance or return day is included; that in fixing the day of service the return day is included and the day of service is excluded, and it matters not that the summons is a short summons.⁶ If the last day, which otherwise might be fixed for the return day, should fall on Sunday, an earlier day must be fixed.⁷ It is the settled rule of law in the case of the short summons Sunday is to be excluded in the computation of time.⁸ A reference to the previous cases upon this question of the computation of time is made in the cases cited.

§ 35. **Meaning of "month" and "year."**—In the construction of the statutes of this state, unless such construction would be inconsistent with the manifest intention of the legislature, the word "month" shall be construed to mean a calendar month; and the word "year" a calendar year.⁹

33—Sagendorp v. Shult, 41 Barb., 102. Where a writ was issued in February, and made returnable the 2d day of April, without naming the year, or using the word "next," it was held sufficiently certain, as it must be understood as referring to April of the then current year: Nash v. Mallory, 17 Mich., 232. So, if a summons were issued on the first day of November, returnable on the 10th day of November *next*, it would be considered as returnable on the 10th day of November next ensuing—that is, on the tenth day of November *instant*, and would be good: Drew v. Dequindre, 2 Doug., Mich., 93.

1—C. L., § 715.

2—C. L., § 718.

3—93 Mich., 542; 53 N. W., 785.

4—117 Mich., 171; 75 N. W., 300.

5—128 Mich., 182; 87 N. W., 53.

6—Crozier v. Allen, 117 Mich., 171; 75 N. W., 300; Lemon v. Hampton, 128 Mich., 182; 87 N. W., 53.

7—*Ex parte* Dodge, 7 Cow., 147; Anon., 2 Hill, 375.

8—Simonson v. Durfee, 50 Mich., 80; 14 N. W., 706; Caupfield v. Cook, 92 Mich., 626; 52 N. W., 1031; Crozier v. Allen, 117 Mich., 171; 75 N. W., 300. See, also, upon computation of time exhaustive note to Halbert v. San Saba Springs L. & L. S. Assn., 49 L. R. A., 193.

9—C. L., § 50, clause 10.

§ 36. **Plea, how named in the summons.**—The summons is, to answer the plaintiff in a plea in the same summons to be mentioned.

In debt, say, “in a plea of debt for . . . dollars.”

In covenant, “in a plea of breach of covenant, to his damage, . . . dollars.”

In trespass, “in a plea of trespass, to his damage one hundred dollars.”

In assumpsit, “in a plea of trespass on the case upon promises, to his damage three hundred dollars.”

In trover, and all actions on the case, “in a plea of trespass on the case, to his damage . . . dollars.”

A variance in this respect, between the summons and declaration in the statement of the cause of action or plea, would be a mere matter of form, and should not be regarded.¹⁰

And even the entire omission of the statement of the plea, will be of no importance.¹¹

§ 37. **Amount of damages, how stated in summons.**—The amount of damages claimed in the summons must not exceed the jurisdiction of the justice, which, in actions upon contract, extends to three hundred, and in torts, to one hundred dollars.¹²

If the summons (and equally so of all process) claims an amount in damages exceeding the jurisdiction of the justice, it will vitiate the writ. The service and return of such a summons imposes no obligation on the defendant to appear, and gives the court no authority to proceed in the suit. Therefore, if the defendant in such a case does not appear, the defect is not cured, although the plaintiff in his declaration claims damages within the jurisdiction of the court. But if the defendant appear and plead to a proper declaration—that is, one claiming damages within the jurisdiction of the court—the objection would be obviated.¹³ So, if the declaration where the summons is right, claim such damages, all subsequent proceedings would be void.¹⁴ But when, in such case, the parties are in court, the declaration may be amended. “When the party has been regu-

10—Bowen v. Ferne, 16 John., 160; 633; see, Wells v. Scott, 4 Mich., Delancy v. Nagle, 16 Barb., 96. 347.

11—Ibid., and Cornell v. Bennett, 14—Rockwell v. Perine, 5 Barb., 573. Unless the declaration should be amended.

12—See, ante, § 9.

13—Yager v. Hannah, 6 Hill, 631.

larly brought into court, and is present when the motion is made, there is no good reason why the pleadings may not be amended in a point touching the jurisdiction of the court, as well as in relation to any other matter."¹⁵ Our statute of amendments¹⁶ has carried the power of the court to permit the amendment of pleadings to lengths limited only by the discretion of the court if there be something substantial to amend, and the privilege asked is really an amendment and not a new creation.¹⁷

If the summons omit to state any amount of damages, it would probably be sufficient, or might be amended.¹⁸

A mistake of a year in the date of the summons may be amended; and if not amended, would not, even if the defendant does not appear, be regarded on *certiorari*.¹⁹

§ 38. Process to be in English.—"All writs, process, proceedings and records in any court within this state, shall be in the English language (except that the proper and known names of process, and technical words, may be expressed in the language heretofore and now commonly used), and shall be made out on paper or parchment, in a fair, legible character, in words at length, and not abbreviated; but such abbreviations as are now commonly used in the English language may be used, and numbers may be expressed by Arabic figures, or Roman numerals, in the customary manner."²⁰

OF SERVING THE SUMMONS.

§ 39. Who may serve.—The statute, C. L., § 715, requires the summons to be directed to any constable of the county in which the justice resides, commanding him to summon the defendant, etc.²¹ And it is also provided, "That any sheriff, un-

15—Woolley v. Wilber, 4 Denio, 570. See Denison v. Smith, 33 Mich., 155.

16—C. L., § 10268.

17—Schindler v. Railway Co., 77 Mich., 154; 43 N. W., 911.

18—Yager v. Hannah, 6 Hill, 631. And where the summons was for \$25 damages, and the declaration claimed a larger amount, but within the jurisdiction of the justice, held, that the variance was immaterial: Dennison v. Collins, 1 Cow., 111; see, Pew v. Yoare, 12 Mich., 16.

19—See *post*, "Amendments." See, Nash v. Mallory, 17 Mich., 232.

20—C. L., § 1115. Publication in a newspaper published in a foreign language though the particular matter was printed therein in English is not a good publication: Schaale v. Wasey, 70 Mich., 414; 38 N. W., 317; Vischer v. Ottawa Circuit Judge, 116 Mich., 666; 74 N. W., 1013.

21—Constables are ministerial officers of justices of the peace: C. L., § 2368; see, Faulks v. People, 39 Mich., 200. As to the powers and

der sheriff or deputy sheriff of any county of this state may and shall hereafter be fully authorized to serve or execute any and all process, civil or criminal, issued, or which may by law be issued, by any justice of the peace, and to have and to exercise all the powers and duties of constables," etc.²²

And the justice may, if he shall judge it expedient, on the request of a party, by written authority endorsed on the summons, empower a proper person of lawful age, and not a party or interested in the suit, to serve it.²³

And the statute further provides, that the "summons may be served by any competent person, and proof thereof by such person, by affidavit filed in the cause, shall have the same effect as if served by any constable."²⁴

duties of constables and nature of the office, see, *Allor v. Wayne Auditors*, 43 Mich., 76; 4 N. W., 492. A constable may serve the summons: C. L., §§ 2367, 715.

In *Parmalee v. Loomis*, 24 Mich., 242, it was said that the service by a constable of a summons in his own favor was only an irregularity, and would not invalidate the judgment when attacked collaterally; but it seems to have been since held that a constable cannot serve a summons in a suit in which he is plaintiff: *Morton v. Crane*, 39 Mich., 526. A party to a suit cannot serve the summons therein himself: *Bush v. Meacham*, 53 Mich., 574; 19 N. W., 192.

22—C. L., § 2595. By authority of this section a sheriff or his deputy may serve writs and levy executions issued by justices of the peace, directed to "any constable," etc., without any special direction from the justice given for that purpose: *Foster v. Wiley*, 27 Mich., 244; see, *Faulke v. People*, 39 Mich., 200.

23—C. L., § 978. See *Gadsby v. Stimer*, 79 Mich., 260; 44 N. W., 606; *King v. Bates*, 80 Mich., 367; 45 N. W., 147. The authority of a private person to serve a summons must be found on the writ or no jurisdiction is acquired, and he must have been selected upon sufficient inquiry to determine his competency: *Rasch v. Moore*, 57 Mich., 54; 23 N. W., 456; *Union Mutual Fire Ins. Co. v. Page*, 61 Mich., 72; 27 N. W., 859. It is not

necessary, however, that the justice certify that the person authorized is of age and disinterested: *Buel v. Duke*, 38 Mich., 167.

24—C. L., § 716. But a summons cannot be directed to any one but a constable, except by personal appointment of the justice. It cannot be directed generally to "any competent person:" *Rasch v. Moore*, 57 Mich., 54; 23 N. W., 456. The plaintiff in a suit cannot serve the summons therein in his own favor: *Bush v. Meacham*, 53 Mich., 574; 19 N. W., 192. Nor does the statute authorizing service by "any competent person" permit such service to be made by a private person until he has been appointed by the justice for that purpose, after an inquiry not only as to his age, but also into such other facts as would bear upon the propriety of the selection, and a determination that he is competent, as required by the statute, §§ 978, 979. And this determination must be made before the writ is served, and the record must show it, or the service will not be held good: *Rasch v. Moore*, *supra*. *Union Mutual Fire Ins. Co. v. Page*, 61 Mich., 72; 27 N. W., 859; *King v. Bates*, 80 Mich., 369; 45 N. W., 147. And the authority to make service must be indorsed on the writ. *Ibid.*; *Union Mutual Fire Ins. Co. v. Page*, 61 Mich., 72; 27 N. W., 859. And the justice must assure himself that the person is not interested. *Ibid.* For proceedings, to authorize a private person to

§ 40. **Where and how served—in county where issued.**—“A summons,” under § 716, “shall in all cases, except as hereinafter otherwise provided, be served at least six days before the time of appearance mentioned therein; and if the defendant be found, it shall be served by delivering to him a copy thereof; but if the defendant shall not be found, it shall be served by leaving a copy thereof at the defendant’s last place of abode, in the presence of some one of the family, of suitable age and discretion, who shall be informed of its contents.”²⁵

§ 41. **In other counties.**—“When an action on any contract or obligation shall have been or shall be brought before any justice of the peace of this state against two or more joint defendants, one or more of whom shall not reside or be found in the county where the suit shall be brought, and one or more of the defendants shall be served with process in the county where suit is commenced, and due proof of such service shall be filed with the justice of the peace before whom such suit is pending, upon application of the plaintiff in such action, at any time within four days from the return day of the writ by which such action was commenced, the justice shall issue one or more *alias* writs of summons or other writ whereby such suit was commenced, returnable not less than six or more than twelve days from date of issue, directed to the sheriff or any constable of the county or counties where such defendant or defendants not so served may be found; and the justice shall endorse on such *alias* writ or writs what defendant or defendants have been served in the county where such suit is commenced, as shown by the proof of service filed with such justice; and it shall be the duty of such sheriff or constable to serve such process not less than six days from the return day thereof, and make return thereof to the justice of the peace issuing the same:

serve process, see, *post*, chap. vi, “Of certain matters in relation to process.”

As to service by copy, see *Iron Cliffs Co. v. Lahals*, 52 Mich., 397; 18 N. W., 121.

25—C. L., § 716. Upon question of computation of time for service, see, *ante*, § 34. Any constable may serve any writ, process or order lawfully directed to him, in any township in his

county: C. L., § 2367. Service can be made only within the county: *Hartford Fire Ins. Co. v. Owen*, 30 Mich., 441. Service, beyond the jurisdiction of the court which issued it, is of no avail: *McEwen v. Zimmer*, 38 Mich., 765. Service of process by merely laying it upon the body of a man too sick to understand it is invalid: *Midler v. Judge of Superior Court*, 38 Mich., 310.

Provided, That it shall be the duty of the justice of the peace on the return day of the first writ, to continue the cause upon his own motion, and without pleadings, until the return day of the alias writ or writs."¹

§ 42. **Process cannot be served on Sunday.**—"No person shall serve or execute any civil process from midnight preceeding to midnight following the said first day of the week; but such service shall be void," etc.²

§ 43. **Service on corporations.**—In suits against corporations the summons is "served by leaving a copy thereof with the president, cashier, secretary, treasurer, or any other officer or agent of such corporation, or by leaving such copy at the banking house or office of such corporation; and upon return of such service being made, such corporation shall be deemed to be in court, and the like proceedings, as near as may be, shall be thereupon had, as in cases of suits between individuals."³

"Whenever in any suit or proceeding either in law or equity, it shall become necessary to serve any process, notice, or writing upon any railroad company in this state, it shall be sufficient to serve the same upon any station agent, or ticket agent at any station or depot along the line, or at the end of the railroad of such company, and such service shall be deemed as good and effectual as if made on the officers, stockholders, or members or either of them of such company."⁴

1—C. L., § 720. Where the docket falls to show that the action was on contract; in what county defendant resides; that the alias writ was directed to the sheriff of the county where the non-resident resides; that the justice indorsed the alias writ showing that service had been made on the resident defendant, the service of the alias writ was held bad: *Reed v. Parker*, — Mich., —; 35 N. W., 979 (July, 1903).

2—C. L., § 5916; *Anderson et al. v. Birce*, 3 Mich., 280. If a legal paper is made and uttered on a legal day, it will not be void for having been mistakenly dated on Sunday: *Van Sickle v. People*, 29 Mich., 61.

3—C. L., § 754, as amended, 1901, Public Acts, p. 101. See, *Gallagher v. Am. Express Co.*, 56 Mich., 13; 22

N. W., 96; *Watson v. Judge of Wayne Circuit*, 24 Mich., 38; *Hartford Fire Ins. Co. v. Owen*, 30 Mich., 441; *Am. Express Co. v. Conant*, 45 Mich., 642; 8 N. W., 574. This section, § 754, applies only to domestic corporations: *Reath v. Telegraph Co.*, 89 Mich., 22; 50 N. W., 817.

A corporation created by, and located in, this state, can be sued only in the county where it is located, unless service of process is made personally on some one of the officers indicated by law as the proper person to represent it for that purpose. There can be no substituted service under C. L., § 10468, for want of finding such officers, except in the home county: *Detroit F. & M. Ins. Co. v. Judge of Saginaw Circuit*, 23 Mich., 492.

4—C. L., § 10022. This section pur-

In suits against school districts, the summons is served by leaving a copy with the treasurer of the district, at least eight days before the return day thereof.⁵ The same rules for the computation of time obtain here as in cases of summons generally.

§ 44. **Time of service.**—Fractions of a day in the service of process are not regarded. A summons returnable on the eighth, in the morning, may be served as well in the afternoon as the forenoon of the first.⁶

§ 45. **Service by copy.**—When the service is by copy, the officer should leave a copy of the summons, endorsed thus:
 “Copy— E.... R...., *Constable.*”

If there are two or more defendants, although they reside at the same place, a copy should be left for each of them.⁷

§ 46. **When not on electors.**—“During the day on which any election shall be held, pursuant to the provisions of law, no civil process shall be served on any elector entitled to vote at such election.”⁸ The statute extends to all writs, whether original or judicial, and to a warrant or summons, by which a man is called into court to answer in a civil action as a party; and to executions against the *body*. The service of an execution upon the *property* of a defendant is not prohibited by it.⁹

ports to have been repealed by Act number 260 of the P. A. of 1899. In fact it was re-enacted with a proviso “that in counties where the company has no such station or ticket office service may be made by serving the same upon any conductor of a freight or passenger train.” See, *City of Detroit v. Wabash, St. Louis & Pacific Ry. Co.*, 63 Mich., 714; 30 N. W., 321.

Both of these sections, § 10022 and Public Acts 1901, p. 101, amending § 754, C. L., 1897, are in force in relation to service of process from justices' courts: *Fowler v. Detroit & Milwaukee Ry. Co.*, 7 Mich., 79; *Detroit Fire and Marine Ins. Co. v. Judge of Saginaw Circuit*, 23 Mich., 495; *Simpson v. Mansfield Ry. Co.*, 38 Mich., 628.

5—C. L., § 4722, as amended by Public Acts 1901, p. 228.

6—*Columbia Turnpike Road v. Hay-*

ward, 10 Wend., 422; *Giffin v. Forrest*, 49 Mich., 309; 13 N. W., 603.

7—*Hutchins v. Latimer*, 5 Porter, Ind., 67.

When under C. L., § 716, service is made by copy, it must be left at “defendant's last place of abode;” leaving the copy at his place of business is not sufficient: *Halsey v. Hurd*, 6 McLean, 14.

The copy must be left at defendant's last place of abode, in presence of *some one of the family*. Leaving it in presence of a person not shown to be one of the family, is not sufficient: *Laidlaw v. Morrow*, 44 Mich., 547, 550; 7 N. W., 191.

An error in the copy served, if it does not mislead, is immaterial: *Merrick v. Mayhue*, 40 Mich., 198.

8—C. L., § 3717.

9—*Corlles v. Holmes*, 20 Wend., 681.

§ 47. **Of the return.**—"The constable serving a summons, warrant, attachment or other process, shall return thereon, in writing, signed by him, the time and manner of executing the same; and, in case of a warrant, he shall in such return, state the fact whether he has or has not notified the plaintiff."¹⁰

The omission of the time of service would not be an objection to the *jurisdiction* of the justice, when the service was personal, the error would be available only in a proceeding to reverse the judgment, in case the defendant does not appear, or appears and makes objection.¹¹ But, notwithstanding this case, it will be well for a justice always to require a return which will show a proper service.

It should appear by the return of a summons against a corporation, in what manner the process was served; so that the justice may be able to determine whether it was served on the proper person.¹² To give a justice jurisdiction and to authorize him to render judgment against a defendant who does not appear, there must be a return showing personal service of process.¹³

In a suit against a corporation, the return of the constable

10—C. L., § 743. The officer's return of service of process is conclusive, in collateral proceedings, upon the parties to the suit in which it was issued: *Michels v. Stork*, 52 Mich., 260; 17 N. W., 833. The return to an attachment may be amended: *Kidd v. Dougherty*, 59 Mich., 240; 26 N. W., 510. So may return to summons: C. L., 1897, § 10271. See cases cited in note to this section.

An error in the copy served that does not mislead is immaterial: *Merrick v. Mayhue*, 40 Mich., 196.

Substituted service in cases where personal service is impossible, cannot be made before the last day on which service may be made: *Iron Cliffs Co. v. Lahals*, 52 Mich., 394; 18 N. W., 121; *Isabelle v. Iron Cliffs Co.*, 57 Mich., 120; 23 N. W., 613. Such service must be made by leaving the copy at the defendant's last place of abode, in the presence of some one of the family. Leaving it with some one not shown by the return to be a member

of the family, is insufficient: *Laidlaw v. Morrow*, 44 Mich., 550-1; 7 N. W., 191.

11—*Bromley v. Smith*, 2 Hill, 517. If the return fails to show the time of service, and the defendant does not appear, or, appearing, objects to the sufficiency of the return, any judgment rendered by the justice will be set aside on *certiorari*: *Ibid.*, and *Wheeler v. Lapham*, 14 Johns., 481; *Stewart v. Smith*, 17 Wend., 517. But in such case, if the defendant appears, and, without objection to the return, pleads in bar, the irregularity will be waived: *Wheeler v. Lapham*, 14 Johns., 481; *Campau v. Fairbanks*, 1 Mich., 151.

12—*Sherwood v. The S. & W. R. R. Co.*, 15 Barb., 650.

13—*Manning v. Johnson*, 7 Barb., 457; *Brown v. Cady*, 19 Wend., 477; *Morton v. Crane*, 39 Mich., 529; *Smalley v. Lighthall*, 37 Mich., 350; *Laidlaw v. Morrow*, 44 Mich., 548; 7 N. W., 191.

that the person served is an officer of the corporation, is sufficient evidence of that fact to give the justice jurisdiction.¹⁴

Where one of several defendants named in a summons is served, it is not necessary to notice in the return the defendant or defendants upon whom no service was made.¹⁵

Upon a summons against several, a return that it was served on the *defendant*, without naming which, would be void.

§ 48. Proceedings after service by copy.—"If it appear by the return of the constable that the summons was not personally served, and the defendant shall not appear on the return day thereof, the plaintiff may thereupon take out a new summons against the defendant in continuation of his suit, returnable not less than three nor more than twelve days from the date thereof, which shall be served at least two days before the time of appearance mentioned therein, and if such summons be returned that the defendant cannot be found after diligent inquiry, the plaintiff may, in further continuance of his suit, have an attachment against the defendant in actions upon *contract*, on filing an affidavit as to the amount claimed to be due, and executing a bond as in other cases."¹⁶

14—New York & Erie Ry. Co. v. Purdy, 18 Barb., 574; Wheeler v. N. Y. & H. R. R. Co., 24 Barb., 414. The statutes providing for service of process on various named corporation officers, only apply to our own corporations, and were not designed to reach foreign corporations; except in cases where special provision has been made otherwise, the remedy as to foreign corporations must be sought as at common law: Watson v. Judge of Wayne Circuit, 24 Mich., 38. By § 10442 provision is made for commencing suits against foreign corporations before justices in cases where the cause of action arises in Michigan: Iron Co. v. Construction Co., 61 Mich., 226; 28 N. W., 77; Ryerson v. Judge, 114 Mich., 352; 72 N. W., 131. Service of process as commencement of suit against a foreign corporation for a cause of action arising out of this state, upon an officer of that corporation then being casually within this state, but not here in the performance of the duties of his office, nor authorized by the corporation to submit to such serv-

ice, confers no jurisdiction: Newell v. Great Western Ry. Co. of Canada, 19 Mich., 336. The statutes allowing corporations to be sued within three years after the expiration of their charters, and enumerating the officers upon whom the service may be made, bring them within the same rules that apply to existing corporations in case such officers do not exist, or cannot be found, and allow the same proceedings to obtain substituted service: C. L., § 10469; Merrill v. Montgomery, 25 Mich., 73.

15—Fogg v. Child, 13 Barb., 246; 1 Cow. Treat., 2d ed., 504.

16—C. L., § 717. Under this statute, when the defendant is not found and service is made by copy, the plaintiff, unless the defendant appears, must take out a new summons in continuation of the suit: Morton v. Crane, 39 Mich., 529; Smalley v. Lighthall, 37 Mich., 350; Laidlaw v. Morrow, 44 Mich., 548; 7 N. W., 191. When a summons is returned without personal service, such return of non-service is the evidence upon which a

By this section the law allows the plaintiff, in actions upon contract, in case a sole defendant is not personally served, and does not appear, or if none of several defendants are thus served and appear, to issue a summons returnable in the time and in the manner specified in the section, upon which, if returned not personally served upon the sole defendant, or upon none, if several, and none, where there are several, appear, to obtain an attachment.

The affidavit for the attachment, in such cases, should be entitled in the cause.

A second summons should be issued within a reasonable time after the return of the first, in order to be a continuation of the suit; and it would be advisable, if not necessary, to issue it on the day of the return of the first summons.¹⁷

§ 49. Transfer to another justice.—It is provided that in

second summons may issue. *Allen v. Mills*, 26 Mich., 127.

If the first summons is returned without personal service and a new summons is issued, under the provisions of this section, the plaintiff, instead of resorting to a writ of attachment, may keep the suit alive by the issue of successive writs of summons until the defendant is found and personally served, or he may have an attachment: *Howell v. Shepard*, 48 Mich., 472; 12 N. W., 661. And it would seem that a return to a summons, in order to authorize a writ of attachment in continuation of the suit, ought to show, in the language of the statute, that "*the defendant could not be found after diligent inquiry.*" But see *Brown v. Knop*, — Mich., —; 100 N. W., 466 (July, 1904), holding that it is not necessary that the return show that after diligent search he was unable to find defendant and had therefore left a copy of the summons at his last place of abode, before an alias summons may issue. It is also held in this case that the justice need not wait one hour after the return hour before issuing the alias writ. It is also here held that in computing the four days within which the alias may issue the return day is to be counted.

New summons and service thereof in

continuation, etc.: *Iron Cliffs Co. v. Lahals*, 52 Mich., 397; 18 N. W., 121.

Where the defendant cannot be found and there is no personal service of the summons, service by copy cannot be made before the last day allowed by the statute for making service. If either the first or second summons is served by copy, or if the summons is returned prior to the last day upon which such service can be made, the court will acquire no jurisdiction to issue an attachment in continuation of the suit: *Iron Cliffs Co. v. Lahals*, 52 Mich., 394; 18 N. W., 121. It is the duty of the constable in good faith and diligently to endeavor to make personal service of the summons on the defendant, and he must exercise that diligence during the whole time given him by law to perform that duty, and he has no right to make return of the summons "not found," until the time has expired in which he could lawfully make service. The jurisdiction of the justice depends upon a proper return, showing a diligent attempt to make such personal service: *Isabelle v. Iron Cliffs Co.*, 57 Mich., 120; 23 N. W., 613. Requisites of return: see *Segar v. Shingle, etc., Co.*, 81 Mich., 344; 45 N. W., 982.

¹⁷—*Bissell v. Sill*, 1 Wend., 210.

case it is made to appear by affidavit of the defendant that the justice before whom the summons is returned is a material witness or has advised respecting the matters involved, that the justice shall transfer the cause to the nearest qualified justice in the county.¹⁸

OF A WARRANT, THE SERVICE AND RETURN.

Of the Warrant.

§ 50. In actions on contract.—“The plaintiff in actions arising out of, or founded upon contract, shall be entitled to a warrant, upon filing with the justice an affidavit made by the plaintiff, or some one in his behalf, that the plaintiff has good reason to believe:

1. That plaintiff has a demand against the defendant for money collected by him as a public officer; or,

2. That the plaintiff has a demand against the defendant for damages arising from the misconduct or neglect of the defendant in any professional employment or public office; or,

3. That there was fraud or breach of trust; *or that defendant does not reside in this state, and has not, for one month immediately preceding the time of making the application.*”¹⁹

That part of the third subdivision of the foregoing section in italics, authorizing a warrant solely on the ground that the defendant does not reside in the state, conflicts with Art. 6, § 33, of the Constitution, which provides, that “No person shall be imprisoned for debt arising out of or founded on a contract, express or implied, except in cases of fraud,” etc.²⁰

§ 51. The affidavit.—A warrant can in no case issue, except upon an affidavit;²¹ that is, a *written* declaration upon oath. The affidavit should not be entitled in any cause, for

18—C. L., § 835. See *post*, chap. viii. daugh v. Williams, 48 Mich., 172; 12

19—C. L., § 722; Chappee v. N. W., 34.

Thomas, 5 Mich., 53.

Public office—professional employment—fraud—breach of trust—as to what constitutes: See, notes to §§ 722 and 9996, C. L., 1897.

The constitution, Art. vi, § 26, requires a showing of probable cause under oath before a warrant can issue: Proctor v. Prout, 17 Mich., 473; Med-

20—Chappee v. Thomas, 5 Mich., 53.

21—If a justice issue a warrant without an affidavit, he is a trespasser. Without such affidavit there is no authority to issue the process. In such case the plaintiff is also a trespasser: Gold v. Bissell, 1 Wend., 210; Evertson v. Sutton, 5 Wend.,

until the process is issued there is no suit in existence. It is not essential that the affidavit should be signed by the deponent. If the witness be sworn, and the justice take down and certify the testimony, it is a sufficient affidavit.²²

281; *Vosburgh v. Welch*, 11 Johns., 175; *Whitney v. Shufelt*, 1 Denio, 592; *Davis v. Marshall*, 14 Barb., 96.

An affidavit for a warrant must set forth a cause of action within the statute authorizing a warrant: *Singer Manufacturing Co. v. McAllister*, 19 Mich., 215.

The Constitution of this state declares that no warrant shall issue to arrest any person "without probable cause, supported by oath or affirmation." This requires facts to be set out, and mere belief, without some showing as to its foundation, is insufficient: *De Long v. Briggs*, 47 Mich., 624; 11 N. W., 412. No arrest can be made except on sworn evidence of facts: *Sheridan v. Briggs*, 53 Mich., 569; 19 N. W., 189. A statement in the affidavit that "the deponent has good reason to believe that he has a cause of action," etc., is not probable cause. Facts showing that there is probable cause, must be sworn to: *Meddaugh v. Williams*, 48 Mich., 172; 12 N. W., 34.

It seems that the affidavit may set forth the grounds of the application for the warrant upon belief; but, to show the grounds of this belief, the affidavit must set forth such facts and circumstances within the plaintiff's knowledge as will authorize the justice who issues the warrant to find such a state of facts as is required by the statute to authorize the proceeding. The warrant cannot be issued upon hearsay, nor upon any statement, however positive, founded upon hearsay. If the plaintiff himself is not personally cognizant of the facts and circumstances relied on, he must procure the affidavit of some one who has personal knowledge of them: *Proctor v. Prout*, 17 Mich., 473. An affidavit for a writ which will deprive a person of his liberty, must not only set forth the facts and circumstances in detail, and not conclusions or inferences from facts, but

they must be facts in the personal knowledge of the deponent: *Sheridan v. Briggs*, 53 Mich., 569; 19 N. W., 189.

The facts stated in the affidavit as the ground for issuing the warrant, must be given in the same way as by a witness on the stand. There must be a distinct averment of such fact upon knowledge, and the facts must be such as in law tend to make out the cause of complaint. It is not for the affiant to draw his own inferences. He must state facts which justify the magistrate in drawing them. The facts must be stated upon knowledge: *Brown v. Kelly*, 20 Mich., 33. And the affidavit must be of the same legal quality, as evidence, as would be required at the trial to establish the facts relied on for cause of arrest: *Sheridan v. Briggs*, 53 Mich., 569; 19 N. W., 189. The affidavit need not in terms state that the facts are sworn to on the personal knowledge of affiant if it purports so to be and the facts are from their nature within his knowledge: *Paulus v. Grobbon*, 104 Mich., 42; 62 N. W., 160. See, further, *Shaw v. Ashford*, 110 Mich., 534; 68 N. W., 281.

Defects in the affidavit for a warrant will be waived by pleading to the merits and going to trial and judgment without objection made to the affidavit: *Maxwell v. Deens*, 46 Mich., 35; 8 N. W., 561; *Jacklin v. Soutler*, 82 Mich., 648; 46 N. W., 1027. But if, before pleading, objection is made to the sufficiency of the affidavit pleading to the merits thereafter will be no waiver: *Warren v. Crane*, 50 Mich., 300; 15 N. W., 465. Nor will giving bond on arrest and obtaining an adjournment of the cause waive defects in the affidavit if objection is made thereto before pleading to the merits: *Brown v. Kelly*, 20 Mich., 32-3.

22—*Millius v. Shafer*, 3 Denio, 60. "As the affidavit begins with the name of the party making it, and appears to have been duly sworn to before a

The form of the oath or affirmation to the affidavit may be as follows: "*You do solemnly swear that the contents of this affidavit by you subscribed are true;*" or, "*You do solemnly and sincerely affirm that the contents of this affidavit by you subscribed are true, and this you do under the pains and penalties of perjury.*"

If the person is conscientiously opposed to taking an oath, he is permitted, instead of swearing, solemnly and sincerely to affirm, under the pains and penalties of perjury.²³

The statute requires the filing of the affidavit with the justice. A paper is said to be filed when it is delivered to the proper officer, and by him received to be kept on file.²⁴

The affidavit must, in all cases, state that the demand arises out of, or is founded on, contract.

Affidavit for Fraud or Breach of Trust.—"In all cases on application for a warrant under the third subdivision of section nineteen, the person applying therefor shall, by affidavit, show the facts and circumstances within the knowledge of the person making such affidavit, constituting the grounds of the application, whereby the justice may the better judge of the necessity and propriety of issuing such warrant."²⁵

In all cases within the third subdivision of the section above referred to—that is, where fraud or breach of trust is alleged—the facts and circumstances establishing the fraud or breach of trust, must be stated in the affidavit; the *belief* of the person making the affidavit will not be sufficient.²⁶ The plaintiff's own

proper magistrate, we think it sufficient:" *Jackson v. Virgil*, 3 John., 540. The *jurat* to an affidavit sworn to before a justice of the peace, in the words: "*Sworn and subscribed this day of*" but omitting the words "*before me,*" is a nullity by reason of the omission: *Smart v. Howe*, 3 Mich., 590. But it has since been held, that where the affidavit is used before the officer who administered the oath, the omission in the *jurat* of the words "*before me,*" does not vitiate it: *In the matter of Teachout*, 15 Mich., 346. It is improper for attorneys to administer affidavits in their own causes: *McCaslin v. Camp*, 26 Mich., 390. By statute it is now prohibited: C. L., 1897,

§ 2640; *Bradley v. Andrews*, 51 Mich., 100; 16 N. W., 250. The fact that the attorney in the cause administers the oath is not an incurable defect. It may be waived: *Germaine v. Muskegon*, 105 Mich., 213; 63 N. W., 78. The fact that one administers the oath who is subsequently employed as attorney in the cause does not make the affidavit defective: *Sullivan v. Hall*, 86 Mich., 7; 48 N. W., 646.

23—C. L., § 10206.

24—*Bouv. Law Dic.*, "File."

25—C. L., § 724. Sec. 19 referred to, is C. L., § 722.

26—*Talman v. Bigelow*, 10 Wend., 420; *Proctor v. Prout*, 17 Mich., 473; *Sheridan v. Briggs*, 53 Mich., 569; 19 N. W., 189.

belief is neither a fact nor circumstance upon which the justice can exercise his judgment. It is not sufficient that the plaintiff is satisfied of the unlawful acts or intentions of the defendant. The justice must be satisfied, and he must be so satisfied from proof of facts and circumstances; not the belief of any one. Facts must be shown to the justice, which shall leave no reasonable doubt on his mind that the defendant has committed a fraud or breach of trust. It is not enough that the affidavit is satisfactory to the plaintiff. The justice must be satisfied, and has no right to be satisfied unless upon legal proof; proof of facts and circumstances, not belief alone.²⁷ Nor would an affidavit be sufficient which stated positively that the defendant had committed the fraud or breach of trust, if it omitted to state the facts and circumstances. The affiant may honestly believe, and thus affirm it in general terms; whereas, if called to state the facts and circumstances upon which he reached the conclusion, the justice (being thus enabled to exercise his judgment in the matter) might well differ from him.²⁸ It is sufficient, however, to swear to the party's *belief* of the *ground* upon which this application is made, if the facts and circumstances constituting the ground of the application are set forth and are sufficient.²⁹ All the facts and circumstances must be set forth in the affidavit; any deficiency in this respect cannot be supplied by proof or a verbal statement to the justice.³⁰

27—Loder v. Phelps, 13 Wend., 46; Smith v. Luce, 14 Wend., 237.

Facts and circumstances must be stated, from which the justice is to judicially determine as to the necessity and propriety of issuing the warrant: Stewart v. Brown, 16 Barb., 367. This was an attachment case, but the same rules are applicable to a warrant. Cow. Treat., 2d ed., 467. Nor can a justice issue a warrant upon his own knowledge of facts, or upon the pretense that he is satisfied from such knowledge that a warrant ought to issue, but only upon such facts set forth in the affidavit, as would warrant him in determining judicially that it was a proper case for issuing the writ: *Ibid.*, p. 480; Money v. Tobias, 12 Johns., 422; 2 Walt's Law and Prac., 2d ed., 99; Vosburgh v. Welch, 11

Johns., 175; Loder v. Phelps, 13 Wend., 46. See note 21, *ante*, p. 42.

28—*Ex parte* Robinson, 21 Wend., 672; Stewart v. Brown, 16 Barb., 367.

29—Johnson v. Moss, 20 Wend., 145.

30—Comfort v. Gillespie, 13 Wend., 404. The same principle is applicable to each of the other provisions of this section of the statute as to that provision concerning fraud or breach of trust. The affidavit should state facts and not belief or conclusions. It would not be sufficient to allege that the defendant is withholding moneys "collected by him as a public officer" or that defendant is guilty of "misconduct in office" or that he is guilty of "neglect in professional employment." The affidavit should state the facts and let the court determine from

The proof must establish at least a *prima facie* case under some clause of the statute, or the justice should not issue the warrant. Unless such a case is made out by the affidavit, the whole proceeding would be void, and the justice a trespasser.³¹

§ 52. In actions for tort—Penalties, etc.—“In actions other than those founded on judgment or contract, the plaintiff shall be entitled to a warrant if he, or some person in his behalf, shall make and file with the justice an affidavit specifying the nature of the demand, and containing a statement that the deponent has good reason to believe, either:

1. That the defendant has committed a trespass, or other wrong, to the damage of the plaintiff; or,
2. That the defendant has incurred a penalty or forfeiture by the violation of some law of this state, which the person filing such affidavit has a right to prosecute in the name of the people of this state, or otherwise.”³²

the facts whether the money withheld was collected by defendant as a “public officer;” whether there was “misconduct” and if there was, whether it was “in office;” whether there was “neglect” and if so whether it was in a professional employment. See, *ante*, § 51, p. 42, note 21.

31—Connell v. Lascelles, 20 Wend., 77; and see, Cow. Treat., 2d ed., 487; Loder v. Phelps, 13 Wend., 46; Vosburgh v. Welch, 11 John., 175; Davis v. Marshall, 14 Barb., 96.

But it seems that where there is some proof tending to show a reasonable ground for issuing the writ, an error in judgment by the justice as to its sufficiency would not make him a trespasser: See, Vosburgh v. Welch, 11 Johns., 175; Rash v. Whitney, 4 Mich., 495, 502-3; Johnson v. Morton, 94 Mich., 6; 53 N. W., 816.

32—C. L., § 723; see, Pardee v. Smith, 27 Mich., 33; and *ante*, § 14, note.

For the requisite of an affidavit for a warrant, see, *ante*, p. 42, note 21.

An affidavit for a warrant for a tort, must set forth facts and circumstances to establish the tort, so that the justice may determine whether there is probable ground for believing that a wrong has been committed.

Mere allegations of wrong, which are plaintiff's deductions from states of fact not set forth, are insufficient: Singer Manufacturing Co. v. McAllister, 19 Mich., 215.

An affidavit for a warrant in trespass which sets forth the cause or ground therefor as follows: “That deponent has, as he has good reason to believe, a just cause of action against W.....D....., of, in the township of, in said county, against whom he applies for process by warrant for trespass committed by said W.....D....., upon lands owned by this deponent, said lands being in,” etc., is merely a statement on belief, and of the plaintiff's conclusions, and is insufficient. It states no fact upon which the justice can determine as to whether there has been a trespass or not, or as to whether there is probable cause for issuing his warrant: De Long v. Briggs, 47 Mich., 624; 11 N. W., 412; Maxwell v. Deens, 46 Mich., 35; 8 N. W., 561; Meddaugh v. Williams, 48 Mich., 171; 12 N. W., 34; Warren v. Crane, 50 Mich., 300; 15 N. W., 465. And see affidavit therein held insufficient: *Ibid.*, p. 301.

An affidavit which shows that the defendant has taken plaintiff's prop-

§ 53. **Against defendant by fictitious name.**—The statute provides that, "When the name of any defendant shall not be known to the plaintiff, he may be described in the process and proceeding by a fictitious name," etc.³³

§ 54. **Defective affidavits.**—Whenever a justice is satisfied that the affidavit upon which a warrant has been issued is fatally defective, he should at once discharge the defendant from arrest, and it is said that a defendant is permitted to controvert the truth of the facts stated in the plaintiff's affidavit, even when they make a *prima facie* case upon their face.³⁴

§ 55. **Content of the warrant.**—"A warrant shall be directed to any constable of the county in which the justice issuing the same resides, and shall command such constable to take the defendant, and bring him forthwith before such justice, to answer the plaintiff in a plea to be mentioned therein, and shall require him, after he shall have arrested the defendant, to notify the plaintiff or prosecutor of the arrest."³⁵

OF THE SERVICE OF THE WARRANT.

§ 56. **How made.**—"A warrant shall be served by arresting the defendant and bringing him forthwith before the justice issuing the same; but if such justice, on the return thereof, shall be absent, or unable to hear or try the cause, or if it shall appear by the affidavit of the defendant, that such justice is a material witness in his behalf on the trial of the cause, the constable shall take the defendant before some other justice of the same township or city, if there be one therein qualified to try the same, and, if not, then before some justice of an adjoining township or city, who shall take cognizance of the

erty from the possession of his bailee and converted it, is sufficient to authorize the issuing of a civil warrant: *Deltz v. Groesbeck*, 32 Mich., 304. Authority to make an affidavit for a justice for the wrongful conversion of goods belonging to the plaintiffs, will be presumed, where the affidavit is made by one of two plaintiffs who were cotenants of the property converted: *Ibid*.

33—C. L., § 765; see, *ante*, § 29.

34—*Shannon v. Comstock*, 21 Wend., 457, 459.

35—C. L., § 725.

A warrant should not be returnable at a particular time, for that might detain the party in custody; the law has fixed the time for its return, which is immediately: See, *Pratt v. Hill*, 16 Barb., 307, and cases cited. The warrant may be served by a sheriff, under-sheriff or deputy sheriff, as well as by a constable. See, C. L., § 2595.

cause, and proceed thereon as if the warrant had been issued by him."³⁶

The defendant must be *actually* arrested and brought *personally* before the justice on a warrant, or the justice will have no jurisdiction in the cause, and all the proceedings will be void.³⁷

§ 57. **Who exempt from arrest.**—Senators and representatives in congress are privileged from *arrest* in all cases, except treason, felony, and breach of the peace, during their attendance at the sessions of their respective houses, and in going to and returning from the same.³⁸

Senators and representatives of this state are, except as above mentioned, privileged from arrest, and are not subject to any civil process, during the session of the legislature, nor for fifteen days next before the commencement and after the termination of each session.³⁹

Officers of the senate and house of representatives, while in actual attendance upon the duties of their offices, are not liable to arrest on civil process.⁴⁰

"*All officers of the several courts of record* shall be liable to arrest, and may be held to bail in the same manner as other persons, except during the actual sitting of any court of which they are officers; and when sued with any other person, such officers shall be liable to arrest, and may be held to bail as other persons, during the sitting of the court of which they are officers."⁴¹

Attorneys, etc.—"No attorney, solicitor or counselor is exempt from *arrest* during the sitting of the court of which he is an officer, unless he is employed in some cause pending and then to be heard in such court."⁴² Attorneys, etc., are not

36—C. L., § 726. A warrant regular on its face and appearing to issue from a court or officer having jurisdiction of the subject matter will protect an officer proceeding in a lawful manner to serve it: *Ortman v. Greenman*, 4 Mich., 291; *Dunn v. Gilman*, 34 Mich., 256; *Wheaton v. Beecher*, 49 Mich., 348; 13 N. W., 769. *Contra*, if the court or officer had no jurisdiction: *People v. Rix*, 6 Mich., 144; or if the writ is bad on its face, as where it was issued under and expressly referred to an unconstitutional

statute. Any one seeking to enforce such a writ is a trespasser. *First National Bank v. Watkins*, 21 Mich., 483.

37—*Colvin v. Luther*, 9 Cow., 61. See, *Whitehead v. Keyes*, 3 Allen, 495.

38—Const. of U. S., Art. 1, § 6.

39—Const. of Mich., Art. 4, § 7.

40—C. L., § 34.

41—C. L., § 1117; *Day v. Brett*, 6 Johns., 22.

42—C. L., § 1117.

This exemption to attorneys does not extend to an attendance before

privileged from arrest while at home, although thereby they are prevented from attending court.⁴³

Females cannot be imprisoned on any process in any civil action, except for unlawful sales of spirituous liquors.⁴⁴

Electors are also exempt from arrest on civil process on the day of holding any election at which they are entitled to vote.⁴⁵

Parties, Witnesses, etc., Attending Court.—Every person connected with a cause, and attending in the course of it, whether compelled to attend by process or not, such as parties, bail, etc., is privileged from arrest whilst going to, attending and returning from court. The privilege of witnesses at common law was the same.⁴⁶ Now, by statute, "Every person duly and in good faith subpoenaed as a witness to attend any court, officer, commissioner, auditors or referees, or summoned to attend any judge, officer or commissioner, in any case where the attendance of such witness may by law be enforced by attachment, or by warrant, shall be exonerated from arrest in any civil suit, while going to the place where he shall be required to attend, while remaining in attendance as such witness, and while returning therefrom."⁴⁷

"The court or officer before whom any person shall have been subpoenaed in good faith to attend as a witness, shall discharge such witness from any arrest made in violation of the last section; and if such court shall have adjourned before such arrest, or before application for such discharge was made, any judge of such court shall have the same power to discharge such witness."⁴⁸

"Every justice of the supreme court, circuit judge and circuit court commissioner shall have the like authority to dis-

an examiner, master or judge, out of court: *Cole v. McClellan*, 4 Hill, 59; see, also, *Humphrey v. Cumming*, 5 Wend., 90; *Gibbs v. Loomis*, 10 Johns., 463; *Tiffany v. Driggs*, 13 Johns., 252; *Gilbert v. Vanderpool*, 15 *Ibid.*, 242; *Secor v. Bell*, 18 *Ibid.*, 52; *Gay v. Rogers*, 3 Cow., 368.

43—*Corey v. Russell*, 4 Wend., 204.

44—C. L., §§ 889 and 10342; see, *Strickland v. Bartow*, 27 Mich., 68, decided before these amendments.

45—C. L., § 3717.

46—*Archbold's Prac.*, 2d Am. ed.,

76; *Clark v. Grant*, 2 Wend., 257; *Watson v. Superior Court Judge*, 40 Mich., 729; *Baldwin v. Branch Circuit Judge*, 48 Mich., 525; 12 N. W., 686; *Mitchell v. Huron Circuit Judge*, 53 Mich., 541; 19 N. W., 176; *Graham's Prac.*, 2d ed., 129; 1 *Greenleaf's Evidence*, § 316. Service of subpoena is not essential, under the rule of the common law, to the protection. Consent to attend as a witness is enough: *Ibid.* Not so under the statute: § 10157-10161; C. L., 1897.

47—C. L., § 10157.

48—C. L., § 10158.

charge any witness arrested contrary to the foregoing provisions."⁴⁹

"Every arrest of a witness made contrary to the foregoing provisions shall be absolutely void, and shall be deemed a contempt of the court issuing the subpoena; and every person making or procuring such arrest, shall be responsible to the witness arrested for three times the amount of damages which shall be found by the jury, and shall also be liable to an action at the suit of the party who subpoenaed such witness, for the loss, hindrance and damage sustained by him in consequence of such arrest."⁵⁰

"But no sheriff or other officer, or person, shall be so liable, unless the person claiming an exemption from arrest, shall, if required by such sheriff or officer, make an affidavit, stating;

1. That he has been legally subpoenaed as a witness to attend before some court, officer, auditors, referees or commissioners, specifying such court, officer, auditors, referees or commissioners, the place of attendance, and the cause in which he shall have been subpoenaed; and,

2. That he has not been subpoenaed by his own procurement, with the intent to avoid the service of any process;

Which affidavit may be taken by such officer, and when so taken, shall exonerate such officer from all liability for not making such arrest."⁵¹

By this statute a witness would not be privileged from arrest unless he had been served with a subpoena, and is attending as a witness.⁵² When an *arrest* only is prohibited by law, the service of a *summons* would not be illegal, but when service of *process* is forbidden, it would include a *summons*.

§ 58. Who to be arrested.—The officer is authorized by the warrant to arrest only the person named in the warrant. He must, at his peril, take care that he arrest no other person but such as is described in the warrant; for if he arrest C. D. upon a warrant against A. B., C. D. may maintain an action for false imprisonment against the officer, even although he be the person actually intended to have been arrested, but by mistake is mis-

49—C. L., § 10159.

50—C. L., § 10160.

51—C. L., § 10161.

52—*Cole v. McClellan*, 4 Hill, 59.

described as A. B. in the warrant.⁵³ If, however, a fictitious name has been inserted, the arrest of the person intended will be justified.⁵⁴ If a person, whose real name is William, is asked, before process against him, whether his name is not John, and he says it is, he cannot maintain trespass, for he shall not be allowed to avail himself of the mistake which he himself occasioned.⁵⁵

§ 59. Who to make the arrest.—The arrest must, as a general rule, be made by the officer to whom the warrant is directed, or by the person deputized for that purpose.⁵⁶ It is not necessary, however, that the officer to whom the warrant is directed should be the person who actually makes the arrest, or even within sight when the arrest is made; but he must be acting in the arrest; he cannot go upon other business, or stay at home and send a third person to make it.⁵⁷

The arrest may be made by the sheriff, his deputy, or by an under sheriff,⁵⁸ as well as by a constable, and, when necessary, the officer may require suitable aid, and for that purpose call upon other persons to assist him in serving the warrant.⁵⁹

§ 60. When to be made.—The arrest may be made at any time after the issuing of the warrant.⁶⁰ It must not, however, be made on Sunday, or it will be void.⁶¹ But after escape, without the assent of the officer, the defendant may be retaken on Sunday.⁶² Where, by the contrivance of the plaintiff's attorney, a party had been arrested on Sunday on criminal process, for the purpose of effecting his arrest on civil process, and he was detained in custody till Monday, and then arrested on civil process, the court ordered him to be discharged out of

53—*Griswold v. Sedgwick*, 6 Cow., 456; same case, 1 Wend., 126; *Scott v. Ely*, 4 Wend., 555; *Miller v. Foley*, 28 Barb., 630.

54—*Ante*, § 53.

55—*Price v. Harwood*, 3 Campb., 110.

56—For authority for a private person to serve a warrant, see, C. L., §§ 978 and 2367.

57—*Coyle v. Hurtin*, 10 Johns., 85.

58—C. L., § 2595.

59—C. L., § 2590; *Firestone v. Rice*, 71 Mich., 377; 38 N. W., 885.

60—If the defendant is absent, or keeps out of the way to avoid an arrest, the officer may retain the warrant a reasonable time, for the purpose of making service. As to what will be a reasonable time, will depend on the circumstances of the case; a month may not be an unreasonable time: *Arnold v. Steeves*, 10 Wend., 514.

61—C. L., § 5916; *Anderson et al. v. Birce*, 3 Mich., 280; see, *Peck v. Cavell*, 16 Mich., 11.

62—*Nichols v. Ingersoll*, 11 John., 155.

custody.⁶³ And where a defendant was seized on Sunday and detained till next morning, and then arrested upon process out of the exchequer, it was held that the arrest was void, and could not be made good, even by a subsequent assent.⁶⁴ A defendant who had been brought into the State on a criminal charge, is not exempt from arrest, unless the criminal proceeding is merely a pretext to bring him within the power of civil process.⁶⁵

§ 61. **Where arrest may be made.**—The arrest may be made at any place within the county.⁶⁶ No man can be arrested in his own house, if the outer door be shut. The officer cannot break open an outer door or window of the defendant's house to make an arrest;⁶⁷ but after he has obtained peaceable admission at the outer door, he may break open an inner door, even if it be the door of a lodger, after requesting admittance.⁶⁸ But this privilege is confined to the defendant's *dwelling house*, and does not extend to a store, barn, or any outhouse disconnected from the dwelling house, and forming no part of the curtilage.⁶⁹ And it extends only to the dwelling house of the

63—Wells v. Gurney, 8 B. & C., 769. tenant: Swain v. Mizner, 8 Gray, 182.

64—Lyford v. Tyrrel, Anst., 85.

65—William v. Bacon, 10 Wend., 636; Lucas v. Albee, 1 Denio, 666. But see, *Re Frank Cannon*, 47 Mich., 481; 11 N. W., 280.

66—C. L., § 2367.

67—The officer may not break the outer door to gain admittance, and if he does so, the owner may resist: *People v. Hubbard*, 24 Wend., 369; *Curtis v. Hubbard*, 4 Hill, 437; *Glover v. Wittenhall*, 6 Hill, 597; *Stearns v. Vincent*, 50 Mich., 219; 15 N. W., 86. The command of one known to be an officer is sufficient protection for one called to assist: *Firestone v. Rice*, *supra*.

68—*Lee v. Gansel*, 1 Cowp., 1; *Ratcliffe v. Burton*, 3 B. & P., 223; *Hubbard v. Mace*, 17 Johns., 127; *Williams v. Spencer*, 5 Johns., 352; *Stedman v. Crane*, 11 Met. (Mass.), 295. Where a house is leased to several, each having a distinct portion, the door through which the rooms of each particular tenant are immediately reached is the outer door as to such

tenant: *Swain v. Mizner*, 8 Gray, 182.

The protection of the dwelling against entry for the service of process is in the outer door only, and it is optional with the owner to take that protection by closing that door against the officer, or to waive it by allowing him to enter. If the officer once gains entrance through the outer door without force or fraud, the privilege is gone, and he may force open any other, or inner door, if necessary, to make complete service of his process: *Stearns v. Vincent*, 50 Mich., 219-220; 15 N. W., 86.

69—*Haggerty v. Wilber*, 16 Johns., 287.

The curtilage is the space or yard including the dwelling house and the customary outbuildings standing near thereto and used in connection therewith—and it is said that this space need not be surrounded by a fence; the barn used by a family and standing within eighty feet of the dwelling, and an outhouse standing thirty-six feet from a fisherman's dwelling, in which he was accustomed to dry his

defendant; for if *he be in the house of a stranger*, the officer, after demand and refusal of admission, may break open the outer door to arrest him. But an officer cannot justify breaking the outer door of the house of a stranger upon *suspicion* that the defendant is there; he is justified or not by the event; if the defendant was actually in the house, the officer is protected; otherwise not.⁷⁰ If, after the defendant is arrested, he escapes into a house, the officer will be justified in breaking even the outer door to retake him.⁷¹

§ 61a. **How arrest to be made.**—The arrest is usually made by actual seizure of the person; but any touching, however slight, of the defendant's person, is sufficient for this purpose; and where the officer had laid hold of the defendant's hand as he held it out of the window, it was deemed sufficient.⁷² But the manner of arrest is not confined to corporeal seizure; the law is well settled that no manual touching of the body, or actual force, is necessary to constitute an arrest and imprisonment. It is sufficient if the party be within the power of the officer and submits to the arrest.⁷³ Where the officer entered the room in which the defendant was, and *locked the door*, telling him at the same time that he arrested him, the court held

nets, have been held to be within the curtilage: See, *People v. Taylor*, 2 Mich., 250; *Pond v. People*, 8 Mich., 150. In the law of burglary, and for the punishment of burglarious breaking, the dwelling house is deemed to include whatever is within the curtilage, even if not included within the dwelling, if used with it for domestic purposes: *People v. Taylor*, *supra*; *Pitcher v. People*, 16 Mich., 142; *Stearns v. Vincent*, 50 Mich., 219; 15 N. W., 86. But it seems that for the purpose of protecting the owner against an officer who seeks to enter to serve civil process, the dwelling house is deemed to be only the house or that part of the building occupied by the family for dwelling purposes. Thus if the owner occupies and uses the lower story of his building as a store or shop, and the upper story for a dwelling place for himself and family, the latter only will be deemed his dwelling house, notwithstanding in-

gress and egress to and from the store and dwelling part may be through the same outer door. And in such case the door within the building opening into that part occupied for domestic purposes will be deemed the outer door of his dwelling house: *Stearns v. Vincent*, 50 Mich., 209, 219, 220; 15 N. W., 86. And it is held, that when a building is leased in distinct portions to several tenants, the door to the part occupied by each tenant is to be deemed the outer door of his dwelling house, and that an officer, though he may be lawfully within the building, has no right to force such door for the service of process. *Swain v. Mizner*, 8 Gray, 182.

70—*Johnson v. Leigh*, 6 Taunt., 246.

71—*Allen v. Martin*, 10 Wend., 300; and see, *post*, as to serving executions.

72—1 Ventrils, 396.

73—*Gold v. Blissell*, 1 Wend., 215; *Wood v. Lane*, 6 C. & P., 774.

it to be a good arrest. Mere words, however, such as telling a man you arrest him, or the like, cannot, *of themselves*, amount to an arrest.⁷⁴ If the officer says, "I arrest you," and the party runs away, it is no escape; but if the party acquiesce in the arrest, and goes with the officer, it will be a good arrest.⁷⁵ Where a sheriff's officer, having a warrant to arrest a party for debt, went to the party and read his warrant to him, told him that, as he knew him, he would take his word, but that he must give bail, and then, having taken a fee for bail to be put in, proceeded to the party's attorney, to let him know it, it was held that it was no arrest.⁷⁶

The remarks of Cowen, J., in *Connah v. Hale*,⁷⁷ illustrate this question. He says: "In the consideration of trespass, what distinction is better settled than that between actual force and implied or constructive force? A.'s horse steps over the imaginary line of his farm dividing it from B.'s. A. may himself be sued as having forcibly broken the close, even though there was no fence. So of mere words. Thus, in the language of Abbott, Ch. J., 'If a person send for a constable and give another in charge for felony, and the constable tell the party charged he must go with him, on which the other, in order to prevent the necessity of actual force being used, expresses his readiness to go, and does actually go, this is an imprisonment, and gives the party thus consenting to go an action of false imprisonment.'⁷⁸ Again, by Best, Ch. J., 'I should think it an imprisonment if a constable told me that 'I must go to Union Hall; for I should know that if I refused, he would compel me. I think it amounts to a trespass.'⁷⁹ The distinction is between an apparent act of authority and a request; as if an officer having civil process, out of respect to the party or the company, merely requests him to come to him, or to fix his time and go and give bail; he either going off and paying no heed to the request, or afterwards volunteering to give bail. In the latter cases, trespass against the person cannot be sus-

74—*Rex v. Sherman*, Hardw., 304;

Genner v. Sparks, 6 Mod., 173; *Fuller v. Bowker*, 11 Mich., 212, 213.

75—*Russen v. Lucas*, 1 C. & P., 158.

76—*George v. Radford*, 3 C. & P., 361.

46d

77—23 Wend., 462.

78—*Pocock v. Moore*, 1 Ry. & Moo., 321; and see, *Gold v. Bissell*, 1 Wend., 210, 215.

79—*Chinn v. Morris*, 2 C. & P., 361.

tained.⁸⁰ No dominion is here exercised; and the person never was in the officer's custody."

The assent of the officer to the escape of the defendant whom he has arrested upon a warrant does not prevent the officer from retaking him or arresting him anew.⁸¹

§ 62. **Authority and cause for arrest to be made known.**—A regular officer is not bound to exhibit his authority or process when he arrests a defendant, but a special deputy must.⁸² But after the party has been arrested, the officer, if required, is bound to inform him of the substance of the warrant. And even before the arrest, the officer should, in some manner, make known that he comes in his official character, or he may be lawfully resisted.⁸³

§ 63. **Aid to arrest.**—"Any sheriff, deputy sheriff, coroner or constable may require suitable aid in the service of process in civil or criminal cases, in preserving the peace, or in apprehending or securing any person for felony or breach of the peace, when such officer may have power to perform such duty; and when any such officer shall find resistance made against the execution of any process, or shall have good reason to believe that such resistance will be made, he may take the power of the county, and proceed therewith in proper person to execute such process."⁸⁴

80—Russen v. Lucas, 1 Ry. & M., 26; 1 C. & P., 158; Berry v. Adamson, 6 B. & C., 528.

81—Arnold v. Steeves, 10 Wend., 515.

82—*Ibid.*, and Bellows v. Shannon, 2 Hill, 86.

If the special deputy refuse to show his warrant when making the arrest, the defendant will be justified in resisting: Frost v. Thomas, 24 Wend., 418.

83—Bellows v. Shannon, 2 Hill, 86; see, Drennan v. People, 10 Mich., 169. Upon the question of what is the duty of the arresting officer as to furnishing the person to be arrested with information as to the authority of the arresting officer, or as to the cause for the arrest, there is not entire accord among the authorities. While it may not be necessary in all cases to exhibit the warrant for the arrest,

yet it is essential that in some way the arrested person shall be informed that the arresting person has authority to make the arrest, and as it seems also, of the cause for the arrest: Drennan v. The People, 10 Mich., 169. See, also, State v. Taylor, 70 Vt., 1; 39 Atl., 447, and particularly an exhaustive note to this case as reported in 42 L. R. A., 673, on "what information is an accused person entitled to at the time of his arrest."

For a very full discussion of the liability of an officer for making an arrest, see note to Leger v. Warren, 62 Ohio St., 500; 57 N. E., 506, as reported in 51 L. R. A., pages 193-225.

84—C. L., § 2590. For a general discussion of the *posse comitatus*—the authority of the commanding officer—the duties of those commanded—their protection—their liability for refusal

The constable cannot take security for the appearance of the defendant before the justice; and such security, if taken, would be void.⁸⁵

§ 64. *Of the return of a warrant.*—Although the statute⁸⁶ requires the arresting officer *forthwith* to take the arrested person before the justice, it means that the officer shall do it as soon as he reasonably can. If the time be unseasonable, as in the night, or if there is danger of a present rescue, the officer may secure the defendant in a house or other safe place until the next day, or such time as it may be reasonable to take him before the justice. He cannot delay taking the defendant before the justice to give the plaintiff an opportunity to collect his witnesses.⁸⁷ So, if the justice who issued the warrant is unable to try the cause, the officer has a right to detain the defendant for a reasonable time, while making a *bona fide* effort to find a magistrate to hear it. Where the justice, upon the defendant being brought before him, after calling the parties, declares himself unable to try the cause, and directed them to go before another justice, it was held that the proceeding did not preclude the officer from taking the defendant before another justice.⁸⁸

The defendant must be *actually* arrested and brought *personally* before the justice; this is essential to the jurisdiction of the justice. If it is not done, a judgment by confession, rendered upon the warrant, though upon a return regular upon its face, of the defendant as in custody, and made by a person

to join—see note to *Robinson v. State*, 93 Ga., 77; 18 S. E., 1018, as reported in 44 Am. St. Rep., 127.

85—*Millard v. Canfield*, 5 Wend., 61.

86—C. L., § 726, quoted *ante*, § 56.

87—*Wright v. Court*, 4 B. & C., 596.

And where a justice issued a warrant for the arrest of an individual late on Saturday night, with an endorsement thereon directing that the accused should be committed until the following Monday for examination, and the constable arrested the accused the same evening and committed him to

jail without first taking him before the magistrate: *Held*, that the justice had exceeded his authority, and that he and the constable were both trespassers; and the court said: "No doubt the justice, on the accused being brought before him, may detain him a reasonable time for examination, but the difficulty here is, the justice ordered the accused to be committed without first being brought before him." *Pratt v. Hill*, 16 Barb., 303; see, a similar ruling in *Edwards v. Ferris*, 7 C. & P., 542.

88—*Arnold v. Steeves*, 10 Wend., 515.

regularly authorized for that purpose, will be *coram non judice*, and void; and all persons acting under it will be trespassers.⁸⁹

§ 65. **Notice of arrest to plaintiff.**—The officer is required to notify the plaintiff of the arrest.⁹⁰ This provision is somewhat vague, and in some cases may be attended with difficulty, as when the plaintiff resides at a distance from the justice, or the place where the arrest is made. If the plaintiff resides out of the county, the constable, of course, would not be required to go out of the county to give him notice. But if he resides in the county, it would seem that it would be the duty of the constable to give him notice. How the notice is to be given, whether personal or by leaving a notice at his dwelling house or place of abode, in his absence; and whether the notice is to be given by the constable in person or by a messenger, or by a notice in writing, are questions somewhat doubtful. Probably, however, a notice in writing from the constable, sent by a third person, and served by delivering it to the plaintiff, or by leaving it at his dwelling house or place of abode, in his absence, would be sufficient, if the constable could not conveniently do it in person. This would seem to be sufficient from necessity, for it is apprehended that the constable would not be justified in carrying the defendant to a remote part of the county, in order to notify the plaintiff; and he cannot leave the defendant in the custody of another person while he goes to notify the plaintiff.

It would be proper, in all cases, when the plaintiff does not reside near the justice, that he should authorize some person who does, to attend to the suit for him, and give the constable information thereof, and in such case notice of the arrest to such person would be sufficient.⁹¹

§ 66. **Form of the return.**—The officer is required to return, upon the warrant, in writing, signed by him, the time and manner in which he executed the same, and whether he has or has not notified the plaintiff.⁹²

In case the defendant is taken before some justice other than the one who issued the warrant, it would seem necessary that the reason of it should be mentioned in the return.⁹³

89—Colvin v. Luther, 9 Cow., 61; Smith, 17 Wend., 517; Wheeler v. N. Bigelow v. Stearns, 19 Johns., 39. Y. & H. R. R. Co., 20 N. Y., 417.

90—C. L., § 725.

93—C. L., § 726; People v. Fuller,

91—Edward's Treatise, 57.

17 Wend., 211.

92—C. L., § 743; see, Stewart v.

After the defendant is brought before the justice, he is, in law, still in the custody of the officer until the justice directs his release. If the cause is adjourned by the defendant, he is to continue in the custody of the officer who made the arrest during the time of adjournment, unless he gives the security required in case of adjournment.⁹⁴

If the defendant is privileged or exempt from arrest, he must plead his privilege in abatement, or move for his discharge before pleading in bar, for such a plea will be a waiver of his right to a discharge, since it admits that he is properly in court for the purposes of the suit.⁹⁵

§ 67. Cause to be tried, when.—"When the defendant shall be brought before the justice on a warrant, the justice shall then, or within three days thereafter, unless the parties agree to allow a longer time, or there be an adjournment, proceed to hear, try and determine the cause."⁹⁶

In case the plaintiff was not notified of the arrest by the officer, the justice might allow a reasonable time for that purpose. So, a reasonable time should be allowed the plaintiff to make his arrangements for the trial; and until the expiration of such time, the justice ought not, in either case, to discharge the defendant from custody.

§ 68. Transfer where justice is material witness, etc.—It is provided⁹⁷ that in case it is made to appear that the justice is a material witness or has advised or counseled respecting the matters involved that the cause shall be transferred to the nearest qualified justice in the county. Such showing must be by affidavit, and can be made by the *defendant* only. Costs up to the time of removal with transcript fee of fifty cents must be paid or tendered as a condition of removal.⁹⁸ The statements in the affidavit cannot be contradicted.⁹⁹

94—See, *post*, "Adjournment."

95—Randall v. Crandall, 6 Hill, 342.

The exemption from arrest is a personal privilege which can be waived, and the waiver is complete when the party fails to claim it at once, and does some act in the cause in reference to his appearance or defence on the

merits: Petrie v. Fitzgerald, 1 Daly, 405.

96—C. L., § 727.

97—C. L., § 835. See, *post*, chap. viii.

98—Oakley v. Dunn, 63 Mich., 496; 30 N. W., 96.

99—*Ibid*.

CHAPTER III

PROCEEDINGS IN ATTACHMENT.

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OF THE WRIT OF ATTACHMENT.

§ 69. **When attachment to issue, affidavit necessary.**—"Any plaintiff shall be entitled to an attachment against a defendant in any action founded on a judgment or on a contract, express or implied, if such plaintiff, or some person in his behalf, shall make and file with the justice an affidavit, specifying, as near as may be, the amount due to the plaintiff, and containing a further statement, either that the deponent knows, or has good reason to believe,¹ either:

1—C. L., § 721.

The proceeding by attachment is a special statutory remedy, and a strict compliance with all the provisions and requirements of the statute is necessary to confer jurisdiction upon the justice, and to authorize a judgment under it. *Greenvault v. F. & M. Bank*, 2 Doug., 502; *Buckley v. Lowry*, 2 Mich., 420; *Roelofson v. Hatch*, 3 Mich., 277; *Millar v. Babcock*, 29 Mich., 526; *Adams v. Abrams*, 38

Mich., 302. Not only must the statute be strictly construed, but all of its requirements must be strictly observed, and the cause for issuing the writ must be plainly within the terms expressed in the statute, or the proceeding cannot be upheld: *Mathews v. Densmore et al.*, 43 Mich., 463; 5 N. W., 669; *Van Norman v. Jackson* Circuit Judge, 45 Mich., 208; 7 N. W., 796; *Fairbanks v. Bennett*, 52 Mich., 63; 17 N. W., 696; *Borland v. Kings-*

bury, 65 Mich., 59; 31 N. W., 620. And so, in attachment against a party not served nor appearing in the suit, the proceeding must be strictly regular under the statute: King v. Harrington, 14 Mich., 532. But a literal compliance with the prerequisites of the statute is sufficient to confer jurisdiction: Roelofson v. Hatch, 3 Mich., 278.

The demand for which an attachment is authorized under this section, must be upon contract express or implied, or upon judgment: Willson v. Arnold, 5 Mich., 98. But it is not necessary that the claim or damages should be liquidated; a demand arising upon contract, the amount of which is susceptible of ascertainment by some standard referable to the contract, is sufficient: Roelofson v. Hatch, 3 Mich., 277. A demand is liquidated when it is certain what and how much is due; for, although it may appear that something is due, if it does not appear how much is due, it is not liquidated: Bouv. Law Dic., "Liquidated."

If the proceeding is to recover a demand due upon judgment, it is immaterial in what state or county the judgment may seem to have been rendered.

Must be due.—Proceedings by attachment lie only for a debt or demand which is due: Hale v. Chandler, 3 Mich., 531. The attachment is merely to obtain the benefit of a lien or security, and the plaintiff is entitled to a lien to the amount only of his debt actually due when the attachment was levied. If, at the time of issuing the attachment, a part only of the plaintiff's demands were due, he can take judgment only for the amount due at the commencement of suit, and is not entitled to include in his judgment any demands against the debtor which fell due between the time of commencing of suit and taking judgment. And should a demand falling due after commencement of suit be included in the judgment, a subsequent attaching creditor would obtain a lien and right to hold the property attached for all the excess over and above what would be required to satisfy that part of plaintiff's claim which was actually due at the com-

mencement of suit: Hinchman v. Town, 10 Mich., 508; Hale v. Chandler, 3 Mich., 531. The provisions of the statute, C. L., § 10586, allowing the writ in certain cases before the debt is due are not applicable to proceedings in justices' courts.

Joint indebtedness.—A creditor is not authorized to resort to attachment when the liabilities are joint, without *all* the defendants are non-residents, or have absconded, or are otherwise subject to the process by attachment: Taylor v. McDonald, 4 Ham., Ohio, 149; Hamilton v. Knight, 1 Blackf., 25. Nor can partnership property be seized on attachment unless *all* the partners are implicated in the acts or transactions which authorize the issuing of the writ. Nor can the separate property of one partner be seized, unless a good cause for issuing the writ is shown against him: Edwards v. Hughes, 20 Mich., 289; Miller v. Judge of Bay Circuit, 41 Mich., 326; 2 N. W., 26; Geiges v. Greiner, 68 Mich., 153; 36 N. W., 48; Sword v. Judge of Lenace Circuit, 71 Mich., 284; 38 N. W., 870. The individual property of an innocent partner is not liable to an attachment for a firm debt fraudulently contracted by the other partner: Jaffray v. Jennings, 101 Mich., 515; 60 N. W., 52. The supreme court of Michigan in Jaffray v. Jennings, *supra*, affirms the doctrine that previous to the enactment of C. L., § 10584, attachment was good against all joint debtors, including partners, where it could be shown that all participated in the cause for the writ and that where it could not be shown that all joint debtors participated in the cause, the property of such only as did participate could be taken. This case also holds that this statute, C. L., § 10584, was enacted to put partners in the same position as other joint debtors, and protect innocent partners as other innocent joint debtors were protected. This case is followed in Cottrell v. Hatheway, 108 Mich., 610; 66 N. W., 596. Whether the section of the statute referred to, found in the circuit court act, under the construction referred to requires the inference that in attachment proceedings in justice's courts the innocent partner is not protected, *quære*.

Upon principle it would seem that so far as this extraordinary procedure is given because of tortious conduct it ought not to be available against one not guilty of it. Mr. Freeman in a note to *Russell v. Cole*, 167 Mass., 6; 44 N. E., 1057, found in 57 Am. St., 436, says, at page 439, that in the absence of a controlling statute the decided weight of authority is in favor of the right to seize the partnership property in a case where the affidavit makes cause against one only. See cases there cited. See, also, note to *Jaffray v. Jennison*, *supra*, as reported in 25 L. R. A., 645.

An attachment is not the proper process to obtain possession of goods which the plaintiff claims as his own: *Mendelsohn v. Smith*, 27 Mich., 2.

The affidavit for the writ is necessary to confer jurisdiction: *Green-vault v. F. & M. Bank*, 2 Doug., 498; *Hale v. Chandler*, 3 Mich., 531; *Wilson v. Arnold*, 5 Mich., 98. And it must comply substantially with the statute. *Wells v. Parker*, 20 Mich., 102. The writ cannot be sustained without a good and sufficient affidavit. The statute § 721 does not require the affidavit for attachment in justices' court to be annexed to the writ or served with it. But it must identify the plaintiffs and show who all of them are. *Burnside v. Davis*, 65 Mich., 74; 31 N. W., 619. And it may be made by an agent of the plaintiff: *Nicolls v. Lawrence*, 30 Mich., 395. But it must appear on the face of the affidavit that it was made either by the plaintiff or by some one in his behalf. If the affidavit is made by any person other than the plaintiff, he must state in the affidavit that he makes it in behalf of the plaintiff: *Borland v. Kingsbury*, 65 Mich., 59; 31 N. W., 620. Though the writ is fair on its face it will not justify the officer in retaining possession of the property if there is no sufficient affidavit: *Aspell v. Hosbein*, 98 Mich., 117; 57 N. W., 27.

If the affidavit states that he is the agent of the plaintiff, that is sufficient: *Adams v. Kellog*, 63 Mich., 105; 27 N. W., 679.

The facts required to be stated in the affidavit, in order to give the court jurisdiction, must exist at the

time when the writ of attachment issues. And for this reason it was formerly required that the affidavit should be made on the same day of the issuing of the writ: *Wilson v. Arnold*, 5 Mich., 98; *Drew v. Dequindre*, 2 Doug., 93-4; *Fessenden v. Hill*, 6 Mich., 242. But by amendment to § 721, made in 1879, there may be such an interval as is therein prescribed, between the making of the affidavit and the issuing of the writ, the law trusting to the presumption that the facts sworn to in the affidavit will continue to exist during the time thereafter allowed for issuing the writ.

Facts, how stated.—The affidavit must state positively, that the defendant is indebted to the plaintiff; the amount of such indebtedness, as near as may be; that the same is due; and (when the writ is applied for under § 721) that the demand is due upon contract, express or implied, or upon judgment. A statement of these matters upon information and belief, merely, is not sufficient: *Wilson v. Arnold*, 5 Mich., 104.

The fact that the defendant is indebted to the plaintiff must be stated positively: *Wilson v. Arnold*, 5 Mich., 98; *Hale v. Chandler*, 3 Mich., 531. When debt is upon both express and implied contract, how stated: *Buehler v. DeLemos*, 84 Mich., 554; 48 N. W., 42.

The amount of the debt may be stated "as near as may be." *Wilson v. Arnold*, 5 Mich., 98; *Hale v. Chandler*, 3 Mich., 531; *Wells v. Parker*, 20 Mich., 102. A statement of the amount "as near as can be specified by deponent," is sufficient: *Barker v. Thorn*, 20 Mich., 265. And so is a statement of the amount "as near as deponent can estimate the same:" *Nicolls v. Lawrence*, 30 Mich., 395; *Roelofson v. Hatch*, 3 Mich., 277. If the amount due is positively stated at a definite sum, the words "as near as may be" are immaterial: *Grover v. Buck*, 34 Mich., 519. An affidavit made by an agent of the plaintiff, stating, "that there is justly due to the plaintiff (naming him), from the said N. . . . (the defendant), the sum of thirty-nine dollars, as near as this deponent can estimate the same," is a sufficiently positive statement that the de-

fendant is indebted, and of its amount, and that the demand is due, and sufficiently shows that the affiant is speaking of his own knowledge. The statute, § 721, only requires the affidavit to specify the amount of the indebtedness, "as near as may be," as in many cases it would be difficult, if not impossible, to state the precise amount with positive certainty: *Nicolls v. Lawrence*, 30 Mich., 395-8; see, *Grover v. Buck*, 34 Mich., 519. But it seems that the plaintiff is not limited in his recovery to the amount sworn to be due in the affidavit, if the proofs show him to be entitled to more: *Pew v. Yoare*, 12 Mich., 16.

The demand must be averred to be due.—The proceedings by attachment lie only for a debt or demand which is due: *Hale v. Chandler*, 3 Mich., 531; *Wells v. Parker*, 26 Mich., 102; *Mathews v. Densmore et al.*, 43 Mich., 463; 5 N. W., 669. There must be a present cause of action existing at the time of filing the affidavit: *Galloway v. Holmes*, 1 Doug., 350; *Buckley v. Lowry*, 2 Mich., 418. Stating that the defendant is indebted, etc., is not equivalent to an allegation that the demand is due: *Cross v. McMakin*, 17 Mich., 511. If, at the time of issuing the attachment, a part only of the plaintiff's demands were due, he can take judgment only for the amount due at the commencement of suit, and is not entitled to include in his judgment any demands against the debtor which fell due between the times of commencing the suit and taking judgment: *Hinchman v. Town*, 10 Mich., 508; C. L., § 10586, providing for cases where debt is not due, is applicable to proceedings by attachment in circuit courts only.

The demand must be on contract or judgment.—When the attachment is applied for under § 721, the affidavit must aver that the demand is due upon contract, express or implied, or upon judgment: *Wilson v. Arnold*, 5 Mich., 98. But it need not further show the nature of the contract: *Drew v. Dequindre*, 2 Doug., 93. The omission in the affidavit of a statement as to whether the amount is due upon "express or implied" contract is not a defect if it is alleged to be due upon contract: *Freer v. Hamilton*, 127

Mich., 381; 86 N. W., 824. The demand, if upon contract, need not be liquidated. If the amount is susceptible of ascertainment by some standard referable to the contract, it is sufficient: *Roelofson v. Hatch*, 3 Mich., 279.

Statement of the cause for issuing the writ.—The grounds or cause for which an attachment may issue, as provided in the several subdivisions of § 721, may be set forth upon the deponent's belief and the statement that he has good reason for such belief: *Macumber v. Beam*, 22 Mich., 401. Where cause for issuing the writ is permitted to be stated on belief, the language of the statute should be followed, and the affiant should state that he "has good reason to believe," etc. A statement that "he is informed and believes," is not in compliance with the statute: *Kegel v. Schrenkhelsen*, 37 Mich., 174. An affidavit in the alternative, that defendant has assigned, disposed of or concealed, or is about to, etc., is bad because in the alternative: *Kegel v. Schrenkhelsen*, 37 Mich., 174; *Dutcher v. Grand Rapids Fire Ins. Co.*, 131 Mich., 671; 92 N. W., 345. A statement that "the defendant, as this deponent has good reason to believe, has disposed of his property with intent," etc., is sufficient: *Nicolls v. Lawrence*, 30 Mich., 395. But a statement that "deponent believes that the defendant is about to remove," etc., without averring that "he has good reason to believe it," is bad: *Hunt v. Strew*, 39 Mich., 368. A statement in language equivalent to that of the statute, is sufficient: *Wilson v. Arnold*, 5 Mich., 104.

Usually a plaintiff may allege as many grounds of attachment within terms of the law as he may deem expedient. But in doing so, the several grounds must be stated conjunctively or cumulatively. Therefore, an affidavit which states two or more grounds for issuing the writ, in the alternative, as, "that defendant has assigned or is about to assign his property," etc., is fatally defective. *Kegel v. Schrenkhelsen*, 37 Mich., 174. Approved: *Dutcher v. Grand Rapids F. I. Co.*, 131 Mich., 671; 92 N. W., 345. An allegation that defendant "fraudulently contracted the debt or incurred

§ 70. **Fraudulent disposition of property.**—1. That the defendant has assigned, disposed of or concealed, or is about to assign, dispose of or conceal, any of his property with the intent to defraud his creditors;² or,

the obligation" will not invalidate the affidavit because in the disjunctive: *Emerson v. Steel & Spring Co.*, 100 Mich., 127; 58 N. W., 659. So an allegation that defendant is about to "assign, dispose of or conceal," etc., will not because in the disjunctive invalidate an attachment affidavit: *Jones v. Peck*, 101 Mich., 389; 59 N. W., 659. But it seems that if there is personal service, and the defendant appears without objection, such a defect will be waived: *Hills v. Moore*, 40 Mich., 210. In overruling the case of *Hills v. Moore*, see, *Borland v. Kingsbury*, 65 Mich., 63-4; 31 N. W., 625, the court said, "If the affidavit is defective in matter of substance and its defects are not waived by a general appearance, the justice obtains no jurisdiction over the case."

An affidavit that D. and A. are not residents of the state, and have not resided therein for three months immediately preceding the time of making the affidavit, and that D. and A. reside in the state of New York, sufficiently shows that each is a non-resident, and has not resided in this state for three months, etc.: *Dorr v. Clark*, 7 Mich., 312.

An affidavit stating that the defendant has absconded, omitting to state that he has absconded *to the injury of his creditors*, is insufficient to authorize an attachment on that ground: *Hewitt v. Terry*, 56 Mich., 591; 22 N. W., 326. "Absconding" as used in the attachment statute means more than a temporary absence for health. It involves the design to withdraw clandestinely, to hide or conceal one's self for the purpose of avoiding legal proceedings: *McMorran v. Moore*, 113 Mich., 101; 71 N. W., 505.

Against Copartners, etc.—An affidavit for an attachment against copartners or joint debtors must show that all of them are implicated in the acts authorizing the writ: *Edwards v. Hughes*, 20 Mich., 289. An affidavit that A., B. & C., "a copartnership under the firm name of (naming the

firm), are indebted to deponent," etc., sufficiently alleges a joint partnership debt: *Miller v. Bay Circuit Judge*, 41 Mich., 326; 2 N. W., 26. An allegation in an affidavit for attachment against two partners that "the said C. & H. have assigned," etc., is a sufficient allegation that each has done so: *Van Benschoten v. Fales*, 126 Mich., 176; 85 N. W., 476.

Not Amendable.—It is said that the affidavit for an attachment cannot be amended; and that if the attachment has been issued upon a defective affidavit, and served, the mistake cannot be corrected by amendment, or by furnishing new and sufficient affidavits: 2 *Walt's Law and Prac.*, 2d ed., 150. It is not amenable: *Freer v. White*, 91 Mich., 74; 51 N. W., 807. *Contra*, as to affidavit for writ of replevin upon the theory that the issuance of the writ does not depend upon the affidavit as in attachment: *Taylor v. Kalamazoo Circuit Judge*, 100 Mich., 181; 58 N. W., 835. The truth of the affidavit can be contested only upon an application to dissolve the attachment: *Bower v. Town*, 12 Mich., 230.

2—*Subdivision 1.*—It is sufficient, under this subdivision, if the intent is to defraud *any* of the party's creditors: *Allen v. Kinyon*, 41 Mich., 281; 1 N. W., 863; *Cleland v. Taylor*, 3 Mich., 201; *Smith v. Rumsey*, 33 Mich., 183; *Pierce v. Rehfuess*, 35 Mich., 53. The question of fraudulent intent is one of fact: *Jackson v. Dean*, 1 Doug., 519; *Oliver v. Eaton*, 7 Mich., 113; *Bagg v. Jerome*, *Ibid.*, 145; *State Bank v. Chapelle*, 40 Mich., 451. If a conveyance is made with intent to hinder or delay or defraud the creditors of the grantor it will be fraudulent as to them: *Corbitt v. Cutcheon*, 79 Mich., 43; 44 N. W., 163; *Ryan v. Meyer*, 108 Mich., 638; 66 N. W., 667; *Gumberg v. Trench*, 110 Mich., 451; 68 N. W., 236. But such an intent will never be presumed without proof: *Miller v. Finley*, 26 Mich., 255; *Robert v. Morrin*, 27 Mich.,

§ 71. **Removal of property from county.**—2. That he is about to remove any of his property from the county in which such application is made, or from the county where the defendant resides, with the like intent: or, that he has removed, or is about to remove, himself or his property from the county, and refuses or neglects, to pay, or to secure the payment of the debt;³

306. Nor will it be presumed from slight circumstances: *Buck v. Sherman*, 2 Doug., 182; *Howe v. Camp*, Walk. Ch., 427. Where an honest intent may be as clearly inferred as a dishonest one, the latter is not to be inferred: *Nye v. Van Huse*, 6 Mich., 329; 346.

A transfer or assignment of property, even if made for value to one who is not a creditor, but with intention on the part of the vendor and vendee to defraud the creditors of the former, will be void as to them: *Jordan v. White*, 38 Mich., 256. None but a purchaser for a valuable consideration, and without notice, can claim property fraudulently assigned, as against an attaching creditor: *Dixon v. Hill*, 5 Mich., 408; *Schalble v. Ardner*, 98 Mich., 72; 56 N. W., 1105.

But a debtor may lawfully convey or mortgage his property in payment of, or as security to, one creditor rather than another, and in such order as he may prefer: *Sweetzer v. Mead*, 5 Mich., 110; *People v. Bristol*, 35 Mich., 34; *Hill v. Bowman*, *Ibid.*, 191; *Olmstead v. Mattison*, 45 Mich., 617; 8 N. W., 555; *State Bank v. Chapelle*, 40 Mich., 447; *Root v. Hare*, 62 Mich., 422; 29 N. W., 29; *Johnson v. Stellwagen*, 67 Mich., 13; 34 N. W., 252; *Franklin Needle Co. v. Amazon Hosiery Co.*, 128 Mich., 198; 87 N. W., 211; *Cole v. Cole*, 126 Mich., 569; 85 N. W., 1098. And he may convey to his wife, in payment of an antecedent debt, in preference to other creditors: *Loomis v. Smith*, 37 Mich., 595; *Allen v. Antisdale*, 38 Mich., 229; *Jordan v. White*, 38 Mich., 253; *Darling v. Hurst*, 39 Mich., 765; *Brigham v. Fawcett*, 42 Mich., 542; 4 N. W., 272; *Cole v. Cole*, 126 Mich., 569; 85 N. W., 1098. A conveyance or security made to pay or secure an honest

debt, will be good, although the debtor may know that the effect will be to hinder and delay other creditors, if there is no intent to defraud them: *Olmstead v. Mattison*, 45 Mich., 617; 8 N. W., 555; *Jordan v. White*, 38 Mich., 258. And even where a creditor takes a conveyance of property for the sole purpose of obtaining payment of an honest debt, the fact that the vendor intended thereby to hinder or defraud his other creditors, will not invalidate the transfer, unless such creditor participates in the fraudulent intent: *Beurmann v. Van Buren*, 44 Mich., 499; 7 N. W., 67; *Hill v. Bowman*, 35 Mich., 191; *Loomis v. Smith*, 37 Mich., 595; *Jordan v. White*, 38 Mich., 253; *Andrews v. Fillmore*, 46 Mich., 315; 9 N. W., 431; *Adams v. Niemann*, 46 Mich., 136; 8 N. W., 719; *Spring & Axle Co. v. Winans, P. & Co.*, 106 Mich., 198; 64 N. W., 23, and cases cited in the opinion. See, also, *Kock v. Bostwick*, 113 Mich., 302; 71 N. W., 473.

It is enough if the effect and intent is to delay though not to defraud: *McBryan v. Trowbridge*, 125 Mich., 542; 84 N. W., 1084. A voluntary transfer without fraudulent intent is valid as to subsequent creditors: *Cole v. Brown*, 114 Mich., 396; 72 N. W., 247; *Barkworth v. Palmer*, 118 Mich., 50; 76 N. W., 151.

A sale of property by the debtor between the issuing and levy of the attachment thereon, if without fraud, is valid, notwithstanding the purchaser knew of the writ: *Hunt v. Strew*, 39 Mich., 368.

3—*Subdivision 2.*—The removal of property exempt from levy upon execution would be no ground for issuing the writ, as such property cannot be held, either upon attachment or execution: *Smith v. Rumsey*, 33 Mich., 183; see, *Wyckoff v. Wyllis*, 8 Mich.,

§ 72. **Fraudulently contracted debt.**—3. That he fraudulently contracted the debt, or incurred the obligation respecting which the suit was brought;⁴ or,

§ 73. **Absconding or non-resident debtors.**—4. That the defendant has absconded to the injury of his creditors, or does not reside in this state, and has not resided therein for one month immediately preceding the time of making the application;⁵

§ 74. **Foreign corporations.**—5. That the defendant is a foreign corporation: Provided, That such affidavit shall not

48; *Elliott v. Whitmore*, 5 Mich., 536-7; *Ostrander v. Packer*, 35 Mich., 430; *Michels v. Stork*, 44 Mich., 2; 5 N. W., 1034; *O'Donnell v. Segar*, 25 Mich., 367; *Rosenthal v. Scott*, 441 Mich., 632; 2 N. W., 909; *Buckley v. Wheeler*, 52 Mich., 1; 17 N. W., 216; *Emerson v. Bacon*, 58 Mich., 526; 25 N. W., 503. See, *Stork v. Reynolds*, 121 Mich., 356; 80 N. W., 289.

4—*Subdivision 3.*—Fraud is not inferable from a mere breach of contract; and when an attachment is asked on the ground of fraud, the burden of proving it is on the part of the plaintiff: *Powers v. O'Brien*, 44 Mich., 317; 6 N. W., 679. Fraud, like any other fact, is to be proved by any facts and circumstances which satisfy the mind of its existence. It may be inferred from circumstances, and often it cannot be proved in any other way: *O'Donnell v. Segar*, 25 Mich., 378. The proof should be so clear and conclusive as to leave no rational doubt in the mind as to its existence: *Buck v. Sherman*, 2 Doug., 182; *Orr v. Lacey*, 2 *Ibid.*, 230; *Hubbard v. Taylor*, 5 Mich., 155. The meaning of this is, that the proof must be such as to create belief, and not mere suspicion: *Fraser v. Passage*, 63 Mich., 551; 30 N. W., 334; *Bliss v. Collins*, 68 Mich., 542; 36 N. W., 731; *Bumpus v. Bumpus*, 59 Mich., 95; 26 N. W., 410; *Pierce v. Pierce*, 55 Mich., 629; 22 N. W., 81. It is not necessary that the proof should leave the mind absolutely free from doubt. If the testimony produces a rational belief, it is sufficient: *Watkins v. Wallace*, 19 Mich., 77. As to

the amount of proof required, fraud stands upon the same footing as any other fact required to be established in civil cases: *Robert v. Morrin*, 27 Mich., 308; see, *Baldwin v. Buckland*, 11 Mich., 390; *Hough v. Dickenson*, 58 Mich., 89; 24 N. W., 809. An allegation that defendant "fraudulently contracted the debt or incurred the obligation," will not invalidate the affidavit because in the disjunctive: *Emerson v. Steel & Spring Co.*, 100 Mich., 127; 58 N. W., 659. An allegation that the defendant "is about to assign, dispose of or conceal," etc., will not, because in the disjunctive, invalidate an attachment affidavit: *Jones v. Peck*, 101 Mich., 389; 59 N. W., 659. But an affidavit alleging that defendant "has assigned, disposed of or concealed, or is about to assign, dispose of or conceal," etc., is bad because in the alternative: *Kegel v. Schrenkhelsen*, 37 Mich., 174; *Dutcher v. Grand Rapids Fire Ins. Co.*, 131 Mich., 671; 92 N. W., 345. The affidavit in the *Kegel* case, *supra*, alleges but one cause. The affidavits in the cases last referred to each allege two causes for the writ.

5—*Subdivision 4.*—The fact that a debtor has absconded is no cause for issuing an attachment, unless it is to the injury of his creditors: *Hewitt v. Terry*, 56 Mich., 501; 23 N. W., 328. "Absconding" defined. *McMorran v. Moore*, 113 Mich., 101; 71 N. W., 505. Non-residence in case of several defendants: See, *Dorr v. Clark*, 7 Mich., 312. A person who stays most of the time in this state, but claims that his home is in another state, from

be deemed insufficient by reason of the intervention of a day between the date of the *jurat* to such affidavit and the issuing of the writ, and that when the person making such affidavit shall reside in any other county in this state than that in which the writ of attachment is to issue, one day's time for every thirty miles, by the usual post-route, from the residence of such person to the place from which such writ shall issue, shall be allowed between the date of such *jurat* and the issuing of such writ."⁶

§ 75. Attachment for trespass on land.—"In all cases where a party has a right of action for the taking of timber, or other trespass on lands, or for any injury to lands, whether direct or consequential, it shall be lawful for the party having such right of action to waive the tort and bring assumpsit therefor."⁷

"When tort is waived, as provided in the preceding section, the plaintiff may commence his suit by attachment against the property of the defendant, as in other cases, and his affidavit for such attachment shall state the amount due him as near as may be, and the fact that the damages are unliquidated shall not prevent the bringing and maintaining of such writ."⁸

§ 76. Bond to defendant.—"In all cases of attachment, the plaintiff shall, before issuing the attachment, file with the justice a bond to the defendant, in the penal sum of two hundred dol-

whence he came, and where his wife lives and has a home of her own, and who visits and lives with her from time to time, is a non-resident, subject to attachment: *Loder v. Littlefield*, 39 Mich., 512.

6—*Subdivision 5.*—It was formerly held that justices of the peace had no jurisdiction in attachments against corporations: *Brigham v. Eglinton*, 7 Mich., 291-3. As to suits against foreign corporations, see, *Gallagher v. American Express Co.*, 56 Mich., 13; 22 N. W., 96. The statute, C. L., § 10474, providing for service of attachment against foreign corporations is permissive only and does not exclude the method of service prescribed: §§ 730 and 731; *Davidson v. Fox*, 120 Mich., 385; 79 N. W., 1106; *Lutz v. Davidson Cycle Co.*, 121 Mich., 108; 79 N. W., 1126.

Intervention of a day, etc.—Prior to

the enactment of this, C. L., § 721, in its present form (May 6, 1879), it was held that the affidavit must be made on the same day of the issuing of the writ: *Drew v. Dequindre*, 2 Doug., 93; *Buckley v. Lowry*, 2 Mich., 418; *Wilson v. Arnold*, 5 Mich., 98; *Fessenden v. Hill*, 6 Mich., 242.

7—C. L., § 11207. The declaration must show that damages accrued from the trespass: *Lockwood v. Boom Co.*, 42 Mich., 536; 4 N. W., 292. Recovery can be had for the proceeds of timber taken through a trespass in an action on the common counts: *Nelson v. Kilbride*, 113 Mich., 637; 71 N. W., 1089. By suing in assumpsit the plaintiff waives all rights of ownership in the property converted: *Nield v. Burton*, 49 Mich., 53; 12 N. W., 906.

8—C. L., § 11208.

lars, with sufficient sureties, to be approved by the justice in writing thereon, signed by him, conditioned to pay the defendant all damages and costs he may sustain by reason of the issuing of the attachment, if the plaintiff shall fail to recover judgment in such suit, and if the plaintiff's demand shall exceed one hundred dollars, the penalty of such bond shall be double the amount of such demand."⁹

A regular bond must be given; a covenant or agreement in the same terms that the bond is required to be, would not be in compliance with the statute.¹⁰

"No bond, deed of conveyance, or other contract in writing, signed by any party, his agent or attorney, shall be deemed invalid for want of a seal or scroll affixed thereto by such party."¹¹

§ 77. **In case bond is defective.**—Formerly, an essential defect in a bond to obtain an attachment would have rendered the proceedings void, and the justice and plaintiff would have been trespassers in taking the property upon the attachment.¹² Now, the only remedy in such a case would be to move to set aside the proceedings, which the plaintiff could prevent by amending the bond given, or executing a new one.¹³

"Whenever a bond is or shall be required by law to be given by any person, in order to entitle him to any right or privilege

9—C. L., § 728.

10—*Hoffman v. Brinkerhoff*, 1 Denio, 184. It is sufficient if this bond conform substantially to the requirements of the statute: C. L., § 10409; *King v. Gridley*, 69 Mich., 91; 37 N. W., 50; *Bublitz v. Trombley*, 113 Mich., 413; 71 N. W., 840. If this bond is defective in any respect it may on the application of all the obligors be amended in any respect, or a new bond may be given on the application of the person required to give it bearing date at the time when such bond was required to be given: C. L., § 10410; *Kidd v. Dougherty*, 59 Mich., 240; 26 N. W., 510; *King v. Gridley*, 69 Mich., 91; 37 N. W., 50; *Bublitz v. Trombley*, 113 Mich., 413; 71 N. W., 840.

The filing of the bond seems necessary to give the court jurisdiction to issue the attachment. And it was

held that the defect for want of a bond might be waived by the defendant's appearance, so far as to make valid any judgment rendered against him, but notwithstanding such appearance, the plaintiff had no lien on the property by virtue of the attachment, because there was no jurisdiction to issue it: *Ibid.* The statute, C. L., § 10410, allowing amendment of a defective bond, would not seem to justify the practice which would allow the giving of a bond after the writ is issued and served when there had been no attempt to give a bond previously. See, *Ackerman v. Finch*, 15 Wend., 652.

11—C. L., § 10417; *Mee v. Benedict*, 98 Mich., 260; 57 N. W., 175, and cases cited in the opinion.

12—*Atkins v. Brewer*, 3 Cow., 206.

13—See note 11, *supra*.

conferred by law, or to commence any proceeding, it shall not be necessary for such bond to conform in all respects to the form thereof prescribed by any statute, but the same shall be deemed sufficient if it conform thereto substantially, and do not vary in any matter to the prejudice of the rights of the party to whom or for whose benefit such bond shall have been given."¹⁴

"Whenever such bond has been heretofore, or shall hereafter be given, and shall be defective in any respect, the court officer, or body who would be authorized to receive the same, or to entertain any proceedings in consequence of such bond, if the same had been perfect, may, on the application of all the obligors therein, amend the same in any respect, or may, on the application of the person required to give such bond, allow a new one to be substituted in the place thereof, bearing date at the time when such bond was required to be given, and such bond shall thereupon be deemed valid from the time of the execution of such defective bond. When application is made to amend, said court, officer or body shall have power to amend such bond in any respect, and without regard to the particular amendment applied for, so as to make said defective bond such a one as might have been required when the latter was given. When a new bond is allowed, it shall be such in form, penalty, and other respects, as might have been demanded when the defective bond was given."¹⁵

§ 78. **Liability of the sureties.**—The bond given on suing out the attachment extends to the *final* determination of the cause; if the judgment rendered by the justice for the plaintiff is not sustained on appeal, an action may be maintained upon the bond.¹⁶ In an action upon it, the measure of damages is not the *mere taxable costs* in the attachment suit; the obligee may recover his *damages at large*, for the seizure, detention and

14—C. L., § 10409. See, note 10, *ante*, p. 67.

15—C. L., § 10410. See, note 10, *ante*, p. 67.

16—Ball v. Gardner, 31 Wend., 270. And the sureties are liable for the defendant's costs if he prevails on *certiorari* from the justice's judgment. There is nothing in the language of the condition limiting defendant's dam-

ages to such as should arise in the suit commenced by the attachment: Bennett v. Brown, 20 N. Y., 99. If the attachment suit after the dissolution of the writ is prosecuted to final judgment the conditions of the attachment bond are satisfied: Hahn v. Siefert, 64 Mich., 647; 31 N. W., 564; Borland v. Kingsbury, 65 Mich., 64; 31 N. W., 620.

deterioration of his goods, his time and trouble in defending the suit, and expense of employing counsel.¹⁷ But if the defendant in the attachment suit has continued in possession of the property levied upon, and it is not shown that he has been subjected to costs, he is entitled to nominal damages only.¹⁸ The obligors in such a bond are, when the plaintiff has failed to recover judgment, *prima facie* liable for the value of the property attached. But where the plaintiff obtained another attachment, upon which the property was taken, judgment obtained, and the property sold on the execution issued thereon, it was held that this might be shown to reduce the damages. "It was still the defendant's property, notwithstanding the seizure on the first attachment, and as such, was liable to be taken on the second attachment."¹⁹ In this case there was merely a failure to recover judgment; there was no "irregularity which made the seizure under the first attachment void; had there been, the property could not have been taken upon the second attachment in favor of the plaintiff"²⁰—though it

17—Cow. Treat., 2d ed., 998; *Dunling v. Humphrey*, 24 Wend., 31.

Where an attachment has been wrongfully sued out, but without malice or intention to oppress on the part of the plaintiff, the damages recoverable against him should be limited to the injury immediately and actually sustained. Mere possible or speculative profits which might have been realized, if the store of the defendant in attachment had not been closed by reason of the attachment, should not be taken into account. Nor, in such a case, could he recover for the rent of a house which he was prevented from building by reason of the levy on the building material; nor for loss of time in being deprived of the use of the house: *Plumb v. Woodmansee*, 34 Iowa, 116; see, *Myers v. Farwell*, 47 Miss., 281. In a suit upon an attachment bond to recover damages caused by the levy of attachment issued by a justice and afterwards dissolved upon proceedings had for that purpose, the plaintiff was allowed to recover his counsel fees paid on the proceedings to dissolve, and for the loss and injury to his business during the time the officer was in possession of his

store under the writ, the court holding, that there was nothing unreasonable in the allowance of the counsel fee; that it was a necessary expense incurred because of the suing out of the attachment, and to get rid of the lien, and therefore constituted a part of the damages suffered; that the bond contemplates a contest over the right to maintain the suit, and it must be understood as embracing the expenditures which the suit renders necessary: *Swift v. Plessner*, 39 Mich., 178. Where, in an attachment against one of the partners in a firm for a debt due from him alone, the officer attached certain articles of partnership property and inventoried them as the property of the partner sued, he was held to be a trespasser, and liable in damages at the suit of all the members of the firm for the breaking up of their business by reason of the attachment: *Haynes v. Knowles*, 36 Mich., 407-410.

18—*Groat v. Gillespie*, 25 Wend., 383.

19—*Earl v. Spooner*, 3 Denio, 246.

20—*Hamner v. Willsey*, 17 Wend., 92.

would, probably, be otherwise if the attachment had been in favor of a third person, and regular."²¹

§ 79. **Content of the writ of attachment.**—"Every attachment shall state the amount claimed by the plaintiff, and shall command any constable of the county in which the justice resides, to attach so much of the goods and chattels of the defendant (except such as are exempt by law from execution) as will be sufficient to satisfy such demand, and safely keep the same to satisfy any judgment that may be recovered by the plaintiff in such attachment, and to return the same at a time therein to be specified, not less than six nor more than twelve days from the date thereof."²²

§ 80. **Amendment of the writ.**—A justice may amend an attachment, even after service and return, by inserting the amount of the debt sworn to by the applicant.²³

OF SERVING THE WRIT.

§ 81. **Attachment, when and how served.**—"The constable serving such attachment, shall execute the same at least six days before the return thereof, by seizing so much of the goods and chattels of the defendant within his county as shall be sufficient to satisfy the demand and costs, and making an inventory thereof, and serving a copy of such attachment and

21—*Otis v. Jones*, 21 Wend., 394.

22—C. L., § 729.

The writ of attachment is a summons with a clause authorizing a seizure of property: *Thompson v. Thomas*, 11 Mich., 276. But see *Borland v. Kingsbury*, 65 Mich., 59; 31 N. W., 620, where it seems to be held that it is not a summons and a writ for the seizure of property in the sense that it may be a summons though it is not good as a writ for the seizure of property. If it is not a valid writ for the attachment of property it would seem that it gives the justice no jurisdiction to proceed with the suit. This case expressly overrules *Hills v. Moore*, 40 Mich., 210. The case of *Hahn v. Seifert*, 64

Mich., 647; 31 N. W., 564, is a case where the defendant consented to the judgment.

23—*Near v. VanAlstyne*, 14 Wend., 230; and see, C. L., § 10268; *Drew v. Dequindre*, 2 Doug. Mich., 93-98; *Farrand v. Bentley*, 6 Mich., 281, and note on p. 284. As to amending, as to the name of the party, see, *Final v. Backus*, 18 Mich., 218. Where only the surname of the plaintiffs are given in the writ, the defect may be cured by amendment: *Barber v. Smith*, 41 Mich., 138; 1 N. W., 992. And a mistake in the writ as to the name of a party may be amended even at the trial, if the fact is then made to appear; *Barmon v. Clippert*, 58 Mich., 377; 25 N. W., 371.

inventory upon the defendant, if he can be found within the county.'²⁴

In order to make a valid attachment of the property, the officer must have the actual possession and custody, or control, of it.²⁵ But it is not necessary that every article should be taken hold of. If the officer is in view of the whole, with the power of actually seizing them, it is sufficient.²⁶ The rules as to the service of an attachment, are the same as govern in the service of an execution.²⁷

Before levying an attachment upon property, of the title to which there is reasonable doubt, the officer has the right to require a bond of indemnity, and may refuse to execute the writ by seizure of such property, until the bond is given.²⁸

24—C. L., § 730.

If any of the provisions of the statute are not complied with by the officer in levying or executing his writ, the lien obtained is lost: *Fairbanks v. Bennett*, 52 Mich., 63; 17 N. W., 606. If the writ is regular on its face and issued by a court of competent jurisdiction the officer will be protected in its service. *Michels v. Stork*, 44 Mich., 4; 5 N. W., 1034; *Watkins v. Wallace*, 19 Mich., 57.

Time.—A service made less than six days before the return day is invalid: *Tunningly v. Butcher*, 106 Mich., 35; 63 N. W., 994. The writ must be retained and personal service secured if possible during the time allowed. A return which does not show that the officer has attempted such service up to the last day is not good: *Bargh v. L. R. Ermeling & Co.*, 110 Mich., 164; 67 N. W., 1083. It is not fatal to the validity of the writ, that the substituted service was made before the time in which personal service could be made had expired, if the return shows that the writ was retained and personal service attempted during the whole time allowed: *Matthews v. Forslund*, 113 Mich., 416; 71 N. W., 854.

Place.—If return fails to show where service was made it will be presumed that service was made in the county: *Bushey v. Raths*, 45 Mich., 183; 7 N. W., 802. Not so as to return of city marshal: *Alverson v. Dennison*, 40 Mich., 179.

25—*Lany v. Jackson*, 5 Mass., 157, 163. There must be such manual seizure or assertion of control as may be made effectual to bring the property and keep it within the dominion of the law. The levy must be so made as to either actually identify or give means of identifying the property so that the levying officer may be charged with the property: *Quackenbush v. Henry*, 42 Mich., 75; 3 N. W., 262. Constructive possession of growing crops is sufficient: *Grover v. Buck*, 34 Mich., 520. Machinery bolted to the floor of a building need not to be detached in order to perfect a levy upon it if the officer gains full control of it: *Patch v. Wessels*, 46 Mich., 249; 9 N. W., 269. An officer is not justified in levying upon property of many times the value of the claim to be protected: *Lee v. Maxwell*, 98 Mich., 496; 57 N. W., 581.

26—*Train v. Wellington*, 12 Mass., 495. It is not necessary to a valid attachment that the officer should remove the property from the store or place where the attachment is made, if he leave it in charge of his servant or agent, or place a keeper over it: *Ibid*.

27—See, *post*, §§ 521-552.

28—*Smith v. Clotte*, 11 Mich., 383. When an officer levies an attachment upon property not belonging to the defendant in the writ, inventories it, has it appraised, takes possession and subjects the property to his own control, such intermeddling would constitute a

§ 82. **What property may be attached.**—The attachment is to be served on “the goods and chattels of the defendant (except such as are exempt by law from execution)”²⁹—that is, articles which are strictly termed “goods and chattels.” In *Tannahill v. Tuttle*, 3 Mich. Rep., 104, the question was discussed whether the interest of the *mortgagor* in personal prop-

conversion of the property and render him liable. Where the plaintiff and his attorney directed the service of the writ upon property which they supposed belonged to the defendant in the attachment suit, but which in fact belonged to another, and after service of the writ refused to assent to the release of the property attached when required by the actual owner of the property levied on, an action of trespass will lie against them in favor of such owner, even though they were not present when the attachment was levied, and did not in person interfere with the property. Had the attorney, instead of directing the levy, merely communicated to the officer the plaintiff's directions to levy, the case might have been different as to him: *Cook v. Hopper*, 23 Mich., 511.

29—C. L., § 729.

Property exempt from attachment.

—The law of exemptions and the procedure in making a levy where exempt property is involved are the same in attachment as in execution levies. For a fuller discussion of this general subject see, *post*, xxvii, §§ 526-528.

When an attachment is levied upon property of a species exempt from execution to a specified amount or value, it is the duty of the attaching officer to have the property appraised, and to give the defendant the opportunity to select the exemptions allowed to him by law: See, C. L., §§ 10325, 10326. The provisions of these sections are applicable alike to attachments issuing from justices and circuit courts: *Michels v. Stork*, 44 Mich., 2; 5 N. W., 1034; and see, *Elliott v. Whitmore*, 5 Mich., 536-7; *Wyckoff v. Wylis*, 8 Mich., 48. The method of appraisal and selection of the exemption is the same as under levies upon execution. As to the proceedings in such cases, see, *post*, chap. xxvii, “Of executions and the proceedings thereon.”

Creditors have no rights against exempt property: *Waite v. Mathews*, 50 Mich., 392; 15 N. W., 524; *Buckley v. Wheeler*, 52 Mich., 1; 17 N. W., 216. It is not necessary for the debtor to claim his exemptions in order to have the benefit of them. The statute declares the exemptions, and is of itself a sufficient notice of the debtor's rights and claim thereto. It contemplates that when an officer levies upon property from which an exemption may be taken, he shall levy upon and appraise the whole, and then permit the debtor to select the amount exempt; and if no selection is made by the debtor, the officer must make it for him: *Vanderhorst v. Bacon*, 38 Mich., 672; *Ostrander v. Packer*, 35 Mich., 430; *Sheldon v. Rounds*, 40 Mich., 427; *Michels v. Stork*, 44 Mich., 2; 5 N. W., 1064; *Stillson v. Gibbs*, 53 Mich., 280, 282; 18 N. W., 815. And if the officer falls to make such inventory and appraisal, and afford opportunity to the debtor to select, or to select the exemptions for him, the levy will be invalid to the amount of the statutory exemptions: *Town v. Elmore*, 38 Mich., 305. When partnership property is attached, each co-partner is entitled to the same amount of exemptions as he would be if he were the sole owner of the property: *Skinner v. Shannon*, 44 Mich., 86; 6 N. W., 108. Exemption laws are remedial and the general rule applies that they should be liberally construed in favor of the debtor: *Alvord v. Lent*, 23 Mich., 371; *Rosenthal v. Scott*, 41 Mich., 633; 2 N. W., 909; *Skinner v. Shannon*, 44 Mich., 87; 6 N. W., 108; *Fischer v. McIntyre*, 66 Mich., 682; 33 N. W., 762; *Hutchinson v. Whitmore*, 90 Mich., 263; 51 N. W., 451. To be entitled to the privileges of the exemption laws the debtor must be a citizen of the state and the property within some one of the classes

erty mortgaged could be taken on an *attachment*, although he was entitled to possession of the property by agreement with the mortgagee, and before condition broken. Martin, J., referring to the statute authorizing the sale of the mortgagor's interest on execution, says: "The directions and provisions of this statute clearly assumes that such right or interest can only be sold upon *final* process. The seizure by attachment is altogether different in its nature: it being a seizure upon *mense* process, and not necessarily accompanied by a right to execution and sale."³⁰ The rule so declared by Martin, J., has

declared exempt: *Wood v. Bresnahan*, 63 Mich., 614; 30 N. W., 206. Conditions existing at the time of and just prior to the levy should determine the question of the exemption: *King v. Moore*, 10 Mich., 542; *O'Donnell v. Segar*, 25 Mich., 375.

30—*Tannahill v. Tuttle*, 3 Mich., 104; *Eggleston v. Mundy*, 4 Mich., 295; *Bacon v. Kimmel*, 14 Mich., 201.

Goods and chattels mortgaged.—In this state a chattel mortgage is not a sale, but only a security: *Haynes v. Leppig*, 40 Mich., 602. And the holder of a mortgage on chattels does not become the absolute owner by breach of the condition of the mortgage. Until foreclosure the mortgagee has a lien only. The parties stand to each other as debtor on one side, and creditor secured by lien on property on the other: *Lucking v. Wesson*, 25 Mich., 443; *Cary v. Hewitt*, 26 Mich., 228; *Kohl v. Lynn*, 34 Mich., 361. The statute (C. L., § 10318) authorizing a levy upon the interest of the general owner of personal property encumbered by security, is not confined to property mortgaged, but covers all goods and chattels pledged by way of mortgage or otherwise for the payment of money, or the performance of any contract or agreement: *Worthington v. Hanna*, 23 Mich., 530. The levy of an attachment upon such mortgaged or otherwise pledged goods and chattels may be made at any time before actual foreclosure. *Cary v. Hewitt*, 26 Mich., 228; *Macomber v. Saxton*, 28 Mich., 516; *Nelson v. Ferris*, 30 Mich., 497. And a foreclosure is not completed until the right of redemption is cut off by a sale: *Haynes v. Leppig*, 40 Mich., 605.

The attachment levy can only be upon the mortgagor's interest, or "right of redemption:" *Bayne v. Patterson*, 40 Mich., 659; *Wilson v. Montague*, 57 Mich., 638; 24 N. W., 851. And cannot interfere with the legal rights of the mortgagee: *Worthington v. Hanna*, 23 Mich., 534. This right of redemption pertains to the whole of the property mortgaged, and is not apportionable: *Ibid.* Hence the attachment or execution creditor cannot levy upon and sell a *part only* of a stock of goods, the *whole* of which is mortgaged, without paying or tendering the full amount of the mortgage: *Worthington v. Hanna*, 23 Mich., 534; *Haynes v. Leppig*, 40 Mich., 606; *Baldwin v. Talbot*, 46 Mich., 19; 8 N. W., 565. But neither payment nor tender of the amount due upon the mortgage is necessary in order to a valid levy and sale of the mortgagor's *entire* interest in the property: *King v. Hubbell*, 42 Mich., 601; 4 N. W., 440.

In attaching mortgaged goods and chattels, it is not essential that the officer should take more than temporary possession of the property. He has a right to take possession for the purpose of an inventory and appraisal. This establishes and perfects his lien; and no provision in the mortgage giving the mortgagee the privilege of taking possession when he deems himself insecure, can defeat this right. If the officer believes the mortgage fraudulent, or satisfied, he need not recognize it; but if he concedes its validity, it will not be necessary for his protection to retain possession. The mortgagee having the first lien and being entitled to fore-

been changed by statute, and mortgaged chattels are now subject to attachment against the mortgagor.³¹

§ 83. **Goods in custody of the law.**—In the absence of a controlling statute, while goods are in the custody of an officer, by virtue of a levy made on attachment or other process, no *other* officer can levy upon them.³² But an officer who has seized property under an attachment or execution, so long as he is in the actual or constructive possession of the property, may attach it again at the suit of the same or another plaintiff. In the first case, the officer who first levied has the actual and exclusive control over the property; it is in the custody of the law; no other officer can seize it under another writ, for in order to attach he must lawfully take possession of it, and this he cannot do. This right or immunity extends over property in the hands of the bailee of the officer or a receiptor,³³

close it at a definite time, is entitled to possession of the property, and the officer should surrender it on demand. But he must respect the attachment lien in his disposition of the property afterwards; and will be liable to the attaching creditor for any wrongful injury to his lien. The attachment blinds the mortgagor's interest as it then stands, and he cannot release to the mortgagee, nor can the latter make further advances on the mortgage security: *King v. Hubbell*, 42 Mich., 603-4; 4 N. W., 440. A levy of the attachment will terminate any authority from the mortgagee, permitting the mortgagor to make sales in the usual course of business: *Ibid.* Further upon this subject of levy upon mortgaged property, see, *post*, § 522.

Growing crops, it seems, are liable to seizure on attachment: *King v. Moore*, 10 Mich., 545; *Grover v. Buck*, 84 Mich., 519; see, *Preston v. Ryan*, 45 Mich., 174; 7 N. W., 819; *Pierce v. Hill*, 35 Mich., 194; *Shutes v. Woodward*, 57 Mich., 213; 23 N. W., 775. Though a part of the realty, growing crops are treated as personalty for the purposes of levy: *Preston v. Ryan*, 45 Mich., 174; 7 N. W., 819.

Partnership property.—As to attaching partnership property, see, *ante*, p.

60, note. In an attachment against one of the partners of a firm for his individual debt, it is not lawful for the officer to seize specific articles of partnership property, or a part of the firm goods, as the property of the partner sued. If any levy can be made in such a case on partnership effect, it must be *on the partner's interest in the whole stock*. Thus, where in attachment against one of the partners the officer attached certain articles of partnership property as the goods of the partner sued, and so inventoried them, he was held a trespasser, and liable to the firm for damages for breaking up their business: *Haynes v. Knowles*, 36 Mich., 407; see, *Sirrine v. Briggs*, 31 Mich., 443; *Hutchison v. Dubois*, 45 Mich., 143; 7 N. W., 714.

31—*Haynes v. Leppig*, 40 Mich., 602; *King v. Hubbell*, 42 Mich., 603; 4 N. W., 440; *Smith v. Judge of Menominee Circuit*, 53 Mich., 563; 19 N. W., 184; *Ganong v. Green*, 71 Mich., 7; 38 N. W., 661; *Mueller v. Provo*, 80 Mich., 481; 45 N. W., 498; *Anderson v. Cook*, 100 Mich., 623; 59 N. W., 423.

32—*Watson v. Todd*, 5 Mass., 271; *Vinton v. Bradford*, 13 Mass., 114.

33—*Thompson v. Marsh*, 14 Mass., 269.

or one who has executed a bond to re-deliver the property. A change in the law in this respect has been made, by which different attachments of the same property may be made; the subsequent attachments may be served on the property in the hands of the officer, and subject to the prior attachment.³⁴

§ 84. **Simultaneous attachments.**—When several attachments are delivered to the *same* officer at the same time, they must probably be served at the same time. In such cases, the distribution of the avails of the property is not in proportion to the amount claimed in the writs, but according to the number of them, each being entitled to an equal share; but, if the share of any plaintiff shall be more than sufficient to satisfy his demand, the overplus must be appropriated to any other of the demands which is not fully paid by its distributive share.³⁵ The rule would be the same in case of simultaneous service by different officers.³⁶

§ 85. **Successive attachments.**—“When there are several attachments against the same defendant in the hands of the same officer, they shall be executed in the same order in which they were received by the officer.”³⁷

“Different attachments of the same property may be made, and one inventory shall be sufficient; the lien of the attachments shall be in the order in which they were served, and the subsequent attachments shall be served on the property as in the hands of the officer, and subject to the prior attachment; the justice who issued the attachment having the priority of lien, shall determine all questions as to priority of liens on the property attached.”³⁸

Therefore, if the second attachment is in the hands of an officer, other than the one who served the first writ, it must be served on the property as in the hands of the first officer, and subject to the prior attachment. The last officer cannot take the property from the possession of the one who first attached it.

34—C. L., § 738.

35—Shove v. Dow, 13 Mass., 529; Sigourney v. Eaton, 14 Pick., 414; Davis v. Davis, 2 Cush., 111; Campbell v. Ruger, 1 Cow., 215.

36—Shove v. Dow, 13 Mass., 529;

Rockwood v. Varnum, 17 Pick., 289.

37—C. L., § 737.

38—C. L., § 738.

When it is intended to levy an attachment upon property already attached, in an officer's custody, it is advisable to deliver the writ to such officer to be executed by him, when it will hold the surplus, after satisfying the previous attachment, or the whole, if the first attachment should be discharged. In such case, no overt act on the part of the officer is necessary to effect the second levy, but a return of it on the writ will be sufficient.³⁹ If the property is in the possession of a receiptor, the officer must also give him notice, with directions to hold it to answer the second writ. The bailee may decline to hold the property for the security of the last attachment, and may return it to the officer.⁴⁰ It has been held that an officer who has permitted the property to go into the hands of a *receiptor* cannot return a levy upon an attachment in another suit without an actual seizure, because the court held that, in such case, he had no constructive possession.⁴¹ But the officer, after committing the property to the custody of the receiptor, who has permitted the property to go again into the hands of the general owner (the debtor), cannot attach it upon another writ without a new seizure.⁴² Nor in such case, can he hold the receiptor responsible beyond the amount of the debts upon which it was attached prior to the time when the receiptor parted with the possession.⁴³

§ 86. **Service upon the defendant.**—The officer must not only seize the goods, but he must also make the inventory, and serve a copy of it and of the attachment on the defendant, or leave copies thereof for him, if not found in the county, six days, at least, before the return day of the attachment.⁴⁴

39—Turner v. Austin, 16 Mass., 180; Whitney v. Farwell, 10 N. H., 9.

40—Ibid.; Whitney v. Farwell, 10 N. H., 9.

41—Knap v. Sprague, 9 Mass., 258.

42—Denny v. Willard, 11 Pick., 519, 525.

43—Whitney v. Farwell, 10 N. H., 13.

44—C. L., § 730.

Personal service.—Service must be made at least six days before the re-

turn, etc. Personal service of the writ, unless accompanied by the statutory inventory duly certified, will not confer jurisdiction on the justice: White v. Prior, 88 Mich., 647; 50 N. W., 655; see, Langtry v. Wayne Circuit Judges, 68 Mich., 451; 36 N. W. 211.

In the case of Withington v. Southworth, 26 Mich., 381, it was said that an attachment returnable on the 20th day of the month could be served on any day prior to the 15th; thus holding, that service might be made on the

"If the defendant cannot be found within the county, the constable shall leave a copy of the attachment and inventory, certified by him, at the last place of residence of the defendant, if there be any such place within the county, and if not, then by leaving the same with any person in whose possession such goods and chattels, moneys and effects, may be found, or in case garnishee proceedings shall be commenced simultaneously with the issuing of said writ, and no goods, chattels, or effects shall be found on which to levy such writ, then by leaving a certified copy of said writ with such garnishee defendant."⁴⁵

sixth day before the return day; thereby leaving only five days intervening between the day of service and the return day. And a like ruling was made in *Town v. Tabor*, 34 Mich., 264-5, holding that an attachment returnable on the 2d day of February might be served as late as the 27th day of January previous. And so, that an attachment returnable on the 17th might be served as late as the 11th of the month: *Brown v. Williams*, 39 Mich., 755. Upon the question of computation of time for service or return, see, *ante*, § 34, and note. It is the service of the attachment which places goods taken under it in the custody of the law, and creates a valid lien: *VanLoan v. Kline*, 10 Johns., 129. No lien attaches, nor are any goods bound until the attachment is levied thereon. The issuing of the writ does not effect any property before levy. *Hunt v. Straw*, 39 Mich., 368.

The writ must be personally served upon the defendant if he can be found within the county, at any time within the time allowed by the statute for making service; and it is the duty of the officer to make a diligent attempt to make such service: *Withington v. Southworth*, 26 Mich., 381. And he must exercise that diligence during the whole time given him by law to perform that duty: *Brown v. Williams*, 39 Mich., 755; *Isabelle v. Iron Cliffs Co.*, 57 Mich., 120; 23 N. W., 616.

45—C. L., § 731.

Service by copy left at the defendant's residence.—If personal serv-

ice cannot be made upon the defendant, the writ must be served by leaving a certified copy thereof, and of the inventory, at his last place of residence, if there is any such place within the county: *Adams v. Abrams*, 38 Mich., 302. See, *Segar v. Shingle and Lumber Co.*, 81 Mich., at p. 347; 45 N. W., 982. As to the sufficiency of the return when there is no last place of residence, etc.: *Buehler v. De Lemos*, 84 Mich., 554; 48 N. W., 42. A return which after stating that defendants have no last place of residence in the county and that no property can be found within said county, recites that "I served garnishee summons on H. and McL. and McA., said to have property," etc., and that "I do further certify and return that I served a copy of the within attachment duly certified by me on B. H. S., who has acted in the capacity of agent for said defendants," conferred no jurisdiction on the justice to render judgment against the defendant: *Faul v. Bencus*, 124 Mich., 25; 82 N. W., 659. A return, however, that the defendant "has no last place of residence in the county," is sufficient as against the objection that it should show diligent search for a last place of residence: *Davidson v. Fox*, 120 Mich., 385; 79 N. W., 1106. But as to when personal service is necessary, see, *Langtry v. Wayne*, Circuit Judge, 68 Mich., 451. But service by copy at the defendant's last place of residence can be made only in those cases where, after reasonable search and diligence, he cannot be found in the county during the time allowed by the

It is the practice, especially where the articles of property are numerous, for the constable to make his inventory of the property attached on a separate piece of paper, and to annex a copy of it by a wafer, or otherwise, to the attachment, also

statute for making personal service of the writ, nor until the whole time during which personal service can be made has expired: *Withington v. Southworth*, 26 Mich., 381; *Nicolls v. Lawrence*, 30 Mich., 395-7; *Brown v. Williams*, 39 Mich., 755; *Michels v. Stork*, 44 Mich., 2; 5 N. W. 1034; *Farr v. Kilgour*, 117 Mich., 227; 75 N. W., 457. But see, *Matthews v. Forslund*, 113 Mich., 416; 71 N. W., 854, in which it is suggested that service made at any time after the writ come to the hands of the officer would be good if the writ were held and effort made to get personal service during the whole period allowed for personal service: *Bargh v. L. R. Ermeling & Co.*, 110 Mich., 164; 67 N. W., 1083, is distinguished. See, *Rolfe v. Dudley*, 58 Mich., 208; 24 N. W. 657. The officer must if possible make personal service of the writ, and he must diligently use *all* the time allowed by law for making such service before he can serve by leaving copy, etc.: *Hubbell v. Rhinesmith*, 85 Mich., 30; 48 N. W., 178; see, *White v. Prior*, 88 Mich., 647; 50 N. W., 655.

Service by copy on the person in possession, etc.—Service by leaving a certified copy of the writ and inventory with the person in whose possession the property is found, can be made only in those cases where the defendant has no last place of residence within the county, and cannot, after reasonable diligence, be found himself in the county during any part of the time within which personal service can by law be made upon him: *Nicolls v. Lawrence*, 30 Mich., 395; *Town v. Tabor*, 34 Mich., 262-5; *Brown v. Williams*, 39 Mich., 755; *Kraft v. Rath*, 45 Mich., 20; 7 N. W., 232. If the defendant cannot be found in the county, it is then only in cases where he has *no last place of residence* in the county, that service can be made by copy upon the person in possession of the goods: *Watts v. Willet*, 2 Hilt., 212. It is required

that there shall be first personal service if possible. If this is not possible, then, second, that service shall be made by copy left at last place of abode; and if there is no last place of abode in the county, then, third, service by copy left with the person in possession of the property attached. Such is the order prescribed by the statute, and no service is good so long as there is opportunity to make service in one of the ways first required, and a good return of substituted service must show that a better service was not possible: *Town v. Tabor*, 34 Mich., 262; *White v. Prior*, 88 Mich., 648; 50 N. W., 655.

The service of these certified copies constitutes a part of the service of attachment, and unless such service of the copies is made as required by law, the justice will not acquire any jurisdiction over the property attached. Therefore, where the defendant could not be found, though he had a residence in the county, but no copies were left there, it was held that his voluntary appearance to the suit on the return day, while it conferred jurisdiction of his person, gave no jurisdiction over the property seized, and that the attachment was void as to the claims of the other attaching or execution creditors: *Watts v. Willet*, 2 Hilt., 212.

Where a true copy of a writ of attachment, not certified, but accompanied by a certified copy of the inventory of the property attached, was served on the defendant, it was held the omission to certify the copy of the writ did not render the service invalid, the defect or irregularity being merely formal: *Leonard v. Woodward*, 34 Mich., 514.

In serving a writ of attachment, all the requirements of the statute must be strictly complied with, in order to confer jurisdiction of the case upon the justice: *Town v. Tabor*, 34 Mich., 262.

to the copy of it. It is sufficient to endorse upon the copy of the attachment left with the defendant, as follows:

“Copy—Constable.”

If it does not appear from the return of the attachment that property has been taken upon it, and there is no garnishee, the proceedings upon it are at an end. The writ of attachment in justice's court is not a summons, and in the absence of a levy upon property of defendant, or one of them, the proceedings fail unless a garnishee shall be summoned who shall be found indebted to the defendant or defendants or to have property or effects in his hand subject to the attachment; or, unless the defendant, or one of them, if there are more than one, shall have been personally served with process or appeared. The contrary is true as to proceedings under the writ in circuit court.⁴⁶ Where there is not personal service and the defendant does not appear the proceeding is one in rem only against the property seized.⁴⁷

§ 87. Disposition of the property after service of the writ.—In order to maintain the lien created by the attachment, the officer must in some form, by himself or another, retain the custody of the property, to prevent the operation of a second attachment.⁴⁸ To preserve an attachment of personal property, the officer must continue in possession of it, either by himself or a keeper; and mere notice that an attachment was made of property is not enough to prevent a second attachment of the same property.⁴⁹ As illustrating the rule that the officer

46—C. L., §§ 740 and 10559; Langtry v. Judges of Wayne Circuit, 68 Mich., 451; 36 N. W., 211.

47—Bower v. Town, 12 Mich., 233.

48—Lyman v. Lyman, 11 Mass., 317. A writ fair on its face will justify a seizure of property and protect the officer against personal responsibility for so doing, but if the writ was issued on a void affidavit, the officer cannot base a *right* to possession upon the writ: Aspell v. Hasbain, 98 Mich., 117; 57 N. W. 27. An officer, while holding property under a writ of attachment, has no right to make use of it for his own convenience or benefit, or for profit. Tand-

ler v. Saunders, 56 Mich., 142; 22 N. W., 271.

49—Shepard v. Butterfield, 4 Cush., 425, 430. An officer has no authority to deliver property which he has attached to the plaintiff in attachment while the suit is still pending, even though the plaintiff is in fact the legal owner of it, and caused it to be attached in ignorance of his ownership. Nor can he replevin the property from the officer while it is so held by him. And if the suit goes down the officer still holds the property until notified, or until he learns that the suit is discontinued: Vanneter v. Crossman, 39 Mich., 610.

must act with diligence in the service of the writ, see, *Springett v. Colerick*, 67 Mich., 362; 34 N. W., 683. In this case the writ was received by the officer at one o'clock in the morning, but levy was not made till afternoon, though there was opportunity to levy sooner. This was held to be negligence. In *Beard v. Clippert*, 63 Mich., 716; 30 N. W., 323, the writ was delivered to the officer and a satisfactory indemnity bond given. Property was then pointed out to be levied upon. It was in a store which was locked and to which admission was denied. The officer made no levy and returned that he could not find any property on which to levy. In defending an action for neglect of his duty an assignment of all their property by the attachment debtors was shown but no bond such as the assignment statute requires was shown. Held, that the officer was liable for not having levied in the absence of this bond.

§ 88. **Bond to prevent removal.**—"No goods or chattels attached shall be removed by the constable, if a bond be executed and delivered to him by any person, with sufficient surety to be approved by such constable, in a penalty at least double the sum stated in the attachment to have been sworn to, conditioned that such goods and chattels shall be produced to satisfy any execution that may be issued on any judgment that shall be recovered by the plaintiff upon such attachment; and thereupon the officer shall deliver the property attached to the person executing such bond."⁵⁰

To constitute a valid levy on property the officer must be within view of the property and have it under his control: *Brown v. Pratt*, 4 Wis., 513; 65 Am. Dec., 330. The officer must assume dominion over the property. He must not only have a view of the property, but he must assert his title to it by such acts as would render him chargeable as a trespasser, but for the protection of his process: *Goode v. Longmire*, 35 Ala., 668; 76 Am. Dec., 309; *Davidson v. Waldron*, 31 Ill., 120; 83 Am. Dec., 206; *Allen v. McCalla*, 25 Ia., 464; 96 Am. Dec., 56; *Battle Creek Valley Bank v. First National Bank*, 62 Neb., 825; 88 N. W., 145; 56 L. R. A., 124.

In an attachment case in the circuit court, it was claimed that the at-

tachment of a growing crop of wheat was invalid, because the officer failed to take possession. In overruling the objection, the court say, that all the possession required is such as the nature of the property renders it susceptible of; and in the case of a growing crop it could be constructive possession only: *Grover v. Buck*, 34 Mich., 519, 521.

50—C. L., § 732. It seems proper for the officer to take such a bond in case of the attachment of a growing crop; and as against any wrongful removal or interference with the crop, the bond would be as important in this case as in any other: *Grover v. Buck*, 34 Mich., 519, 521-2.

It has been held, that where a defendant gave bond to procure the re-

Upon the execution and delivery of this bond, the officer is required to deliver up the property to the obligor in the bond.⁵¹ The statute does not require the approval of the officer to be in writing, yet it is advisable that it should be done so; the mere acceptance of the bond would be a sufficient approval. For the purpose of ascertaining the sufficiency of the surety, the officer is authorized to administer an oath to the person offered as surety.⁵²

The giving of the bond does not operate to discharge the goods from the lien of the attachment; they still remain in the custody of the law.⁵³

In an action upon such bond, the plaintiff is not required to show the facts necessary to give jurisdiction to the justice.⁵⁴

§ 89. Receiptor for property.—The officer, instead of taking a bond, is at liberty, if he see fit, to take a receiptor of the property.⁵⁵

§ 90. Where the property is claimed by a third person.—“If any person other than the defendant shall claim any goods or chattels attached by a constable, he may, after such seizure, and at any time before execution shall have been issued upon the judgment obtained on such attachment, execute a bond to the plaintiff with sufficient sureties to be approved by the constable or by the justice who issued the attachment, in a penalty double the value of the property attached, conditioned that in a suit

lease of his property from attachment, and to prevent its removal, that he could not thereafter apply to a circuit court commissioner for a dissolution of the attachment under the provisions of C. L., § 10595: See, *Paddock v. Matthews*, 3 Mich., 18. But it has also been decided, that where the affidavit to procure an attachment against a non-resident debtor was insufficient to confer jurisdiction on the court to issue the writ, that a bond given to prevent the removal of the property seized under that writ was void, and no action was maintainable on it: *Caldwell v. Colgate*, 7 Barb., 253.

51—C. L., § 734.

52—C. L., § 10395.

53—*Van Loan v. Kline*, 10 Johns., 129; *Sterling v. Welcome*, 20 Wend., 238. But the lien may be lost by the

neglect of the officer to levy execution on the attached property for an unreasonable length of time after judgment; *Sterling v. Welcome*, 20 Wend., 238, 240.

54—*Whiley v. Sherman*, 3 Denio, 185. But it seems that it may be shown in defense that the justice had no jurisdiction to issue the attachment: *Homan v. Brinkerhoff*, 1 Denio, 184. And if the defendant should show that the attachment was void, the plaintiff could not recover: *Ibid.*

55—*Harvey v. Lane*, 12 Wend., 563. The receiptor's possession is the possession of the officer, else the delivery to the receiptor would be a relinquishment of the levy: *Mayhue v. Snell*, 37 Mich., 305. See, *Bowen v. Culp*, 36 Mich., 224; *Burk v. Webb*, 32 Mich., 173.

to be brought on such bond, within three months from the date thereof, such claimant will establish that he was the owner of the goods seized at the time of the seizure, and in case of his failure to do so, that he will pay to such plaintiff the value of the property so attached, with interest."⁵⁶ It will be noticed that this bond, unlike the one provided for in § 732, runs to the plaintiff, rather than to the officer. It is not conditioned, as in the other, to produce the property to satisfy the execution, but that he will pay the value of the property if he, the obligor, fails to establish his ownership of the goods.

The sureties in this bond may be approved either by the constable or the justice. The remarks in relation to this subject, with regard to the next preceding bond, apply to this.¹ One surety is sufficient in that bond; in this there must be at least two.

There is a difficulty in ascertaining the amount of the penalty of this bond. "How, and in what manner, is the constable to get at the value of the property? The statute makes no provision on this subject. In other cases similar to this, as in the action of replevin, for instance, the officer is authorized to administer an oath to and examine witnesses, in order to ascertain the value. No authority of that kind is given here. Without it, an oath administered by the constable would be nugatory, and no indictment for perjury would lie upon it; and hence that course should not be adopted. I know of no other way, than for the constable to satisfy himself of the value, by advising with persons of judgment, or otherwise, as he may see fit, and then to double that value, and insert it in the bond by way of penalty. If the sureties should then refuse to execute the bond, he might undoubtedly remove the property."²

"Upon either of the bonds aforesaid being executed and delivered to the constable, he shall deliver up the property seized by him to the obligor in such bond."³

§ 91. Lien of the attachment.—The attachment, after being actually levied, is a valid lien on the goods, and has preference over any execution or attachment issued out of any court,

⁵⁶—C. L., § 733.

¹—See, *ante*, § 88.

²—Cow. Treat., 2d ed., 519.

³—C. L., § 734.

whether of record or not, which has not been previously levied.⁴ The lien continues until after judgment and execution is regularly obtained, and ceases on the issuing of the execution and a levy by virtue of it, or the elapsing of a reasonable time after the execution is issued to make a levy.⁵ If, after having obtained judgment, the plaintiff does not take out and proceed upon an execution with all due diligence, he loses his preference.⁶

§ 92. Of the return of an attachment.—The constable serving the attachment is required to return thereon, in writing, signed by him, the time and manner of executing the same,⁷ and he is likewise required to return upon the writ of attachment, or attached thereto, a copy of the inventory of the property attached, certified by him, and any bond which may have been executed and delivered to him, pursuant to the foregoing provisions of the act.⁸

4—C. L., §10315.

Where an attachment has been levied upon the property of a deceased person before his death, the lien continues, and the suit may be prosecuted to judgment after his death, and the attached property sold on execution to satisfy it, whether commissioners have been appointed or not, to hear claims against the estate: See, C. L., § 9425, and *Smith v. Jones*, 15 Mich., 281.

5—*Van Loan v. Kline*, 10 Johns., 129, 131; *Sterling v. Welcome*, 20 Wend., 238. The lien acquired by virtue of the attachment, will remain in force only a reasonable length of time after judgment for the purpose of the levy of execution thereon: *Bushey v. Rath*, 45 Mich., 181-186; 7 N. W., 802. And a bond on appeal given by the defendant in attachment releases the property seized. When an appeal is taken, the bond given is presumed to insure satisfaction of the judgment, and there is no longer any object in retaining the property levied upon for that purpose: *Ibid*.

6—*Van Loan v. Kline*, 10 Johns., 129; *Bushey v. Rath*, 45 Mich., 181; 7 N. W., 802.

Expense of keeping animals, etc.—Where animals are attached, and expense incurred in the keeping thereof,

it is the duty of the justice, on the trial of the suit, to examine witnesses as to such expense from the time of seizure to and including the day of trial, and to determine the amount thereof, and incorporate the same in the judgment as a part thereof: C. L., § 989; *Bushey v. Rath*, 45 Mich., 184; 7 N. W., 802.

The officer holding animals under an attachment has no right to work them for the expense of their keeping: *Bushey v. Rath*, 45 Mich., 181, 186; 7 N. W., 802.

7—C. L., § 743.

8—C. L., § 744. The "foregoing provisions" referred to are, C. L., §§ 732, 733.

Return of personal service.—The writ must be returned personally served upon the defendant if he can be found within the county during any of the time within which personal service may be made. And if not found, the return, in order to confer jurisdiction by service in any other manner, must show the use of reasonable diligence to make personal service, during all the time allowed by law for making such service: *Withington v. Southworth*, 26 Mich., 381; *Brown v. Williams*, 39 Mich., 755. Upon what is personal service and how it should be made and the time

When the constable returned upon an attachment, that he had delivered to each of the defendants, personally, a copy of

of making, see, *ante*, §§ 81, 86; Farr v. Kilgour, 117 Mich., 227; 75 N. W., 457; Matthews v. Forslund, 113 Mich., 416; 71 N. W., 854; C. L., § 730.

Return of service by copy at defendant's residence.—If personal service of the writ cannot be made upon the defendant, the return must show service by leaving a certified copy of the writ and inventory at the defendant's last place of residence in the county, if he had one: C. L., § 731; Adams v. Abrams, 38 Mich., 302. And such return, in order to confer jurisdiction, must show, not only that the defendant could not be found in the county, but that the officer used reasonable diligence to make personal service during all the time allowed by the statute for that purpose, nor can such return be made before the expiration of the time in which personal service is permitted: Town v. Tabor, 34 Mich., 265; Brown v. Williams, 39 Mich., 755. Therefore a return of service by leaving a certified copy at the defendant's usual place of abode with his wife, is insufficient, in that it does not show that the copy was left at his last place of residence in the county, nor that the defendant could not be found therein: Michels v. Stork, 44 Mich., 2; 5 N. W., 1034. As to what is essential to service by copy left at defendant's residence, see, *ante*, note 45, § 86; Faul v. Bencus, 124 Mich., 25; 82 N. W., 659; Davidson v. Fox, 120 Mich., 385; 79 N. W. 1100.

Return of service by copy upon the person in possession, etc.—A return of service by leaving a certified copy of the writ and inventory with the person in whose possession the property is found, must, in order to be valid, show that the defendant could not be found in the county, and that he has no last place of residence therein; and both of these facts must appear in the return: Nicolls v. Lawrence, 30 Mich., 395-7; Town v. Tabor, 34 Mich., 262. Unless the defendant is personally served, or appears in the case, the jurisdiction to take any subsequent proceedings there-

in will depend upon a proper return, showing a diligent attempt to make such service: Withington v. Southworth, 26 Mich., 381. Where there is no personal service on the defendant, if the officer fails to show by his return that he retained the writ in his hands and made diligent search for the defendant during all the time within which personal service might by law have been made, his return of the service by copy either at defendant's last place of residence, or upon the person with whom the property was found, will not be sufficient to confer jurisdiction upon the justice to proceed further in the case: Brown v. Williams, 39 Mich., 755; Myers v. Prosser, 40 Mich., 644; Kraft v. Raths, 45 Mich., 20; 7 N. W., 232; Town v. Tabor, 34 Mich., 362; see, Alverson v. Dennison, 40 Mich., 179. Where the officer's return showed that he served the writ on the day of its date by taking property, and that on the same day he served a copy of the writ of attachment, and of the inventory, duly certified by him, upon the person with whom he found the property, naming him, and then added, "the defendant not having any last place of residence within the county": *Held*, that the service was insufficient, there being no statement in the return that the defendant was not found, or that the officer was unable to find him in the county, or that he had made any attempt to find him to serve the writ on him; the only reason given for substituted service on the person in whose possession the property was found, was that the defendant had no last place of residence in the county, when for aught that appears the officer may have known the defendant to be in the county, and that service could have been made upon them. Under such service and such a return, the defendant not appearing in the suit, the justice could acquire no jurisdiction.

The statute (§ 730) only allows service upon the person in whose possession the property is found, when the defendant cannot be found in the county; or when, not being found, has

the attachment and inventory, it was prima facie sufficient, although he did not state that the copies served were certified by him.¹

§ 93. *Proceedings after the return of the attachment.*—"If the attachment be returned personally served upon any of the defendants, the justice shall proceed therein in the same manner as upon a summons returned personally served."²

no last place of residence therein: *Nicolls v. Lawrence*, 30 Mich., 395. Where the defendant is not found and does not appear, service by leaving copies at his last place of residence, or with the person in whose possession the property was found, will not be sufficient, unless the officer has diligently sought to make personal service during all the time given by the statute for making such service; therefore, a return of service by leaving copies, etc., made before the expiration of the last day upon which personal service is permitted, will not give the justice jurisdiction. Thus, where by the date of the officer's return of service by copy it appeared that there still remained one day after the date of the return within which personal service might have been made if the defendant could have been found in the county, it was held, that the justice acquired no jurisdiction. In all cases, the return should inform the justice that lawful service has been made: *Town v. Tabor*, 34 Mich., 262. A justice may acquire jurisdiction over the person either on a return showing proper service of the writ, or by the voluntary appearance of the defendant to an insufficient return. But where the defendant appears specially to object to the jurisdiction, or to quash the writ for want of a return showing proper service, his appearance cannot be considered as a submission to the jurisdiction: *Michels v. Stork*, 44 Mich., 2; 5 N. W., 1034. Further upon service by copy left with the person in possession, see, *ante*, note 45, § 86. If the defendant cannot be found within the county, it is only in cases where he has *no last place* of residence in the county, that service can be made by leaving a copy of the attachment and inventory with the person in whose possession the goods

are found, and in such case the officer's return must show not only that the defendant could not be found, but that he has *no last place* of residence in the county—otherwise it is said that the justice will acquire no jurisdiction in the case, unless the defendant should voluntarily appear in the suit. So, the return to a writ of attachment not personally served, must show that a copy of the writ was left at the defendant's last place of residence in the county, or that there was no such place of residence, or the omission will be fatal: *Adams v. Abram*, 38 Mich., 302; *Villet v. Westenhaver*, 42 Mich., 593; 4 N. W., 448; *Michels v. Stork*, 44 Mich., 2; 5 N. W., 1034; C. L., § 731.

Service of a certified copy of the inventory alone is not sufficient service upon the defendant: *Stearns v. Taylor*, 27 Mich., 88. But it seems that service of copies of both the writ and inventory, the latter, only, being certified, is sufficient: *Leonard v. Woodward*, 34 Mich., 514. Where a return to the writ shows that goods have been attached, but is silent as to the place of seizure, it will be presumed that the constable acting in accord with the statute, took them "within his county": *Bushey v. Rath*, 45 Mich., 183; 7 N. W., 802.

As to amending the return: See, *Bushey v. Rath*, 45 Mich., 183; 7 N. W., 802; *Haynes v. Knowles*, 36 Mich., 407; *Kidd v. Dougherty*, 59 Mich., 240; 26 N. W., 510.

Return, when conclusive on the parties in collateral proceedings: *Michels v. Storks*, 52 Mich., 260; 17 N. W., 833.

1—*Van Kirk v. Wilds*, 1 Barb., 520.

2—C. L., § 735; *Borland v. Kingsbury*, 65 Mich., 59-60; 31 N. W., 620.

"If the attachment shall not be personally served upon any of the defendants, and none of the defendants shall appear on the return day thereof, the justice shall continue the cause for not less than thirty and not exceeding ninety days; and in such case, no hearing shall be had or judgment rendered thereon until the expiration of that time, unless the defendant shall sooner appear and request a trial; in which case the justice shall appoint a day for the trial of such suit, and cause notice thereof to be given to the plaintiff."³

§ 94. **Perishable fruits.**—The statutes authorizing the sale of perishable fruits, levied upon without waiting for judgment, are not as free from confusion as might be wished. C. L., § 739, being sec. 36 of the justice court act, provided for a sale, upon the order of the justice of "animals or perishable property" seized upon the writ, if the case was not tried on the return day, the proceeds to be turned over to the justice and applied as other moneys realized from sale of other property. In 1871 was passed an act providing for the sale of peaches and berries which might be levied upon, and requiring that the constable should forthwith make return of such a levy to the justice who might make an order of sale "at such time, place and manner" as he might "deem most beneficial for

3—C. L., § 736; *Langtry v. Wayne* Circuit Judge, 68 Mich., 451-3; 36 N. W., 211.

Where there is no personal service, all the proceedings against parties not served or appearing must be strictly regular under the Statute: *King v. Harrington*, 14 Mich., 532, 541; *Withington v. Southworth*, 26 Mich., 381; *Brown v. Williams*, 39 Mich., 756; *Kraft v. Rath*, 45 Mich., 21; 7 N. W., 232; *Langtry v. Judge of Wayne Circuit*, 68 Mich., 451; 36 N. W., 211. See other cases cited, *ante*, § 81, note 24. A justice cannot render judgment in an attachment suit within thirty days from the return day of the process, in case where the defendant was not personally served, and did not appear and request a trial. An appearance specially to object to the jurisdiction of the justice is not such an appearance as will authorize the justice to proceed to judgment

before the expiration of the thirty days. Such an appearance as would waive a want of personal service, must be a general appearance for the purpose of a trial: *Wright v. Russell*, 19 Mich., 346. But appearing and pleading to the merits brings the parties before the court whether lawfully served with process or not, and they cannot thereafter object to the manner in which they are brought in: *Manhard v. Schott*, 37 Mich., 235; *Hart v. Blake*, 31 Mich., 278. See, *Borland v. Kingsbury*, 65 Mich., 59; 31 N. W., 620.

A common law *certiorari*, to a justice, will lie to remove a cause commenced by attachment, where no personal service is had, and no appearance entered, if the defendant had no notice of the proceedings until after the statutory remedy for review was gone: *Withington v. Southworth*, 26 Mich., 381.

the benefit of the defendant." This act contained a section repealing all conflicting statutes. This act of 1871 was amended in 1901 by act No. 59, making it applicable to "other perishable property" and adding a section, as follows:

"Sec. 3. No sale shall be made under the provisions of this act except upon the written order of the court from which process shall have been issued, authorizing such sale at such time, place and manner as said court shall decree most beneficial for the benefit of defendant: Provided, That the court shall direct reasonable notice to be given to the defendant or his agent of the time and the place of such application to sell." The act of 1871 did not purport to cover the general subject of perishable property, and hence could not have been intended to repeal the section of the justice's act referred to, unless it should be construed to do so as to peaches and berries. The act of 1901 includes "other perishable property," and adds another section requiring notice to defendant of "application to sell." There being nothing in the act providing for any "application to sell," it providing that the justice shall order a sale upon the officer's return that such property has been levied upon, it is a little difficult to know what was intended. The act of 1901 contains no repealing clause. The act of 1871 requires the officer to make return *forthwith* if he levies on property within its provisions, and this requirement is retained in the act of 1901. It seems reasonable to conclude, that because it makes this requirement, the act of 1871 is in conflict with the provisions of § 739 as to peaches and berries, and that the act of 1901 is in conflict with that section as to all perishable property, for that section contemplates a return under the general rule. This act of 1901 is in conflict with itself in that in its first section it provides that if a sheriff shall levy on perishable property under a writ from a court of record *he*, the sheriff, shall proceed to sell as *he* may deem most beneficial for the defendant, and in its third section it provides that the sheriff shall sell as the *court* shall "deem most beneficial for the benefit of the defendant." While the conclusion may not be free from question, the safer course would seem to be to have the officer make a return *forthwith* if he levies on perishable property, and then to get a written

order from the justice directing the time, place and manner of sale. Notice of the return of such levy should be given under the direction of the justice, and of the proposed order of sale, to be made at a time fixed in the notice.

As to what is "perishable" property within the meaning of that term in a statute having a similar object to the one under consideration, see, *McCreery v. Berney National Bank*, 116 Ala., 224; 22 So., 577.

"When the cause is continued, as provided for in the thirty-third section, and it shall appear that any of the property taken under the attachment consists of animals or perishable property, the justice may make an order directing the officer having the custody thereof to dispose of the same, as upon execution, and the money realized therefor shall be paid over to the justice, and applied as other money realized from the sale of the property attached is applied."⁴

By this section, the justice is authorized to order the sale of "animals or perishable property" before judgment. It is discretionary in the justice whether a sale shall be made, and he is to determine, from all the circumstances of the case, whether a sale is expedient or not.

The following statute was enacted in 1871: "Whenever any constable shall by virtue of any attachment or execution issued by any justice of the peace, levy upon any peaches, blackberries, raspberries or strawberries (or other perishable fruit), he shall forthwith make his return to said justice, who, by a written order, shall authorize the constable to sell such property at such time, place and manner as said justice shall deem most beneficial for the benefit of the defendant."⁵

§ 95. Release of property from the attachment.—"If, at any time before judgment, the defendant shall appear and answer to the action, and shall give a bond to the plaintiff, in a penalty double the amount claimed by the plaintiff, with one or more sureties, to be approved by the justice, conditioned to pay any judgment the plaintiff may recover against him in the action, within thirty days after the rendition thereof, the

⁴—C. L., § 739. The "thirty-third" section here referred to is the foregoing C. L., § 736. ⁵—C. L., § 10361, as amended Public Acts, 1901, p. 90.

justice shall thereupon make an order discharging the property attached."⁶

Upon the execution and delivery of this bond, the justice is to make an order discharging the property attached. This order does not depend upon the validity or invalidity of the proceedings under the writ.

In case there was any irregularity in the proceedings which would render the attachment void, the bond would also be void. The defendants are not estopped from availing themselves of the objection that the proceedings under which the property was seized were void.⁷

Where the attachment has been dissolved by giving a bond, the officer should not deliver the property to the debtor in case he holds it upon another attachment which is in force, or, if it has been levied upon by another officer, under another attachment.

§ 96. Dissolution of the attachment.—Provision is made for the dissolution of attachments on application or petition to a circuit judge or circuit court commissioner of the county where the writ issued.⁸ The statute is as follows: "In all cases where a writ of attachment has been or shall be issued and served under the provisions of law, it shall be lawful for any defendant, whose property may be attached by virtue of such writ, to apply to the judge of the circuit court, or to the circuit court commissioner of the county where such writ was issued, for a dissolution of such attachment; which application shall be in writing, and shall contain the reasons for such application."⁹

6—C. L., § 742.

7—Caldwell v. Colgate, 7 Barb., 253.

8—These provisions are contained in the Act of April 7, 1851, being in C. L., §§ 10595-10598. And they apply as well to the dissolution of attachments issued by justices of the peace as to those issued from the circuit courts: *Albertson v. Edsall*, 16 Mich., 203. If the attachment is unauthorized, the proper proceeding is to apply for a dissolution under this statute: *Roelofson v. Hatch*, 3 Mich., 277. See, *Gott v. Hoschna*, 57 Mich., 417; 24 N. W., 123: Under the procedure for discharge of the property from the

levy taken under § 742, no question of validity of the writ need be raised. If the bond is given the property is to be discharged regardless of whether the attachment was warranted or not.

9—C. L., § 10595.

The object of the proceeding under this statute is merely to release the property from the lien of the attachment: *Hyde v. Nelson*, 11 Mich., 353. And the right to a dissolution is not cut off by the fact that other attachments and liens are resting upon the property: *Schall v. Bly*, 43 Mich., 401; 5 N. W., 651; *Sheldon v. Stewart*, 43 Mich., 574; 5 N. W., 1067;

"Upon the presentation of such application, the judge or said commissioner shall issue a citation to the plaintiff in attachment requiring him to show cause, on a day and at

Drs. K. & K. U. S. Med. & Surg. Ass'n v. Post & Tribune Co., 58 Mich., 487; 25 N. W., 477.

When to be made.—The application for dissolution may be made at any time before judgment, and as well after defendant's appearance as before: *Hyde v. Nelson*, 11 Mich., 353, 356. But not after the defendant of claimant has given bond for the restoration or release of the property, and procured its release: *Paddock v. Matthews*, 3 Mich., 18. The defendant cannot contest the validity of the attachment, or the truth of the affidavit for the issuing of the writ, by plea in abatement; that can be done only upon an application for a dissolution of the attachment in the manner provided by this act: *Bower v. Town*, 12 Mich., 230.

Who may apply.—The proceeding to dissolve can be maintained only by the defendant who is the owner of the property, or has the right to the possession of it. A person who has fraudulently assigned his property cannot maintain the proceeding to dissolve an attachment issued against himself and levied on that property: *Chandler v. Nash*, 5 Mich., 409. Nor can the commissioner dissolve an attachment upon the application of a defendant who is not entitled to have the property restored to his possession: *Price v. Reed*, 20 Mich., 72. But a partner not implicated in the grounds upon which a writ of attachment has been issued, and upon which partnership property has been seized, is entitled to have the attachment dissolved, and the property restored to him, for he is entitled to the possession of it: *Edwards v. Hughes*, 20 Mich., 289. A defendant owning and entitled to the possession of a part of the property attached, is entitled to move for a dissolution: *Patterson v. Goodrich*, 31 Mich., 225.

The application or petition must be in writing, must set forth and describe the property taken, aver the petitioner's right to it, and set forth the reason for a dissolution, and must

be verified by oath: *Osborne v. Robbins*, 10 Mich., 277. The application need not be entitled in the cause in which the attachment issued: *Heyn v. Farrar*, 36 Mich., 258. The application must show that the *defendant's* property was *attached*, because the jurisdiction of the officer is dependent upon it: *Osborne v. Robbins*, 10 Mich., 277; *Chandler v. Nash*, 5 Mich., 416. But the application, it seems, is sufficient so far as showing title to the property in the applicant, if, from its terms, it could reasonably be inferred that the property still continued to belong to the applicant: *Macumber v. Beam*, 22 Mich., 395, 401. It must set forth and describe the property attached, because without such description the property could not be known, and no order for its return could be made, and there would not be sufficient certainty as to the defendant's property and right. A statement in the application "that on said writ of attachment some of the goods and chattels of this applicant have been seized," is not sufficient: *Osborne v. Robbins*, 10 Mich., 277; *Nelson v. Hyde*, 10 Mich., 521; *Macumber v. Beam*, 22 Mich., 401. An application is not at fault for alleging the alternative that defendant has not "assigned, disposed of or concealed," etc.: *First Nat'l Bank v. Steele*, 81 Mich., 93; 45 N. W. 579. An application alleging that defendant "has not assigned, disposed of, or concealed her property," is sufficient to include an interest in property held with another: *Cottrell v. Hatheway*, 108 Mich., 619; 66 N. W., 596. The application should allege that applicant is entitled to the possession of the property: *Johnson v. DeWitt*, 36 Mich., 95; *Zook v. Blough*, 42 Mich., 487; 4 N. W., 219. The cases of *Johnson v. DeWitt*, 36 Mich., 95, and *Zook v. Blough*, 42 Mich., 487, 4 N. W., 219, so far as they hold that dissolution proceedings will not lie when, if successful, the defendant will not be entitled to possession because the property must remain in the custody of the law under

a time and place in said citation to be named, before the said judge or commissioner, why the said attachment should not be

other levies, are overruled in *Dra. K. & K. U. S. M. & S. Ass'n. v. Post & Tribune Co.*, 58 Mich., 487; 25 N. W., 477. As to the sufficiency of the allegation negating the grounds upon which the writ issued, see, *Patterson v. Goodrich*, 31 Mich., 225-6. An affidavit for an attachment charged that defendant "has assigned, disposed of and concealed and is about to assign, dispose of and conceal" his property with intent, etc. In his petition for a dissolution of the writ defendant denied "that he has assigned, disposed of and that he is about to assign, dispose of," etc. The petition was held bad because in the conjunctive: *Bane v. Keys*, 115 Mich., 244; 73 N. W., 230.

The citation.—If the citation is insufficient, the proceedings will be treated as if abandoned: *Pearson v. Creslin*, 16 Mich., 281. In *Caupfield v. Cook*, 92 Mich., 626; 52 N. W., 1031, it was held that both the day of service and the return day of the citation must be excluded in computing time of service under the statute. This case was followed by *First Nat'l Bank v. Williams Milling Co.*, 110 Mich., 15; 67 N. W., 976, holding the same rule, notwithstanding a full argument and discussion of this question of computation of time in *Chaddock v. Barry*, 93 Mich., 542; 53 N. W., 785, upon principle and authority and concluding that in computing time under statutes like the one in question, the day of service is to be excluded and the return day included. This case of *Chaddock v. Barry* has been followed in *Crozier v. Allen*, 117 Mich., 171; 75 N. W., 300, and in *Lemon v. Hampton*, 128 Mich., 182; 87 N. W., 53, both of which last cases were short summons cases in which the language of the statute is "at least three days before," etc. The language of the citation statute is "three days at least before," etc. It would seem that the difference in language in the two statutes was not such as to require a different rule for the computation of time, and yet it is difficult to understand how the court, in the

case of *Bank against Milling Co.* could have lost sight of *Chaddock v. Barry*. It would seem that this last case, with the later cases of *Crozier v. Allen*, and *Lemon v. Hampton*, referred to, should establish the rule of the exclusion of the one day and the including of the other. If Sunday intervenes under this statute, it is to be excluded in the computation: *Caupfield v. Cook*, 92 Mich., 626; 52 N. W., 1031; *First Nat'l Bank v. Williams Milling Co.*, 110 Mich., 15; 67 N. W., 976; *Crozier v. Allen*, 117 Mich., 171; 75 N. W., 300; *Lemon v. Hampton*, 128 Mich., 182; 87 N. W., 53. Service in any case must be by reading: *Cleland v. Clark*, 111 Mich., 336; 69 N. W., 652.

Grounds for dissolution.—The commissioner can dissolve an attachment only for reasons going to show that the plaintiff has not a good and legal cause for suing out the writ. This includes nothing but an inquiry into the facts, or the sufficiency of the affidavit; all other defects in the proceedings must be passed upon by the court, and not by the commissioner: *Vinton v. Mead*, 17 Mich., 388-9. The inquiry before the commissioner does not touch the issue in the attachment suit; it is merely to inquire into the truth of the matters on which the plaintiff has, by an *ex parte* affidavit, been enabled to obtain the writ: *Edgerton v. Hinchman*, 7 Mich., 352, 354. It is competent to negative knowledge of indebtedness to show no intent to defraud: *Hyde v. Nelson*, 11 Mich., 353; *Dimmock v. Cole*, 130 Mich., 601; 90 N. W., 333. The issue upon a petition to dissolve, is not whether plaintiff had good reason to think the defendant guilty of conduct justifying the use of the writ, but whether he is actually guilty of such conduct: *Blanchard v. Brown*, 42 Mich., 46; 3 N. W., 246. If a portion of the debt involved in the attachment proceedings is free from fraud, the attachment must be dissolved, though a portion was fraudulently contracted. *Estlow v. Hanna*, 75 Mich., 219; 42 N. W., 812.

dissolved, and the property be restored to the defendant in attachment.”¹

“The citation shall be served three days, at least, before the return day thereof, by reading it to the plaintiff in attachment (or to either of them, if there be more than one), if found within the county, and if not, then the same may be served upon the agent or attorney of the plaintiff, by the sheriff, either of his deputies, or any constable or other person authorized by such judge or commissioner, and on the return day thereof, or at such other day thereafter as the judge or commissioner shall appoint for that purpose, he shall proceed to hear the proofs and allegations of the parties; and if said judge or commissioner shall be satisfied that such plaintiff had not a good and legal cause for suing out such writ, the said judge or commissioner may order such attachment to be dissolved, and the property attached to be restored to the defendant, and may, at his discretion, require the said defendant to enter his appearance to the plaintiff’s action prior to the dissolution of such attachment.”²

1—C. L., § 10596.

Unless the party follows up his application with a citation, his proceedings will be considered as having been abandoned: *Pearson v. Creslin*, 16 Mich., 281. See, further, as to service of the citation, *ante*, § 96, note 9.

2—C. L., § 10597.

Upon the hearing before the commissioner, the plaintiff in the attachment holds the affirmative, and is to begin the proofs. The burden of proof is on him to show the existence of such facts as justified the issuing of the writ: *Macumber v. Beam*, 22 Mich., 395; *Brown v. Blanchard*, 39 Mich., 790; *Iosco County S. B. v. Barnes*, 100 Mich., 1; 58 N. W., 606; *Genesee County Sav. Bank v. Barge Co.*, 52 Mich., 164; 17 N. W., 790. On the hearing the defendant may be examined as to his intentions, and evidence may be given that the plaintiff has been secured by collaterals: *Ibid.* On the hearing to dissolve, evidence that the defendant, a short time previous to the attachment, made an arrangement with a person to take his property under a pretended sale in order to cover the same from the de-

fendant’s creditors, and that the person took possession of it under this arrangement, is material, and should be admitted: *Parker v. Luce*, 14 Mich., 9. Where an attachment was issued upon the ground that the defendant was about to remove his property, with *intent to defraud* his creditors, the defendant’s own testimony that he was not aware at the time that he was indebted to any one is competent for the purpose of negating any *intent to defraud*, because, if he was not aware that he was indebted to any one he could not have entertained a design to defraud creditors: *Hyde v. Nelson*, 11 Mich., 353; *Dimmock v. Cole*, 130 Mich., 601; 90 N. W., 333. Where an attachment issued upon an affidavit that plaintiff had good reason to believe that defendant had absconded, etc., to the injury of his creditors, the commissioner, on an application to dissolve, found that at the time of making the affidavit the plaintiff had good reason to believe that the defendant had absconded, but that in fact the defendant *had not* absconded: *Held*, that the attachment was properly dissolved; and, further,

"The judge or commissioner shall have full power to issue subpoenas, and, if necessary, attachments, to compel the attendance of witnesses to testify in such cases, and may, in his discretion, require the party moving for such dissolution to give security for the costs of such proceedings; and may order the costs of such proceedings to be paid by the party against

that in order to maintain the attachment, it must be shown that a good and legal cause for issuing the writ existed in fact, and not merely in the belief of the plaintiff, however, well founded that belief may have been; and that the cause for issuing the writ actually exists at the time of the hearing of the application: *Folsom v. Teichner*, 27 Mich., 107; *Blanchard v. Brown*, 42 Mich., 46; 3 N. W., 246. If the petition is sustained, the officer is not only authorized to dissolve the attachment, but to order the property restored: *Price v. Reed*, 20 Mich., 74. But the petitioner cannot have a dissolution of the writ unless he continues to be the owner of the property at the time of making the application. He would not be entitled to an order of return, to himself, of property of which he was not the owner: *Macumber v. Bean*, 22 Mich., 401. Nor is the owner entitled to a dissolution unless he is also at the same time entitled to the possession of the property: *Johnson v. DeWitt*, 36 Mich., 97. This case is expressly overruled in *Drs. K. & K. U. S. Med. & Sur. Ass'n v. Post & Tribune Co.*, 58 Mich., 487; 25 N. W., 477.

Effect of dissolution.—If the attachment is dissolved before the defendant has appeared in the attachment suit, it puts an end to the suit, unless the commissioner should require him to appear to the action before dissolution. A dissolution after the defendant has appeared to the action is not a discontinuance, but the plaintiff may proceed and obtain a personal judgment against the defendant, the same as in a suit commenced by summons: *Hyde v. Nelson*, 11 Mich., 356; *Bower v. Town*, 12 Mich., 233; see, *Hills v. Moore*, 40 Mich., 210; *Gray v. York*, 44 Mich., 415; 6 N. W., 874. It is held in *Borland v. Kings-*

bury, 65 Mich., 59; 31 N. W., 620, that the writ of attachment is not in form a summons, such that personal service will give jurisdiction of the person, and that unless there is a voluntary appearance such service alone will not justify proceeding in the case to judgment if writ is dissolved; thus overruling case of *Hills v. Moore*, 40 Mich., 210. See, also, *Langtry v. Judge of Wayne Circuit*, 68 Mich., 451; 36 N. W., 211, holding the same doctrine. For a collection of the Michigan cases on the subject of the dissolution of the attachment, see, note to *Iosco Co. Sav. Bank v. Barnes*, 100 Mich., 1; 58 N. W., 606.

An order of dissolution and return will not affect or interfere with the officer's lien and custody of the property under other writs and executions: *State Bank of Fenton v. Whittle*, 41 Mich., 365; 1 N. W., 957.

Findings—Review, etc.—The commissioner's findings of facts on an application to dissolve, if supported by any evidence, are conclusive: *Sheldon v. Stewart*, 43 Mich., 574; 5 N. W., 1067. If the proceeding to dissolve is taken before the circuit judge the same rule obtains. His findings of fact are conclusive if there is evidence to support them: *Dimmock v. Cole*, 130 Mich., 601; 90 N. W., 333. The proceeding before the circuit judge may be heard at chambers: *Genesee County Sav. Bank v. Barge Co.*, 52 Mich., 164; 17 N. W., 790. Proceedings for dissolution are not superseded by rendition of judgment in the case: *Gore v. Ray*, 73 Mich., 390; 41 N. W., 329, and cases cited in the opinion. And so is his finding of no cause, when the grounds for issuing the writ are not supported by any proof: *Powers v. O'Brien*, 44 Mich., 317; 6 N. W., 679.

whom the decision shall be in the premises and may issue execution therefor, returnable in sixty days from its date.”³

§ 97. **Appeal from proceedings to dissolve.**—“Either party conceiving himself aggrieved by the determination, order or judgment of any circuit court commissioner under the provisions of this act, may appeal therefrom to the circuit court for the same county, and a return may be compelled, and the same proceedings shall be thereupon had, as near as may be, and with the like effect, as in cases of appeal from judgments rendered before justices of the peace, and costs shall be awarded and collected in the circuit court in the same manner, and on perfecting the said appeal said attachment proceedings and the levy thereunder shall be held in the same condition and of the same force and validity, as when said proceedings for a dissolution of said attachment were commenced, and the officer executing said attachment shall continue to have the same rights and duties under said attachment as regards the property attached as if said proceedings had never been commenced, and any order or judgment made by such commissioner dissolving said attachment shall have no force or effect to release the attached property from the attachment levy until the same shall be affirmed by the circuit court, if appealed from, and no such order shall be issued in any case by any commissioner until the expiration of five days after the making of the same; and the said circuit court shall also have full power and jurisdiction over said cause and proceedings, to hear and determine the same and render judgment therein, as if the said proceedings had been originally commenced before the said circuit judge thereof. And either party to said proceedings in said appeal shall, if he so elect, be entitled to have the issue in said proceedings tried by a jury as in ordinary suits in said court.”¹

3—C. L., § 10598.

The commissioner may impose costs upon the defeated party: *Linn v. Roberts*, 15 Mich., 443.

1—C. L., § 10599. Regarding this statute, Mr. Justice Campbell says: “Since the statute was so amended as to enable the circuit court, as a court, to hear such proceedings on appeal from the officer, and to have the aid of

a jury, if so desired, the original power of this (supreme) court to issue *certiorari* has been regarded as practically superseded.” The supreme court, however, has continued to review these proceedings on *certiorari*. See, *Genesee Sav. Bank v. Barge Co.*, 52 Mich., 164; 17 N. W., 790; *Carver v. Chappel*, 70 Mich., 49; 37 N. W., 879; *First Nat’l Bank v. Steele*, 81

§ 98. **When judgment may pass for plaintiff.**—"The plaintiff shall not have judgment in any such action, except in some one of the following cases, to wit:

1. "When the property of the defendants, or one of them, if there are several, shall have been attached in the county where the action is brought; or,

2. "When the defendant, or one of them, where there are several, shall have been personally served with process, or shall have appeared; or,

3. "When a garnishee shall have been summoned, who shall be found indebted to the defendant or defendants, or to have property or effects in his hands, subject to the attachment."²

"The return, that no property was found on the attachment, shall not affect the proceedings against the garnishee."³

§ 99. **Of the execution in attachment.**—The lien of the attachment upon the property taken continues until after judgment and execution regularly obtained, with the view to secure the application of the property to the discharge of the debt. It ceases on the issuing of the execution, and the elapsing of a reasonable time thereafter to make a levy. A levy must be made in the usual way, as if no connection existed between the process of attachment and the process of execution.⁴

Mich., 93; 45 N. W., 579; *Iosco Sav. Bank v. Barnes*, 100 Mich., 1; 58 N. W., 606; *Dimmock v. Cole*, 130 Mich., 601; 90 N. W., 333.

The statute giving appeals in these cases, contemplates that there shall be a hearing before the circuit court in the same manner as in other appeals on trials of fact, and anything can be shown there which could be shown before a judge or commissioner: *Drs. K. & K., U. S. Med. & Surg. Ass'n v. Post & Tribune Co.*, 58 Mich., 487; 25 N. W., 477, 480. This statute providing for review on appeal applies to proceedings before a circuit court commissioner only, and not to those before a circuit judge. Such is the language of the statute, and, see, *Cleland v. Clark*, 111 Mich., 336; 69 N. W., 653.

2—C. L., § 740. *Langtry v. Wayne*

Judge, 68 Mich., 452; 36 N. W., 211.

The plaintiff is not limited in his recovery of judgment to the amount sworn to be due in the affidavit on which the attachment issued, if by the proof a greater amount is shown to be due: *Pew v. Yoare*, 12 Mich., 16. The mere fact of taking judgment for more than is due will not dissolve the attachment, unless it was done with an intent to defraud: *Hale v. Chandler*, 3 Mich., 531.

3—C. L., § 741.

4—*Van Loan v. Kline*, 10 Johns., 131; *Sterling v. Welcome*, 20 Wend., 238. When there is no personal service of the attachment upon the defendant, and he does not appear in the suit, the proceeding is strictly against his property, and no property except that attached can be taken on the ex-

For proceedings on execution when the defendant was not personally served, see Chapter XXVII, *post*.⁵

The manner of proceeding against garnishees in attachment will be considered hereafter.

ecution. But when the defendant has been personally served, or has appeared, the proceedings in the suit are to be the same in all respects as upon the return of a summons personally served, in a suit commenced by summons; and in such case the execution may be levied upon the property of the defendant generally, as in other cases: *Bower v. Town*, 12 Mich., 230-

233. The attachment lien remains for a reasonable length of time after judgment, for the purpose of the levy of execution on the property seized: *Bushey v. Raths*, 45 Mich., 181; 7 N. W., 802. And then the execution levy relates back to the levy of the attachment, so as to hold the interest then owned by the defendant.

5—See C. L., §§ 898, 899.

CHAPTER IV.

PROCEEDINGS IN REPLEVIN ACTIONS.

OF THE WRIT.

- § 100. When replevin will lie.
- § 101. When and how issued.
- § 102. The affidavit.
- § 103. The bond.
- § 104. Content of the writ.

OF SERVING THE WRIT.

- § 105. The levy on property.
- § 106. The return.
- § 107. Alias and pluries writs.
- § 108. Of judgment.

OF THE WRIT.

§ 100. **When replevin will lie.**—In all cases not in this chapter¹ specially provided for, proceedings in replevin before a justice shall be governed by the two hundred and thirteenth and two hundred and fourteenth chapters of the Compiled Laws of eighteen hundred and seventy-one, as the case may be.²

“Whenever any goods or chattels shall have been unlawfully taken, or unlawfully detained, an action of replevin may be brought for the recovery thereof, and for the recovery of the damages sustained by such unlawful taking or detention, except in the cases hereinafter excepted.”³

1—C. L., Chap. 34.

2—C. L., § 752. See C. L., 1897, chapters 294 and 295. Those chapters are equally obligatory on justice's courts as on circuit courts: Elliott v. Whitmore, 5 Mich., 535-6; Rentschler v. Fox, 130 Mich., 499; 90 N. W., 275. Replevin will lie before a justice to recover property wrongfully taken on federal process where its value is not such as to give the federal court jurisdiction, but is such as to bring it within the justice's jurisdiction. Carew v. Matthews, 41 Mich., 576; 2 N. W., 829.

3—C. L., § 10648.

As to the form of the action, the statute recognizes no distinction between replevin for taking and that for

detaining property, but the action is, in form, in all cases, for detaining only: Trudo v. Anderson, 10 Mich., 370; Hickey v. Hinsdale, 12 Mich., 103; Le Roy v. East Saginaw Ry., 18 Mich., 234. In this state replevin is founded on an unlawful detention, whether the taking was unlawful or not: Sexton v. McDowd, 38 Mich., 148; Hickey v. Hinsdale, 12 Mich., 99. Unlawful detention being the foundation of the action, it must obtain at the commencement of the suit: Gildos v. Crosby, 61 Mich., 413; 28 N. W., 153; Eldridge v. Sherman, 70 Mich., 266; 38 N. W., 255; Adriance v. Rutherford, 57 Mich., 170; 23 N. W., 718; Pearl v. Garlock, 61 Mich., 419; 28 N. W., 155; Rose v. Eaton,

"Whenever, by any statute, executors or other persons, suing in the right of another, are authorized to maintain actions of trespass or trover, for any personal property, unlawfully taken or unlawfully detained, such persons may maintain actions of replevin for such property."⁴

"No replevin shall lie for any property taken by virtue of any warrant for the collection of any tax, assessment or fine, in pursuance of any statute of this state."⁵

77 Mich., 247; 43 N. W., 972; Colby v. Postman, 115 Mich., 95; 72 N. W., 1098; Reid, Murdock & Co. v. Ferris, 112 Mich., 693; 71 N. W., 484, and cases cited. If goods have been fraudulently disposed of or concealed to avoid the writ, replevin may be maintained though it develops that he was not in actual possession at the time the writ issued: Gildos v. Crosby, 61 Mich., 413; 28 N. W., 153; Hall v. Kalamazoo, 131 Mich., 404; 91 N. W., 615. Anything showing that the plaintiff is not entitled to possession will defeat his action: Upham v. Caldwell, 100 Mich., 264; 58 N. W., 1001. See *post*, p. 100, note 7. And it proceeds on the idea that the property is actually withheld by the defendant, and is to be taken by the officer under his process from him: Sexton v. McDowd, 38 Mich., 148-50.

Replevin is a possessory action, and the object is to enable the plaintiff to obtain the actual possession of property wrongfully detained from him at the time the action is brought; and if the property was actually in the plaintiff's possession at the time of suing out the writ, the action cannot be maintained; therefore, where an officer levied an execution upon property in the dwelling-house of the execution debtor, but claimed as exempt from execution, and made an inventory and appraisal thereof, but did not remove the same, and left the house and property as he found it, but still claiming the property under the levy, it was held that the debtor could not maintain replevin, because he still had the actual possession of the property: Hickey v. Hinsdale, 12 Mich., 99. But where, in a similar case, the officer attached exempt property, and took part of it away and locked the re-

mainder in a trunk which was left in the debtor's office where the levy was made, with the understanding with the debtor that the officer should thereby lose no rights under the levy, it was held that there was such a deprivation of possession as to enable the debtor to maintain replevin: Maxon v. Perrott, 17 Mich., 332. The plaintiff must be entitled to the possession of the property at the time the writ issues: Clark v. West, 23 Mich., 247; Hunt v. Strew, 33 Mich., 85. But the mere present right to possession is sufficient without any further valuable interest: Woolston v. Smead, 42 Mich., 57; 3 N. W., 251; Van Baalen v. Dean, 27 Mich., 104. A sale of goods made on Sunday being void, the vendor may, on a subsequent day, tender back the purchase price and replevy the property: Tucker v. Mowrey, 12 Mich., 378.

For a discussion of the law controlling the pleadings and evidence in a suit in replevin, see, *post*, §§ 649-659.

4—C. L., § 10649. Justices have jurisdiction in replevin against an administrator: Slinger Mfg. Co. v. Benjamin, 55 Mich., 333; 21 N. W., 358; 23 N. W., 25; and to recover beasts distrained: Pistorius v. Swarthout, 67 Mich., 186; 34 N. W., 547.

5—C. L., § 10651.

Although the warrant may have issued erroneously or irregularly, if on its face it gives authority to the officer to collect the tax, fine, etc., replevin cannot be sustained for property taken upon it: People v. Albany C. P., 7 Wend., 485. The provision of this section (§ 10651), "That no replevin shall lie for property taken by virtue of any warrant for the collection of any tax," etc., must be construed to apply only to cases where the property seized is

"No replevin shall lie at the suit of the defendant in any execution or attachment, to recover goods or chattels seized by virtue thereof, unless such goods or chattels are exempted by law from such execution or attachment; nor shall a replevin lie at the suit of any other person, unless he shall, at the time, have a right to reduce into his possession the goods taken or detained."⁶

The plaintiff in replevin must have a general or special property in the goods taken, and a right to their possession at the time of the taking and detention and when the writ was issued,

that of the person, or one in privity with the person, against whom the tax was assessed. There must be jurisdiction to levy the tax for which the property has been taken or replevin will lie to recover it. See *post*, § 650, note 15. *Travers v. Inslee*, 19 Mich., 98; see *Le Roy v. East Saginaw Ry.*, 18 Mich., 234; *McCoy v. Anderson*, 47 Mich., 502; 11 N. W., 200; *Hill v. Wright*, 49 Mich., 230; 13 N. W., 528; *Curtiss v. Witt*, 110 Mich., 131; 67 N. W., 1106; *Tousey v. Post*, 91 Mich., 634; 52 N. W., 57; *Whittaker v. Fuller*, 96 Mich., 141; 55 N. W., 612; *Pioneer Fuel Co. v. Malloy*, 131 Mich., 466; 91 N. W., 750. Replevin, however, will not lie for property taken by the proper officer, the tax roll and warrant being fair on their face: *Mogg v. Hall*, 83 Mich., 578; 47 N. W., 553; *Boyce v. Peterson*, 84 Mich., 490; 47 N. W., 1095; and cases cited in the opinion; *Boyce v. Stevens*, 86 Mich., 549; 49 N. W., 577; *Gray v. Flinn*, 96 Mich., 62; 55 N. W., 615; *Curtiss v. Witt*, 110 Mich., 131; 67 N. W., 1106; *Michigan Lake Superior Power Co. v. Atwood*, 126 Mich., 651; 86 N. W., 139; *Northwestern C. & L. Co. v. Scott*, 123 Mich., 357; 82 N. W., 76; *Stever v. Brown*, 119 Mich., 196; 77 N. W., 704.

6—C. L., § 10652. As to what property is exempt, see, C. L., § 10322. The execution or attachment writs do not establish rights to property against others; their force is spent in this direction when they operate to protect the officer from being held responsible as a wrongdoer: *Le Roy v. East Saginaw Ry.*, 18 Mich., 239; *Adams v. Hubbard*, 30 Mich., 104; *Gidday v. Witherspoon*, 35 Mich., 368. It is not necessary that plaintiff have more than the mere right of possession in order to maintain replevin: *Woolston v. Smend*, 42 Mich., 54; 3 N. W., 251. A human corpse is not "property" such as that the next of kin can maintain replevin for it: *Keyes v. Konkel*, 119 Mich., 550; 78 N. W., 649.

Where goods were taken in execution, they not being at the time in the possession of the debtor in the execution, but in the possession of a third person: *Held*, that the third person might maintain replevin: *Judd v. Fox*, 9 Cow., 259. And property seized in execution while in the possession of the defendant in execution, may be replevied by another who has the immediate right of possession: *Bassett v. Armstrong*, 6 Mich., 397. And so, property which is exempt, if taken on execution, may be replevied by the judgment debtor: *Hickey v. Hinsdale*, 12 Mich., 99; *Maxon v. Perrott*, 17 Mich., 332; *Durfee v. McClurg*, 5 Mich., 532, 537. A husband and wife may join in an action to recover exempt property: *Shepard v. Cross*, 33 Mich., 96.

If the judgment were void, any pretended execution issued upon it would be no execution within the meaning of the statute, which prohibits a defendant in execution from bringing replevin for the property taken upon it: *Adams v. Hubbard*, 30 Mich., 104; *Iron Cliffs Co. v. Labals*, 52 Mich., 394; 18 N. W., 121.

or he cannot maintain the action.⁷ But it is not necessary that the plaintiff should ever have had actual possession before bringing suit.⁸

At common law as a general rule, replevin would lie whenever trespass *de bonis* could be sustained;⁹ under the statute, perhaps, the correct rule would be, that it can be brought in all cases where trover could be supported.

The action can be maintained for the taking or detention of *personal chattels only*. It does not lie for things fixed to the freehold.¹⁰ When one enters and ousts the owner of land, continues in possession, cutting and removing the crops, replevin will not lie for them, although they were sown by the owner.¹¹ Several persons cannot join their several rights in this action, but each must have a separate replevy; but joint tenants, or tenants in common, may.¹²

If one part owner of a chattel sue alone, the non-joinder of the other or others may be pleaded in abatement,¹³ but not in bar.¹⁴ If he sues for a moiety only in his writ, the suit will be abated.¹⁵ One tenant in common of personal property, cannot maintain replevin against his co-tenant for such property.¹⁶ A defendant may defend asserting title in a third

7—Sharp v. Whittenhall, 3 Hill, 576; Wheeler v. Train, 3 Pick., 258; Dunham v. Wyckoff, 3 Wend., 280. Anything going to show that at the time suit was commenced the plaintiff had no right to the possession of the property, is a bar to the action: Belden v. Laing, 8 Mich., 500; Clark v. West, 23 Mich., 242; Glddey v. Altman, 27 Mich., 206; Hunt v. Strew, 33 Mich., 85; Steere v. Vanderberg, 90 Mich., 187; 51 N. W., 205. Plaintiff must recover if at all on the strength of his own title or right of possession, not on the weakness of that of the defendant: Upham v. Caldwell, 100 Mich., 264; 58 N. W., 1001; Whitney v. Hyde, 91 Mich., 13; 51 N. W., 696; Burk v. Webb, 32 Mich., 173.

8—Baker v. Fales, 16 Mass., 147.

9—But this is not universally true: Sharp v. Whittenhall, 3 Hill, 576.

10—Niblet v. Smith, 4 Term R., 504; 2 Saund. Pl. & Ev., 5 Am. ed., 669; Cresson v. Stout, 17 John., 116.

11—Demott v. Hagaman, 8 Cow., 220.

12—2 Saund. Pl. & Ev., 5 Am. ed., 770.

13—Hart v. Fitzgerald, 2 Mass., 509.

14—Wright v. Bennett, 3 Barb., 451.

15—D'Wolf v. Harris, 4 Mason, 515, 538.

But where plaintiff brought replevin for one hundred bushels of wheat, part of a larger quantity in the same bulk, to all of which he was entitled: *Held*, that the action was maintainable: Crouse v. Derbyshire, 10 Mich., 479.

16—Wetherell v. Spencer, 3 Mich., 123; Kindy v. Green, 32 Mich., 310; Kline v. Kline, 49 Mich., 419; 13 N. W., 800; Coan v. Mole, 39 Mich., 454. But as to replevin by the owner of an undivided half of property when the defendant has no interest in the other half, see, Crapo v. Seybold, 36 Mich., 444.

person without it being necessary to make such third person a party to the proceeding.¹⁷

§ 101. Writ, when and how issued.—“Whenever any plaintiff, his agent or attorney, shall make and file an affidavit with the justice, setting forth that his personal goods and chattels, not exceeding in value one hundred dollars, have been unlawfully taken, or are unlawfully detained by any other person, specifically describing such property, and giving the value thereof, and stating that the plaintiff is lawfully entitled to the possession of said property, that the same has not been taken for any tax, assessment, or fine, levied by any law of this state, nor seized under any execution or attachment against the goods and chattels of such plaintiff liable to execution, and claiming damages for the detention of the same, or taking the same, not exceeding one hundred dollars, in addition, and shall file with such justice a bond with sufficient surety or sureties, to be approved by the justice, and payable to the defendant in a penalty at least double the value of the property, as sworn to in the affidavit, and not less than one hundred dollars, with the condition prescribed in section ten of the one hundred and twenty-fourth chapter of the revised statutes of eighteen hundred and forty-six, with the justification of the sureties to said bond endorsed thereon, in writing, and to be made under oath, the justice shall issue a writ of replevin, directed to any constable of the county, commanding him to take the property described, and return the same forthwith to the plaintiff, and that he summon the defendant to appear at a time and place therein to be named, before such justice, to answer the said plaintiff concerning the unlawful taking or detention of the said goods and chattels; and, in case of the neglect or refusal of said justice to require the sureties to said bond to justify in writing, and under oath, before issuing said writ, the said writ upon motion shall be dismissed, and the property taken by virtue thereof returned to the person (persons) from whom it was taken, unless the plaintiff, on such motion being made, shall forthwith file with the justice a new bond in the form and penalty, in this act provided, with good and sufficient sure-

17—Colby v. Portman, 115 Mich., 95: 72 N. W., 1098.

ties, who shall justify their responsibility in the manner hereinbefore provided; and the justice shall be liable to the injured party in an action of trespass for any damage he may have sustained by reason of said writ having been issued."¹

§ 102. **The affidavit.**—Before issuing the writ, the plaintiff, his agent, or attorney, must make and file with the justice the affidavit required by the foregoing section. Its office is to confer jurisdiction.² It must conform in all respects to the requirement of the statute, even although the statement omitted be not strictly appropriate in the particular case, or the objection will be fatal. When in replevin by a supervisor, for an assessment roll, the affidavit did not contain a statement "that the property was not taken for any assessment levied by virtue of any law of this state," nor, "that it was not seized under any execution against the goods and chattels of the plaintiff liable to execution," the proceeding was held to be irregular. "The nature of the property replevied in this case," said the judge, "is such that the omission in the affidavit might be regarded immaterial, was it not for the positive requirements of the law, and which was expressly introduced by the legisla-

1—C. L., § 748. Section 10 of Chap. 124 of the revised statutes of 1846, is § 10657 of C. L., 1897. As to the nature of the action and when it will lie, see, *ante*, § 100.

Value of property.—The jurisdiction of the justice in replevin depends upon the value of the property as set forth in the affidavit and writ, and alleged in the declaration, and not upon the amount subsequently proved upon the trial. Under a plea of the general issue and trial on the merits, where the affidavit and declaration have alleged the value to be within the jurisdiction of the court, proof on the trial that the property exceeded one hundred dollars in value, will not oust the justice of jurisdiction, nor prevent the plaintiff's recovery: *Henderson v. Desborough*, 28 Mich., 170. For the purpose of jurisdiction, the value of the property is presumed to be correctly stated in the affidavit: *Ibid.*; *Carew v. Mathews*, 41 Mich., 579; 2 N. W., 829. But, unless the affidavit alleges the value of the property sought to be replevied, not to exceed one

hundred dollars, it will not confer jurisdiction on the court; and, although the defect for want of such statement may be waived, yet it will be fatal if duly insisted on: *Sager v. Shutts*, 53 Mich., 116; 18 N. W., 580. But as to when the defendant may have judgment exceeding \$100 for the value of the property taken, see, *Chilson v. Jennison*, 60 Mich., 235; 26 N. W., 859.

2—*Elliott v. Whitmore*, 5 Mich., 537. The allegations in the affidavit are only to be considered upon the question of jurisdiction, and cannot affect the trial on the merits: *Elliott v. Whitmore*, 5 Mich., 537; *Bloomingtondale v. Chittenden*, 75 Mich., 305; 42 N. W., 836. The affidavit is not fatally defective because not signed by the affiant: *Bloomingtondale v. Chittenden*, 75 Mich., 305; 42 N. W., 836; nor because in one place the names of plaintiff and defendant are transposed: *Churchill v. Rea*, 126 Mich., 175; 85 N. W., 465. The affidavit for the writ must show that the plaintiff is entitled to possession, and that the de-

ture to apply indiscriminately to every action of *replevin*, whether brought in a justice's court or a court of record, and they cannot be altered or in any manner disregarded by the courts.³

The affidavit must describe the property specifically,⁴ and give the value thereof,⁵ but it must not be entitled in the cause.⁶

defendant, and not a stranger, unlawfully detains it. The seizure is to be made from the actual or constructive possession of the defendant: *Sexton v. McDowd*, 38 Mich., 148.

3—*Phenix, et al., v. Clark*, 2 Mich., 327; *Dwight v. Blackmar*, 2 Mich., 330.

4—C. L., § 748.

In replevin, the process must describe the property to be taken; but this description need not be so explicit and exclusive as to supersede recourse to extrinsic help. If, with the description and such aid as the plaintiff usually affords, the officer can identify the property, it is sufficient. In the great majority of cases the description in the writ must be aided by other means of identification, and the officer must use his intelligence in ascertaining such facts as will assist him in applying the description to the property intended. *Sexton v. McDowd*, 38 Mich., 148; *Farwell v. Fox*, 18 Mich., 166. For cases holding descriptions sufficient, see, *Wattles v. Dubois*, 67 Mich., 313; 34 N. W., 672, holding that a description of wheat as of the Fultz variety when it was of the Clawson variety is not fatal when other description was good. "Sufficient of said stock (of boots and shoes fully located) to satisfy the claim of plaintiffs as mortgagees of said goods amounting to \$805," is held sufficient when plaintiffs' mortgage covered the entire stock: *Pingree v. Steere*, 68 Mich., 204; 35 N. W., 905. "A quantity of wheat, rye and oats, being one-half of the grain grown on the Simmons farm in the year 1892," is held good in *Simmons v. Robinson*, 101 Mich., 240; 59 N. W., 623. "24 Michigan Reports, one lot of books, one lot of paper and envelopes, one lot of written matter": *Burt v. Adelson*, 74 Mich., 730; 42 N. W., 278.

A description in this language: "One sewing machine and one pool table," was held sufficient in *Proper v. Conkling*, 67 Mich., 244; 34 N. W., 560. See, also, *Dillon v. Howe*, 98 Mich., 168; 57 N. W., 102; *Durrell v. Richardson*, 119 Mich., 592; 78 N. W., 650. A description may be sufficient though it require extrinsic evidence to determine the meaning of particular words: *Dages v. Brake*, 125 Mich., 64; 83 N. W., 1039.

A description of grain or other chattels defined by measurement, which is indefinite as to quantity and not otherwise made certain, as, "*a quantity of corn consisting of about 200 bushels*," and not otherwise identified, is insufficient: *Stevens v. Osman*, 1 Mich., 92; *Farwell v. Fox*, 18 Mich., 166. But the property described as "*six oxen*" has been held sufficient: *Farwell v. Fox*, 18 Mich., 166. And so, a description giving the quantity, kind and location of the property, so that no other property than that claimed can be taken, as, "*all the groceries in the store occupied by Potter on a certain lot in St. Joseph*," has been held good: *Krieger v. Warner*, 2 Mich., *nisi prius*, 229.

5—Where the property consists of several articles, it is sufficient to give the value of the whole, and not of each separately: *Root v. Woodruff*, 6 Hill, 418. Unless the affidavit alleges the value of the property not to exceed one hundred dollars, it will not confer jurisdiction upon the justice to issue the writ: *Sager v. Shutts*, 53 Mich., 116; 18 N. W., 580; see, *Henderson v. Desbrough*, 28 Mich., 170. The value as alleged in the affidavit is presumed to be the true value till subsequent proceedings show to the contrary: *Carew v. Mathews*, 41 Mich., 579; 2 N. W., 829.

6—*Milliken v. Lunt*, 3 Denio, 54.

§ 103. **The bond.**—The condition of the bond required by this, § 748, is “that the plaintiff will prosecute the suit to effect, and that if the defendant recover judgment against him in the action, he will return the same property, if return thereof be adjudged, and will pay the defendant all such sums of money as may be recovered by such defendant against him in the said action.”

§ 104. **The writ.**—Upon making and filing the affidavit and bond a writ of replevin issues, directed to any constable of the county.⁸

“Such writ shall be returnable not less than six, nor more than twelve days from the date of the same, and shall be served not less than six days before the return thereof.”⁹

OF SERVING THE WRIT.

§ 105. **The levy.**—“Upon the receipt of such writ, with the affidavit hereinbefore required, annexed, the sheriff [or constable] shall proceed to seize and take into his custody the property described therein, and for that purpose may break open any house, stable, outhouse or other building in which such property may be concealed, having first demanded de-

7—In an action against the sureties in a replevin bond, no judgment can be recovered against them for an amount exceeding the penalty in the bond and the costs of the suit on the bond: *Fraser v. Little*, 13 Mich., 195. As to suit on the bond, return of property, etc., see, *Jennison v. Halre*, 29 Mich., 207. But it seems that an action will lie upon a replevin bond only when a writ of return of the property, or other execution, is returned unsatisfied: *Scott v. Scott*, 50 Mich., 372; 15 N. W., 515. As to the sufficiency of the bond when signed by sureties only, see, *Cahill's Appeal*, 48 Mich., 616; 12 N. W., 877.

The bond remains in force until the final determination of the cause, and covers the defendant's costs in all courts, whether on appeal or *certiorari*: *Brabon v. Pierce*, 34 Mich., 39; *Monroe v. Heintzman*, 46 Mich., 12; 8 N. W., 571. If plaintiff appeals, the appeal bond does not supercede the replevin bond, but gives an additional

or cumulative remedy therto. *Brabon v. Pierce*, 34 Mich., 39. As to the filing of a new bond, see, *Hatch v. Christmas*, 68 Mich., 87; 35 N. W., 833; *Hopkins v. Green*, 93 Mich., 395; 53 N. W., 537. May be waived: *Bloomingtondale v. Chittenden*, 75 Mich., 307; 42 N. W., 836. A bond signed by a firm and one of the partners is not good: *Hopkins v. Green*, 93 Mich., 395; 53 N. W., 537. The giving of this bond does not operate to pass title to the property involved: *Lindsay v. Morse*, 129 Mich., 350; 88 N. W., 881.

8—C. L., § 748.

9—C. L., § 749. An objection that the return day is Sunday, is waived if the defendant appears, pleads to the merits, and goes to trial without objection: *Pierce v. Rehfuess*, 35 Mich., 53. Upon the question of the return day of the writ and the computation of time for the return and service, see, *ante*, § 34 and note, “*The citation*,” p. 91.

liverance thereof at the building or place where the same is concealed."¹⁰

The officer would be liable in trespass for levying on the property mentioned in the writ, if he take it from the possession, and it be the property of, one who is a stranger to the suit.¹¹ In such a case, the process will be no justification to the plaintiff in replevin, or to those who act under his authority in removing the goods. The owner of the property may have the usual remedy by action, or retake the property without process, if he can do it peaceably.¹²

"The officer shall summon the defendant according to the command of the writ, by delivering to him personally a certified copy of such writ, if such defendant can be found; and if he cannot be found, then by leaving such certified copy at his usual place of abode, with some person of proper age."¹³

10—C. L., § 10655.

It is to be observed that the statute authorizes the breaking open of a house or building to obtain the property only in case that property is concealed therein; therefore, in breaking open the building the officer acts at his peril, for if the property is not there he would be a trespasser: *Rentschler v. Fox*, 130 Mich., 498; 90 N. W., 275.

11—*Stimpson v. Reynolds*, 14 Barb., 506; *Elder v. Morrison*, 10 Wend., 128; *Cook v. Hopper*, 23 Mich., 511. But see, *Shipman v. Clark*, 4 Denio, 446, where it is intimated that the writ would protect the officer.

12—*Shipman v. Clark*, 4 Denio, 446; *Spencer v. McGowan*, 13 Wend., 256.

If the property described in the writ is found in the actual or constructive possession of a third person, who claims it, the officer cannot be required to take it without an indemnifying security from the plaintiff. Although the property may be correctly described, yet, if it is not detained by the defendant, but is claimed and apparently owned by a third person, the writ will not protect the officer if such person is the *bona fide* owner and holder: *Sexton v. McDowd*, 38 Mich., 148.

In an action against an officer for the wrongful taking of property in replevin, a special verdict in the re-

plevin suit that the property was not detained by the defendant therein is not conclusive evidence that the plaintiff in replevin was not the owner of the property: *Ibid.*

13—C. L., § 10659.

Service by leaving a certified copy of the writ with defendant's wife, it not appearing that the defendant could not be found, nor that the copy was left with her at defendant's place of abode, is not sufficient: *Wheeler v. Wilkins*, 19 Mich., 78. As to certifying, see, *Leonard v. Woodward*, 34 Mich., 514, holding failure to certify not to be fatal under the circumstances of the particular case. The proper practice on a motion to dismiss for failure to certify is to allow an alias writ to issue and complete the service: *Anderson v. Lane*, 105 Mich., 89; 62 N. W., 1027. The statute does not contemplate the service of a copy of the affidavit: *Patterson v. Parsee*, 38 Mich., 609. For illustration of defective service not necessarily fatal, see, *Fleugel v. Lards*, 108 Mich., 682; 66 N. W., 585. One who takes a special appeal and on getting adverse decision in the circuit court, then pleads the general issue waives the jurisdictional question: *Clute v. Everhart*, — Mich., —; 100 N. W., 124 (June, 1904).

The service of the writ, when the defendant is not found, should be gov-

§ 106. **The return.**—"The sheriff (or constable) shall return the writ at or before the return day thereof, with the affidavit thereto annexed, and the names of the persons who executed the bond taken by him from the plaintiff, and their places of residence; and he shall state in his return in what manner he executed the writ; and if the goods and chattels specified therein shall not have been replevied, he shall state in his return the cause thereof."¹⁴

§ 107. **Alias and pluries writs.**—If the constable has not summoned the defendant, and the property has been replevied, a summons or an alias writ may be issued, unless he shall appear, and so on until he is duly summoned.¹⁵

If the first writ was not executed at all, an *alias* writ is to be issued, and so on until the property is delivered and the defendant summoned.¹⁶

An *alias* or *pluries* writ, in form, is like the first, except that in an *alias*, after the word "*command*," insert "*as we before commanded you*," and in a *pluries*, "*as we have oftentimes before commanded you*." If the plaintiff cannot find the whole of the property, he is not bound to take any part of it except

erned, it is presumed, by the same rules as in case of the service of a writ of attachment by copy; and that it is the officer's duty to use all reasonable diligence, during all the time allowed by law for making personal service, to find the defendant and to make such service upon him; and, that service by leaving a certified copy of the writ at the defendant's usual place of abode can be made only in case the defendant cannot be found during any part of the time allowed by law for making personal service, and not until the whole time within which personal service can be made has expired. For mode of service in attachment when defendant cannot be found, see, notes to § 86, *ante*.

14—C. L., § 10661.

It is presumed that the return to a writ of replevin, when the defendant cannot be found, should be governed by the same rules as in case of an attachment served by copy: See, notes to § 92, *ante*. The return may be amended; but if not amended

is conclusive as made: *Green v. Kindy*, 43 Mich., 279; 5 N. W., 297.

15—That an alias writ may issue for no other purpose than to get service on the defendant, see, *Bell v. Judge*, 26 Mich., 414.

16—As to whether an *alias* writ may issue under the statutes of this state, see, *Maxon v. Perrott*, 17 Mich., 332. An *alias* may issue for the purpose of personal service merely where property has been seized, but no personal service obtained in the life of the original writ: *Bell v. Judge*, 26 Mich., 414. The appearance of defendant cannot be coerced by the seizure of property and the continued issuance of successive writs without expectation of service: *Lanahan v. Judge of Kent Circuit*, 106 Mich., 685; 64 N. W., 740. As to whether an *alias* writ of replevin for the sole purpose of correcting a defect in the service is authorized—*quaere*: *Chappelle v. Webster*, 122 Mich., 482; 81 N. W., 341.

at his election. But if he see fit, he may accept that part of the goods found, and, without issuing another writ, proceed in the cause for the damages for the part not found. Such was the course of proceeding in such a case at common law,¹⁷ which would also apply to a similar case under the statute.¹⁸

§ 108. **Proceedings to judgment.**—"If the goods and chattels specified in any writ of replevin shall not be found, or shall not be delivered to the plaintiff, he may proceed in the action for the recovery of the same, or the value thereof."¹⁹

"If the sheriff return to the writ of replevin that the defendant has been duly summoned in either of the modes hereinbefore prescribed, the plaintiff shall declare within the same time as in personal actions, and the further practice and proceedings in the case shall be the same as in actions begun by summons." After such a return, proceedings may be had against the defendant, as if he had actually appeared.²⁰

17—Wilk. Replev., 20 (6 Law Library). Bell v. Judge, 26 Mich., 414; Maxon v. Perrott, 17 Mich., 332; Anderson v. Lane, 105 Mich., 89; 62 N. W., 1027; Lanahan v. Judge, 106 Mich., 685; 64 N. W., 740.

18—Snow v. Roy, 22 Wend., 602.

19—C. L., § 10660; see, Hanselman v. Kegel, 60 Mich., 549-560; 27 N. W., 678; McBrien v. Morrison, 55 Mich., 353; 21 N. W., 368; Maxon v. Perrott, 17 Mich., 334.

20—C. L., § 10669. See replevin, *post*, chap. xxxix.

CHAPTER V.

PROCEEDINGS IN GARNISHMENT.

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§ 109. When garnishment authorized.—“In any action commenced before a justice of the peace, founded upon contract, express or implied, or upon judgment or decree, or after the rendition of judgment in any case, if the plaintiff, his agent or attorney, shall make and file with such justice an affidavit stating that he has good reason to believe, and does believe, that any person, naming him, has property, money or effects in his hands, or under his control, belonging to the defendant, or any or either of the defendants, in such suit, judgment or decree, or that such person is indebted to such defendant, or any or either of the defendants, the justice shall issue a summons against such person requiring him to appear before such justice at a time and place mentioned in the said summons, not less than six nor more than twelve days from the date thereof, and answer, under oath, all questions put to him touching his indebtedness to such defendant, or any or either of the defendants, naming him or them, and the property, money and effects of the defendant, or any or either of the defendants, in his possession, within his knowledge, or under his control; which summons shall be served and returned in the same manner as a summons issued against a defendant in other

cases: Provided, That any co-partnership or company doing business in this state, may be garnisheed under this act if a personal service on the resident bookkeeper, superintendent, foreman, or any resident manager of such co-partnership or company is obtained. The garnishee shall be entitled to the same fees as he would be if he were subpoenaed as a witness in such case."¹

1—C. L., § 990, as amended by Public Acts, 1901, p. 253.

The act to authorize proceedings against garnishees, being in derogation of the common law, must be strictly construed: *Maynards v. Cornwell*, 3 Mich., 309; *Ford v. Dry Dock Co.*, 50 Mich., 358; 15 N. W., 509; *Crisp v. Ft. Wayne & E. Ry. Co.*, 98 Mich., 648; 57 N. W., 1050. The proceedings are purely statutory, and cannot be extended to cases not provided for by law: *Sievers et al. v. Woodburn Sarven Wheel Co.*, 43 Mich., 275; 5 N. W., 311; *Hanselman v. Kegel*, 60 Mich., 548; 27 N. W., 678; *Crisp v. Ft. Wayne & E. Ry. Co.*, 98 Mich., 648; 57 N. W., 1050. They are in the nature of an equitable attachment of the debt or assets of the principal defendant in the hands of a third person. The object is to reach such assets and apply them in discharge of the principal debt. *Bethel v. Judge of Superior Court*, 57 Mich., 379; 24 N. W., 112. Before garnishee process can issue the plaintiff must have a judgment against the principal defendant or must have commenced suit against him upon contract, express or implied, or upon judgment: *Iron Cliffs Co. v. Lahais*, 52 Mich., 306; 18 N. W., 121.

As to when garnishee process will not lie, see *Spear v. Rood*, 51 Mich., 140; 16 N. W., 312; *Farwell v. Chambers*, 62 Mich., 316; 28 N. W., 859; *Custer v. White*, 49 Mich., 262; 13 N. W., 583; *Anderson v. Odell*, 51 Mich., 492; 16 N. W., 870; *Drake v. Lake Shore & Michigan Southern Ry. Co.*, 69 Mich., 168; 37 N. W., 70.

A purchaser of property is not liable to be garnisheed for the price until delivery, or part payment of the price, or a credit has been given therefor: *Case v. Dewey*, 55 Mich., 116; 20 N. W., 817; 21 N. W., 911; *Folkerts v.*

Standish, 55 Mich., 463; 21 N. W., 891. Nor a debtor after an oral assignment of the claim against him by his creditor: *Neumann v. Calumet & Hecla Mining Co.*, 57 Mich., 97; 23 N. W., 600.

All the proceedings in garnishment are special and statutory. They give a harsh and peculiar remedy, and ought not to be resorted to when the redress sought may be obtained through common law proceedings. And when taken, the statutory requirements must be strictly construed and followed. The proceedings are merely ancillary to the principal case, and if that is defective they go down with it: *Iron Cliffs Co. v. Lahais*, 52 Mich., 394; 18 N. W., 121; *Farwell v. Chambers*, 62 Mich., 321; 28 N. W., 859; *Segar v. Shingle & L. Co.*, 81 Mich., 344; 45 N. W., 982. An executor or administrator is not subject to garnishment under this statute for money or property in his hands for distribution: *Basom v. Taylor*, 39 Mich., 682. A register in chancery as to funds deposited with him as such is not to be reached by this proceeding: *Voorhies v. Sessions*, 34 Mich., 99. An assignee for the benefit of creditors cannot be held as garnishee of his assignor: *Cook v. Rogers*, 31 Mich., 391. Nor can a receiver be held as a garnishee: *Tremper v. Brooks*, 40 Mich., 333. A claim must be actionable at the suit of the principal defendant or it cannot be subject to garnishment: *Farwell v. Chambers*, 62 Mich., 322; 28 N. W., 859. Wages to be earned under existing contracts are subject to garnishment: *Kane v. Clough*, 36 Mich., 436. A garnishee is not justified in paying a judgment against him if judgment in the principal suit is void: *Dutcher v. Grand Rapids Fire Ins. Co.*, 131 Mich., 672; 92 N. W., 345.

The jurisdiction of a justice of the peace, in garnishee proceedings, does not depend upon the amount due from the garnishee to the principal debtor, but upon the sum claimed to be due from the latter to the plaintiff in the garnishee proceedings.²

If a debtor hold a joint contract against two or more, the creditor must summon all the parties liable to discharge it. One of two joint debtors cannot be charged as garnishee in a suit where the other debtor is not joined; therefore, a judgment rendered against one of several joint debtors as garnishee is void, and no bar to a subsequent suit against all.³

"Bills of exchange and promissory notes not due, in the hands of the garnishee at the time of the service of the summons, shall be deemed 'effects,' under the provisions of this act."⁴

2—Wetherwax v. Paine, 2 Mich., 555.

3—Wetherwax v. Paine, 2 Mich., 555. A party cannot be held alone as garnishee upon a debt owing by himself and another jointly: Wellover v. Soule, 30 Mich., 481; Ball v. Young, 52 Mich., 476; 18 N. W., 225. Nor can several persons be joined as garnishees in the same proceeding unless they are all jointly liable to the principal defendant; and this is so whether the proceedings relate to the possession of property belonging to the principal defendant or to indebtedness due to him: Ball v. Young, 52 Mich., 476; 18 N. W., 225. Nor can a debt owing to two persons be garnisheed in a suit against only one of them: Markham v. Gehan, 42 Mich., 74; 3 N. W., 262; Kennedy v. McLellan, 76 Mich., 603; 43 N. W., 641; Stone v. Dowling, 119 Mich., 476; 78 N. W., 549. Nor can a garnishee be held in a suit against joint defendants when he is indebted to only one of them: Wellover v. Soule, 30 Mich., 481; Ford v. Detroit Dry Dock Co., 50 Mich., 358; 15 N. W., 509. See, Lyon v. Balentine, 63 Mich., 97; 29 N. W., 837.

4—C. L., § 1011. The maker of a promissory note may be garnisheed thereon after its maturity, if it is owned by the principal defendant:

Somers v. Losey, 48 Mich., 294; 12 N. W., 188. As to whether the maker can be garnisheed before its maturity, under the present state of the law: *Quere. Ibid.* Formerly it was held that he could not: See, Littlefield v. Hodge, 6 Mich., 326.

Where mortgagees of chattels are in possession and selling them to satisfy their mortgage, they can be made liable as garnishees of the mortgagor only to the extent of such of the mortgaged property or the proceeds thereof as may remain in their hands after the mortgage is satisfied: Dagget Co. v. McClintock, 56 Mich., 51; 22 N. W., 105. But when the mortgage is fraudulent as to creditors, see, Cummings v. Fearey, 44 Mich., 39; 6 N. W., 98.

Personal property exempt from execution while in the hands of the principal debtor, cannot be reached by garnishment against one to whom he has assigned or conveyed the same: Anderson v. Odell, 51 Mich., 492; 16 N. W., 870; Willson v. Bartholomew, 45 Mich., 41; 7 N. W., 227.

Municipal corporations are not subject to process by garnishment. Therefore, a school district cannot be garnisheed for moneys owing by it: School District v. Gage, 30 Mich., 484.

§ 110. **The affidavit.**⁵—If the affidavit is made by the agent or attorney of the party, it is sufficient to describe him as agent, etc., in the body of the affidavit, without swearing positively to the fact that he is such agent or attorney.⁶

§ 111. **The summons.**—“The summons issued in pursuance of section 1 of this act may be substantially in the form of the ordinary justice’s summons, and need not recite either the commencement of suit by the plaintiff against the principal defendant, or any of the allegations contained in the affidavit for garnishment theretofore filed, but shall contain a command to summon the garnishee to answer in the suit in substantially the following form: ‘To answer, under oath, all questions put to him touching his indebtedness to A B, principal defendant at the suit of C. D, plaintiff herein, and the property, money, and effects of the said A B in his possession, within his knowledge, or under his control, according to the allegations contained in the affidavit of said C. D (or E. F., agent of said C D), duly made and filed in this suit.’ ”

5—The affidavit should show upon what the action is founded: *Conway v. Judge of Ionia Circuit*, 46 Mich., 28; 8 N. W., 588. If the principal suit is upon contract, the affidavit for the writ of garnishment should state whether it was brought upon an express or implied contract: *Wielmeister v. Manville*, 44 Mich., 408; 6 N. W., 859. And it should state definitely the grounds upon which the writ is applied for, whether to reach an indebtedness due to the principal defendant, or property in the possession of the garnishee belonging to him: *Ibid.* Garnishment proceedings are founded upon the affidavit. If the affidavit is insufficient there is no jurisdiction. Voluntary appearance will not confer jurisdiction: *Ettelsohn v. Insurance Co.*, 64 Mich., 334; 31 N. W., 201. As to amendment of the affidavit, see, *Wattles v. Judge of Wayne Circuit*, 117 Mich., 662; 76 N. W., 115; *Union Nat’l Bank v. Judge of Muskegon Circuit*, 117 Mich., 678; 76 N. W., 116; *Millard v. Judge of Lenawee Circuit*, 107 Mich., 134; 64 N. W., 1046. An action on a foreign judgment is an action on contract

within the meaning of the garnishment statute and an affidavit alleging that it so arises is sufficient: *Wattles v. Judge of Wayne Circuit*, and *Union Nat’l Bank v. Judge of Muskegon Circuit*, *supra*.

The statute authorizes the issuing of the writ upon two grounds: 1. The possession of property, money, goods, chattels, credits and effects belonging to the principal defendant. 2. An indebtedness to the principal defendant. These grounds are distinct, and the garnishee cannot be held on one when the affidavit and process is confined to the other, so held under C. L., § 10600, which is similar in terms, in this respect, to § 990, as amended by Pub. Acts, 1901, p. 253; *Botsford v. Simmons*, 32 Mich., 352.

6—*Wetherwax v. Paine*, 2 Mich., 555.

7—C. L., § 1015. The “section 1, of this act,” referred to, is C. L., § 990, as amended by Pub. Acts, 1901, p. 253.

A mere clerical error as to the month in the return day of the summons, is waived by an appearance and answer on the day intended; or, the summons

§ 112. **Service and return.**—The summons is to be made returnable in not less than six nor more than twelve days from the date thereof; and shall be served and returned in the same manner as a summons issued against a defendant in other cases.⁸

“The personal service of a summons upon such garnishee shall be deemed the commencement of a suit in the name of the plaintiff against such garnishee, which summons may be served in the same or adjoining county of this state, and require the appearance of such garnishee before such justice at his office in the same or any adjoining counties of this state, and a constable or sheriff of either county may serve the same: Provided, The lawful fees for travel and attendance shall be paid or tendered to such garnishee at the time of such service, and such suit may be entered on the docket as suits in other cases.’”

might be amended after answer, or the mistake be disregarded: *Wellover v. Soule*, 30 Mich., 481.

8—C. L., § 990, as amended by Pub. Acts, 1901, p. 253. As to the manner of serving and returning a summons, see, *ante*, §§ 39-47.

9—C. L., § 994. For fees to be paid or tendered, see, *post*, § 493, and notes.

Docket Entry.—The following form of entitling a garnishee suit upon the justice's docket has been held sufficient, viz. :

STATE OF MICHIGAN, } ss.
.....COUNTY. }
M....S. G...., Plaintiff,
v.
W....H. M...., Defendant.
D....J. K...., Garnishee Defendant.
P....F. D...., Plaintiff's Attorney.
Proceedings in Garnishment.
H....H. G...., Principal Defendant's
Attorney.
B....& L...., Attorneys for Garnishee.

The language of the statute that "such suits may be entered in the docket as suits in other cases." is not mandatory, but permissive: *Fasquelle v. Kennedy*, 55 Mich., 305; 21 N. W., 347.

It seems that this section providing for service "in the same or adjoining counties," upon the authority of Hebel

v. Amazon Ins. Co., 33 Mich., 400, is not applicable to suits against foreign corporations, but that service in such cases is controlled by C. L., § 1014, in which there is no provision for service beyond the county in which process issues.

There must be jurisdiction over the principal defendant through service or appearance or the garnishment proceedings will avail nothing: *Kraft v. Rath*, 45 Mich., 20; 7 N. W., 232.

Service of the summons should be made by an officer authorized to serve process: Johnson v. Delbridge, 35 Mich., 436. And for service upon a corporation, see C. L., § 1016. In order to reach a joint debt owing by two or more, in garnishment, all of the debtors must be served: Wetherwax v. Paine, 2 Mich., 555; Hirth v. Pelfe, 42 Mich., 31; 3 N. W., 239.

Process, although duly served upon the garnishee, will be of no avail, unless by due service upon, or appearance by, the principal defendant, the court obtains jurisdiction of him in the principal suit: *Kraft v. Raths*, 45 Mich., 20; 7 N. W., 232. And so the garnishee proceedings will be nugatory, if the garnishee summons is taken out and delivered for service before the garnishee has become liable to the principal defendant: *Hiltcock v. Miller*, 48 Mich., 603; 12 N. W., 871;

§ 113. **Liability of garnishee.**—"The person summoned as garnishee, from the time of the service of such summons, shall be deemed liable to the plaintiff in such suit, to the amount of the property, money and effects in his hands or possession, or under his control, or due from him, to the defendant in such suit: Provided, That when the defendant is a householder having a family, nothing herein contained shall be applicable to any indebtedness of such garnishee to the defendant for the personal labor of such defendant, or his family, to the amount of eighty per-centum of such indebtedness, but in no case shall more than thirty dollars of such indebtedness be exempt from the operation of this act, and in all cases at least eight dollars shall be so exempt: Provided, further, That in case the defendant is not a householder, having a family, nothing herebefore contained shall be applicable to any indebtedness of such garnishee to the defendant for the personal labor of such defendant to the amount of forty per-centum of such indebtedness, but in no case where the principal defendant is not a householder shall more than fifteen dollars of such indebtedness be exempt from the operation of this act, although in all cases of the description mentioned in this proviso, at least four dollars shall be so exempt."¹¹

Hopson v. Dinan, 48 Mich., 612; 12 N. W., 875.

The garnishee cannot waive process and due service upon himself, and voluntarily submit himself to the court in such a way as to bind the principal defendant, and thereby protect himself by such judgment as may be rendered against him in the garnishee proceedings: *Hebel v. Amazon Ins. Co.*, 33 Mich., 400.

10—C. L., 904. *Fasquelle v. Kennedy*, 55 Mich., 305-7.

11—C. L., § 991, as amended by Pub. Acts, 1901, p. 235. The garnishee is liable, as such, from the time of the service of the writ: *Maynards v. Cornwell*, 3 Mich., 311. And his liability depends upon the state of the claim, as one garnishable or not, at the time of service: *Martz v. Detroit Fire & Marine Ins. Co.*, 28 Mich., 204; *Bethel v. Judge*, etc., 57 Mich., 359; 24 N. W., 112. It is the duty of the garnishee to regard the exemptions of the prin-

cipal debtor and he pays the amount he may owe into court, without disclosing as to whether the debtor is a householder, at his peril: *Crisp v. Ft. Wayne & Elmwood Ry. Co.*, 98 Mich., 648; 57 N. W., 1050. The principal defendant may intervene on his own motion, in the garnishment proceedings and urge his exemptions: *McDougall v. Lamb*, 113 Mich., 69; 71 N. W., 458.

A garnishee is not liable where the garnishee process was delivered to the officer for service before the debt sought to be reached had accrued to the principal defendant: *Hitchcock v. Miller*, 48 Mich., 603; 12 N. W., 871. He cannot be held if he was not indebted to the principal defendant when the garnishee proceedings were commenced. The fact of his becoming indebted afterwards is of no avail: *Hopson v. Dinan*, 48 Mich., 612; 12 N. W., 875; *Bethel v. Judge*, 57 Mich., 381; 24 N. W., 112. As to wages to

§ 114. Garnishee neglecting to appear.—"If such garnishee neglect or refuse to appear at the time and place mentioned in such summons, and answer as aforesaid, the justice shall continue the cause to some other day; and without further showing than the officer's return, that the summons had been personally served upon the garnishee and his fees paid or tendered, issue a warrant to bring such garnishee before him."¹²

"Such warrant shall command the officer forthwith to take the body of such garnishee, and bring him before such justice, and shall contain a further command that such officer, after he shall have arrested the garnishee, notify the plaintiff of such arrest; and such warrant shall be served and returned in the same manner as warrants issued in other cases."¹³

§ 115. Examination of the garnishee.—"On the appearance of such garnishee before such justice, or on some other day to which the same may be adjourned, the plaintiff may proceed to examine the garnishee on oath or otherwise, as the plaintiff may elect, touching the matters alleged in the affidavit, and the justice shall take minutes of such examination, and file the same with the other papers in the cause. Upon such examination the garnishee shall not be deemed a witness for the plaintiff, and his answers or disclosures upon such examination may be contradicted and controverted by the plaintiff upon the trial of the issue hereinafter provided for in section ten."¹⁴

be earned, see, *Kane v. Clough*, 36 Mich., 436. Money earned on labor contract providing payment in gross sum is exempt under this statute: *Rikerd v. Lumber Co.*, — Mich., —; 98 N. W., 739 (March, 1904).

12—C. L., § 992.

13—C. L., § 993. For service and return of warrant, see, *ante*, §§ 56-68.

14—C. L., § 995, as amended by Pub. Acts, 1901, p. 235. Section "ten" referred to in this paragraph is C. L., § 999.

Minutes of the examination.—The law makes it the duty of the justice "to take minutes of such examination, and file the same with the other papers in the cause;" and, while it does not say that he shall reduce the examina-

tion to writing, yet such is its fair import, when it is considered that the disclosure is the evidence, and all the evidence that can be produced *against* him. If the justice omits to reduce material statements or admissions of the garnishee to writing, such statements or admissions cannot be proved upon the trial by the justice, or any other witness, for the purpose of creating a liability not admitted by the written disclosure. The law does not permit a justice to neglect his duty to take minutes of the disclosure, and then to testify to the disclosure made from his memory; nor does it permit him to supply any part of the disclosure from his recollection: *Isabelle v. Iron Cliffs Co.*, 57 Mich., 123; 23 N. W., 613. As to the sufficiency of the

Prior to the amendment of this section in 1901, it was held that the garnishee was to be regarded as a witness for the plaintiff, and that his disclosure was to be taken as true and could not be impeached.¹⁵ The object of this amendment and of a similar one to § 999, was evidently the overturning of this rule and the making of the trial under § 999 to proceed according to the general course of trials of issues between parties, and permit a judgment even against the disclosure of the garnishee.

"He is required to disclose, in response to the affidavit upon which the writ issued, whether he has property of the defendant in his possession or under his control, or is indebted to him."¹⁶

entry of the disclosure in the justice's docket instead of upon a separate paper and filed with the other papers, etc., see, *Watson v. Kane*, 31 Mich., 61.

15—*Maynards v. Cornwell*, 3 Mich., 312; *Isabelle v. Iron Cliffs Co.*, 57 Mich., 120; 23 N. W., 613, and cases cited in the opinion.

16—As to the sufficiency of the disclosure and the garnishee's liability thereunder, see, *Drake v. Lake Shore & Michigan Southern Ry. Co.*, 69 Mich., 168; 37 N. W., 70; *Hosley v. Scott*, 59 Mich., 420, 423; 26 N. W., 659; *Kimball v. Macomber*, 50 Mich., 362; 15 N. W., 511; *Ball v. Young*, 52 Mich., 476; 18 N. W., 225; *Lyon v. Kneeland*, 58 Mich., 570; 25 N. W., 518; *Custer v. White*, 49 Mich., 462; 13 N. W., 583; *Maynards v. Cornwell*, 3 Mich., 309. The statements of the garnishee cannot be controverted; he cannot be contradicted: *Newell v. Blair*, 7 Mich., 103. The garnishee's answers are to be regarded as true, and this principle extends to assertions made upon his belief as well as those upon his own personal knowledge: *Sexton v. Amos*, 39 Mich., 698. Nor can his statements be contradicted, or any recovery be had against him beyond his admitted liability: *Sexton v. Amos*, 39 Mich., 699. The garnishee is the plaintiff's witness: *Whitfield v. Stiles*, 57 Mich., 410; 24 N. W., 119. And cannot be contradicted by the plaintiff: *Isabelle v. Iron Cliffs Co.*, 57 Mich., 123; 23 N. W., 613. But a disclosure made by the garnishee be-

fore the justice has obtained jurisdiction in the principal case, is of no effect. And such jurisdiction subsequently obtained, will not make the disclosure of any avail: *Iron Cliffs Co. v. Lahals*, 52 Mich., 394; 18 N. W., 121; *Kraft v. Itaths*, 45 Mich., 20; 7 N. W., 232. The doctrine of the foregoing cases in this note upon the conclusive character of the disclosure would seem to be overturned by the amendments in 1901 to §§ 995 and 999, giving the right to contradict the disclosure. See Pub. Acts, 1901, p. 235.

In garnishee proceedings commenced in the Circuit Court, where the affidavit only alleged that the garnishee had *property, money and effects* in his hands, etc., it was held that the examination of the garnishee could extend only to his liability for such *property, money and effects*, and that he could not be examined as to his indebtedness to the principal debtor. And it is presumed that the same rule applies in justice's courts: See, *Mack v. Brown*, 20 Mich., 335; *Botsford v. Simmons*, 32 Mich., 352. It is the duty of the garnishee to state, with entire accuracy and distinctness, all facts that may be necessary to enable the court to decide intelligently the question of his liability: *Drake on Attachment*, § 629. He may correct or explain his disclosure on issue joined: *Barber v. Howd*, 85 Mich., 221; 48 N. W., 539. Defendant in garnishment may on appeal be permitted to file a

§ 116. **Proceedings following the examination.**—"Upon closing the examination, if the plaintiff shall have recovered a judgment against the defendant, the garnishee may, after the expiration of the time limited by law for an appeal, or stay of execution on said judgment, if no appeal has been made, or stay of proceedings put in, pay to the justice before whom the examination was had, all moneys then due and owing by him to the defendant, or sufficient to satisfy said judgment (except such as is exempt, as provided by section two of this act), and thereupon such justice shall execute and deliver to the garnishee a release and discharge for the amount paid, and enter such discharge upon his docket, or the plaintiff may immediately declare against the garnishee, in the manner provided by section ten of this act, and the like proceedings shall be had as upon a suit brought against the debtor; but if a suit be pending and undetermined between the plaintiff and the

plea and show his disclosures before the justice to have been mistaken and that his indebtedness was to another than the principal defendant: *Gerow v. Hyde*, 131 Mich., 442; 91 N. W., 615. Garnishee defendant may waive further examination by acknowledging indebtedness to amount of the judgment in the principal suit: *Barber v. Howd*, *supra*. It is the duty of the garnishee to set forth in his disclosure the true condition of the liability. His admission of a liability different from the true one, or one that does not exist, may authorize a judgment against him, but binds no one else: *Hirth v. Pfeiffe*, 42 Mich., 31; 3 N. W., 239. He should answer every pertinent interrogatory so far as he is able, if not in his power to do so fully: *Drake on Attachment*, § 630; *Shaw v. Bunker*, 2 Metc., 376. If he be in doubt whether under an existing state of facts he is chargeable, he should state all the essential facts with minuteness and precision, and leave it for the court to decide the question of his liability. And for his own protection, he should state in his disclosure every fact within his knowledge which has destroyed the relation of debtor and creditor, previously existing between him and the defendant: *Drake on Attachment*, §§ 630, 632. But he cannot in his

answer be allowed to make allegations which have the effect of changing the terms of a written contract under which he appears to be a debtor to the defendant: *Ibid.*, § 631, citing *Field v. Watkins*, 5 Ark., 672. To ascertain the liability of the garnishee, almost every variety of question bearing upon this point may be propounded, and an answer required; the limit to such examination seems to rest in the discretion of the court: *Drake*, § 641; *Worthington v. Jones*, 23 Vermont, 546; *Knapp v. Levanway*, 27 *Ibid.*, 298. But the interrogatories must be confined to such matters as the law contemplates as the ground of the garnishee's liability: *Lyman v. Parker*, 33 Maine, 31; *Mack v. Brown*, 20 Mich., 335. Nor can any attorney, as garnishee of his client, protect himself, on the ground of privileged communications, from disclosing the effects of his client in his hands: *Drake*, § 648, citing *Comstock v. Pale*, 18 La., 479. It is not permissible to receive and retain such parts of a garnishee's disclosure as tend to charge him, and to exclude and deny such parts of it as tend in the other direction. The whole disclosure must be taken and construed together, and the proper result be deduced therefrom: *Sexton v. Amos*, 39 Mich., 699.

defendant, the cause shall be continued, but it shall not be necessary to adjourn the same to any day certain; and nothing in this amendment shall be construed as to in anywise interfere with the provisions of section fourteen, of the act of February twenty-eight, eighteen hundred and forty-nine, relative to costs in proceedings against garnishees.'"¹

§ 117. What deemed a discontinuance against garnishee.—
 "If the plaintiff fail to recover judgment against the defendant in the cases mentioned in section seven of this act, or if the defendant pay the judgment rendered in such case, or stay the execution thereon within the time, and in the manner prescribed by law, it shall in either case be deemed a discontinuance of all proceedings against the garnishee.'"²

1—C. L., § 996. The section 2 referred to, is C. L., § 991; amended, Pub. Acts, 1901, p. 235; the section 10 named, is C. L., § 999; and the section 14, of the Act of February 28, 1849, is C. L., § 1003.

When the garnishee proceedings are dropped after disclosure, and never carried to judgment, any payments made by the garnishee to the plaintiff are at his peril: *Hitchcock v. Miller*, 48 Mich., 608; 12 N. W., 871. And payment by the garnishee to the justice of the amount of the judgment rendered against him, when the judgment against the principal defendant was void for want of jurisdiction, cannot be protected or bar a suit against the garnishee for the money so paid: *Laidlaw v. Morrow*, 44 Mich., 547; 7 N. W., 191. But when a promissory note or other demand past due, and held by or owing to the principal defendant, has been garnisheed, then after disclosure made and a valid judgment against the principal defendant, the garnishee will be protected in paying it to the justice without waiting for a judgment against himself: *Somers v. Losey*, 48 Mich., 294; 12 N. W., 188.

Money paid by the garnishee to a justice to be applied on a judgment against the principal defendant, cannot be applied by him to the payment of any other judgment against the same party: *McDonald v. Lewis*, 42 Mich., 135; 3 N. W., 300; *Dane v. Holmes*, 41 Mich., 661; 3 N. W., 169.

See, *Barber v. Howd*, 85 Mich., 223; 48 N. W., 539.

2—C. L., § 1000. The section 7 here referred to is C. L., § 996; see, *Isabelle v. Iron Cliffs Co.*, 57 Mich., 123; 23 N. W., 613.

The failure of the garnishee plaintiff to appear on the return day of the summons to show cause, will also operate as a discontinuance of the proceedings: See C. L., § 836. And no subsequent appearance of the plaintiff and garnishee, either voluntarily or in obedience to a second summons, to show cause, will re-instate or revive the cause so as to affect any prior rights acquired by third persons: *Johnson v. Dexter*, 38 Mich., 695. But a voluntary appearance of both the parties after such a discontinuance would, probably, as between themselves, be a waiver of the statutory nonsuit: *Ibid*. And if the garnishee's disclosure shows that he has no effects of the principal defendant, and is not indebted to him, the proceedings are at an end: *Maynards v. Cornwell*, 3 Mich., 312; *Lorman v. Phoenix Ins. Co.*, 33 Mich., 65; *Hackley v. Kanitz*, 39 Mich., 398; *Spears v. Chapman*, 43 Mich., 541; 5 N. W., 1038; *Weirich v. Scribner*, 44 Mich., 73; 6 N. W., 91.

A failure to recover judgment against the principal defendant operates as a discontinuance of the garnishee proceedings: *Bethel v. Judge*, etc., 57 Mich., 379; 24 N. W., 112. The garnishee defendant is not released, however, where the plaintiff ap-

§ 118. Second summons against garnishee.—"After the final determination of the suit against the defendant, in the case mentioned in the preceding section, and at any time within thirty days after such final determination of the suit, and in cases of garnishee proceedings commenced after the rendition of a judgment against the defendant therein, within thirty days after the closing of the examination in such garnishee proceedings, the justice shall, at the request of the plaintiff, his agent or attorney, issue a summons against the garnishee, commanding him to appear before the justice to show cause why a judgment should not be rendered against him."³

peals from the judgment in the principal suit until the appeal is finally determined in favor of the appellee: *Erickson v. Duluth S. S. & A. Ry. Co.*, 105 Mich., 415; 63 N. W., 420. No judgment can be taken against the garnishee until judgment has been taken against the principal defendant: *Iron Cliffs Co. v. Lahals*, 52 Mich., 396; 18 N. W., 121; *Laidlaw v. Morrow*, 44 Mich., 547; 7 N. W., 191. Payment into court by the garnishee, without regarding the exemptions of the principal defendant, is at the garnishee's peril: *Crisp v. Fort Wayne & E. Ry. Co.*, 98 Mich., 651; 57 N. W., 1050.

3—C. L., § 997. The preceding section in this section referred to, is C. L., § 996.

A valid judgment against the principal defendant is necessary in order to authorize and support subsequent proceedings under this § 997, or any judgment against the garnishee: *McCloskey v. Judge of Wayne Circuit*, 26 Mich., 100; *Laidlaw v. Morrow*, 44 Mich., 547; 7 N. W., 191; *Arno v. Wayne Circuit Judge*, 42 Mich., 375; 4 N. W., 147.

No judgment can be rendered against the garnishee until after judgment in the principal cause; and not then until after he has been summoned to show cause why judgment should not be rendered against him, unless he voluntarily appears and consents that such judgment may be taken: *Iron Cliffs Co. v. Lahals*, 52 Mich., 394; 18 N. W., 121. But the garnishee, after his disclosure, may waive second process and declaration against himself, and

also proof of indebtedness of the principal defendant to the plaintiff in garnishment. Thus, where about a year after judgment against the principal defendant, a garnishee process was taken out and served upon B. as a debtor of the principal judgment debtor, whereupon, on the return day of the garnishee summons, B., the garnishee, went with the plaintiff in the garnishee suit before the justice, and B. then subscribed before the justice on the docket, that he (B.), as garnishee of the principal defendant, was indebted to the garnishee plaintiff, and authorized the justice to enter judgment against himself (B.) as garnishee, and in favor of the garnishee plaintiff, and the justice did so: *Held*, that B. thus waived second process, declaration and proof that the principal defendant owed the plaintiff in garnishment, and that the judgment against B. was authorized and valid: *Bigalow v. Barre*, 30 Mich., 1. Defendant in garnishment is not entitled to the second summons to show cause where the judgment in the principal case has been rendered, and the time for staying execution and for appeal has passed, but the plaintiff may declare against him at once: *Elsner v. Rommel*, 98 Mich., 77; 56 N. W., 1107. A summons to show cause issuing seventy-four days after the rendition of judgment in the principal suit, there having been no continuance of the cause, will not sustain a judgment against the garnishee though he appeared and pleaded to the merits: *Heritage v. Armstrong*, 101 Mich., 86; 59 N. W., 439. The period of 30 days

“Such summons shall be made returnable not less than three nor more than ten days from the date thereof, and shall be served at least two days before the time of appearance mentioned therein.”⁴

§ 119. **Pleadings, trial, appeal, etc.**—“In all cases where a judgment has been rendered against the defendant, and also after a final determination of the suit pending against the defendant, as mentioned in section seven of this act, and the garnishee has been duly summoned to appear and show cause, the plaintiff may declare against the garnishee for the property, moneys and effects above mentioned, in trover; or if the garnishee be indebted to the defendant, for moneys had and received, or if the garnishee shall have property, moneys and effects of the defendant in his possession, and shall also be indebted to the defendant, the plaintiff may declare in trover, and add thereto a count for moneys had and received, and may give the special matter in evidence; and the garnishee may plead thereto, and issue may be formed and tried as if the defendant had brought such suit against the garnishee for the matters set forth in such declaration, and either party shall be entitled to an appeal or other process, as in other cases. The answers or disclosure of the garnishee made as in this act provided shall not be conclusive of the truth of the matters therein set forth, but upon the trial of any issue between the plaintiff and the garnishee, the plaintiff may introduce evidence to contradict, or otherwise controvert, the truth of the said answers or disclosure.”⁵

referred to in this statute is to be reckoned from the entry of judgment and not from the expiration of the time for appeal: *Kayser v. Farmer's & M. Bank*, 115 Mich., 688; 74 N. W., 181. It is the duty of the justice to issue this summons against the garnishee upon request of the plaintiff made within the thirty days, though the plaintiff may not have appeared at the time of the disclosure: *Hyde v. Chadwick*, 132 Mich., 270; 93 N. W., 616.

4—C. L., § 998. For service and return of summons, see, *ante*, §§ 39-47.

5—C. L., § 999, as amended by Pub. Acts, 1901, p. 236. The section 7 re-

ferred to, is C. L., § 996. It is not necessary that plaintiff should elect to declare in either trover or assumption. He may do both at the same time: *Peninsular Stove Co. v. Judge of Wayne Circuit*, 85 Mich., 400; 48 N. W., 549. The principal defendant has the right, at least in the absence of objection by the garnishee, to intervene and urge the exemption of the property in the hands of the garnishee: *McDougall v. Lamb*, 113 Mich., 69; 71 N. W., 458. The language of this statute enables the garnishee to make any defence which he might make if the action were one against him by the principal defend-

The declaration against the garnishee, whether for property in his hands, or upon his indebtedness to the defendant, must be predicated upon his disclosure.⁶

There may be such a disclosure by the garnishee as will render a further inquiry necessary, and an adjudication to determine his liability, or its extent, as well as to protect him against subsequent litigation.⁷ And where the garnishee has property in his hands, it may sometimes be desirable to prove its value.

And it seems that upon the trial the garnishee may make other and further statements for the purpose of showing that he is not liable, and may correct any statement made by him in his disclosure, by mistake or inadvertence, as, that by mis-

ant—the defenses of recoupment and set-off are available. See, *post*, § 131.

After service of the summons to show cause and before pleading, the garnishee has the right to make a further and supplemental disclosure: *Drake v. Lake Shore & Michigan Southern Ry. Co.*, 69 Mich., 168; 37 N. W., 70. And before judgment can be rendered against him, judgment must have been rendered against the principal defendant: *Iron Cliffs Co. v. Lahals*, 52 Mich., 396; 18 N. W., 121. And no judgment can be rendered against him except upon the liability admitted in his disclosure: *Isabelle v. Iron Cliffs Co.*, 57 Mich., 123; 23 N. W., 613. *Contra*, since amendment of 1901: Pub. Acts, p. 235. Nor can judgment be rendered against him unless it will discharge him to the extent of such judgment from liability to the principal defendant: *Hamilton v. Rogers*, 67 Mich., 135; 34 N. W., 278.

6—*Maynards v. Cornwell*, 3 Mich., 813. Upon the trial of the issue on the hearing of cause the burden of proof is upon the plaintiff to make out a *prima facie* case: *Spears v. Chapman*, 43 Mich., 541; 5 N. W., 1038.

If the disclosure is ambiguous, leaving it uncertain whether any indebtedness exists or if so, to whom, and the case rests substantially upon that, the plaintiff must fail: *Spears v. Chapman*, 43 Mich., 541; 5 N. W., 1038; *Walker v. Detroit, Grand Haven & Milwaukee Ry. Co.*, 49 Mich., 448; 13 N. W., 812. Therefore the gar-

nishee's disclosure admitting possession of property which he had received from the principal defendant, but which he had since been told had been sold to another, does not show him liable: *Sexton v. Amos*, 39 Mich., 695; see, *Lyon v. Kneeland*, 58 Mich., 570; 25 N. W., 518. But the liability of a garnishee who admits an indebtedness to the principal defendant, is fixed by his disclosure: *Somers v. Losey*, 48 Mich., 294; 12 N. W., 188. And whatever the disclosure admits, may be taken by the plaintiff as established: *Allen v. Hazen*, 26 Mich., 142; *Sexton v. Amos*, 39 Mich., 697-8.

Appeal—Certiorari.—The plaintiff, as well as the garnishee, may appeal: *Newell v. Blair*, 7 Mich., 106. The appeal or *certiorari* of the garnishee suit must be separate from an appeal or *certiorari* in the suit against the principal defendant; an appeal or *certiorari* in the latter will not carry up the garnishee proceedings for review: *Withington v. Southworth*, 26 Mich., 381. The disclosure taken before the justice, and reduced to writing, is competent evidence on the appeal. Further evidence may be taken in the Circuit court in corroboration of the garnishee's statement before the justice. The garnishee may be examined on the appeal for a fuller disclosure, and he may there make corrections in his statements made in the court below: *Newell v. Blair*, 7 Mich., 106.

7—*Maynards v. Cornwell*, 3 Mich., 309, 313.

take he had overstated the amount of money in his hands; so, if in his disclosure he should admit effects in his hands as belonging to the defendant, yet it would be contrary to the intent of the law to hold him responsible if he should afterwards ascertain and offer to prove on the trial that the ownership was not where he supposed it to be.⁸

On the trial before the justice, the garnishee may avail himself of the statute of limitations, the same as he might do if sued by the defendant for the debt.⁹

§ 120. **Judgment, execution, etc.**—"Judgments rendered against a garnishee under the provisions of this act, shall have the same force and effect as they would have under existing laws, if such defendant had been named as plaintiff therein."¹⁰

"If judgment be rendered against the garnishee, the justice may issue execution thereon, as in other cases; such execution may be directed to the sheriff, or any constable of the county where such justice resides, or to the sheriff or any constable of any county in this state, and may be fully executed in the county to which it is directed; but if the body of such garnishee be taken in such execution, he shall be committed to the jail of the county in which he resides."¹¹

"Judgments against garnishees may be stayed in the same manner, and with like effect, as in other cases."¹²

"If the garnishee shall, on demand, deliver to the officer having such execution all the property, money and effects in his possession or under his control, belonging to the defendant, and pay all moneys found to be due from him to the defendant at the time the suit was commenced against him, or so much of the money, property or effects as may be necessary to satisfy such execution, then the costs which may have accrued against such garnishee shall be paid out of the property, moneys and effects so paid over or delivered to such officer."¹³

8—*Newell v. Blair*, 7 Mich., 106-107; the justice: *Barber v. Howd*, 85 Mich., 221; 48 N. W., 539.
Gerow v. Hyde, 131 Mich., 442; 91 N. W., 615.

In the case of *Newell v. Blair* it was held, that on an appeal in the garnishee cause, the plaintiff, on the trial in the circuit court, may examine the garnishee fully as to his liability; and there would seem to be no good reason why such further examination might not be had on the trial before

9—*Hazen v. Emerson*, 9 Pick., 144.

10—C. L., § 1008.

11—C. L., § 1001. See upon the service and return of executions, *post*, §§ 521-552.

12—C. L., § 1002. See upon stay of execution, *post*, §§ 512-520.

13—C. L., § 1003.

"The officer having such execution shall endorse all moneys received from such garnishee, and a description of all property or effects delivered to him by the garnishee; and such delivery or payments shall be deemed a delivery or payment to the defendant in such suit."¹⁴

"Upon the return of such execution so endorsed, the same shall be entered on the docket of the justice as fully as such return appears upon such execution, and such entry or a transcript thereof shall be prima facie evidence of the facts therein stated."¹⁵

"Whenever the garnishee shall pay or deliver to the officer having such execution any property which may be sold on an execution by existing laws, the officer shall proceed to levy upon and sell the same at public auction or vendue, as in other cases, and if the garnishee shall deliver to such officer any notes, bills, bonds, or other choses in action, the officer shall return the same to the justice, to be retained in his hands for the use of the plaintiff, and the plaintiff may sue and collect the same, or so much thereof as may be necessary to pay the judgment against the defendant, and the costs. The balance, if any, shall be returned to the garnishee or the defendant. All bills, bonds, notes, accounts and other choses in action received or delivered under the provisions of this section, shall be taken subject to all liens, set-offs, rights, liabilities and equities existing between the original parties thereto."¹⁶

"If the garnishee pay to the officer having such execution any bank note or bill, the same shall be paid over to the plaintiff at the par value thereof, if he will accept the same; if not, it shall be sold in the same manner as other personal property."¹⁷

§ 121. Suit by defendant against garnishee.—"No suit shall be maintained or recovery had by such defendant against the garnishee for the amount of money sworn, proved or admitted to be due from such garnishee to the defendant, or for the property, or the value thereof, money or effects in the hands

14—C. L., § 1004.

15—C. L., § 1005.

16—C. L., § 1006.

A debtor's property exempt from ex-

ecution, is also exempt from garnishee process at the election of the debtor; *Wilson v. Bartholomew*, 45 Mich., 41; 7 N. W., 227.

17—C. L., § 1007.

of such garnishee as aforesaid, while such proceedings is pending."¹⁸

"The preceding section shall not be so construed as to prevent such defendant from prosecuting for and recovering of such garnishee any other or further sum of money due from such garnishee, or the possession, or value of any other property or effects in the hands of such garnishee, belonging to such defendant."¹⁹

§ 122. Demands not due.—"If it shall appear upon any examination or trial had under the provisions of this act, that any sum or sums of money is or are owing and payable from the garnishee to the defendant at some future time or times, it shall be the duty of such court, after such examination, or the rendition of the verdict (if a trial by jury is had), and after the trial (if the cause is tried by the court), to note the time or times when the sum or sums of money mentioned in this section shall become due and payable, and shall thereupon continue the cause until after the time or times so noted."²⁰

18—C. L., § 1009. A landlord is not entitled to sue to recover possession of leased premises for non-payment of rent during the pendency of garnishment proceedings against the tenant by the landlord's creditor: *O'Conner v. White*, 124 Mich., 22; 82 N. W., 664. The rule requiring the pendency of another suit to be pleaded in abatement and not in bar, applies as well where the prior suit is a garnishee proceeding as in other cases; this § 1009 does not make garnishee proceedings an exception to the general rule: *Near v. Mitchell*, 23 Mich., 382.

If the garnishee is sued by the principal defendant after the commencement of garnishee proceedings against him, he may plead the pendency of such proceedings in abatement of the suit: *Grosslight v. Cresup*, 58 Mich., 531; 25 N. W., 505.

If a garnishee having notice or knowledge that the debt or demand owing by him to the principal defendant has been assigned by such defendant to a third person before service of the writ of garnishment, and conceals or fails to mention such assignment on his disclosure, but admits that he still owes the debt to the prin-

cipal defendant, and thereby allows judgment to be rendered against him in favor of the garnishee plaintiff, such judgment, or any payment by him of the debt to the justice, will be no defense to an action by the assignee for the recovery of the assigned debt or demand: *Tabor v. Van Vranken*, 39 Mich., 793. Nor can such former recovery by the plaintiff in garnishment be shown under the general issue in a suit by the assignee to recover the demand: *Ibid*.

19—C. L., § 1010.

20—C. L., § 1012. The justice loses jurisdiction to render judgment against the garnishee under this and the following sections, being §§ 1012 and 1013, if the adjournment provided for in § 1012 is not had: *Heritage v. Armstrong*, 101 Mich., 85; 59 N. W., 439.

It seems that in order to hold a garnishee for a debt or obligation payable in the future, there must be a present valid obligation to pay when the time arrives, without any contingency; for if his obligation to pay depends only upon a contingency which may or may not happen, he is not liable. Thus, shippers of a cargo under contract with the owner of the ship

“After the said sum or sums of money become due and payable as mentioned in the preceding section, the justice or court shall, at the request of the plaintiff, issue a summons against the garnishee as mentioned in section eight of this act, returnable in the same time, and the same proceedings shall be had thereon, and with the like effect, as if the said sum or sums of money had been due and payable at the time of the service of the summons”.²¹

§ 123. When effects or demands garnisheed, are claimed by a third person.—“When the examination or disclosure of the garnishee shall disclose that any other person or corporation than the defendant claims in whole or in part the money, property, or indebtedness due by him, or in his possession, and the name and residence of such claimant, the garnishee may deliver such money, property or indebtedness to the justice, who shall cause to be served on such claimant a written notice to appear in said court and maintain his said claim; such notice shall contain the name of the parties to the principal and garnishee suits, the name and place of residence of the justice, the return day or adjourned day of the garnishee suit, and the substance or a copy of the disclosure, and shall be served at least ten days before the return or adjourned day of the garnishment suit; the notice may be served in the same or any adjoining county; in other respects it shall be served in the same manner as summonses from justices’ courts; for the purpose of giving an opportunity of serving the notice above provided, it shall be the duty of the justice, on the return day of the garnishment suit, if requested by the garnishee, to adjourn such suit not less than ten or more than thirty days. After the service of such notice, and the payment or delivery

that he should have a share of the net profits arising on the cargo, were held not liable as garnishees of the owner until the termination of the voyage, as it was altogether contingent whether anything would ever be due to the owner: *Davis v. Ham*, 3 Mass., 33; and see, *Thorndike v. DeWolf*, 6 Pick., 122, 123. And so, where consignees of goods to be sold for the owner received and sold them for him on credit, and guaranteed the

payment thereof by the owner, were held not liable as garnishees of the owner before the credit expired, because the purchasers were the debtors to the owner, and the liability of the consignee to the owner was contingent upon the non-payment by the purchasers: *Tucker v. Ellisby*, 12 Pick., 25; as to wages not yet due, see, *Ibid.*, 105; *Kane v. Clough*, 36 Mich., 436.

21—C. L., § 1013.

to the justice of the money, property, or indebtedness, as above provided, the garnishee shall be discharged from all liability to any person in respect to the money or property so paid or delivered; and the proof of the service of such notice filed in the suit, and the certificate or docket entry made by the justice of such payment or delivery, shall be prima facie evidence of the facts stated therein. The claimant shall appear in the suit on the return or adjourned day named in the notice served upon him as aforesaid, and in default thereof judgment shall be rendered against him in respect to his claim. The defendant or defendants so notified shall be considered as defendants in the place and stead of the garnishee, and an issue may be formed between the plaintiff and such defendants in the same manner as provided in section ten of act number one hundred and thirty-seven of the session laws of eighteen hundred and forty-nine, being section eight thousand and forty of Howell's Annotated Statutes of eighteen hundred and eighty-two; the issue may be tried by the justice or by a jury, as in other cases, and such judgment shall be rendered between the parties as shall be just, and such substituted defendant or claimant shall have the same right to appeal as the original garnishee: Provided, That this section shall not be operative when the answer of the garnishee shall disclose that such claimant does not reside in the county where such disclosure is made, or in any adjoining county; nor in case such claimant is a corporation and its principal place of business is not in the same or any adjoining county.'²²

§ 124. Corporations as garnishees.—"All corporations of whatsoever nature, whether foreign, domestic, municipal or

22—C. L., § 1017. The section 8040 of Howell's annotated statutes is C. L., § 909. The purpose of this statute, § 1017, is that the claimant shall be brought before the court, so that in whatever judgment may be rendered against the principal defendant, or in the application of the money which shall be paid into the hands of the justice to the extinguishment of the claim against the principal defendant, the claimant of the fund thus cited in shall be concluded: *Pecard v. Home*

& Co., 91 Mich., 346; 51 N. W., 891.

See, also, *Stone v. Dowling*, 119 Mich. 476; 78 N. W. 549. Where a garnishee discloses that another claims money in his hands, and deposits the money with the justice, the garnishee is relieved from liability to such third person, though the garnishee colluded with the plaintiff to bring the suit, and though the third person had brought trover for the money: *Bryant v. Wilcox*, — Mich. —; 100 N. W. 918 (Oct., 1904).

otherwise, except counties, may be proceeded against as garnishees in the same manner and with like effect as individuals under the provisions of this act, and the rules of law regulating proceedings against corporations, and the summons against the garnishee in such case may be served on the president, cashier, secretary, treasurer, comptroller, or other principal officer of such corporation, and it shall be the duty of such officer so served, or the proper officer of such corporation having knowledge of the facts, to appear before the justice at the return day of the summons and answer thereto, or to answer at his option in writing, verified by his oath, before some person authorized to administer oaths, and transmit the same, by mail or otherwise, to the justice issuing said summons, on or before the return day thereof, which shall be deemed a sufficient compliance with such summons; and unless he shall so appear or so answer, such corporation shall be held to be indebted to the defendant in the original suit, to the amount of any judgment that may be made against such defendant in said original suit, unless within three days after the return day of such summons such corporation shall, by such officer, show a sufficient reason to the satisfaction of the justice for non-appearing to answer such summons, and the justice shall thereupon, on the third secular day, render judgment against such corporation, as against other garnishees for the amount of such debt, and with like effect; but on such cause shown, such officer may be examined as other garnishees, and with like effect, as against the corporation he represents. Such corporation or the plaintiff in such suit may appeal from such judgment rendered under this section to the circuit court of the proper county, in the same manner as appeals may be taken from any other judgment of a justice of the peace, where the liability of such corporation may be fully inquired into: Provided, That when a municipal corporation is proceeded against, as provided for in this act, judgment shall have been obtained in a court of competent jurisdiction by the plaintiff against the defendant before garnishment proceedings shall be valid against such municipal corporation: Provided, further, That it shall be necessary for the plaintiff in the action to cause to be served a notice in writing upon the

clerk, treasurer, or comptroller of such municipal corporation, signed by the justice of the peace before whom an action of garnishment has been commenced, stating that judgment has been rendered and is on file in favor of the plaintiff and against the defendant; that the plaintiff has filed an affidavit to that effect, and that he believes or has good reason to believe that such municipal corporation is indebted to the defendant, and has money, property or effects in its hands belonging to such defendant, and that such municipal corporation shall hold such money, property or effects until the final disposition of the action or garnishment then pending before such justice, unless sooner released by the justice. Such corporation receiving the notice, herein provided, shall hold any money, property or effects in its hands belonging to the defendant named in such notice until the final disposition of the action against said municipal corporation, unless sooner released by order of the justice. Such money may be released by the defendant giving a bond in double the amount claimed to be due by the plaintiff in the action then pending, conditioned that if the plaintiff recover, the bondsmen will pay into court for the use of said plaintiff the amount of such judgment and costs, such bond to be approved by the justice. The plaintiff in such original action against the defendant shall cause to be filed with the treasurer of such municipal corporation, at the time of service of the notice aforesaid, a certified copy of the judgment, whereupon such municipal corporation shall be liable to the judgment creditor for the amount of such judgment. The filing of such judgment shall constitute a lien upon any money, property or effects that such municipal corporation may have in its hands, belonging to the defendant in such action, and such municipal corporation shall be required to make disclosure, the same as in garnishee proceedings, and such further action shall be had under the law now provided for in garnishee proceedings, after the service of a summons, and any reference hereafter made relative to garnishee shall include and be construed to mean municipal corporations, after a filing of a certified copy of the judgment as hereinbefore provided:

Provided, further, That when such corporation shall wish

to appeal, in cases where they have not answered as garnishees, they shall, in addition to the other requirements of law, file with the justice a full and complete answer, in writing, as such garnishees, verified by the oath of one of the officers having knowledge of the facts; which said officer shall also answer under oath all questions put to him by such justice relating to the matter of such suit, and whereupon the said justice shall, within the time required for making such return of such appeal, at the option of the plaintiff, either make such return or set aside the judgment rendered against such corporation, by entry thereon upon his docket, and across the face of such judgment, in which event said corporation, if they have not already paid all costs in such suit, shall be liable for the same: Provided, further, That in the Upper Peninsula garnishee process under this act may be served on the clerk of all companies organized under the general mining laws of the state of Michigan, as well as on other officers thereof mentioned in this section.' '23

23—C. L., § 1014. As amended by Public Acts, 1903, p. 97.

School districts are clearly municipal corporations under the laws of this state, and cannot waive objection to a justice's jurisdiction in garnishment: *School District v. Gage*, 39 Mich., 484; *Seeley v. Board of Education of Port Huron*, 39 Mich., 486. The garnishee cannot, by submitting to a jurisdiction not given by the statute, waive or prejudice the rights of the principal defendant: *Seeley v. Board of Education of Port Huron*, 39 Mich., 484; and see, *Johnson v. Dexter*, 38 Mich., 605. It is to be noticed that this section as it now stands authorizes garnishment proceedings against *municipal* corporations (except counties), as against others. A suit against an officer of the municipal corporation, who is the proper custodian of the money or property of the municipality, is a suit against the corporation: *Smith v. Woolsey*, 22 Ill. App., 185; *Triebel v. Colburn*, 64 Ill., 376. The person making the disclosure is described therein as the "assistant treasurer" of the garnishee defendant; held, to show sufficient authority to make it: *Whit-*

worth v. Detroit L. & N. Ry. Co., 81 Mich., 98; 45 N. W. 500. The provision for transmission of the disclosure is upheld in *Whitworth v. Detroit L. & N. Ry. Co.*, *supra*. Costs cannot be taxed against a successful garnishee defendant on appeal: *Winne v. Judge of Wayne Circuit*, 74 Mich., 329; 42 N. W. 279.

The terms, "general or special agent," as used in this § 1014, in designating the persons or officers upon whom the garnishee summons may be served, are very indefinite; but employed as they are here in association with terms designating the principal officers of the corporation, they evidently intend agents who either generally or in respect to some particular department of the corporate business have a controlling authority, either general or special. Every servant of the company is in a sense an agent; but these terms do not mean every man who is entrusted with a commission or employment. Hence the return of service of a summons upon an agent must show that he is such an agent as is contemplated by the statute; otherwise the justice will acquire no jurisdiction over the com-

§ 125. **Service of process on corporations.**—"Any process, notice, or writing issued by a justice of the peace against any corporation, may be served in the manner prescribed by law for serving process on the corporation against which the process, notice or writing, is issued."²⁴

§ 125a. **When garnishee to be released from liability.**—"In all cases where the defendant takes an appeal from the judgment in the justice court, and in all cases where the judgment in justice court becomes final in favor of said defendant, the justice shall make and deliver an order or orders releasing the garnishee or garnishees from all liability," etc.²⁵

§ 126. **Proceedings against garnishees in attachment.**—"That any person or corporation indebted to the defendant in any attachment suit, or who has any property or effects belonging to said defendant, may be summoned as a garnishee of such defendant in such attachment proceedings. The proceed-

pany. Therefore a return of service of a garnishee summons issued against a railroad company, which merely showed service upon "I. D., agent of the within named defendant," without showing what I. D.'s agency was, was held invalid: *Lake Shore and Michigan Southern Ry. Co. v. Hunt*, 39 Mich., 469. A foreign insurance company may be garnished in justice's court: *Grinnell v. Niagara Fire Ins. Co.*, 127 Mich. 19; 86 N. W. 435. A return of service on an "agent," without specifying whether general or special, gives jurisdiction: *Ibid.*

24—C. L., § 1016.

Service of garnishee process upon corporations not found within the state must be made precisely in the way provided by the statutes. And where service purports to be made upon the agent of a foreign corporation, it seems that in order to acquire jurisdiction, the court must have competent evidence not only that the person served is an agent competent to receive service, but also that the service is strictly according to law; nor is the admission of service by one who claims to be the agent of the company sufficient, without competent evidence that he is such agent: *Hebel v. Amazon Ins. Co.*, 33 Mich., 400; see, *Hartford*

Fire Ins. Co. v. Owen, 30 Mich., 441. But see *Whitworth v. Detroit L. & N. Ry. Co.*, 81 Mich., 98; 45 N. W. 500, holding that a statement in the disclosure that it is made by the assistant treasurer of the corporation and on its behalf is sufficient showing of authority. The general agent in this state of a foreign corporation doing business here, and authorized to receive service on its behalf, has authority under the statute, when served with garnishee process against the company, to make answer on behalf of the company; and a foreign corporation after due service of garnishee process upon its authorized agent, is not to be considered in default for want of answer, after disclosure filed by such agent: *Lorman v. Phoenix Ins. Co.*, 33 Mich., 65.

25—C. L., § 1018. As amended by Act 178, Pub. Acts, 1895, p. 547. The statute proceeds with provisions requiring all garnishment proceedings auxiliary to the principal suit to be returned with the main action, and for further appropriate action in the garnishment suit in the appellate court. For a construction of this statute prior to the amendment of 1895 see: *Erickson v. Duluth S. S. & A. Ry. Co.*, 105 Mich., 415; 63 N. W., 420.

ings against the garnishee shall be conducted in the manner prescribed in chapter two hundred and two of the Compiled Laws of eighteen hundred and seventy-one, and the amendments thereto, now or hereafter passed. Such garnishee proceedings may be commenced simultaneously with the issuing of the writ of attachment, or while such attachment suit is pending, and shall be deemed auxiliary to the proceedings in attachment, but shall be entered separately upon the justice's docket, the same as in other garnishee cases. If the disclosure shows that the garnishee is indebted to the defendant in attachment, or that such garnishee has any money, property, credits, or effects in his or its hands, or under his or its control, the plaintiff in attachment shall be entitled to judgment in such attachment proceedings the same as in the case of property attached, and shall also be entitled to judgment against the garnishee as in other cases."²⁶

§ 127. In attachment against foreign corporations.—"Whenever an action shall be commenced by attachment against a foreign corporation, and proceedings by garnishment shall also be commenced in the same action, if it shall appear on the return of the writ of attachment that a copy thereof, and also copies of all garnishee summons issued in said action, have been personally served on any officer, member, clerk, or agent of such foreign corporation within this state, the same proceedings may be thereupon had in said action against said corporation, and in the same manner, as upon the return of a summons personally served in actions against natural persons; and in all cases of proceedings by garnishment against corporations, whether foreign or domestic, service of any process in the manner above provided for in case of foreign corporations shall have the like force and effect as personal service upon natural persons."²⁷

²⁶—C. L., § 745. Chapter 202, C. L., '71, is chapter 35, C. L., '97. For a construction of this statute prior to the amendment of 1895 see: *Erickson v. Duluth S. S. & A. Ry. Co.*, 105 Mich., 415; 63 N. W., 420.

As to the liability of corporations as garnishees prior to the enactment of this section (in 1883), in its present form, see, *Hewitt v. Wagar Lumber*

Co., 38 Mich., 701. As to the showing necessary to the liability of a corporation: *Ibid.*

²⁷—C. L., § 746. Prior to the amendment of 1879 a justice had no jurisdiction in attachment against foreign corporations: *Brigham v. Eglington*, 7 Mich., 291; *Hartford Fire Ins. Co. v. Owen*, 30 Mich., 441. This statute is limited to suits in garnish-

"The rights and liabilities of garnishees in such cases, and the proceedings against them, shall be the same in all respects as is provided by law in other cases of garnishment."²⁸

§ 128. **Public officers as garnishees.**—No person claiming his authority from the law, and obliged to execute it according to the rules of law, can be holden by process of this kind.²⁹ A public officer who has money in his hands to satisfy a demand, which one has upon him merely as a public officer, cannot, for that cause, be his trustee.³⁰ Thus, a county treasurer is not liable to be proceeded against as garnishee, for money in his hands as treasurer, for the payment of a demand due from the county to the defendant.³¹ Nor a sheriff or constable, for money received by him on an execution in favor of the defendant in the writ. The money, in such cases, is in the custody of the law, and it is not liable to be arrested in the hands of the officer.³² It is not the money of the defendant until paid over to him. But when an officer has seized, upon an execution, a greater sum than the execution required, the surplus is the money of the defendant, and may be levied upon by the officer, and he is liable as garnishee for such surplus.³³

ment where the original suit was begun by attachment: Kirby Carpenter Co. v. Trombley, 101 Mich., 447; 50 N. W., 809.

28—C. L., § 747.

29—Brooks v. Cook, 8 Mass., 246.

30—Shealy v. Brewer, 7 Mass., 250, 261.

31—Shealy v. Brewer, 7 Mass., 250.

32—Winder v. Bailey, 3 Mass., 289; Dubois v. Dubois, 6 Cow., 494; Lightner v. Steinel, 33 Ill., 510; see Robinson v. Howard, 7 Cush., 257; and see Voorhees v. Sessions, 34 Mich., 99.

Public officers are not liable as garnishees for money in their possession and held by them in their official capacity as such officers, as, in case of funds held by a register in chancery: Voorhees v. Sessions, 34 Mich., 99. Or, by receivers appointed by order of the court: Tremper v. Brooks, 40 Mich., 333. Nor can school district officers be garnisheed for money in their hands or due from them officially: School District v. Gaze, 39 Mich., 484. Previous to the amendment of this statute

in 1899, and finally in 1903, a municipal corporation could not be reached with garnishment proceedings. These amendments enable parties to proceed against municipal corporations, except counties, as against others. It is essential, however, that the principal suit shall have gone to judgment before such proceedings shall be valid. Nor will garnishment process reach property transferred in good faith by a public officer to a surety on his official bond, to enable the latter to secure his own and his principal's liability: Spear v. Rood, 51 Mich., 140; 16 N. W., 312.

An assignee for the benefit of creditors is not liable as garnishee of the assignor. Cook v. Rogers, 31 Mich., 391. But where an assignment or conveyance of personal property is fraudulent as against creditors of the person assigning or conveying, the garnishee process is the proper mode to reach it: Burlingame v. Bell, 16 Mass., 320; Hastings v. Baldwin, 17 *Ibid.*, 558.

33—Wheeler v. Smith, 11 Barb., 345; Watson v. Todd, 5 Mass., 271-319.

A justice of the peace is not liable to be proceeded against as garnishee on account of money paid to him by an officer, on an execution in favor of the defendant in the attachment suit. It does not belong to the debtor in attachment until it is paid over to him.³⁴

§ 129. Guardians, executors, administrators, etc.—Guardians, executors and administrators, like officers whose duties are prescribed and regulated by law, cannot be summoned and charged as garnishees; certainly not until there had been a settlement, a decree of the probate court, a demand of the balance and a refusal of payment.³⁵

An attorney at law having money in his hands collected by him in the course of his profession, is liable as garnishee, when the money was received for the defendant.³⁶

§ 130. Demands in suit.—A debt due from A. to B. for the recovery of which an action has been commenced and referred by a rule of court, in which rule it was agreed that judgment should be entered up, etc., is not liable to attachment in the hands of A., at the suit of B.'s creditors.³⁷ "In this case, before the attachment, a writ to compel payment was pending a rule of reference had been entered into in which the parties had agreed that judgment should be entered according to the report, and the referees had agreed on their report. In this state of the action, no day for pleading remained for the trustee, and the law furnished him with no legal defense

34—*Hooks v. York*, 4 Porter, Ind., 636. A judgment rendered by one justice cannot be reached by garnishee process from another justice: *Stevens et al. v. Woodburn & Sarven Wheel Co.*, 43 Mich., 275; 5 N. W. 311. But a justice before whom a judgment has been obtained, and to whom the same has been paid pending garnishee proceedings before him to reach the avails of that judgment, may, upon judgment being rendered in the garnishee proceedings against the judgment debtor, and after the time for appealing from the garnishee proceedings has expired, apply the money so paid into court in payment of the garnishee judgment: *Griffin v. Potter*, 27 Mich., 166.

35—*Wilder v. Treat*, 7 Mass., 271;

Brooks v. Cook, 8 Mass., 246; *Walte v. Osborne*, 11 Maine, 185; *Gassett v. Grout*, 4 Metc., 486. Executors and administrators are not liable to garnishment in justice's courts for moneys in their hands due to creditors of the deceased under C. L., § 9399: *Basom v. Taylor*, 39 Mich., 682.

36—*Thayer v. Sherman*, 12 Mass., 441; *Staples v. Staples*, 4 Maine, 532; *Woodbridge v. Morse*, 5 N. H., 519.

37—*Howell v. Freeman*, 3 Mass., 121. A demand in suit pending before one justice cannot be garnisheed by a creditor of the plaintiff in a suit brought against him before another justice: *Noyes v. Foster*, 48 Mich., 273; 12 N. W., 221; *Custer v. White*, 49 Mich., 262; 13 N. W., 583.

against the principal's demand of judgment. The principal being entitled to judgment, his execution was properly ruled out and satisfied. The debt, consequently, due him from the trustee, was, at the time of *Howell's* attachment, so situated, he could not defend himself against paying it to *Freeman*; it is not, therefore, a credit in the hands of the trustee, subject to this attachment." Nor would the debtor be liable as garnishee, after issue was joined in the cause, for the same reason.³⁸ In Massachusetts it has been decided that a judgment debtor could not be held as garnishee;³⁹ but the contrary has been held in Indiana.⁴⁰

A covenant to pay rent at a particular time does not create a garnishable debt until the time stipulated for payment arrives.⁴¹ Sailors' wages are not liable to garnishee process unless the voyage in which they are earned is first completed.⁴² But a debt owing at present, though payable hereafter, is subject to garnishee process.⁴³

When an entire contract is made for labor, on a large number of articles in the process of manufacture, to be paid for when finished, the owner cannot be held as garnishee of the laborer until the work is performed on all the articles.⁴⁴ A promise to perform labor for another to a certain amount is not a credit subject to this process, until this promise is broken.⁴⁵

Charging one-as garnishee, does not vary his liability under a contract with the principal defendant; as, if he be bound to

38—*Kidd v. Shepherd*, 4 Mass., 238.

39—*Sharp v. Clark*, 2 Mass., 91, 93. So also in Michigan: *Slevers v. Woodburn Sarven Wheel Co.*, 43 Mich., 275; 5 N. W., 311.

40—*Halbert v. Stinson*, 6 Blackford, 398. This, however, was a foreign attachment. But see *Griffin v. Potter*, 27 Mich., 166, and *Slevers v. The Woodburn Sarven Wheel Co.*, 43 Mich., 275; 5 N. W., 311.

41—*Wood v. Partridge*, 11 Mass., 488, 493; *Thorp v. Preston*, 42 Mich., 511; 4 N. W., 227.

42—*Taber v. Nye*, 12 Pick., 105; see, *Wyman v. Hichborn*, 6 Cush., 264; *Hadley v. Peabody*, 13 Gray, 200. As to garnishment for wages not yet earned under an existing contract of employment, see, *Kane v. Clough*, 36

Mich., 436; *Webber v. Bolte*, 51 Mich., 113, 115; 16 N. W., 257.

43—*Wood v. Partridge*, 11 Mass., 488; *Tucker v. Clisby*, 12 Pick., 22, 25; *Thorndike v. De Wolf*, 6 Pick., 120, 122. The debt must be owing absolutely and without contingency: *Thorp v. Preston*, 42 Mich., 511; 4 N. W., 227.

44—*Robinson v. Hall*, 3 Metc., 301; *Dally v. Jordan*, 2 Cush., 390. Garnishment process cannot reach sums payable upon a contract, but which will not become due until the performance thereof at some future time: *Webber v. Bolte*, 51 Mich., 113; 16 N. W., 257; *Hopson v. Dinan*, 48 Mich., 612; 12 N. W., 875; *Kiely v. Bertrand*, 67 Mich., 332; 34 N. W. 674.

45—*Wright v. Geyer*, 4 Mass., 102.

deliver merchandise at a particular time and place, and by the default of his creditor he be discharged from such contract, he is also discharged as garnishee. He cannot be held by a demand made for their delivery, on an execution against the goods and chattels of the defendant in his hands, at any other time and place than that stipulated for in the contract.⁴⁶

§ 131. **Right of set-off, etc.**—The garnishee has a right to set off against the debt which he owes the principal, any demand which he might set off in any of the modes allowed, either by statute or common law, or in any course of proceeding.⁴⁷ But this does not include any claims for unliquidated damages for mere torts.⁴⁸ He may set up any defense which he might if sued by the principal defendant.⁴⁹

46—Jewett v. Bacon, 6 Mass., 60-61.

47—Smith v. Stearns, 19 Pick., 22; Boston Type & S. Foundry Co. v. Mortimer, 7 *Ibid.*, 166; Brewer v. Pitkin, 11 *Ibid.*, 298.

48—Hathaway v. Russell, 16 Mass., 474, 476.

49—Allen v. Hall, 5 Metc., 263; Green v. Nelson, 12 *Ibid.*, 567; and the statute of limitations: Hazen v.

Emerson, 9 Pick., 144. But a garnishee who has goods in his possession belonging to the principal defendant cannot retain them merely because the principal defendant owes him a debt, for he has no legal lien on them until he attaches or levies on them the same as any other creditor, there being no pledge of them: Allen v. Meguire, 15 Mass., 490; see Brewer v. Pitkin, 11 Pick., 298; Allen v. Hall, 5 Metc., 267.

CHAPTER VI.

MATTERS IN RELATION TO PROCESS.

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| § 132. Form of process. | § 137. Deputing persons to serve. |
| § 133. Proceedings on Sunday. | § 138. Officer protected by. |
| § 134. Proceedings on holidays. | § 139. Irregularities, and waiver of. |
| § 135. Seventh day observers. | § 140. Security for costs. |
| § 136. Proceedings to be in English. | § 141. Security in suits for labor. |

§ 132. **Form of process.**—"All process issued by a justice of the peace should be signed by him, and may be under seal or without seal. It shall not be necessary in any process to recite any of the contents or conditions of any bond or affidavit required to be made or filed before the issue of such process, but in any case the statement in such process that such affidavit or bond has been made or filed shall be sufficient."¹

A general authority by a justice to a constable to fill up or alter process issued by the justice, would be void; such authority as to a particular process would be valid, but indiscreet and imprudent.²

§ 133. **Proceedings on Sunday.**—"No court shall be opened or transact any business on the first day of the week, unless it be for the purpose of instructing or discharging a jury, or of receiving a verdict; but this section shall not prevent the exercise of the jurisdiction of any single magistrate, when it shall

1.—C. L., § 952. As amended by Pub. Acts, 1883, p. 202. This section refers to process issued under the provisions of this chapter 34. Under our Justice's Act, process from a justice court in civil cases is not authorized to run into another county, or to be served beyond the bailiwick: *Hartford Fire Ins. Co. v. Owen*, 30 Mich., 441. Except certain process in garnishment: See, *ante*, §§ 112, 120.

2—*Pierce v. Hubbard*, 10 Johns., 405. by another person, by the direction and *in the presence of the justice*, where no discretion is given to the person thus acting as a mere clerk or amanuensis, may be treated as the official act of the justice, and as admissible. But any authority by a justice to another to fill up or alter process at his discretion, or any such filling up or alteration done by another *not* in the presence of the justice, and by his express direction, would render the process void. *Garrison v. Hoyt*, 25 Mich., 509; see, C. L., § 2589.

be necessary, in criminal cases, to preserve the peace, or to arrest offenders.”³

While the statute does not in specific terms prohibit the issuing of process on Sunday, and though formerly it was, and in some jurisdictions it still is, held that it might be done,⁴ yet now it is held that even if it was not prohibited by the common law, it is under statutes like ours.⁵

“No person shall serve or execute any civil process from midnight preceding, to midnight following the said first day of the week; but such service shall be void, and the person serving or executing such process, shall be liable in damages to the party aggrieved, in like manner as if he had not had any such process.”⁶ This section makes the service absolutely void, and renders the service of a summons or any other civil process on Sunday of no effect; so, the service of a *certiorari* on that day would be void.⁷

§ 134. Proceedings on holidays.—“The following days, viz.: The first day of January, commonly called New Year’s Day; the twenty-second day of February, commonly called Washington’s Birthday; the thirtieth day of May, commonly called Decoration Day; the fourth day of July; the first Monday of September, commonly called Labor Day; the twenty-fifth day of December, commonly called Christmas Day; every Saturday from twelve o’clock noon until twelve o’clock at night, which is hereby designated a half holiday; election days, embracing national, state, county and city elections; and any day, appointed or recommended by the governor of this state, or the president of the United States as a day of fasting and prayer or thanksgiving, shall, for all purposes whatever as regards the presenting for payment or acceptance, and of the protesting and giving notice of the dishonor of bills of exchange, bank checks and promissory notes, made after this act shall take effect, also for the holding of courts, except as hereinafter

3—C. L., § 1114.

4—McKally’s Case, 9 Coke, 68; Havens v. Stiles, 8 Idaho, 250; 67 Pac., 919; 56 L. R. A., 736.

5—Van Vechten v. Paddock, 12 Johns., 178; 7 Am. Dec., 303.

6—C. L., § 5916. Service of a writ of *certiorari* on Sunday is void: An-

derson v. Birce, 3 Mich., 280. And so is the return of an execution on that day: Peck v. Cavell, 16 Mich., 9.

7—Anderson *et al.* v. Birce, 3 Mich., 280. Like any other defective service a general appearance will waive the defect: See, Pierce v. Rehfuß, 35 Mich., 53.

provided, be treated and considered as the first day of the week, commonly called Sunday, and as public holidays or half holidays; and all such bills, checks and notes otherwise presentable for acceptance or payment on any of the said days shall be deemed to be payable and presentable for acceptance or payment on the secular or business day next succeeding such holiday or half holiday; *Provided*, That in construing this section, every Saturday, unless a whole holiday, as aforesaid, shall, for the holding of court and the transaction of any business authorized by the laws of this state, be deemed a secular or business day: *Provided, also*, That in case the return or adjourn day in any suit, matter or hearing before any court, officer, referee or arbitrators shall come on any of the days first above named, except Sunday, such suit, matter or proceeding, commenced or adjourned as aforesaid, shall not, by reason of coming on any of such days except Sunday, abate, but the same shall stand continued to the next succeeding day, at the same time and place unless the next day be the first day of the week, or a holiday, in which case the same shall stand continued to the next day succeeding said first day of the week or holiday, at the same time and place: *Provided, further*, That whenever the first day of the general term of any circuit court, as fixed by the order of a circuit judge shall fall upon either of the days first above named, or whenever any circuit court shall be adjourned to any of the days first above named, such court may be adjourned to the next succeeding secular day: *And provided, further*, That nothing herein contained shall be construed to prevent or invalidate the entry, issuance, service or execution of any writ, summons or confession of judgment or other legal process whatever, holding courts or the transaction of any lawful business except banking on any of the Saturday afternoons herein designated as half holidays, nor to prevent any bank from keeping its doors open or transacting its business on any of the said Saturday afternoons, if by a vote of its directors it elects to do so.”¹

1—C. L., § 4880. As amended by Ihling, 47 Mich., 614; 11 N. W., 408. Pub. Acts., 1903, p. 420. But a judgment rendered by a justice

The issuing of a summons is a ministerial act merely, and may be lawfully issued on a holiday: Smith v. Hemmens v. Bentley, 32 Mich., 89. upon one of these days is void: A school district cannot make a de-

§ 135. **Seventh day observers.**—In regard to the service of process, and the holding of courts, in the case of parties who observe the seventh day of the week as the Sabbath, the law provides: “That no person who conscientiously believes that the seventh day of the week ought to be observed as the Sabbath, and actually refrains from secular business and labor on that day, shall be compelled to defend any civil suit in the justice’s courts of this state on that day.”²

“Whenever any person, as aforesaid, shall be served with any process returnable on the seventh day of the week, such person may make affidavit before any person authorized to administer oaths setting forth the fact that a summons has been issued, naming the day when the same was issued, when returnable, by whom issued, and in whose favor, and against whom the same was issued; and also that the said affiant conscientiously believes that the seventh day of the week ought to be observed as the Sabbath, and that the said affiant actually refrains from secular business and labor on said day, and may at any time after service of such process, and before the return day thereof file such affidavit with justice before whom said cause shall be pending.”³

“It shall be the duty of any justice of the peace before whom any cause shall be pending, in which such affidavit shall be filed regularly, to call such cause on the return day thereof, as in other cases, and upon his own motion to adjourn the same without pleadings, to such time as he shall see fit: Provided, the same shall not be adjourned to the seventh or the first day of the week: And, provided also, that the said cause shall not be so adjourned more than ten days, for the cause aforesaid.”⁴

§ 136. **Proceedings to be in the English language.**—“All writs, process, proceedings and records in any court within this state, shall be in the English language (except that the proper and known names of process, and technical words, may be expressed in the language heretofore and now commonly used), and shall be made out on paper or parchment, in a fair,

duction from a teacher's wages for 2—C. L., § 796.
vacations on these public holidays: 3—C. L., § 797.
School District v. Gage, 39 Mich., 484. 4—C. L., § 798.

legible character, in words at length, and not abbreviated; but such abbreviations as are now commonly used in the English language may be used, and numbers may be expressed by Arabic figures, or Roman numerals, in the customary manner."⁵

§ 137. **Deputing persons to serve process.**—"Every justice who shall issue any process authorized by this chapter, whenever he shall judge it expedient, on the request of the party, may, by written authority endorsed on such process, empower any proper person being of lawful age, and not a party or interested in the suit, to execute the same."⁶

"The person so empowered shall possess all the authority of a constable in relation to the execution of such process, and shall be subject to the same obligations, but shall not receive any fee or reward for his services thereon."⁷

It will be seen that a party cannot be *deputed* to execute any process in his own case. A constable cannot serve a summons

5—C. L., § 1115. Where a notice of guardian's sale was published in a newspaper printed for the most part in German, but the notice itself was printed in English, the court, while holding the publication bad, declined after 17 years to permit an attack in a collateral proceeding: *Schaale v. Wasey*, 70 Mich., 419; 38 N. W., 317.

6—C. L., § 978; *Monteith v. Cash*, 1 E. D. Smith, 412. But a person under twenty-one years of age cannot be deputed to serve process: *Miln v. Russell*, 3 E. D. Smith, 303; *Rasch v. Moore*, 57 Mich., 54, 56; 23 N. W. 456. A deputation of authority to serve a summons, endorsed thereon, need not state that the person authorized is of age and not interested in the suit: *Buel v. Duke*, 38 Mich., 167. The form of deputation held sufficient in this case, was as follows: "By request of plaintiff, I hereby authorize C..... H..... to serve the within process on the within defendant. Dated October 28, 1874, F..... J. B....., Justice of the peace."

The statute (C. L., § 716) permitting a summons to be served by any competent person, does not authorize such service to be made

by a private person until he has been appointed by the justice for that purpose: See, *ante*, § 39, note 23. *Contra*, as to service of notice under the drain law when the language is, as here, that it may be served by "any competent person": *Walpert v. Newcomb*, 106 Mich., 357; 64 N. W. 326. This because there is no requirement for particular authorization, as in case of process issued by justices. See C. L., §§ 978 and 979.

When an execution is duly delivered to a constable to be served, it becomes his duty to execute it in person; he has no power to substitute another constable in his place: *Downs v. McGlynn*, 2 Hilt., 14; see, *Foster v. Willey*, 27 Mich., 244.

But, as to whether a justice can, under this section 978, deputize a person to serve an execution: *Querc. Harvey v. McAdams*, 32 Mich., 472. If, however, this can be done, the plaintiff thus selecting the person who shall serve the execution, thereby makes himself responsible for the acts of the deputy: *Ibid*.

7—C. L., § 979; *Rasch v. Moore*, 57 Mich., 56; 23 N. W., 456.

in his own favor.⁸ Nor can a *warrant, attachment* or *execution* be executed by a constable who is a party in the suit.

§ 138. **Process protects the officer, when.**—A constable is protected in the execution of process, although the court had not in fact jurisdiction in the case, provided that, on face of the process, it appears that the court had jurisdiction of the subject matter. But, in no case, where there is in fact a want of jurisdiction, is the officer bound to act. He has a discretion, if he chooses to exercise it; if he refuses to act, the party cannot make him accountable; he is protected by showing that the process was issued without authority.⁹ But this rule is one of *protection* merely: the officer may *defend* under it, but he cannot build up a title or right to possession upon it, as against third persons.¹⁰ The knowledge of the officer that the court had no jurisdiction is of no importance. He must be governed, and is protected, by the process, and is not affected by anything which he has heard or learned out of it, going to impeach it.¹¹ A ministerial officer executing, in good faith and without oppression, a warrant regular on its face, and issued by an officer having jurisdiction of the *subject*

8—See, *ante*, § 39, note 24.

9—Cornell v. Barnes, 7 Hill, 35; Earl v. Camp, 16 Wend., 567; Beach v. Botsford, 1 Doug., Mich., 205. An invalid writ, although fair on its face, will not protect an officer in seizing the property of the wrong person: Mathews v. Densmore *et al.*, 43 Mich., 461; 5 N. W., 669. And further, as to when a constable will be protected by his process: See, Wall v. Trumbull, 16 Mich., 228; Dunn v. Gillman, 34 Mich., 256; Bird v. Perkins, 33 Mich., 28; Finn v. Peck, 47 Mich., 208; 10 N. W., 202.

Under the statute, C. L., § 2595, authorizing sheriffs to serve any process which constables may execute, no special direction of the process to the sheriff is necessary; and a sheriff or his deputy is not liable in trespass, on the ground of want of authority, for levying a justice's execution addressed to any constable, etc. An officer does not render himself liable in trespass for proceeding in good faith to serve a justice's execution after being told by the defendant that

an appeal has been taken, where the justice insisted that the appeal had not been perfected. He has a right to rely on his process until he is officially notified that it has been suspended: Foster v. Willey, 27 Mich., 244.

10—Beach v. Botsford, 1 Doug., Mich., 199; LeRoy v. East Saginaw City Railway, 18 Mich., 233; Adams v. Hubbard, 30 Mich., 104; see, Haynes v. Knowles, 36 Mich., 407.

11—Webber v. Gay, 24 Wend., 485; People v. Warren, 5 Hill, 440. But if the process shows on its face, either that it was issued without authority, or that the person who issued it had no jurisdiction to issue such process, it will be no protection to the officer: Stroud v. Butler, 18 Barb., 327; Parker v. Walrod, 16 Wend., 514.

A ministerial officer cannot justify under a process issued by a court or officer having no jurisdiction of the subject matter. But this rule is based upon the ground that every man is bound to know the law; and the subject matter in reference to which the

matter, will be protected by the warrant, and is not required to look beyond it for his authority to serve it.¹²

§ 139. **Irregularity, waiver, etc.**—Any irregularity in the issuing or service of process, and all defects in its form or substance, are waived or cured, so far as any question in regard to them may arise in the particular suit, by the defendant's omitting to take advantage of them at the very first opportunity.¹³ Thus, if process is void because of some defect in the manner in which it issued, yet if the defendant appear at the return day and does not object, but joins issue upon the merits, the justice's jurisdiction over his person will be complete.¹⁴ And if he plead to the suit, or take any similar

question of jurisdiction arises, can generally be decided by reference to the statute itself, without an inquiry into the facts which the law does not disclose. Thus, if a justice issued a writ of possession in ejectment, or a warrant of commitment to the state prison on a conviction of murder, such writ or warrant would be no protection to the officer, however regular on its face, because he is presumed to know, and can easily ascertain from the law, that the justice had no jurisdiction of the subject matter, viz.: the ejectment or conviction of murder. No fact beyond what the law discloses is necessary to decide the question. But the law makes no presumption, in ordinary cases, that the officer knows the matter of fact in the case in which the process issued, and of which the law gives no information, and which are not disclosed by the process which he is called to execute. And where the jurisdiction of the subject matter depends upon *matter of fact*, the existence or non-existence of which cannot be determined from the law, and which is not of public notoriety, the ministerial officer ought to be protected (if the process is regular on its face), and ought not to be bound to ascertain the jurisdiction at his peril, unless the law has clearly given him the right to demand the information and determine the fact: *People v. Rix*, 6 Mich., 144; see, *LeRoy v. East Saginaw City Ry. Co.*, 18 Mich., 233.

12—*Ortman v. Greenman*, 4 Mich.,

201; *Watkins v. Wallace*, 19 Mich., 57, 74.

13—An irregularity is defined to be "the want of adherence to some prescribed rule or mode of proceeding; and it consists either in omitting to do something that is necessary for the due and orderly conducting of a suit, or doing it in an unreasonable manner." In all such cases, if a defendant will take advantage of the irregularity, he must do so at the earliest period: *Turril v. Walker*, 4 Mich., 177, 183. Waiver is a voluntary act, and implies an election by the party to dispense with something of value, or to forego some advantage which he might at his option have demanded or insisted on: *Warren v. Crane*, 50 Mich., 300; 15 N. W., 465.

14—*Malone v. Clark*, 2 Hill, 657; *Crane v. Hardy*, 1 Mich., 56, 61; *Campau v. Fairbanks*, 1 Mich., 152; *Pierce v. Rehfuß*, 35 Mich., 53; see, *Slatterly v. Hilliker*, 39 Mich., 573. While an appearance specially for the specific purpose of making an objection or of arresting the suit on account of previous irregularities, waives nothing, yet, if the appearance was for another purpose and with a view to prolonging the pendency of the action, and contemplated a step adapted to a case regularly on foot, it will be a waiver of prior defects. Thus, appearing and applying for an adjournment is a step in the cause, and one which means that the action shall be kept on foot, and further proceedings shall be had therein, and, therefore, is a waiver

steps, which supposes the process to be valid, he cannot afterwards object to the process itself.¹⁵ Unless the party pleads, asks an adjournment, cross-examines the plaintiff's witnesses, or in some other way litigates the cause, the irregularity is not cured. Merely being present to attend the progress of an irregular proceeding, or saying "here" when his name is called, is not enough.¹⁶ So appearing and making the objection is no waiver; for, if this was the case there would be no such thing as an objection to process.¹⁷

If there has been an irregularity in the service of the process, the defendant may apply to the justice to set aside the service.

of prior defects: *Lane v. Leech*, 44 Mich., 163; 6 N. W., 228. So, where a defendant was arrested upon a warrant for trespass upon lands, issued upon an insufficient affidavit, but appeared in the cause, pleaded the general issue and went to trial on the merits without having made any objection to the sufficiency of the affidavit, or validity of the warrant: *Held*, that those objections were waived; that while much allowance will be made in favor of a party under arrest, and a waiver of objections will not be hastily assumed, yet it would be misleading for a party to lie by indefinitely and submit himself without some kind of protest to the trial on the merits and then rely on an objection which he has a right to waive if he chooses: *Maxwell v. Deens*, 46 Mich., 35; 8 N. W., 561.

But, giving bail on arrest by virtue of a warrant, is no waiver of the right to object to the sufficiency of the affidavit on which the warrant was founded. Nor will an adjournment obtained before pleading, by a party so arrested, waive any right to object to the proceedings on which the arrest was founded: *Brown v. Kelley*, 20 Mich., 27; see, *Warren v. Crane*, 50 Mich., 301-2; 15 N. W., 465; *Stephenson's Case*, 32 Mich., 60.

But a garnishee cannot waive legal service of process upon himself in such a way as to prejudice the rights of the principal defendant: *Hebel v. Amazon Ins. Co.*, 33 Mich., 400.

15—*Bronson v. Earl*, 17 Johns., 63; *Swartwout v. Roddis*, 5 Hill, 118. All objections to the process or proceedings

by which a defendant is brought into court are waived by his pleading to the merits: *Gunn Hardware Co. v. Dennison*, 83 Mich., 40; 46 N. W., 940. And this though it be after a special appeal has been overruled: *Ovid Township v. Haire*, 133 Mich., —; 94 N. W., 1060 (May, 1903).

Even if the writ is void, and the defendant, in ignorance of it, appears and goes to trial on the merits without objection, the irregularity is waived: *Stewart v. Hill*, 1 Mich., 265-7.

16—*Fanning v. Trowbridge*, 5 Hill, 428. When a party does not appear in a suit before a justice he waives nothing, and may take objection to any irregularity, on appeal or *certiorari*: *Campau v. Fairbanks*, 1 Mich., 152. *Ex parte* proceedings must conform to the statute: *Lee v. Mason*, 10 Mich., 405. But where the justice has by law no jurisdiction of the subject matter of the suit, no appearance, waiver or consent will confer jurisdiction; and this objection may be raised at any time: *Clark v. Holmes*, 1 Doug., 393. And without jurisdiction, the proceedings are void: *Spear v. Carter*, 1 Mich., 19, 23; *Thompson v. Michigan Mutual Benefit Association*, 52 Mich., 522; 18 N. W. 247.

17—*Wheeler v. Lampman*, 14 Johns., 481; *Wright v. Russell*, 19 Mich., 346; *Wheeler v. Wilkins*, *Ibid.*, 78. An appearance made merely for the purpose of applying to have proceedings set aside for want of jurisdiction, waives nothing: *McCaslin v. Camp*, 26 Mich., 390.

The defendant may show that a return of personal service of a summons, is untrue, as where summons against the father was served on the son, but returned personally served on the father, it was held that the defendant might show that it had never been served upon him.¹⁸ In this case the defendant did not appear, and assigned the want of service as error, and for that reason the judgment was reversed. But the fact of want of service cannot be set up in opposition to the return, and shown to be false, collaterally, in an action upon the judgment, or in any other action. The remedy, if the return is false, is to set aside the service, and, if this is denied by the justice, to appeal and allege the want of service as error, or prosecute the constable for a false return.¹⁹

§ 140. Security for costs.—“Any justice of the peace may, either before or after the issuing of any process, in his discretion, require security of the plaintiff for any costs which may be adjudged against him in any action, and the person becoming such security shall sign an undertaking, in writing, to that effect, upon the docket of said justice, and in all cases plaintiffs who are not residents of the county in which such suit is brought shall give such security before process shall issue; and if any plaintiff, after commencing an action in the county in which he resides, shall remove from said county, the justice shall require such plaintiff to give security for all costs which have accrued and may accrue in the action, and if judgment be rendered against the plaintiff in any case for costs, an execution may issue against said plaintiff and the person becoming security for said costs; and in case the defendant recover against said plaintiff any sum besides cost, a separate execution may issue for the collection of the same.”²⁰

And it is further provided, that where any person shall be-

18—*Fitch v. Devlin*, 15 Barb., 47.

19—*New York & Erie Co. v. Purdy*, 18 Barb., 574.

20—C. L., § 713. In case of appeal, the security for costs is liable for the costs in the appellate court: *Dunn v. Sutliff*, 1 Mich., 26; *Brabon v. Pierce*, 24 Mich., 40. And so when the cause is removed by *certiorari*: *McLean v. Isbell*, 44 Mich., 129; 6 N.

W., 210; see, *Boatz v. Berg*, 51 Mich., 8; 16 N. W., 184.

The obligation of the party who becomes security for costs, is based upon a sufficient consideration, and a common law action may be sustained thereon, notwithstanding the security may not have been given in strict conformity to the mode prescribed by the statute: *Brion v. Kennedy*, 47 Mich., 499; 11 N. W., 288.

come security for another for costs, in case the defendant shall recover judgment against the plaintiff for costs, thereupon judgment shall be immediately, and in such suit, entered, as well against such security as against such plaintiff, and execution may issue against such security, in the same manner as if he had been himself a party to such suit.²¹

The filing of security in the case of a non-resident plaintiff, is not essential to confer jurisdiction on the justice. "The statute does not make the giving of security a condition, on compliance with which, only, the process shall issue. Nor does it provide that the process shall be void, or be quashed, or set aside, if such security should not be given. The court having general jurisdiction of the subject matter and of the parties, may proceed to final judgment, unless the defendant move to set aside the process for this defect. Such a motion, when made, must prevail, unless the plaintiff in the suit furnish the requisite security. But where no motion is made, the objection is deemed to be waived and the defect cured. The only object is to secure the defendant against costs, in case judgment is finally rendered in his favor; and this object is secured as effectually by giving security after the issuing of the process as before."²²

The discretion which the justice is required to exercise, is a legal one, that is, he is not to require security for costs (except in case of non-resident plaintiffs) unless some good cause is shown justifying it. He cannot arbitrarily compel the giving of security, as is sometimes done. Also, the application should be made as soon as an opportunity offers, provided the cause is known. A defendant should not be permitted, after a cause has been adjourned, to interpose this application, in case he

21—C. L., § 10353; see, *McLean v. Isbell*, 44 Mich., 129; 6 N. W. 210.

Sureties are concluded by the judgment against their principal, when it has been duly obtained in the course of regular proceedings; but it seems not when the judgment is allowed through collusive and fraudulent agreement between the parties to the suit, to the prejudice of the surety: *Wright v. Hakes*, 30 Mich., 525.

22—*Parks v. Goodwin*, 1 Doug., Mich., 56; see, *Gray v. Willcox*, 56 Mich., 58; 22 N. W. 109; *Brown v. Pontiac Mining Co.*, 105 Mich., 653; 63 N. W., 1000; *Harris v. Doyle*, 130 Mich., 470; 90 N. W. 293. The right to insist upon this obligation of the plaintiff to give the security may be waived by not insisting upon it at the first opportunity after knowledge of non-residence: *Harris v. Doyle*, *supra*.

was apprised of the facts upon which his application is founded, at the time the cause was adjourned.²³

The undertaking of the surety must be entered in the docket.

§ 141. Security for costs in suits for personal labor.—"In any suit brought to recover for the personal work and labor of the plaintiff, security for costs shall not be ordered in case the plaintiff shall make and file with the court an affidavit that he has a good and meritorious cause of action and is unable to procure security for costs."²⁴

The security given by a plaintiff extends to the final determination of the cause when carried up by *appeal*; so that the party is liable for the costs of the appeal, if adjudged against the plaintiff.²⁵ This is upon the ground that it is the same cause, though carried by appeal to a higher court, and it is considered but a continuation of the original suit. And so when a cause is removed by *certiorari*.²⁶

23—*Robinson v. Sinclair*, 1 Denio, 628.

24—C. L., § 11283. Constitutionality of this statute upheld: *Jones v. Judge of Shiawassee Circuit*, 105 Mich., 664; 63 N. W., 976. This statute is not applicable in cases of non-resident plaintiffs: *Oswicki v. Ferrick*, 106 Mich., 41; 63 N. W., 981; see, *Burrows v. Brooks*, 113 Mich., 307; 71 N. W., 460.

25—*Travers v. Nichols*, 7 Wend., 434; *Dunn v. Sutliff*, 1 Mich., 24. But a submission to arbitration of the subject matter of the suit is a discontinuance of the suit, and discharges the security for costs. *Dunn v. Sutliff*, 1 Mich., 24; *Brabon v. Pierce*, 34 Mich., 40.

26—*McLean v. Isbell*, 44 Mich., 129; 6 N. W., 210.

CHAPTER VII,

OF THE APPEARANCE OF PARTIES.

APPEARANCE OF ADULTS.

- § 142. May appear how.
§ 143. By attorney, authority to be proved.
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APPEARANCE OF INFANTS.

- § 146. Why cannot appear personally.
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§ 148. Infant defendants.

TIME FOR APPEARANCE.

- § 149. Effect of failure to appear.

OF THE APPEARANCE OF PARTIES OF FULL AGE.

§ 142. **May appear how.**—"Every plaintiff of full age, may appear and conduct his suit or defense, either in person or by attorney; but the constable who served either the original or jury process in the cause, shall not appear and advocate for either party at the trial."¹

§ 143. **Appearance by attorney, authority must be proved.**—"The authority to appear as attorney for any party may be either written or verbal; and such authority shall be proved by the attorney or other competent testimony, in all cases where requested by the opposite party, or where the opposite party shall not appear."²

1—C. L., § 761; *Westbrook v. Blood*, 50 Mich., 445; 15 N. W., 544. A written request by the plaintiff or his attorney that a case be adjourned or held open is an appearance by the plaintiff and gives the justice jurisdiction to act if presented to him within one hour after the return hour of the process by which the suit is commenced: *Wagner v. Kellogg*, 92 Mich., 616; 52 N. W., 1017.

2—C. L., § 762. The authority of an attorney who appears in a justice's court extends no farther than the proceedings before the justice: *Berkery*

v. Circuit Judge, 82 Mich., 160; 46 N. W., 436.

The office of attorney, in the professional sense of the term, is not known in justices' courts. They are not courts of record, and have no such control over those who practice in them as to render it safe to give such persons any very liberal power to conclude the rights of those whom they claim to represent. *Bailey v. Delaplaine*, 1 Sandf., 13. But a party may appoint an attorney in fact, who will be entirely competent to appear for and represent him in justices' court:

The former law did not require "an attorney of a court of record of this state" to prove his authority to appear. He is now on the same footing, in that respect, as other persons. No good reason, it is conceived, can be given why a defendant should be shut out from ascertaining the fact that the attorney has, in fact, the right to recover judgment and receive the money.

When the authority of an attorney to appear is in writing, the hand-writing of the client may be established presumptively. Thus, where letters were directed by the attorney to the client, at the residence of the latter, in relation to the subject matter of the suit, and several answers were received by him in due course of mail, purporting to be signed by the client, all in the same hand-writing, and dated at his residence, which letters contained a general authority to the attorney to take any steps, legal or otherwise, as he might deem advisable, for the recovery of the debt, it was held the authority was sufficiently proved. The court said: "An authority to appear may be by parol or in writing, and the attorney himself may prove his authority."³ If the authority is in writing, evidence of the hand-writing must be produced. This may be established, however, presumptively; as, where letters were directed to a particular person on business, and answers were received in due course of mail, a fair inference arises, that

Hughes v. Mulvey, 1 Sandf., 95. The statute, however, is peremptory in its requirements that, in justice's court, where the defendant does not appear, the person appearing as the plaintiff's attorney shall prove his authority; and his failure to do so is not cured by C. L., § 950: *Scofield v. Cahoon*, 31 Mich., 206. The purpose of the statute is to provide for ascertaining with certainty, in all cases, whether any one assuming to represent another is able to bind him: *Westbrook v. Blood*, 50 Mich., 446; 15 N. W., 544. And the fact that the person appearing for the plaintiff as his attorney did not prove his authority, is ground for reversing a judgment for the plaintiff, if neither he or the defendant appeared, and the objection is a proper ground for a special appeal: *Woodbridge v. Robinson*, 49 Mich., 228; 13 N. W. 527. But a

justice's judgment cannot be attacked collaterally on the ground that the person appearing as attorney failed to prove his authority: *Reed v. Gage*, 33 Mich., 180; *Maheo v. Snell*, 33 Mich., 182; *Fruitport Twp. v. Judge of Muskegon Circuit*, 90 Mich., 20; 51 N. W., 109.

3—*Gaul v. Groat*, 1 Cow., 113. A mere verbal request is a sufficient authority for a person to appear and manage a cause for another in a justice's court: *Ibid.*, *Murray v. House*, 11 John., 461; *Tulloch v. Cunningham*, 1 Cow., 256. But a person cannot prove his authority to appear as attorney for a party by producing a letter from a third person who is an attorney at law, without proving that the latter is himself attorney for the party: *Westbrook v. Blood*, 50 Mich., 445; 15 N. W. 544.

the answers were written by the person from whom they purport to come.⁴

A justice is not bound to require proof of the authority of a person who claims to appear as attorney for one of the parties, if the other party does not object to such appearance;⁵ by not requiring proof of the authority of the opposite party to appear by attorney, he will be deemed to have admitted it; if the defendant does not appear, the authority of the attorney to appear must be proved.

The justice cannot act upon information which he has received out of court in relation to the appointment of an attorney, even though the information came from the party for whom the attorney appears.⁶ Therefore, when the justice examined the attorney on oath, as to his authority, before the time mentioned for appearance in the process, or the defendant had appeared, it was held that the examination was extrajudicial, and in judgment of law proved nothing.⁷ An authority from the party on the record authorizes the appearance, although he is but a nominal plaintiff, and not the party in interest.⁸

The attorney cannot delegate his authority to a third person, unless authorized by his power.⁹ In such case the authority of the attorney and the substitute must be proved.¹⁰

§ 144. Who may be authorized to appear.—Infants and married women may be authorized to appear for either party.¹¹

4—*Bush v. Miller*, 13 Barb., 481. As to when an attorney's authority will be presumed, see, *Wilcox v. Kaslick*, 2 Mich., 165.

5—*Ackerman v. Finch*, 15 Wend., 652. If either party wishes proof of the authority of the attorney who appears for the opposite party, such proof must be required when the attorney first appears: *Merritt v. Thompson*, 3 E. D. Smith, 596, 599; see, *Underhill v. Taylor*, 2 Barb., 348; and, *Andrews v. Harrington*, 19 Barb., 343. It seems that if a party himself does not appear, the authority of an attorney to appear for him should be proved under oath: *Morton v. Crane*, 39 Mich., 530. But the right to object to an appearance as attorney in justice's court for want of authority, is

not waived by having demanded a plea of him before making the objection: *Westbrook v. Blood*, 50 Mich., 445; 15 N. W., 544.

6—*Beaver v. Van Every*, 2 Cow., 429.

7—*Fanning v. Trowbridge*, 5 Hill, 428; see, *Westbrook v. Blood*, 50 Mich., 444; 15 N. W., 544.

8—*Culver v. Barney*, 14 Wend., 161.

9—Bac. Ab.; "Authority," (D). The employment of one member of a firm is the employment of all and any one of them may act: *Eggleston v. Boardman*, 37 Mich., 14.

10—*Fanning v. Trowbridge*, 5 Hill, 428; and see, *Splier v. M'Queen*, 1 Mich., 252.

11—Bac. Ab., "Authority," (B). A defendant's wife, as such, is not au-

"But the constable, who served either the original or jury process in the cause, shall not appear and advocate for either party at the trial."¹²

When the constable, who served the summons, answered for the plaintiff, and presented to the justice the note on which the suit was brought, and stated the plaintiff's demand, it was held not to be an appearing and advocating the cause within the meaning of a like statute.¹³ But where the constable appeared on the day of trial for the plaintiff, and proved the note declared on, the defendant not appearing, it was held to be within the meaning of the statute, appearing and advocating at the trial.¹⁴ The party by whom the constable was employed could not object that his appearance was erroneous.¹⁵

A general authority to collect, implies an authority to appear for the plaintiff.¹⁶

It would be irregular to allow the same person to appear for both parties.¹⁷

§ 145. Appearance by townships.—"The supervisor of each township shall be the agent for his township for the transaction of all legal business, by whom suits may be brought and defended, and upon whom all process against the township shall be served."¹⁸

OF THE APPEARANCE OF INFANTS.

§ 146. Why not allowed to appear personally.—An infant is regarded in law as incapable of properly caring for, guarding and enforcing his rights. It is therefore required that some

thorized to appear for him in a suit before a justice, but she may be authorize so to do: *Hughes v. Mulvey*, 1 Sandf., 92. Nor is the law partner of one who is the official attorney for a municipal corporation entitled, on proof of that fact, to appear as attorney for the corporation in justice's court: *Willcox v. Clement*, 4 Denio, 160.

12—C. L., § 761. One serving a summons issued by a justice, under a special authority given him by the justice for that purpose, is to be deemed a constable as to that action,

and cannot act as counsel on the trial: *Wilkinson v. Vorce*, 41 Barb., 370.

13—*Pinney v. Earl*, 9 Johns., 352, 354.

14—*Ford v. Smith*, 11 Wend., 73.

15—*Smith v. Goodrich*, 5 Johns., 354.

16—*McMinn v. Richtmeyer*, 3 Hill, 236.

17—*Sherwood v. The Saratoga & Washington Ry. Co.*, 15 Barb., 650.

18—C. L., § 2336. An action by the treasurer in the name of the township is improperly brought: *Laketon Twp. v. Akeley*, 74 Mich., 695; 42 N. W., 165.

one shall be appointed to represent him, to stand for him whenever he comes into court as a party, either plaintiff or defendant. The person so appointed to represent him, if plaintiff, is called a "next friend," and if defendant, a "guardian *ad litem*."

§ 147. **Infant plaintiffs.**—"No process shall be issued for an infant plaintiff, nor shall any issue joined by such plaintiff without process be heard, until a next friend for such plaintiff shall be appointed."¹⁹

"Whenever requested, the justice shall appoint some suitable person to be named by such plaintiff, who will consent thereto in writing, to act as his next friend in such suit, who shall be responsible for the costs therein."²⁰

The consent must be in writing, and be filed with the justice.²¹

The full age of man or woman is twenty-one years; every person under that age is an infant.

If process issue in favor of an infant plaintiff before the appointment of a next friend, it may be set aside on motion as irregular.²²

If the appointment is to be made in a suit instituted by joining issue without process, the consent should be entitled in the cause.

After making the appointment, it should be noted in the docket.

The next friend must be a responsible person,²³ as he is responsible for the costs. In what manner the costs are to be collected of him, is difficult to say, unless an agreement to pay

19—C. L., § 756. Where suit is prosecuted by next friend, the suit being appealed, the appellate court will presume the appointment regular: *Kearney v. Doyle*, 22 Mich., 294; *Dillon v. Howe*, 98 Mich., 168; 57 N. W., 102. The proper practice where an infant brings suit is indicated in *Haines v. Oatman*, 2 Doug., Mich., 429.

20—C. L., § 757.

21—C. L., § 760.

22—*Wilder v. Ember*, 12 Wend., 191; *Fitch v. Fitch*, 18 Wend., 513;

Fellows v. Niver, *Ibid.*, 563; *Haines v. Oatman*, 2 Doug., Mich., 430. As to when an appointment will be presumed to be regular, see, *Kearney v. Doyle*, 22 Mich., 294.

But the infant, and not the next friend, is the party to the suit, and is not bound by any relinquishments of its rights by the next friend, nor can the next friend admit away its rights: *Burt v. McBain*, 29 Mich., 260, 265.

23—*People v. N. Y. Com. Pleas*, 11 Wend., 164; *Haines v. Oatman*, 2 Doug., Mich., 430.

them is contained in the consent of the person who proposes to become next friend, which may be done.²⁴

The rule that an infant shall appear by next friend, and not by attorney, relates to the appearance *upon the record*, but it is not intended to deprive the infant of the professional aid of an attorney.²⁵ The next friend may, after his appointment, authorize another person to appear and prosecute the suit. It would be the same in respect of a guardian for the defendant.

If an infant plaintiff appear and prosecute a suit in person or by attorney, the defendant can take advantage of it only by moving to set aside the proceedings for irregularity, or by pleading it in an abatement.²⁶

§ 148. Infant defendants.—"After the service of process against an infant defendant, the suit shall not be any further prosecuted until a guardian for such defendant be appointed; and the justice, upon the request of such defendant, shall appoint some person who will consent thereto in writing, to be guardian of the defendant, in the defense of the suit."²⁷

"If such defendant shall not appear on the return day of the process, or if he neglect or refuse to nominate such guardian, the justice may, on motion of the plaintiff, appoint any discreet person to be such guardian."²⁸

"The consent of every such next friend or guardian shall be filed with the justice; and the guardian for the defendant shall not be liable for any costs in the suit."²⁹

24—1 Cow. Treat., 2d ed., 542-3. The responsibility for costs is to the defendant. *Sick v. Michigan Aid Assn.*, 49 Mich., 50; 12 N. W. 905. As between the infant and the next friend the infant is responsible for costs unless by reason of some misconduct or failure to exercise ordinary prudence the next friend has caused the infant to carry on fruitless litigation. See *Waring v. Crane*, 2 Paige Ch., 79; 21 Am. Dec. 70. The language of the statute "who shall be responsible for the costs therein," does not mean that the next friend must be financially able to pay the costs, but rather that he shall be liable for the costs: *Rabidon v. Muskegon Circuit Judge*, 110 Mich., 297; 68 N. W., 147.

25—*People v. N. Y. Com. Pleas*, 11 Wend., 164.

26—*Schemerhorn v. Jenkins*, 7 Johns., 373. And if no objection is made until after issue joined on the merits, all objection and irregularity is waived: *Treadwell v. Bruder*, 3 E. D. Smith, 597; *Schemerhorn v. Jenkins*, 7 Johns., 373.

27—C. L., § 758. No person should be appointed guardian who has any interest in the suit adverse to the infant. *Damouth v. Klock*, 29 Mich., 289, 296.

28—C. L., § 759.

29—C. L., § 760.

If a guardian is not appointed for an infant defendant, and judgment is rendered against him, he may reverse the judgment because of the error: *Mockey v. Gray*, 2 Johns., 192; *Alderman v. Tirrell*, 8 Johns., 418. But if there are several defendants, and they

The consent of the guardian must be in writing, and the appointment noted in the docket, as in the case of a next friend.³⁰

OF THE TIME FOR APPEARANCE, ETC.

§ 149. Effect of failure to appear at time fixed.—"Judgment of nonsuit with costs shall be rendered against a plaintiff prosecuting an action before a justice of the peace in the following cases: * * * * *

1. If he fail to appear on the return of any process within one hour after the same was returnable;

2. If after an adjournment he fail to appear within one hour after the time to which the adjournment shall have been made."³¹ * * * * *

are sued as joint debtors, and judgment rendered against all, it is no cause for reversing the judgment that one of them was an infant and no guardian was appointed for him: *Mason v. Denison*, 11 Wend., 612; *Mason v. Denison*, 15 *Ibid.*, 64

30—A judgment is not void, but voidable merely, because no guardian *ad litem* was appointed: *Schimpf v. Wayne Circuit Judge*, 120 Mich., 103; 88 N. W., 384. Neither is an administrator's sale invalid for the reason that no guardian *ad litem* was appointed for an infant heir already represented by a general guardian: *Wheelock v. Lake*, 117 Mich., 11; 75 N. W., 140. Such guardian *ad litem* may be appointed in the circuit court after appeal: *In re Sanborn's Estate*, 109 Mich., 191; 67 N. W., 128.

31—C. L., § 836; *Morris v. Bleakley*, 1 Hilt., 90; *Redman v. White*, 25 Mich., 523. And the justice's docket must show that the appearance was within the hour: *Ibid.*; *Mudge v. Yaples*, 58 Mich., 307; 25 N. W., 297; *Post v. Harper*, 61 Mich., 434; 28 N. W., 161; *Stolte D. & F. Co. v. Cochran*, 111 Mich., 193; 69 N. W., 247.

The failure of the plaintiff to appear within an hour of the time to which a cause has been adjourned, operates as a discontinuance, and deprives the justice of jurisdiction except to render judgment of nonsuit: *Brady v. Taber*, 29 Mich., 199; *Cagney v. Wattles*, 121

Mich., 469; 80 N. W. 245. And the failure of the plaintiff to appear within one hour of the time for the return of a garnishee summons to show cause, etc., works a discontinuance of the garnishee proceedings: *Johnson v. Dexter*, 38 Mich., 695. To constitute an appearance, the party must do some act or take some step in the action: if, when the cause is called, a party refuses to answer, or merely answers "here," but refuses to put in any pleading or take any other step in the cause, there is no legal appearance on his part: *Fanning v. Trowbridge*, 5 Hill, 428, 430; *People v. Wilgus*, 5 Denio, 58, 62. A written request by the plaintiff or his attorney that the case be held open, or adjourned, constitutes an appearance: *Wagner v. Kellogg*, 92 Mich., 616; 52 N. W. 1017. An appearance may be general or special. It is general, when the party appears for the purpose of litigating the cause upon its merits, and upon all questions that may arise; it is special, when he appears merely for the purpose of making some motion or objection, raising some question or pleading some special matter which does not relate to the merits of the case: See *Wright v. Russell*, 19 Mich., 346, 350. An appearance will not be deemed to be special unless the party states that it is special, and he ought to state distinctly the purpose for which he appears. And the justice should state in his minutes

In practice, the justice gives one hour for the parties to appear, and unless both appear, he ought not, within that time to proceed in the cause.³² In this case it was decided, that, as a general rule, a justice should wait one hour for the appearance of the parties, and no longer unless a reasonable excuse was shown for further indulgence. The preceding provision of the statute was not intended to change this rule. "Many circumstances may exist rendering it necessary to delay beyond the hour to call the cause, such as being engaged in other official duties, and the like."³³

and docket whether the appearance is general or special; and if the latter, the grounds or purpose of the appearance.

32—*Shufelt v. Cramer*, 20 Johns., 309; *Sherwood v. Saratoga & Washington Ry. Co.*, 15 Barb., 650.

Our statute does not require the justice to wait an hour for the defendant, still it is reasonable and proper that he should wait that length of time: *Smith v. Brown*, 34 Mich., 455, 458; *Talbot v. Kuhn*, 89 Mich., 30; 50 N. W., 791. The justice ought to wait an hour for the defendant to appear in the same cases in which by the terms of the statute such time is given to the plaintiff. There is no good reason for giving an additional hour to the plaintiff and withholding it from the defendant. Justice requires that both parties shall have equal chances, and the justice ought to wait a reasonable time for the defendant, and that, by analogy to the time allowed for the plaintiff, may ever be regarded as an hour: *Bossence v. Jones*, 46 Mich., 492; 9 N. W., 531. As to waiting an hour for the defendant, see, *Chair Co. v. Runnels*, 77 Mich., 104; 43 N. W., 1006; *Talbot v. Kuhn*, 89 Mich., 30; 50 N. W., 791; *Hodge v. Bagg*, 81 Mich., 243; 45 N. W., 841. In *Talbot v. Kuhn*, *supra*, it is held that while the statute does not require the justice to wait one hour, if defendant fails to appear, before rendering judgment, yet by judicial construction it is the right of the defendant that he should wait the hour and that if he fails to do so the error may be corrected by application to the proper court. If the plaintiff fails to appear within the hour the justice loses juris-

diction to do anything but render a judgment of nonsuit, and this by virtue of the express language of the statute. On the other hand, if the defendant fail to appear and judgment is rendered before the expiration of the hour, the judgment is good unless reversed in a proceeding taken to that end. No appeal lies from a judgment of nonsuit against a plaintiff who fails to appear within the hour after the time fixed. Such judgment is regarded as a voluntary nonsuit from which no appeal lies, notwithstanding C. L., § 902.

33—The absence of the justice for a few minutes beyond the hour to which the cause was adjourned, for the purpose of holding a coroner's inquest, was held not to work a discontinuance of the case. The court says the justice was absent on official duty, and both duties could not be performed at the same instant, and the absence of the justice for a few minutes more than the hour to which the cause was adjourned, could not be allowed to operate as a discontinuance, though the defendant might have remained at the office till the expiration of the hour and then left. But in such case, if the defendant had gone away ignorant of the cause of the justice's absence, the justice should have notified him of his return at the earliest opportunity, and should have required proof that he had received such notice before taking any other step in the cause; and if the defendant had in good faith dismissed his witnesses, he would, on showing cause, be entitled to the necessary time to procure their attendance: *Stadler v. Morse*, 9 Mich., 264-6. . .

But where upon the adjourned day

"If no reasonable excuse exists or appears, the cause should be called within the time designated by the statute, and the refusal would be error. Independently of this construction, the justice was right in this case, as the defendant wilfully abandoned the defense when the suit was about to be called."³⁴

The defendant at the expiration of the hour, the plaintiff not appearing, requested the justice to call the case, who told him he had made it a rule to wait five minutes on account of variation of time-pieces, and should wait that time, and if the plaintiff did not appear he would dismiss the cause, but if he did appear he should go on with it. The defendant left, and soon after, within five minutes, the plaintiff appeared, and the justice proceeded to try the cause. This was, on *certiorari*, alleged as error. The court say: "The first question is, whether the defendant was bound to wait five minutes after an hour had elapsed from the time appointed for his appearance. I think not. The words of the statute are, 'Judgment of nonsuit, with costs, shall be rendered against a plaintiff, if he fail to appear on the return of any process, *within one hour* after the same was returnable.' If the plaintiff had appeared before the defendant left, or if he had been in sight and approaching, and the justice had told the defendant, then, it seems, the defendant would have gone away at his peril.³⁵ But here the plaintiff had neither arrived, nor was there anything to show that he

the justice was absent in the performance of duties as superintendent of the poor, and returned to his office about thirty minutes after the expiration of an hour from the time to which the cause had been adjourned, and the defendant not being then present, the justice found him near by and informed him that he was ready to proceed with the trial, but the defendant refused to appear, whereupon the justice adjourned the case and caused notice thereof to be served upon the defendant, and then upon the adjourned day, the defendant not appearing, the cause was tried and judgment rendered against him: *Held*, that as the justice was not absent in the performance of any official duty as a justice, but in the performance of the duties of another office, the judgment should be reversed: *Ruberts v.*

Hathaway, 42 Mich., 592; 4 N. W., 307. See, *Woempener v. Ketchum*, 110 Mich., 34; 67 N. W., 1106, holding that a justice may hold open a cause from day to day for performance of other official duties without losing jurisdiction. Attention is called to sections 799 and 800, being Act 114, Pub. Acts of 1885. This act provides for the transfer of causes to another justice in cases of vacancy occurring in the office of justice before whom such actions are pending; also for such transfer in cases where the justice is sick or "unable for any cause, temporarily or negligently, to perform the duties of his office."

34—*Barber v. Parker*, 11 Wend., 51; and see, *Cornell v. Bennett*, 11 Barb., 657.

35—*Baldwin v. Carter*, 15 Johns., 496; *Barber v. Parker*, 11 Wend., 51.

intended to appear; and the justice was not engaged in any other official business. If, under such circumstances, the defendant must, at his peril, wait beyond the hour, the statute is, in effect, repealed. When the law says that the plaintiff shall have but one hour, the justice has no right to say that he shall have sixty-five minutes."³⁶

If the defendant fails to appear in proper season, there may be a final judgment against him, which will be a bar to any further litigation of the same matter, and it may also deprive him of the advantage of a set-off. And it has been held, that if the defendant appears on the return day of the process, and the justice and plaintiff are still present in the court, the defendant may interpose his defense as a matter of right, even if the plaintiff has put in his declaration, and the cause has been adjourned to a subsequent day for trial, and for the purpose of allowing the plaintiff an opportunity of getting his witnesses.³⁷ The plaintiff does not lose any rights in such a case, and to deprive a defendant of his defense under such circumstances would seem to be unjust. But if the defendant does not appear on the return day of the process nor on the adjourned day, until after a witness has been called and examined on the part of the plaintiff, it seems that he will be too late, even if the justice is disposed to admit the defense.³⁸

36—*Willcox v. Clement*, 4 Denio, 160.

37—*Pickert v. Dexter*, 12 Wend., 150; *Lowther v. Crummie*, 8 Cow., 87. And it is said that if the defendant appears on the return day, though not at the time mentioned in the process, nor within an hour of it, yet he may still interpose his defense if the plaintiff is proceeding with the trial on that day, and the trial is then in progress: *Sweet v. Coon*, 15 Johns., 86; *Atwood v. Austin*, 16 Johns., 180; *Lowther v. Crummie*, 8 Cow., 87; *Pickert v. Dexter*, 12 Wend., 150. If the defendant does not appear on the return day, but does appear on the day to which the

cause may have been adjourned for the convenience of the plaintiff, the justice may, in his discretion, then permit the defendant to interpose his defense: *Sammis v. Brice*, 4 Denio, 576; *Jenkins v. Brown*, 21 Wend., 454; *Mead v. Darragh*, 1 Hilt., 396. But it is said that he cannot at this time claim to put in his defense as a matter of right: *Sammis v. Brice*, 4 Denio, 576; *Jenkins v. Brown*, 21 Wend., 454; *Snell v. Loucks*, 11 Johns., 69.

38—*Monfort v. Hughes*, 3 E. D. Smith, 591, 593-9; *Mead v. Darragh*, 1 Hilt., 396.

CHAPTER VIII.

OF THE TRANSFER OF CAUSES TO OTHER JUSTICES.

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|---|---|
| § 150. In suits commenced by warrant. | § 153. In case of vacancy in office of justice. |
| § 151. In suits commenced by other process. | § 154. Further in case of absence or vacancy. |
| § 152. In case of absence of justice on day of trial. | |

§ 150. In suits commenced by warrant.—Provision is made for taking a defendant arrested on a *warrant* before some other justice, in case the justice who issued it shall be absent, or unable to hear or try the case, or if it shall appear by the affidavit of the defendant that such justice is a material witness in his behalf on the trial of the case.¹

§ 151. In suits commenced by other process.—“If, before joining issue in any cause, the defendant, or his agent or attorney, shall make and file with the said justice an affidavit, stating that the justice, before whom the same is pending, is a material witness for such defendant, without whose testimony he cannot safely proceed to the trial thereof, and shall state in said affidavit the facts he expects to prove by said justice, or shall make and file as aforesaid an affidavit that the said justice has advised or counseled with the plaintiff in respect to the subject matter of said cause, the justice shall forthwith make in his docket an entry of the filing of such affidavit, and an order that the suit and all papers relating thereto, be transferred to one of the nearest justices of the peace in the same county, who is not of kin to either party, sick, absent from town, or interested in the event of said suit, either as counsel or otherwise, which justice shall be named in said order, and such transfer shall forthwith be made by such justice, and the justice to whom such transfer shall be

¹—C. L., § 726. See, *ante*, §§ 64, 68.

made, shall thereupon proceed to hear, try and determine the cause in the same manner as if the suit had been originally commenced before him, and with like effect, or the said justice may in the order aforesaid, in his discretion, postpone the hearing of said cause to such time as he shall see fit, not exceeding five days, at which time the justice to whom the cause is transferred, shall attend and proceed to hear, try and determine said cause as aforesaid: Provided, that the defendant shall pay to the justice making such order of transfer, the costs which have so far accrued and as taxed by said justice, together with fifty cents for such transcript, and the sum so paid shall be recovered by the said defendant against the plaintiff in addition to his other costs, if he finally prevail in said cause."²

The proper time to make this affidavit would be after the plaintiff had declared, and before plea. The justice would have no right to interpose his private knowledge or recollection, as an answer to the affidavit. The facts sworn to, however, must be material to the issue.³

§ 152. In case of absence of justice on the day of trial.—
 "If any justice of the peace shall be absent when there shall be pending before him any matter or suit undetermined, he

2—C. L., § 835. This statute is applicable only to suits at law, not to special proceedings: *People v. Brighton*, 20 Mich., 70. If parties appear before the justice to whom the transfer is made without objection and go to trial, if such justice has jurisdiction of the subject matter the question of the regularity of the transfer is foreclosed: *Smith v. St. Joseph Circuit Judge*, 46 Mich., 338; 9 N. W. 440. As to when a justice will be deemed to be disqualified to act by reason of interest, see *West v. Wheeler*, 40 Mich., 505; 13 N. W., 838; *Moon v. Stevens*, 53 Mich., 144; 18 N. W., 600; *Taggart v. Waters*, 115 Mich., 638; 13 N. W., 885. There can be no removal until all statutory prerequisites have been complied with: *Oakley v. Dunn*, 63 Mich., 494; 30 N. W., 96. Counter affidavits to affidavits for removal, not receivable: *Ibid*.

was necessary for the plaintiff to prove the execution of a paper to which the justice was the only subscribing witness: *Held*, that the disability of the justice to be sworn did not authorize him to admit other proof of the execution of the instrument: *Jones v. Phelps*, 5 Mich., 218.

3—*Hopkins v. Cabrey*, 24 Wend., 260. The justice has a right to judge of the sufficiency of the affidavit; but he cannot refuse to transfer the cause on the ground that he does not recollect the fact which the defendant expects to prove by him: *Young v. Scott*, 3 Hill, 32; see, *Murtha v. Walters*, 2 Sandf., 517. When such an affidavit is drawn and presented to the justice, he is bound to swear the defendant to the truth of it, whether the affidavit is sufficient or not; and his refusal to do so would be a misdemeanor: *People v. Brooks*, 1 Denio, 457.

Where, in a suit before a justice, it

may deliver over all the papers relating to such matter or suit, with a minute of his proceedings therein, to some neighboring justice of the same city or township, who may thereupon proceed to hear, try and determine such matter or suit, in the same manner as if such matter or suit had been commenced before him, and with like effect; but the parties to such matter or suit, their agents or attorneys, shall be notified of such transfer previous to any hearing or trial of such matter or suit.”⁴

§ 153. In case of vacancy in the office of any justice.—
 “Whenever the office of any justice shall become vacant by resignation, removal or otherwise, and there shall be pending before him any matter or suit undetermined, and the books and papers of such justice shall be delivered over to any other justice of the city or township, pursuant to the foregoing provisions, the justice to whom such books and papers shall be so delivered, shall proceed to hear, try, and determine such matter or suit, and to issue execution thereon, in the same manner and with the like effect as he might have done if such matter or suit had been originally commenced before him.”⁵

§ 154. Further, in case of vacancy, absence of justice, etc.—
 Further provisions for the transfer of causes have been enacted as follows:

“In case a vacancy from any cause shall occur in the office of a justice of the peace, all causes and matters pending before him at the time such vacancy shall occur shall stand transferred to the justice of the same township or city whose term of office shall soonest expire: Provided, that the hearing or trial of the same shall not be had within ten days after such vacancy shall occur.”⁶

“In case of the sickness of any justice, or of his absence from the township or city in which he was elected, or his inability from any cause, temporarily or negligently, to perform the duties of his office, any such matter or cause pending before him shall stand continued before him two weeks, at

⁴—C. L., § 964.

will be found in C. L., §§ 967-970

⁵—C. L., § 971. The “foregoing provisions” referred to in this section,

⁶—C. L., § 799.

the end of which time, unless said justice shall be able to attend the same, such cause or matter shall stand transferred to the justice of the same township or city whose term of office shall soonest expire, and be heard or tried before him in the same manner and time as in case of a vacancy: Provided, that this act shall not be construed to prevent the transfer of causes by justices under the existing provisions of law.'"

7—C. L., § 800.

CHAPTER IX.

OF PLEADINGS IN GENERAL AND OF THE DECLARATION.

OF PLEADINGS IN GENERAL.	§ 161. Mistake in name of plaintiff.
§ 155. By statute.	§ 162. Mistake in name of defendant.
§ 156. Time for pleading.	§ 163. Facts, how alleged.
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OF PLEADINGS IN GENERAL.

§ 155. **By statute.**—"At the time of the first appearance of the parties before the justice, either upon the return of process or their voluntary appearance to join issue, the pleadings of the parties shall be made, unless the justice shall allow, further time upon cause shown, and when both parties have appeared, an issue shall be joined before an adjournment shall be had, except as aforesaid; and when the defendant shall have appeared upon a warrant, the pleadings shall be made within such reasonable time as the justice shall allow for that purpose."¹

§ 156. **Discretionary power of justice as to time of receiving pleadings.**—When upon the return of a summons, after waiting an hour and twenty minutes, the plaintiff declared, and proceeded to the proof of his demand by examining two witnesses; and then (an hour and a half after the time speci-

1—C. L., § 766. When a party is brought before a justice upon a warrant, he should be allowed reasonable time to procure counsel and to plead: *Brown v. Kelley*, 20 Mich., 32; *Meddaugh v. Williams*, 48 Mich., 172; 12 N. W., 34. In the latter case, when the defendant was brought before the justice upon a warrant, he was required to plead immediately, which he did by putting in the general issue, and the suit was then adjourned. *Held*, that having been compelled to plead immediately, it was his privilege, as a matter of right, on the adjourned day to amend his pleading by adding thereto a notice of special defense under the general issue, but this privilege having been denied by the justice, the judgment was reversed.

fied in the summons for appearance) the defendant appeared and asked leave to plead, offering to pay all costs, and the justice refused to give such leave, and only permitted the defendant to cross-examine the plaintiff's witnesses, the court held that the defendant should have been allowed to put in his plea and go into his defense.² In a former case,³ the court decided that the defendant may plead if he appears and offers to make his defense before the court has entered upon the trial of the merits. In the above case, in 12 *Wendell*, the judge observes: "I would approve of the qualification to the general rule, contained in *Sweet v. Coon*, and allow the defendant to plead, if he appeared on the return of the summons before the cause is adjourned, or even after, if the plaintiff was still present, or before the plaintiff had closed his case, if he went to a hearing on a return day. The latter indulgence I should grant, because, if the plaintiff came prepared for a hearing on the return day, he must have prepared under the expectation that the defendant would appear, and therefore there would be no great inconvenience in permitting the defense."

But, to allow a defendant to come in on an *adjourned* day and go into his defense, although upon payment of costs and consenting to an adjournment, would tend to encourage negligence on the part of the defendant, and to promote delay and embarrassment of the plaintiff. The defendant not appearing on the return of the summons, the plaintiff at the adjourned day is not bound to anticipate and prepare for a contested trial; and to permit the defendant to have the benefit of a trial under such circumstances, is allowing him to take advantage of his own negligence, to the prejudice of another.⁴ In such a case the defendant would be allowed only to give evidence in mitigation of the damages.⁵

But where the defendant appeared on the adjourned day, for the first time, and made an affidavit excusing his default in not appearing on the return day, and generally of merits in the cause, as advised by counsel, and offered to pay the costs of the adjournment and all subsequent proceedings, and to

2—Pickert v. Dexter, 12 Wend., 150.

3—Sweet v. Coon, 15 Johns., 86.

4—Pickert v. Dexter, 12 Wend., 153;

Snell v. Loucks, 11 Johns., 69.

5—Snell v. Loucks, 11 Johns., 69.

allow the plaintiff a further adjournment if he wished it, and, under the circumstances, asked leave to plead and tendered a plea, the court held that a justice might, on the cause shown, have given the leave without violating the spirit of any decision of the court; that he had the same power in this respect as a court of record, which is to let in a defendant to plead at any stage of the cause, on such terms as shall save all reasonable chance of preparation to the plaintiff, while it subserves the purposes of justice by promoting a trial upon the merits, without dispensing with the exercise of proper diligence on the side of the defendant.⁶ But as this is matter of discretion merely in the justice, his decision upon the question is conclusive. For that reason the justice should not be too rigid upon the defendant. If the justice is satisfied by the affidavits, or otherwise, that the defendant has a good excuse for not appearing on the return day, that he has a good defense, and that the application is made in good faith, he should allow the party to plead. He may also require the defendant to pay the costs of the plaintiff in preparing for trial, in case an adjournment should be wished by the plaintiff; he may require the defendant to consent to an adjournment, and to admit the affidavit of a witness for the plaintiff, in case of his absence on the day of trial.

§ 157. Nature and essentials of.—Pleading is the statement in a logical and legal form of the facts which constitute the plaintiff's cause of action, or the defendant's ground of defense; it is the formal mode of alleging on the record that which would be the support or the defense of the party in evidence.

And in general, whatever circumstances are necessary to constitute the cause of action on the ground of defense, must be stated in the pleadings, and all beyond is surplusage. But *facts* only are to be stated; and not arguments or inferences, or matters of law.⁷

6—*Jenkins v. Brown*, 21 Wend., 464. Justices' courts have all such powers for the purposes of jurisdiction as are usual in courts of record, except the power of setting aside a verdict and arresting judgments thereon: *Van Sickle v. Kellogg*, 19 Mich., 49.

7—1 Chitty's Pleadings, 10 Am. ed., 213, 214; *Picard v. McCormick*, 11 Mich., 69. The real object of pleading in any court is, to apprise the opposite party of the nature and grounds of the action, or the defense, as the case may be, so that there shall be neither mis-

§ 158. **Construction of pleadings.**—Pleadings in justices' courts have always been liberally construed, and great latitude has been allowed in them.⁸ But, notwithstanding the liberality with which courts have regarded them, they are still subject to the same rules as the pleadings in courts of record; and it is only when they have passed without objection from the opposite party that they have been regarded with favor by the courts.⁹

§ 159. **May be written or oral.**—"The pleadings in a suit before a justice of the peace may be either written or verbal, at the discretion of the party making the same, except in case of notice of title to land; when written, they shall be filed with the justice; when verbal, the justice shall enter in his docket the substance thereof; the declaration shall be sufficient on general demurrer, if conformable at the time, to the rules of pleading applicable to the circuit court; the plea of the general issue shall be in the same form as in those courts, and notice of any defense not admissible under the general issue, shall be given with such plea; no special demurrer shall be allowed; pleas in abatement must be pleaded under oath, and the execution of a written instrument, filed with the justice,

apprehension nor surprise on the trial as to what matters are to be litigated: *Hurtford v. Holmes*, 3 Mich., 463.

8—Pleadings in justices' courts should be viewed with liberality. Technicalities in such pleadings should be discountenanced, and substance instead of form required: *Hurtford v. Holmes*, 3 Mich., 460. Technicalities and form are neither expected nor required in the proceedings of justices' courts: *Kinyon v. Fowler*, 10 Mich., 16; see, *Wilcox v. Toledo, etc., R. R. Co.*, 43 Mich., 584; 5 N. W., 1003; *Snyder v. Winsor*, 44 Mich., 140; 6 N. W., 197. But, while the rules of pleadings applied to justices' courts are extremely liberal, a cause of action must be as fully proved in those courts as in any other: *Cicotte v. Morse*, 8 Mich., 424.

9—The insufficiency of a pleading, either for want of substance or sufficient specification, may be waived by the party to be affected by it; and if the declaration is not sufficient in this

respect, and the defendant pleads substantially, and goes to trial on the merits, he is estopped from objecting afterwards to the pleading for insufficiency: *Hurtford v. Holmes*, 3 Mich., 460, 464. Thus, pleading to the merits and going to trial thereon before a justice, precludes the defendant from objecting to evidence on the ground that particular facts essential to its introduction were not set forth in the declaration, if it so states the plaintiff's cause of action that it may be fully understood, and so as not to mislead the defendant: *Chancey v. Skeels*, 43 Mich., 347; 5 N. W., 380. And, though a declaration be informal, if it fairly apprises the defendant of the claim made against him, it will be held sufficient if not demurred to: 43 Mich., 584, *supra*; see, *Whelpley v. Nash*, 46 Mich., 25; 8 N. W., 570. Pleadings are always understood to date, as to their allegations, from their actual filing: *Allen v. Carpenter*, 15 Mich., 41.

shall not be denied, except under oath, as hereinafter provided.”¹⁰

OF THE DECLARATION.

§ 160. Requisites of.—The declaration is a specification, in a legal form, of the circumstances which constitute the plaintiff's cause of action. The general requisites of a declaration are: 1st, that it correspond with the process; 2d, that it contain a statement of all the facts necessary in point of law to sustain the action, and no more; and 3rd, that these facts be set forth with certainty and truth.¹¹

The declaration must agree with the process in the number of the plaintiffs, and the character in which they sue.

§ 161. Mistake in name of plaintiff.—The name of the *plaintiff* must be stated in the process. If the name of the plaintiff is mistaken in the process, the same name may and must be in the declaration; unless the process is amended as it may be, by inserting the true name.¹² If, however, the correct name is not used, the defendant may plead the misnomer in abatement.¹³

§ 162. Mistake in name of defendant.—The same rule, as to number, applies to *defendants*. “No process shall contain the names of the defendants in more than one action.”¹⁴

“When in actions for *tort*, a summons is returned not found or served by copy, as to part of the defendants who shall not

10—C. L., § 707; Crouse v. Derbyshire, 10 Mich., 481. Pleadings in justices' courts are to be viewed with liberality and to be liberally construed: Bank v. Carson, 60 Mich., 432; 27 N. W., 589. Technicalities are not favored: Soper v. Mills, 50 Mich., 75; 14 N. W., 704; Whittle v. Balles, 65 Mich., 640; 32 N. W., 874; Nugent v. Teachout, 67 Mich., 571; 35 N. W., 254; Lynch v. Craney, 95 Mich., 199; 54 N. W., 879.

Still they must be sufficient to fairly show a cause of action, and with sufficient certainty to obviate surprise on the part of the other side and to enable him to prepare to meet the proofs: Watkins v. Ford, 69 Mich., 457; 37 N. W., 300.

11—1 Chitty's Pl., 10 Am. ed., 240, 244. If the declaration is in writing it must conform in substance to the rules of the Circuit Court: Benalleck v. People, 31 Mich., 201. Declarations in justices' courts are to be liberally construed, and, though informal, when they fairly apprise the defendant of the claim against him may be held sufficient: Costello v. TenEyck, 86 Mich., 348; 49 N. W., 152; see cases cited in preceding note.

12—Willard v. Missani, 1 Cow., 37; Waterbury v. Mather, 16 Wend., 611; but see, 1 Chitty's Pl., 10 Am. ed., 247.

13—Waterbury v. Mather, 16 Wend., 611.

14—C. L., § 712.

appear, the plaintiff may dismiss the cause as to such defendants, and proceed against the defendants personally served or appearing.¹⁵

If the defendant be sued by a *wrong name*, and does not appear, the process having been personally served, the plaintiff will declare against him, and proceed to judgment, in the name in the process. The defendant may either plead the misnomer in abatement, or move to set aside the process,¹⁶ unless a fictitious name is used.¹⁷ When a suit is commenced for or against a *copartnership*, and the names of all the several parties are not known, the suit may be commenced in the partnership name of said plaintiffs or defendants, and the plaintiffs or defendants have the right, at any time before the pleadings are closed, to amend the same by inserting the names of the parties composing the partnership.¹⁸ In actions upon *instruments in writing*, any of the parties to which are designated by the initial letter or letters, or contraction of the christian or first name or names, it is sufficient to describe them in the same manner in the declaration.¹⁹

If a person enter into a bond or deed by a wrong name, he should be sued by such name; and a declaration against him by his right name, stating that he by the wrong name executed the bond, is bad, and the defendant may avail himself of this objection under the general issue.²⁰

15—C. L., § 775.

16—Mann v. Carly, 4 Cow., 148.

17—C. L., § 765; *ante*, § 29. But it seems that a plaintiff cannot avail himself of the statute allowing process to be issued against a defendant by a *fictitious name*, on the ground that his name was not known to the plaintiff, unless an averment to that effect is contained in the declaration, or is alleged by way of replication to a plea of misnomer: Waterbury v. Mather, 16 Wend., 611.

18—C. L., § 764; *ante*, § 24; see, Hubbardston Lumber Co. v. Covert, 35 Mich., 261. This section can only apply where there is a partnership, and not to a case where a single person uses a name indicating a partnership which does not exist: Sterling v. Heintzman, 42 Mich., 449; 4 N. W., 165.

19—C. L., § 763; *ante*, § 30; see, Fewlass v. Abbott, 28 Mich., 270; Barber v. Smith, 41 Mich., 138; 1 N. W., 992; Ramsdell v. Eaton, 12 Mich., 117; Shaw v. Fortine, 98 Mich., 254; 57 N. W., 128; Fisher v. Northrup, 79 Mich., 287; 44 N. W., 610.

20—1 Chitty's Pl., 245; Gould v. Barnes, 3 Taunt., 504; see, Meredith v. Hinsdale, 2 Caines, 362. The misspelling of a name is not material, if the two names be of the same sound: 1 Chitty's Pl., 245. The name is the same when the pronunciation is the same: 1 Doug., Mich., 69; Finnegan v. Mayworm, 5 Mich., 146. But when "the Board of Supervisors of the County of St. Joseph," brought suit on a bond, alleging that it was given to "the Board of Supervisors of the County of St. Joseph;" but the bond proved, was given to "the Supervisors of the County of St. Joseph," the court held

A variance between the *summons* and declaration, as to the plea, is a matter of form, merely, and not to be regarded.²¹

§ 163. Requirement as to allegations of fact in the declaration.—If the defendant does not appear, or appearing, does not object to the declaration, technical nicety or form in it will not be required. In such cases, pleadings having no claim to form, and very little to substance, have been held good.²² It is no objection that there is no venue; nor in an action for goods sold, that there is no averment that the goods were sold and delivered by the plaintiff to the defendant; and that no promise or undertaking by the defendant is stated.²³ When the declaration was “for moneys due on contract (lost by fire), damages for non-performance of contract, services rendered, money paid, goods sold and delivered,” it was held

that there was a variance, and that the plaintiffs should have averred in the declaration that the bond was made to *them* by the name mentioned in the bond: *Supervisors of St. Joseph v. Coffenbury*, 1 Mich., 355.

21—See, *ante*, § 36.

22—*Groff v. Griswold*, 1 Denio, 432; *Kinyon v. Fowler*, 10 Mich., 16; see *Soper v. Mills*, 50 Mich., 75; 14 N. W. 704. But the declaration must contain a substantial statement of a cause of action. Therefore, where a plaintiff, in declaring against the indorser of a note, merely presented the note indorsed by the defendant, and stated that he declared against the defendant as indorser, without making any statement or averment as to the presentation of the note for payment, and notice of non-payment to the defendant, the declaration was held bad, as those latter allegations were necessary to show the liability of the defendant: *Barber v. Taylor*, 1 Mich., 352. But when a declaration contains in substance a cause of action, and to which the general issue is pleaded, it will, after judgment be presumed that all inaccuracies and defects in the plaintiff's statement of his case were supplied by proof on the trial: *Stange v. Clement*, 17 Mich., 402. Pleading and going to trial precludes parties from setting up merely tech-

nical defects, where the declaration contains a good case otherwise: *Grand Rapids & Indiana Ry. Co. v. Southwick*, 30 Mich., 446. But the objection that the declaration fails to state any cause of action is not waived by pleading to the merits; the point may be made by an objection to the introduction of any evidence: *Stoflet v. Marker*, 34 Mich., 313; *Jennison v. Haire*, 29 Mich., 207. Where the statute has *expressly* required the existence of any fact, in order to give a cause of action, such fact must be averred in the declaration: *Beaubien v. Cleotte*, 8 Mich., 12.

In declaring on a statute, where there is an exception in the enacting clause, the pleader must negative the exception; but where there is no exception in the enacting clause, but an exemption in a proviso to the enacting clause, or in a subsequent section of the act, it is a matter of defense, and must be shown by the defendant: *Myers v. Carr*, 12 Mich., 71; *Lynch v. The People*, 16 Mich., 472.

In construing statutes adopted from the laws of other states, our courts will apply the same construction as given by the courts of the state from which they were adopted: *Harrison v. Sager*, 27 Mich., 476.

23—*Stafford v. Williams*, 4 Denio, 183.

good.²⁴ "We have repeatedly held that pleadings in justices' courts, as brief and imperfect as those in the present case, were sufficient to let in the evidence, unless the party was called on at the time of joining issue, to state his cause of action or defense more at large."²⁵ When the defendant does not demur, but goes to trial, and is fairly beaten on the merits, the court above will overlook all defects of form, and of substance too, in the pleadings. But if the declaration does not set forth a cause of action, if one is not made out by proof, the judgment will be reversed. Thus, where the declaration alleged that the defendant, *or his family*, set his dog on certain swine of plaintiff, and proved that the daughter of defendant,

24—*Young v. Rummell*, 5 Hill, 60; 7 Hill, 503. Thus, where the plaintiff declared verbally "on common counts in assumpsit, and also on a breach of a written contract, now on file in court, in all for three hundred dollars or under," and the defendant pleaded the general issue, it was held that, under the liberal rules of pleading applicable to justices' courts, the declaration was sufficient, and that the contract referred to was admissible in evidence thereunder: *Bradshaw v. McLoughlin*, 39 Mich., 480; see, *Soper v. Mills*, 50 Mich., 75; 14 N. W., 704.

Contract executed by an agent—When a contract purporting to be executed by agents of the respective parties was set forth at length in the declaration, and alleged to be the contract of the parties, the declaration was held sufficient without showing how the agency was constituted: *Regents, etc., v. The Detroit Y. M.'s S.*, 12 Mich., 138.

Consideration, how alleged—In declaring upon simple contracts, except in those cases where the contracts themselves import a consideration, the rules of pleading require the consideration to be set out. When the mode in which the consideration is stated is defective, informal or uncertain, the declaration will be bad on demurrer. The consideration is required to be set forth, that the court may see that it is of the kind and nature to sustain the premises, and should be distinctly set out that the court may judge of it; and the declaration should state the whole consideration expressly and

formally, correspondent with the facts in the case, and co-extensive with the contract. If the plaintiff may, in general terms, allege that there was a consideration, without specifying in what it consists, it will be impossible for the court, upon demurrer, to say, from the declaration, whether that which the plaintiff considers a valid consideration, is, in fact, one which will support the action. Therefore, where the declaration simply avers that the promise was made for a good and valuable consideration, without stating in what the consideration consists, it is clearly defective. But, if to such a declaration the defendant should plead the general issue, he would be deemed to have waived his right to a more specific statement of the consideration, and the plaintiff might prove a sufficient consideration under it, and the judgment would be sustained: *Kean v. Mitchell*, 13 Mich., 207; see *Tillman v. Fuller*, 13 Mich., 113; *Comstock v. Howd*, 15 Mich., 237.

But in a declaration on the common counts in assumpsit, it is not necessary to set out the consideration, nor to explain what it consisted of: *Crane v. Grassman*, 27 Mich., 443. When a party claims pay for his services rendered under a special contract which he has performed on his part, and nothing remains but to receive payment in money, he may declare upon the common counts only, and need not set out the special agreement: *Crane v. Grassman*, 27 Mich., 444.

25—*Young v. Rummell*, 5 Hill, 60.

not by his direction, set the dog on the hog, the judgment was reversed, because the father was not answerable for the act of his daughter, done without his authority or approval; but the daughter, whether an infant or not, was answerable for her own trespass.²⁶ So, where the plaintiff declared for the breach of a "verbal contract" in a case where the statute of frauds required the contract to be in writing, and the defendant pleaded to the declaration, and on the trial, upon proof of the parol contract, the defendant for that reason objected that the contract was invalid, which objection was overruled, the judgment rendered for the plaintiff was reversed.²⁷ The case of *Barber v. Taylor*²⁸ may seem, at the first view, to conflict with the above cases, but such is not the case. In a recent case, the supreme court held that pleadings in a justice's court should be viewed with liberality. That *technicalities* in pleadings in their courts should be discountenanced, and substance instead of form required. That the object of a pleading in any court is to apprise the opposite party of the nature and grounds of action or defense, as the case may be, so that there should be neither misapprehension nor surprise on the trial as to what matters are to be litigated. That if a party is not sufficiently apprised, he may demur or demand a more full and particular statement before joining an issue upon the merits. But if he pleads *issuably*, and goes to trial on the merits without objection, he shall be, upon principle, *estopped* from raising any objection afterwards to a pleading of the case on the ground of its sufficiency, either for want of substance or sufficient specification.²⁹

But a party, by demurring, may require the declaration to contain all which is required by law to be set forth in it; that is, it must be correct in substance. The declaration will be

26—*Tift v. Tift*, 4 Denio, 175.

27—*Green v. Armstrong*, 1 Denio, 550. Where a thing is originally authorized by statute, which could not be done at common law, then, in pleading, everything 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 in pleading, it is not necessary to aver that the writing was made; that the writing was made is a matter of evidence to be shown upon the trial: *Dayton v. Williams*, 2 Doug., Mich., 32.

28—1 Mich., 352.

29—*Hurtford v. Holmes*, 3 Mich., 460. And see cases *ante*, §§ 159, 160, notes 10 and 11.

sufficient on general demurrer, if conformable, at the time, to the rules of pleading applicable to the circuit court. A special demurrer is not allowed.³⁰

§ 164. **Declarations in actions by or against corporations.**—In the pleadings “in actions by or against any corporation created by or under any law of this state, it shall not be necessary to recite the act or acts of incorporation, or the proceedings by which such corporation was created, or to set forth the substance thereof, but the same may be pleaded by reciting the title of such act, and the date of its approval.”³¹

§ 165. **Declarations on judgments.**—“In pleading a judgment or decision of a court or officer of special jurisdiction, it shall be sufficient to allege generally, that judgment or decision was duly given or made.”³²

§ 166. **Pleading performance of condition and on open accounts.**—“In pleading the performance of a condition precedent in a contract, it will be sufficient to allege generally, that the party performed all the conditions on his part; if the allegation be denied, the facts showing the performance must be proved on the trial.”³³

“Plaintiffs, in actions founded on open accounts, shall embrace all claims then due on account, not exceeding twenty-five dollars, or failing so to do, shall not recover costs in any subsequent suit on claims not so embraced.”³⁴

30—C. L., § 767; *ante*, § 159. “A general demurred to a declaration is simply an objection to it on the ground that it is insufficient in law. It cannot be doubted that in whatever form, it be put any objection in justice’s court, by the defendant that the plaintiff’s declaration is insufficient in law, would be held sufficient to constitute a general demurrer”: *Stevens v. Harris*, 99 Mich., 230, 233; 58 N. W., 230. A general demurrer is a waiver of objections to jurisdiction over the person: *Thompson v. Michigan M. B. Assn.*, 52 Mich., 522; 18 N. W., 247; *Norberg v. Heineman*, 59 Mich., 210; 26 N. W., 481.

31—C. L., § 10472; see, *Wilson Sewing Machine Co. v. Spears*, 50 Mich., 534; 15 N. W., 894.

32—C. L., § 770.

In declaring on a judgment rendered by a justice of the peace, the usual form applicable to judgments in courts of record, without stating the particular facts whereby the justice obtained jurisdiction, is sufficient. Thus, on a judgment in assumpsit, a statement of the amount of the judgment, and its character as a judgment in assumpsit, show affirmatively that it was within the general jurisdiction of the justice who rendered it, and no more in this respect is required: *Goodsell v. Leonard*, 23 Mich., 374.

33—C. L., § 771.

34—C. L., § 768; see, *Town v. Smith*, 14 Mich., 348; *Dutton v. Shaw*, 35 Mich., 431; *Morehouse v. Baker*, 48 Mich., 338; 12 N. W. 170; *Minnaugh v. Partlin*, 67 Mich., 391; 34 N. W., 717. This statute does not make it

§ 167. Form of declaration.

IN JUSTICE'S COURT.

James Stiles	}	Before C.....B. J....., a Justice of the Peace in and for the County of Lenawee.
v.		
James Jackson.		

Lenawee County, ss. ³⁵

James Stiles,³⁶ plaintiff in this suit, by C..... D....., his attorney (or, *in his own proper person*), complains of James Jackson,³⁷ the defendant herein, who has been summoned to answer the said plaintiff in a plea of trespass on the case upon promises.³⁸

For that whereas heretofore to wit:.....(*allege a time when the cause of action arose*), at to wit:.....(*allege a place where the cause of action arose, then state the cause of action and conclude thus:*³⁹) to the damage of the plaintiff of three hundred dollars,⁴⁰ and therefore he brings suit.

necessary, in cases of an account made up of several items, to bring a single action to recover all on penalty of having a former judgment for a part successfully pleaded in bar of an action for another part. Its effect is simply to defeat a recovery for costs in the second action: *Phelps v. Abbott*, 116 Mich., 624; 74 N. W., 1010.

35—When no local description is necessary, it is not essential to allege that the act took place in any particular township or place named within the county; it is sufficient to aver that it took place in the county only. But if the township or place be stated as matter of description, as in the situation of premises, then a variance would be fatal. When a transitory matter occurred out of the county, it may, in some cases, for the purpose of explaining a fact, be necessary to state that it occurred abroad. If the exact place abroad be stated, it should be shown under a *videlicet* (*i. e., to-wit*): That it happened in the county where the suit is brought, thus: In the township of, in the county of Monroe, to-wit: In the township of, in the county of Lenawee: 1 Chitty's Pl., 10 Am. ed., 275.

36—See, *ante*, § 27.

37—See, *ante*, § 28-31.

38—See, *ante*, § 36.

39—In stating the cause of action, it is not necessary to allege more than will constitute a *prima facie* or sufficient cause: *Atty. Gen'l v. Michigan State Bank*, 2 Doug., 361. Under a general allegation of damage, a party is entitled to recover those damages only which the law presumes to have accrued from the act complained of: *Burrel v. The N. Y. & S. S. Co.*, 14 Mich., 34. But where the party has sustained a special injury or damage, such as the law would not ordinarily presume to result from the wrong complained of, such special damages must be alleged and set forth in the declaration, otherwise the plaintiff would not be allowed to recover for them: *Fuller v. Bowker*, 11 Mich., 204; *Gilbert v. Kennedy*, 22 Mich.

40—This sum is, in general, the amount to which the court has jurisdiction in the particular action. The sum must not exceed the jurisdiction of a justice in the particular action, or the whole proceeding would be void: *Rockwell v. Perine*, 5 Barb., 574; see, *ante*, § 37. So, where the justice had jurisdiction to fifty dollars, and the

declaration contained three counts claiming fifty dollars, and had no conclusion stating the amount claimed, it was held, on appeal, that the suit must be dismissed for want of jurisdiction: *Swift v. Woods*, 5 Blackf., 97, 357. But when, in such a case, the parties are in court before the justice, the declaration may be amended: *Wooley v. Wilber*, 4 Denio, 570; 16 Mich., 326; *ante*, § 37.

But if, at the close of his declaration, he claims a specified sum for damages, which is intended to include all his damages under the declaration, he cannot have judgment for more than that sum: *Kenyon v. Woodward*, 16 Mich., 326. Where a declaration contains two counts, the first of which closes without any *ad damnum* clause, and the second states a cause of action not within the jurisdiction of the justice, but closes with a general *ad damnum*, inserted at the end of the declaration, this clause will be deemed

to apply to the first count as well as to the second: *Sheldon v. Sullivan*, 45 Mich., 324; 7 N. W., 900. It does not seem necessary, in a declaration in justice's court, to state the amount of damages claimed; and that if no specified sum is claimed, it will be intended that the plaintiff claimed damages to the amount of the justice's jurisdiction. Therefore, where a plaintiff declared on the common counts, claiming damages thereunder to the amount of \$100, and in the same declaration declared on certain promissory notes, but did not specify the amount of damages claimed under the counts on the notes, it was held that he was not limited in his recovery to the sum of \$100, as the \$100 damages mentioned in the declaration referred only to his claim under the common count: *Pew v. Yoare*, 12 Mich., 16. But there must be an allegation of damages, since it does not necessarily follow that plaintiff is injured in the particular case.

CHAPTER X.

OF PLEAS TO THE JURISDICTION AND IN ABATEMENT.

IN GENERAL.

§ 168. Kinds of pleas and pleading order.

OF PLEAS TO THE JURISDICTION.

§ 169. Jurisdiction—what it is.

§ 170. Objections to jurisdiction, etc.

OF PLEAS IN ABATEMENT.

§ 171. To the disability of plaintiff.

§ 172. To the disability of defendant.

§ 173. In abatement of the process.

§ 174. To the action of the process.

§ 175. Strict construction of.

§ 176. Must be verified.

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§ 181. Of evidence to sustain plea.

§ 182. Of misjoinder of parties.

§ 183. Of misnomer.

§ 184. Of pendency of another action.

§ 185. Of joinder of causes of action.

§ 186. Of misjoinder of counts.

§ 187. Of dividing causes of action.

IN GENERAL.

§ 168. **Kinds of pleas and order of pleading them.**—Pleas are of two sorts: *dilatory* pleas, and pleas to the *action*. *Dilatory pleas* are such as tend merely to delay or put off the suit, by questioning the propriety of the remedy, or the correctness of the procedure as taken, rather than by denying the injury. Pleas to the action are such as to dispute the very cause of suit.¹

The order always to be observed in pleading, is:

- a.—To the jurisdiction.
- b.—To the disability of the person.
 - 1.—Of the plaintiff.
 - 2.—Of the defendant.
- c.—To the process.
 - 1.—To the form of the process.
 - 2.—To the action of the process.
- d.—To the action itself in bar of it.

By this order of pleading, each subsequent plea admits that

¹—3 Black. Com., 301.

there is no foundation for the former, and the defendant is precluded from pleading any matter *prior* in point of order to that upon which judgment to answer over has been given against him; and after a plea in bar to the action, the defendant cannot plead in abatement, unless for matter arising after the commencement of the suit.² Nor can a plea in bar and a plea in abatement be pleaded at the same time.³ In such a case, if the plea in bar is first, the plea in abatement may be disregarded.⁴ Where, after having pleaded in abatement, the defendant pleads in bar, he waives his first plea.⁵ By pleading according to the above arrangement, the defendant may go through the whole series.

OF PLEAS TO THE JURISDICTION.

§ 169. **Jurisdiction—what it is.**—The justice must have authority to determine the particular question presented and to command the particular persons interested in that determination, to enforce the determination. Authority in the justices' courts to decide particular classes of cases comes from the statutes defining the jurisdiction of these courts, and within the limits of this authority these courts are said to have "jurisdiction of the subject matter." Authority to command the persons interested comes from the statutes prescribing what classes of persons (usually determined by residence) may be so commanded by the justice, and through their voluntarily

2—1 Chlt. Pl., 10 Am. ed., 441; Cook v. Ferral, 13 Wend., 285; Palmer v. Everton, 2 Cow., 417.

3—Palmer v. Everton, 2 Cow., 417; Smith v. Elder, 3 Johns., 105; Burnham v. Webster, 5 Mass., 266. *Contra* in the circuit court in Michigan by virtue of circuit court rule number 6: National Fraternity v. Wayne Cir. Judge, 127 Mich., 186; 86 N. W., 240.

4—Jenkins v. Pepoon, 2 Johns. Cases, 313.

5—Burnham v. Webster, 5 Mass., 266-268. Matter which is merely in denial of the plaintiff's right of action is never pleadable in abatement, but must be pleaded in bar: Morgan v. Butterfield, 3 Mich., 625. Under circuit court rule No. 6, a defendant may,

in circuit courts, plead in abatement and at same time plead the general issue and not lose the benefit of his plea in abatement. This rule is construed to include pleas to the jurisdiction as well as the plea in abatement: National Fraternity v. Wayne Circuit Judge, 127 Mich., 186; 86 N. W., 540. Grant, J., uses the following language in the opinion in the last named case: "Chitty and other writers upon pleading recognize a distinction between pleas to the jurisdiction and pleas in abatement. We think, however, under the practice and decisions in the courts of this state, a plea to the jurisdiction is included in the term 'plea in abatement' used in the rule."

submitting themselves to this authority (as in the case of plaintiffs, and defendants who waive the service of process) or through their being brought under this authority through the service of compulsory process, as is the case usually with defendants. When this authority exists as to a particular person the court is said to have "jurisdiction of the person."

Parties cannot confer, by consent or otherwise, jurisdiction of the subject matter.⁶ Specific provisions of the statutes determine whether the justice has authority to determine a case like that presented, and questions of whether the court has authority of this sort are determined by the application of these statutes.

As to jurisdiction of the person, while it is true that in all cases the court must have this jurisdiction before it can pass a judgment affecting the person, yet it is not essential that this shall be gained through the service of compulsory process for appearance. Any conduct which in effect acknowledges this authority of the court is as effective as the service of compulsory process.

A justice may sometimes be shorn of jurisdiction, which otherwise he might possess, by reason of some specific rule of law, either common or statutory, as in the case of interest in the controversy to be submitted to him or relationship to the parties or one of them.

§ 170. Objections to jurisdiction and effect of absence of jurisdiction.—Objections to the jurisdiction of the justice may be made at any stage of the proceedings, in case he has no jurisdiction over the subject matter of the suit, or he has not obtained jurisdiction of the person of the defendant. In all such cases, the whole proceedings would be void. Thus, if a warrant or attachment issues without the requisite proof by affidavit, the proceedings would be void. If, however, the defendant should, in such a case, appear and join issue, the objection would be thereby waived, and the subsequent proceedings would be valid.⁷ If a justice, without consent of parties,

⁶—*Farrand v. Bentley*, 6 Mich., 281; *General v. Molliter*, 26 Mich., 444; *Moore v. Ellis*, 18 Mich., 77; *Attorney Stephenson's Case*, 32 Mich., 60.

⁷—*Swartout v. Roddis*, 5 Hill, 118.

try a cause which he is prohibited from trying by reason of affinity or consanguinity to either of the parties, the judgment would be void.⁸ In all such cases, the defendant may plead to the jurisdiction of the court, or he may object at any time, whenever the objection is not waived by pleading.⁹

OF PLEAS IN ABATEMENT.

§ 171. Pleas to the disability of the plaintiff are, that he is not in existence, being only a fictitious person or dead,¹⁰ that he died since the commencement of the suit, but if there are more than one plaintiff or defendant, and any die, and the cause of action survives, the suit does not abate;¹¹ that the plaintiff is an infant, and has declared in person or by attorney, and not by next friend;¹² that the plaintiff is a married woman,¹³ or married after the commencement of suit.¹⁴ If she marry after issue joined, it may be pleaded *puis dar. cont.*¹⁵ When a married woman has no interest whatever in the subject matter of the action, and improperly sues alone, it is a defense under the general issue,¹⁶ or defendant may plead it in abatement. It is a good plea that plaintiffs suing as husband and wife are not married;¹⁷ and this objection will not avail under the general issue.¹⁸

8—*Ante*, § 2, and *Clark v. Mikesell*, 81 Mich., 45; 45 N. W., 377.

9—In *Clark v. Mikesell*, 81 Mich., 45; 45 N. W., 377, the question of disqualification of the justice by reason of interest was raised by plea in abatement.

10—*Doe v. Penfield*, 19 John., 308; *Archbold's Pl.*, 304.

11—C. L., § 10121; *Newberry v. Trowbridge*, 13 Mich., 275. This rule is applied in case where the action is against a principal joined with the sureties on his bond. On the death of the principal the action proceeds in the names of the survivors. It is erroneous to bring in the personal representative of the deceased: *Healy v. Newton*, 96 Mich., 228; 55 N. W., 666. So in the case of the death of one partner: *Van Kleeck v. McCabe*, 87 Mich., 599; 49 N. W., 872.

12—1 Saund. Pl. & Ev., 5 Am. ed., 6; *Schermerhorn v. Jenkins*, 7 Johns., 373; *Young v. Young*, 3 N. H., 345; *Blood v. Harrington*, 8 Pick., 552; C. L., §§ 10455-10465.

13—*Milner v. Milnes*, 3 Term., 627.

14—*Morgan v. Painter*, 6 Term., 265; *Bates v. Stevens*, 4 Vt., 545; *Swan v. Wilkinson*, 14 Mass., 295; *Templeton v. Clary*, 1 Blackf., 288.

15—*Le Bret v. Papillon*, 4 East., 502. But as to suits by and against married women, under present Michigan statutes, see, *post*, § 178 and notes.

16—1 Saund. Pl. & Ev., 5 Am. ed., 7; *Caudell v. Shaw*, 4 Term R., 361.

17—Saund. Pl. & Ev., 7; 1 Bac. Ab., "Abate," (G).

18—*Dickenson v. Davis*, 1 Strange, 480; *Ricket and Wife v. Stanley*, 6 Blackf., 169; *Coombs and Wife v. Wil-*

When a domestic corporation sues, and the defendant wishes to deny the existence of such corporation, he may either plead in abatement, or give notice under his plea of the general issue, that the plaintiffs are not a corporation, and annex thereto an affidavit of the truth of such plea or notice.¹⁹

"In suits or proceedings by or against any corporation, a mistake in the naming of such corporation shall be pleaded in abatement; and if not so pleaded, shall be deemed to have been waived."²⁰

§ 172. To the disability of the defendant.—Nonjoinder or misjoinder of parties as defendants, is cause for plea in abatement;²¹ and so, that the defendant is misnamed;²² or, that the defendant was a married woman at the time of action brought.²³ If the defendant marry after the commencement of the suit, it cannot be pleaded even in abatement;²⁴ and plaintiff may in that case proceed to judgment against her.²⁵ The coverture of the defendant, when the supposed contract was entered into, is a defense in bar of the suit.²⁶

Hams, 15 Mass., 243. As to the rights of married women in the courts of the state, see, *post*, § 178 and notes.

Insanity of the plaintiff when suit was commenced, is said to be a good plea in abatement: 1 Chitty's Pl., 10 Am. ed., 449, n. 1.

19—C. L., § 10471. A plea of the general issue with no notice to the contrary admits corporate existence in case of a domestic corporation. *Garton v. Nat'l Bank*, 34 Mich., 279; *Wilson S. M. Co. v. Spears*, 50 Mich., 534; 15 N. W., 894; *Manhard Hardware Co. v. Rothschild*, 121 Mich., 657; 80 N. W., 707.

This statute in terms is applicable to domestic corporations only. As to whether a like result would follow at the common law in cases of corporations generally is not clear upon authority. It is held in Michigan, however, that a plea of the general issue puts plaintiff to his proof of corporate character, if a foreign corporation: *Farmers & Mechanics B. of M. v. Troy City Bank*, 1 Doug., Mich., 457; *Owen v. Farmers Bank of Sandstone*, 2 Doug., Mich., 133.

20—C. L., § 10473; *Johr v. St. Clair*

Supervisors, 38 Mich., 532. Formerly the existence of plaintiff as a corporation could only be tested by plea in abatement: *Boston Type Foundry v. Spooner*, 5 Vermont, 93; *Proprietors of Kennebeck v. Call*, 1 Mass., 485; *Conard v. Atlantic Ins. Co.*, 1 Peters, 450; *Society for the Propagation &c. v. Town of Pawlet*, 4 *Ibid.*, 501.

21—*The Merchants' & Farmers' Bank v. Dakin*, 24 Wend., 411; *Burgess v. Abbott*, 1 Hill, 476; *Hawks v. Munger*, 2 Hill, 200; *Mitchell v. Chambers*, 43 Mich., 150; 5 N. W., 57; see, *McIntosh v. McIntosh*, 79 Mich., 198; 44 N. W., 592.

22—Arch. Pl., 289, 291. If a corporation, when defendant is misnamed, advantage of it can only be taken by plea in abatement: C. L., § 10473.

23—*Milner v. Milnes*, 3 Term. R., 627; 1 Chitty's Pl., 10 Am. ed., 449.

24—1 Chitty's Pl., 449; *Crockett v. Ross and Wife*, 5 Greenl. R., 445; *Durgin v. Leighton*, 10 Mass., 58.

25—*Cooper v. Hunchin*, 4 East., 521.

26—*Marshall v. Rutton*, 8 Term. R., 545. As to suits against married women under Michigan statutes, see, *post*, § 178 and notes.

§ 173. **Pleas in abatement of the process** are, that a warrant or attachment issued without the requisite affidavit; privilege from arrest upon a warrant; or, from the service of other process.²⁷ The defendant may also make these objections without pleading.²⁸ So he may show that a return of personal service of the summons is untrue; as, where a summons against the father was served on the son, but returned personally served on the father, it was held that the defendant might show that it had not been served upon him.²⁹ In this case the defendant did not appear, and assigned the want of service as error, and for that cause the judgment was reversed.

§ 174. **Pleas to the action of the process** are, that another action is pending for the same cause in another court in this state.³⁰ To an action on a judgment, a writ of *certiorari* pending may be pleaded; but it must appear by the plea that the writ was brought prior to the commencement of the action, and that the requisite steps were taken to render it a supersedeas to the execution.³¹ An appeal would have the same effect on a justice's judgment.

A plea in abatement personal to one of two defendants cannot be pleaded by both.³²

§ 175. **Plea in abatement strictly construed.**—*Great accuracy* is necessary in the form of all pleas in abatement, as well in the *commencement* as in the conclusion, for it is said they make the plea.³³

27—King v. Colt, 4 Day, 129; Hubbard v. Sanborn, 2 N. H., 468; Van Alstine v. Dearborn, 2 Wend., 586; Halsey v. Steward, 1 Southard, 366; Gilbert v. Vanderpool, 15 Johns., 242. While according to the rules of the common law a plea in abatement was the proper method of raising questions of this sort, under the practice as now recognized it is proper to raise them by motion to dismiss for the defect: Stringer v. Dean, 61 Mich., 196; 27 N. W., 886.

28—Halsey v. Steward, 1 Southard, 366. Defective service can be objected to only by motion or plea in abatement. It is too late after pleading to the merits: Pollard v. Dwight, 4 Cranch., 421; Farrar v. U. S., 3

Peters, 459; Tilton v. Parker, 4 N. H., 142; Morse v. Calley, 5 N. H., 223. It is otherwise with void process: Coleen v. Figgins, 1 Breese, 3; see Hart v. Huckins, 6 Mass., 399.

29—Fitch v. Devlin, 15 Barb., 47.

30—Bowne v. Joy, 9 Johns., 221. The defense of a former suit pending can only be raised by a plea in abatement: Ryan v. Mills, 129 Mich., 170; 88 N. W., 392. But an action pending in the court of another state cannot be so pleaded: *Ibid.*; Newell v. Newton, 10 Pick., 470.

31—Jenkins v. Pepoon, 2 Johns. Cases, 312.

32—Shannon v. Comstock, 21 Wend., 456.

33—1 Chitty's Pl., 462.

The plea must have the highest degree of certainty and precision. Every allegation necessary to make out the case covered by it, and every fact which if alleged by the other side would defeat the plea, must be distinctly and not inferentially set forth. Such a plea must be certain to every intent, and be pleaded without any repugnancy. It must not state different facts having no relation to each other.³⁴

§ 176. Plea must be verified.—"No plea in abatement, or other dilatory plea, which does not involve the merits of the action, shall be received by any court, unless the party offering such plea shall prove the truth thereof by affidavit, or by some other evidence."³⁵

This affidavit or evidence must be positive as to the truth of every fact contained in the plea, leaving nothing to be collected by inference. Belief will not answer; the party must swear without qualification, that the plea is true in substance and matter of fact.³⁶

It is not necessary that the affidavit should be by the party himself; it may be by his attorney, or even by a stranger.³⁷ If the truth of the plea appear to the court upon an inspection of its own records or proceedings, an affidavit or other evidence is not necessary.³⁸

§ 177. The form of judgment on plea in abatement.—If an issue of fact, joined on a plea in abatement, be found for the plaintiff, the judgment is final that he recover; but on demurrer, it is, that the defendant answer over; that is, plead again. The judgment for the defendant, in all cases, is that the suit abate.³⁹

§ 178. Consideration of the special defense of coverture.—The defendant's coverture, when the supposed contract was

34—Belden v. Laing, 8 Mich., 500; Findley v. The People, 1 Mich., 234; Wales v. Jones, 1 Mich., 254; Heyman v. Covell, 36 Mich., 157; Dubois v. Henderson, 40 Mich., 262. And generally it must set up matters not apparent on the face of the declaration. The few exceptions are where certain defects or defenses are waived if not specially pleaded: Hinman v. Eakins, 26 Mich., 82.

35—C. L., §§ 767, 10070.

36—Kingsland v. Cowman, 5 Hill, 608.

37—1 Chitty's Pl., 463. But it must not be sworn to before the declaration is filed. And it must be properly and exactly entitled in the cause: *Ibid.*

38—Gray v. Sidneff, 3 B. & P., 397.

39—1 Chitty's Pl., 466.

entered into, is available as a defense under the general issue.⁴⁰ If the parties are sued as husband and wife when they were not, the fact that they were not is a defense under the general issue.⁴¹

This plea will not avail, if the husband be imprisoned in the state prison for life,⁴² or divorced *a vinculo matrimonii*,⁴³ or from bed and board,⁴⁴ or if the wife shall have come from any other state or country into this state, without her husband, he having never lived with her in this state⁴⁵ or where she made the contract under authority from the court of probate;⁴⁶ all which may be replied to the plea. But it is no answer to the plea that the husband and wife have separated, and that the wife has a separate maintenance secured to her by deed.⁴⁷

But in this state, the rules, as they were at the common law, in relation to the joinder of husband and wife, are very much changed by the statute in respect to the rights of married women. The following provisions have been enacted:

“The real and personal estate of every female, acquired before marriage, and all property, real and personal, to which she may afterwards become entitled, by gift, grant, inheritance, devise, or in any other manner, shall be and remain the estate and property of such female, and shall not be liable for the debts, obligations and engagements of her husband, and may be contracted, sold, transferred, mortgaged, conveyed, devised or bequeathed by her, in the same manner and with the like effect as if she were unmarried.”⁴⁸

40—Marshall v. Rutton, 8 Term. R., 545.

41—Sinclair v. Hervey, 2 Chitty's Rep., 642.

42—C. L., § 8620.

43—Lewis v. Lee, 3 B. & C., 291.

44—C. L., § 8682.

45—C. L., § 8678. A married woman residing in another state cannot, by pleading disqualification to contract, evade payment of notes given by her for goods purchased in Michigan, without showing that the laws of that state do so disqualify her. Notes authorized by Michigan laws are not to be presumed to be void, nor is it conceded that such notes made in this state would be void, notwithstanding the woman's inability to contract in

the state of her residence: Wheeler v. Constantine, 39 Mich., 62.

46—C. L., § 8670.

47—Marshall v. Rutton, 8 Term R., 545.

48—C. L., § 8690. She has the same power over her property, in all respects, that she had while unmarried: Starkweather v. Smith, 6 Mich., 377; Farr v. Sherman, 11 Mich., 33. She may contract in relation to her sole property the same as if she were unmarried, and her contracts of sale and purchase of property, and her obligations incurred in relation to her sole property, are to be treated the same, and she may be sued thereon the same as if she were unmarried: Durfee v. McClurg, 6 Mich., 232; Burdeno v.

“Actions may be brought by and against a married woman in relation to her sole property, in the same manner as if she were unmarried, and in cases where the property of the hus-

Amperse, 14 Mich., 95; Starkweather v. Smith, 6 Mich., 377; Tong v. Marvin, 15 Mich., 69; People v. Horton, 4 Mich., 67; Moore v. Foote, 34 Mich., 443. And she may mortgage her own property to secure a debt owing by her husband alone: Watson v. Thurber, 11 Mich., 457. Wife's power to make contracts is not general, but statutory, and cannot be extended beyond the constitutional and statutory limits: Kenton Ins. Co. v. McClellan, 43 Mich., 565; 6 N. W., 88. She has no power to make contracts except concerning her separate estate, which must be either by making agreements concerning property already possessed, and referring to it, or else concerning property acquired by the contract, or in consideration of it: Johnson v. Sutherland, 39 Mich., 579; West v. Laraway, 28 Mich., 464; Jenne v. Marble, 37 Mich., 319. There must be a direct relation between the contract and the property: Reed v. Bays, 44 Mich., 82; 6 N. W., 111. She cannot incur a mere personal obligation unconnected with property and not charging it: Jenne v. Marble, 37 Mich., 121. The test of the validity of a married woman's contract is, does it or does it not deal with her individual estate: Russell v. People's Savings Bank, 39 Mich., 671. A married woman whose husband has transferred to her the homestead and the personal property about the house and agreed to pay her \$100 per year during life in consideration of her release of dower and all claims present and future to his property is competent to contract for a nurse for herself: Barber v. Eberle's Estate, 131 Mich., 317; 91 N. W., 123. A wife cannot maintain an action against her husband for a personal tort committed upon her while living as husband and wife: Bandfield v. Bandfield, 117 Mich., 80; 75 N. W., 287. A wife is not liable on a note given by her jointly with her husband for personal property purchased by them jointly: Caldwell v. Jones, 115 Mich., 129; 73 N. W., 129. A wife may convey her property to pay hus-

band's debts: Kleidsen v. Blodgett, 113 Mich., 655; 72 N. W., 9; see Citizen's Savings Bank v. Darling, 110 Mich., 227; 68 N. W., 132. So she may give her note to pay husband's debt and to prevent an attack upon a conveyance by her husband to her: Whelpley v. Stoughton, 112 Mich., 594; 70 N. W., 1098. She is not liable for servants in the house and on the farm owned by her husband, though hired by her: Kirt v. Kropp, 110 Mich., 51; 61 N. W., 1080. A mere incidental benefit to her property will not support her contract: Detroit C. of C. v. Goodman, 110 Mich., 498; 68 N. W., 295. Nor will her undertakings bind her, unless it is made affirmatively to appear that it is within her powers, and relates to or concerns her separate property or estate: Russell v. People's Savings Bank, *supra*; Powers v. Russell, 26 Mich., 179; 28 Mich., 466-7, *supra*; West v. Laraway, 28 Mich., 465. There is no presumption of the validity of a married woman's contract, whether negotiable or not, hence proof must always be given if such a consideration will bind her: Kenton Ins. Co. v. McClellan, 43 Mich., 565; 6 N. W., 88; Buhler v. Jennings, 49 Mich., 538; 14 N. W., 488. And the burden of proof is on the plaintiff to show that the contract is within her powers: 28 Mich., 466-7, *supra*. A wife may contract with her husband, and enforce such contracts, in relation to her separate estate: Randall v. Randall, 37 Mich., 563. A husband cannot make a valid agreement with the wife to pay her for her services as keeper of his house. Such contract is without consideration and against public policy: Michigan Trust Co. v. Chapin, 106 Mich., 384; 64 N. W., 334.

A married woman may carry on business in her own name, and for that purpose may make herself liable for purchases made on credit. She may also employ her husband to act as her agent in carrying on such business; and the fact that her husband, by reason of financial embarrassment, is unable to carry on business

band cannot be sold, mortgaged or otherwise encumbered, without the consent of his wife, to be given in the manner prescribed by law, or when his property is exempted by law from sale on execution or other final process issued from any court against him, his wife may bring an action in her own name, with the like effect as in cases in actions in relation to her sole property as aforesaid.”¹

In his own name for the support of his family, is no impediment to the wife's engaging in business for that purpose. Nor would a business thus carried on by the wife for the purpose of keeping property purchased by her from the reach of her husband's creditors, be a fraud on his creditors, unless the necessary result were to hinder, delay or defraud such creditors in the collection of their debts. A purchase by the wife of property which would never have come to the possession of either husband or wife, except in pursuance of an understanding that she should be the purchaser and carry on business by means of it, cannot wrong the husband's creditors. Where one refuses to sell to the husband, not being willing to trust him, but is willing to trust the wife on credit, and sells to her in good faith, the title of the property will not pass, contrary to the intent of both parties, to the husband for the benefit of his creditors, who could not be wronged by a sale to her, and have no right to insist on a sale to the husband: Rankin v. West, 25 Mich., 195. As to the rights of the wife in personal property purchased by her and her husband jointly: See *Walt v. Boyce*, 35 Mich., 425.

1—C. L., § 8692. She may sue and be sued alone and in her own name, upon her own contracts and obligations. Thus, where a married woman purchased goods and furniture on her own credit, to be used in a boarding house, the business of which was carried on and managed solely by herself, she was sued alone and held liable: *Tillman v. Shackleton*, 15 Mich., 447; *Gilliam v. Boynton*, 36 Mich., 236. And so, where a woman, having an estate of her own, and living with her husband, purchased goods used in the husband's family, such as family necessaries, but solely on her

own credit and agreement to pay: *Campbell v. White*, 22 Mich., 178. But a woman purchasing goods suitable for ordinary family use, of one who knows that she is a married woman and living with her husband, but does not claim to be buying upon her own individual account, the inference would be that she was buying upon her husband's account and for the use of his family, and in the absence of any express agreement she would not thereby render herself liable to pay for them: *Powers v. Russell*, 26 Mich., 179; see also *Kirt v. Kropp*, 110 Mich., 51; 67 N. W., 1080. She cannot bind herself to pay the board of her sister, the contract having no reference to her separate property: *June v. Labadie*, 132 Mich., 135; 92 N. W., 937.

A married woman may sue alone in respect to her separate interests and estate: *Willson v. Coolidge*, 42 Mich., 112; 3 N. W., 285; *Glover v. Alcott*, 11 Mich., 489. And so, for her personal service rendered for another: *Mason v. Dunbar*, 43 Mich., 407; 5 N. W., 432. And she can hire out, with her husband's consent, and can sue for, and recover, and keep her earnings, even where the hiring is to a firm in which her husband is a partner; and in such case, a settlement by the husband with the firm for her wages, without her authority, the firm having knowledge of her claims at the time, will not debar her from suing and recovering against the firm for the wages, and if the husband is jointly liable with the other members of the firm, he must be made a defendant in the suit with them: *Benson v. Morgan and others*, 50 Mich., 77; 14 N. W., 705. Nor is it any defense to a suit by a wife on a claim against a firm of which her husband was a member, that other partners have been injured by his frauds to which she was

“The husband of any married woman shall not be liable to be sued upon any contract made by such married woman in relation to her sole property, and the wife shall be liable to be sued upon any contract or engagement made by her in

not a party: *Moore v. Foote*, 34 Mich., 443. Nor will a wife's suit upon a chose in action, of which she is the sole owner, be defeated by her husband's former recovery on it: *Blackwood v. Brown*, 32 Mich., 104.

But it seems that she is liable only upon her contracts and obligations made with respect or in relation to her sole property: *Glover v. Alcott*, 11 Mich., 470. Therefore, where a woman joined with her husband in making a promissory note, to secure a debt owing by him alone, she was held not liable, as the engagement was not made with reference to her own property, and she received no consideration for signing it: *De Vries v. Conkling*, 22 Mich., 255; *Emery v. Lord*, 26 Mich., 431; *Ross v. Walker*, 31 Mich., 120; *Barnes v. Brown*, 32 Mich., 146.

A wife's note, given for property purchased by her, is valid: *Gillam v. Boynton*, 36 Mich., 236. But giving her note, or making a contract merely for the payment of money, creates no lien on her estate: *West v. Laraway*, 28 Mich., 464.

But the note of a married woman will not be valid, unless made upon a consideration running to herself, and such consideration must be shown before any recovery can be had upon it against her: *Buhler v. Jennings*, 49 Mich., 538; 14 N. W., 488. And if she is in fact not liable, her oral admission of liability upon it will not bind her: *Ibid.* She must be connected with the consideration, or she will not be bound. Where a wife signed a note with her husband merely because he requested her to, but without any knowledge as to what the note was to be used for, the fact that it was afterwards, without her knowledge, used to pay a judgment against her husband and herself, will not make the note binding on her, she never having given it or authorized it to be given for that purpose: *Schlatterer v. Nickodemus*, 51 Mich., 627; 17 N. W., 210. She may, however, give her note to pay her husband's debt if,

in consideration of her so doing, a contemplated attack upon a conveyance from her husband to her is to be abandoned: *Whelpley v. Stoughton*, 112 Mich., 594; 70 N. W., 1098.

She may transfer a note belonging to herself by her own indorsement, and thereby make herself liable, if it is done for the benefit of her own estate. But the statute does not enable her to bind herself by an indorsement made merely for the benefit of another. She cannot pledge her personal responsibility merely as surety for another. She cannot even indorse the note of a corporation of which she is a stockholder, and thereby pledge her personal liability for its benefit, the corporation being a distinct person, in the law, from herself: *Russell v. People's Savings Bank*, 39 Mich., 671.

A married woman cannot bind herself by a contract of suretyship; such a contract is not within the words or spirit of the statute: *Russell v. People's Savings Bank*, 39 Mich., 671; *Kitchell v. Mudgett*, 37 Mich., 81; *Gantz v. Toles*, 40 Mich., 725. She cannot make herself personally liable for the debt or obligation of another where no consideration passes to her for that purpose: *De Vries v. Conkling*, 22 Mich., 255; *Reed v. Buys*, 44 Mich., 80. Nor be personally bound with her husband or any other person as surety, by mere personal promise: *Jenne v. Marble*, 37 Mich., 321; *Emery v. Lord*, 26 Mich., 431; *Ross v. Walker*, 31 Mich., 120; *West v. Laraway*, 28 Mich., 465.

And so, she was held not liable on her covenant of warranty contained in a deed made by her husband and herself to convey lands owned by him alone: *Hovey v. Smith*, 22 Mich., 170. While a married woman is not liable upon her promissory note given for the purpose of securing the debt of her husband, yet if there was any equitable obligation on her part to pay the debt for which the note was given, as, if it were for materials furnished and used in improving her property with-

cases where her husband is not in law liable, or where he refuses to perform such contract or engagement, and in any case herein authorized, the cause of action shall be deemed to have accrued from and after the passage of this act."¹

Upon a replication denying the coverture, it will be sufficient to prove cohabitation under marriage by repute, which may be established by general reputation, the acknowledgment of the parties, and reception by their friends as man and wife, etc.²

§ 179. Of nonjoinder—of plaintiffs.—When a joint contractor, tenant in common, or a party who has received a joint

out her having paid or become bound to pay the husband or anyone else for them, or if the husband as between him and his wife was acting as her agent, then whether the note was given in payment or as security merely, and notwithstanding the credit may have been originally given to the husband, there would be a good and valuable consideration for the note, and she would be bound; this would be in effect substantially a debt incurred on account of her separate property: *Emery v. Lord*, 26 Mich., 432; see *Whelpley v. Stoughton*, 112 Mich., 594; 70 N. W., 1098. And she may sue alone to recover exempt property of her husband which has been taken on execution: *King v. Moore*, 10 Mich., 538. And so, in any case where exempt property of her husband is seized in adverse proceedings, as in attachment, or where a poundmaster improperly seizes it without process. The remedy is not confined to final process: *Ingersoll v. Gage*, 47 Mich., 121; 10 N. W., 135. But the right of the wife to sue alone in her own name for exempt property does not preclude the husband from joining with her in the suit: *Shepherd v. Cross*, 33 Mich., 98.

A sale of property by the husband, though exempt from execution, is valid without the written consent of his wife, she knowing of the sale and making no objection, or verbally consenting thereto: *Holman v. Gillett*, 24 Mich., 414. A wife may sustain an action in her own name for damages for an assault and battery upon her without joining her husband: *Berger v. Jacobs*, 21 Mich., 215; *Hyatt v. Adams*, 16 Mich.,

198. And for defamation of her character: *Leonard v. Pope*, 27 Mich., 145. But not against her husband: *Wagner v. Wayne Circuit Judge*; no opinion was filed in this case, but the conclusion of the court is stated in the opinion filed in *Bandfield v. Bandfield*, 117 Mich., 80; 75 N. W., 287. A wife may maintain an action for the alienation of her husband's affections: *Warren v. Warren*, 89 Mich., 123; 50 N. W., 842. Such actions should be brought by the wife alone, and not jointly with her husband: *Michigan Central Ry. Co. v. Coleman*, 28 Mich., 440; *Burt v. McBain*, 29 Mich., 202. And the husband also can sue alone for his damages resulting from an assault, such as loss of services and society of the wife, and his expenses in caring for and providing medical treatment for her: *Berger v. Jacobs*, 21 Mich., 215, 221.

1—C. L., § 8693; *Tong v. Marvin*, 15 Mich., 71. Nor is a husband liable for money loaned to his wife upon her credit only; nor for money loaned to her for her use and without the knowledge of her husband, where the lender conceals the fact of such lending from him: *Franklin v. Foster*, 20 Mich., 75.

2—*Leader v. Barry*, 1 Esp., 354; *Doe v. Fleming*, 4 Bing., 266. Marriage is provable in all civil cases involving property rights by evidence of conduct and reputation, but not in criminal cases or in actions for criminal conversation or divorce: *Perry v. Lovejoy*, 49 Mich., 529; 14 N. W., 485. But unless the parties live together, some proof of an actual marriage seems necessary: *Odell v. Wake*, 3 Camp., 394; *Horn v. Noel*, 1 *Ibid.*, 61.

injury, is not joined as a plaintiff, the nonjoinder may be pleaded in abatement. In actions upon *contracts* (or on judgments) the nonjoinder of a co-contractor as plaintiff may be taken advantage of at the trial under the general issue,³ or if it appears on the pleadings, the defendant may demur.⁴ But if the plaintiff sue as executor, administrator, etc., on a contract, the nonjoinder must be pleaded in abatement.⁵ In actions for *torts*, if one of several who should be plaintiffs sue alone, the nonjoinder of the others must be pleaded in abatement, and the defendant cannot take advantage of it in any other manner, except to prevent the plaintiff on the trial from recovering more than his aliquot share or interest.⁶ It is no objection that the defect appears on the pleadings.⁷ If the defendant do not plead the nonjoinder in abatement, the others may afterwards sue alone for the injury to their undivided shares, and the defendant cannot plead in abatement of such action the nonjoinder.⁸

§ 180. *Of defendants.*—The nonjoinder of a person as *defendant* in an action upon *contract* must be pleaded in abatement,⁹ unless upon the declaration or other pleading of the

3—1 Saund. Pl. & Ev., 5 Am. ed., 10; Burgess v. Abott, 1 Hill, 476; Blackburn v. Blackburn, 132 Mich., 525; 94 N. W., 24. When the husband sues alone for the property of the wife held in her own right, or in that of another, it is not necessary to plead the nonjoinder in abatement; it may be taken advantage of under the general issue: Brown v. Filfield, 4 Mich., 322; Hill v. Gibbs, 5 Hill, 56.

4—1 Saund. Pl. & Ev., 10; Burgess v. Abott, 1 Hill, 476.

5—Brassington v. Ault, 2 Bing., 177; 1 Saund. Pl. & Ev., 10.

6—Bradish v. Schenck, 8 Johns., 177. The nonjoinder of the other owner or party who might be joined as plaintiff, only goes to apportion the damages: Achey v. Hull, 7 Mich., 423. And the principle that nonjoinder of plaintiffs in tort must be pleaded in abatement, applies in replevin: Wright v. Bennett, 3 Barb., 451; see Brown v. Filfield, 4 Mich., 327. A failure to plead in abatement for the nonjoinder of persons who

should have been made co-plaintiffs, will not enlarge the personal right of recovery of the person bringing the suit: Ives v. Williams, 53 Mich., 636; 19 N. W., 562.

7—*Quære*, People v. Dennis, 4 Mich., 615.

8—1 Saund. Pl. & Ev., 10; Hill v. Gibbs, 5 Hill, 56; see Achey v. Hull, 7 Mich., 423.

But in actions on contract, whether the judgment be against one or all the joint debtors, as well as where the suit is instituted against part only of those jointly liable, and no plea in abatement is interposed on that account, such judgment is a bar to the action upon the original claim against the defendants not served in the one case, and against the debtors not proceeded against in the other: Brooks v. McIntyre, 4 Mich., 319.

9—Brooks v. McIntyre, 4 Mich., 316, 318. And cannot otherwise be taken advantage of unless the defect appear on the face of the declaration: People v. Dennis, 4 Mich., 609, 615; Ballou v.

plaintiff, the nonjoinder appear and that the person is living; in which case the defendant may demur, but cannot avail himself of the objection on the trial.¹⁰ In actions for *torts*, nonjoinder of others as defendants cannot, in general, be pleaded in abatement, or otherwise taken advantage of.¹¹ But where the tort consists in the omission by several joint owners of land of some act to be done by them respecting the land, the nonjoinder of the other owners may be pleaded in abatement.¹²

The defendant in his plea must name *all* the joint contractors; he will fail, if it appear on the trial that the contract was made with others also not named in the plea.¹³ The plea

Hill, 25 Mich., 204; *Hinman v. Eakins*, 26 Mich., 80; *Bowen v. Culp*, 36 Mich., 224.

10—*Burgess v. Abbott*, 1 Hill, 476; *Morrison v. Trenchard*, 4 M. & G., 709. But unless the declaration expressly shows that the other joint contractor is *alive*, the defendant cannot demur: 1 Hill, 476.

Copartners and joint debtors—Where a copartner or other joint debtor has compromised and paid to the creditor his share and proportion of the debt, and has received from the creditor a discharge from the copartnership or other joint liability, it will not be necessary thereafter, in a suit by the creditor against the other copartner or other joint debtor to recover the balance of the debt, to join the party so released as a codefendant. Nor in fact could he be properly joined: See, C. L., §§ 10449-10453, quoted, *post*, § 205. *Beekman v. Sylvester*, 109 Mich., 183; 66 N. W., 1093.

11—1 Saund. Pl. & Ev., 11. Where a tort is committed by several individuals, the plaintiff may sue all jointly, or one or more separately: *Livingston v. Bishop*, 1 Johns., 290; *Rose v. Oliver*, 2 *Ibid.*, 365; *Marsh v. Berry*, 7 Cow., 344; 8 *Ibid.*, 43; *Creed v. Hartmann*, 29 N. Y., 591. If an action is brought and judgment obtained against one of the joint wrong-doers, the payment of that judgment will bar an action against the others: *Dexter v. Broat*, 16 Barb., 337; *Osterhout v.*

Roberts, 8 Cow., 43. But until payment or tender of the amount of the judgment, the plaintiff may sue each defendant separately, and then elect which judgment to collect. He may collect the costs in each case, but the damages only in one: *Livingston v. Bishop*, 1 Johns., 290; *Osterhout v. Roberts*, 8 Cow., 43. If less than all the wrong-doers are sued, the plaintiff may recover against those who are liable, and judgment will be rendered in favor of those not guilty: *Dominick v. Eacker*, 3 Barb., 18; *Fox v. Jackson*, 8 *Ibid.*, 355; *Montfort v. Hughes*, 3 E. D. Smith, 591; *McIntosh v. Ensign*, 28 N. Y., 169. Where the animals of different owners do mischief when together, the several owners cannot be joined as defendants for the trespass. Thus, where the cows of several owners are found together trespassing in a garden, each owner is liable only for the damages done by his own cow; but in the absence of proof to the contrary, it will be presumed that each cow did an equal amount of the mischief: *Buddington v. Shearer*, 20 Pick., 479. So, if several dogs worry sheep, a joint action will not lie against all the owners: *Van Steenburgh v. Tobias*, 17 Wend., 562; *Auchmuty v. Ham*, 1 Denio, 495.

12—*Mitchell v. Tarbutt*, 5 Term. R., 651; *Low v. Mumford*, 14 Johns., 426.

13—*Mechanics' & Farmers' Bank v. Dakin*, 24 Wend., 411; *Godson v. Good*, 6 Taunt., 587; *Creelin v. Calvert*, 14 M. & W., 11.

is not sustained if it appears that either a greater or less number of persons made the contract than the plea mentions.¹⁴ Nor, if the contract was joint and several.¹⁵ Nor, if the person omitted is a dormant partner of a firm, unless the plaintiff knew it.¹⁶ Nor, if he is an infant.¹⁷ Nor, if the action as to the person not joined is barred by the statute of limitations.¹⁸ This section, 9743, authorizes the plaintiff to avail himself of the fact by replication of it to the plea; probably the plaintiff must by replication avail himself of the fact that the person not joined was an infant.¹⁹

§ 181. Of evidence, to sustain the plea.—Proof of some one item of the plaintiff's claim being the debt of the person named in the plea, will sustain the plea.²⁰

Upon a replication denying a plea of the nonjoinder of a co-defendant, plaintiff may, besides giving evidence to disprove a joint liability of all or any of the parties named in the plea, prove that another or others not named in the plea are also liable;²¹ or that the claim as against the persons named in the plea is barred by the statute of limitations.²² Or that the defendant, in making the contract, represented or otherwise induced the plaintiff to believe that he was dealing with him alone.²³

The plea admits the plaintiff's claim, but not the amount of it. If the defendant fail in sustaining his plea, he may contest the whole or any part of the claim, which the plaintiff gives in evidence, the same as if the general issue had been pleaded.²⁴

§ 182. Of misjoinder of parties.—The joinder of persons as plaintiffs or defendants who should not be joined, in actions

14—Hawks v. Munger, 2 Hill, 200; Mechanics' & Farmers' Bank v. Dakin, 24 Wend., 411.

15—Van Tine v. Crane, 1 Wend., 524.

16—New York Dry Dock Co. v. Treadwell, 19 Wend., 525.

17—Glossop v. Colman, 1 Starkle R., 25.

18—C. L., § 9743.

19—Burgess v. Merrill, 4 Taunt. R., 468. The doctrine of this case is denied in Slocum v. Hooker, 13 Barb., 536.

20—Vanslike v. Gilmore, 6 Blackf., 511; Colson v. Selby, 1 Esp. R., 452.

21—Crellin v. Calvert, 14 M. & W., 11; Mechanics' & Farmers' Bank v. Dakin, 24 Wend., 411.

22—C. L., § 9743.

23—Bonfield v. Smith, 12 M. & W., 405.

24—Mechanics' and Farmers' Bank v. Dakin, 24 Wend., 411, 416; France v. White, 1 M. & G., 731; Hill v. White, 6 Bing., N. C., 23, 26. And defendants must submit to nominal damages at all events: 24 Wend., 411, 416.

upon contract, had the effect at the common law of defeating the plaintiff on the trial. The misjoinder could be pleaded in abatement, but it was not advisable. The same effect was produced in actions for torts, if there was a misjoinder of *plaintiffs*, but it was not so in respect to *defendants*, as those not guilty could be acquitted.²⁵ By C. L., § 837, as amended by Pub. Acts, 1901, p. 78, it is now provided that in case of misjoinder of defendants the plaintiff may discontinue as to such as he pleases at any time before final submission, or he may go to the finding of the court or jury as to which of the defendants are liable and have judgment entered against such only as are found liable. This statute does not affect the common law rule as to misjoinder of plaintiffs.

§ 183. Of misnomer.—There seems to be confusion in the books upon the effect of the misnomer of the plaintiff, and when, if ever, it must be pleaded in abatement. But it is well settled that where a written contract is sued upon, a variance in name can be taken advantage of under the general issue, and the misnomer need not be pleaded in abatement.²⁶

§ 184. Of pendency of another action.—The pendency of a former action for the same cause may be pleaded in abatement,²⁷ but not in bar.²⁸ Where two suits are commenced at the same time, their pendency may, it seems, be pleaded re-

25—1 Saund. Pl. & Ev., 11; see, Larkin v. Butterfield, 29 Mich., 254.

26—Gilbert v. Hanford, 13 Mich., 40, 43. A plaintiff cannot proceed in a suit wherein he is wrongly named, or by the initials of his christian or first name: Fisher v. Northrup, 79 Mich., 287; 44 N. W., 610. Under C. L., § 763, in actions upon instruments in writing, it is competent to use the name as used in making the contract, though only initials or contractions of a Christian name are used.

The effect of a motion to dismiss a cause in justice's court, because the plaintiff's Christian name is not given in the writ, is in effect a plea in abatement, which is admitted by the statement of the party who appears for the plaintiff that he cannot amend because of a want of knowledge of the plaintiff's full name: Fisher v. Northrup, *supra*.

27—Perclval v. Hickey, 18 Johns., 257; Haight v. Holley, 3 Wend., 258; Wales v. Jones, 1 Mich., 254. And if this defense is relied on, it must be pleaded in abatement: Sullings v. The Goodyear D. V. Co., 36 Mich., 313. But a pending and undetermined chancery proceeding is no bar in itself to a legal action, whatever may be the force of a final decree: Kinney v. Robison, 52 Mich., 393; 18 N. W., 120.

A prior suit pending, in which there can be no recovery because it was prematurely brought, is no bar to a recovery in a new suit brought for the same cause of action: Blackwood v. Brown, 34 Mich., 4.

The rule requiring the pendency of another suit to be pleaded in abatement and not in bar, applies as well where the prior suit is a garnishee suit, as in other cases. The pendency of such proceedings cannot be proved

ciprocally the one to the other.²⁹ But the commencement of a second suit, after bringing the first, cannot be pleaded in abatement of the first; but, if a judgment is rendered in the second suit in favor of the plaintiff, it may be pleaded in bar of the first suit.³⁰ In an action against one of several joint contractors, the defendant cannot plead in abatement the pendency of another action for the same cause against another contractor; but he should plead in abatement the nonjoinder of the joint contractor, and if a second action be brought against all, the pendency of the prior action against the other joint contractor may be pleaded.³¹

§ 185. Joinder of causes of action.—When a plaintiff has two or more causes of action of the same kind, and the actions are in the same form, they may and ought to be joined in the same suit; and this should be done by setting them out in separate counts in the declaration. Thus, in actions arising on contract, several causes of action in assumpsit may be

under the plea of the general issue: *Near v. Mitchell*, 22 Mich., 382; *Ryan v. Mills*, 129 Mich., 170; 88 N. W., 392.

28—*Hurley v. Greenwood*, 5 B. & Ald., 101; *Percival v. Hickey*, 18 Johns., 257. Nor can the pendency of another suit in another state for the same cause of action be pleaded in abatement in this state: *Bowne v. Joy*, 9 Johns., 221; *Walsh v. Durkin*, 12 *Ibid.*, 99; *Newell v. Newton*, 10 Pick., 470. Nor in bar; if good at all, it could only be pleaded in abatement: *Wilcox v. Cassick*, 2 Mich., 166, 178.

29—*Haught v. Holley*, 3 Wend., 258. But not unless they are commenced at the same time: *Ibid.* But a plea of the pendency of a former suit will not avail unless it is averred in the plea that the suit is *still* pending. Where a second suit is commenced in good faith, and the former suit discontinued before the defendant was called upon to plead in the second, the latter cannot be abated by the pendency of the prior suit when it was commenced: *Wales v. Jones*, 1 Mich., 254. And the plea will be bad unless it aver that the former suit is still pending: *Pew v. Yoare*, 12 Mich., 16.

30—*Nichols v. Mason*, 21 Wend., 339.

31—*Henry v. Goldney*, 15 M. & W., 494; see, *ante*, § 180, note 10. The highest degree of certainty is required in a plea in abatement. Therefore, where a plea in abatement averred that another suit was commenced at the same time, upon and for not performing the very same identical promises and undertakings, without adding, *in the said declaration in this present suit mentioned*, or other equivalent words, it was held bad on that account: *Wales v. Jones*, 1 Mich., 254. So where in replevin a plea in abatement was interposed, setting up the pendency of a prior suit in replevin, by virtue of the writ in which the property in controversy was taken by one of the defendants, the plea was held bad because it did not allege that any affidavit was attached to the writ in the first suit, nor that the writ commanded the sheriff to take the property in controversy. A plea in abatement must contain every allegation necessary to make out the case covered by it: *Belden v. Laing*, 8 Mich., 500.

joined; so also in debt and covenant.³² But assumpsit, covenant and debt cannot be joined.³³ So, in actions in tort, several distinct trespasses may be joined in the same suit.³⁴ And an action on the case may be joined with trover.³⁵ But actions arising on contract cannot be joined with actions in tort.³⁶ Therefore, assumpsit cannot be joined with case,³⁷ nor with trover,³⁸ nor debt with trespass.³⁹ But the several causes of action must all exist in the same right or they cannot be joined. Thus, an executor suing for a demand due to the estate of the deceased, cannot join a demand due to himself.⁴⁰ If several causes of action are improperly joined, the defendant may demur.⁴¹

§ 186. **Misjoinder of counts.**—Joinder of repugnant counts in a declaration does not preclude recovery on one or the other. They do not destroy each other.⁴² The objection of misjoinder of counts should be disposed of in the beginning of the trial by compelling an election and thus limit the range of the testimony.⁴³ A person who has been compelled to elect between counts, may upon a new trial proceed upon another count.⁴⁴

§ 187. **Dividing causes of action.**—Where a person has several demands or existing causes of action growing out of the

32—Burrill's Prac., 74; Union Cotton Manufactory v. Lobdell, 13 Johns., 462. Plaintiff may join all the causes of action he has when recovery may be had in each in the same form of action if separate suits were brought: Tregent v. Maybee, 54 Mich., 226; 19 N. W., 962.

33—Pell v. Lovett, 19 Wendell, 546. But a count on a judgment may be joined with a count for use and occupation, and with the common counts: Hogsett v. Ellis, 17 Mich., 351.

34—1 Chitty's Pl., 200.

35—Jennings v. Webb, 1 Term. R., 277; Ayer v. Bartlett, 9 Pick., 156, 161.

36—Martin v. The Mayor, etc., 1 Hill, 545; Hall v. Fisher, 20 Barb., 442. By C. L., § 10421, it is provided that assumpsit may be brought for fraudulent representations or conduct. The effect of this is held to permit the joinder of the common counts

with a special count for false representation: First National Bank v. Steel, — Mich., —; 99 N. W., 786 (May, 1904).

37—Church v. Mumford, 11 Johns., 479.

38—Howe v. Cook, 21 Wend., 29.

39—Coryton v. Lithebye, 2 Saunders Rep., 117; Dalson v. Tyson, 3 Salk., 204.

40—1 Chitty's Pl., 204; Lucas v. New York Central R. R. Co., 21 Barb., 245.

41—1 Chitty's Pl., 205; Cooper v. Blasell, 16 Johns., 146; Hall v. Fisher, 20 Barb., 442; Lucas v. New York Central R. R. Co., 21 *Ibid.*, 245.

42—Berringer v. Cobb, 58 Mich., 557; 25 N. W., 491.

43—Ives v. Williams, 53 Mich., 636; 19 N. W., 562.

44—Gott v. Superior Court Judge, 42 Mich., 625; 4 N. W., 529.

same contract, or resting in *matters of account* which may be joined; and if the cause of action, although there may be many items of it, be split up, and a suit is brought for *part* only, and subsequently a second suit for the *residue*, the first action may be pleaded in abatement of the second, or in bar.⁴⁵ The same rule applies to several actions against the same person for the *same wrong*.⁴⁶

45—Bendernagle v. Cocks, 19 Wend., 207; Gurnsey v. Carver, 8 Wend., 492; Smith v. Jones, 15 Johns., 229; Phillips v. Berick, 16 Johns., 136; Coggins v. Bulwinkle, 1 E. D. Smith, 434; Bancroft v. Winspear, 44 Barb., 209; Fish v. Folley, 6 Hill, 54; Stevens v. Lockwood, 13 Wend., 644; Dutton v. Shaw, 35 Mich., 431. See the same principle as applied to counter claims—set-offs, recoupment, etc.: See, Morehouse v. Baker, 48 Mich., 335; 12 N. W., 170; Dutton v. Shaw, 35 Mich., 434; Hartford Fire Ins. Co. v. Davenport, 37 Mich., 614; Iron Cliffs Co. v. Gingrass, 42 Mich., 30; 3 N. W., 238; Chandler v. Childs, 42 Mich., 128; 3 N. W., 297; Hazen v. Reed, 30 Mich., 331; Huntoon v. Russell, 41 Mich., 316; 2 N. W., 38.

But the causes of action must arise out of a single contract or transaction; therefore, where two bills of goods were purchased, one on a credit of six months and the other without any, the causes of action were held to arise on separate contracts, and that a recovery for one bill was not a bar to a suit upon the other: Staples v. Good-

rich., 21 Barb., 317. If there are several items of account for goods sold, or work performed at different times, there must be an express contract, or the circumstances must be such as to raise one implied contract embracing all the items, in order to make them a single or entire demand: Secor v. Sturgis, 16 N. Y. Rep., 548, 558. Separate suits may be brought upon claims embraced in an open account, subject, under C. L., § 768, to the penalty of loss of costs in subsequent suits where the whole of the claim upon such an account is not included in one action: Phelps v. Abbott, 116 Mich., 624; 74 N. W., 1010. Where defendant gave notice of set-off of \$150, and then withdrew \$50 of the item, it was held that he could not afterward have his action for that portion withdrawn, though the justice could not have given him more than \$100: Andreas v. School Dist. No. 4 Frac., — Mich., —; 100 N. W., 1021 (Oct., 1904).

46—Farrington v. Payne, 15 Johns., 432; and see, Bendernagle v. Cocks, 19 Wend., 207; Fish v. Folley, 6 Hill, 54; Allison v. Connor, 36 Mich., 283.

CHAPTER XI.

OF PLEAS IN BAR AND NOTICE OF SPECIAL MATTER.

PLEAS IN BAR AND SPECIAL DEFENSES.	§ 193. Effect of general issue in debt.
§ 188. Character of pleas in bar.	§ 194. Effect of general issue in covenant.
§ 189. A failure or want of consideration.	§ 195. Effect of general issue in trover and case.
§ 190. Illegality of consideration.	§ 196. Effect of general issue in trespass.
§ 191. Written instruments, execution how denied.	§ 197. Pleas of several defendants.
§ 192. Effect of general issue in assumpsit.	

§ 188. **Character of pleas in bar.**—These pleas either deny that the plaintiff ever had the cause of action complained of, or they admit that he once had the cause of action, but insist that it no longer exists.¹

“No special plea in bar shall be pleaded in any civil action hereafter to be commenced; but all matters of defense to any such action, may be given in evidence under the general issue.”²

“In all civil actions hereafter to be commenced, the general issue shall consist of a demand by the defendant, of a trial of the matters set forth in the plaintiff’s declaration.”³

“ * * * The plea of the general issue shall be in the same form as in those courts [circuit courts] and notice of any defense not admissible under the general issue, shall be given with such plea. * * * ”⁴

1—2 Saund. Pl. & Ev., Part I., p. 647.

2—C. L., § 10071. The statute abolishing special pleadings does not make special pleading void when the parties have voluntarily adopted it, joined issue, and proceeded to trial and judgment: Wales v. Lyon, 2 Mich., 276.

3—C. L., § 10072.

4—The *general issue*, in all civil actions, denies every material averment in the plaintiff’s declaration which much be proved, whatever the

nature or form of the action may be: Kinnle v. Owen, 1 Mich., 249. It denies every fact necessary to enable the plaintiff to recover: Young v. Stephens, 9 Mich., 502; Ingals v. Eaton, 25 Mich., 34-5. Thus, in assumpsit, as a general rule, it puts in issue, without further notice, every fact and combination of facts, necessary to constitute the plaintiff’s cause of action. It denies the existence of any such state of facts as could constitute or establish the promise declared upon, or

“To entitle a defendant to avail himself of any matter of defense, which, according to the practice as it has heretofore existed, was required to be pleaded specially, or of which a

which would entitle the plaintiff to recover upon the cause of action alleged: Winslow v. Wager, 28 Mich., 455; see, Hill v. Callaghan, 31 Mich., 424; Child v. Detroit Mfg. Co., 72 Mich., 623; 40 N. W., 916; Denver v. Booming Co., 51 Mich., 472; 16 N. W., 817. It denies that the promise relied upon has any validity or legal force: Snyder v. Willey, 33 Mich., 483, 489. The defendant's ownership of a note sued upon may be contested under this plea: Reynolds v. Kent, 38 Mich., 246. When a written contract is declared upon, a variance in names may be taken advantage of under the general issue: Gilbert v. Hanford, 13 Mich., 40. And so, in actions upon contracts, the non-joinder of a co-contractor as plaintiff may be taken advantage of at the trial under this plea: 1 Saund. Pl. & Ev., 5 Am. ed., 10; Burgess v. Abbott, 1 Hill, 476. And evidence may be given under this plea to show that the instrument declared upon was void, for the reason that it was given in consideration of an illegal sale, as in case of sales made in violation of law: Myers v. Carr, 12 Mich., 63; Dean v. Chaplin, 22 Mich., 275; and see, Hill v. Callaghan, 31 Mich., 424. *Payment* may be shown under the general issue: Olcott v. Hanson, 12 Mich., 454; Burt v. Olcott, 33 Mich., 179; Brennan v. Tietzort, 49 Mich., 398; 13 N. W., 790. So may a *subsequent agreement* destroying or modifying the old: Conkling v. Tuttle, 52 Mich., 630; 18 N. W., 391. So may non-compliance with *conditions*: Morley v. Insurance Co., 85 Mich., 217; 48 N. W., 502. So may a *rescission* of the contract for cause: Stahelin v. Sowle, 87 Mich., 124; 49 N. W., 520. In an action on a sealed instrument, by virtue of C. L., §§ 10185-6, the defense of want of consideration cannot be made under the general issue: Boyer v. Sowles, 109 Mich., 481; 67 N. W., 530; Robson v. Dayton, 111 Mich., 440; 69 N. W., 834. And in an action of tort, everything which may properly be considered by the jury in mitigation of damages may be given in evidence under this plea: Delevan v. Bates, 1 Mich., 97; Osborn v. Lovell, 36 Mich., 246. Thus, in an action for treble damages for trespass in cutting timber, the defendant may show under the general issue without notice, that the trespass was involuntary and under a *bona fide* claim of right: *Ibid.* So in slander: Huson v. Dale, 19 Mich., 17. In trover defendant may show property in a third person: Stephenson v. Little, 10 Mich., 433. The general issue admits the jurisdiction of the court over the person of the defendant: Webb v. Mann, 3 Mich., 140; Gott v. Brigham, 41 Mich., 227; 2 N. W., 5; Grand Rapids, Newaygo & Lake Shore Ry. Co. v. Gray, 38 Mich., 461. It admits that a defendant sued by a corporate name is sued by the right name: Lake Superior Building Co. v. Thompson, 32 Mich., 293; see, C. L., § 10473; Grand Rapids & Ind. R. R. Co. v. Southwick, 30 Mich., 446; Johr v. St. Clair Supervisors, 38 Mich., 532, 535-6. And so, in a suit brought by a corporation organized under the laws of this state, the general issue admits its corporate name and existence: Wilson Sewing Machine Co. v. Spears, 50 Mich., 534; 15 N. W., 894; see, C. L., §§ 10471, 10473; Garton v. Union City Bank, 34 Mich., 279; Grand Rapids & I. Ry. Co. v. Southwick, 30 Mich., 444. Unless a notice is given under the plea, and duly verified, denying the existence of the corporation: § 10471, *supra*. And in a suit by an executor or administrator who has made profert of his letters, the general issue admits his official character: Vickery v. Bler, 16 Mich., 50. The general issue also waives objections to process and service thereof: Campau v. Fairbanks, 1 Mich., 151; Crane v. Hardy, 1 Mich., 56; Pardee v. Smith, 27 Mich., 33, 388; Hart v. Blake, 31 Mich., 278; Manhard v. Schott, 37 Mich., 234; Grand Rapids, N. & L. S. R. R. Co. v. Gray, 38 Mich., 461; Gott v. Brigham, 41 Mich., 227; 2 N. W., 5; Gunn Hardware Co. v. Denison, 83 Mich., 40; 46 N. W., 940:

special notice was required to be given under the general issue or other general plea, such defendant shall annex to his plea of the general issue a notice to the plaintiff, briefly stating the precise nature of such matter of defense."⁵

Jacklin v. Soutler, 82 Mich., 648; 46 N. W., 1027; *Dailey v. Kennedy*, 64 Mich., 208; 31 N. W., 125; *Taylor v. Adams*, 58 Mich., 187; 24 N. W., 864. The general rule being, that a party who pleads the general issue and goes to trial on the merits, waives objections to the process unless he makes them known in some way: *Maxwell v. Deens*, 46 Mich., 37; 8 N. W., 561. But the plea of the general issue waives only such jurisdictional defects as appear on the face of the declaration: *Segar v. Shingle and Lumber Co.*, 81 Mich., 344; 45 N. W., 982.

And so, the plea of the general issue, and going to trial on the merits, waives formal and technical defects to the declaration: *Hurtford v. Holmes*, 3 Mich., 400; *Grand Rapids & I. Ry. Co. v. Southwick*, 30 Mich., 466; and see, *Grand Rapids, N. & L. S. R. R. Co. v. Gray*, 38 Mich., 461; *Jackson v. Collins*, 39 Mich., 557; *Reeder v. Moore*, 95 Mich., 594; 55 N. W., 436; *Campbell v. Kalamazoo*, 80 Mich., 655; 45 N. W., 652; *Fuller v. Jackson*, 82 Mich., 480; 46 N. W., 721; *Clark v. North Muskegon*, 88 Mich., 308; 50 N. W., 254. But it does not waive an objection that the declaration fails to set forth the essential allegations necessary to show a cause of action: *Stoffet v. Marker*, 34 Mich., 313; and see, *Jennison v. Haire*, 29 Mich., 207; *Stange v. Clements*, 17 Mich., 402. Pleadings in justices' courts are to be viewed with liberality, and are to be liberally construed, and technicalities are not favored: *First National Bank v. Carson*, 60 Mich., 432; 27 N. W., 589; *Whittle v. Bales*, 65 Mich., 640; 32 N. W., 874. Still they must be sufficient to fairly show a cause of action and with sufficient certainty to obviate surprise on the part of the other side and to enable him to prepare to meet the proofs: *Watkins v. Ford*, 69 Mich., 357; 37 N. W., 300.

5—C. L., §§ 10073, 767.

The notice under the general issue.
—The object of this notice is, to ap-

prise the plaintiff of the nature of the defense relied upon, so that he may be prepared to meet it, and so that he may not be taken by surprise on the trial by a defense which he could not, with reasonable certainty, anticipate: *Rosenbury v. Angell*, 6 Mich., 508, 514. The office of the notice is to present tangible issues, and not to introduce matters which form no part of the issue. It cannot make such matters relevant or material: *Proctor v. Houghtaling*, 37 Mich., 45. And as to the general requisites of the notice, no distinction is made between one kind of action and another: *Cresinger v. Reed*, 25 Mich., 455; see, *Bailey v. Kalamazoo Publishing Co.*, 40 Mich., 254; *Brown v. Moore*, 32 Mich., 257; *Hale Mfg. Co. v. Amer. Saw Co.*, 43 Mich., 251; 5 N. W., 300. The notice is not properly a pleading, nor is it to be tested by the same rules applicable to a plea. No issue of fact or law can be founded upon it; the only issue in the case is the general issue. The notice is of matters of defense intended to be introduced in evidence under that issue: *Ibid.*; and *McIlharty v. Wadsworth*, 8 Mich., 349, 351; and see, *Porter v. Kimball*, 1 Mich., 239, 241; *Myers v. Carr*, 12 Mich., 70. To such a notice there can be no replication, nor any new assignment, but the plaintiff goes to trial on the declaration, plea and notice: *McFarlane v. Ray et al.*, 14 Mich., 460.

Although special pleas are not allowed (C. L., § 10073), yet where one is put in it is customary to allow it to stand as a notice of defense; nor is there any valid objection to this course. Special pleas were abolished to avoid technicality and prolixity, but notices containing the substance of special pleas are required where such pleas were formerly essential, and if one is put in where the other should have been, the difference being in matter of form only, may be disregarded, and the general purpose of the statute will be equally advanced by that course: *Ben-*

§ 189. "A failure or want of consideration in whole or in part, may be shown in defense, to any action or set-off, upon or arising out of any bond or promissory note or other instrument in writing, except negotiable notes, negotiated before falling due, to any person not having at the time it was negotiated, knowledge of such defense."¹

A total failure, or want of consideration, was, in actions

edict v. Smith, 48 Mich., 593; 12 N. W., 866.

Notice of defense under the general issue, when sufficient: Whittle v. Bales, 65 Mich., 640; 32 N. W. 874; see, Watkins v. Ford, 69 Mich., 357; 37 N. W., 300; Waldo v. Waldo, 52 Mich., 94; 17 N. W., 710.

The sole test of the sufficiency of a notice of special matter of defense is that it shall apprise the plaintiff of the nature of the defense relied on, so that he may be prepared to meet it and to avoid surprise on the trial. See cases last cited and Briesenmelster v. Supreme Lodge K. of P., 81 Mich., 523; 45 N. W., 977.

Among the defenses of which notice is required to be given, is discharge in bankruptcy: Parks v. Goodwin, 1 Mich., 25. In trespass for taking away goods and chattels, the defense that they were taken in attachment against a third person alleged to be the owner, requires notice: Rosenbury v. Angell, 6 Mich., 508, 513. And so, in trover, that the goods were taken in attachment: Fry v. Soper, 39 Mich., 727. So in replevin: Bateman v. Blake, 81 Mich., 227; 45 N. W., 831. And in trover by an assignee, that the property was seized on process in favor of the assignor's creditors, notice is required: Frankel v. Coots, 41 Mich., 75; 1 N. W., 940. In an action for trespass on lands, license can be shown only under notice: Senecal v. Labadie, 42 Mich., 127; 3 N. W., 296; Vanderkarr v. Thompson, 19 Mich., 87; Waldo v. Waldo, 52 Mich., 94; 17 N. W., 710. Defenses arising out of misrepresentation and fraud, require a special notice: Miller v. Finley, 26 Mich., 249; Walt v. Kellogg, 63 Mich., 144; 30 N. W., 80. And so, proof of the worthlessness of a patent right for which the note sued upon was given: *Ibid.* The defense of a former recov-

ery is not admissible without notice: Achey v. Hull, 7 Mich., 430; Tabor v. Van Vranken, 39 Mich., 794. And in assumpsit, on a policy of insurance, a defense that the insurance was procured by fraud, requires notice: Fire Insurance Co. v. Hannowald, 37 Mich., 106. So, the statute of limitations: 111 Mich., 642; 70 N. W., 140; Whitworth v. Pelton, 81 Mich., 101; 45 N. W., 500. So, the release of a surety through unauthorized extension of time: Rawlings v. Cole, 67 Mich., 431; 35 N. W., 66. So, failure of consideration in action on bond: Boyer v. Sowles, 109 Mich., 481; 67 N. W., 530; Robson v. Dayton, 111 Mich., 440; 69 N. W., 834; Hollenbeck v. Breakey, 127 Mich., 555; 86 N. W., 1055. So, notice of non-tenantable condition of premises leased in action for rent: Holmes v. Wood, 88 Mich., 436; 50 N. W., 323.

These, C. L., §§ 10071, 10072, 10073, do not apply to pleas *puis darrein continuance*, nor to any matter which, if pleaded specially, would destroy the plea of the general issue: Johnson v. Kibbee, 36 Mich., 270.

Amendments to the notice attached to the plea, is in the discretion of the court: Brown v. Moore, 32 Mich., 254. Amendment of notice may be allowed after appeal: Hopkins v. Briggs, 41 Mich., 175; 2 N. W., 199. Such amendments are in the discretion of the court: Randall v. Baird, 66 Mich., 312; 33 N. W., 506; Deline v. Michigan F. & M. Ins. Co., 70 Mich., 435; 38 N. W., 298; Minnock v. Eureka F. & M. Ins. Co., 90 Mich., 236; 51 N. W., 367.

1—C. L., § 769. Parole evidence is competent to show a bill or note without consideration. So held where it was permitted to show an agreement that the note be used by the payee as collateral and he, the payee, to take

upon simple contracts, a defense as between the parties and required no notice.² This section allows a defense of *partial* failure, or want of consideration. The defense, in this section, is applied by the statutes to any sealed instrument.

"In any action upon a sealed instrument, and where a set-off is founded on any sealed instrument, the seal thereof shall only be presumptive evidence of a sufficient consideration, which may be rebutted in the same manner, and to the same extent, as if such instruments were not sealed."³

"The defense allowed by the last section shall not be made, unless the defendant shall have given notice thereof with his plea of the general issue."⁴

Notice must also be given in actions upon contracts, though not under seal, where there is only a *partial* failure or want of consideration.⁵ If, however, the bond or other contract is offered as a set-off, notice is not necessary.

§ 190. Illegality of consideration.—In assumpsit, illegality of consideration, between the original parties to a promissory note, may be given in evidence under the general issue.⁶

§ 191. Written instruments, denial of execution of.—The general issue does not always operate as a denial of the execution of a written instrument.

"When any written instrument, purporting to be executed by one of the parties, is declared upon or set off, it may be used in evidence on the trial of the cause against such party, without proving its execution, unless its execution be denied by oath at the time of declaring, or pleading, or giving notice of

care of it so that the maker should not have to pay it; *Brown v. Smedley*, — Mich., —; 98 N. W., 856 (March, 1904); see C. L., § 828.

2—*Hill v. Callaghan*, 31 Mich., 423.

3—C. L., § 10185; *Case v. Boughton*, 11 Wend., 106. A seal is presumptive evidence of consideration, and in the absence of any statute to the contrary, is conclusive: *Lee v. Wisner*, 38 Mich., 85. Seal is but presumptive evidence of consideration: *Green v. Langdon*, 28 Mich., 221; *Hollenbeck v. Breakey*, 127 Mich., 555; 86 N. W., 1055; *Boyer v. Sowles*, 109 Mich., 481; 67 N. W., 530. This statute applies to all sealed instruments between party

and party: *Hobbs v. Brush E. L. Co.*, 75 Mich., 550; 42 N. W., 965.

4—C. L., § 10186. See cases cited in note, p. 193.

5—C. L., § 828. Total failure of consideration may be shown under the general issue without notice: *Hubbard v. Frelburger*, — Mich., —; 94 N. W., 727 (May, 1903). See cases cited in note, § 192.

6—*Myers v. Carr*, 12 Mich., 63, 70; see, *Hill v. Callaghan*, 31 Mich., 423. So it may be shown that money sued for was furnished to enable defendant to conduct a bawdy house: *McDonald v. Born*, — Mich., —; 97 N. W., 693 (Dec., 1903).

set off, if such instrument shall be produced and filed with the justice.'7

Unless the parties seeking to recover on the written instrument produce the instrument, so that the opposite party shall

7—C. L., § 826. Thus, where a promissory note sued upon was filed with the justice at the time of declaring: *Held*, that the plaintiff was entitled to read the note in evidence on the trial, without proving its execution, unless the defendant denied its execution on oath, at the time of pleading: *Burson v. Huntington*, 21 Mich., 427. The execution of a bond sued upon need not be proved unless denied by affidavit: *Lee v. Wisner*, 38 Mich., 87. In an action upon a promissory note, against makers and indorsers, the general issue, unaccompanied by an affidavit denying the execution of the note, is an admission by each defendant that he signed the instrument as alleged in the declaration; also, that it was executed by the parties declared against; and is also an admission that the defendants executed the instrument by the name and description alleged in the declaration, and obviates the necessity of proving partnership between persons signing in a firm name and charged as partners: *Lobdell v. Merchants' & Manufacturers Bank*, 33 Mich., 408; see, also, *Howry v. Eppinger*, 34 Mich., 29; *Anderson v. Walter*, *Ibid.*, 113; *Jennison v. Halre*, 29 Mich., 207; *Mills v. Bunce*, *Ibid.*, 364; *Curran v. Rogers*, 35 Mich., 221; *Towle v. Dunham*, 76 Mich., 251; 42 N. W., 1117; *Haught v. Arnold*, 48 Mich., 512; 12 N. W., 680.

A denial under oath appended to the plea, merely puts the plaintiff to proof of the execution of the written instrument declared upon: *Hunter v. Parsons*, 22 Mich., 103; see, *Polhemus v. Ann Arbor Savings Bank*, 27 Mich., 44. But proof of the execution of a written instrument will not be dispensed with unless the paper is filed with the justice at or before the time when the opposite party is required to plead or give notice of his defense thereto: *Colbath v. Jones*, 28 Mich., 280; *Newton v. Principaal*, 82 Mich., 271; 46 N. W., 234; *People v. Cotteral*, 115 Mich., 43; 73 N. W., 9; 74 N. W., 183; *Ryerson v.*

Tourcotte, 121 Mich., 78; 79 N. W., 933. It may be filed at any time previous thereto, and if it is on file with the justice at that time it will be sufficient: *Smoke v. Jones*, 35 Mich., 409.

A failure to deny, etc., only admits the execution of the instrument declared upon: *Montross v. Roger Williams Ins. Co.*, 49 Mich., 477; 13 N. W., 823. An indorsement or assignment of the instrument by another person not a party to the suit by which the plaintiff claims title to the paper, is not thereby admitted. Such indorsement or assignment must still be proved in order to show the plaintiff's title to the instrument: *Spicer v. Smith*, 23 Mich., 96; *Newton v. Principaal*, 82 Mich., 271; 46 N. W., 234. It admits the execution and delivery of the instrument, but does not preclude the defendant from making any other defense to the paper on the merits which does not contradict its execution, such as, that it was procured of the defendant by fraud, or without consideration, etc.: *Freeman v. Ellison*, 37 Mich., 459; *Ada Dairy Assn. v. Mears*, 123 Mich., 470; 82 N. W., 258. Or that the defendant had no legal capacity to make the instrument: *Kenton Ins. Co. v. McClellan*, 43 Mich., 564; 6 N. W., 88. "The correct rule, we think, is, that the admission of the execution of the instrument, contemplated by the statute, is an admission that it was executed by the defendants by the name and description alleged in the declaration": *Pegg v. Bidelman*, 5 Mich., 26; *Naphtzker v. Lantz*, — Mich., —; 100 N. W., 601 (July, 1904).

A denial of delivery, merely, is not a denial of the execution of the instrument: *Burson v. Huntington*, 21 Mich., 415. The signature is admitted if delivery only is denied by the affidavit: *McCormick v. McKee*, 51 Mich., 426; 16 N. W., 796. So, in case of a partnership note, an affidavit by two out of three of the partners, denying, "each

have an opportunity of inspecting it before pleading to the declaration; or, if set off, to ascertain its genuineness, when the notice of set-off is given, the party of whom the amount due upon it is sought to be obtained is not bound to deny the execution under oath, and the plea of the general issue would not, in such case, excuse from proof of the execution. A failure to make a denial of the execution under oath only operates as an admission of the execution of the instrument, leaving the party at liberty to set up any defense other than that he did not execute it, which is admissible under his plea of the general issue or notice.

The affidavit of one of several defendants, denying the execution of the instrument sued on, renders it necessary, as to him, that proof of partnership or of the handwriting should be made. The implied admission, created by the statute, still exists as to the other defendant, who is not entitled to any benefit from the oath of his codefendant, except the incidental benefit which would result from the plaintiff failing to maintain the issue as to one of the joint defendants.⁸

for himself, that he ever executed or delivered," etc., is not a denial that it is a valid firm note, duly executed and delivered by the third partner as the note of the firm: *Mills v. Bunce*, 29 Mich., 364.

A plea of the general issue, without an affidavit of denial, would not admit the execution of an unsealed obligation when an instrument under seal had been declared on. The affidavit filed with the plea of the general issue denying the execution, should not be technically construed. If it is sufficient to show that the defendant means in good faith to contest the execution or delivery of the instrument sued on, he should be permitted to make his defense. It was not intended, in requiring such an affidavit, to compel a full statement of the facts but only to indicate the defense, or to make a plain denial. Nor will the admission resulting from a want of an affidavit of denial dispense with the production of the instrument in court: *McCormick v. Bay City*, 23 Mich., 457; *Haight v. Arnold*, 48 Mich., 512; 12 N. W., 680. A failure to deny admits the authority of an agent by whom the

instrument purports to have been signed: *English v. Ayer*, 92 Mich., 370; 52 N. W., 639. But see *Dewey v. Toledo, A. A. & N. M. Ry. Co.*, 91 Mich., 351; 51 N. W., 1063. The statute (§ 1355) applies only to written instruments purporting to be executed by one of the parties to the suit, and not to instruments made by third person, not parties in the case. Thus, where a contract was assigned by writing indorsed upon the instrument, and the assignee sued the maker, who failed to deny the execution of the contract on oath: *Held*, that the maker did not thereby admit the making of the assignment nor the genuineness of the signature to the assignment: *Hinckley v. Weatherwax*, 35 Mich., 510; *Spicer v. Smith*, 23 Mich., 96.

8—*Pegg v. Bidelman*, 5 Mich., 26; *Davis v. Scarritt*, 17 Ill., 202; see *Mills v. Bunce*, 29 Mich., 364. When several persons are sued jointly as makers of a promissory note, an affidavit by one of them that he has neither executed the note nor authorized any one to execute it for him, is sufficient to put the execution and

If the written instrument declared on, or set off, is filed at the time of declaring or pleading, and giving notice of set-offs, its execution must be denied on oath *at the time of such filing, and not afterwards*, in order to put the party relying on it upon proof of its execution.⁹

§ 192. Effect of general issue in assumpsit.—In assumpsit, the general issue denies the making of the promise. Under this plea, any matter which shows that the plaintiff *never* had a cause of action, and also most matters in *discharge* of the action, are admissible. So, under this plea, evidence of the defendant's incapacity to contract, as that at the time the supposed contract was entered into the defendant was an infant, a lunatic, or a *feme-covert*, would be admissible. And so a release, arbitration, former recovery for the same cause, payment, alteration in the terms of the contract, and some others. Of some defenses in this action notice must be given with the general issue, as a tender, set-off, or the statute of limitations.¹⁰

validity of the note at issue, so far as he is concerned, even though his co-defendants do not join in the affidavit: *Wren v. McLaren*, 48 Mich., 197; 12 N. W., 41. And so, where such an affidavit was made when the defendants were partners: *Haight v. Arnold*, 48 Mich., 512; 12 N. W., 680.

9—*Fish v. Hall*, 4 Mich., 506; see, *ante*, § 191, note 7.

10—1 Chitty's Pl., 515; 1 Saund. Pl. & Ev., 226; *Young v. Rummell*, 2 Hill, 478.

Under the general issue the defendant may give in evidence nearly every defense which shows that there was not a subsisting cause of action at the time the suit was brought: *Young v. Rummell*, 2 Hill, 478; *Boyd v. Weeks*, 5 *Ibid.*, 393; *Infancy*, *Darby v. Boucher*, 1 Salk., 279; 1 Tidd's Pr., 646; *Duress*, *Ibid.*, 646; *Payment*, *Drake v. Drake*, 11 Johns. R., 531; *Sheets v. Baldwin*, 12 Ohio, 120; *Fulton Bank v. Stafford*, 2 Wend., 486; or its equivalent, *Clark v. Yale*, 12 Wend., 470; *Performance of the Contract*, *Wilt v. Ogden*, 13 Johns., 56; *Accord and satisfaction*, *Cherlot v. Barker*, 2

Johns., 346; *Fulton Bank v. Stafford*, 2 Wend., 486; *Arbitrament and award*, *Martin v. Thornton*, 4 Esp. R., 181; 1 Chitty's Pl., 478; a release, *Ibid.*; *Fulton Bank v. Stafford*, 2 Wend., 486; a former recovery for the same cause, *M'Daniel v. Hughes*, 3 East., 378; *Young v. Rummell*, 2 Hill, 478; *Miller v. Manice*, 6 *Ibid.*, 124; *Prescott v. Hull*, 17 Johns., 284; *Wood v. Jackson*, 8 Wend., 1; total failure of consideration of a note, *People on rel. of Fleming v. Niagara C. P.*, 12 Wend., 246; *Payne v. Cutler*, 13 *Ibid.*, 605; C. L., § 769; or, that the note was obtained by fraud or given without consideration, *Sill v. Rood*, 15 Johns., 230; *Hills v. Bannister*, 8 Cow., 31. The rule being that where the defense goes to destroy the plaintiff's right of action entirely, it may be given in evidence under the general issue without notice; but if it goes merely to reduce or mitigate the damages, notice must be given: *Gleason v. Clark*, 9 Cow., 59; *People on rel. of Fleming v. Niagara C. P.*, 12 Wend., 246. See, *ante*, p. 193, note 1.

§ 193. **In debt.**—In debt on a record, the general issue merely puts in issue the existence of the record as stated; of any matter in discharge of the action, notice must be given; as, payment or release; levy by execution, etc. In debt on a justice's judgment, the general issue would only put in issue the fact that such judgment was rendered. In debt on bond, it would be only a denial of the execution of it.

§ 194. **In covenant.**—In covenant, this plea only puts in issue the execution of the deed.¹¹

§ 195. **In trover and actions on the case.**—In trover and actions on the case, the general issue allows any defense except the statute of limitations.¹²

§ 196. **In trespass.**—In trespass to real or personal property, or to the person, the general issue would not authorize the giving in evidence anything but what directly controverts the truth of any matter which the plaintiff would be bound to prove. Of any justification or matter in discharge of the cause of action, notice must be given with the general issue.¹³

§ 197. **Pleas by several defendants.**—Several defendants may join in the same plea, or each may plead separately; one may plead in abatement, another in bar, and a third may demur, except in actions against husband and wife, when the husband must join in the plea with his wife. But personal defenses, as coverture, infancy, etc., should be pleaded separately; and one of several defendants may justify by command of another defendant, who pleads the general issue, or confesses the action, for one defendant cannot, by pleading, take away

11—But under the general issue in covenant, the defendant may show that the deed is not his, by proving a lack of power in the agent who executed it on his behalf: *Agent, etc., v. Lathrop*, 1 Mich., 438.

12—*Delavan v. Bates*, 1 Mich., 97. As to when an officer who has levied on property must, in his defense in trover for taking, etc., give notice of the judgment under which the execution issued: See, *Comstock v. Hollon*, 2 Mich., 355; *Thomas v. Watt*, 104 Mich., 201; 62 N. W., 345. But see, *Hine v. Commercial Bank, etc.*, 119

Mich., 448; 78 N. W., 471, where it is held that the general issue in trover will not permit the showing that the property for which suit is brought is held by virtue of an attachment, following *Eureka I. & S. Works v. Bresnahan*, 66 Mich., 489; 33 N. W., 834, and cases cited.

13—In trespass for taking goods, etc., the defense that the goods were taken under an attachment against a third person alleged to be the owner, is not admissible under the general issue without notice: *Rosenburg v. Angell*, 6 Mich., 508.

the ground of defense from the other. If two defendants join in a plea which is sufficient for one but not for the other, the plea is bad as to both, for the court cannot sever it and say that one is guilty and the other is not, when they all put themselves on the same terms.¹⁴ But this rule would not apply to a joint plea of the general issue, as neither defendant could give in evidence a justification under that plea in any case.

14—1 Chitty's Pl., 10 Am. ed., 565-6-7.

CHAPTER XII.

A CONSIDERATION OF SOME OF THE DEFENSES OF MOST COMMON OCCURRENCE.

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ACCORD AND SATISFACTION.

§ 198. **What it is.**—Accord is an agreement between two parties to give and accept something in satisfaction of a claim made by the one against the other,¹ which when performed, is satisfaction, and a bar to all actions upon that account.² Accord and satisfaction is a defense in all actions except upon records.³

§ 199. **How pleaded.**—The best and safest way of pleading an accord is to plead it by way of satisfaction; for, if it is pleaded by way of accord, a precise execution of it in every part must be pleaded; and if there be a failure in any part, the plea is insufficient; but if it is pleaded by way of *satisfaction*, the defendant need plead no more, but that he paid the plaintiff, or delivered to him, the money or article in full satisfaction, which he received.⁴ The acceptance in satisfaction is the essence and gist of the plea.⁵ A plea of accord merely, without satisfaction, will be bad; that is, it must be expressly averred that the money or property was *accepted* in satisfaction and discharge; and an averment that the money or the property was given in payment and satisfaction would be insufficient.⁶ The plea must show that the satisfaction proceeded from the defendant; for, if it be executed by a total stranger, the defendant cannot avail himself of it.⁷ It is not necessary, in general, to allege the satisfaction to be reasonable,⁸ or the value of it.⁹ Where accord and satisfaction is admissible under the general issue, it must appear that the accord was executed before the commencement of the suit,¹⁰ but when specially pleaded, *puis*, etc., it is no objection that it

1—Bacon's Abr., "Accord and Satisfaction," C.

2—3 Bla. Com., 15, 16. The next friend of an infant cannot bind the infant by an accord and satisfaction: Burt v. McBain, 29 Mich., 260.

3—1 Chitty's Pl., 485-6; 1 Saund. Pl. & Ev., 25.

4—Bacon's Abr., "Accord and Satisfaction," C.; Daniels v. Hallenbeck, 19 Wend., 410.

5—Daniels v. Hallenbeck, 19 Wend., 408, 410.

6—Drake v. Mitchell, 3 East., 251; see, Russell v. Lytle, 6 Wend., 390;

Hawley v. Foote, 19 *Ibid.*, 516; Brooklyn Bank v. DeGrauw, 23 *Ibid.*, 342; Tilton v. Alcott, 16 Barb., 598; Brown-ling v. Crouse, 43 Mich., 489; 5 N. W., 664; Harrison v. Gamble, 69 Mich., 96; 36 N. W., 682.

7—Clow v. Borst, 6 Johns., 37; Daniels v. Hallenbeck, 19 Wend., 408; Kemp v. Balls, 10 Exch., 607.

8—Heathcote v. Cruikshank, 2 Term., 26.

9—3 Chitty's Pl., 924, note o.

10—Bartlett v. Pentland, 10 B. & C., 776.

was executed after the commencement of the action, and it may be pleaded in bar of the further maintenance of the suit.¹¹ If the accord and satisfaction took place after action brought, the notice must aver, and it must be proved, that it was a satisfaction of the costs and damages sustained by the breach of contract.¹² But where, to an action upon a note, the defendant pleaded payment by the maker, after the suit was brought, of a sum about two dollars less than the note, and interest, "in full satisfaction and discharge of the note," the plea was held to be good, on the ground that interest ought not to be considered as part of the debt within the purview of the rule that payment of a *less* sum, in satisfaction of a debt due, is not good, and as to the costs, when parties settled without noticing them, they are to be borne by each party.¹³

There is an exception to the rule that a smaller sum is not a satisfaction of a greater, namely, where creditors agree to take a composition from their debtor.

To establish this defense, the defendant must prove the agreement between him and the plaintiff to accept the satisfaction, and that the satisfaction agreed upon was reasonable, perfect, certain and executed,¹⁴ and proceeded from the defendant.¹⁵

§ 200. What will amount to satisfaction.—The satisfaction must be a reasonable and complete satisfaction of the thing demanded, and operates as an extinguishment of the original cause of action. Therefore, acceptance of a less sum is not a satisfaction of a greater.¹⁶ So, an agreement with one of two

11—*Corbell v. Swinburne*, 8 Ad. & Ell., 673.

12—*Francis v. Aywell*, 5 B. & Ald., 886; 1 Saund. Pl. & Ev., 37.

13—*Johnston v. Brannan*, 5 Johns., 271; *Tillotson v. Preston*, 3 Johns., 229.

14—*Heathcote v. Cruikshank*, 2 Term R., 26.

15—*Clow v. Borst*, 6 Johns., 37; *Daniels v. Hallenbeck*, 19 Wend., 408. But if such a satisfaction is advanced by a stranger and is accepted by the defendant, it is a good satisfaction: *Simpson v. Eginston*, 10 Exch., 845. And if payment is made

by a stranger and subsequently ratified by the defendant, it is a good bar: *Belshaw v. Bush*, 11 C. B., 191, 207; and see, *Booth v. Smith*, 3 Wend., 66.

16—*Fitch v. Sutton*, 5 East., 230. That is, where the greater sum is actually and justly due, and there is no dispute to its amount: *Seymour v. Minturn*, 17 Johns., 169; *Dederick v. Leman*, 9 *Ibid.*, 333; *Harrison v. Gamble*, 69 Mich., 96; 36 N. W., 682; *Leeson v. Anderson*, 99 Mich., 247; 58 N. W., 72. This doctrine is applicable to debts liquidated by agreement or otherwise; and a claim any portion of which is in dispute cannot be said

joint makers of a note to accept part of it from him and to look to the other for the residue and the payment of the money accordingly, is not a good accord and satisfaction, nor will it prevent a suit against both for that debt.¹⁷ But payment and acceptance of a part of a debt in satisfaction of the whole, *before* the time it became due,¹⁸ or at a place where it was not payable,¹⁹ or if a third person guarantee or secure the payment of a less sum,²⁰ or there be a release, or some consideration for the relinquishing his further claim, would be a sufficient satisfaction.²¹ But payment and acceptance in satisfaction of an amount exceeding the principal of the debt, but not covering the whole interest, nor the costs of suit, is sufficient.²² If a debtor give a chose in possession for a chose in action, as a horse, or other property in specie, it is sufficient.²³ The property assigned or delivered may amount to the sum in demand, and more, or it may amount to less—not even the twentieth part of it—yet it is good enough, because the plaintiff has accepted it as a full satisfaction.²⁴ But the property given, or the thing done, must appear to be of some value or advantage to the plaintiff.²⁵

to be liquidated within the meaning of the rule: *Tanner v. Merrill*, 108 Mich., 58; 65 N. W., 664.

17—*Harrison v. Close*, 2 Johns., 448; see, *post*, § 205. Separate compromise by joint debtors.

18—*Johnston v. Brannan*, 5 Johns., 269; *Seymour v. Minturn*, 17 *Ibid.*, 169.

19—*Co. Lit.*, 212.

20—*Steinman v. Magnus*, 11 East., 390; *Kellogg v. Richards*, 14 Wend., 116; *Page v. McCrea*, 1 Wend., 164; *Boyd v. Hitchcock*, 20 Johns., 76.

21—*Fitch v. Sutton*, 5 East R., 230; *King v. Brewer*, 121 Mich., 339; 80 N. W., 238.

Compromise settlements.—But the rule that a part payment is no bar to an action for the residue of the debt, applies only in those cases where the demand is undisputed, and is liquidated; for if the sum is disputed or the amount unliquidated, a payment of a part and the acceptance of it in satisfaction by the creditor will bar an action for any further sum than that paid and accepted: *Lougridge v. Dor-*

ville, 5 B. & Ald., 117; *Wilkinson v. Byers*, 1 Ad. & E., 106; *Atlee v. Backhouse*, 3 M. & W., 651; *Palmerton v. Huxford*, 4 Denio, 166; *Pierce v. Pierce*, 25 Barb., 343. Where parties have compromised claims apparently made in good faith by one against the other, the courts will not go back of their action and inquire into the merits of the controversy or reasonableness of the settlement: *Hull v. Swartout*, 29 Mich., 250; *Prichard v. Sharp*, 51 Mich., 432; 16 N. W., 798; *Hart v. Gould*, 62 Mich., 262; 28 N. W., 831; *Freeman v. Freeman*, 68 Mich., 28; 35 N. W., 897; *Brown v. Kriser*, 129 Mich., 448; 89 N. W., 51; *Kern Brewing Co. v. Royal Ins. Co.*, 127 Mich., 39; 86 N. W., 388; *Lamb v. Rathburn*, 118 Mich., 666; 77 N. W., 268.

22—*Johnston v. Brannan*, 5 Johns., 269.

23—*Heathcote v. Crookshanks*, 2 Term. R., 24, 26.

24—*Watkinson v. Inglesby*, 5 Johns., 386, 392.

25—*Preston v. Christman*, 2 Will., 86.

§ 201. **In case of a specialty security.**—Such, where co-extensive, operates as a satisfaction of a simple contract debt or security; and is a satisfaction, as the simple contract is merged in the specialty,²⁶ but not if the specialty be void, or be taken merely as a collateral or additional security,²⁷ and a judgment having been obtained on the collateral security, will not, unless it has produced satisfaction, be an extinguishment of the original demand.²⁸ But one bond is not satisfied by the giving of another,²⁹ nor is a judgment satisfied by merely obtaining another judgment upon it.³⁰ The general principle of law in such cases is, that a security of a higher nature extinguishes *inferior* securities, but not securities of equal degree.³¹

A bill of exchange or promissory note, etc., will sometimes operate as an accord and satisfaction. If the debt is satisfied by a bill or note, it forms a bar to an action for the debt.³² Where A. and B. have suits for false imprisonment pending

26—Winton v. Foster, 2 Bing., N. C., 692.

27—Twopenny v. Young, 3 B. & C., 210; Sterling v. Rogers, 25 Wend., 658.

28—Drake v. Mitchell, 3 East., 259.

29—Phelps v. Johnson, 8 Johns., 55; Jackson v. Shaffer, 11 Johns., 513, 517.

30—Mumford v. Stocker, 1 Cow., 178; Andrews v. Smith, 9 Wend., 53.

31—Andrews v. Smith, 9 Wend., 53, 54. Taking judgment on a note collateral to a chattel mortgage, does not destroy the lien of the mortgage: Thurber v. Jewett, 3 Mich., 295.

32—Wittersby v. Mann, 11 Johns., 576; Johnson v. Weed, 9 *Ibid.*, 310; Sage v. Walker, 12 Mich., 425. The giving of a promissory note for goods sold, or for an antecedent debt, or other valuable consideration, is no satisfaction or payment, unless it is specially agreed to be so taken; and in this respect it makes no difference whether it be given for a precedent debt or for a debt created contemporaneously with the making of the note, or whether it be the note of the debtor or of a third person: Gardner v. Gorham, 1 Doug., Mich., 50, 510. As to when a bill or note will be construed as payment, see the following cases: Au Sable R. B. Co. v. Sanborn, 30

Mich., 358; Breitung v. Lindauer, 37 Mich., 217; Brown v. Dunkel, 46 Mich., 29; 8 N. W., 537; Tabor v. Michigan M. L. Ins. Co., 44 Mich., 324; 6 N. W., 830; Riverside Iron Works v. Hall, 64 Mich., 165; 31 N. W., 152; McMorran v. Murphy, 68 Mich., 246; 36 N. W., 60; Beecher v. Dacey, 45 Mich., 92; 7 N. W., 689. But it may be presumed, from the circumstances attending the transaction, and the subsequent acts of the parties, that the note was given and accepted in satisfaction of the former note or antecedent debt: Hotchin v. Secor, 8 Mich., 494; Sears v. Smith, 2 Mich., 243; Sage v. Walker, 12 Mich., 425. Thus, where a debtor gave a new note for the accrued interest due on a bond and mortgage, with a higher rate of interest than that named in the bond, the giving of such new note was held to operate as payment upon the bond and mortgage of the interest for which the new note was given: Burchard v. Fraser, 23 Mich., 224. And therefore it is not necessary to prove that it was expressly agreed that it should be taken in satisfaction: Hotchin v. Secor, 8 Mich., 494. The taking of a bill or note for a present or former simple contract debt, is *prima facie* a satisfaction, and

against each other, a mutual agreement to discontinue the suits, which are accordingly discontinued, is good as an accord and satisfaction.³³ Destroying certain documents upon plaintiff's undertaking, in consideration thereof, not to bring an action for slander, is a sufficient accord and satisfaction.³⁴

§ 202. **An accord must be certain.**—An accord that the defendant should employ a workman three or four days about repairing the house is bad,³⁵ and performance of an uncertain accord will not aid the first uncertainly.³⁶

§ 203. **An accord must be executed.**—While it remains executory, although without any default on the part of the defendant, it is no bar to the action; even payment or delivery of part of the money or goods agreed to be received in satisfaction, and a tender of the residue, is insufficient.³⁷

§ 204. **Satisfaction must proceed from the defendant.**—If it be executed by a total stranger, it will not avail the defendant.³⁸ Accord and satisfaction to one of several co-plaintiffs will operate as a discharge to all,³⁹ and by one of several copartners, or co-obligors,⁴⁰ or joint wrong-doers,⁴¹ will avail as to all, although it is agreed that it shall not operate as a satisfaction for the others.⁴²

§ 205. **Separate compromises by joint debtors.**—Provision is now made by statute enabling copartners, and other joint debtors, separately to compromise and settle their respective shares and proportions of the joint liabilities, and thereby protect themselves from payment and actions for the re-

amounts to an agreement to give the person delivering it credit for the time it has to run: 1 Saund. Pl. & Ev., 29; Yale v. Coddington, 21 Wend., 175.

33—Foster v. Trull, 12 Johns., 456.

34—Lane v. Applegate, 1 Starkle, 97.

35—Adams v. Tapling, 4 Mod. R., 88.

36—Russel v. Russel, 3 Lev., 189; 1 Saund. Pl. & Ev., 32.

37—Fitch v. Sutton, 5 East., 230; Russell v. Lytle, 6 Wend., 391; Hawley v. Foote, 19 Wend., 516; Brooklyn Bank v. DeGrauw, 23 Wend., 342; Tilton v. Alcott, 46 Barb., 598.

38—Clow v. Borst, 6 Johns., 37; Daniels v. Hallenbeck, 19 Wend., 408, 516.

39—Pinnel's Case, 5 Coke R., 117.

40—Jacaud v. French, 12 East., 317; Strang v. Holmes, 7 Cow., 214.

41—Dufresne v. Hutchinson, 3 Taunt., 117; Strang v. Holmes, 7 Cow., 224. And a partial satisfaction by one of several wrong-doers is, so far as it goes, satisfaction as to all: Merch B. v. Curtis, 37 Barb., 317.

42—Ellis v. Bitzer, 2 Ham., Ohio, 59; McBride v. Scott, 132 Mich., 176; — N. W., —.

mainder of the joint debts and liabilities, the provisions are as follows:

"That whenever any firm or copartnership shall be dissolved, by mutual consent or otherwise, it shall and may be lawful for any one or more of the individuals composing such firm or copartnership, to make a separate settlement or compromise with any one or all of the creditors of such firm or copartnership; and such settlement or compromise shall be a full and complete discharge, both in law and in equity, to the debtor or debtors making such settlement or compromise, and to such debtor or debtors only, of and from all and every liability to the creditor or creditors with whom the same is made or incurred, by reason of his or their connection with such firm or copartnership; Provided, however, That in case of such settlement or compromise, the copartner or copartners who are not parties to the same, shall be discharged from all liability to the creditor or creditors except for their joint, ratable portion of such copartnership debt.⁴³

"Every such debtor or debtors making such settlement or compromise, shall take from the creditor or creditors, or their attorney, with whom he may make the same, a receipt or memorandum, in writing, exonerating and discharging him or them, from all and every individual liability, incurred by reason of such connection with such firm or copartnership, whether such liability was incurred as endorsee, acceptors, or otherwise, which receipt or memorandum shall refer to the instrument as evidence of the indebtedness, and may be given in evidence by such debtor or debtors, under the general issue in bar of any creditor's right of recovery against him or them, or any indebtedness or liability so settled or compromised; and if such liability shall be, by judgment in any court in this state, then on production to, and filing in such court a receipt or memorandum, signed by such creditor, agent or attorney, entitled in such cause, describing such judgment, then the justice before whom such judgment may remain, or if in a court

43—C. L., § 10448; see, Southworth v. Parker, 41 Mich., 198; 1 N. W., 944. It has been held in New York, under a similar statute, that a release to one of several joint debtors, under authority of the statute, should refer to the statute: Bank of Poughkeepsie v. Ibbatson, 5 Hill, 462; Hoffman v. Dunlap, 1 Barb., 185.

of record, then the clerk of such court shall discharge such judgment of record, so far as such debtor or debtors, so settling or compromising, shall be concerned.”⁴⁴

“Such settlement or compromise with the individual members of a firm or copartnership, shall not be so construed as to discharge the other copartners, except as provided in the first section of this act; nor shall it impair the right of the creditors to proceed in law or in equity, against the members of such firm or copartnership as have not been discharged, and it shall not be necessary to make such person or persons as have been discharged, by such settlement or compromise, parties to any suit with the other copartners who have not been discharged; and the member or members of such firm or copartnership, so proceeded against, shall be entitled to set off any demand against said creditor or creditors, which could have been set off had such suit been brought against all the individuals comprising such firm or copartnership; nor shall such settlement, compromise or discharge of an individual of a firm or copartnership prevent the other members of such firm or copartnership from availing themselves of any defense at law or equity that would have been available had not this act been passed, except that they shall not set up the discharge of one or more partners, as the discharge of the other copartners, unless it shall expressly appear in the receipt or memorandum that all were intended to be discharged.”⁴⁵

“Such settlement or compromise of one or more members of such firm or copartnership, with a creditor of such firm or copartnership, shall in nowise affect the right of the other partners to demand and recover from their copartners making such settlement or compromise, their ratable portions of such firm or copartnership debt, in the same manner, and to the same extent, as if this act had not been passed.”⁴⁶

“The provisions of this act shall extend to joint debtors in the same manner as it now extends to copartners; and such joint debtors are hereby authorized, individually, to settle or compromise, and be discharged from their joint indebtedness

44—C. L., § 10450. It is not essential that the release be filed in court as a condition of its validity: *Beekman v. Sylvester*, 109 Mich., 183; 66 N. W., 1093.
45—C. L., § 10451.
46—C. L., § 10452.

in the same manner as is herein provided by the settlement and compromise of copartners."⁴⁷

DURESS.

§ 206. What it is.—Duress is of two kinds; by imprisonment and by threats.¹

A bond or contract procured by means of unlawful impris-

47—C. L., § 10453. A judgment cannot be enforced against one of three joint judgment debtors, where the other two show a discharge from the judgment, and there has been no discontinuance as to them, such judgment in such case must be against all: *Beekman v. Sylvester*, 109 Mich., 183; 66 N. W., 1093.

1—Duress exists when one, by the unlawful act of another, is induced to make a contract or perform some act under circumstances which deprive him of the exercise of free will. It may be either of the person or of the goods of the party. Duress of the person is either by imprisonment, or by threats, or by the exhibition of force which apparently cannot be resisted. Duress of goods may exist when one is compelled to submit to an illegal exaction in order to obtain them from one who has them in possession, but refuses to surrender them unless the exaction is submitted to. Thus, where the plaintiff pledged goods for £20, and when he offered to redeem them the pawnbroker refused to surrender the property unless he was paid the exorbitant exaction of £10 for interest. This was held to be duress of the goods; and, although the plaintiff submitted to the exaction, he was held entitled to recover back all that had been unlawfully demanded and taken. This, say the court, was a payment by compulsion. It is duress of goods when a common carrier refuses, until payment of excessive charges, to deliver the property for the carriage of which the charges were made. And so, where one having securities in his hands which he refuses to surrender until illegal commissions are paid. So, if illegal tolls are demanded for passing a raft of lumber, and the owner pays them to liberate his raft, he may

recover back what he has been illegally compelled to pay. So, one may recover back money which he pays to release his goods from an attachment which is sued out with knowledge on the part of the plaintiff that he has no cause of action. Nor is the principal confined to payments made to recover goods; it applies equally well when money is extorted as a condition to the exercise by the party of any other legal right; for example, when a corporation refuses to suffer a lawful transfer of stock till an illegal exaction is submitted to. And the mere threat to employ colorable legal authority to compel payment of an unfounded claim, is such duress as will support an action to recover back what is paid under it.

But when a party threatens nothing except what he has a legal right to do or perform, there is no duress. When, therefore, a judgment creditor threatens to levy his execution on the debtor's goods, and under fear of the levy the debtor executes and delivers a note for the amount, with sureties the note cannot be avoided for duress. And it is said, that a refusal to pay on demand a debt that is due, thereby forcing the creditor, while in great financial embarrassment, to accept in full for only a partial payment, is not duress if the debtor has done nothing unlawful to cause the embarrassment, which compelled the creditor to submit to the extortion: *Hackley v. Headley*, 45 Mich., 569; 8 N. W. 511. The foregoing discussion found in the opinion in this case just referred to is supported by many authorities cited therein. See also *Mayhew v. Phoenix Ins. Co.*, 23 Mich., 105; *Peter v. Thickstun*, 51 Mich., 590; 17 N. W. 68; *Prichard v. Sharp*, 51 Mich., 432; 16 N. W., 798. As to effect of threats

onment of the person making it, is void.² So, although the imprisonment is under *legal* process, the bond or contract may be avoided. "It is a sound and correct principle of law that when a man shall falsely, maliciously and without probable cause sue out a process, in form regular and legal, to arrest and imprison another, and shall obtain a deed from a party thus arrested to obtain his deliverance, such deed may be avoided by duress of imprisonment."³

to furnish to prosecuting officers information upon which criminal prosecution might be instituted, see *Barger v. Farnham*, 131 Mich., 487; 90 N. W., 281. Duress to be available must be by the plaintiff or his authority: *Boydan v. Haberstumpf*, 129 Mich., 137; 88 N. W., 386. The execution of a mortgage by a wife, upon the statement by the husband, who is in custody, that she would have to do it to save him from jail, is voidable for duress, though those having him in custody made no statement to her; the agent of the insurance company, which had been defrauded through the forgery of the husband, had however suggested to the husband that he procure his wife to make the mortgage: *Bentley v. Robson*, 117 Mich., 691; 76 N. W., 146; *Benedict v. Roome*, 106 Mich., 378; 64 N. W., 193. Such a conveyance is not void but voidable: *Miller v. Lumber Co.*, 98 Mich., 163; 57 N. W., 101; *Meech v. Lee*, 82 Mich., 274; 46 N. W., 383; *Cribbs v. Sowle*, 87 Mich., 340; 49 N. W., 587. As to the effect of subsequent recognition of the instrument procured by duress, see *Meech v. Lee*, 82 Mich., 274; 46 N. W., 383, where a second mortgage is held to be effected by the original transaction; and *Bentley v. Robson*, 117 Mich., 691; 76 N. W., 146; where payments on the security obtained were subsequently made, they were held not to effect a waiver of the illegality. A mother who releases a claim for damages then in suit in order to save her son from a criminal prosecution is under duress: *Welser v. Welch*, 112 Mich., 134; 70 N. W., 438. But a settlement and deductions compelled by taking advantage of a creditor's financial embarrassments, and threatening ruin by stopping payments due

to him from others, is duress, and cannot be sustained: *Vyne v. Glenn*, 41 Mich., 112; 1 N. W., 997. A plea of duress is not good as against a bona fide holder of negotiable paper: *Farmers & M. Bank v. Butler*, 48 Mich., 192; 12 N. W., 36. It must appear that the action in question was influenced by the unlawful restraint. It is not sufficient to show unlawful restraint alone: *Feller v. Green*, 26 Mich., 70.

2—*Thompson v. Lockwood*, 15 Johns., 256; *Evans v. Begleys*, 2 Wend., 243; *Strong v. Grannis*, 26 Barb., 122, 126. But 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 unlawful and unnecessary privation, and be induced to execute the deed, or make the contract, to avoid such illegal hardship or privation: *Rood v. Winslow*, 2 Doug. Mich., 68, 71. Securities obtained under pressure of a criminal prosecution resorted to to enforce civil liability cannot be enforced by one guilty of such conduct: *Selber v. Price*, 26 Mich., 518; *Briggs v. Withey*, 24 Mich., 136.

3—*Watkins v. Baird*, 6 Mass., 506, 511; *Holbrook v. Cooper*, 44 Mich., 373; 6 N. W., 850. The rule seems to be that where there is an arrest for improper purposes, without a just cause; or, where there is an arrest for a just cause under lawful authority, but for an unlawful purpose, it may be construed to be a duress: *Strong v. Grannis*, 26 Barb., 162; *Severance v. Kimball*, 8 N. H., 386; *Richardson v. Duncan*, 3 N. H., 508; and see, *Hacket v. King*, 6 Allen, 58; *Hacket v. King*, 8 Allen, 144. A recognizance illegally extorted from a prisoner

§ 207. **Modern doctrine of duress**—"The true doctrine of duress at the present day, both in this country and England, is that a contract obtained by so oppressing a person by threats regarding his personal safety or liberty, or that of his property, or of a member of his family, as to deprive him of the free exercise of his will and prevent the meeting of minds necessary to a valid contract, may be avoided on the ground of duress. * * * * The law no longer allows a person to enjoy without disturbance, the fruits of his iniquity, because his victim was not a person of ordinary courage: and no longer gauges the acts that shall be held legally sufficient to produce duress by any arbitrary standard, but holds him who, by putting another in fear, shall have produced in him a state of mental incompetency to contract, and then takes advantage of such condition, no matter by what means such fear be caused, liable at the option of such other to make restitution to him of everything of value thereby taken from him."⁴

In an action on a bond executed by two, one cannot plead that the other executed it by duress.⁵ But this rule does not apply to a bond taken by an officer by virtue of his office.⁶

while under arrest, and in violation of his right to an examination, before being required to give such security, has been held to have been obtained by duress: *Champlain v. People*, 2 N. Y., 82. And where a person arrested another on the pretense that he had a warrant, when in fact he had none, and the prisoner gave property to obtain his release, it was held that the duress avoided the transaction: *Foshay v. Ferguson*, 5 Hill, 154; see, *Lyon v. Waldo*, 36 Mich., 345.

Where a timid and ignorant man was induced, by threats of prosecution for slander, to assign a mortgage to another, the assignment was held to be without consideration, on account of the duress: *Tate v. Whitney*, Har. Ch. (Mich.), 145; see, *Gates v. Shutts*, 7 Mich., 127.

Nor is it necessary that the party executing the contract should be under fear of personal injury to himself to render the transaction void. Thus,

where a wife, terrified by threats made in her presence to arrest her husband for an alleged embezzlement, was induced to transfer sufficient of her separate property to secure the amount alleged to have been embezzled, it was held to be under duress, and void: *Eddie v. Slimmon*, 26 N. Y., 9. And, where a bailee of perishable merchandise exacts more than is due to him as a condition of delivering it to the owner, the money so paid wrongfully as the necessary means of obtaining delivery, may be recovered back as money paid under duress: *Harmony v. Bingham*, 1 Duer, 210; *Harmony v. Bingham*, 12 N. Y., 99; *Atlee v. Backhouse*, 3 Mees. & W., 633.

4—*Galusha v. Sherman*, 105 Wis., 263; 81 N. W., 495; 47 L. R. A., 417; *Cribbs v. Sowle*, 87 Mich., 340; 49 N. W., 587.

5—*Thompson v. Lockwood*, 15 Johns., 256.

6—*Ibid.*

INFANCY.

§ 208. **Effect of.**—The effect of infancy is, that any contract or agreement made by the infant, except its object be necessities, may be avoided. Such contract or agreement is not void for the infancy but voidable only, and cannot be avoided by him during the continuance of his infancy.⁷ The only exception to this general rule is the case of contracts which could by no possibility benefit the infant.⁸

§ 209. **When contract is for necessities.**—The word *necessaries* is not confined, in its strict sense, to such articles as are necessary to the support of life, but extends to articles fit to maintain the particular person in the state, station and degree in life in which he is.⁹ Meat, drink, apparel, medicine, schooling and instruction, are necessities.¹⁰ An infant is liable for money borrowed to purchase necessities, if it be actually applied to that purpose; at least, if the lender either lays out the money himself, or sees it laid out for necessities.¹¹ So, an infant is liable for money paid to procure his liberation from arrest on execution; and also on *mesne* process, where the arrest was for necessities.¹² Necessaries supplied to the wife and children of an infant are necessities to him.¹³ The rank or fortune of the defendant may make some articles necessities which in the case of another person must be deemed articles of mere comfort and convenience; but articles which, in the particular case, are matters of comfort and convenience

7—Dunton v. Brown, 31 Mich., 182; Armitage v. Widoe, 36 Mich., 124; Osborn v. Farr, 42 Mich., 134; 3 N. W., 299; Lansing v. Michigan C. Ry. Co., 126 Mich., 663; 86 N. W., 147. A minor may bind himself by contract for necessities, and such contract, when executed, if reasonable under all the circumstances, or not so unreasonable as to be evidence of fraud or undue advantage, cannot be repudiated by him: Squier v. Hydloff, 9 Mich., 274, 277. An adult contracting with an infant cannot avoid his contract for the infancy: Widrig v. Taggart, 51 Mich., 103; 16 N. W., 251.

8—Dunton v. Brown, 31 Mich., 182; Chandler v. McKinney, 6 Mich., 217.

9—Wharton v. McKenzie, 5 Ad. & Ell., N. S., 606; Peters v. Flemming, 6 M. & W., 42; Ford v. Fothergill, 1 Esp., 211.

10—Bac. Abr., "Infancy," 1, 3. A good common school education would be necessary for every one: Middlebury Col. v. Chandler, 16 Vt., 683; and see, Harris v. Roof's Executors, 10 Barb., 489; Squier v. Hydloff, 9 Mich., 274. A horse held not to be: Wood v. Losey, 50 Mich., 475; 15 N. W., 557.

11—Randall v. Sweet, 1 Denio, 460; Smith v. Oliphant, 2 Sandf., 306.

12—Randall v. Sweet, 1 Denio, 460.

13—Turner v. Trisby, 1 Strange, 168; People v. Moores, 4 Denio, 518.

merely, can never be included under the term necessities.¹⁴ An infant widow is bound by her contract for the providing of the funeral of her husband, who has left no property to be administered.¹⁵

Although the articles furnished are such as are generally classed as necessities, an infant is not liable if he live at home with his father, and is maintained by his father.¹⁶ Nor, if he live away from the father, but is furnished by the father with all that is necessary for him.¹⁷ If the infant is supplied with necessities from any quarter, as if he purchase sufficient from one tradesman, although upon credit, any others he may purchase about the same time from other tradesmen cannot be deemed necessities.¹⁸

Where the plaintiff, an infant, contracted to labor for a certain time, and left the defendant before the time without cause, it was held, in an action for his work and labor, that the plaintiff's violation of his agreement was neither a defense nor a ground for reducing the amount of the recovery.¹⁹

§ 210. Infant's contracts voidable.—The general rule is, that the contracts of infants are voidable, and not absolutely void.²⁰

14—Wharton v. McKenzie, 5 Ad. & Ell., N. S., 606.

15—Chappell v. Cooper, 13 M. & W., 252.

16—Walling v. Toll, 9 Johns., 141; Bainbridge v. Pickering, 2 W. Bla., 1325; 3 C. & P., 111.

17—Story v. Perry, 4 C. & P., 526.

18—1 Esp., 211; Bainbridge v. Pickering, 2 W. Bla., 1325; see, Wood v. Losey, 50 Mich., 475; 15 N. W., 557.

19—Whitmarsh v. Hall, 3 Denio, 375-6; but see, Moses v. Stevens, 2 Pick., 332. In such case the infant is not compellable to pay damages, by way of recoupment or otherwise, for withdrawing from his contract engagement. Persons who contract with minors do so at their own risk. The adult binds himself, but the infant does not: Widrig v. Taggart, 51 Mich., 163; 16 N. W., 251.

But it seems that where an infant has made a contract to render services and labor for another, and has performed it, that he will be bound by the terms of the agreement, if it was reasonable under all the circum-

stances, or not so unreasonable as to be evidence of fraud or undue advantage on the part of the employer: Squier v. Hydliff, 9 Mich., 274. If a contract for services is apparently fair and reasonable under the circumstances, the infant who has performed it should be held to its terms, and should not be allowed to repudiate it unless an unfair advantage has been taken of him. So long as the employer acts in good faith, and is not notified of any dissent on the part of the infant, he has a right to understand that his responsibility is measured by his agreement. On the other hand, the infant may abandon the service when he pleases, or stipulate for such new terms as he can obtain. He is bound by the terms of the contract so far as he executes it without dissent, but no further: Spicer v. Earl, 41 Mich., 191; 1 N. W., 923.

20—2 Kent's Com., 9 ed., 234. An infant's contracts are not void, but voidable. The law, in declaring such contracts voidable, does so for the infant's protection; and it is for the

And there are but few, if any, executory contracts of an infant, except perhaps for necessities, which are not voidable at his election.²¹

§ 211. **Infant must do equity.**—The infant, if he would repudiate, must restore what he has received by virtue of the contract, if it is possible for him to do so. The right to repudiate, however, is based upon the incapacity of the infant. This same incapacity excuses him from returning or answering for, the consideration received by him if, through his improvidence or otherwise, it is spent or lost during minority.²²

Infancy is not permitted to protect fraudulent acts; and, therefore, if an infant takes an estate, and agrees to pay rent, he cannot protect himself from the rent by pretense of infancy, after enjoying the estate, when of age. If he receives rents, he cannot demand them again when of age, according to the doctrine now understood.

The note of an infant, though negotiable, is voidable, and not void.²³

infant to avoid the contract or ratify it. A stranger, or wrong-doer, cannot set up the infant's incapacity to contract, as a protection to himself. Though voidable at the option of the infant, his contract is valid as to third persons who are strangers to both the parties to the contract, and who do not claim under either of them: *Holmes v. Rice*, 45 Mich., 142; 7 N. W., 772.

21—*Moses v. Stevens*, 2 Pick., 335, 336.

It is only such agreements as are not possibly to be regarded as beneficial to the infant, which are null from the beginning: *Dunton v. Brown*, 31 Mich., 182.

An infant cannot affirm or disaffirm his voidable contract: *Armitage v. Widoe*, 36 Mich., 124, 130. That is a matter for his decision when he arrives at mature age: *Dunton v. Brown*, 31 Mich., 182. Nor can his guardian affirm or annul it during his infancy: *Ibid.*

An infant's partnership contract is not void, but only voidable; therefore, where an infant entered into a partnership agreement and advanced money and performed services in the

business of the firm: *Held*, that he could not afterwards, during his minority, repudiate the agreement and sue his partner upon implied contract, for his services and money advanced: *Dunton v. Brown*, 31 Mich., 182; *Osburn v. Farr*, 42 Mich., 134; 3 N. W., 299. An assignment for the benefit of creditors, made by a firm one of whom is an infant, is not therefore void, but at most is only voidable: *Soper v. Fry*, 37 Mich., 236.

22—*Corey v. Burton*, 32 Mich., 30; *Chandler v. Simmons*, 97 Mass., 508; 93 Am. Dec., 117; see, note covering the whole subject of infants' contracts in 18 Am. St. Rep., 573-724. For other cases on character of the contracts of infants, see, *ante*, §§ 208-210, and notes.

23—*Goodsell v. Myers*, 3 Wend., 479.

The mercantile paper of a minor is voidable at his election, and not absolutely void, but it has no binding force until confirmed.

If a minor purchases goods and gives his note therefor, and sells a part of the goods before his majority and the remainder after that time, still, he will not be liable upon the

Generally, whatsoever an infant is bound *to do by law*, the same shall bind him, albeit he doeth it *without* suit of law.²⁴ A bond executed by an infant, the reputed father of a bastard child, is valid.²⁵

§ 212. **Infant's liability for torts.**—A party, notwithstanding his infancy, will be liable for torts in the same manner as adults.²⁶ As a general rule, where an action against an infant is founded on a contract, it cannot be converted into a tort, so as to charge the infant.²⁷ An infant would not be liable on his contract for a fraudulent representation that he was of full age, whereby the plaintiff was induced to contract with him.²⁸

But there are exceptions to this rule. Where goods were delivered to an infant, who was master of a ship, under an agreement to carry them to a particular place, and they were wrongfully shipped by him to a different place, he was liable in trover for them.²⁹ So, if an infant hire a horse to go to one place, and go to another, it is a conversion of the horse.³⁰ So, if goods are sold to an infant, he falsely affirming that he was of age, the vendor may recover them in trover;³¹ so, it would seem, if with an intention not to pay for them, he fraudulently conceal the fact of his being an infant.³² If an infant wilfully and intentionally injure an animal hired by him, an action of

note if he disaffirms it after his majority, but he will be liable upon an implied assumpsit, as for goods sold and delivered, for the value not exceeding the purchase price, of so many of the goods as remained and were sold or disposed of by him after he came to age: *Minnock v. Shortridge*, 21 Mich., 304.

An infant cannot appoint an agent or attorney, or empower them to act for him; nor can he affirm what one has assumed to do for him, or as his agent or in his name: *Armitage v. Widoe*, 36 Mich., 129.

24—*Baker v. Lovett*, 6 Mass., 80.

25—*People v. Moores*, 4 Denio, 518.

26—*Bullock v. Babcock*, 3 Wend., 301.

27—*Jennings v. Randall*, 8 Term., 335.

28—*Conroe v. Birdsall*, 1 Johns. Cases, 127; *Burley v. Russell*, 10 N.

H., 184; *Badger v. Phinney*, 15 Mass., 359; *Brown v. McCune*, 5 Sandf., 224.

But where an infant fraudulently obtains goods on credit, by falsely representing himself to be of age, with intent not to pay for them, he will be liable in tort for the fraud, even though he may defeat a collection of the price of the goods on the ground of infancy: *Wallace v. Morse*, 5 Hill, 391; *Eckstein v. Frank*, 1 Daly, 334. And the vendor may claim the goods: *Badger v. Phinney*, 15 Mass., 359; *Flitts v. Hall*, 9 N. H., 441; *Eckstein v. Frank*, 1 Daly, 334; see, *Campbell v. Perkins*, 4 Selden, 440.

29—*Vasse v. Smith*, 6 Cranch., 226.

30—*Homer v. Thwing*, 3 Pick., 492; *Fish v. Ferris*, 5 Duer, 49.

31—*Badger v. Phinney*, 15 Mass., 359.

32—*Wallace v. Morse*, 5 Hill, 389, 391.

trespass may be sustained against him for the tort.³³ And though the action be assumpsit, yet if in point of substance it be of the description of a tort, infancy will be no defense; as in assumpsit for money embezzled by him.³⁴

§ 213. Infant's liability for negligence.—An infant is liable for his negligent conduct.³⁵ His contributory negligence will defeat his recovery in an action founded in negligence.³⁶ Age is to be considered in determining questions of negligence of infant.³⁷

§ 214. Burden of proof and evidence.—The burden of proof on the plea of infancy is on the defendant.³⁸ The burden of proof is upon the infant defendant to show that articles within a class generally considered as necessary, are not such in the particular case.³⁹ But, *semble, contra*, in case where the property not of this class.⁴⁰ The plaintiff either denies the infancy of the defendant, or proves, either that the goods, etc., were necessities,⁴¹ or that the defendant ratified the contract after he became of age. In case the infancy is denied, the proof of his non-age is cast upon the defendant. A new promise ratifying the contract must be proved to have been made before the

33—Campbell v. Stokes, 2 Wend., 137; Conklin v. Thompson, 29 Barb., 218. But where an infant hires a horse and injures it through want of skill, knowledge or discretion, then the infancy may be a defense to an action of trespass, alleging violent driving and cruel treatment: Campbell v. Stokes, 2 Wend., 137.

34—Bristow v. Eastman, 1 Esp., 172.

35—Chaddock v. Tabor, 115 Mich., 27; 72 N. W., 1093. The infant is not liable however on the doctrine of imputed negligence as this doctrine rests on the theory of agency: Hampel v. Detroit G. R. & W. Ry. Co., — Mich., —; 100 N. W., 1002 (Oct., 1904); overruling Apsey v. Ry. Co., 83 Mich., 432; 47 N. W., 319. See, also, Mullen v. Owosso, 100 Mich., 103; 58 N. W., 663; 23 L. R. A. 693; 43 Am. St., 436, and Fye v. Chapin, 121 Mich., 679; 80 N. W., 797.

36—Hassenyer v. Michigan C. Ry. Co., 48 Mich., 205; 12 N. W., 155;

Baker v. Flint & P. M. Ry. Co., 68 Mich., 90; 35 N. W., 836; Strudgeon v. Sand Beach, 107 Mich., 497; 65 N. W., 616; Borek v. Michigan Bolt & W. Wks., 111 Mich., 129; 69 N. W., 254; Lehman v. Eureka I. & S. Wks., 114 Mich., 260; 72 N. W., 183; Henderson v. Detroit Citizens' S. Ry. Co., 116 Mich., 368; 74 N. W., 525.

37—See cases in last note.

38—Simmons v. Simmons, 8 Mich., 318; Stewart v. Ashley, 34 Mich., 183; Lynch v. Johnson, 109 Mich., 640; 67 N. W., 908.

39—Lynch v. Johnson, 109 Mich., 640; 67 N. W., 908.

40—Wood v. Losey, 50 Mich., 475; 15 N. W., 557.

41—In a suit against an infant for the price of goods or property sold to him, the burden is on the plaintiff to show, before he can recover, that the articles sold were necessities for the infant in the circumstances in which he was at the time of the sale: Wood v. Losey, 50 Mich., 475; 15 N. W., 557.

commencement of the suit. For a promise after action will not be sufficient.⁴² Upon this issue it is sufficient to entitle the plaintiff *prima facie* to recover, to prove a new promise, without showing that the defendant was of age at the time of making it; it is for the defendant to prove, if he can, that he was under age at the time, the fact being more particularly within his knowledge.⁴³

A promise which will ratify a contract made during infancy must be voluntary and express, and given with knowledge that the party's infancy discharged him from all legal liability.⁴⁴ A bare acknowledgment of the debt, even by paying a sum on account for it, will not be sufficient.⁴⁵ If it were a conditional promise to pay when he should be able, the plaintiff must prove his ability; but it is sufficient to give evidence of ability from ostensible circumstances and appearances in the world.⁴⁶ The promise must be made to the plaintiff, or, what is the same thing, to his attorney or agent; a promise to a stranger will not answer.⁴⁷

PAYMENT.

§ 215. **How the defense made.**—In assumpsit, or debt on simple contract, payment may be given in evidence under

42—Thornton v. Illingworth, 2 B. & C., 824.

43—Barthwick v. Caruthers, 1 Term., 668; Hartley v. Wharton, 11 Ad. & E., 934; Bigelow v. Grannis, 4 Hill, 206; Bay v. Gunn, 1 Denio, 108.

44—Thrupp v. Fleider, 2 Esp., 628; Harmer v. Killing, 5 *Ibid.*, 103; Goodsell v. Meyers, 3 Wend., 479; Bigelow v. Grannis, 2 Hill, 120; Smith v. Mayo, 9 Mass., 62; Whitney v. Dutch, 14 Mass., 457.

45—Smith v. Mayo, 9 Mass., 62. There must be an affirmative act to amount to ratification; a mere acquiescence for a time is not enough: Jackson v. Carpenter, 11 Johns., 539; Jackson v. Burchin, 14 *Ibid.*, 124; Voorhies v. Voorhies, 24 Barb., 150. Where on coming of age the infant makes a distinct acknowledgment of the contract and indicates an intention to be bound by it, there is ratification. Lynch v. Johnson, 109 Mich., 640; 67 N. W., 908.

Mere silence will not amount to

ratification: Lynch v. Johnson, *supra*.

The infant has the time prescribed by the statute of limitations after coming of age in which to bring his action, upon the theory that there has been no ratification: Donovan v. Ward, 100 Mich., 601; 59 N. W., 254, and cases cited in the opinion.

46—Clarke v. Bradshaw, 3 Esp. R., 156; Bigelow v. Grannis, 2 Hill, 120; Goodsell v. Myers, 3 Wend., 479; Hodges v. Hunt, 22 Barb., 150; Taft v. Sergeant, 18 Barb., 320.

47—2 Cow. Treat., 2d ed., 691 to 696. On simple contracts, payments may be proved under the general issue without notice: Olcott v. Hanson, 12 Mich., 452; Burt v. Olcott, 33 Mich., 178; Brennan v. Tletsort, 49 Mich., 397; 13 N. W. 790. Payment implies a voluntary act of the debtor with the intention of satisfying a demand against him, either in whole or in part: Detroit, Hillsdale & Southwestern Ry. Co. v. Smith, 50 Mich., 112; 15 N. W., 39.

the general issue; in covenant or debt, on a specialty, notice must be given.⁴⁸ It must be pleaded in all cases of payment *after action brought*, if the whole demand was paid.⁴⁹ Payment must have been made to the plaintiff or one authorized by him to receive it. Payment to one of several plaintiffs, or by one of several defendants, is sufficient, or by an agent.⁵⁰

A common mode of proving payment is by a receipt. It is not, however, necessary to produce it. A payment may be proved by other evidence than the receipt, even if one has been taken, and without accounting for its not being produced.¹ If produced, the circumstances under which it was given may be shown, as that it was obtained by fraud or misapprehension.²

48—*Boyd v. Weeks*, 5 Hill, 393. That is, under our statute, notice *puis darrein continuance* would have to be given.

49—*King v. Smith*, 4 C. & P., 108.

Proof that a person is clerk for another does not establish his right to receive for his employer payment of demands not shown to have any connection with the business: *Brown v. School District*, 36 Mich., 149.

50—*Walters v. Smith*, 2 B. & Ad., 889. To constitute a payment, the money or other valuable thing delivered to the creditor must be accepted by him as payment, otherwise the debt will not be extinguished: *Kingston Bank v. Gay*, 19 Barb., 459. Payment made on behalf of a debtor by some other person may be adopted by him: *Glover v. Parish of Dowagiac*, 48 Mich., 595; 12 N. W., 867.

Payment may be effected by an arrangement to accept the debtor's debt, in satisfaction of the demand against the former, if all the parties agree to it; and such an agreement need not be in writing. Such a payment, by way of substitution, is a matter of defense, and may be rebutted: *Ibid.* Unless the creditor agrees to the substitution, he is not bound by it: *Blanchard v. Boom Co.*, 40 Mich., 566.

But it seems that the assent of the creditor that the money or thing shall be received as payment may be proved by his subsequent acts and conduct, as well as by proof of an express agreement: *Hotchin v. Secor*, 8 Mich., 494.

1—*Southwick v. Hayden*, 7 Cow., 334. The burden of proof of payment is on the debtor, and where there is conflict in the testimony on the subject, the question must be determined by the probabilities and circumstances corroborating the one or the other: *Adams v. Field*, 25 Mich., 16; see, *Smith's Appeal*, 52 Mich., 415; 18 N. W., 195. The payment or delivery of money by one to another, without some other circumstance to qualify or explain the meaning of the act, imports the payment of a debt, and not a loan: *Downey v. Andrus*, 43 Mich., 65; 4 N. W., 628.

Where a creditor received payment of his claim in money, fifty dollars of which he afterwards found to be spurious, and brought suit for that part of the debt claimed as unpaid by reason of the worthlessness of the fifty dollars, and on trial the defendant admitting the debt and the payment of it, but denying that any of the money paid was spurious. *Held*, that the burden of proof was upon the plaintiff to show that the fifty dollars was spurious, and he must prove that before he could recover: *Atwood v. Cornwall*, 25 Mich., 142.

2—*Stratton v. Rastall*, 2 Term., 366; *Shaw v. Platon*, 4 B. & C., 715; *Johnson v. Ward*, 9 Johns., 310. A mere receipt may be contradicted or explained by the party: 2 Cow. Treat., 954; 1 Greenleaf's Ev., § 305. A receipt or acknowledgment of payment is not conclusive evidence of the fact of payment: *McAllister v. Engle*, 52 Mich., 56; 17 N. W., 694. Indorse-

§ 216. **What will operate as payment.**—If a person received in payment counterfeit bank notes, it does not operate as a payment.³ So, a payment in genuine bills of a bank which had broken before the payment was made, of which both parties were ignorant.⁴ But, in such cases, the party receiving the bills must offer to return them within a reasonable time after discovering that they are worthless, or he must bear the loss.⁵ Payment may be proved by the delivery and acceptance of any particular article; thus, where a party agreed to accept a specific article in payment of a judgment, its acceptance was deemed a satisfaction of the judgment.⁶

The note, either of the party or a third person, is not payment, whether given for a precedent debt or one contracted at the time, unless there be an agreement to receive it as such.⁷

ments upon notes, unexplained, prove payment, and, whether explained or not, prove an extinguishment and release of liability to the amount of the indorsement, as between the parties, unless it be shown that they were not intended so to operate: *Morris v. Morris*, 5 Mich., 171, 180. But indorsements are not of themselves sufficient evidence of payment as against the debtor to take the case out of the operation of the statute of limitations: § 9744; and see, *Michigan Ins. Co. v. Brown*, 11 Mich., 265, 273.

3—*Markle v. Hatfield*, 2 Johns., 454-5; *Thomas v. Todd*, 6 Hill, 340.

4—*Lightbody v. Ontario Bk.*, 11 Wend., 9; *Ontario Bank v. Lightbody*, 13 Wend., 101; *Young v. Adams*, 6 Mass., 182; *Gloucester Bank v. Salem*, 17 *Ibid.*, 42, 43.

5—*Thomas v. Todd*, 6 Hill., 340; *Camidge v. Allenby*, 6 B. & C., 373;

6—*Brown v. Feeter*, 7 Wend., 301; *New York State Bk. v. Fletcher*, 5 *Ibid.*, 85. And if a chattel is accepted in payment of a debt, it is a good payment and discharge, although the chattel may not be of half the value of the debt: *Sibree v. Tripp*, 15 M. & W., 35; *Brooks v. White*, 2 Metc., 285, 286. But an attorney, without special instruction, has no authority to receive anything but money in payment of his client's debt: *Jackson v. Bartlett*, 8 Johns., 361; *Kellogg v. Gilbert*, 10 Johns., 220. And an

agent who is authorized to receive money cannot bind his principal by receiving goods in payment instead: *Howard v. Chapman*, 4 C. & P., 508. Nor has a sheriff or constable power to receive anything but legal currency on an execution in his hands for collection: *Heald v. Bennet*, 1 Doug., Mich., 513. And the same rule applies to Justices of the Peace: *Welch v. Frost*, 1 Mich., 30. Delivery and acceptance of a land contract is payment where there was an agreement to take certain lands in exchange for stock of groceries at a price fixed. *Van Wert v. Olney & J. G. Co.*, 100 Mich., 328; 59 N. W., 139.

7—*Porter v. Talcot*, 1 Cow., 359; *Muldon v. Whitecock*, 1 *Ibid.*, 290; *Frisbe v. Larned*, 21 Wend., 450. The note of the debtor, given to and accepted by the creditor for the amount of the debt, is not a payment of the demand unless it is so understood or agreed between them: *Brown v. Dunkle*, 46 Mich., 29; 8 N. W., 537; *Breltung v. Lindauer*, 37 Mich., 217; *Beecher v. Dacey*, 45 Mich., 92; 7 N. W., 689. And the date of the note does not therefore necessarily fix the date of the indebtedness: *Ibid.* Nor will the debtor's acceptances, given for the demand, operate as payment unless they were given upon the agreement that they should be received as payment: *Au Sable, etc., Co. v. Sanborn*, 36 Mich., 358; see, *Burrows v.*

"It is believed that no principle of law is better established at the present day than the giving a promissory note for goods sold, or for any other valuable consideration, is no payment unless it is specially agreed to be so taken; and in this respect it makes no difference whether the note be given for a preceding debt, or for a debt contemporaneously with the agreement; or whether it be the note of a third person, or of the party to the agreement."⁸

Bangs, 34 Mich., 304. But if the acceptance of a third person, given by the debtor to the creditor for the amount of the demand, is not paid when due, and the creditor holds it thereafter without notice to the debtor or of the non-payment until the acceptor fails, the creditor will thereby make the acceptance his own, and it will operate as payment: Blanchard v. Boom Co., 40 Mich., 566. The giving of a new note for the amount of an old one past due, will not operate as a payment of the latter unless it was so understood or agreed between the parties; but as an additional security, rather. But if the old note was given up when the new one was delivered, it will be *prima facie*, but not conclusive, evidence of payment; the real intention of the parties will be open to explanation: Sage v. Walker, 12 Mich., 425; Brown v. Dunckle, 46 Mich., 29; 8 N. W., 537. Renewals of notes at a bank, in the absence of evidence to the contrary, ought always to be regarded as payment, because the banks so regard them: Childs v. Pellett, 102 Mich., 559; 61 N. W., 54. And it seems that even where a note is given for a prior demand, yet, if it is not paid when due, the creditor may sue upon the original demand, otherwise, if the creditor accepts the note of a third person in payment: Cole v. Sacket, 1 Hill, 516. And it is said that the giving of a note by one of several partners or joint debtors for a demand antecedently due from all, will not extinguish their liability, though the creditor expressly accept the note in satisfaction: Waydell v. Luer, 5 Hill, 448; but see, *contra*, Hotchln v. Secor, 8 Mich., 494.

8—Gardner v. Gorham, 1 Doug., Mich., 510; see, Sorrell v. Brewster,

1 Mich., 373. But a note received for a prior demand is payment of that demand, if such is the understanding and assent of the parties; and that such was their understanding and assent, may be proved by their subsequent acts and conduct, as well as by direct proof of an express agreement: Hotchln v. Secor, 8 Mich., 494; see, also, Burchard v. Fraser, 23 Mich., 224, and *ante*, § 201, note 32. Acceptance of the note of two of the partners, in payment of a partnership debt due from them and other partners, will extinguish the original debt and release those other partners: Hotchln v. Secor, 8 Mich., 494. And where the vendor of land takes from the purchaser the note of a third person for the purchase price, the presumption is that he takes it in payment, and not merely as security: Sears v. Smith, 2 Mich., 243; but see, Noel v. Murray, 3 Kernan 167. If the owner of land purchased subject to a mortgage thereon, pays the mortgage and takes up the note collateral therewith, after maturity, the note will be deemed paid, and no recovery can be had on it thereafter: Appledorn v. Streeter, 20 Mich., 9; and, see, Mich. Ins. Co. v. Kibbee, 6 Mich., 410. Where a note accompanying a mortgage is not produced or accounted for, it must be presumed paid, as against the party claiming on the mortgage: Basset v. Hathaway, 9 Mich., 28. Where a mortgagor who is personally liable for the debt redeems, it should be deemed a payment; but otherwise, if a person who is not liable for the debt purchases the property and redeems, if there is a prior outstanding mortgage: Johnson v. Johnson, Wal. Chy. (Mich.), 331. If the holder of notes secured by chattel mortgage appropriates sufficient of the

Subsequent events may charge the creditor with the amount of the note, as where he neglects to make demand and give notice, by which the security of some of the parties is lost, or where, without the assent of the debtor from whom it was received, the bill or note is cancelled on receiving other security in its stead.⁹ If, where a note has been taken as payment, the plaintiff was induced to take it by the fraudulent representations of the other party as to the solvency of the maker, the note will not be considered a payment.¹⁰

Whether a note was taken absolutely as payment or not, is a question of fact for the jury.¹¹

§ 217. Presumptions of payment.—Payment may be presumed, from lapse of time or other circumstances, and thus furnish evidence in support of the notice.¹² A bond is pre-

mortgaged property to pay the debt, it will operate as a payment of the notes. *Place v. Grant*, 9 Mich., 42.

9—1 *Hays v. Stone*, 7 Hill, 128; and see, *Sage v. Walker*, 12 Mich., 425.

10—*Pierce v. Drake*, 15 Johns., 475.

11—*Johnson v. Weed*, 9 John., 310; *Gardner v. Gorham*, 1 Doug., Mich., 507; *Hotchin v. Secor*, 8 Mich., 494; *Miller v. Ross B. & C. Co.*, 107 Mich., 538; 65 N. W., 562.

Payment by check.—The giving of a check is presumptively a payment, rather than a loan: *Bernard v. Fee's Estate*, 129 Mich., 429; 88 N. W., 1052. The mere mailing of a check, pursuant to an agreement that payment may be made by check, does not, irrespective of the questions of receipt by the payee and payment by the bank, operate as payment: *Baumgardner v. Henry*, 131 Mich., 240; 91 N. W., 169. A check which is not paid on presentment is not regarded as a payment of the drawer's debt to his creditors: *Olcot v. Rathbone*, 5 Wend., 490; *Genin v. Lockwood*, 12 Barb., 265; *Strong v. Stevens*, 4 Duer, 668. A check payable on demand ought to be presented for payment on the same or the next day after it was drawn: *Maule v. Brown*, 4 Bing., N. C., 268; *Mohawk Bank v. Broderick*, 10 Wend., 304; *Broderick Bank v. Broderick*, 13 *Ibid.*, 133; *Stephens v. McNeill*, 26 Barb., 651. Where a creditor receives a check

upon a bank where the drawer has funds, but delays presentment for payment for an unreasonable time, during which the bank fails, the holder of the check must bear the loss: *Little v. The Phoenix Bank*, 7 Hill, 359. But mere delay in presentment will not affect the rights of a *bona fide* holder of a check, as against the drawer, if the drawer has not sustained any damage in consequence of the non-presentment: *Harbeck v. Croft*, 4 Duer, 122, 129. If the drawer has no funds in the bank, a presentment is not necessary: *Fitch v. Redding*, 4 Sandf., 130; *Reddington v. Gilman*, 1 Bosw., 235; *Franklin v. Vanderpool*, 1 Hall, 78. Delivering a check to the payee does not transfer the title to the money mentioned in it and in the hands of a bank, even though the money is on deposit there to the credit of the drawer: *Butterworth v. Peck*, 5 Bosw., 341; *Marine & F. I. Bank v. Jauncey*, 3 Sandf., 257. The taking of an *acceptance* for the price of goods is not payment in the absence of specific agreement: *Kirkpatrick v. Bessals*, 116 Mich., 657; 74 N. W., 1042; *Same v. Costo*, 116 Mich., 662; 74 N. W., 1117.

12—But presumption of payment can never arise from lapse of time alone, short of the period of limitations fixed by law: *Adair v. Adair*, 5 Mich., 304. So, payment of a demand note will not be presumed from the neglect to

sumed to be paid after twenty years.¹³ So, a judgment of a court of record is presumed to have been paid after ten years.¹⁴ The presumption of payment by lapse of time may be repelled by proof of facts and circumstances repelling such an inference.¹⁵ Payment may also be presumed from the usual course of dealings between the parties; thus, where it was proved that the plaintiff and other workmen came regularly to receive their wages from the defendant, whose practice it was to pay every Saturday night.¹⁶ A receipt for rent due on a certain day is strong evidence of payment of former rents.¹⁷

§ 218. Application of payments.—A debtor, upon paying money to a creditor to whom he is indebted upon different demands, has the right to direct upon which of the several demands the payment shall be applied.¹⁸ And in the absence of *express* directions, the intent of the debtor will sometimes be presumed, and the presumption will govern. Thus, a general payment will always be presumed to be intended to apply upon a debt that is due, in preference to one that is not.¹⁹ And

present it until sufficient time has elapsed to bar it under the statute: Smith's Appeal, 52 Mich., 415; 18 N. W., 195.

13—Jackson v. Hotchkiss, 6 Cow., 401; see, C. L., § 9734.

14—C. L., § 9751. And actions thereon are barred after that time: *Ibid.*

15—Jackson v. Sacket, 7 Wend., 94; Morris v. Wadsworth, 17 Wend., 103; as, by showing that the defendant has admitted the debt by paying interest within six years; or, that he has resided out of the state during the above time: Newman v. Newman, 1 Stark., 101; C. L., §§ 9744, 9740.

16—Lucas v. Novosileski, 1 Esp., 196.

17—2 Saund. Pl. & Ev., 470, 642. And a settlement of accounts between parties is *prima facie* evidence of settlement of all accounts between them, but still the parties may show what was settled and what omitted: Bourke v. Kneeland, 4 Mich., 336.

18—Thayer v. Denton, 4 Mich., 192, 196; Hall v. Marston, 17 Mass., 575; Bonaffe v. Woodberry, 12 Pick., 463; Reed v. Boardman, 20 Pick., 441. A

debtor, when making a payment, has the right to direct its application, and the creditor receiving it cannot refuse to apply it accordingly; he cannot credit it on some other account without the debtor's assent: Mich. Air Line Ry. v. Mellen, 44 Mich., 321; 6 N. W., 845.

When a debtor delivers money to his creditor, not for the purpose of payment, but for some other purpose, the creditor's control and use of the money is limited to the purpose for which it was delivered to him; he cannot apply it to the payment of his demand. A creditor cannot lawfully pay himself with the debtor's money, without the debtor's consent, either express or implied: Detroit, Hillsdale & Southwestern Ry. Co. v. Smith, 50 Mich., 112; 15 N. W., 39.

If the debtor pays with one intent as to its application, and the creditor receives it with another, the intent of the debtor shall govern: Allen v. Culver, 3 Denio, 284; Hall v. Constant, 2 Hall's R., 185, 189.

19—Baker v. Stackpole, 9 Cow., 420; Stone v. Seymour, 15 Wend., 19, 24.

where the payment is equal to one debt, but differs in amount from others, this shows an intention to apply it to the debt corresponding in amount with the payment.²⁰ When the debtor has once made the application, he cannot change it without the consent of the creditor; and where he has made the application upon a joint debt, it extinguishes so much of the debt, and the paying debtor and creditor cannot, even by their concurrent aid, afterwards change the application and thus revive the debt, without the consent of the co-creditor.²¹

Unless there is an express or implied application by the debtor, at or before the time of payment, his right to make the application is gone, and that right thereafter belongs to the creditor.²² And it is held that he may make the application at the time of payment, or at any time before verdict on the demand.²³ The appropriation by the creditor may be evidenced, either by a verbal declaration, or by the terms of a receipt given, or by rendering an account in which it is credited, or by any other act which shows that a particular application was made.²⁴

20—Robert v. Carnie, 3 Caines, 14; Stone v. Seymour, 5 Wend., 19.

21—Thayer v. Denton, 4 Mich., 192.

22—Smith v. Applegate, 1 Dely, 91; Wood v. Genett, 120 Mich., 222; 79 N. W., 199. Payments by a debtor who has received his discharge in bankruptcy, made from time to time, without application, upon a running account for goods sold at different times, partly before and partly after the discharge, where the creditor had no notice of the bankruptcy proceedings, and was not named as a creditor in the bankrupt's schedules, and where the payments made after the discharge exceeded the purchases made after that time, may be applied by the creditor to the items first due on the account: Hill v. Robbins, 22 Mich., 475.

23—Allen v. Culver, 3 Denio, 284; Pattison v. Hull, 7 Cow., 749; Phillpott v. Jones, 2 Ad. & Ell., 41. But a creditor cannot apply a payment so as to revive an outlawed note which he holds against the debtor, and remove the bar of the statute of limitations, when it was not intended or

supposed by the parties, when made, that he should apply it for that purpose: Krone v. Krone, 38 Mich., 661. That the creditor may apply a payment to a claim barred by the statute of limitations seems true; but if it is to have the effect of removing the bar of the statute the debtor must make the application: Blake v. Sawyer, 83 Me. 129; 21 Atl. 834; 23 Am. St. Rep. 762. A debtor and creditor cannot agree on Sunday for a particular application of a credit to be earned on Monday: Pillen v. Erickson, 125 Mich., 68; 83 N. W., 1023. An indorsement of payment made by the owner of a note, not in the presence of the maker, is not sufficient evidence of payment to interrupt the running of the statute of limitations: C. L., § 9744; Michigan Ins. Co. v. Brown, 11 Mich., 265; Rogers v. Anderson, 40 Mich., 290; Ocobock v. Myers' Estate, 127 Mich., 181; 86 N. W., 534; Fowles v. Joslyn, 130 Mich., 272; 89 N. W., 946.

24—Allen v. Culver, 3 Denio, 285, 291.

So, the intent of the creditor to make a particular application of a payment by crediting it upon an open account, implies an intention to apply it to the items in the order of time, even though the creditor has security for the earlier items, but not for the others.²⁵ And where some debts are secured and others not, the creditor may make the application to the latter and retain his rights to the secured debts.²⁶ But when he has once made the application he will not be allowed to change it.²⁷

Where no application is made by the parties, the law will so apply a general payment as to extinguish those debts first due;²⁸ and in case of a running account, to the items in the order of time;²⁹ and to those debts which are secured, in order to relieve the surety, rather than to demands not secured.³⁰ Thus, where one has given an agreement that if the person to whom it is given will sell another goods on credit, he will see the amount paid, and the goods are delivered accordingly, the first moneys received by the creditor on the debtor's general account, must be applied on the purchase under this guaranty.³¹

§ 219. Essentials of the notice of payment under the general issue.—A notice of payment need not specify any sum; it is sufficient to allege that "the defendant paid the plaintiff the several sums of money mentioned in the plaintiff's declaration."³² If the plaintiff proves as much as covers the demand

25—Truscot v. King, 2 Selden, 147; Webb v. Dickinson, 11 Wend., 62.

26—Clark v. Burdett, 2 Hall, 197, 200; Van Rensselaer v. Roberts, 5 Deno, 470; Wood v. Callaghan, 61 Mich., 402; 28 N. W., 162.

A creditor cannot apply a payment to a debt not due if others are due: Richardson v. Coddington, 49 Mich., 1; 12 N. W., 886.

27—Simpson v. Ingham, 2 R. & C., 65; Mayor, &c., of Alexandria v. Paten, 4 Cranch., 317; Van Rensselaer v. Roberts, 5 Deno, 470; Thayer v. Denton, 4 Mich., 192; see, McMaster v. Merrick, 41 Mich., 505; 2 N. W., 895.

28—Hunter v. Osterhoudt, 11 Barb., 38; Phillips v. Preston, 5 How., 288;

Grasser & B. B. Co. v. Rogers, 112 Mich., 112; 70 N. W., 445; People v. Sheehan, 118 Mich., 539; 77 N. W., 88.

Where the parties do not make any specific application of the moneys paid, the law will apply it usually as the justice and equity of the case may require: Youmans v. Heartt, 34 Mich., 397.

29—Down v. Morewood, 10 Barb., 183; Allen v. Culver, 3 Deno, 284; Webb v. Dickinson, 11 Wend., 62.

30—Pattison v. Hull, 8 Cow., 747; Dows v. Morewood, 10 Barb., 183.

31—Gard v. Stevens, 12 Mich., 292.

32—Chew v. Wooley, 7 Johns., 399; New York Dry Dock Co. v. M'Intosh, 5 Hill, 290.

established on the part of the plaintiff, it will be sufficient, although he may have given notice of a larger sum.³³

RELEASE.

§ 220. **What it is and effect of.**—In an action by several on a joint contract, or any personal action, a release by one joint plaintiff is a bar to the action.³⁴ So, in an action against several, a release to one is a release to all.³⁵ A receipt in full to one joint obligor, on his paying his proportion of the debt, is not a discharge of the others.³⁶

A covenant not to sue is construed a release, to prevent circuity of action,³⁷ but a covenant not to sue one of several cocontractors, does not operate as a release, but is a covenant only.³⁸ The covenant must be with *all*, to be construed a release. An agreement not to sue for a *limited time only* is not a release. It extinguishes the right of the creditor to enforce, and the obligation of the debtor to make payment, until the limited time expires.³⁹ An agreement not to sue upon a contract for a limited time, or until certain acts done, is a good *bar* to an action brought in violation of it. It is not an independent or collateral undertaking, but a mere modification of the right and obligation of the original contract. But such an agreement is not pleadable in *abatement*.⁴⁰

A release without consideration, and not under seal, is void,⁴¹ *Where a release contains introductory matter, explaining the facts, the release, though in general terms, must be controlled

33—Falcon v. Benn, 2 Ad. & Ell. N. S., 314.

34—Austin v. Hall, 13 Johns., 286.

35—Bronson v. Fitzhugh, 1 Hill, 185. So, in case both of wrong-doers and joint contractors: *Ibid*.

36—C. L., §§ 10449-10452. This statute is a modification of the common law rule that a release of one of several joint debtors releases all. Therefore, a release under this statute should in some manner refer to it, and be so drawn with reference to it as to show an intention to discharge the party only to whom it is given; otherwise, it may be a release to all: See, Hoffman v. Dunlap, 1 Barb., 185.

and Bank of Poughkeepsie v. Ibbotson, 5 Hill, 461.

37—Jackson v. Stackhouse, 1 Cow., 122; Morgan v. Butterfield, 3 Mich., 620.

38—Rowley v. Stoddard, 7 Johns., 207; Couch v. Mills, 21 Wend., 424; Bank of Chenango v. Osgood, 4 Wend., 607; Harrison v. Wilcox, 2 Johns., 448; Catskill Bank v. Messenger, 9 Cow., 37; see, Morgan v. Butterfield, 3 Mich., 615.

39—Robinson v. Godfrey, 2 Mich., 408, 410.

40—Morgan v. Butterfield, 3 Mich., 615.

41—Jackson v. Stackhouse, 1 Cow. R., 122.

by the previous recital.⁴² Where a release acknowledged the receipt of one dollar, in full of a judgment described in it, and also in full of all debts, demands, etc., whatsoever, it was held, that it was confined by the particular words to the judgment only.⁴³ The plaintiff may prove to this notice that the release is not by deed, or that it was obtained by fraud. If suit is brought in the name of one who has no interest in the demand, as by the payee of a note not negotiable, which has been assigned, and the nominal plaintiff release the suit after notice of the assignment, which release is set up, the plaintiff may show the assignment and notice.⁴⁴

A fair settlement of conflicting claims is binding upon the parties, though they may have yielded legal rights.⁴⁵

FORMER RECOVERY.

§ 221. **When former judgment a bar.**—To render a former trial a bar in a subsequent suit for the same matter, there should be a trial and judgment upon the merits;⁴⁶ a judgment of nonsuit would not be a bar to a subsequent suit,⁴⁷ unless such a judgment was rendered after the cause had been submitted to the justice, and he had taken time to make up his

42—Rich v. Lord, 18 Pick., 322; Solly v. Forbes, 2 Brod. & B., 38; Payler v. Homersham, 4 M. & S., 423; Simons v. Johnson, 3 B. & Ad., 175; Jackson v. Stackhouse, 1 Cow., 126.

43—Jackson v. Stackhouse, 1 Cow., 122. A general release of all claims or demands will operate as a discharge of all existing causes of action, and, as well, demands not due as those actually due: Tynan v. Bridges, Cro-Jac., 300; see, Leggett v. Bank of Sing Sing, 25 Barb., 326; Allen v. Patterson, 3 Selden, 476, 480.

44—Timan v. Leland, 6 Hill, 237. Where a release is general in its terms, parol evidence is not admissible to show that certain claims were excepted by parol from its operation: See, Van Brunt v. Van Brunt, 3 Edw. Ch., 14; Hoes v. Van Hoesen, 1 Barb. Ch., 379; Bronson v. Fitzhugh, 1 Hill, 185; Brooks v. Stuart, 9 Ad. & Ell., 854.

45—Converse v. Blumrich, 14 Mich., 109. Courts cannot disturb settle-

ments between parties, unless on satisfactory evidence of mistake, fraud or unconscionable advantage: Prichard v. Sharp, 51 Mich., 432; 16 N. W., 798; Hart v. Gould, 62 Mich., 262; 28 N. W., 831; Lewless v. Detroit, G. H. & M. Ry. Co., 65 Mich., 292; 32 N. W., 790; Calkins v. Green, 130 Mich., 57; 89 N. W., 587.

46—Quackenbush v. Ehle, 5 Barb., 469; Tucker v. Rohrbach, 13 Mich., 73. A judgment for the defendant for costs, on the ground that the suit was commenced before the claim was due, is not a judgment on the merits, and is no bar to a new suit for the same demand: Franks v. Fechner, 44 Mich., 177; 6 N. W., 215; see, Hart v. Lindley, 50 Mich., 20; 14 N. W., 682.

47—Bowne v. Johnson, 1 Doug. (Mich.), 185; Yale v. Brotherton, 10 John., 303; Willis v. Green, 10 Wend., 519; Tattersall v. Hass, 1 Hill, 56; Seaman v. Ward, 1 *Ibid.*, 52; Dexter v. Clark, 35 Barb., 271.

judgment.⁴⁸ "The question whether a verdict and judgment for the defendant in a former suit is a bar to a second suit for the same cause or matter, does not depend upon the fact that the proof in the former suit was sufficient to sustain that

48—*Shall v. Lathrop*, 3 Hill, 237; *Willis v. Green*, 10 Wend., 519. A former judgment of the same court or a court of concurrent jurisdiction, directly upon the point in issue, is, as a plea in bar, or evidence, conclusive between the same parties, or others claiming under them, upon the same matter in a subsequent suit or proceeding, not only as to the matter actually determined, but as to every other matter which the parties might have litigated and have had decided as incident to the subject matter of the suit, or coming within the legitimate range of the original action, both as to matters of claim and defense: *Embury v. Connor*, 3 N. Y., 511; *Wales v. Lyon*, 2 Mich., 276; *Love v. Francis*, 63 Mich., 181; 20 N. W., 843; *Gardner v. Buckbee*, 3 Cow., 120; *Wood v. Jackson*, 8 Wend., 9; *Etheridge v. Osborn*, 12 *Ibid.*, 399; *Peltier v. Sewell*, *Ibid.*, 389; *Burt v. Sternburgh*, 4 Cow., 559; *Harris v. Harris*, 36 Barb., 88; *Hayes v. Reese*, 34 *Ibid.*, 150; *Ehle v. Bingham*, 7 *Ibid.*, 494; *Haile v. Baker*, 1 Seldon, 357; *Davis v. Tallcot*, 2 Kern., 184; *Demarest v. Darg*, 5 Tiff., N. Y., 281; *Yonkers & N. Y. Fire Ins. Co. v. Bishop*, 1 Daly, 449. But it is not competent, under the general issue to rely on a former judgment; it must be specially pleaded: *Briggs v. Milburn*, 40 Mich., 514; *Porter v. Leache*, 56 Mich., 41; 22 N. W., 104. To constitute a judgment in one case a bar to another action, it is not essential that the object of the two suits should be the same; nor that the parties should stand in the same relation or position to each other, if the point in controversy were the same in both cases. Nor is it important that one suit was brought to enforce one stipulation in a contract, while the other suit involved a different stipulation of the same contract. The validity or invalidity of the contract being adjudged in the one case, it is settled for the other

also. Nor is it material whether the point was actually litigated in the first suit or not, if its determination was necessarily included in the judgment. *Barker v. Cleveland*, 19 Mich., 236; *Jacobson v. Miller*, 41 Mich., 90; 1 N. W., 1013. A judgment by confession for part of a claim arising out of the same contract or transaction, as, for part of the amount due on a note, is a bar to a suit for the balance of the demand: *Town v. Smith*, 14 Mich., 348. But a recovery in covenant for an installment due on a bond will be no bar to a suit on installments subsequently falling due: C. L., § 709. And where separate judgments are rendered against joint trespassers, an execution upon one of the judgments is a bar to an action upon the judgment against the others: *Boardman v. Acer*, 13 Mich., 77; *Kasson v. People*, 44 Barb., 347. But it seems to be otherwise in case of separate judgments against different parties for the same debt; as, for example, against makers and indorsers of a note: *Boardman v. Acer*, 13 Mich., 80. At the common law a judgment rendered against one of several joint debtors extinguished the original demand, and was a bar to a suit against the others. See *Candee v. Clark*, 2 Mich., 255, and *Bonesteel v. Todd*, 9 Mich., 375. But where, under the statute, C. L., §§ 10371, 840, service of process is obtained upon part of the debtors only, and the judgment is rendered in form against all, the original cause of action is not extinguished, and the judgment is not a bar to a subsequent suit against all the joint debtors upon the original demand: *Bonesteel v. Todd*, 9 Mich., 375. If a defendant fraudulently conceals a part of his liability, which for that reason is not included in the judgment against him, the judgment will not bar a suit to recover that part of the demand which was so concealed: *Johnson v. Provincial Insur-*

action. For where the same matter was in issue and submitted to the jury in the former suit without sufficient proof, the decision of the jury upon the matter in issue, and thus submitted to them, followed by the judgment of the court upon their verdict, will be a bar to another action for the same cause or

ance Co., 12 Mich., 216, 223. And when a judgment is pleaded in bar, it may be shown not to have been on the merits: *Franks v. Fecheimer*, 44 Mich., 177; 6 N. W., 215. And that the merits of the plaintiff's claim were not litigated or passed upon in the former suit, and this may be shown by the testimony of the justice: *Wood v. Faut*, 55 Mich., 185; 20 N. W. 897; *Lyman v. Becannon*, 29 Mich., 466; see, *Jennings v. Sheldon*, 44 Mich., 92; 6 N. W. 96. And by parol evidence: *Munro v. Meech*, 94 Mich., 596; 54 N. W., 290. Where a party sued a sheriff for taking personal property, and failed, and afterwards brought suit to recover the same property from the person who purchased it at the sheriff's sale, the suit against the sheriff was held to be a bar, he and the purchasers being privies: *Prentiss v. Holbrook*, 2 Mich., 372. A note is not merged in and barred by a judgment thereon in attachment where there was no personal service and no part of the judgment has been satisfied: *Smith v. Curtiss*, 38 Mich., 393.

An adjudication is conclusive in respect to, (1) the subject matter of the litigation; (2) the point of fact or law or both necessarily settled in determining the issue on the subject matter: *Jacobson v. Miller*, 41 Mich., 90; 1 N. W., 1013.

Splitting demands.—If judgment is taken for only a part of an entire claim, or demand, all of which is due and collectable at the time suit is brought, it will bar a recovery for the balance of the claim. All demands actually due by the same contract, make but an entire contract within this rule: *Miller v. Covert*, 1 Wend., 487; *Smith v. Jones*, 15 Johns., 229; *Phillips v. Berick*, 16 *Ibid.*, 136; *Willard v. Sperry*, *Ibid.*, 121; *Bendernagle v. Cocks*, 19 Wend., 207; *Coggins v. Bulwinkle*, 1 E. D. Smith, 434; *Dutton v. Shaw*, 35 Mich., 431. But it

seems that where there are several demands due, but each arising out of separate and distinct contracts, a judgment for one will not bar a suit for another: *Staples v. Goodrich*, 21 Barb., 317. See, *Phelps v. Abbott*, 116 Mich., 624; 74 N. W., 1010. Because many items are found in a general account it does not follow that they must all be included in a single cause of action. It is when the several items result from a single contract: *Stickel v. Steel*, 41 Mich., 350; 1 N. W., 1046. And the same general rules as to splitting up causes of action prevail in cases of tort as in actions on contract: *Farrington v. Palne*, 15 Johns., 432. So, a fraud cannot be separated into two causes of action, and one settled or sued for and the other left open; it is and must be an entirety: *Allison v. Connor*, 36 Mich., 283. And it is a general principle in suits against wrong-doers, that the plaintiff may recover, by way of damages, all that he has lost through the wrongful act for which suit is brought, up to the commencement of the suit. And it is also a general rule that damages resulting from one and the same cause of action must be assessed and recovered once for all, and that actions cannot be repeated from day to day, as the daily effects of the one original wrong happen to mature. When the tortious cause of damage has been done and the effects have not fully accrued, but must accrue, and are already reasonably and fairly capable of safe estimation, the injured party is entitled to have them considered by the jury: *Thompson v. Ellsworth*, 39 Mich., 719; see, § 188, *ante*. But where the injury is a continuing one, a judgment for damages will not bar an action for injuries accruing after the time of commencing the first suit: *Beckwith v. Griswold*, 29 Barb., 294; see, *ante*, § 188. It seems that where judgment is taken for a part only of

matter where the same evidence which is necessary to sustain the second suit, if it had been given in the former action, would have authorized a recovery therein. Where a general declaration embraces several causes of action, the plaintiff in a second suit may show that he offered no evidence as to one or more of those causes of action, and that the cause went to the jury upon a different part of his claim from that for which the second suit is brought. And then the judgment in the first action will be no bar to the second. But where he attempts to give evidence as to all the causes of action, and submits the question to the jury without withdrawing any part of his claim, and he fails as to the whole, or a part, for want of sufficient proof, the defendant may insist upon the first judgment as a bar, if the same evidence which is sufficient to sustain the second suit would have authorized a recovery in the first action, in case it had been produced on the trial thereof." It is no answer to the defense that the form of action in both suits is not the same, or that all the plaintiffs or defendants in both suits are not the same. For if the same question was submitted to the jury in the first action, and the evidence in the last suit, if it had been given in the first action, would have been equally available as in the last, to entitle the plaintiff to recover under the state of pleadings in both, then the verdict and judgment in the first action is an absolute bar to any recovery therein. But where the form of the first action was such that the proof necessary to a recovery could only be brought forward in a different form of action, or where, from the number of the plaintiffs or defendants in the first suit, the testimony relied on in the second is sufficient to authorize a recovery in the second action, but could not have produced a different result in the

the demand in suit, upon an agreement made between the parties at the time in court, that such judgment shall not operate as an estoppel or bar to a new suit for the balance of the demand, that such agreement will be binding, and may be shown in evidence in the new suit: *Merchants' Bank v. Schulenberg*, 48 Mich.; 102; 11 N. W., 826.

As to set-offs, when the demands of parties are distinct and separate in their nature or origin, it is in general

at the option of the party sued whether he will make use of his demands against the plaintiff as counter claims in that suit—when the case is such as to admit of it—or make them the subject of an independent action. And when a demand is such that it is available by way of recoupment, the rule is the same; there is no imperative requirement that it shall be used as a counter claim: *Morehouse v. Baker*, 48 Mich., 335, 338; 12 N. W., 170.

first, the failure of the plaintiff in the first suit is no bar to his recovery in the other, although it is for the same cause of action for which he attempted to recover in the first suit."⁰

The defendant may also show that the demand on which the suit is brought was set off or submitted to the justice or jury in a former suit.¹

The plaintiff, in answer to the notice, may show that the court in which the former action was had, had no jurisdiction of the case,² or, that the proceedings were *void* for any cause.³

A former recovery upon a justice's judgment does not bar a subsequent action on the same judgment, unless upon the first suit on the judgment a defense is set up upon which a judgment is rendered against the plaintiff, or, the plaintiff fail in such suit to recover the *whole* of the judgment, or, it be used as a set-off, passed upon and allowed or disallowed.⁴

0—Miller v. Manice, 6 Hill, 114, 121. In general, the cause of action is the same where the same evidence will support both actions: Rice v. King, 7 Johns., 20; Cairns v. Smith, 8 *Ibid.*, 338.

When the defense of a former recovery is set up, and the record of the former suit does not clearly show the matters then in dispute, and where upon the whole record it remains doubtful whether the same subject matter was actually passed upon, and in cases where several distinct matters were in issue, and the judgment does not clearly and necessarily cover and embrace all, parol evidence is admissible to show what matters were proved and passed upon. Thus, it may be shown that the plaintiff withdrew or abandoned a part of his claim, or that the defendant abandoned some particular matter he had set up in defense, as set off or recoupment, preferring to bring an independent action thereon. In such case it would thus be made to appear that upon such matters no evidence had been given, and that no adjudication had been had thereon: Merchants' Bank v. Schulenberg, 48 Mich., 102, 105; 11 N. W., 826.

The question as to whether a former recovery is a bar or not, does not depend upon the question as to whether the form of action in the

former and present suit is the same. The question is, as to whether the same point or demand was passed upon and adjudicated in the former suit. If the question has been determined between the parties, the fact that the former suit was in assumpsit, when legally it should have been in tort, will not defeat the bar: Jennings v. Sheldon, 44 Mich., 92; 6 N. W., 96. But a former judgment, to be a bar, must be upon the same issue and between the same parties. Evidence that the question in issue was decided in another suit, in which only one of the present litigants was a party, is not admissible: Phillips v. Jamieson, 51 Mich., 153; 16 N. W., 318.

1—Hatch v. Benton, 6 Barb., 28; Rogers v. Rogers, 1 Daly, 194; McLean v. Hugarin, 13 Johns., 184; Skelding v. Whitney, 3 Wend., 154; see, Wilder v. Case, 16 Wend., 583. see, *post*, "Set-off," Chap. xiii.

Recoupment of a demand in a former suit is a bar: Ward v. Fellers, 3 Mich., 281.

2—Schoonmaker v. Clearwater, 41 Barb., 200; Gage v. Hill, 43 Barb., 44; Blin v. Campbell, 14 Johns., 432; Wilcox v. Kassick, 2 Mich., 165.

3—Wixon v. Stephens, 17 Mich., 522.

4—Millard v. Whitaker, 5 Hill, 408. *Effect of appeal.*—The fact that an

STATUTE OF LIMITATIONS.

§ 222. **Nature of the defense.**—Statutes of limitations were formerly regarded as statutes of presumption and looked upon with disfavor, but are now regarded as statutes of repose as well, and are looked upon favorably by the courts.⁵ Statutes of limitations may be retroactive, but a definite time must be fixed in the statute within which suits, where the cause of action has already accrued at the time of the enactment of the statute, may be brought, and such time must be reasonable.⁶

The bar of the statute cannot be escaped by amendment of pleadings.⁷ An amendment adding notice of the statute is within the discretion of the court.⁸

§ 223. **The statutes.**—"The following actions shall be commenced within six years next after the cause of action shall accrue, and not afterwards, that is to say:⁹

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

2. All actions upon judgments rendered in any court, other than those above excepted;¹⁰

appeal has been taken, is said not to affect the conclusiveness of the judgment as a bar, while it remains unreversed: *Tyler v. Willis*, 35 Barb., 213; *Willard v. Fox*, 18 Johns., 497. But a reversal of the judgment would destroy its effect as a bar: *Wood v. Jackson*, 8 Wend., 9; *Onderdonk v. Ranlett*, 3 Hill, 323. If a justice's judgment is for costs only, and not upon the merits, and does not give the defendant any substantial rights, the plaintiff, after appealing from it, may discontinue his suit and begin anew: *Franks v. Fecheimer*, 44 Mich., 177; 6 N. W., 215.

5—*Jewitt v. Pettit*, 4 Mich., 508; *Greene v. Anglemire*, 77 Mich., 168; 43 N. W., 772; *McKisson v. Davenport*, 83 Mich., 211; 47 N. W., 100.

6—*Ludwig v. Stewart*, 32 Mich., 28; *Krone v. Krone*, 37 Mich., 307; *Price v. Hopkin*, 13 Mich., 218.

7—*Gorman v. Newaygo Circuit*

Judge, 27 Mich., 138; *Wingert v. Wayne Circuit Judge*, 101 Mich., 395; 59 N. W., 662. Where the amendment does not introduce a new cause of action the running of the statute is arrested at the institution of the suit: *Pratt v. Montcalm Circuit Judge*, 105 Mich., 499; 63 N. W., 506; *Belden v. Blackman*, 124 Mich., 667; 83 N. W., 616.

8—*Pratt v. Montcalm Circuit Judge*, 105 Mich., 499; 63 N. W., 506; *Shank v. Woodworth*, 111 Mich., 642; 70 N. W., 140, citing *Ripley v. Davis*, 15 Mich., 75.

9—C. L., § 9728.

10—Issuing execution upon a judgment does not prevent the running of the statute; therefore, to save a claim in judgment, the judgment must be renewed by suit commenced before the expiration of six years from the rendition of judgment in justice's courts, and within ten years on judgments in

3. All actions for arrears of rent;
4. All actions of assumpsit, or upon the case, founded upon any contract or liability, express or implied;¹¹
5. All actions for waste;
6. All actions of replevin and trover, and all other actions for taking, detaining, or injuring goods or chattels;
7. All other actions on the case, except actions for slanderous words, or for libels."

"All actions for trespass upon land, or for assault and battery, or for false imprisonment, and all actions for slanderous words, and for libels, shall be commenced within two years next after the cause of action shall accrue, and not afterwards."¹²

"All actions against sheriffs, for the misconduct or neglect of their deputies, shall be commenced within three years next after the cause of action shall accrue, and not afterwards."¹³

the circuit court, otherwise the judgment will be barred: *Ten Eyck v. Wing*, 1 Mich., 55. A judgment in justice's court is barred in six years: *Jerome v. Williams*, 13 Mich., 526; and in the circuit court (see C. L., § 9751) in ten years after its rendition. But when a justice's judgment is removed by transcript to the circuit court, and there docketed before it is barred, it becomes of the same force and effect as a judgment rendered in the circuit court, and suit may be maintained on it at any time, within ten years after it was rendered: *Arnold v. Thompson*, 19 Mich., 333. In determining the question of whether action on the judgment, so transferred to the circuit from the justice's court, is barred by the statute, time is to be computed from the rendition of judgment in the justice's court and not from the time of the filing of the transcript in the circuit court: *Wilcox v. Lantz*, 107 Mich., 2; 64 N. W., 735.

11—All actions of assumpsit, on sealed as well as other contracts, are required to be brought within six years: *Sigler v. Platt*, 16 Mich., 206. While C. L., § 10417 permits assumpsit to be brought where convenient might be maintained, yet, if assumpsit is brought, that form of action will

be barred in six years under this § 9728. The statute does not fix the bar by the cause of action, but by the form of the action; *Christy v. Farlin*, 49 Mich., 319; 13 N. W., 607. Not so in case of assumpsit on judgment in circuit court. It is the fact that it is on a judgment, rather than that it is an assumpsit, that determines the period of limitation: *Snyder v. Hitchcock*, 94 Mich., 313; 54 N. W., 43. On the other hand again, an action of debt on a lease under seal, may be brought at any time within ten years after the action accrues, but if action is brought in assumpsit instead, it must be brought within six years; the form and not the cause of action determining the period: *Stewart v. Sprague*, 71 Mich., 50; 38 N. W., 673. Where a party has an election of remedies, they will be governed by the limitation appropriate to each. *Goodrich v. Leland*, 18 Mich., 110. Delay in bringing an action on the case for fraud, while it may have some bearing on the fraud as affecting the plaintiff's conduct, cannot bar the suit unless coming within the statute of limitations applicable to the case: *Dayton v. Monroe*, 47 Mich., 193; 10 N. W., 196.

12—C. L., § 9729.

13—C. L., § 9730. Where a dep-

"All personal actions on any contract, not limited by the foregoing sections, or by any law of this state, shall be brought within ten years after the accruing of the cause of action, and not afterwards."¹⁴

"The limitations hereinbefore prescribed for the commencement of actions, shall apply to the same actions when brought in the name of the people of this state, or in the name of any officer or otherwise, for the benefit of the state, in the same manner as to actions brought by individuals."¹⁵

"All actions and suits for any penalty or forfeiture on any penal statute, brought in the name of the people of this state, shall be commenced within two years next after the offense was committed, and not afterwards, except in the cases mentioned in the next section."¹⁶

"The preceding section shall not apply to any suit which is or shall be limited by any statute, to be brought within a shorter or longer time than is prescribed in said section; but such suit shall be brought within the time that may be limited by such statute."¹⁷

"None of the provisions of this chapter shall apply to any action brought upon any bills, notes, or other evidences of debt issued by any bank."¹⁸

§ 224. When the statute begins to run.—The statute begins to run from the time there is a complete cause of action.¹⁹

uty sheriff neglected to pay over money collected on an execution. It was held, under a similar statute, that the statute of limitations commenced to run from the return day of the execution, and not from the day the money was demanded of him. *The President, etc., v. Balch*, 9 Greenleaf's R., 74; see, *Elliot v. Cronk's Administrators*, 13 Wend., 40; *Peck v. Hurlburt*, 40 Barb., 559.

14—C. L., § 9734. An action of debt upon a sealed instrument is not barred until after ten years: *Goodrich v. Leland*, 18 Mich., 118. Covenant must be brought in ten years: *Post v. Campau*, 42 Mich., 94; 3 N. W., 272.

15—C. L., § 9747.

16—C. L., § 9748.

17—C. L., § 9749.

18—C. L., § 9731. Upon certifi-

cates of deposit, and obligations payable on demand, when not excepted by this statute, the time runs from the beginning: *Tripp v. Curtenius*, 36 Mich., 494; see, *Palmer v. Palmer*, 36 Mich., 487; *Kimball v. Kimball*, 16 Mich., 211.

19—*When statute begins to run*—In case of *infants* and other *persons, under disability* to sue, see *post*, § 233, and notes. On *mutual accounts*, see *post*, § 232, and notes. In case of *principal and agent*, when there is a demand by the principal: *Kimball v. Kimball*, 16 Mich., 211, 219; *Ewers v. White's Estate*, 114 Mich., 266; 72 N. W., 184. Upon a *judgment*, the day following its rendition, the day of its rendition being excluded: *Warren v. Slade*, 23 Mich., 1. In case of justice's judgment transferred to the circuit court by

§ 225. **Effect of disability to sue.**—When the statute once begins to run, no subsequent disability to sue will prevent it from running.²⁰ A disability that will prevent the statute from running must exist when the right of action first accrues; and if several disabilities exist together, the statute does not begin to run until the whole are removed.²¹ But in case of several disabilities, the party can only avail himself of such of them as existed when the right of action first accrued. If new disabilities arising from time to time could be added to disabilities existing when the right of action accrued, claims

transcript when the judgment is entered in the justice's court rather than when transcript filed in the circuit court: *Wilcox v. Lantz*, 107 Mich., 2; 64 N. W., 735. Upon an agreement to pay at death, when death occurs. *Sword v. Keith*, 31 Mich., 247; *Davis v. Teachout's Estate*, 126 Mich., 136; 85 N. W., 475. In case of continuous service under contract for indefinite period, when service terminates: *Carter v. Carter*, 36 Mich., 207. Upon covenants, from the breach: *Mattison v. Vaughan*, 38 Mich., 373, or when substantial damage is suffered: *Post v. Campau*, 42 Mich., 90; 3 N. W., 272. Upon a warranty in a contract for machinery to be put in running order and tested, after a reasonable time to do so has elapsed: *Felt v. Reynolds R. F. E. Co.*, 52 Mich., 602; 18 N. W., 378. Against an action for conversion of personal property of an intestate, not until administrator is appointed: *Parks v. Norris*, 101 Mich., 71; 59 N. W., 428. In case of an express trust, when notice of the repudiation of the trust is brought to the *cestui que trust*: *Frank v. Estate of Morley*, 106 Mich., 635; 64 N. W., 577. Where the cause of action has been fraudulently concealed, when the fact of its existence is discovered: *Tompkins v. Hollister*, 60 Mich., 470; 27 N. W., 651; *Stebbins v. Patterson*, 108 Mich., 537; 66 N. W. 484. On installments due on contracts with laborers and material men, as against officers failing to require the statutory bond for their protection, when payment is due from the contractor: *Staffon v. Lyon*, 110

Mich., 260; 68 N. W., 151. On a demand note, from the day of its delivery: *Palmer v. Palmer*, 36 Mich., 487. So with a bank certificate of deposit: *Tripp v. Curtenius*, 36 Mich., 494. The same principle governs when the paper is payable a certain period after demand: *Palmer v. Palmer*, *supra*. Where payment is to be made in installments, from the date of each installment respectively: *Gray v. Pindar*, 2 Bos. & Pul., 427. Upon paper payable at sight, from the time of presentation: *Holmes v. Kerrison*, 2 Taunt., 323. In case of a surety compelled to pay, from the time of such payment: *Rodman v. Heddin*, 10 Wend., 498. Upon warranty of quality of goods, from time they turn out not to be as warranted: *Battley v. Faulkner*, 3 B. & A., 288. Upon a guaranty, from the time of the principal's default: *Holl v. Hadley*, 4 Nev. & M., 315. Upon a *supersedeas* bond given under C. L., § 10485, upon the rendition of judgment of affirmance, or at the latest at the earliest date on which costs could be taxed: *Busch v. Wilcox*, 106 Mich., 515; 64 N. W., 485. In computing time for the period of the statute, the day on which the action accrued is excluded: *Warren v. Slade*, 23 Mich., 1.

If the statute has run against a judgment it is of no avail to take execution upon it. *Ludeman v. Hirth*, 96 Mich., 17; 55 N. W., 449.

20—*Peck v. Randall*, 1 Johns., 165; *Ten Eyck v. Wing*, 1 Mich., 45; *Demarest v. Wynkoop*, 3 John Ch. R., 129.

21—*Jackson v. Johnson*, 5 Cow., 74.

might be protracted to an indefinite extent of time, and to the great injury and oppression of parties.²²

Notice of this defense must be given under the plea of the general issue.²³

§ 226. How the defense of the statute of limitations may be overcome.—By proving that the original cause of action in fact accrued within six years before the commencement of the suit. This is done by proving the time the cause of action accrued, and that it was within six years previous to the commencement of the suit by issuing the first process, or otherwise.²⁴

§ 227. A new promise defeats the bar of the statute.—Proving a new promise of the defendant within six years relieves from the bar of the statute. The promise that will revive a debt must be proved in an explicit manner, and be, in its terms, unequivocal and determinate; and if any condition is annexed, performance of it, or a readiness to perform it, must be shown.²⁵

22—Ten Eyck v. Wing, 1 Mich., 40, 45.

23—Notice of the statute of limitations must be added to the plea of the general issue to enable the defendant to avail himself of such defense: Whitworth v. Pelton, 81 Mich., 98; 45 N. W., 500; Bellows v. Butler, 127 Mich., 100; 86 N. W., 533. A defendant may be estopped from insisting upon the bar of the statute where he has by his conduct deceived a plaintiff into believing that a suit is unnecessary: Renackowsky v. Board of W. Com'rs, 122 Mich., 613; 81 N. W., 581; Klass v. City of Detroit, 129 Mich., 35; 88 N. W., 204. The defense of the statute of limitations cannot be raised by demurrer: First Nat'l Bank v. Steel, — Mich., —; 99 N. W., 786 (May, 1904); Renackowsky v. Board of W. Com'rs, 122 Mich., 613; 81 N. W., 581.

A notice of the defense of the statute of limitations, "That the plaintiff's cause of action did not accrue within six years next before the filing of the plaintiff's amended declaration," is bad. It does not show the cause of action barred before the commence-

ment of suit: Wilcox v. Kassick, 2 Mich., 165.

Amendment.—After issue joined, it is in the discretion of the court to allow the defendant to interpose the defense of the statute of limitations by amendment to his notice, or by adding such notice under the general issue by way of amendment: Ripley v. Davis, 15 Mich., 75, 79. The defense of the statute of limitations should not be allowed to be interposed by way of amendment during the trial of the cause: Marx v. Hilsendegen, 46 Mich., 336; 9 N. W., 439; Shank v. Woodworth, 111 Mich., 642; 70 N. W., 140. Nor can a new cause of action be introduced by amendment after the statute has run: Gorman v. Newaygo Circuit Judge, 27 Mich., 138; Wingert v. Wayne Circuit Judge, 101 Mich., 395; 59 N. W., 662; Pratt v. Montcalm Circuit Judge, 105 Mich., 499; 63 N. W., 506.

24—Beardmore v. Rattenbury, 5 B. & A., 452.

25—Stafford v. Richardson, 15 Wend., 302; Allen v. Webster, *Ibid.*, 284; Bell v. Morrison, 1 Peters, 360, 363, 372. Where a new promise is set

And the statute provides that, "In actions founded upon contract express or implied, no acknowledgment or promise shall be evidence of a continuing contract, whereby to take a case out of the provisions of this chapter, or to deprive any party of the benefit thereof, unless such acknowledgment or promise be made or contained by or in some writing, signed by the party to be charged thereby."²⁶

The writing containing the promise, although in the handwriting of the party, would not be sufficient unless signed by him.²⁷ It must be signed by the party himself, or by some one authorized to act for him.²⁸ The promise must not be condi-

up to take a case out of the statute, it must be proved in a clear and explicit manner, either expressly or by such an unqualified acknowledgment as authorizes its implication; and the acknowledgment should contain an unqualified and direct admission of a present subsisting debt, which the party is liable and willing to pay, and must not be accompanied by any circumstance or declaration which repels the presumption of a promise or intention to pay: *Ten Eyck v. Wing*, 1 Mich., 40; see, *Jewett v. Petit*, 4 Mich., 508. A letter of the debtor asking a creditor if he would take a new note for the amount of several held by the creditor against the debtor, and if not how much cash he would take to balance all debtor owed, *Held*, to keep the cause of action alive as to all. *Rumsey v. Settle's Estate*, 120 Mich., 372; 79 N. W., 579. See, *Haladay v. Weeks*, 127 Mich., 363; 86 N. W., 799, where it is held that a promise to "pay when able" was not sufficient. In *King's Estate*, 94 Mich., 411; 54 N. W., 178, an indorsement reading "the within note shall not be outlawed" is held sufficient.

26—C. L., § 9740. The payment and indorsement in his own hand, by the maker of a promissory note, of a partial payment thereon, is a sufficient acknowledgment, and competent evidence of such payment to take the case out of the statute: *Chandler v. Lawrence*, 3 Mich., 261.

A verbal contract or promise is not sufficient; it must be in writing: *Joy v. Thompson*, 1 Doug., 373; *Hillebrands v. Nibelink*, 40 Mich., 646.

Where, to save a note from outlawing, the maker and endorser made and signed an indorsement on the back of it as follows: "For value received, we admit our liability on the within note, and hereby promise to pay the amount due thereon, principal and interest, on demand, less any payment which should be applied thereon:"

Held, that this was a sufficient promise, and upon a sufficient consideration to prevent the bar of the statute: *Parsons v. Frost*, 55 Mich., 230; 21 N. W., 303; see, *Minor v. Lorman*, 56 Mich., 212; 22 N. W., 265-6. After an open account has been barred, an accounting changing it into an account stated, will not revive it unless by agreement in writing: *Sperry v. Moore's Estate*, 42 Mich., 360; 4 N. W., 13. A written reply to a demand for payment, that it was impossible to pay at present, is not sufficient to constitute a new promise: *Cromer v. Platt*, 37 Mich., 132. A new promise to pay a debt barred by the statute, cannot be inferred from the mere recognition of the existence of a just demand: *Mainzinger v. Mohr*, 41 Mich., 686; 3 N. W., 183; see, *Chandler v. Lawrence*, 3 Mich., 261; *Jewett v. Petit*, 4 Mich., 508.

27—*Bayley v. Ashton*, 12 Ad. & Ell., 493.

28—See, *Hyde v. Johnson*, 2 Bing., N. C., 776. But it seems that the instrument need not be literally signed by subscribing the name of the promisor at the end of the writing, but that it will be sufficient if it is found anywhere in the writing, provided it was put there for the purpose of creating

tional. A promise to pay "as soon as I can" is a promise to pay if able, and is not sufficient.²⁹

§ 228. In case of joint contractors.—"If there be two or more joint contractors, or joint executors or administrators of any contractor, no such joint executor or administrator shall lose the benefit of the provisions of this chapter, so as to be chargeable, by reason of any acknowledgment or promise, made or signed by any other or others of them."³⁰

"In actions commenced against two or more joint contractors, or joint executors or administrators of any contractor, if it shall appear on the trial or otherwise, that the plaintiff is barred by the provisions of this chapter, as to one or more of the defendants, but entitled to recover against any other or others of them, by virtue of a new acknowledgment or promise or otherwise, judgment shall be given for the plaintiff as to any of the defendants against whom he was entitled to recover, and for the other defendant or defendants against the plaintiff."³¹

"If, in any action on contract, the defendant shall plead in abatement that any other person ought to have been jointly sued, it shall be a good replication to such plea, if true in fact, that the action was, by the provisions of this chapter, barred against the person so named in the plea, but not so barred by reason of such acknowledgment or promise, as against such defendant."³²

§ 229. To whom and when promise to be made.—It is not necessary that the acknowledgment or promise be made to the plaintiff.³³ It must be made before the action is brought.³⁴

a liability on the part of the promisor: *ship has been dissolved: Borden v. Davis v. Shields*, 26 Wend., 341; *James Fletcher's Estate, supra.*
v. Patten, 2 Seldon, 9; *Holmes v.* 32—C. L., § 9743.
Mackrel, 3 J. Scott, N. S., 789; *Lobb* 33—*Pinkerton v. Balley*, 8 Wend.,
v. Stanley, 5 Q. B., 574. 600; *Dean v. Hewet*, 5 *Ibid.*, 257. But

29—*Halladay v. Weeks*, 127 Mich., the promise must be made to the cred-
363; 86 N. W., 799, and cases cited itor or to some one in his behalf, or his
in the opinion. agent or attorney; if to a stranger,

30—C. L., § 9741. it would not be sufficient. *Ibid.*, and

31—C. L., § 9742; *Reading v.* *Wakeman v. Sherman*, 5 Seld., 85;
Beardsley, 41 Mich., 123; 1 N. W., *Bloodgood v. Bruen*, 4 *Ibid.*, 362.
965; *Borden v. Fletcher's Estate*, 131 34—*Bateman v. Pindar*, 3 Ad. & Ell.,
Mich., 220; 91 N. W., 145. The fact N. S., 574; *Tanner v. Smart*, 6 B. &
that the joint debtors were partners C., 603.
will not affect the rule if the partner-

A promise by the defendant to pay as soon as he is able, unaccompanied by any proof of his liability, will not authorize a recovery of the plaintiff, although made within six years after the cause of action had accrued, and before the cause of action was barred by the statute.³⁵

§ 230. **When promise may be inferred.**—The defense of the statute of limitations may also be overcome, by proving an acknowledgment or admission that the debt is unpaid, from which a promise may be inferred. The acknowledgment must be an unqualified and direct admission of a previous, subsisting debt, which the party is liable and willing to pay. If there be accompanying circumstances that repel the presumption of a promise or intention to pay; if the expression be equivocal, vague and indeterminate, leading to no certain conclusion, but at best to probable inferences, which may affect different minds in different ways, the proof will be insufficient.³⁶

This acknowledgment must be in writing, and must be signed by the party to be charged thereby, and not by an agent for him.³⁷

§ 231. **By proof of payment.**—“Nothing contained in the four preceding sections shall alter, take away, or lessen the effect of a payment of any principal or interest, made by any person; but no indorsement or memorandum of any such payment, written or made upon any promissory note, bill of exchange or other writing, by or on behalf of the party to whom such payment shall be made, or purport to be made, shall be deemed sufficient proof of the payment, so as to take the case out of the operation of the provisions of this chapter.”³⁸

35—Hayden v. Williams, 7 Bing., 163; Tanner v. Smart, 6 B. & C., 603; Cocks v. Weeks, 7 Hill, 45; Wakemen v. Sherman, 5 Seld., 85. A promise to pay when able requires proof of ability before there can be a recovery: Wait v. Morris, 6 Wend., 394; Scouton v. Eislord, 7 Johns., 36. Such promise held insufficient in Halladay v. Weeks, 127 Mich., 363; 86 N. W., 799.

36—Allen v. Webster, 15 Wend., 284, 289; Ten Eyck v. Wing, 1 Mich., 40; Bell v. Morrison, 1 Peters, 362. If the acknowledgment of a debt barred by the statute is accompanied by declarations or circumstances which

rebut the implication of a promise, or obligation to pay, the claim is not revived: Jewett v. Petit, 4 Mich., 508.

37—See, ante, § 227.

38—C. L., § 9744. The four preceding sections referred to are C. L., §§ 9740-9743.

Payment upon the demand, effect of: Chandler v. Lawrence, 3 Mich., 266-7. When accompanied by declarations denying liability: Jewett v. Petit, 4 Mich., 508; Ten Eyck v. Wing, 1 Mich., 40. Payments on an open account: Payne v. Walker, 26 Mich., 60.

The running of the statute is not arrested by a payment made by one a

It is immaterial whether the payment is made in money or in some other manner. The giving of a note for the interest accrued on the demand in question is sufficient.³⁹ So, a debtor's account stated with his creditor, in which credit is given for interest, is the same as if the money had been paid.⁴⁰ If payment be made by a note, it operates as a payment from the time of giving the note, and not from the time it is paid.⁴¹ If there are two debts, one barred by the statute and the other not, and a debtor pay a sum generally, without appropriating it to either debt, the creditor cannot, by applying it to the oldest debt, take it out of the statute,⁴² nor if there are two clear and undisputed debts.⁴³ If it be agreed between the debtor and creditor that the latter shall receive goods to be sold, and the proceeds to be applied toward the payment of the debt or note, if the sale is made, and the avails indorsed upon the note *within* a reasonable time, it will be deemed a payment made by the maker's order. But if the holder, without any assent on the part of the maker, or any notice to him, makes the sale and indorsement *after* a reasonable time has elapsed, it will not take the case out of the statute.⁴⁴

year and a half after authority was given him to make the payment: *Sweet v. Ellis*, 109 Mich., 460; 67 N. W., 535.

The statute does not prescribe what effect part payment of a demand shall have, but it operates as an acknowledgment of the continued existence of the demand, and as a waiver of any right to take advantage, by plea of the statute of limitations, of any such lapse of time as may have occurred previous to the payment having been made. The payment is not a contract: it is not in itself even a promise. But it furnishes ground for implying a promise, in renewal from its date, of any right of action which before may have existed: *Miner v. Lorman*, 56 Mich., 212; 22 N. W., 265. Wherever therefore the circumstances are such as to negative the idea of a new acknowledgment of the obligation payment will not arrest the running of the statute: *Borden v. Fletcher's Estate*, 131 Mich., 220; 91 N. W., 145. So the application of the proceeds of a chattel mortgage sale upon the debt secured

by mortgage will not prevent the bar of the statute: *Westinghouse Co. v. Boyle*, 126 Mich., 677; 86 N. W., 136.

39—*Wenman v. Mohawk Ins. Co.*, 13 Wend., 267; *Commonwealth Ins. Co. v. Whitney*, 1 Metc. R., 21. And a delivery of goods and chattels in part payment is sufficient: *Hooper v. Stephens*, 4 Ad. & Ell., 71; *Hart v. Nash*, 2 Cr. M. & R., 337.

40—*Smith v. Ludlow*, 6 Johns., 267.

41—*Irving v. Velitch*, 3 M. & W., 90.

42—*Mills v. Fawkes*, 5 Bing. N. C., 455; see, *Bancroft v. Dumas*, 21 Vt., 456; *Ayer v. Hawkins*, 19 *Ibid.*, 26. A payment of money not intended or supposed by the parties to be made upon a note, cannot be applied to it by the creditor so as to save the note from the bar of the statute: *Krone v. Krone*, 38 Mich., 661.

43—*Burn v. Boulton*, 2 M. G. & S., 476.

44—*Porter v. Blood*, 5 Pick., 54; see, *Pond v. Williams*, 1 Gray, 630, 635.

The indorsement of a partial payment upon a promissory note, written by the party sought to be charged thereby, is competent evidence of such payment, to take the case out of the statute of limitations. The admission of the defendant, as well as any other competent parol evidence, is admissible under the statute to prove the fact of part payment on a demand, to take the case out of the statute of limitations.⁴⁵

If the acknowledgment of a debt barred by the statute of limitations, or if a partial payment of it, is accompanied by declarations, or circumstances, which rebut the implication of a promise of payment, or that the debtor, by the partial payment, admitted his obligation to pay the residue, the claim is not revived.⁴⁶

But, "if there are two or more joint contractors, or joint executors or administrators of any contractor, no one of them shall lose the benefit of the provisions of this chapter, so as to be chargeable by reason only of any payment made by any other or others of them."⁴⁷

45—Chandler v. Lawrence, 3 Mich., 261; Williams v. Gridley, 9 Metc., 482. But indorsements unexplained, and not shown to be in the handwriting of the debtor, have no weight under the statute as evidence of payment to take the case out of the statute: Mich. Ins. Co. v. Brown, 11 Mich., 265, 273. See, Snyder v. Winsor, 44 Mich., 140; 6 N. W., 197. Nor is an indorsement of payment made in the presence of the maker by the owner sufficient evidence of payment to interrupt the running of the statute: Fowles v. Joslin, 130 Mich., 272; 89 N. W., 946.

46—Jewett v. Pettit, 4 Mich., 508, 510; Westinghouse v. Boyle, 126 Mich., 677; 86 N. W., 136; Borden v. Fletcher's Estate, 131 Mich., 220; 91 N. W., 145; Sweet v. Ellis, 109 Mich., 460; 67 N. W., 535; Lester v. Thompson, 91 Mich., 245; 51 N. W., 893.

47—C. L., § 9745; see, Shoemaker v. Benedict, 11 N. Y., 176; Halden v. Crafts, 4 E. D. Smith, N. Y., 560; and see, Pennoyer v. David, 8 Mich., 407; Sigler v. Platt, 16 Mich., 207; Smith v. Sheldon, 35 Mich., 42. A payment or new promise by one joint debtor, or co-surety, will not operate to keep the obligation alive as to an-

other who was not privy to it or in any way participating in it: Probate Judge v. Stevenson, 55 Mich., 320; 21 N. W., 348-9. One joint maker or debtor should not lose the benefit of the statute by reason of payments made by the other: Rogers v. Anderson, 40 Mich., 290. Nor will payment on a note by the estate of one of the joint makers bind the other, or deprive him of the benefit of the statute: Holcomb v. Sloan, 39 Mich., 173-4. A partnership note is a joint contract within the meaning of this § 9745, and a payment made by one of the partners on such a note, after dissolution, to a payee having knowledge of the dissolution, will not bind the other partner: Gates v. Fisk, 45 Mich., 522; 8 N. W., 558; see, Mainzinger v. Mohr, 41 Mich., 685-7; 3 N. W., 183. Even though a husband is authorized to act for his wife generally still a payment made by a husband on a joint mortgage of himself and wife, given for the husband's debt, will not prevent the running of the statute as to the wife: Curtiss v. Perry, 126 Mich., 600; 85 N. W., 1131.

Although a note may be barred as against a joint maker, who has signed

§ 232. When statute begins to run in case of mutual accounts.—“In all actions of debt or assumpsit, brought to recover the balance due upon a mutual and open account current, the cause of action shall be deemed to have accrued at the time of the last item proved in such account.”⁴⁸

If the items in an account are *all on one side*, as between a tradesman and customer, and some of them are within six years, and the others beyond that time, the former will not entitle the plaintiff to give evidence of the latter.⁴⁹ The statute applies to *mutual* accounts.⁵⁰ An item of the account on *either* side, within six years before the bringing of the suit, draws after it the account on both sides, and takes the account of the other party out of the statute.⁵¹ The foregoing section

it as surety for the other maker, yet the surety may take it up and enforce it against the principal debtor if the latter, by partial payments or otherwise, has kept it alive as against himself: *McClatchie v. Durham*, 44 Mich., 435; 7 N. W., 76.

48—C. L., § 9732.

In order to prevent the statute from cutting off an account which accrued more than six years before suit brought, it must appear that there was a mutual account current between the parties during a period within six years prior to commencement of suit. That is, that at least the last item of such account, on one side or the other, was within the six years. To constitute a mutual account, there must be a mutual credit—a credit founded on one side upon a subsisting debt upon the other, or an express or implied agreement for a set-off of mutual debts. If no charges were made by the defendant, it is not enough for the plaintiff merely to prove the charges on his side. This would not make a mutual account, but only a credit on one side. There must be a mutual alternate deal, and credits given, either expressly or impliedly, upon both sides, of some items of deal. It is not necessary that the defendant should put his credits or charges on a book, nor that he should claim them on the trial. It will be sufficient if the plaintiff has given him the credits to which he is entitled, if it was understood between the parties at the time

that he was to have such credits on account, to apply against the charges of the other party: *Kimball v. Kimball*, 16 Mich., 211, 217. And further, as to what are mutual accounts, see, *Campbell v. White*, 22 Mich., 178; *White v. Campbell*, 25 Mich., 463. And as to what is not, see, *Mandigo v. Mandigo*, 26 Mich., 349. The statute runs from the last item: *Sperry v. Moore's Estate*, 42 Mich., 357; 4 N. W., 13.

Payments on an account are sufficient to render it an open mutual account, so as to prevent its being cut off by the statute of limitations: *Payne v. Walker*, 26 Mich., 60.

49—*Buller's N. P.*, 149; 2 Saund. Pl. & Ev., 312.

50—*Coster v. Murry*, 5 John. Ch. R., 522; s. c., 20 Johns., 576.

Sickles v. Mather, 20 Wend., 72. That is, where there are mutual accounts. See, also, *Davis v. Smith*, 4 Greenlf., 337; *Cogswell v. Doliver*, 2 Mass., 217; *Chamberlin v. Cuyler*, 9 Wend., 126; *Penniman v. Rotch*, 3 Metc., 216. But in the last case it is said that where there is but one item of credit on one side, that item must have been given or paid to apply generally on the account on the other side, for, if it was applied to the specific payment of some one item on the other side, or to apply only on some one item, it does not make such a mutual account as will take both accounts out of the statute. *Ibid.*

51—If there is an account only on

of the statute does not apply exclusively to such actions as are brought on accounts in which debits and credits are stated, and a balance struck, but extends also to cases in which the plaintiff seeks to recover the balance due to him, though he declares only on the debit side of the account. And in the latter case, if the defendant does not file an account in offset, nor prove items on his side of the account by way of payment, but relies on the statute, the plaintiff may avoid the statute by showing that there was a mutual and open account current, and proving an item *on either side* within six years.⁵²

The account, to come within the above section, must be "an open account current." When the account is stated between the parties, or when anything shall have been done by them which, by their implied admission, is equivalent to a settlement, it has then become an ascertained debt. "All intricacy of account, or doubt as to which side the balance may fall, is at an end," and thus the case is neither within the letter nor the spirit of the exception. In short, when there is a settled account, that becomes the cause of action, and not the original account.⁵³ "The mere rendering an account does not make it a stated one; but, if the other party receives the account, admits the correctness of the items, claims the balance, or offers to pay it, as it may be in his favor or against it, then it becomes a stated account."⁵⁴ The balance due on such settlement may be the commencement of and constitute an item

one side, an item within six years will not draw after it any items beyond that period: *Kimball v. Brown*, 7 Wend., 322; *Hollock v. Losee*, 1 Sandf., 220.

If there is an interval of six years or more, in which no accounts occur on either side, all items prior to that interval are cut off. Thus, where a plaintiff sued upon a claim arising in 1869, the defendant was allowed to prove set-offs arising in 1865, they being within six years, but he was not allowed to go back from 1865 to 1858 (there being no dealings between those two dates) and have the benefit of an item of account of that early date, because there was an interval of more than six years from 1858 to 1865: *Mandigo v. Mandigo*, 26 Mich., 349.

52—*Penniman v. Rotch*, 3 Mete.,

216; *Kimball v. Kimball*, 16 Mich., 211, 217.

53—3 Saund. Pl. & Ev., 311; *Watson v. Lyles' Adm'r*, 4 Leigh., 240; *Toland v. Sprague*, 12 Peters, 333; *Howes v. Woodruff*, 21 Wend., 640; see, *Union Bank v. Knapp*, 3 Pick., 96.

54—*Toland v. Sprague*, 12 Peters, 333. But in action for goods sold and delivered, where the benefit of the statute of limitations is claimed as a defense to a portion of the demand sued for, on the ground that it has been converted into an account stated, by assent of the defendant to the account as rendered to him, it is not sufficient to sustain such defense, that upon and after the exhibition of the account to him he remained entirely passive; he must show some word or

in a new account. In such case, however, the statute would be a bar to the *items* of the account which were settled, but would not affect the *balance* found due.⁵⁵

§ 233. **What disability will affect the running of the statute.**—“If any person entitled to bring any of the actions mentioned in this chapter shall, at the time when the cause of action accrues, be within the age of twenty-one years, insane, or imprisoned in the state prison, or absent from the United States and from the British provinces of North America, such person may bring the action within the times in this chapter respectively limited, after the disability shall be removed: Provided, If any person not already barred by the provisions of law heretofore existing, from maintaining any of said actions, shall be barred according to the foregoing provisions of this enactment therefrom, then such person may bring such action within one year after this act shall take effect and not afterwards.”¹

When the statute once begins to run, it continues to run, notwithstanding any subsequent disability.² The disability which entitles a party to the benefit of the above section, must exist when the right of action first accrued; and if several disabilities exist at that time, the statute does not begin to run until the whole are removed. Cumulative or successive dis-

act implying that he assented to the account: *White v. Campbell*, 25 Mich., 463; *Payne v. Walker*, 26 Mich., 63.

55—*Union Bank v. Knapp*, 3 Pick., 96. An account stated, may be effected without any written acknowledgment by the party against whom the balance is ascertained, and it may be proved by unsigned writings. But when an account has become barred by the statute, the fact that the parties come together and examine and adjust the same, and orally agree upon a balance due, will not hinder the statute from continuing to run against the original matters of the account and save the balance so ascertained from the bar of the statute, unless the account stated be supported by evidence of some writing signed by the party to be charged: *Sperry v. Moore's Estate*, 42 Mich., 360; 4 N. W., 13; see C. L., § 9740; *Chase v. Trafford*, 116 Mass., 529.

1—C. L., § 9733, as amended April

15, 1871, Laws of 1871, p. 226. As to the construction of this section prior to the amendment thereto, April 15, 1871, see, *Ersine v. Messicar*, 27 Mich., 84. And since the amendment: *Krone v. Krone*, 37 Mich., 308. If an heir of an intestate resides in Germany at the time of the death and dies there the assignee and administrator of those who inherit from such heir can bring his action to recover a death benefit from a mutual benefit association at any time within ten years from the death of the non-resident: *Wolf v. District Grand Lodge No. 6, I. O. B. B.*, 102 Mich., 23; 60 N. W., 445. Where the circumstances are such that the action must be brought in the name of the person seduced, and not by another the statute will not begin to run till her majority: *Watson v. Watson*, 53 Mich., 168; 18 N. W., 605.

2—*Pack v. Randall*, 1 Johns., 165.

abilities do not prevent the statute from running; the party claiming the benefit of the exception can avail himself only of the disability existing when the right of action first accrued.¹³ If all of several plaintiffs are not under a disability, this section will not prevent the statute from barring the action, notwithstanding some of them may be.¹⁴

“When any person shall be disabled to prosecute an action in the courts of this state, by reason of his being an alien, subject or citizen of any country at war with the United States, the time of the continuance of such war shall not be deemed a part of the respective periods herein limited for the commencement of any of the actions before mentioned.”¹⁵

§ 234. Effect of absence of the defendant from the state.—

“If, at the time when any cause of action mentioned in this chapter, shall accrue against any person, he shall be out of the state, the action may be commenced within the time herein limited therefor, after such person shall come into this state, and if, after any cause of action shall have accrued, the person against whom it shall have accrued shall be absent from and reside out of the state, the time of his absence shall not be taken as any part of the time limited for the commencement of the action.”¹⁶

13—*Jackson v. Johnson*, 5 Cow., 274.

14—*Perry v. Jackson*, 4 Term., 516; see, *Brown v. Delatfield*, 1 Denio, 445.

15—C. L., § 9735.

16—C. L., § 9736. The condition upon which the suspension of the statute, as provided in the latter clause of this section, depends, requires the concurrence of two facts—residence out of the state, and absence from it; and without the conjunction of these two elements the condition will be incomplete. Absence, to prevent the operation of the statute, must be actual, not merely constructive. Returns of the debtor to set the statute running again, must be sufficiently open to enable the creditor, with reasonable diligence, to serve process upon him; it must not be a secret return, designed to deceive and mislead the creditor. Open visits, which might well be known to all persons, are to be cred-

ited to the debtor, while on the other hand, successive absences may be accumulated against him: *Campbell v. White*, 22 Mich., 178. The provisions of this statute apply to causes of action which accrue without the state between non-residents: *Belden v. Blackman*, 118 Mich., 448; 76 N. W., 979. This statute held to apply where both maker and payee of a note remove for a time and take up their residence in another state—certainly if the action is not barred by the statutes of the latter state: *Blackburn v. Blackburn's Estate*, 124 Mich., 190; 82 N. W., 835.

The burden of bringing his action within the exception is on him whose cause of action is otherwise barred: *Belden v. Blackman*, 124 Mich., 667; 83 N. W., 616. The exception of this statute applies by analogy to the ten-year limitation of C. L., § 9751, as to actions upon judgments: *Newlove v.*

In order to avail himself of the provision in the former part of this section, the defendant must show that the creditor knew of his coming into the state, so as to have had the opportunity to prosecute him, or that his coming was so public as to amount to constructive notice or knowledge, and to raise the presumption that, if the creditor had used ordinary diligence and due means, the defendant might have been prosecuted.¹⁷ This provision applies to persons who have never been within the state, as well as to citizens who have been absent for a time,¹⁸ and to a new promise made out of the state, whether the promise was made before or after the original promise had been barred by the statute.¹⁹ In assumpsit against several

Pennock, 123 Mich., 260; 82 N. W., 54.

Where a defendant claims the benefit of the statute of limitations, and it appears that he had removed his residence to a foreign country, and had afterwards returned to this state, the burden of proving that the sum of the times of his presence within this state amounted to six years, and was sufficient to satisfy the statute, is upon him; he is the party who substantially asserts the affirmative of the issue: *Ibid.*, White v. Campbell, 25 Mich., 463. This statute, C. L., § 9736, providing for a deduction from the period of limitations, of the time the debtor is absent from and resides out of the state, applies to every cause of action mentioned in the chapter (C. L., chap. 268) which includes debtors by judgment recovered in courts of record, as well as in those not of record: Conrad v. Nall, 24 Mich., 275.

17—White v. Bailey, 3 Mass., 271; Little v. Blunt, 16 Pick., 359; Fowler v. Hunt, 10 Johns., 464; and see, Randall v. Wilkins, 4 Denio, 577. And it is held that a temporary absence from the state by a resident thereof, without a change of residence, will not prevent the running of the statute during such absence: Hickok v. Bliss, 34 Barb., 321; and see, Campbell v. White, 22 Mich., 178.

18—Little v. Blunt, 16 Pick., 359; Ford v. Babcock, 2 Sandf., 518; Carpenter v. Wells, 21 Barb., 593. Where the debtor was not a resident of nor

within the state when the cause of action accrued, the statute does not begin to run until he comes into the state, and the statute does not bar the action until he has been in the state six full years after deducting all the time of his residence abroad; and it is immaterial whether the absence is continuous or made up of several distinct absences: Berrien v. Wright, 26 Barb., 208; Gans v. Frank, 36 Barb., 320; Power v. Hathaway, 43 Barb., 214; and see, Campbell v. White, 22 Mich., 178. If the defendant has not, after deducting the aggregate of all absences, resided or remained within the state for a time equal to six years after the cause of action accrued and before commencement of suit, the statute is no bar: Ford v. Babcock, 2 Sandf., 518; Cole v. Jessup, 10 N. Y., 96; Berrien v. Wright, 26 Barb., 208; Harden v. Palmer, 2 E. D. Smith, 172; see, Burrows v. Bloomer, 5 Denio, 532-5. On a suit brought in this state upon a cause of action which accrued in another state, the defendant cannot avail himself of the limitation laws of the latter state, nor of the fact that the cause of action is barred by the laws of that state. Limitations affect only the remedy, and the defense is available only when the action is barred by the laws of the state where suit is brought: Rugles v. Keeler, 3 Johns., 263; Gans v. Frank, 36 Barb., 320; Power v. Hathaway, 43 Barb., 214; see, Lincoln v. Battelle, 6 Wend., 475.

19—Little v. Blunt, 16 Pick., 359.

defendants, it is no answer to a plea of the statute, that *one* of them, within six years from the accruing of the cause of action, departed from the state and continued absent until the commencement of the suit. *All* the persons liable upon a joint *contract* must depart from the state in order to arrest the running of the statute against the demand. The rule is different in actions for torts. A resident defendant who is liable in such a cause of action may be sued alone, though another person who is out of the state might be bound with him in the same action. Such absent person may also be sued on his return.²⁰

§ 235. Death of claimant or debtor—Extension of time by reason of.—"If any person entitled to bring any of the actions before mentioned in this chapter, or liable to any such actions, shall die before the expiration of the time herein limited, or within thirty days after the expiration of the said time, and if the cause of action does by law survive, the action may be commenced by or against the executor or administrator of the deceased person, or the claim may be proved as a debt against the estate of the deceased person, as the case may be, at any time within two years after granting letters testamentary or of administration, and not afterwards, if barred by the provisions of this chapter."²¹

§ 236. Extension of time by reason of. failure to serve process, etc.—"If, in any action, duly commenced within the time limited in this chapter, and allowed therefor, the writ or declaration shall fail of a sufficient service or return, by any

20—*Brown v. Delafield*, 1 Denio, 567; *Fannin v. Anderson*, 10 Q. B., 811.

The statute does not run in favor of a maker of a joint and several contract to pay money, during the time of his residence out of the state, although it may at the same time run and be a bar to the other joint contractor who is and has remained in the state: *Bogart v. Vermilya*, 10 N. Y., 447. And where defendants are joint debtors, the absence of one of them from the state will suspend the running of the statute as to him, notwithstanding his co-debtor has remained in the state: *Denny v. Smith*, 1 N.

21—C. L., § 9737; see, *Post v. Campau*, 42 Mich., 94; 3 N. W., 272; *Sperry v. Moore's Estate*, 42 Mich., 253-7; 4 N. W., 13. In case of the debtor's death within thirty days after the expiration of the time, etc.: *Sword v. Keith*, 31 Mich., 247, 263. The failure to file an inventory will not delay the running of the statute: *First Nat'l Bank v. Estate of Sherman*, 117 Mich., 605; 76 N. W., 97. The lapse of 12 years without administration will not defeat the application of this statute: *Baker v. Halleck's Estate*, 128 Mich., 180; 87 N. W., 100.

unavoidable accident, or by any default or neglect of the officer to whom it was committed, or if the writ be abated, or the action otherwise avoided or defeated, by the death of any party thereto, or for any matter of form, or if after a verdict for the plaintiff, the judgment shall be arrested, or if a judgment for the plaintiff shall be reversed on a writ of error, the plaintiff may commence a new action for the same cause, at any time within one year after the abatement or other determination of the original suit, or after the reversal of the judgment therein; and if the cause of action does by law survive, his executor or administrator may, in case of his death, commence such new action within the said one year.²²

Where the holder of a note was stayed by an injunction from chancery from prosecuting the same, it was held that it did not suspend the running of the statute. The remedy of the party stayed is by application to chancery to prevent the defendant from setting up the statute as a bar.²³

§ 237. By reason of fraudulent concealment of causes of action.—"If any person who is liable to any of the actions mentioned in this chapter, shall fraudulently conceal the cause of such action from the knowledge of the person entitled thereto, the action may be commenced at any time within two years after the person who is entitled to bring the same shall discover that he has such cause of action, although such action would be otherwise barred by the provisions of this chapter."²⁴

22—C. L., § 9738. If suit is abated through failure of officer to make return of a summons in due season, the plaintiff may commence anew at any time within a year, though the statute of limitations has in the meantime run against his claim: *Ricaby v. Gentle*, 122 Mich., 336; 80 N. W., 1093. This section applies to reversals on writ of *certiorari* also: *McOmber v. Chapman*, 42 Mich., 117; 3 N. W., 288. See *Spicer v. McQueen*, 1 Mich., 252. This section is applicable where the action is defeated because of mistaken choice of remedies: *McMillan v. Reaume*, — Mich., —; 100 N. W., 166 (June, 1904).

Where a suit was commenced before a justice on the last day under the statute of limitations, and afterwards appealed to the circuit court, and there

dismissed for matter of form, it was held that the year within which a new suit might be brought, commenced at the time of dismissal in the circuit court: *Partridge v. Lott*, 15 Mich., 251. Where, for want of personal service of the summons, a second summons is taken out in continuation of the suit, the suit will be deemed commenced at the time when the first summons was delivered to the officer: *Cornell v. Moulton*, 3 Denio, 12. As to when a suit will be deemed to be commenced, etc.: *Howell v. Shepard*, 48 Mich., 472; 12 N. W., 661.

23—*Barker v. Millard*, 16 Wend., 572; *Berrien v. Wright*, 26 Barb., 208. But as to this, see, C. L., § 9754.

24—C. L., § 9739; *Johnson v. Provincial Ins. Co.*, 12 Mich., 216, 233; *Tompkins v. Hollister*, 60 Mich., 470;

§ 238. **Set-offs, when barred.**—"All the provisions of this chapter shall apply to the case of any debt or contract alleged by way of set-off on the part of a defendant; and the time of the limitation of such debt shall be computed in like manner as if an action had been commenced therefor, at the time when the plaintiff's action was commenced, provided such debt or contract would have been barred according to law, before the accruing of the claim or demand upon which such defendant is sued."²⁵

As an action of assumpsit cannot be maintained for a demand after the time limited by the statute has elapsed, so a demand which has been barred by the statute cannot be set off. If the defendant, under a plea and notice, give it in evidence, it may be objected to at the trial.²⁶

Where joint debtors are sued, some of whom are not served with process, and judgment is obtained against all under the statute, such judgment does not prevent the running of the statute in respect to the defendants on whom service was not made.²⁷

§ 239. **Computation of time, etc.**—In determining whether the statute of limitations has run against a note, the day on which the action accrued is excluded from the computation. Therefore, where a note payable on demand was made on the 14th day of February, 1839, a suit commenced on the 14th day of February, 1845, is in time.²⁸

27 N. W., 651; Stebbins v. Patterson, 108 Mich., 537; 66 N. W., 484; Wolkins v. Knight, — Mich., —; 96 N. W., 445 (Sept., 1903); Wells v. Winsor, 3 Pick., 73; First Massachusetts Turnpike Cor. v. Field, 3 Mass., 201. So, if plaintiff did not discover the fraud until after six years: Homer v. Fish, 1 Pick., 435. The concealments contemplated in this section, 9739, are those of the person sought to be charged with the debt or liability, and not those of his clerk, servant or agent, without his fault: Stevenson v. Robinson, 39 Mich., 160; see, Robert v. Morin, 27 Mich., 307; Allen v. Conklin, 112 Mich., 74; 70 N. W., 339.

25—C. L., § 9746. "Under the terms of this statute the claim of defendant

is barred if the period of limitation had run against it before the accruing of the cause of action upon which the plaintiff brings suit and not otherwise:" Busch v. Wilcox, 106 Mich., 514; 64 N. W., 485.

26—Ruggles v. Keeler, 3 Johns., 263.

27—Bruen v. Bokee, 4 Denio, 56.

28—Cornell v. Moulton, 3 Denio, 12; Warren v. Slade, 23 Mich., 1. Where a receipt was given for money, to be accounted for on demand with interest, it was held to be the same as a note payable on demand, and the statute commenced to run from its date. But where a receipt was given for property, to be sold and accounted for by the receptor, the statute would not commence to run against him until he

§ 240. **Subsequent acknowledgment in case of breach of contract.**—If the cause of an action arising from the breach of a contract *to do an act* at a specific time, is once barred by the statute, a subsequent acknowledgment by the party that he broke the contract will not take the case out of the statute. The defendant promised to invest plaintiff's money on good security; the security was bad; it was proved that the defendant acknowledged that the security was bad, and promised to pay the plaintiff: *Held*, that the plaintiff could not recover. "The subsequent promise must agree with the original promise stated in the declaration." "Contracts of this sort are not capable of being revived by any subsequent promise."²⁹

A distinction seems to have been taken in England, between a promise to pay a sum of money, and a contract for the performance of a particular act.³⁰ If a man acknowledge the existence of a debt barred by the statute, the common law has been supposed to raise a new promise to pay it, and thus the remedy is revived; but no such effect can be given to an acknowledgment, where the cause of action arises from the doing, or omitting to do, some act at a particular moment in breach of a contract.³¹ But where the promise declared on was to invest plaintiff's money on good security, and that the defendant invested it on bad security, to which defendant pleaded the statute, and plaintiff replied a new promise, on the trial of which it was proved that defendant acknowledged the security to be bad, and promised that plaintiff should be paid, the court said: "Contracts of this sort are not capable of being revived by any subsequent promise."³²

had sold the property, or until it was demanded of him. And where A. received certain notes of B., and gave him a receipt therefor, as having received them for collection, agreeing to apply the proceeds to the payment of a certain note given by B. to a third party, and to pay over or account to B. for the balance: *Held*, that the statute would not commence to run against such a receipt until A. had been called on for an accounting; that the receipt established the relation of principal and agent in respect to the collection and disbursement of the

moneys, which could only be changed to the relation of debtor and creditor by a demand: *Kimball v. Kimball*, 16 Mich., 221.

29—*Whitehead v. Howard*, 2 Brod. & Bing., 372; *Short v. McCarthy*, 3 B. & Ald., 626.

30—*Wetzell v. Bussard*, 11 Wheat., 309.

31—*Boydell v. Drummond*, 2 Camp., 160; but see, *Gibbons v. McCasland*, 1 B. & Ald., 690.

32—*Whitehead v. Howard*, 2 Brod. & Bing., 372.

§ 241. **Subsequent acknowledgment in case of torts.**—Evidence of an admission within six years of a trespass committed more than six years before, and for which the action was brought, and to which the statute was pleaded, was held sufficient to take the case out of the statute.³³

TENDER.

§ 242. **When can be made.**—At common law, a tender may be made in any case wherein the debt or duty is certain; but it cannot be in any action for unliquidated damages, as by a landlord against a tenant for not repairing.³⁴ By statute, an exception is made of a casual or involuntarily trespass or injury. This statute will be considered hereafter.³⁵

§ 243. **By whom made.**—A tender made by a servant, or a stranger, on the behalf and at the desire of the party, is as good as if it had been made by the party himself.³⁶ Where an agent tendered a greater sum than he was authorized to do by the defendant, the tender was holden good for the larger amount.³⁷

§ 244. **To whom made.**—A tender may be made to any person in whom, either as a party or privy, the right to the thing tendered is.³⁸ A tender to an agent or servant authorized to

33—Gibbons v. McCasland, 1 B. & Ald., 92; Hurst v. Parker, 2 Chitty, 249. But see, Holtham v. Detroit, — Mich., —; 98 N. W., 754 (March, 1904), holding that a cause of action for tort barred by the statute of limitations cannot be revived by agreement, either express or implied. In an action for torts, the statute begins to run from the time when the wrongful act was done. Thus, in trover, from the time of the conversion: Kelsey v. Griswold, 6 Barb., 436; Denys v. Shuckburgh, 4 Young & C., 42. And for wrongful taking of goods on execution, from the time of taking: Read v. Markle, 3 Johns., 523.

34—Searle v. Barrett, 4 N. & M., 200.

35—C. L., §§ 10405, 10406.

36—Cropp v. Hambleton, Cro. Eliz., 48. And it is said that any person may make a good tender for an idiot. And so a relative, though not the guardian, may make a good tender for an infant. Brown v. Dysinger, 1 Rawle, 408. But a tender by one with no authority is of no avail: Sinclair v. Learned, 51 Mich., 335; 16 N. W., 672.

A creditor cannot lawfully refuse a tender by an agent duly authorized, if he has reasonable opportunity to learn his authority: Eslow v. Mitchell, 26 Mich., 500.

37—Reed v. Goldring, 2 M. & S., 86.

38—Bacon's Ab., "Tender E."

receive payment, is a tender to the creditor himself.³⁹ A tender to one of two joint creditors is a tender to both.⁴⁰ Where a creditor told his clerk, who was previously authorized to receive the money, not to receive a sum if offered on a particular debt, as he had put it into the hand of his attorney, and the clerk, on tender made, refused to receive the money, it was held a good tender to the principal.⁴¹

§ 245. **Of what to be made.**—Where a party is entitled to money the tender must be in money which is made current by the laws of the United States. But a tender of bank notes, if not objected to on that ground, will be good.⁴² So, if the party agree before the day of payment to receive them, and when tendered refused them, provided they are current.⁴³ All gold, silver and minor coins stricken and issued at the mint of the United States, except trade dollars, are a legal tender. The American gold coins are double eagles, eagles, half eagles, three dollar pieces, quarter eagles and dollar pieces, and are legal tender for any amount.⁴⁴ Of silver coins there are dollars, which are also legal tender for any sums;⁴⁵ half dollars, quarter dollars, dimes and half dimes, which are legal tender

39—Goodland v. Blewitt, 1 Camp., 477. But a tender must be made to the creditor or some one authorized to act for him. It is insufficient if made to a mere servant of the creditor: Thurber v. Jewett, 3 Mich., 295.

40—Douglas v. Patrick, 3 Term R., 683. But it must be pleaded as a tender to both: *Ibid.* Where two persons are both interested, a tender to either is sufficient, especially if both are present: Beebe v. Knapp, 28 Mich., 53.

41—Moffat v. Parsons, 5 Taunt., 307; Muffatt v. Parsons, 1 Marsh., 55.

A tender to a merchant's clerk at the store for goods previously bought there is good, notwithstanding the claim had been left with an attorney for collection: Hoyt v. Byrdes, 11 Maine, 475. And tender to an attorney with whom the claim is left for collection is good: McIniffe v. Wheelock, 1 Gray, 600; Jackson v. Crofts, 18 Johns., 100. And if the attorney by letter demands payment at his office, a tender

by the debtor there to any one in charge of the office, in the attorney's absence, will be valid: Kiston v. Braithwaite, 1 M. & W., 310; Wilmut v. Smith, 3 C. & P., 453. And where money was coming due on a contract which specified no place of payment, but the creditor told the debtor that she would be at home to receive it on the day of payment, it was held that tender at the house to her son, who lived with her, was good, she having absented herself at the time: Smith v. Smith, 25 Wend., 405; Smith v. Smith, 2 Hill, 351; and see, Judd v. Ensign, 6 Barb., 258.

42—Fosdick v. VanHusen, 21 Mich., 567; Richards v. White, 44 Mich., 622; 7 N. W., 233; Waldron v. Murphy, 40 Mich., 668; Koehler v. Buhl, 94 Mich., 496; 54 N. W., 157.

43—Wright v. Reed, 3 Term R., 554; Warren v. Mains, 7 Johns., 476.

44—Rev. Stat., U. S., 2d ed., § 3585.

45—Act of Congress of Feb. 28, 1878; the silver trade dollar excepted.

for all sums not exceeding five dollars.⁴⁶ The minor coins of the United States are a five cent piece, a three cent piece and a one cent piece;⁴⁷ and are a legal tender for any amount not exceeding twenty-five cents in any one payment.⁴⁸ United States notes, commonly termed greenback currency, are also legal tender for sums to any amount.⁴⁹

Where the plaintiff presented for payment, at one time, at the banking house of defendants, thirty-five dollar notes of the defendants, the defendants, to redeem them, tendered three hundred half-dollar pieces of the recent coinage of the United States, which the plaintiff refused: *Held*, that each bill was to be considered a separate debt, and, therefore, the tender was good.⁵⁰

§ 246. *How to be made.*—The law requires to constitute a valid tender, whether of money or chattels, that they be actually produced and offered in sufficient quantity, at the time and place agreed upon, unless such production and offer is dispensed with by the declarations, or equivalent conduct of the person to whom tender is made, waiving the same.¹ Generally speaking, an objection to the tender upon a particular

46—Rev. Stat., U. S., 2d ed., §§ 3513-3586.

47—Rev. Stat., U. S., 2d ed., § 3515.

48—Rev. Stat., U. S., 2d ed., § 3587.

49—Rev. Stat., U. S., 2d ed., § 3588.

A tender made in greenbacks and fifty cent fractional United States currency is sufficient where no objection was made to the tender on this ground at the time: *Beebe v. Knapp*, 28 Mich., 53.

50—*Strong v. Farmers' & Mechanics' Bank of Michigan*, 4 Mich., 350. See, *Johnson v. Cranage*, 45 Mich., 14; 7 N. W., 188.

1—A denial by the creditor that anything is due and a refusal to accept anything: excuses production of money: *Lacy v. Wilson*, 24 Mich., 479. A tender of a gross sum in discharge of several liens is good. It is not necessary to make a separate tender for each: *Johnson v. Cranage*, 45 Mich., 14; 7 N. W., 188. It is not essential, in the tender of money, that it be actually counted over in

the presence of the person to whom tender is made. It is enough that opportunity is given to count it: *Wade's Case*, 5 Coke, 115. A tender of an insufficient amount is of no avail: *Montague v. Dougan*, 68 Mich., 98; 35 N. W., 840. A tender of too much will not vitiate: *Hubbard v. Chennango Bank*, 8 Cow., 88. An offer to pay what may be found to be due is not a good tender: *Chase v. Welsh*, 45 Mich., 345; 7 N. W., 895. One who would be entitled to subrogation to the mortgagor's rights under a chattel mortgage must tender amount due on the mortgage and expenses so far incurred in foreclosure: *Shutes v. Woodard*, 57 Mich., 213; 23 N. W., 775. A tender made of less than amount due upon condition that it shall be in full, if accepted discharges the debt, if amount is in dispute: *Rosema v. Porter*, 112 Mich., 13; 70 N. W., 316. See illustration of defective tender in, *Niederhauser v. Detroit C. S. Ry. Co.*, 131 Mich., 550; 91 N. W., 1028.

ground, is a waiver of all other objection to the form in which it is made.² When, however, no particular objection is urged against the tender, it seems that the tender must be good against any objection which might be made.³

The imposition of conditions not justified will vitiate the tender.⁴

§ 247. **Effect of tender.**—The tender of money, in payment of a money debt, only discharges the debtor from payment of interest thereafter, from liability to costs, and discharges any security the creditor may hold for the debt. The debt still remains.⁵ And if, after having made a tender, the debtor re-

2—Fosdick v. VanHusan, 21 Mich., 567; Moynahan v. Moore, 9 Mich., 914; Flanders v. Chamberlain, 24 Mich., 305; Hill v. Carter, 101 Mich., 158; 59 N. W., 413.

As to whether, where no objection to the tender is made at the time, all objections to the form of making are waived, see Browning v. Crouse, 40 Mich., 339; Slesinger v. Bresler, 110 Mich., 198; 68 N. W., 128.

3—Browning v. Crouse, 40 Mich., 339.

4—Wilson v. Wagar, 26 Mich., 452. A tender is not defeated because made upon a condition the creditor has a right to insist upon: Allen v. Atkinson, 21 Mich., 351; Brink v. Freeoff, 40 Mich., 610; s. c., 44 Mich., 69; 6 N. W., 94. See, further, Moynahan v. Moore, 9 Mich., 9; Potts v. Plaisted, 30 Mich., 149; Sager v. Tupper, 35 Mich., 134. That the note shall be surrendered may be insisted on as a condition: Wilder v. Seelye, 8 Barb., 408; Smith v. Rockwell, 2 Hill, 482.

5—Raymond v. Bernard, 12 Johns., 274; Manny v. Harris, 2 *Ibid.*, 24; Jackson v. Law, 5 Cow., 248; Porter v. Hodenpuy, 9 Mich., 10; Eslow v. Mitchell, 26 Mich., 500. A tender is an admission of a liability to the amount tendered, but not of any larger amount claimed by the plaintiff: Kennedy v. Nims, 52 Mich., 153; 17 N. W., 735. A tender, to be effectual as such, must be of the whole amount due. A tender of a part only will not be operative unless accepted by the creditor: Coots v. McConnell, 39

Mich., 742. A tender of amount due on land contract deprives the vendor of right to declare a forfeiture for non-payment in analogy to the rule that a tender of amount due on a mortgage discharges the lien: Hill v. Carter, 101 Mich., 158; 59 N. W., 413. Where it is claimed that certain services rendered were to discharge amount due it will not defeat the right to show such agreement that a tender has been made of amount due: Hill v. Carter, *supra*. A valid tender once made is effective to discharge a lien though not thereafter kept good: Caruthers v. Humphrey, 12 Mich., 270; Sears v. VanDusen, 25 Mich., 351 (a guarantor); Stewart v. Brown, 48 Mich., 383; 12 N. W., 499. The evidence in support of a tender to discharge a lien should be clear and satisfactory: Engle v. Hall, 45 Mich., 57; 7 N. W., 239; Proctor v. Robinson, 35 Mich., 284; Selby v. Hurd, 51 Mich., 1; 16 N. W., 180. Stops interest: Cowles v. Marble, 37 Mich., 158; Jones v. Shaw, 56 Mich., 332; 23 N. W., 33. A tender made and payment into court cannot be withdrawn though there is no debt: Thompson v. Townsend, 41 Mich., 346; 1 N. W., 1042. But the holder of the security must in every case have a reasonable opportunity to look over the papers, to calculate and ascertain the amount due, and if such papers are not present he must have a reasonable time to get them and make the calculation: Potts v. Plaisted, 30 Mich., 149, *supra*. A tender of the amount due upon a mortgage made at an unreasonable time and place, in the ab-

fuses to pay the debt upon any subsequent demand, he loses the benefit of his tender, except that security for the debt is discharged.⁶

But the tender of specific articles on the day and at the place specified for performance, as, where a note is payable in specific articles, is a satisfaction of the contract.⁷ In such case,

sence of the mortgage, may be properly declined until the mortgagee can have a reasonable time to examine the mortgage and make the necessary computations. And if the refusal to accept the tender is not absolute and unreasonable, it will not discharge the lien. *Waldron v. Murphy*, 40 Mich., 668; see, *Parks v. Allen*, 42 Mich., 482; 4 N. W., 227; *Chase v. Welsh*, 45 Mich., 345; 7 N. W., 895.

Where the discharge of a mortgage is claimed on the ground of a tender, the evidence in support of the tender should be very clear and satisfactory, and ought to place the defendant distinctly in the wrong: *Engle v. Hall*, 45 Mich., 57; 7 N. W., 239. A mortgagee, engaged in his ordinary occupation, is not bound at his peril to know at all times the exact amount owing to him on his security, and to be ready to determine forthwith, without opportunity for examination and computation, whether he will accept any particular sum that is tendered to him in satisfaction of his claim. He must have a reasonable opportunity to satisfy himself as to the amount he is entitled to receive: *Root v. Bradley*, 49 Mich., 27; 12 N. W., 896. A tender of the amount due upon a mortgage, in order to be effectual as a release of the lien, must be open, fair and reasonable, and be made at a proper time and place and to the proper person; and the refusal of such a tender must be without justifiable excuse to warrant a forfeiture of the security: *Post v. Springsted*, 49 Mich., 90; 13 N. W., 370. And it seems that a valid tender cannot be made by or on behalf of one who is neither liable for the debt nor has any interest in the mortgaged property: *Sinclair v. Learned*, 51 Mich., 335; 16 N. W., 672.

A tender regularly and lawfully made discharges a lien, and while the debt is not thereby discharged without pay-

ment, yet the security is destroyed at once. And the holder of a security upon which a party is authorized to make a tender is not concerned where, or on what terms the person tendering the money obtained it, so long as he could have got payment by accepting the tender: *Eslow v. Mitchell*, 26 Mich., 500. A lien for rent under a clause in a lease is discharged by tender in full: *Gordon v. Constructive H. Co.*, 117 Mich., 621; 76 N. W., 142. A tender by a junior incumbrancer accompanied with a demand for an assignment from his senior, of the amount of a prior lien does not operate to discharge that lien: *Schmittiel v. Moore*, 120 Mich., 199; 79 N. W., 195.

6—*Town v. Trow*, 24 Pick., 168. If, after tender and refusal to accept, the debtor deposit the money with a third person with notice to the creditor, he is not obliged to call on the depositor for the money, and if after such a deposit the creditor calls on the debtor for the money, and he does not pay or tender the sum due, the tender is unavailing. *Ibid.* If a tender is refused and the money is received back by the debtor, the tender will be of no avail: *Browning v. Crouse*, 40 Mich., 339. And the tender to a mechanic of the amount due him, and for which he has a lien on property in his possession, discharges the lien, and the property is forever after freed from the lien. And in replevin by the owner for the property it is not necessary to bring the tender into court or show that it has been kept good: *Porter v. Hodenpuy*, 9 Mich., 9.

7—*Lamb v. Lathrop*, 13 Wend., 95. Where the party to whom tender is made is non-resident a delivery of the specific goods to a warehouseman subject to the order of the non-resident, with notice to him of such action is a good tender: *Angell v. Loomis*, 97

after tender and refusal to accept, the relation of the parties is changed to that of bailor and bailee.⁸

§ 248. **Effect of notice of tender under general issue.**—A notice of tender must contain a profert in court of the money tendered.⁹ It admits a cause of action to the amount of the money tendered, which sum must be paid into court.¹⁰

The plaintiff either denies the tender or shows that suit was commenced before tender, or that on a subsequent demand of the money it was not paid.

A person making a tender must hold himself in readiness, at all reasonable times and places, to meet a demand for the money tendered, and if he fail to pay it on request, he loses the benefit of the tender,¹¹ and a new right to damages accrues from the non-payment upon the subsequent demand.¹²

Mich., 5; 55 N. W., 1008. If property received on a sale is of any appreciable value it must be tendered in order to a valid rescission: *Johnson v. Flynn*, 97 Mich., 581; 56 N. W., 939.

8—*Lamb v. Lathrop*, 13 Wend., 95. And the party making the tender will thereafter hold the articles as bailor, but at the risk and expense of the creditor: *Sheldon v. Skinner*, 4 Wend., 525; see, *Brooklyn Bank v. De Grauw*, 23 Wend., 344.

9—*Ayres v. Pease*, 12 Wend., 393.

10—*Hathaway v. O'Hara*, 14 Wend., 221; *Sheriden v. Smith*, 2 Hill, 538. And if the notice is not accompanied by payment of the money into court, the tender will not avail: *Ibid.*, and *Wilder v. Seelye*, 8 Barb., 408; *Livingston v. Harrison*, 2 E. D. Smith, 197; *Roosevelt v. New York & H. R. R. Co.*, 45 Barb., 554; *Porter v. Hodenpuy*, 9 Mich., 10. And the notice of tender should show, not only that the money was properly tendered, but that it has been kept good, that the debtor was not only ready and willing to pay at the time of tender, but that he always has been and now is ready and willing to pay: *Kortright v. Cady*, 23 Barb., 490; *Wilder v. Seelye*, 8 Barb., 408; *Roosevelt v. Bull's Head Bank*, 45 Barb., 579. Money paid into court belongs to the plaintiff, without reference to the result of the suit: *Logue v. Gillick*, 1 E. D. Smith, 398; *Wood v. Perry*, 1 Barb., 114; *Slack v. Brown*,

13 Wend., 390. It operates as a payment as far as it goes, and the plaintiff has the right to take it out of court, but the defendant has not: *Murray v. Bethune*, 1 Wend., 191. If the declaration is on the common counts, notice of tender with payment of money into court is an admission that the defendant is indebted to that amount upon some contract, but not that he is liable upon any particular contract upon which the plaintiff may choose to rely: *Kingham v. Robins*, 5 M. & W., 94; *Stapleton v. Nowell*, 6 *Ibid.*, 9; *Charles v. Branker*, 12 *Ibid.*, 743; *Archer v. English*, 1 M. & G., 873. But if the declaration is upon a special contract, notice of tender with payment, etc., is an admission of the cause of action as therein set forth, but not of the amount of damages alleged: *Johnston v. Columbian Ins. Co.*, 7 Johns., 315; *Spalding v. Vandercook*, 2 Wend., 431; *Yate v. Willan*, 2 East., 134; *Stoveld v. Brewin*, 2 B. & Ald., 116; *Wright v. Goddard*, 8 Ad. & E., 144; *Bulwer v. Horne*, 4 B. & Ad., 132.

11—*Town v. Trow*, 24 Pick., 168; *Porter v. Hodenpuy*, 9 Mich., 9. And it has been held that if after a tender, which was refused, the debtor use the money in his business or mingle it with his other funds, the tender will not be good: *Roosevelt v. B. H. Bank*, 45 Barb., 579; see, *Brooklyn Bank v. De Grauw*, 23 *Ibid.*, 345.

12—*Manny v. Harris*, 2 Johns., 31.

The demand must be by some one authorized to receive the debt and give the debtor a discharge.¹³ A letter demanding payment is not, it seems sufficient; the demand should be personal, that the defendant may have an opportunity at the time of paying the money demanded.¹⁴ But where, to a letter demanding payment, an answer was returned that the demand should be settled, it was deemed sufficient evidence to go to the jury of a subsequent demand.¹⁵ The demand must be of the exact sum specified as having been before tendered and refused.¹⁶ If the demand be made upon one of two parties liable jointly, it is sufficient.¹⁷

§ 249. Tender under the statute after suit is brought.—

“When any action at law shall be commenced, for the recovery of a sum certain, or which may be reduced to a certainty by calculation, or for a casual or involuntary trespass or injury, the defendant, in any stage of the proceedings before trial in such causes, or before such damages shall have been assessed, or before judgment rendered in an action of debt, may tender to the plaintiff, or his attorney, any sum of money which such defendant shall conceive sufficient amends for the injury done, for which such action or proceeding was instituted, or sufficient to pay the plaintiff's demand, together with the costs of such action or proceeding, to the time of making such tender.”¹⁸

“If it shall appear upon the trial of the cause, or upon the assessment of damages, that the amount so tendered was sufficient to pay the plaintiff's demand, or was sufficient amends for the injury done, and the costs of the suit or proceeding up to the time of such tender, the plaintiff shall not be entitled to recover or collect any interest on such demand from the time of such tender, or any costs incurred subsequent to that time, but shall be liable to the defendant for the costs incurred by him subsequent to such time.”¹⁹

13—*Cole v. Bell*, 1 Camp., 478, n. 1;
Anderson v. Cleland, 1 Esp., 47.

14—*Edward v. Yates*, R. & M., 360.

15—*Hayward v. Hague*, 4 Esp., 93.

16—*Spybey v. Hyde*, 1 Camp., 181;
Town v. Trow, 24 Pick., 170; *Rivers*
v. Griffiths, 5 R. & A., 630.

17—*Pierce v. Bowles*, 1 Stark R.,
323.

18—C. L., § 10405.

19—C. L., § 10406. These sections
of the statute authorize a tender only
after action commenced, and therefore
a tender made before suit must be

If the plaintiff *refuse* to accept the sum tendered, the amount tendered must be included in the amount of his recovery. The plaintiff, although he refused the sum tendered, may at any time thereafter, even on the trial, accept the sum tendered, and the defendant must pay it (allowing him a reasonable time to procure the money), or his refusal to pay will render the tender unavailing.

If the plaintiff recover an amount exceeding the sum tendered, he will recover full costs, unless the tender was accepted, when the costs will depend upon the excess.

The statute only applies to action "for the recovery of a *sum certain*, or which may be reduced to a certainty *by calculation*, or for a *casual* or *involuntary* trespass or injury." In these cases, it is incumbent on the defendant to bring his case within the terms of the statute. Therefore, in an action of trespass, the jury or the court should find that the trespass was "casual or voluntary."²⁰

USURY.

§ 250. **The statute.**—"No bond, bill, note, contract or assurance, made or given for or upon a consideration or contract,

accompanied by payment of the amount into court, or the tender will not avail as a defence: *Brown v. Ferguson*, 2 Deno, 196; see, *Johnson v. Comstock*, 6 Hill, 10.

A claim for unliquidated damages for refusing to deliver property on a contract of sale is not a proper case for a tender under these §§ 10405, 10406. But where, in a suit for such damages before a justice, the defendant made a tender which was refused and then paid over to and left with the justice, and after judgment and appeal taken, the plaintiff took the money from the justice: *Held*, that the reception of this money by plaintiff did not bar him in the circuit court from recovering such further amount as he or she appeared to be entitled to; but that the justice should not have paid the money to plaintiff after appeal without defendant's consent: *McKircher v. Curtis*, 35 Mich., 478.

A tender after suit brought can only be made under the statute, §§ 10405, 10406. This does not allow such a

tender to bar the further prosecution of the suit, but only to stop interest and costs, and to subject the plaintiff to subsequent costs if the tender is sufficient. Section 10406 contemplates that such tender may be shown on the trial: *Snyder v. Quarton*, 47 Mich., 211; 10 N. W., 204. If a full tender is made, subsequent costs must go to the defendant: *Wilcox v. L. & R. Powder Co.*, 44 Mich., 35; 5 N. W., 1091.

Where a tender has been duly made and the money paid into court, the amount of the tender should not be included in the verdict or judgment for plaintiff: *Wetherbee v. Kusterer*, 41 Mich., 359; 2 N. W., 45. As to costs where tender has been made. See, *Smith v. Curtiss*, 38 Mich., 393; *Thompson v. Townsend*, 41 Mich., 346; 1 N. W., 1042.

20—*Slack v. Brown*, 13 Wend., 390; see, *Hollister v. Brown*, 19 Mich., 163. Where tender is made after suit brought, but before service of process on defendant and before he knows that

whereby or whereon a greater rate of interest has been, directly or indirectly, reserved, taken or received, than is allowed by law, shall be thereby rendered void; but in any action brought by any person on such usurious contract or assurance, except as is provided in the following section, if it shall appear that a greater rate of interest has been, directly or indirectly, reserved, taken or received than is allowed by law, the defendant shall not be compelled to pay any interest thereon."²¹ The "following section" referred to in the above is as follows: "Whenever it shall satisfactorily appear by the admission of the defendant, or by proof that any bond, bill, note, assurance, pledge, conveyance, contract, security, or any evidence of debt has been taken or received in violation of this act, the court shall declare the interest thereon to be void."²²

"In any action brought on any bill of exchange, or promissory note payable in money, and to order or bearer, originally given or made for, or upon any usurious consideration or contract, if it shall appear that the plaintiff became, in good faith, the indorsee or holder of such bill of exchange or promissory

costs have been incurred, it is sufficient to tender the debt alone, without offering to pay costs: *Hull v. Peters*, 7 Barb., 331.

21—C. L., § 4857. This section is a part of Act 156 of the Public Acts of 1891, and by virtue of a clause in section one of that act it does not apply to existing contracts, "whether the same be either due or not due or part due." Section one of this act fixed the rate of interest at six per cent with a permissible rate of eight per cent. This section one was amended by Act 207 of the Public Acts of 1899, changing the rate to five per cent with a permissible maximum rate of seven per cent. Nothing is usury in this state that does not exceed the maximum rate allowed by the statute: *Havens v. Jones*, 45 Mich., 253; 7 N. W., 818. Any agreement for a rate in excess of the statutory rate and within the maximum rate allowed, to be valid, must be in writing: C. L., § 4856; *Nelson v. Dutton*, 51 Mich., 416; 16 N. W., 791. Interest continues to run at the same rate after as before due: *Warner v. Jull*, 38

Mich., 662. Prior to the amendment of the statute of 1891 the penalty attaching to a usurious contract was the forfeiture of the interest in excess of the highest permissible rate. Under the law as it now stands all interest is forfeited: C. L., § 4857. The defense of usury is a personal defense which can only be interposed by a party to the contract: *Farmers' & M. Bank v. Kimmel*, 1 Mich., 84; *Sellers v. Botsford*, 11 Mich., 59. A purchaser of mortgaged premises cannot insist upon a reduction of the amount of a mortgage on the lands, by the amount of usurious interest paid by his grantor for the defense is a personal one: *Gray v. H. M. Loud & Sons L. Co.*, 128 Mich., 427; 87 N. W., 376. This principle was applied in *Barney v. Tontine Surety Co.*, 131 Mich., 192; 91 N. W., 140. A general payment by the maker on a promissory note the interest on which is usurious, must be applied to reduce the principal: *Fretz v. Murray*, 118 Mich., 302; 76 N. W., 495.

22—C. L., § 4858.

note, for a valuable consideration, before the same became due, then and in such case, unless it shall further appear that the plaintiff, at the time of becoming such indorsee or holder, had actual notice that such bill or note was given for or upon a usurious consideration or contract, he shall be entitled to recover thereon, in the same manner, and to the same extent, as if such usury had not been alleged and proved."²³

§ 251. Interest upon installments of interest permitted.—
 "When any installment of interest upon any note, bond, mortgage, or other written contract, shall have become due, and the same shall remain unpaid, interest may be computed and collected on any such installment so due and unpaid, from the time at which it became due, at the same rate as specified in any such note, bond, mortgage, or other written contract, not exceeding ten per cent; and if no rate of interest be specified in such instrument, then at the rate of seven per centum per annum."²⁴

23—C. L., § 4864. As to whether this section will now apply to any bills or notes made or given since the taking effect of Act 156, Laws of 1891: *Query*. See, sections 2 and 3 of that act above quoted. Prior to the passage of that act the following decisions in this note were made: *Coatsworth v. Barr*, 11 Mich., 199.

Where a person loaning \$300 was by agreement to have a mortgage for \$412 therefor, drawing interest at ten per cent, and to avoid the appearance of usury, the lender required the borrower to execute the mortgage to a third person, who was to and did sell and assign the mortgage to the lender for \$300, which he received for the use of the borrower, it was held that the mortgage was usurious, and that only the \$300 and interest could be collected thereon by the lender of the borrower who made the mortgage: *Caruthers v. Humphrey*, 12 Mich., 270. The purchase of a mortgage from the mortgagee, where the purchaser has knowledge that the mortgagee in making the sale is acting as the agent of the mortgagors, is in effect but a loan to the mortgagors upon the mortgage, of the amount actually paid therefor by the purchasers. And the surplus,

if the mortgage is given for more than this, is usurious and void: *Smithers v. Heather*, 25 Mich., 447.

24—C. L., § 4859; see, C. L., § 4856. A mortgage given before the time when this section, § 4859, took effect (July 5, 1869), remains subject to the law regulating interest as in force at the time it was given. And the fact that a part of the money secured by the mortgage was not paid over to the mortgagor until after that act took effect, does not subject that part of the money to the payment of compound interest: *Huxford v. Eslow*, 53 Mich., 179; 18 N. W., 630; see, *Hoyle v. Page*, 41 Mich., 533; 2 N. W., 665; and *Voigt v. Beller*, 56 Mich., 140; 22 N. W., 270; *Clapp v. Galloway*, 56 Mich., 272; 22 N. W., 869; *Jones v. Shaw*, *Ibid.*, 332; 23 N. W., 33; *Rix v. Strauts*, 59 Mich., 364; 26 N. W., 638.

Interest collected on unpaid interest falling due upon a note or mortgage executed prior to this act is usurious, and may be collected back, or set off in an action brought to enforce payment of the note or mortgage: *Havens v. Jones*, 45 Mich., 253; 7 N. W., 818.

Compound interest can be collected

§ 252. Interest on contracts payable in other states, etc.—

“It shall be lawful for any person or corporation, borrowing money in this state, to make notes, bills, bonds, drafts, acceptances, mortgages, or other securities, for the payment of principal or interest, at the rates authorized by the laws of this state, payable at the place where the parties may agree, although the legal rate of interest in such place may be less than in this state; and such notes, bonds, bills, drafts, or other securities, shall not be regarded or held to be usurious, nor shall any securities taken for the same, or upon such loans, be invalidated in consequence of the rate of interest of the state, kingdom or country, where the paper is made payable, being less than in this state, nor of any usury or penal law therein.”²⁵

under the statute (C. L., § 4859) only in those cases where payments or installments of interest fall due by themselves and may be demanded separately from the principal. Where the principal and interest become due and payable all at one time, they constitute but one debt, and any demand or suit for this debt must embrace the whole, both principal and interest. In such case there is no installment or payment of interest falling due by itself and separately from the principal, therefore such interest cannot be compounded under the statute. Thus, a mortgage made payable “one year after date with annual interest at ten per cent,” means that the interest shall be computed at ten per cent per annum, and does not provide for successive installments of interest, and in that case the interest cannot be compounded: *Hoyle v. Page*, 41 Mich., 533; 2 N. W., 665. Compound interest is collectable only by virtue of this statute: *Voigt v. Beller*, 56 Mich., 141; 22 N. W., 270. Where no interest is payable until the principal is due, interest cannot be computed on interest: *Rix v. Strauts*, 59 Mich., 364; 26 N. W., 638. Computation of interest upon interest may be made up to the time when the obligation matures. Beyond that simple interest only is allowed. *McVicar v. Denison*, 81 Mich., 348; 45 N. W., 659; *Wallace v. Glaser*, 82 Mich., 191; 46 N. W., 227.

When a note is payable “with annual interest,” it means with interest payable at the end of each year: *Leonard v. Phillips*, 39 Mich., 182; *Cook v. Willes*, 42 Mich., 439; 4 N. W., 169. But if the paper is to mature in less than two years, the expression, “with interest annually,” does not call for the payment of any interest until the note is due: *Leonard v. Phillips, supra*.
25—C. L., § 4860.

Where a contract is made in another state for the payment of money to be paid there, the validity of the contract will be determined by the laws of that state; and though the contract be usurious, but is not rendered void on that account by the laws of that state, yet if suit is brought here, our courts will enforce the contract, and cannot give any of the remedies provided by the laws of the other state for usurious payments. Our courts can give no other remedies than those provided by our laws. Therefore, if on such a contract the laws of the other state provide for the recovery of the usury paid, or for its appropriation to reduce the balance of the debt, those provisions form no part of the contract, but relate solely to the remedy which will be afforded by her courts to the party from whom the usury is taken. Our courts cannot enforce those remedies in a suit here: *Collins Iron Co. v. Burkman*, 10 Mich., 283.

"No plea of usury, nor defense founded upon an allegation of usury, shall be sustained in any court in this state, nor shall any security be held invalid on an allegation of usury, where the rate of interest reserved, discounted or taken, does not exceed that allowed by the laws of this state, in consequence of such security being payable in a state, kingdom or country where such rate of interest is not allowed."²⁶

"It shall be lawful for all parties loaning money in this state, to take, reserve, or discount interest upon any note, bond, bill, draft, acceptance, or other commercial paper, mortgage, or other security, at any rate authorized by the laws of this state, whether such paper or securities, for principal or interest, be payable in this state, or in any other state, kingdom, or country, without regard to the laws of any other state, kingdom or country; and all such notes, bonds, bills, drafts, or acceptances, or other commercial paper, mortgages or other security, shall be held valid in this state, whether the parties to the same reside in this state or elsewhere."²⁷

"When any contract or loan shall be made in this state, or between citizens of this state and any other state or country, bearing interest at any rate which was or shall be lawful according to any laws of the state of Michigan, it shall and may be lawful to make the amount of principal and interest of such contract or loan payable in any other state or territory of the United States, or in England; and in all such cases, such contract or loan shall be deemed and considered as governed by the laws of the state of Michigan, and shall not be affected by the laws of the state or country where the same shall be made payable; and no contract or loan which may have heretofore been made or entered into, in this state, or between citizens of this state and of any other country, bearing interest at a rate which was legal according to the laws of this state at the time when the same was made or entered into, shall be invalidated or in anywise impaired or affected by reason of the same having been made payable in any other state or country."²⁸

26—C. L., § 4861.

27—C. L., § 4862.

28—C. L., § 4863.

DRUNKENNESS.

§ 253. Under what circumstances a defense.—Intoxication is a good defense upon plea of the general issue to a deed or to a promise.²⁹ A drunkard is not an incompetent person in the law, as is an idiot, or one generally insane. He is simply incompetent upon proof, that at the time of the act his understanding was clouded or his reason dethroned by actual intoxication.³⁰ A contract entered into by a person who is so drunk as not to know what he is doing is voidable only, and not void, and therefore may be ratified by him when he becomes sober.³¹

29—Pitt v. Smith, 3 Camp., 33-4; Fenton v. Holloway, 1 Stark., 126. The ground of invalidity seems to be, that an intoxicated person has no agreeing mind; and see, Cook v. Clayworth, 18 Ves., 15; Barrett v. Buxton, 2 Ark., 167; Burroughs v. Richmond, 1 Green N. J., 233; Prentice v. Achorn, 2 Paige, 30; Harrison v. Lemon, 3 Blackf., 21; Gore v. Gibson, 13 M. & W., 623. Partial intoxication may not be sufficient; intoxication, to avoid an agreement, must disable a man to know the consequences of his contract: Foot v. Tewksbury, 2 Vt., 97; and see, Cook v. Clayworth, 18 Ves., 16, 17. Where a note is signed by a person who, if intoxicated, was yet aware of what he was doing, and not deceived as to the identity of the paper signed, it is not void, and any defense to it must be on the ground of fraud, and not on absolute incapacity. Such a note would be valid in the hands of an honest holder for value: Miller v. Finley, 26 Mich., 249.

30—Wright v. Fisher, 65 Mich., 275; 32 N. W., 605.

31—Carpenter v. Rodgers, 61 Mich., 384; 28 N. W., 156.

But drunken persons are held for their tortious acts, even though they have no actual intention to do wrong, and even if they do not know the act done to be illegal and wrong: Prentice v. Achorn, 2 Paige, 30, 31. And, as to a criminal act, see, People v. Garbutt, 17 Mich., 19.

CHAPTER XIII.

OF SET-OFFS AND GIVING NOTICE THEREOF.

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| § 263. In case of assignment of non-negotiable claims. | § 274. Claim sounding in tort. |
| § 264. In case of assignment of negotiable claims. | § 275. When set-off barred by statute of limitations. |

§ 254. In general.—Set-off is the compensation of one debt or demand for another, by virtue of which damages are recovered by the party in whose favor a balance shall be found. Set-offs are allowed for the purpose of avoiding a multiplicity of actions, and to enable parties who have mutual cross demands, unconnected with each other, and arising upon contract, express or implied, which are liquidated or capable of being ascertained by calculation, and not resting in opinion only, to have the whole adjudicated in one action.¹

1—Ward v. Fellers, 3 Mich., 285-6. The right of set-off at law is given and limited by statute. The common law never recognized it. Unless a case is positively embraced within the specifications of the statute, the remedy is denied and the claim will remain to be separately enforced as though there was no such statute: Woods v. Ayres, 39 Mich., 348. Where a claim is a proper subject of set-off it may be so used or it may be sued upon separately: McEwen v. Bigelow, 40 Mich., 215; Hunton v. Russell, 41 Mich., 316; 2 N. W., 38; Mitchell v. Wells, 54 Mich., 130; 19 N. W., 777. But see, C. L., § 781, providing that where it is not used by way of set-off when it might be, that no costs can be recovered in an action upon it; see, also, The Seventh Day A. Pub. Assn. v. Fisher, 95 Mich., 274; 54 N. W., 759. In an action by an administrator, defendant cannot set off a claim which he has failed to present to the commissioners on claims: Quinn v. Mc-

§ 255. **Notice under the general issue is required.**—"To entitle a defendant to a set-off he must give notice of the same, specifying the nature of his claim, with reasonable certainty at the time of joining issue on a question of fact upon the merits of the cause."²

§ 256. **Must arise on judgment or contract.**—"In the following cases, and under the following circumstances, a defendant may set off demands which he has against the plaintiff: 1. It must be a demand arising upon judgment or upon contract, express or implied, whether such contract be written or unwritten, sealed or without seal; and if it be founded upon a bond or other instrument having a condition, the sum equitably due by virtue of its condition only, shall be set off;"³

If the demand to be set off be a judgment, it is immaterial upon what cause of action it was recovered, whether contract or tort, or for costs merely.⁴ A judgment rendered before a justice of the peace is the subject of set-off as much as a judg-

Govern, 97 Mich., 114; 56 N. W., 226; Benjamin v. Early, 123 Mich., 93; 81 N. W., 973. This is not true where there has never been appointed a commission on claims: Boltwood v. Miller, 112 Mich., 657; 71 N. W., 506. The object of the statute is to save the expense of litigation in cross actions, and does not exist in cases where the defendant could not bring an action at law to recover the demand sought to be set off, from the plaintiff: Gardiner v. Fargo, 58 Mich., 72; 24 N. W., 655-7. The purpose of set-off is, to set up by way of counter claim, and to obtain allowance in one action for, such independent causes of action as would be capable of being sued upon directly against the plaintiff: Brennan v. Tietzort, 49 Mich., 397; 13 N. W., 790. A claim cannot be the subject of set-off under the general statute which is not liquidated. Smith v. Warner, 14 Mich., 152; Holland v. Rea, 48 Mich., 218; 12 N. W., 167; Morehouse v. Baker, 48 Mich., 335; 12 N. W., 170. A claim is said to be liquidated when some specific amount, or some specific data from

which such amount can be calculated by an ordinary mathematical process, shall have been arrived at: Smith v. Warner, 14 Mich., 157.

2—C. L., § 777. Where a plea is accompanied by a sworn statement of set-off it cannot be objected that there is no notice of it: Kinney v. Robison, 52 Mich., 389; 18 N. W., 120. A notice of set-off may be as broad as a declaration on the common counts: Ferguson v. Milliken, 42 Mich., 441; 4 N. W., 185. A plea *puis darrein continuance* supersedes a previous plea of the general issue and notice of set-off: Whittemore v. Stephens, 48 Mich., 573; 12 N. W., 858. The notice of set-off may be amended in the discretion of the court: Rawlings v. Fisher, 110 Mich., 19; 67 N. W., 977.

3—C. L., § 776. It does not necessarily follow because *assumpsit* might lie upon a claim that it is proper matter for set-off: Wood v. Ayres, 39 Mich., 345.

4—Edw. Treatise, 59; 2 Cow. Treat., 2d ed., 735; Barbour's Law of Set-off, 38; and see, Sherman v. Ballou, 8 Cow., 304.

ment of a court of record,⁵ unless it be a judgment rendered by a justice in a suit commenced by attachment, in which the defendant was not personally served with the process, and did not appear.⁶ If the defendant in execution escape, the judgment may be set off.⁷

The right of set-off, founded upon a bond, is not confined to cases where the condition is for the payment of money only. In an action of debt brought for the penalty of a bond conditioned for the performance of the award of arbitrators, one of the breaches assigned was, that the defendant did not pay a certain sum awarded to the plaintiff. It was held that a set-off was admissible.⁸ So, where the bond was conditioned for the performance of a certain work within a certain time, and on failure to perform it, for the payment of a weekly sum thereafter, until the work was finished. The work not being completed within the stipulated time, a certain sum became forfeited, according to the provisions of the bond, which sum was allowed to be a good set-off.⁹ So, a set-off may be made to an action on bond, the condition of which is for the payment of an annuity.¹⁰

§ 257. Must be due defendant in his own right.—“2. It must be due to him in his own right, either as being the original creditor or payee, or as being the assignee or owner of the bond;”¹¹

5—Ewen v. Terry, 8 Cow., 126. But a justice's judgment from which an appeals has been taken, and which is then pending and undetermined, cannot be used by way of set-off. But the appeal will not of itself be a bar to a new action on the judgment: Willard v. Fox, 18 Johns., 497.

6—People v. The Judges, etc., 6 Cow., 598. This was on the ground that such a judgment was merely *prima facie*, and not conclusive, evidence of the debt.

Where a judgment rendered on a suit commenced by attachment is offered as a set-off, it will not be allowed if it appear that property was taken on the attachment, and is then in the custody of the officer, since the presumption will be that the judgment was satisfied by the goods taken: Miller v. Starks, 13 Johns., 517.

7—McGuinty v. Herrick, 5 Wend., 240. If the defendant escape, the plaintiff is remitted to his former rights, the imprisonment is no longer a satisfaction: *Ibid.* If a defendant is taken on execution issued on a judgment against him, this will bar a set-off of the judgment so long as the imprisonment continues: Bank of Beloit v. Beagle, 20 How., 331; Cooper v. Bigalow, 1 Cow., 56.

8—Burgess v. Tucker, 5 Johns., 105.

9—Fletcher v. Dyche, 2 Term., 32.

10—Collins v. Collins, 2 Bur., 820. The sum due on a bond may be set off against any demand recoverable under the common counts, or for which *indebitatus assumpsit* will lie: Downer v. Eggleston, 15 Wend., 51; Tuttle v. Bebee, 8 Johns., 153.

11—C. L., § 776. McGraw v. Pettibone, 10 Mich., 537. A debt due to

Therefore, in an action against a man for his own debt, he cannot set off a demand due to him in right of his wife.¹²

A debt due to the defendant as a surviving partner, or surviving joint creditor, may be set off against a demand on him in his own right.¹³

The defendant may set off, not only a demand, which is a proper matter of set-off, originally due to him from the plaintiff, but also any such demand, whether negotiable or not, originally due from the plaintiff to a third person, and by that person assigned to the defendant.¹⁴

It is not competent for a defendant to purchase a judgment conditionally for the purpose of setting it off. He must become the absolute proprietor for that purpose.¹⁵ But it is not necessary that the consideration of the assignment should have been actually paid to render it a legal set-off.¹⁶

The assignment may be by writing, without seal; and it would seem that a verbal assignment is sufficient.¹⁷

§ 258. Must be demand for property sold, etc., or it must be liquidated.—"3. It must be a demand for real estate sold, or for personal property sold, or for money paid, or services done, or if it be not such a demand, the amount must be

a person in his individual capacity cannot be set off against a debt due from him as a trustee: *First N. Bank of Detroit v. E. T. Barnum, etc.*, 58 Mich., 124; 24 N. W., 543.

12—Bull., N. P., 179.

13—*Newberry v. Trowbridge*, 13 Mich., 275, 276. But a joint debt cannot be set off against a separate demand, nor a separate debt against a joint one: *Barb. on Set-off*, 56 Grant v. Royal Exch. Assur. Co., 5 Maul & S., 439; *Detroit, H. & S. W. Ry. Co. v. Smith*, 50 Mich., 113; 15 N. W., 39; *Keystone Mfg. Co. v. Forsyth*, 115 Mich., 51; 72 N. W., 1109. Unless it be so agreed between the parties: *Kinnerly v. Hossack*, 2 Taunt., 170. A debt from the plaintiff as surviving debtor to defendant, may be set off against a debt due from the defendant to the plaintiff in his own right: *French v. Andrade*, 6 Term., 582.

14—*Edw. Treat.*, 59: Thus, he may set off a bond executed by the plain-

tiff: *Tuttle v. Bebee*, 8 Johns., 152; or a judgment: *Ford v. Stuart*, 19 Johns., 342; or an account against him: *Martin v. Williams*, 17 Johns., 330; which has been duly assigned to the defendant in his own right. But there can be no set-off between claims where the debtor on one side is not the creditor on the other side, nominally or really: *Hendricks v. Toole*, 29 Mich., 340. The defendant must be the real owner of the counter-claim with the right to control it: *McGraw v. Pettibone*, 10 Mich., 537; *Dunlap v. J. P. Donaldson Co.*, 74 Mich., 290; 41 N. W., 927.

15—*Miller v. Gilman*, 7 Cow., 469; *Satterlee v. Ten Eyck*, 7 *Ibid.*, 480.

16—*Everet v. Strong*, 5 Hill, 163; *Everit v. Strong*, 7 Hill, 585.

17—*Prescott v. Hull*, 17 Johns., 284; *Ford v. Stuart*, 19 *Ibid.*, 342; *Runyan v. Mersereau*, 11 *Ibid.*, 538; *Littlefield v. Storey*, 3 *Ibid.*, 425; *Dawson, v. Coles*, 16 *Ibid.*, 51.

liquidated, or be capable of being ascertained by calculation." ¹⁸

Under the first clause of this subdivision, a demand to be set off must be for real estate sold, or for personal property sold, or for money paid, or services done. The demand under this clause, in order to be set off, must be such for which an action of *indebitatus assumpsit* may be sustained at common law; and such demand may be set off, although the amount thereof is unliquidated or not ascertained by the parties, but depends upon proof.¹⁹ Any other demand arising on contract may be set off, if the amount be liquidated, that is, ascertained by the agreement or settlement of the parties, or if the amount be capable of being ascertained by calculation merely, as a bill of exchange, or a promissory note for the payment of money, or a written contract for a sum certain, though payable in specific articles, or a written contract for specific articles, at a value or price stipulated in the contract.²⁰

§ 259. Demand must be due.—"4. It must have existed at the time of the commencement of the suit, and must then have belonged to the defendant;" ²¹

18—C. L., § 776. A defendant may recover by way of set-off for moneys previously paid by him to the plaintiff for liquors, and which moneys, according to the law then in force, were paid without consideration: *Webber v. Howe*, 36 Mich., 150; 3 Mich., 340.

19—Edw. Treat., 2d ed., 59; 2 Cow. Treat., 2d ed., 736, 737; and see, *Velle v. Myers*, 14 Johns., 165; *Shepard v. Little*, 14 Johns., 210; *Bowen v. Bell*, 20 *Ibid.*, 338.

20—Barb. Set-off, 78; 2 Cow. Tr., 736, 737; *Smith v. Warner*, 14 Mich., 156; and as to what are liquidated demands, see, *ante*, § 69, note 1; *Smith v. Warner*, 14 Mich., 157; *Butts v. Collins*, 13 Wend., 139, 156, 157; *Downer v. Eggleston*, 15 Wend., 51-63. That the set-off under the second provision must be a liquidated demand: See, *Ward v. Fellers*, 3 Mich., 285; *Smith v. Warner*, 14 Mich., 152; *Ibid.*, 16 Mich., 390; *Mitchell v. Shuert*, 16 Mich., 444. A claim which is neither liquidated nor capable of being ascertained by calculation, but

the amount of which would have to be determined from the conflicting opinion of witnesses, is not a proper subject of set-off unless within the description found in the first clause of this section: *Carter v. Joseph*, 48 Mich., 615; 12 N. W., 876. Unliquidated damages sounding in tort cannot be applied by way of set-off: *Brazee v. Bryant*, 15 N. W., 49; 50 Mich., 136. Nor is set-off admissible in an action brought for the recovery of unliquidated damages for the breach of a special agreement: *Holland v. Rea*, 48 Mich., 218; 12 N. W., 167; *Morehouse v. Baker*, 48 Mich., 339; 12 N. W., 170; see, *Howell v. Medler*, 41 Mich., 641. Money had and received may be set-off: *Hall v. Kinner*, 61 Mich., 269; 28 N. W., 96. So a claim for services: *Dustin v. Radford*, 57 Mich., 163; 23 N. W., 715; so a claim for money paid without consideration: *Webber v. Howe*, 36 Mich., 156; *Bronson v. Herbert*, 95 Mich., 479; 55 N. W., 359.

21—C. L., 776.

That is, the demand must be due at the time of the commencement of the suit,²² and must *at that time* be the property of the defendant.²³

§ 260. **Plaintiff's demand must be such as could be subject of set-off.**—"5. It can be allowed only in actions founded on demands which could themselves be the subject of set-off according to law;"²⁴

A demand for uncertain or unliquidated damages cannot be set off and by this subdivision, in an action for the recovery of such a demand, no set-off of any demand can be made.²⁵

22—*Braithwaite v. Colman*, 4 Nev. & Man. 654. Strictly speaking, there is no right of set-off until suit is begun in which it may be pleaded. The right accrues with the commencement of the action: *Kinney v. Taylor*, 62 Mich., 571; 29 N. W., 86, 512. A demand note is due at once without demand as between the bank and its depositor and a proper matter of set-off: *Citizens' Savings Bank v. Vaughan*, 115 Mich., 156; 73 N. W., 143. As to the rule in equity where the cross demands are a part of the same general transaction, as between a bank and its depositor who is also a borrower of the bank, see, *Thompson v. Union Trust Co.*, 130 Mich., 508; 90 N. W., 204, and cases cited in the opinion. The holding here is that the deposits may be set off against the notes of the depositor held by the bank though not due at time insolvency of bank occurs.

23—See, *Smith v. Warner*, 16 Mich., 390, 398; *Jefferson County Bank v. Chapman*, 19 Johns., 322. If a demand is purchased by defendant on condition that it is to be his if allowed as a set-off, but otherwise not, there is no such change of title as to render it available as a set-off: *Miller v. Gillman*, 7 Cow., 469; *Smith v. Warner*, 16 Mich., 398. Where the defendant offers to set-off a demand that has been assigned to him, he must prove affirmatively that it was assigned before suit commenced: *Heidenheimer v. Wilson*, 31 Barb., 636; see, *Jefferson County Bank v. Chapman*, 19 Johns., 322. But it seems that where the assignment is in writing, and

bears date prior to the commencement of suit, that is *prima facie* evidence of an assignment before suit: *Bell v. Davis*, 8 Barb., 210. If the demand belonged to all the defendants jointly at the time of commencement of suit, it is no objection to it as a set-off that one of the defendants derived his title by assignment from his co-defendant: *Bell v. Davis*, 8 Barb., 210. To make a set-off available, it must be due, and defendant's right to sue for it must be complete at the time when plaintiff's action was commenced. Therefore, if any demand of payment was necessary before defendant could sue on the claim offered as a set-off, such demand must have been made before plaintiff's suit was commenced, otherwise the set-off cannot be allowed: *Kingston Bank v. Gay*, 19 Barb., 459; *Routen v. Dry Dock Co.*, 4 E. D. Smith, 420. A debtor of an insolvent bank cannot, after the insolvency and before the appointment of a receiver, buy up claims and set them off in an action by the receiver: *Stone v. Dodge*, 96 Mich., 514; 56 N. W., 75.

24—C. L., § 776. The statute permits set-offs only where the claim sued upon would itself be the proper subject of a set-off: *Smith v. Warner*, 14 Mich., 156; *Bradley v. Thompson Smith's Sons*, 98 Mich., 455; 57 N. W., 576. Nothing can be set off unless it could be sued upon, and on the other hand, any claim coming within the statute can be set-off if it could be sued: *Wallace v. Finnigan*, 14 Mich., 171.

25—*Hepburn v. Hoag*, 6 Cow., 613. Thus, where an action is brought for

§ 261. If several defendants, demand must be due to all.—
 “6. If there be several defendants, the demand set off must be due to all of them jointly, unless the defendant shall prove an agreement of the plaintiff or plaintiffs that the demand proposed to be set off should apply as payment upon his or their claim;”²⁶

An agreement that such a demand might be set off would be within this section.²⁷ When the plaintiff owes a debt to several persons jointly, one of whom owes him, the latter may acquire the right of set-off against the plaintiff by taking an assignment to himself alone, of the debt due from the plaintiff, before the commencement of plaintiff's suit.²⁸

the recovery of unliquidated damages for the breach of a special contract, as for a breach of warranty in the sale of goods, no set-off is allowable: *Wilmot v. Hurd*, 11 Wend., 584. The right of set-off does not depend on the form of plaintiff's action, provided it is in form *ex contractu* but on the nature of the demand sued upon. Therefore, where the plaintiff might recover under the common counts, he cannot, by declaring specially, deprive the defendant of his right of set-off: *Downer v. Eggleston*, 15 Wend., 58; *Burgess v. Tucker*, 5 Johns., 105; *Smith v. Warner*, 16 Mich., 396. Nor it seems can a plaintiff deprive a defendant of the right of set-off by bringing his action in tort, as in trover for money not returned after demand: *Pierce v. Underwood*, 103 Mich., 62; 61 N. W., 344. But see, *Pinch v. Willard*, 108 Mich., 204; 66 N. W., 42, where, in a replevin action, the general doctrine is stated that “set-off is a creature of the statute, and it has never been authorized in actions of tort.” And where, in a special count upon a breach of contract, the plaintiff claims unliquidated damages, and in the same declaration adds the common counts upon demands which might themselves be the subject of set-off, the defendant may avail himself of a set-off to those demands declared upon in the common counts. And where the plaintiff, by a special count, joins an unfounded claim for unliquidated damages, in the same suit with other claims that

are the subject of set-off, the legal inference is, that the plaintiff's action is founded, not on the baseless demand that was asserted, but rather upon the others that were not only asserted, but proved: *Smith v. Warner*, 16 Mich., 390.

26—C. L., § 776. Joint defendants can set-off only such demands as are due to all of them: *Robbins v. Brooks*, 42 Mich., 62; 3 N. W., 256; *Van Middlesworth v. Van Middlesworth*, 32 Mich., 183. And so with partners: *Sager v. Tupper*, 38 Mich., 258; *Randall v. Baird*, 66 Mich., 312; 33 N. W., 506; *Kinney v. Robison*, 52 Mich., 389; 18 N. W., 120. A joint and several note may be set-off against a claim by one of the makers: *Ferguson v. Millikin*, 42 Mich., 441; 4 N. W., 185. See, *post*, § 262, note 30.

27—*Kinnersly v. Hossack*, 2 Taunt., 170.

28—*Martin v. Williams*, 17 Johns., 330; see, *Wolf v. Washburn*, 6 Cow., 261; *Bell v. Davis*, 8 Barb., 210. A debt due to one of two joint makers of a note, cannot be set-off against the note: *Mott v. Burnett*, 2 E. D. Smith, 50. And in an action by an individual against a firm, a debt due from the plaintiff to one of the firm cannot be set-off against the plaintiff's debt which is due from the members of the firm: *Pinckney v. Kuyler*, 4 E. D. Smith, 469; *Warner v. Barker*, 3 Wend., 400. Nor can a debt due to the defendant jointly with another be set-off, for a joint debt cannot be set-off against an individual one:

§ 262. **Against whom must be due.**—"7. It must be a demand existing against the plaintiff in the action, unless the suit be brought in the name of a plaintiff who has no real interest in the contract upon which the suit is founded; in which case, no set-off of a demand against the plaintiff shall be allowed, unless as hereinafter specified;"²⁹

In general, a debt owing by one of several partners cannot be set off against a partnership demand.³⁰ But it seems that demands against individual partners may be set off against demands of the firm, if the course of dealing of the firm, in receiving such demands in payment, is *uniform* and *so notorious*, that persons dealing with the firm must be supposed to have had reference to it in their transactions with them.³¹

A debt due to a defendant, as a surviving partner, may be set off against a demand on him by the plaintiff in his own right.³² So, a debt due from one who was the only apparent trader may be set off in an action by himself and partners.³³

§ 263. **In case of assignment of claims other than negotiable instruments.**—"8. If the action be founded upon contract (other than a negotiable promissory note or bill of exchange) which has been assigned by the plaintiff, a demand existing against such plaintiff, or any assignee of such contract, at the time of the assignment thereof, and belonging to the defendant in good faith before notice of such assignment,

Campbell v. Grant, 2 Hilt., 291; Wolf v. Jasspon, 126 Mich., 11; 85 N. W., 260; Rumney v. Detroit & M. C. Co., 129 Mich., 644; 89 N. W., 573. The general rule is, that to authorize a set-off the debts must be mutual and due to and from the same persons in the same capacity: Dudley v. Griswold, 2 Blackf., 24; and see, Ladue v. Hart, 4 Wend., 583; Wasson v. Gould, 3 Blackf., 18.

29—C. L., § 776.

30—Ladue v. Hart, 4 Wend., 583; see, Beebe v. Bull, 12 Wend., 504. Nor a partnership debt against an individual debt due to one of the members of the firm, although the notes and accounts of the firm have been transferred to such partner, and he has undertaken to pay the firm debts: Sears v. Patrick, 23 Wend., 528. A demand due to one partner cannot be set-off against a claim

against all the partners jointly: Sager v. Tupper, 38 Mich., 258, 265. A claim against only one of several plaintiffs cannot be set off against a demand sued on by all. Elfield v. Edwards, 39 Mich., 264. A joint indebtedness cannot be set off in a suit brought by only one of the debtors: Detroit H. & S. W. Ry. Co. v. Smith, 50 Mich., 112; 15 N. W., 39.

31—Everingham v. Ensworth, 7 Wend., 226.

32—Slipper v. Stidstone, 5 Term. R., 493. And conversely, a debt due from the plaintiff as surviving partner, may be set off against a debt due from the plaintiff to the defendant in his own right: French v. Androde, 6 Term. R., 52; Meader v. Scott, 4 Vt., 26.

33—Stracey v. Deey, 7 Term. R., 361; Lord v. Baldwin, 6 Pick., 348.

may be set off to the amount of the plaintiff's debt, if the demand be such as might have been set off against such plaintiff or such assignee while the contract belonged to him;"³⁴

The section authorizes a defendant in an action founded upon a contract other than negotiable paper, which has been assigned to a third person, to set off a demand belonging to him in good faith, *before notice of the assignment*; but it must be a demand *which was in existence against the plaintiff at the time he made the assignment*. A debt accruing subsequently is impliedly excluded; the legislature undoubtedly believing, in such case, that the equity of the assignee was the strongest, *even in the absence of notice to the defendant*. The distinction is new, and the reason for it not obvious, where the defendant has purchased the demand with the view to apply it in satisfaction of a demand held against him; the time when it accrued does not seem at all important in balancing the equities of the parties. The fault lies rather with the *assignee*, in not giving previous notice of the assignment, thereby leaving the defendant to believe the plaintiff to be still the owner of the demand. The language of the statute, however, is explicit, and the rule imperative upon the courts.

34—C. L., § 776. An assigned demand cannot be off-set by a demand not yet due at the time of the assignment: *Kull v. Thompson*, 38 Mich., 685. Where a debtor contracts with his creditor to perform certain labor, and before entering upon the work, assigns the contract to persons who have guaranteed its performance, the creditor cannot set off, in a suit by the assignees, his demand against the debtor due when the assignment was made. This because the assigned claim while owned by the assignor was itself not the subject of set-off, not being due. See, § 776, subdivision 5; *Bradley v. Thompson Smith's Sons*, 98 Mich., 449; 57 N. W., 576. In an action on an account by one holding a naked assignment of it, charges existing against the assignor at the time of the assignment are available to the defendant to the amount of the debt assigned only, and judgment against the plaintiff for the excess is unauthorized: *Pabst Brew-*

ing Co. v. Lueders, 107 Mich., 41; 64 N. W., 872.

Where the plaintiff has purchased a claim which was due at the time of the purchase and assignment thereof to him, and brings suit thereon, the defendant may set off any claim which is a proper subject of set-off under the statute, which he held against the original creditor at the time of the assignment to plaintiff, and also any claim against the original creditor which the defendant had purchased and became the owner of, in good faith, before he had notice of the assignment to plaintiff; and the defendant may do this even though he purchased such claim against the original creditor after the assignment to plaintiff, provided the defendant purchased in good faith, and without notice of the assignment to the plaintiff. The statute makes the demands a proper set-off if they belonged to the defendant in good faith before notice of the assignment. And it is no

A promise by a maker of a note not negotiable, made to the assignee of it to pay it, would preclude him from setting off a demand against the payee, which arose before the giving of the note, for it is to be presumed from his giving the note, and his promise to pay it, that such set-off had been paid or satisfied, especially in the absence of all explanation.¹

Where suit is brought on a demand by the assignee of the original creditor, and the defendant has a larger demand against the assignor, which is of a character to entitle it to be set off against the demand sued on, such set-off can only be made to the amount of the plaintiff's debt, but no judgment for a balance can be rendered against the plaintiff. The justice in such a case may render judgment generally for the defendant for the costs of his defense; but what remedy the defendant has under such circumstances to recover the balance due to him over the plaintiff's claim, is not very apparent. None is provided by statute.²

§ 264. In case of assignment of negotiable instruments.—

"9. If the action be upon a negotiable promissory note or bill of exchange which has been assigned to the plaintiff after it became due, a set-off to the amount of the plaintiff's debt may be made of a demand existing against any person or persons who shall have assigned or transferred such note or bill after it became due, if the amount be such as might have been set off against the assignor while the note or bill belonged to him."³

Though a note be transferred after it becomes due, the maker is not entitled to set off a demand against the payee, if, at the time of the transfer, the payee has other demands against the maker to an amount sufficient to exhaust the demands sought to be set off.⁴ Where the maker of two notes has a demand

objection that the defendant purchased the demands for the purpose of using them as a set-off, and at a great discount, or for a mere nominal sum. All that the statute requires is, that the demands shall be actually, and not merely colorably, owned by the defendant. The amount paid for them is immaterial: *Smith v. Warner*, 16 Mich., 390, 397, 398; and see, C. L., § 10054. An assignee of a judgment takes it subject to any matters of set-

off existing in favor of the judgment debtor against the assignor up to such time as such debtor has notice of the assignment: *Finn v. Corbitt*, 36 Mich., 318.

1—*Gould v. Chase*, 16 Johns., 226.

2—*Kost v. Cathern*, 3 Denio, 344. See, *Pabst Brewing Co. v. Lueders*, 107 Mich., 41; 64 N. W., 872.

3—C. L., § 776.

4—*Collins v. Allen*, 12 Wend., 356.

against the payee sufficient to extinguish one of them, and the payee transfers one of them after its maturity, the other being sufficient to meet the demand of the maker, and subsequently the second note is transferred also after its maturity, the holder of the note first transferred would be entitled to recover the whole amount of it; as the one to whom the first note was transferred would have the greater equity.⁵

Where a note is transferred *bona fide* for a valuable consideration before it becomes due, no set-off can be allowed of demands against any but the plaintiff. Such a case is not within the statute.⁶ Where the plaintiff buys a negotiable note after it becomes due, he should give immediate notice of the transfer to the maker, as the maker would be entitled to set off any demands he might acquire thereafter against the payee without notice of the transfer.⁷

§ 265. In case of trust relations.—“10. If the plaintiff be a trustee for any other, or if the suit be in the name of a plaintiff who has no real interest in the contract upon which the suit is founded, so much of a demand existing against those whom the plaintiff represents, or for whose benefit the action is brought, may be set off as will satisfy the plaintiff's debt, if the same might have been set off in action brought by those beneficially interested;”⁸

Where a note is transferred for the purpose of depriving the defendant of his set-off, the case would come within the above provision. The plaintiff is to be deemed, so far as the equitable defense of the maker of the note is concerned, a trustee; as to him the transfer or indorsement is void, on the ground of fraud, and the note is to be deemed the property of the payee.⁹

In an action on such note, the maker would be bound to

5—Collins v. Allen, 12 Wend., 356.

6—Smith v. Van Loan, 16 Wend., 659. But where a person purchased a note after maturity, he takes it subject to any set-off which the maker held against the original payee: *Ibid.*

7—2 Cow. Treat., 2d ed., 742; but see, *contra*, Manhattan Co. v. Reynolds, 2 Hill, 140.

It is said that a general assignee for the benefit of creditors is not such a *bona fide* purchaser as to be entitled

to refuse a just-set-off; he is regarded as the representative of the assignor, and any demand available as a set-off against the assignor before assignment, will be equally available against his assignee: Maas v. Goodman, 2 Hilt., 175; and see, Griffin v. Marquardt, 3 E. D. Smith, 28; also, Berry v. Brett, 6 Bosw., 627.

8—C. L., § 776.

9—Savage v. Davis, 7 Wend., 223.

prove the fraudulent transfer, or he will not be allowed to prove his set-off. The same rule would apply when the note is transferred after it becomes due.¹⁰

§ 266. In case of actions against principal and surety.—

“11. In actions upon a note or other contract against several defendants, any one of whom is principal, and the others sureties therein, any claim upon contract in favor of the principal defendant, and against the plaintiff, or any former holder of the note or other contract, may be allowed as a set-off by the principal or any other defendant.”¹¹

§ 267. Judgment in cases of set-off.—“If the amount of set-off duly established be equal to the plaintiff's debt, judgment shall be entered for the defendant, with costs; if it be less than the plaintiff's debt, the plaintiff shall have judgment for the residue only, with costs; if it be more than the plaintiff's debt, and the balance found due to the defendant from the plaintiff in the action be three hundred dollars or under, judgment shall be rendered for the defendant for the amount thereof, with costs; and execution shall be awarded as upon a judgment in a suit brought by him; but no such judgment shall be rendered against the plaintiff when the contract which is the subject of suit shall have been assigned before the commencement of such suit, nor for any balance due from any other person than the plaintiff in the action.”¹²

It is not necessary, to entitle a defendant to a judgment for the amount of his set-off proved on the trial, that there should be something proved and allowed to the plaintiff.¹³

“If the balance found due to the defendant exceed three

10—Hendricks v. Judah, 1 Johns., 319.

11—C. L., § 776. See, Locke v. Smith, 10 Johns., 250; Newell v. Salmons, 22 Barb., 647. A joint and several note may be set-off against the claim of one of the makers: Ferguson v. Millikin, 42 Mich., 441; 4 N. W., 185; see, Detroit, H. & S. W. Ry. Co. v. Smith, 50 Mich., 113; 15 N. W., 39.

12—C. L., § 778. Merchants' Bank v. Schulenberg, 54 Mich., 51; 19 N. W., 741. A cross action has always been allowed both at common law

and under the statute in cases where recoupment may be proper; and where the defendant refuses to recoup and brings his action, he may do so and will be allowed his costs if he prevails: Minnaugh v. Partlin, 67 Mich., 391; 34 N. W., 717. But if defendant fails to set-off a claim when he has an opportunity, he will not thereafter be allowed costs in suits to recover the same: *Ibid.*

13—Greenleaf v. Low, 4 Denio, 168. But if the plaintiff does not appear at the trial and proceed with it, the justice must render a judgment of

hundred dollars, the justice shall set off so much of the defendant's demand against the plaintiff's debt as shall be sufficient to satisfy it, if requested to do so by the defendant, and shall render judgment for the defendant for his costs; but if the defendant shall not require such set-off, the justice shall render judgment of discontinuance against the plaintiff, with costs to the defendant; and the defendant may thereafter sue for and recover his demand in any court having cognizance thereof."¹⁴

§ 268. Judgment in case of set-off against executor, etc.—
 "Whenever a set-off is established in a suit brought by executors or administrators, and the defendant shall be entitled to judgment, such judgment shall be rendered against the plaintiffs in their representative character, and shall be evidence of debt established to be paid in the course of administration, but no execution shall issue thereon."¹⁵

§ 269. Neglect to set off a demand, effect of.—"If defendant neglect to set off any demand which, according to the preceding provisions, might have been allowed to him on the trial of the cause, he shall be forever thereafter precluded from recovering costs in any action brought to recover such demand, or any part thereof, which might have been set off; and if the demand which might have been set off consisted of a negotiable promissory note or bill of exchange, no person who shall derive title thereto, after the amount thereof might have been set off as aforesaid, shall recover costs in any action thereon."¹⁶

non-suit, and a judgment in favor of the defendant, for a set-off would in such a case be erroneous: *Green v. Angell*, 13 Johns., 469. But see, *post*, § 273.

14—C. L., § 779. On an appeal from a judgment rendered under this section, the circuit court can render no other or different judgment than could have been rendered by the justice: *Cross v. Eaton*, 48 Mich., 184; 12 N. W., 35; *Mimnaugh v. Partlin*, 67 Mich., 391; 34 N. W., 717.

15—C. L., § 780. In such a case the defendant cannot set off a note of the deceased purchased by the defendant after the death of the deceased:

Root v. Taylor, 20 Johns., 137. An executor can maintain a suit in his own name, or as executor upon a note given to him as executor, for a debt due to the testator at the time of his decease. But if the executor bring an action in his own name, the defendant cannot set-off a demand which existed against the testator at the time of his decease: *Merritt v. Seaman*, 6 N. Y., 168.

16—C. L., § 781. *Huntoon v. Russell*, 41 Mich., 316; 2 N. W., 38. A defendant may, however, withhold his claim of set-off to be litigated in another suit: *McEwen v. Bigelow*, 40 Mich., 215. But a tender of the dif-

§ 270. **Notice of set-off, when may be given.**—Notice of set-off must be given at the time of joining issue, and it cannot be given afterwards.¹⁷ It can be given only when the plea involves "a question of fact upon the merits of the cause;" not where there is a demurrer or a plea in abatement.¹⁸

§ 271. **Form and substance of the notice.**—Unless objected to, a notice in almost any form will answer. Where the defendant stated that he pleaded the general issue, and gave notice of set-off, and claimed a balance of fifty dollars, it was held sufficient, unless the plaintiff objected to its form, and required a specification of the nature of the defendant's claim, and that the plaintiff could not on the trial object to evidence of the set-off, on account of the defective notice.¹⁹

If the notice is defective for want of certainty, the plaintiff, at the time, must object on that account, or require a specification of the set-off.²⁰

The notice need not claim a balance in favor of the defendant.²¹ The defendant is not bound to be as formal as in a bill of particulars, but he may be required to specify the nature of his claim with reasonable certainty; it must be so specific that the plaintiff shall not be surprised upon the trial by any demand not embraced in the notice.²² It is enough if a claim offered in evidence on the trial as a set-off, is included within the notice of set-off given at the joining of issue.²³ See bill of particulars, *post*, Chapter XVI.

ference between the defendant's set-off and the plaintiff's claim will bar the latter of costs subsequent to the tender: *Smith v. Curtiss*, 38 Mich., 393; *Morehouse v. Baker*, 48 Mich., 338-9; 12 N. W., 170; *Mimnaugh v. Partlin*, 67 Mich., 391, 393; 34 N. W., 717.

17—*Waring v. Lockwood*, 10 Johns., 108; *Sellick v. Fox*, 12 *Ibid.*, 205; see, *ante*, § 255. No formal notice of set-off is required in cases heard before commissioners on claims in probate proceedings or on appeal from their decision unless ordered by the court: *Westra v. Estate of Westra*, 101 Mich., 526; 60 N. W., 55.

18—See, *post*, "Amending pleas," § 577.

19—*Civil v. Wright*, 13 Wend., 403.

20—*Bell v. Davis*, 8 Barb., 210; see, *Wiggins v. Gans*, 3 Sandf., 38.

21—*People v. The Judges, etc.*, 4 Cow., 21.

22—*Harrington v. Ensign*, 11 Wend., 554.

23—*Bell v. Davis*, 8 Barb., 210. A notice of set-off as broad as the common money counts in assumpsit will, if no bill of particulars is called for, cover anything that could be proved as a demand under such counts: *Ferguson v. Millikin*, 42 Mich., 441; 4 N. W., 185. A defense of set-off must be clearly proved before it can be allowed. It should be substantiated by the same evidence that would be required were the defendant suing on the demand as plaintiff in the action: *Prentiss v. Sprague*, 1 Hilt., 428.

§ 272. **Effect of plea puis darrein continuance.**—A plea *puis darrein continuance* supersedes a previous plea of the general issue with notice of set-off and places the issue entirely on the new plea.²⁴

§ 273. **Discontinuance not allowed where set-off pleaded.**—By statute it is provided "That in any action hereafter commenced in this state when the defendant has given notice of set-off, the plaintiff shall not be allowed to discontinue his suit, or submit to a nonsuit without the consent of the defendant."²⁵ This statute does not prevent the plaintiff from withdrawing certain items of his claim from the consideration of the court. The statute gives defendant the right to an adjudication upon his claim pleaded in set-off, regardless of whether or not the plaintiff asks an adjudication upon his claim, or any part of it.²⁶

§ 274. **Claims sounding in tort not to be set-off.**—Matters of tort are not properly subjects of set-off;²⁷ but if not objected to, and are actually set off, they can never be questioned again.²⁸ The consequences would be the same if the claim was for unliquidated damages. If a party introduce an improper set-off, and goes into an investigation with a view to make it available, and it passes and is submitted to the justice or jury, it cannot be heard again.²⁹ Where a judgment is insisted on as a set-off, and submitted to and passed upon by a jury, whether the same be allowed or not, the judgment is extinguished.³⁰

24—Whittemore v. Stephens, 48 Mich., 573; 12 N. W., 858.

25—C. L., § 10081. This statute was enacted immediately following the decision in Merchants' Bank v. Schuelenberg, 54 Mich., 49; 19 N. W., 741.

26—Busch v. Jones, 94 Mich., 223; 53 N. W., 1051; Lechmere v. Hawkins, 2 Esp., 626; Downer v. Eggleston, 15 Wend., 51. As there cannot be any splitting of a cause of action, see *ante*, §§ 187 and 221, note 48. So, if a party brings an action for only a part of his demand, and recovers judgment thereon, he cannot subsequently set-off the residue in an action

against him by the opposite party: Miller v. Coventry, 1 Wend., 487.

27—Dean v. Allen, 8 Johns., 390; Moore v. Davis, 11 Johns., 144.

28—Wilson v. Larmouth, 3 Johns., 433; M'Lain v. Hagarin, 13 Johns., 184. And therefore, in an action for tort, a demand arising on contract cannot be set-off, although such demand would be a valid set-off if offered in an action on contract where a set-off was allowable: Moore v. Davis, 11 Johns., 144; Dygert v. Copperstoll, 13 Johns., 210.

29—Wilder v. Case, 16 Wend., 583.

30—McGulnty v. Herrick, 5 Wend., 240.

§ 275. **When demand pleaded as set-off is barred by statute of limitations.**—Under C. L., § 9746, a debt alleged by way of set-off is not barred by the statute of limitations unless the statutory period had elapsed before the accruing of the claim upon which suit is brought.³¹

31—Bush v. Wilcox, 106 Mich., 515; 64 N. W., 485.

CHAPTER XIV.

OF RECOUPMENT.

§ 276. What it is and when allowed. § 278. Notice of the defense.
§ 277. Judgment for defendant, when.

§ 276. **What it is and when allowed.**—Recoupment, in its original sense, was a mere right of deduction from the plaintiff's demand, arising from payment in whole or in part, or from recovery, or some analogous fact; but it is now understood to embrace all counter claims of the defendant, arising out of the same transaction, as does the cause of action of the plaintiff.¹

1—Sedgwick on Damages, 3d ed., 431. And will be allowed whenever an action for damages can be maintained by the defendant for the plaintiff's breach of the contract sued upon: *Houston v. Young*, 7 Ind., 200. But it is optional with the defendant whether he will recoup his damages in the plaintiff's suit or reserve them for a separate action of his own: *Morehouse v. Baker*, 48 Mich., 335; 12 N. W., 170.

Recoupment adjusts by one action adverse claims growing out of the same subject matter. It is not necessary that the opposing claims should be of the same character. In all cases where the demands of both parties spring out of the same contract or transaction, the defendant may *recoup*, although the damages on both sides are unliquidated. The defense is contradistinguishable from set-off, in these essential particulars: 1st, in being confined to matters arising out of, and connected with, the transaction or contract upon which the suit is brought; 2d, in having no regard as to whether or not such matters be liquidated or unliquidated; and 3d, that the judgment is not the subject of statutory regulation, but is con-

trolled by the rules of the common law: *Ward v. Fellers*, 3 Mich., 281. C. L., § 10082 was enacted in 1861 and regulated the judgment to be rendered in actions where recoupment was pleaded by allowing a recovery by the defendant in excess of the claim of the plaintiff. At the common law this defense could be made to the extent only of plaintiff's claim. The right of recoupment is not confined to damages arising before action brought, but may include anything for which a cross action could lie at the time of pleading: *Platt v. Brand*, 26 Mich., 173. Recoupment is favored in the law as avoiding multiplicity of suits: *Morehouse v. Baker*, 48 Mich., 335; 12 N. W., 170.

Recoupment is merely setting off one distinct cause of action against another, although both of them arose out of the same contract: *Gillespie v. Torrance*, 25 N. Y., 306; and see, *Allen v. McKibbin*, 5 Mich., 449, 456. And only such damages can be recouped as spring out of the contract upon which suit is brought: *Forrest v. Johnson*, 100 Mich., 321; 58 N. W., 1005; *Molby v. Johnson*, 17 Mich., 382; *Thompson v. Richards*, 14 Mich., 184-5; *Holland v. Rea*, 48 Mich., 218,

In actions of assumpsit to recover damages for the breach of an agreement, the defendant may set up, by way of recoupment, that the plaintiff has violated the *same* agreement, and thus defeat a recovery for more than the balance.² Thus, it was held that in an action to recover the rent of demised premises, the tenant might avail himself of a breach of the landlord's agreement to repair by way of *recoupment*, though not as a *set-off*.³ And, in an action to recover the price of goods sold with warranty, the defendant may recoup his damages for a breach of warranty.⁴ And so, that work contracted for was not equal in quality to what the agreement required.⁵ The doctrine is equally applicable as well where fraud is not imputable to the plaintiff in relation to the contract on which

225; 12 N. W., 167; *Brazee v. Bryant*, 50 Mich., 136; 15 N. W., 49; *McKevitt v. Felge*, 57 Mich., 374; 24 N. W., 109.

Recoupment is in substance and effect a cross action, and unless the party whom it is attempted to subject to it could be compelled to respond for the damages in an independent action against him, he cannot be reached by recoupment. Hence there can be no recoupment against infants in actions upon contract brought by them: *Widrig v. Taggart*, 51 Mich., 103; 16 N. W., 251.

2—*Whitbeck v. Skinner*, 7 Hill, 53.

3—*Ibid.*; and see, *Darvin v. Potter*, 5 Denio, 306; *Nichols v. Dusenbury*, 2 Comst., 283. In a suit by a landlord for rent, the tenant may recoup damages for a breach of covenant for quiet enjoyment contained in the lease: *Mayor, etc., v. Mable*, 3 Kern, 151. And in an action for rent, the tenant may show that he was induced to enter into the lease by fraudulent representations of the landlord, or that the premises leased comprehended lands which were not in fact included, and may recoup the damages sustained in consequence: *Allaire v. Whitney*, 1 Hill, 424; *Whitney v. Allaire*, 1 Comst., 305; *Whitney v. Allaire*, 4 Denio, 554.

4—*McAllister v. Reab*, 4 Wend., 483; *Reab v. McAllister*, 8 Wend., 109.

The defendant may show that the goods sold were, by the terms of the

contract, to be delivered in good shipping order, or that there was some other warranty as to their quantity or quality, and for a breach of such warranty the defendant may recoup: *Stewart v. Black*, 1 Hill, 122; *Ives v. Van Epps*, 22 Wend., 155; *Batterman v. Pierce*, 3 Hill, 171. Where there is an express warranty as to the description and quality of the goods, which is broken, the purchaser need not return them, but may retain them, and in an action for the price, recoup such damages as result from a breach of the warranty: *Warren v. Van Pelt*, 4 E. D. Smith, 202; *Norris v. LaFarge*, 3 *Ibid.*, 375; *Harris v. Bernard*, 4 *Ibid.*, 195; *Van Epps v. Harrison*, 5 Hill, 63. So, in an action by an administrator for purchase price of personal property sold with warranty, defendant may recoup for breach of the warranty: *Bottwood v. Miller*, 112 Mich., 657; 71 N. W., 506.

5—*Ives v. Van Epps*, 22 Wend., 155.

In an action for payment for service rendered under a contract which has not been fully performed, the defendant may recoup such damages as he has sustained by reason of the non-performance of the residue of the contract: *Sickles v. Pattison*, 14 Wend., 257; *Hudson v. Felge*, 58 Mich., 148; 24 N. W., 863. And in an action for the price of building a steamboat, the defendant may recoup such sum as will need to be expended in supplying defects in the vessel, or its machinery,

the action is founded, as where it is.⁶ And the defendant may avail himself of it where there was fraud, although he has not returned the property, on discovering the fraud.⁷

Nor is it an objection to this defense that the plaintiff does not sue upon the original contract of sale of property, but upon a note given for the purchase money.⁸

so as to make it conform to the contract for its construction: *Blanchard v. Ely*, 21 Wend., 342. And where plaintiff sued for his pay for building a house: *Held*, that the defendant might recoup his damages sustained by the non-completion of the building at the time specified, as in such case the law will imply damages for the want of the use of it, if he were intending to occupy it himself; and the rule is the same if the defendant lost the opportunity of renting the premises in consequence of the plaintiff's default. But if the building was erected for the purpose of renting, and the defendant did not, in fact, lose any opportunity of renting by plaintiff's delay, there would be no damages to recoup: *Wagoner v. Caskill*, 40 Barb., 175. The consignee of goods also may recoup from the price charged for freight and transportation, any losses occurring from the wrongful act or neglect of duty upon the part of the carrier: *Strong v. Grand Trunk Ry. Co.*, 15 Mich., 215. And where action is brought on *quantum meruit*, for labor done under a special contract, which has not been substantially performed by the plaintiff on his part, if there are damages growing out of such non-performance which do not enter into the contract price, the defendant may recoup them in the suit: *Allen v. McKibbin*, 5 Mich., 449.

6—*Batterman v. Pierce*, 3 Hill, 171.

7—*Van Epps v. Harrison*, 5 Hill, 63; *Burton v. Stewart*, 3 Wend., 236; *Bleeker v. Vrooman*, 13 Johns., 302; *Sill v. Rood*, 15 Johns., 230.

Negligence.—In an action for compensation for services, the employer may recoup his damages resulting from breach of orders and negligence by the employee in the use of defendant's property: *Still v. Hall*, 20 Wend., 51. And damages, from want of skill, or the neglect to use it, may be recouped

in an action for compensation for work generally, or for the performance of a particular job under special contract: *Ives v. Van Epps*, 22 Wend., 155; *Grant v. Butler*, 14 Johns., 377.

Where fraud has occurred, or where there has been a failure of consideration, total or partial, or a breach of warranty, fraudulent or otherwise, all or any of these facts may be relied on in defense by a party when sued on such a contract, and he shall not be driven to a cross action to recover damages therefor: *Withers v. Green*, 9 Howard, 214; *Van Buren v. Diggs*, 11 *Ibid.*, 461.

8—*Reab v. McAllister*, 8 Wend., 109; *Judd v. Dennison*, 10 Wend., 512; *Harrington v. Stratton*, 22 Pick., 510; *Perley v. Balch*, 23 *Ibid.*, 284; *Goodwin v. Morse*, 9 Metc., 278. Thus, in an action by the payee, on a promissory note given for the price of goods, the defendant may recoup his damages for the non-delivery of the goods at the time specified: *Fabricati v. Launitz*, 3 Sandf., 743. And so, where the goods were not of the quality contracted for: *Spaulding v. Vandercook*, 2 Wend., 431. And in an action on a promissory note, given by two persons on a contract of purchase of property by one of the makers only, it is competent to recoup damages growing out of breach of the contract or purchase, to the same extent as if the note had been given by the purchaser only: *McHardy v. Wadsworth*, 8 Mich., 349.

In an action for tort, there can be no recoupment for damages sustained by the defendant for another tort, committed by the plaintiff: *Murden v. Priment*, 1 Hilt., 75. Nor for any distinct and independent wrong on the part of the plaintiff: *Cram v. Dresser*, 1 Sandf., 120. So, to, in an action for a tort, there cannot be a recoupment even for a claim arising

The defendant has his election whether he will set up his claim by way of recoupment in answer to plaintiff's demand, or resort to a cross action for his damages.⁹

§ 277. Judgment for defendant, when.—Formerly the rule was, that whatever might be the amount of the defendant's damages, he could, in recoupment, only set them up by way of abatement, either in whole or in part, of the plaintiff's demand. And even where they exceeded the plaintiff's claim, could not, as in case of set-off, go beyond that and have judgment in his favor for balance.¹⁰ But now the statutes provide: "That in any action, in any court, if the defendant shall claim damages by way of recoupment, by plea or otherwise, in pursuance of the rules and practice of such court, and on the trial of the issue formed, if the court or jury trying the same shall find

upon contract: *Piser v. Stearns*, 1 Hilt., 86; *Drake v. Cockroft*, 4 E. D. Smith, 34; *Pattison v. Richards*, 22 Barb., 143. But where, in actions for tort, the defendant has suffered damages from some wrongful conduct of the plaintiff in the transaction on which he founds his action, the defendant may recoup. And, in such cases, recoupment is as applicable in actions of tort as in cases of contract: *Chandler v. Childs*, 42 Mich., 128; 3 N. W., 297; *Carey v. Guillow*, 105 Mass., 18.

Who may recoup.—The original parties to the contract may, of course, recoup such damages as they may have sustained. And it is said that in case of the assignment of the right of either party under the contract, the assignee will be entitled to all the advantages and disadvantages of the assignor, and that the right of recoupment will pass to the assignee as an incident to the contract: And see, also, C. L., § 10054. But if an infant sues for his wages the defendant cannot recoup damages for the non-performance of the infant's agreement under which such labor was performed: *Whitmarsh v. Hall*, 3 Denio, 375; *Widrig v. Taggart*, 51 Mich., 103; 16 N. W., 251. Nor can a surety, when sued upon the contract of his principal, for the performance of which he is the surety,

set up by way of recoupment, any damage sustained by his principal for the non-performance by plaintiff of his part of the contract. The claim which may be recouped is a distinct cause of action belonging to the principal, which he may bring an action upon, or recoup in his own defense, and this right of election belongs exclusively to the principal, and the surety can do no act to impair that right: *Gillespie v. Torrance*, 25 N. Y., 306; *LaFarge v. Halsey*, 1 Bosw., 171. And where A. sold goods to B. with warranty, and C., a third party, gave his note for the purchase price, which was accepted in payment, on a suit against C., on the note, he cannot recoup damages for a breach of the warranty of the goods sold. The right of action and to recover for those damages belonged to B., the purchaser, alone: *Delano v. Rawson*, 10 Bosw., 286.

9—*Ward v. Fellers*, 3 Mich., 281, 391; *Gillespie v. Torrance*, 25 N. Y., 306; *McDonald v. Christie*, 42 Barb., 36; *Barth v. Burt*, 43 *Ibid.*, 628; *Batterman v. Pierce*, 3 Hill, 171; *Morehouse v. Baker*, 48 Mich., 335; 12 N. W., 170. The burden of proof is on defendant to establish his claim which he seeks to recoup: *Truax v. Heartt*, — Mich., —; 97 N. W., 394 (Dec., 1903).

10—*Ward v. Fellers*, 3 Mich., 281.

such defendant entitled to an amount of damages, whether liquidated or not, greater than the amount of the demand of the plaintiff, the court shall give judgment according to the true right thereof for the defendant, for the amount of such excess so found and costs, and issue execution therefor against the plaintiff, as in cases of judgment and execution on plea or notice of set-offs."¹¹

If, however, the defendant, in his recoupment, use or procure the allowance of only a part of his damages in defense of the plaintiff's claim, he cannot maintain a cross action for the remainder.¹²

§ 278. Notice of the defense.—To make the defense of recoupment available, notice of it must be given, under the general issue,¹³ unless the defense goes to the whole cause of action, in which case, it is said to be admissible under the general issue.¹⁴

11—C. L., § 10082. This statute entitles the defendant to recover the balance when the damages proved by him exceed the demand established in favor of the plaintiff: *Chandler v. Childs*, 42 Mich., 128; 3 N. W., 297.

12—*Batterman v. Pierce*, 3 Hill, 171; *Gillespie v. Torrance*, 25 N. Y., 306, 310; *Wilder v. Case*, 16 Wend., 583; *Britton v. Turner*, 3 N. H., 481. But see the correctness of this rule questioned in *Ward v. Fellers*, 3 Mich., 281. This last case was decided before the enactment of the statute (C. L., § 10082) above cited, by which the defendant may in recoupment, have the benefit of his whole damages, therefore the reason of the rule, that the allowance of a part of defendant's damages in recoupment will bar an action for the balance, is made much stronger than before.

13—*Eldridge v. Mather*, 2 Comst., 157; *Diefendorf v. Gage*, 7 Barb., 18; *Barber v. Rose*, 5 Hill, 76; *Trowbridge v. Mayor of Albany*, 7 Hill, 430; Where a plea was "the general issue notice of set-off and recoupment" it was held not sufficiently definite, but that it might be amended: *Bacon v. Reich*, 121 Mich., 480; 80 N. W., 278. Where the docket showed that "the defendant pleaded the general issue

and gave notice of recoupment," upon the trial of the appeal in the circuit court evidence was admitted, over plaintiff's objection that it was too indefinite and its admission was held error in *Kerr v. Bennett*, 109 Mich., 546; 67 N. W., 564. See further upon sufficiency of the notice: *Liggett S. & A. Co. v. Michigan B. Co.*, 106 Mich., 445; 64 N. W., 466; C. L., §§ 10071, 10073. And the defendant will be limited to the claims set up in his notice of recoupment: *McKevitte v. Feige*, 57 Mich., 374; 24 N. W., 109; *Taylor v. Salt & L. Co.*, 103 Mich., 1; 61 N. W., 5.

If defendant recoups for damages sustained from plaintiff's breach of the contract on which he sues, the notice of recoupment should point out in what respect the contract was broken to defendant's injury: *Roethke v. Philip Best Brewing Co.*, 33 Mich., 340.

14—*Barber v. Rose*, 5 Hill, 76; *Pungs v. American Brake-Beam Co.*, 128 Mich., 318; 87 N. W., 364. But notwithstanding, if under our statute, the defendant desires to have judgment for the balance of his damages after satisfying the plaintiff's claim, a notice of recoupment would seem indispensable.

CHAPTER XV.

OF REPLICATIONS, DEMURRERS AND PLEAS PUIS DARREIN CONTINUANCE.

OF REPLICATIONS.

§ 279. Only proper to pleas in abatement.

§ 281. Judgment on.

OF PLEAS PUIS DARREIN CONTINUANCE.

OF DEMURRERS.

§ 280. What they are, kinds and effect of.

§ 282. What matters so pleaded.

§ 283. Plea must be verified.

OF REPLICATIONS.

§ 279. Only proper to pleas in abatement.—The statute having abolished all pleas in bar, except the general issue, replications in consequence, except to pleas in abatement, are abolished, and any matter which might have been replied to the plea under the old practice, may now be proved in answer to the defense set up in the notice.

OF DEMURRERS.

§ 280. What they are, kinds of, and effect of.—A demurrer is an objection made by one party to the pleading of his opponent, for some defect in it, either in substance or form. Demurrers are either *general* or *special*; *general*, when no particular cause is alleged; *special*, when the particular defect is pointed out. The former will suffice when the pleading is defective in *substance*, and the latter is requisite where the objection is only to the *form* of pleading. The *special* demurrer is not permitted in justice's courts, by reason of the express provision of the statute.¹ A demurrer may be to the whole or part of the declaration.² In point of form, no precise

¹—C. L., § 767.

²—Any objection to the sufficiency in law of the declaration will be sufficient in justice's court regardless of the form in which the objection is

urged: *Stevens v. Harris*, 99 Mich., 233; 58 N. W., 230. A declaration is demurrable for want of any accurate showing of the extent of the plaintiff's rights, and how they have

words are necessary; the usual form of a *general* demurrer,³ to a declaration, alleges that the declaration, and the matters therein contained, are not sufficient in law to enable the plain-

been impaired: *Ives v. Williams*, 53 Mich., 639; 19 N. W., 562. If the demurrer is intended to apply to the whole declaration it must cover the whole. But, when a part only, as, for instance, one of the counts of the declaration appears objectionable, the demurrer should be confined expressly to such part; for a demurrer to the whole declaration containing several counts will not be sustained if any one of the counts is good: *Achran v. Scott*, 3 Wend., 229; *People v. Bartow*, 6 Cow., 295. When in covenant, and debt on bond, several breaches are assigned in the declaration, some of which are good and the others bad, and the whole declaration is demurred to, the plaintiff will have judgment on the demurrer: *Martin v. Williams*, 13 Johns., 264; *Glover v. Tuck*, 24 Wend., 153; *Brum v. Stebbins*, 4 Hill, 154. The defendant, under such circumstances, should plead to the breaches which are well assigned, and demur to the others: *Ibid.*, *Brum v. Stebbins*, 4 Hill, 154; *Glover v. Tuck*, 24 Wend., 153. But in assumpsit, where several breaches are alleged in the same count, the defendant cannot demur to a part and plead to the remainder; if no breach is well assigned, he may demur to the whole count; if one breach is well assigned and others are not, he may under the general issue, object on the trial against receiving evidence, or assessing damages on the defective breaches: *Pettibone v. Stevens*, 6 Hill, 258; see, *Root v. Woodruff*, 6 Hill, 418. And where defendant demurs to one count, he must at the same time plead to the others: 1 Chit. Pl., 10 Am., ed., 664; Arch. Pl., 309; 1 Burrill's Prac., 146. But he cannot plead and demur to the same count at the same time: *Hair v. Weaver*, 1 Blackf., 77; *Rickert v. Snyder*, 5 Wend., 104. In the order of pleading, the defense by demurrer is required to be taken before pleading to the merits and going to issue upon the facts; and where such a plea has been made, and afterwards it appears desirable to demur to the same count

or counts, the plea should be withdrawn from the record for the purpose of allowing the demurrer to be interposed. While a plea to the merits stands upon the record undisposed of, it excludes the right to demur; and if such a plea is put in while a demurrer to the same count or counts is pending and undisposed of, it overrules the demurrer. There cannot be an issue of fact and an issue of law standing at the same time in respect to the same matter; one admits what the other denies: *Cicotte v. County of Wayne*, 44 Mich., 173; 6 N. W., 236. If there are several defendants, one may demur and another may plead: *Archibold Pl.*, 310. A misjoinder of counts or causes of action should be taken advantage of by demurrer to the whole declaration; defendant cannot, in such case, plead to one count and demur to the other: *Smith v. Merwin*, 15 Wend., 184; *Ferriss v. North American Fire Ins. Co.*, 1 Hill, 70. If a declaration fails to state any cause of action, the objection is not waived by pleading to the merits instead of demurring; the objection may be made to the introduction of any evidence: *Stoffet v. Marker*, 34 Mich., 313. But the better practice is to raise the objection to the sufficiency of the declaration by demurrer, before any costs of a trial on the merits are incurred: *Rowland v. Kalamazoo Supts.*, 49 Mich., 553; 14 N. W., 494. A defendant cannot withdraw his demurrer and interpose another pleading without the leave of the court: *Blecker v. Bellinger*, 11 Wend., 179.

3—C. L., § 767. A general demurrer is a waiver of objections to the jurisdiction of the court over the person: *Thompson v. Michigan M. B. Association*, 52 Mich., 522; 18 N. W., 247. It operates as an appearance in the cause: *Ibid.*

A demurrer to a declaration on technical grounds does not affect its sufficiency in matters of substance: *Enright v. Hartsig*, 46 Mich., 469; 9 N. W., 496.

tiff to support his action.⁴ A joinder in demurrer, asserts that the pleading is sufficient.⁵

A demurrer admits the *facts* pleaded, and refers the question of their legal sufficiency to the court.⁶ It will not lie to a bill of particulars.⁷

§ 281. **The judgment on demurrer.**—If the justice decide in favor of the party demurring, he should permit the opposite party to amend his pleading. If, however, the plaintiff declines to accept the privilege of amendment of his declaration, and elects to stand on his demurrer, he cannot then plead to the merits.⁸ If the decision is against the party demurring, the court should allow him to withdraw his demurrer and answer the pleading demurred to.⁹ But, if the defendant withdraw his demurrer and plead to the declaration, he cannot afterwards question the decision upon the demurrer.¹⁰

If, however, no application be made to amend or answer the pleading, the judgment will be final; if in favor of the defendant, for his costs; if in favor of the plaintiff, the justice will proceed and ascertain the amount of his demand, and render judgment for the same with costs, except on a demurrer to a plea in abatement or to a replication to such plea.¹¹

4—1 Chit. Pl., 10 Am. ed., 666.

5—*Ibid.*, 667.

6—1 Chit. Pl., 10 Am. ed., 662. A demurrer admits the allegation in the declaration for the purposes of that issue only, and not a right of action in the plaintiff which the proofs might fall to sustain if the demurrer were overruled and he was allowed to plead to the merits: *Cook v. Detroit & Milwaukee Ry. Co.*, 45 Mich., 453; 8 N. W., 74. But it seems that a demurrer to special counts does not admit facts stated in consolidated common counts placed at the close of the declaration: *Rose v. Jackson*, 40 Mich., 29, 34.

If the plaintiff is satisfied, on receiving the demurrer, that it is well taken, he should ask leave of the court to amend his declaration, and thus cure the defect in his pleading: *Stange v. Clemens*, 17 Mich., 409.

7—*Cicotte v. Wayne County*, 44 Mich., 173; 6 N. W., 236.

8—*Boyer v. Sowles*, 109 Mich., 48; 67 N. W., 530.

9—On overruling a demurrer to a declaration, judgment goes for the plaintiff, unless leave is given to the defendant to plead: *Tefft v. McNoah*, 9 Mich., 206. If the defendant desires to plead anew to the merits, he should apply to the court for leave to withdraw his demurrer, and to enter such plea, and this should be done before judgment is entered on the demurrer: *Emery v. Whitwell*, 6 Mich., 490.

10—*Wale v. Lyon*, 2 Mich., 276; *Jones v. Thompson*, 6 Hill, 621; *Krattz v. Electric Light Co.*, 82 Mich., 457; 46 N. W., 787; *Ashton v. Detroit City Ry. Co.*, 78 Mich., 587; 44 N. W., 141.

11—See *Emery v. Whitwell*, 6 Mich., 474, 489.

OF PLEAS PUIS DARREIN CONTINUANCE.

§ 282. What matters may be so pleaded—in general.— Though by rule of court adopted in 1884, being circuit court rule 9, this plea is to have the effect simply of a notice under the general issue, and does not have the effect of waiver of other defenses, nor require any replication,¹² still it would seem to possess its common law status when pleaded in justice's courts.¹³ Where a matter of defense has arisen after the commencement of the suit, it cannot be pleaded in bar of the action *generally*, but must, where it has arisen *before* suit, be pleaded as to the further maintenance of the suit, and cannot be given in evidence otherwise; and when it has arisen *after* issue joined, *puis darrein continuance*, as that the plaintiff has given the defendant a release, payment, etc.¹⁴

Pleas of this kind are either in abatement or in bar. Either kind is in general a waiver of all former pleas, and the judgment, whether upon demurrer or verdict, if for the plaintiff, is final that he recover.¹⁵ This rule does not, however, apply where

12—Burt v. Wayne Circuit Judges, 90 Mich., 570; 51 N. W., 482; People v. Plank Road Co., 125 Mich., 366; 84 N. W., 290.

13—Johnson v. Kibbee, 40 Mich., 269; Snyder v. Quarton, 47 Mich., 211; 10 N. W., 204; Whittemore v. Stephens, 48 Mich., 573; 12 N. W., 858.

14—1 Chit. Pl., 10 Am. ed., 657; Boyd v. Weeks, 5 Hill, 393; Covell v. Weston, 20 Johns., 414; Rowell v. Hayden, 40 M. E., 582; Jackson v. Ramsey, 3 Cow., 75. Facts arising after issue joined, can only be pleaded *puis darrein continuance*; and if pleaded generally, in bar to the further maintenance of the suit, without being in form, *puis darrein*, etc., the plea will be bad: Hart v. Meeker, 1 Sandf., 623. A plea or notice of defense *puis*, when in bar, may be to the whole declaration, or to some particular count in it; but it must set up a complete defense to the whole declaration, or to the count to which it applies: Morris v. Cook, 19 Wend., 699; Smith v. Ely, 5 McLean, 76; see Johnson v. Kibbee, 36 Mich., 269. Matter which

was a proper subject for a plea *puis* at common law, may be so pleaded under our practice instead of a notice: Snyder v. Quarton, 47 Mich., 211; 10 N. W., 204.

In a suit brought upon an appeal bond, and issue joined thereon, a discharge of the judgment thereafter obtained can be shown only under a plea *puis darrein continuance*; Souvals v. Leavitt, 53 Mich., 577; 19 N. W., 261. But tender of payment after suit brought is not a proper matter for a plea *puis*: Snyder v. Quarton, 47 Mich., 211; 10 N. W., 204. In a suit to recover upon a contract, a plea *puis* that the plaintiff had sold and assigned the demand after suit brought, presents an immaterial issue, and may be disregarded: The purchasers of a demand, whether before or after suit brought thereon, may still pursue his remedy in the name of the original contracting party: Moon v. Harder, 38 Mich., 566.

15—Kimball v. Huntington, 10 Wend., 675; Culver v. Barney, 14 *Ibid.*, 161. By pleading one of these pleas the defendant abandons all other pleas

the matter of the plea affects the remedy only and not the right of action; thus, a plea *puis darrein* of a discharge under the act abolishing imprisonment for debt, is not a waiver of a plea in bar before pleaded.¹⁶

§ 283. **Plea must be verified.**—A plea *puis darrein*, being a dilatory plea, must be verified by affidavit, or by some other evidence.¹⁷

pleaded by him in the cause, and places the issue of the suit upon this single plea: *Wheelock v. Rice*, 1 Doug. Mich., 272. It waives the general issue: *New York Dry Dock Co. v. McIntosh*, 5 Hill, 290. And all notices of special matter under it: *Adler v. Wise*, 4 Wis., 159; *Adams v. Filer*, 7 Wis., 306. And the case then stands the same as if the plea *puis* had been the plea originally put in: 1 Burrill's Prac., 424; *Morris v. Cook*, 19 Wend., 699. At common law, the effect of a plea *puis darrein continuance* is to destroy the issue previously formed, and a new issue must be formed on the plea *puis*, by replication or otherwise: *Johnson v. Kibbee*, 36 Mich., 269. By such a plea the defendant abandons his former plea and places the issue of the suit entirely on the new plea; and all further defense to the action is thereby rested upon the point newly set forth: *Whittemore v. Stephens*, 48 Mich., 573; 12 N. W., 858; *Burt v. Wayne Circuit Judges*, 90 Mich., 520; 51 N. W., 482; *People v. Plank Road Co.*, 125 Mich., 366; 84 N. W., 290. The plea *puis* conclusively admits the cause of action as set out in the declaration: *Adams v. Filer*, 7

Wis., 306. And confesses everything except the matter contested by the plea *puis*: *Raynor v. Dyett*, 2 Wend., 300; *Kimball v. Huntington*, 10 *Ibid.*, 679.

16—*Raynor v. Dyett*, 2 Wend., 300. The waiver applies only where the defendant assumes a new ground of defense, and abandons the defense before relied on: *Ibid.* And not where the matter of the plea affects only the remedy: *Culver v. Barney*, 14 Wend., 161. Nor where the plea goes only to one of several counts, or to some particular part of an entire claim: *Morris v. Cook*, 19 Wend., 699.

17—*Ante*, § 168; *Wheelock v. Rice*, 1 Doug. Mich., 271; *West v. Stanley*, 1 Hill, 69; but see, *Jackson v. Peer*, 4 Cow. R., 418; *Bancker v. Ash*, 9 Johns., 250.

Great strictness and certainty are required in regard to pleas *puis*, and but one of them can be pleaded.

Where two defendants have pleaded jointly, one of them may abandon that plea and plead *puis*. The other defendant is not prejudiced thereby, and as to him, the suit may be prosecuted to judgment on the original issue: *Wheelock v. Rice*, 1 Doug. Mich., 271-2.

CHAPTER XVI.

OF THE BILL OF PARTICULARS

§ 284. When may be required.

§ 285. Demand to be made for.

§ 286. Not a pleading.

§ 287. Content and effect of.

§ 288. Amendment of.

§ 284. When may be required.—“In cases before a justice, where a bill of particulars of the demand of the party may be required in a court of record, the plaintiff may be required by the justice to file such bill of particulars of his demand; and the defendant, if required by the plaintiff, shall file a like bill of particulars, he may claim as a set-off; and the evidence on the trial shall be confined to the items set forth in said bill.”¹

In all actions in which the plaintiff declares generally, without specifying the particulars of his cause of action, the justice, upon application, will order him to give the defendant the particulars in writing. Thus, in actions for work and labor, goods sold and delivered, and the like, the defendant may call for the particulars of the demand. But whenever the particulars of the cause of action are fully specified in the declaration, as in actions on the case, special assumpsit, or on a note, or the like, any further particulars would, of course, be unnecessary.²

1—C. L., § 772. A bill of particulars is not demandable in an action on the case for consequential damages. *Everett v. Marquette* Judge, 39 Mich., 437; *Kehrig v. Peters*, 41 Mich., 478; 2 N. W., 801. Nor in garnishee cases as matter of right: *Strong v. Hollon*, 39 Mich., 411. A showing that by reason of a loss of plaintiff's books he was unable to furnish a specific bill of particulars will excuse him from doing so: *Rossman v. Bock*, 97 Mich., 430; 56 N. W., 777. But it is said in *Gary v. Eaton* Circuit Judge, 132 Mich., 105; 92 N. W.,

774, that bills of particulars in actions of tort do not rest upon any strict legal right. They rest in the sound discretion of the trial court to be required or refused according as justice and fair dealing require. This was a *crim con.* action.

2—*Day v. Davis*, 5 C. & P., 340; *Cowper v. Amos*, 2 C. & P., 267. The office of a bill of particulars is, to inform the opposite party of the cause or causes of action which the party giving it intends to rely on at the trial, not specifically set out in the declaration, or notice accompanying

Also, when the defendant gives notice of set-off, the plaintiff may obtain a particular of the set-off, in the same manner a defendant would be entitled to it, if the matter so set off were declared upon.

§ 285. **Demand to be made for.**—Application should be made for a bill of particulars when the parties first appear. It cannot be ordered on the trial of the cause. The justice may, undoubtedly, if necessary, on the first appearance of the parties, order it to be filed within a certain number of days before the trial—such a time as would give the parties an opportunity, after it is filed, to prepare for trial.

Whenever the justice orders either party to file a bill of particulars, he shall note on his docket the fact that it had been ordered, and of the filing, when it has been filed.³

Where the plaintiff requires of the defendant a bill of particulars, the order is that the defendant deliver it in a certain time, or that he shall not be allowed to give evidence of them at the trial. As a justice cannot nonsuit the plaintiff, it would

the general issue. Therefore, if a contract is set out in the declaration, it is admissible in evidence, although not mentioned in the bill of particulars: *Davis v. Freeman*, 10 Mich., 192; and see, *People, etc., v. Monroe C. P.*, 4 Wend., 200. The object of the bill of particulars is, to secure such a specification of the nature and items of the cause of action or ground of defense as will enable the parties to make an intelligent preparation for trial, and to enter upon the investigation before the court or jury with an understanding of what is really in controversy. It may, and usually does, restrict the proofs in these causes of action on grounds of defense specified in it: *Cicotte v. Wayne County*, 44 Mich., 173; 6 N. W., 236. An assigned demand, if set forth in plaintiff's bill of particulars, may be recovered under the common counts. In such a case it is not necessary that the declaration should be special. The defendant, when sued upon the common counts, can always be informed as fully by demanding a bill of particulars as by averments in the

declaration, and that is all that is needed for his protection: *Snell v. Gregory*, 37 Mich., 500; see, *Kelley v. Waters*, 31 Mich., 404; *Wilcox v. Toledo & Ann Arbor Ry. Co.*, 43 Mich., 584; 5 N. W., 1003. In a case in which the declaration sounds in tort and not in assumpsit, but in which if recovery is had it must be for specific amounts paid to specific parties or due upon contract, and the allegations of the declarations were only general, it is held that a bill of particulars is demandable: *Anti-Kalsomine Co. v. Kent Circuit Judge*, 119 Mich., 434; 78 N. W., 467.

3—When a party has demanded a bill of particulars from his opponent, it is error for the justice on his own motion, and without any objection from the party making the demand, to exclude the bill because not filed within the time allowed by the justice. If the same is offered before trial, and there is nothing to show that its reception will be prejudicial to the party asking for the bill: *Boatz v. Berg*, 51 Mich., 8; 16 N. W., 184.

seem that the order must be the same when the defendant requires a bill of particulars of the plaintiff's demand.⁴

§ 286. **Not a pleading.**—The bill of particulars is no part of the pleading and cannot be permitted to affect the declaration on demurrer. It cannot be construed into an amendment of the declaration.⁵ A plea or demurrer will not lie to a bill of particulars.⁶

§ 287. **Content and effect of a bill of particulars.**—The bill of particulars filed by either party, should contain an account of the items of the demand, and state, in general, when and in what manner they arose.⁷ It must be drawn with such particularity as to inform the opposite party of the foundation of the transaction upon which the claim arises; and it will be sufficiently certain and definite if it apprises the party for whose benefit it is given, of the evidence which is to be offered, so that there can be no mistake as to the preparation to be made to resist the claim.⁸ When the bill of particulars stated

4—When a plaintiff refuses to comply with a proper and rightful demand for a bill of particulars, evidence of his demand may be properly rejected: *Peterson v. Tilden*, 44 Mich., 168; 6 N. W., 217. In such case the justice may exclude all testimony on the part of the plaintiff and dismiss the cause; such refusal being a virtual discontinuance of the suit: *Lovette v. Essig*, 92 Mich., 461; 52 N. W., 750. And so when a defendant refuses to file the particulars of his set-offs: *Boatz v. Berg*, 51 Mich., 8; 16 N. W., 184. When a defendant has duly and rightfully demanded a bill of particulars, his right thereto is not waived by pleading before it is given: *Peterson v. Tilden*, 44 Mich., 168; 6 N. W., 217.

5—*Cicotte v. County of Wayne*, 44 Mich., 173; 6 N. W., 236; *Weston v. County of Luce*, 102 Mich., 528; 61 N. W., 15.

6—*Cicotte v. County of Wayne*, 44 Mich., 173; 6 N. W., 236.

7—*Moran v. Morrissey*, 28 How., 100; *Moran v. Morrissey*, 18 Abb., 131. It should furnish the items in detail, specifying the dates, prices and amounts as near as may be done: *Humphrey v. Cottley*, 4 Cow. R., 54.

8—*Ryckman v. Haight*, 15 Johns., 222. Neither party is required to do more than furnish the items which he claims against the other. He is not required to state any credits or set-offs in favor of the other party: *Williams v. Shaw*, 4 Abb., 209; *Ryckman v. Haight*, 15 Johns., 222. A demand for money loaned cannot be recovered under a bill of particulars which merely sets forth a claim for services rendered: *Judd v. Burton*, 51 Mich., 74; 16 N. W., 237. A charge in a bill of particulars for money loaned to the defendant, will not authorize proof of the loan of a United States bond or other bonds or like obligations for the payment of money; such a charge can be supported only by proof of the loan of coin, bank bills or some well-known circulating medium popularly known and designated as money: *Waterman v. Waterman*, 34 Mich., 490. A bill of particulars which furnishes no information beyond that found in the declaration is insufficient, and evidence should not be received under it: *Knop v. National F. Ins. Co.*, 101 Mich., 359; 59 N. W., 653. Unless the plaintiff shows his inability to make it more specific: *Rossman v. Bock*, 97 Mich., 430; 56 N. W., 777.

an item of money paid to A., by mistake, instead of B., the plaintiff was allowed to prove that the item was intended, and must have been understood, to refer to B., and the defendant, to set aside that item, must make affidavit that he had been misled.⁹ So, where the work for which the action was brought was stated in the particulars to have been done in the wrong month, the plaintiff was permitted to give evidence of the work having been in another month.¹⁰ An error in the date, or other inaccuracy, will not preclude the plaintiff from proving the item, unless it appear that the defendant has been either surprised or misled by it.¹¹ Although a party is confined in his proof to the items contained in his bill of particulars, "and the evidence on the trial shall be confined to the items set forth in said bill,"¹² yet if it appear from the evidence of one party that the other is entitled to more for items not included in the bill, he may recover for such items.¹³

Where there has been an effort at compliance with the demand for a bill of particulars an objection to evidence on the trial comes too late, a request for further particulars should be made: *Freehling v. Ketchum*, 39 Mich., 299; *Township of Buckeye v. Clark*, 90 Mich., 432; 51 N. W., 528; *Strutz v. Brown*, 110 Mich., 687; 68 N. W., 981. Not so where the claimed compliance gives no particulars beyond what may be found in the allegations of the declaration: *Knop v. National F. Ins. Co.*, 101 Mich., 359; 59 N. W., 653. The office of the bill is to amplify and explain the allegations of the declaration: *Knop v. National F. Ins. Co.*, *supra*. Further as to sufficiency of, see, *Duplanty v. Stokes*, 103 Mich., 630; 61 N. W., 1015; *Tanner v. Page*, 106 Mich., 155; 63 N. W., 993; *Strutz v. Brown*, *supra*.

In case of the sale and delivery of different bills of goods at different times, each bill containing several articles or items, it will be sufficient if the bill of particulars gives the dates and amounts of the several sales and deliveries, without itemizing the different articles included in each bill, unless a fuller statement is demanded; such a bill is usually sufficient to inform a defendant of what he is expected to meet; and if he is dissatis-

fied with it, and really needs a fuller statement, he should demand it: *Freehling v. Ketchum*, 39 Mich., 299.

9—*Day v. Bower*, 1 Camp., 69, n.

10—*Millwood v. Walter*, 2 Taunt., 224. Where the plaintiff seems to have a cause of action, but his evidence fails to support the demand set forth in the bill of particulars, the bill may be amended: *Cummin v. Wilcox*, 47 Mich., 501; 11 N. W., 289.

11—*Harrison v. Wood*, 8 Bing., 371; *Lambirth v. Boff*, *Ibid.*, 411; *Tucker v. Barrow*, 7 B. & C., 622; *Collins v. Beecher*, 45 Mich., 436, 438; 8 N. W., 97.

12—*Tefft v. McNoah*, 9 Mich., 206. When a bill of particulars is properly demandable, and is given, no recovery can be had for any omitted items which should have been included therein: *Bennett v. Smith*, 40 Mich., 211.

13—*Hunt v. Watkins*, 1 Camp., 68; see, *Steel v. Lacy*, 3 Taunt., 285; *Holland v. Hopkins*, 2 B. & P., 243; *Fiske v. Wainwright*, 1 M. & W., 486; *Williams v. Allen*, 7 Cow. R., 316. At the trial the particulars of the plaintiff's demand are considered as incorporated with the declaration, and on proof of the delivery of the bill, even though voluntary and without the order of the court, the plaintiff will be confined in his proof to the

When the defendant offers evidence of a claim against the plaintiff, the latter may prove a payment of such claim, although such payment does not appear in his bill of particulars; for it was not a proper item to make out the case of the plaintiff, in the first instance, but to rebut evidence procured by the defendant.¹⁴ So, the defendant, in answer to proof of a demand of the plaintiff, may, for the same reason, prove payment, although not included in his bill, for this would be admissible under the general issue.¹⁵

§ 288. Amendment of bill of particulars.—“Such bill may be amended at any time before the trial, to supply any deficiency or omission in the items, when by such amendments, substantial justice will be promoted.”¹⁶

“The justice may, in his discretion, require, as a condition of an amendment, the payment of costs to the adverse party, to be fixed by the justice; but such payment cannot be required, unless an adjournment is made necessary by the amendment.”¹⁷

items therein contained: 1 Tidd's Pr., 299; 1 Burrill's Pr., 432; Williams v. Allen, 7 Cow. R., 316; Tefft v. McNoah, 9 Mich., 206.

14—Brown v. Denison, 2 Wend., 593.

15—Olcott v. Hanson, 12 Mich., 452. A party's private account books, unsupported by other evidence, are not competent proof of the items set forth in his bill of particulars: Tioga Mfg. Co. v. Stimpson, 48 Mich., 213; 12 N. W., 173.

A party testifying in his own behalf, and having personal knowledge of the items and matters set forth in his bill of particulars, may use the bill to refresh his recollection, notwithstanding that the bill is a mere copy of entries made in his books: Hudnutt v. Comstock, 50 Mich., 596, 601; 16 N. W., 157.

16—C. L., § 773. Where the sole objection to evidence offered is that

it varies from the bill of particulars, if the variance is merely formal it is better to permit an amendment of the particulars than to reject the evidence, because the amendment will generally be in furtherance of justice, unless there is reason to believe that the defendant will be prejudiced thereby: Collins v. Beecher, 45 Mich. 436; 8 N. W., 97; see, Cummin v. Wilcox, 47 Mich., 501; 11 N. W., 289.

An amendment of the bill of particulars does not operate as a change of the issue of the cause: Clotte v. Wayne County, 44 Mich., 173, 175; 6 N. W., 236. An amendment may be allowed in the circuit court after appeal if it introduces no new cause of action: Anderson C. Co. v. Pungs, 127 Mich., 543; 86 N. W., 1040. See, further as to amendment, Sogge v. Schwartz, 116 Mich., 635; 74 N. W., 1000.

17—C. L., § 774.

CHAPTER XVII.

OF ADJOURNMENTS.

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| § 289. In general. | § 294. After trial commenced. |
| § 290. On application of party. | § 295. From necessity. |
| § 291. After prior adjournment. | § 296. Must be docket entry of. |
| § 292. When not allowed. | § 297. Irregular adjournments. |
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§ 289. Of adjournments in general.—“At the time of the return of a summons against a resident of the county, in favor of one who is also a resident, or an attachment personally served, or of a writ of replevin, or of joining issue without process, a justice may, in his discretion, and with or without the consent of the parties, adjourn the cause not exceeding six days.”¹

1—C. L., § 795. The right expressly given to the justice by this section, to adjourn on his own motion on the return day, cuts off all implications of an intent to give him the like power in any other stage of the case: *Stadler v. Moors*, 9 Mich., 268; see, *Gamage v. Law*, 2 Johns., 192. The justice cannot of his own motion adjourn a cause until process is returned, though it be the return day: *Harbour v. Eldred*, 107 Mich., 95; 64 N. W., 1054. A justice has no authority to adjourn a cause upon his own motion where the parties, or either of them, are not residents of his county: *Hall v. Shank*, 57 Mich., 36; 23 N. W., 478. Where service of an attachment was made on the return day of the writ it was held that the justice could not proceed to trial on the same day: *Noyes v. Hillier*, 65 Mich., 626; 32 N. W., 872. As to adjournments by consent of parties: see, *Simon v. Sempliner*, 86 Mich., 136; 48 N. W., 700.

A defendant who has requested, or at least consented to, an adjournment on account of the sickness of the jus-

tice, will not be heard to complain that such adjournment was on the justice's own motion, and, being for more than six days, worked a discontinuance of the suit: *Patterson v. McTae*, 29 Mich., 258.

A cause in a justice's court may be adjourned on the written stipulation of their counsel, and without the personal presence of the parties. And this is a very different case from a verbal agreement between parties out of court, upon which action was had by the justice afterwards. In such a case the justice assumed to act upon information furnished by himself, of what the parties agreed to elsewhere; but in this case, when he acts, he has before him the written stipulation of the parties, which is just as effectual for whatever agreements are therein incorporated as any oral agreement then made in his presence would be: *Palmer v. Lewis*, 24 Mich., 242. Where, after parties have in the presence of the justice agreed to an adjournment of the cause to a particular time, and afterward, and not in

Neither party is, under this section, entitled to an adjournment, of course without showing cause for it,² but the adjournment in such cases is, in a great measure, discretionary with the justice. Thus he should adjourn the case on the application of either party, upon his showing reasonable ground for it, as, the want of testimony, the sickness of his family, etc. It cannot be expected, usually, in a contested suit, that the parties would be prepared with their proof at the time of joining issue. Under a provision substantially the same as the above section, a judgment was reversed, because the justice refused to grant an adjournment to the defendant who was unable to attend on account of his child being dangerously sick. The court said, that the discretion given to the justice is not an arbitrary one; it ought to be soundly and judiciously exercised.³

§ 290. Adjournments on the application of a party.—"If either party to the suit shall make it appear to the satisfaction of the justice, by his own oath, or the oath of any other person, that he cannot safely proceed to trial for the want of

the presence of the justice, agree that the adjournment shall be to the following day, and each party informs the justice subsequently of such agreement, the justice changing his docket entry accordingly, it is held a good adjournment to the later date: *Simon v. Sempliner*, 86 Mich., 136; 48 N. W., 700.

Where on the return day both parties ask for an adjournment, one for eight days and the other for thirty days, and the justice adjourns the suit for seven days, it is a good adjournment, upon the theory that it is an adjournment by consent, both parties asking an adjournment, though neither to that particular time: *Shaw v. Fortine*, 98 Mich., 254; 57 N. W., 128.

Adjournment of suits returnable on, or adjourned to, holidays.—For provisions relative to the adjournment of suits returnable on, or adjourned to, legal holidays, see C. L., § 4880, as amended by Pub. Acts, 1903, p. 420, and the provision in full, *ante*, § 134.

Provision is also made by the statutes, that when any process shall be made returnable on Saturday, in

cases where the defendant conscientiously believes that the seventh day of the week should be observed as the Sabbath, and shall make and file with the justice an affidavit to that effect, that the justice shall, on the return day, adjourn the cause on his own motion to some other day of the week: C. L., §§ 796, 798. See, the provision in full, *ante*, § 134.

2—*Stadler v. Moors*, 9 Mich., 269; *Walter A. Wood, etc., v. Vanderbilt*, 109 Mich., 489; 67 N. W., 690.

3—*Rose v. Stuyvesant*, 8 Johns., 426; *Mercer v. The L. & N. Bank*, 29 Mich., 243.

It is not the practice for parties to be ready to join issue and proceed at once to trial on the return day of the summons; and the showing for a continuance need not be as complete on that day as would be required later in the case, and it would be error for the justice to refuse an adjournment on the return day upon a sworn statement showing that the defendant was too ill to leave his house or to attend: *Locke v. The Leonard Silk Co.*, 37 Mich., 479.

some material testimony or witness, the justice shall postpone the trial for such reasonable time, and so often as he shall deem it proper, not exceeding in all three months, unless by consent of the parties to such suit a longer time shall be stipulated therefor in writing, to be signed by the parties or their attorneys and filed with the justice: Provided, that a party claiming an adjournment after a former adjournment has been had, shall further make it appear, to the satisfaction of the justice, that he has used reasonable diligence to procure such testimony or witness since the last preceding adjournment.”⁴

The party may show cause for an adjournment by an oral statement and examination on oath before the justice.⁵

The application to adjourn may be made on the oath of the party or of any other person. It is in the discretion of the justice to require the oath of the party or not; in general he would be better acquainted with the facts which establish his cause of action or defense, and the person by whom they can be proved, than any other person would be. But this is not always so. It may be that a third person is as well, perhaps better acquainted with them than the party himself; and in such and like cases, there can be no propriety in excluding the oath of such person. This is a matter which rests in the sound discretion of the justice.⁶ An adjournment upon joining issue

4—C. L., § 791. A party is entitled to an adjournment, as a matter of right, provided he complies with the statute in showing reasonable grounds therefor: *Nellis v. McCarn*, 35 Barb., 115. But he is not entitled, of right, to an adjournment, unless by consent of the other party, without showing some cause recognized by the statute: *Stadler v. Moors*, 9 Mich., 269. An application for an adjournment merely for the purpose of enabling the party to procure counsel, cannot be granted. Such a ground is not a legal cause for an adjournment: *Warner v. Comstock*, 55 Mich., 615; 22 N. W., 64. See, *Segar v. Shingle & Lumber Co.*, 81 Mich., 344, 347; 45 N. W., 982. The “three months” of the statute begin to run on the return day: *Hatch v. Christmas*, 68 Mich., 86; 35 N. W., 833. A voluntary appearance after the expiration of the three months

fixed by the statutes gives the justice jurisdiction to render judgment: *Gilmore v. Lichtenburg*, 129 Mich., 275; 88 N. W., 629.

5—If an application for an adjournment is based upon an affidavit made and sworn to by the party himself, the opposite party will have the right to cross-examine him upon such affidavit; and a refusal to submit to such cross-examination, is sufficient reason for refusing to allow the adjournment: *Boatz v. Berg*, 51 Mich., 8, 10; 16 N. W., 184.

6—*Kilmer v. Crary*, 13 Johns., 228. And it would seem that the plaintiff is entitled, as a matter of right, to make the proofs required, by an agent or attorney: *Seers v. Grandy*, 1 Johns., 514. In fact, the statute provides that he may make the proofs by his own oath or the oath of any other person.

is so much a matter of course in litigated cases, that a strict compliance with the letter of the statute in this respect should not, except in extraordinary cases, be required. The parties, usually, make no preparation for trial until after issue joined, for until that time neither of them can legally know what will be the claim or defense of his antagonist; and hence, the statute does not require that either party, in order to obtain an adjournment, in the first instance, should show that he has made any effort to procure his witnesses. Nor can the party asking an adjournment be compelled to state the name or nature of the testimony which is to be obtained.⁷ At least, it would be in the discretion of the justice to require it or not.

The length of time for which the cause shall be adjourned, is in the discretion of the justice; it must be for a reasonable time, such time as will be reasonable under all the circumstances of the case. The distance at which the witness resides, and many other circumstances, are to be considered.

It will be observed that the only cause for an adjournment, under *this* provision,⁸ is a want of some material testimony or witness; no other reason will be sufficient if the opposite party object.

The justice is authorized to adjourn the case as often as he shall deem it proper, the time to which the cause may be adjourned cannot exceed three months, unless by consent of parties; except in the Upper Peninsula.

§ 291. **Adjournment after a prior adjournment.**—If a party ask an adjournment after a former adjournment has been had on his own motion, he must, in addition to the requirement already mentioned, “further make it appear to the satisfaction of the justice, that he has used *reasonable diligence* to procure such testimony or witness since the last preceding adjournment.”⁹ If the party show that he has subpoenaed a material witness who does not attend, and that he cannot safely proceed to trial without him, or other reasonable excuse for not being ready, the justice shall grant the adjournment.¹⁰ The party

7—2 Cow. Treat., 2d ed., 846; see
Eaton v. North, 7 Barb., 631.
8—C. L., § 791.

9—C. L., § 791.
10—Beekman v. Wright, 11 Johns.,
442; Hemstreet v. Young, 9 Johns.,

is not bound to state what he expects to prove by the absent witness, unless the conduct of the party is such as fairly to cast a well-grounded suspicion upon the good faith of the application to adjourn. In such case, if he refuse to disclose what he expects to prove, the adjournment may be refused.¹¹ If he state what he expects to prove, the adjournment may be denied in case the opposite party will admit it.¹² It will not be sufficient, however, to admit that the witness will swear as stated; the admission must extend to the existence of the fact proposed to be proved by the witness, that what the party expects to prove is true.¹³

It must also be shown that the party expects to be able to procure the attendance of the witness at the day to which he desires to have the case adjourned.¹⁴

It is not a sufficient reason for refusing the adjournment, that the witness lives out of the jurisdiction of the court, for the party may procure his attendance or his testimony.¹⁵

Nor can the adjournment be refused because the party refuses to pay costs; a justice has no right to require the payment of costs as a condition of allowing an adjournment.¹⁶

§ 292. When adjournment not allowed.—“No party shall be entitled to an adjournment after he shall have seen the account or demand of the adverse party, unless he shall exhibit his account or demand, if any he has, to be litigated or passed upon in the suit, or shall state the nature thereof, as far forth as may be in his power, to the satisfaction of the justice.”¹⁷

This provision has nothing to do with the question of set-off on the trial. At the time when the exhibit is required, the sole question before the justice is, the propriety of granting an adjournment; hence, the party is to set forth the nature of his

364. And even where a day of trial has been agreed upon by the parties, one of them is not thereby prevented from asking a further adjournment, on sufficient cause shown: *Annin v. Chase*, 13 Johns., 462; and see, *Smith v. Fenton*, 2 Cow. R., 425.

11—*Onderdonk v. Raulett*, 3 Hill, 323.

12—*Brill v. Lord*, 14 Johns., 341.

13—*People v. Vermilyea*, 7 Cow., 369.

14—*Onderdonk v. Raulett*, 3 Hill, 328.

15—*Eaton v. Coe*, 2 Johns., 383. But if it is necessary to take the testimony of a foreign or absent witness by commission, that may be sufficient reason for an adjournment: *Eaton v. North*, 7 Barb., 631.

16—*Hemstreet v. Young*, 9 Johns., 364; *Beekman v. Wright*, 11 *Ibid.*, 442; *People v. Calhoun*, 3 Wend., 420.

17—C. L., § 792.

demand to the satisfaction of the justice, who is to be reasonably satisfied that the party has good grounds for asking for an adjournment; that the witness stated to be absent, is necessary to support a *bona fide* demand which the party has, or at least supposes he has, and that injustice may be done if he is driven to a trial *instanter*, without an opportunity to support his claim. This is the whole object of the provision; and when the adjournment is granted the object is attained, and the parties upon the trial are thrown upon the issue joined by the pleadings.¹⁸

§ 293. **Adjournment in suits commenced by warrant.**—"If a cause commenced by warrant be adjourned on the application of the defendant, he shall continue during the time of adjournment in the custody of the constable, unless he shall give bond to the plaintiff in the sum of two hundred dollars, with sufficient surety or sureties, to be approved by the justice, conditioned that the defendant will render himself in execution in case judgment shall be rendered against him in the suit, and that no part of his property liable to execution shall be removed, secreted or assigned, or disposed of, except for the necessary support of himself and family, until any judgment the plaintiff may obtain against him shall be satisfied, or until the expiration of ten days after the plaintiff shall be entitled to execution thereon."¹⁹

If the plaintiff, being present, make no objection to the surety, he will be received of course. If any objection is made to his competency, the justice shall require him to justify under oath.

"If such cause be adjourned on the application of the plaintiff, the defendant, if the justice shall think it proper, shall be discharged from custody, but the cause shall not be discontinued by such discharge; and at the adjourned day the same proceedings shall be had as in case of a summons returned personally served."²⁰

It is in the discretion of the justice either to discharge the defendant or detain him in custody. The statute allows three days in which the justice is required to proceed to hearing and

18—Harrington v. Ensign, 11 Wend., 554. 19—C. L., § 793.
20—C. L., § 794.

determine the cause.²¹ If a longer time is required, the cause must be adjourned. The justice, in such case, should require the plaintiff to make a strong case before he allows an adjournment.

Where a day for the trial has been agreed on by the parties,²² or they are under a stipulation not to delay the trial beyond the day fixed, the parties are not, therefore, precluded, upon sufficient cause, from asking a further adjournment.²³

An agreement of the parties, before the justice, to adjourn a cause, and that if a certain person do not attend at the adjourned day, the justice might adjourn for such reasonable time as he might deem necessary, in order to procure the attendance of the witness, is a valid and binding agreement between the parties, which neither has a right to rescind without the consent of the other.²⁴

§ 294. **Adjournment after trial commenced.**—After the jury has been sworn in the cause, it is too late to apply for an adjournment. The trial of the cause is then considered as commenced.²⁵ So, also, would it be if the justice had commenced the trial by examination of a witness, or the hearing of any other testimony.²⁶ But, although the justice cannot in such case, grant an adjournment, he may hold open his court for a short time to enable a party to procure a witness. The granting of this privilege rests in the discretion of the justice, and, unless that discretion is abused, the judgment will not be reversed. And for such purpose two hours has been considered not an unreasonable time.²⁷ But where the justice allowed the party twenty hours to obtain a witness twelve miles off, it was held unreasonable.²⁸ So, where he allowed four days, although the defendant had not pleaded, and even had not appeared.²⁹

21—C. L., § 727; see, *ante*, § 67.

22—*Annin v. Chase*, 13 Johns., 462.

23—*Smith v. Fenton*, 2 Cow., 425.

As, where the party shows that a material witness is absent, and that he has used due diligence to secure his attendance, or to obtain his testimony: *Ibid.*

24—*Richardson v. Brown*, 1 Cow., 255.

25—*Pink v. Hall*, 8 Johns., 437;

Parmelee v. Thompson, 7 Hill, 77;

Story v. Fiessel, 2 E. D. Smith, 90;

Pollock v. Ehle, *Ibid.*, 541; *Story v.*

Bishop, 4 *Ibid.*, 423.)

26—See, *Gale v. Barnes*, 1 Cow., 235.

27—*Pease v. Gleason*, 8 Johns., 409.

28—*Green v. Angel*, 13 Johns., 469.

29—*Wilcox v. Clement*, 4 Denio, 160. When practicable, it is better to hold the cause open for a definite

§ 295. **Adjournments from necessity.**—Adjournments may also be made from necessity. Thus, where an attachment is issued against a witness;³⁰ or, a new venire is issued;³¹ the cause may be adjourned for a reasonable time. So, when a witness refuses to be sworn, or to answer any pertinent or proper question, the cause may be adjourned from time to time at the request of the party in whose favor such witness attended, until such witness shall testify in the cause, or be dead, or otherwise incapable of testifying as a witness.³²

“In case of the sickness of any justice, or of his absence from the township or city in which he was elected, or his inability from any cause, temporarily or negligently, to perform the duties of his office, any such matter or cause pending before him shall stand continued before him two weeks, at the end of which time, unless said justice shall be able to attend the same, such cause or matter shall stand transferred to the justice of the same township or city, whose term of office shall soonest expire, and be heard and tried before him in the same manner and time as in case of a vacancy, etc.”³³

§ 296. **Must be docket entry of adjournment.**—The statute³⁴ requires the justice to enter “every adjournment, stating on whose motion, and to what time and place” on his docket. A failure to do so if not waived is fatal to the judgment.³⁵

time, as, for a certain number of hours; an indefinite holding open for several days is improper: *Ibid.* But the justice may hold the cause open for a reasonable time, and continue it from day to day, in the progress of the trial, as the necessities of the case may require; and such holding open or continuance is not an “adjournment” controlled by the statute: *Stadler v. Moors*, 9 Mich., 268; *Woempener v. Ketchum*, 110 Mich., 34; 67 N. W., 1106.

30—C. L., § 803; *Aberhall v. Roach*, 3 E. D. Smith, 345; see, *post*, §§ 304-5. So, where a justice is engaged in the trial of another cause, or in other official business, he may adjourn or hold a cause open until the first cause or prior business is disposed of: *Hunt v. Wickwire*, 10 Wend., 102; *Stadler v. Moors*, 9 Mich., 268.

31—C. L., § 833; *Fiero v. Reynolds*,

20 Barb., 275; see, *post*, § 323;

see, *Day v. Wilber*, 3 Caines R., 134.

32—C. L., §§ 984, 986; see, *post*, §§ 304-5.

33—C. L., § 800; see, *ante*, § 154.

34—C. L., § 957.

35—So held where the docket failed to show to what place the adjournment was had: *Waldron v. Palmer*, 104 Mich., 556; 62 N. W., 731; *Fitzhugh v. Rivard*, 109 Mich., 154; 66 N. W., 947; *Stotte, D. & F. Co. v. Cochran*, 111 Mich., 193; 69 N. W., 247. And a failure of the docket to show the place to which an adjournment was taken is not a “technical defect” which may be disregarded on *certiorari*: *Mitts v. Harvey*, 125 Mich., 354; 84 N. W., 288. Where an application was made to adjourn and the docket of the justice recited that “I overruled said motion and adjourned said cause until one o'clock p. m., at

§ 297. **Of irregular adjournments.**—An adjournment not authorized by the statute, is a discontinuance of the suit.³⁶ As where the justice being absent from the place of holding the court, sent a note in writing to adjourn the cause; where, in the absence of the justice, the parties agreed to adjourn, which was entered by him on his docket,³⁷ where the cause was adjourned indefinitely, and not to a day certain.³⁸

§ 298. **Waiver of irregularities.**—If the party having the right to object to the erroneous adjournment appear at the adjourned day and go to trial on the merits,³⁹ or cross-examine a witness;⁴⁰ or apply for an adjournment, or do any other act treating the cause as existing,⁴¹ the irregularity would be waived. So, where the case was indefinitely adjourned, but on notice from the justice the parties appeared and proceeded to trial.⁴² But mere appearance of the party and answering

my office in the city of Lapeer," it was held that the justice did not lose jurisdiction; that the entry indicated a mere holding open to an hour certain on the same day: *Loder v. Reed*, 129 Mich., 180; 88 N. W., 389.

36—*Gamage v. Law*, 2 Johns., 192. An adjournment, unless by consent, without some cause recognized by the statute, or without showing cause when the statute has given it only on cause shown, or without showing diligence when that is required, or an adjournment on the justice's own motion, except on the return day, operates as a discontinuance of the suit: *Stadler v. Moors*, 9 Mich., 269; see *Hall v. Shank*, 57 Mich., 36; 23 N. W., 478. So, an adjournment for more than four days after the trial is completed, for the purpose of rendering judgment, deprives the justice of jurisdiction of the case: *Brady v. Taber*, 29 Mich., 199. An unauthorized adjournment ousts the justice of jurisdiction: *Segar v. Shingle and Lumber Co.*, 81 Mich., 344; 45 N. W., 982; *Scullen v. George*, 65 Mich., 215; 31 N. W., 841.

37—*Kimball v. Mack*, 10 Wend., 497; *Weeks v. Lyon*, 18 Barb., 530; *Deland v. Richardson*, 4 Denio, 95; *Wiest v. Critsinger*, 4 Johns., 117. But if both parties should subsequently appear and proceed to trial, the

irregularity would be waived: *Ibid.*

38—*Allen v. Edwards*, 4 Hill, 499; *Wilcox v. Clement*, 4 Denio, 160. So, also, where the justice held open the cause for an unreasonable length of time after the trial had commenced: *Green v. Angel*, 13 Johns., 469; 4 E. D. Smith, 423; *Aberhall v. Roach*, 3 *Ibid.*, 345; *Redfield v. Florence*, 2 *Ibid.*, 339. So, when the plaintiff does not appear on the return day, or on an adjourned day, the cause cannot be adjourned: it must be dismissed: *Bailey v. Delaplaine*, 1 Sandf., 11; *Norris v. Bleakley*, 1 Hilt., 90; *Sprague v. Shedd*, 9 Johns., 140; *Green v. Angel*, 13 *Ibid.*, 469. Nor can the justice adjourn a cause on motion of the plaintiff, in the absence of the defendant, without cause shown: *Stadler v. Moors*, 9 Mich., 264.

39—*Sprague v. Shedd*, 9 Johns., 136, 140; *Tift v. Culver*, 3 Hill, 180.

40—*Dunham v. Hayden*, 7 Johns., 381.

41—*Fanning v. Trowbridge*, 5 Hill, 428. See, *ante*, § 139, note 15.

42—*Allen v. Edwards*, 3 Hill, 499. Any objection to an illegal adjournment by a justice must be made before the trial of the cause is entered upon, or it will be waived: *Erie Preserving Co. v. Witherspoon*, 49 Mich., 377; 13 N. W., 781.

to his name, but declining to take any part in the proceedings, is no waiver.⁴³ So, if a defendant, after being improperly refused an adjournment, voluntarily confess judgment, he waives the irregularity.⁴⁴

The party upon whose application an erroneous adjournment is made, cannot object to it as irregular.⁴⁵ Nor can the other party, unless he objected to it at the time, as by not doing so he will be considered as consenting to it.⁴⁶

43—Fanning v. Trowbridge, 5 Hill, 428. 46—Dunham v. Hayden, 7 Johns., 381; Kilmore v. Sudam, 10 Johns., 529.

44—Hill v. Downer, 11 Johns., 461.

45—Peck v. McAlpine, 3 Caines R., 166.

CHAPTER XVIII.

OF COMPELLING THE ATTENDANCE OF WITNESSES.

OF THE WRIT.

§ 299. In what cases justice may issue.

§ 300. Subpoena *duces tecum*.

§ 301. Compelling attendance before arbitrators.

§ 302. Single, for several witnesses.

OF THE SERVICE OF THE WRIT.

§ 303. By whom and how.

OF COMPELLING ATTENDANCE BY ATTACHMENT.

§ 304. Under what circumstances may.

§ 305. How attachment executed.

OF FAILURE TO ATTEND OR TESTIFY.

§ 306. May be fined for not attending.

§ 307. Witness also liable in damages.

§ 308. Refusing to be sworn may be committed.

OF THE WRIT.

§ 299. In what cases justices may issue subpoenas for witnesses.—“Any justice of the peace may issue subpoenas to compel the attendance of witnesses, to give evidence in any cause or matter depending before himself or any other justice or court; and such subpoenas shall be valid to compel the attendance of a witness within the same county where the cause or matter is to be tried, or in another county, and within thirty miles of the place of trial.”¹

§ 300. Subpoenas *duces tecum*.—If the party desires a witness to produce in evidence, on the trial, any deed, book, paper or other thing, in his possession, the subpoena must require the witness so to do. Such subpoena is called a subpoena *duces tecum*. It should describe the writing or other thing desired to be produced with such particularity as that it could be identified with reasonable certainty.²

§ 301. Compelling appearance before arbitrators.—“Witnesses may also be compelled to appear before such arbitrators by subpoenas, to be issued by any justice of the peace, in the

1—C. L., § 801.

2—Inability to find after diligent search will excuse production under subpoena *duces tecum*: *Lamb v. Lipincott*, 115 Mich., 611; 73 N. W., 887.

Where documents are in court their production may be compelled by order, without a subpoena *duces tecum*: *Hunton v. Hertz & H. Co.*, 118 Mich., 475, 76 N. W., 1041.

same manner and with the like effect, and subject to the same penalties for disobedience, or for refusing to be sworn or to testify, as in cases of trials before justices of the peace."³

§ 302. Single Subpoena may be used for several witnesses.—The subpoena may contain the names of as many witnesses as the party may wish to have inserted. And there is no impropriety in the justice inserting the name of one witness, and permitting the party to insert such others as he may please.⁴ In fact, he may insert them without such permission.

OF THE SERVICE OF THE SUBPOENA.

§ 303. By whom and how served.—"A subpoena may be served either by the constable or any other person, and it shall be served by reading the same, or stating the contents to the witness, and by paying or tendering the fees allowed by law for traveling, and one-half day's attendance."⁵

If the witness be a married woman, the subpoena must be served upon her, and the fees paid or tendered to her, and not to her husband.⁶ The subpoena must be served on the witness a reasonable time before the trial.⁷ He is entitled to a reasonable time to travel to court according to the usual modes of public conveyance, and cannot be required to travel on Sunday.⁸ He is bound to make extraordinary effort to obey the subpoena; nothing but extreme poverty and utter inability to attend, or sickness of himself or family, conclusively proved, will excuse his non-attendance.⁹

OF COMPELLING ATTENDANCE BY ATTACHMENT.

§ 304. Under what circumstances attendance so compelled.—"Whenever it shall appear by the affidavit of the party in

3—C. L., § 10929.

4—2 Cow. Treat., 2 ed., § 59.

5—C. L., § 802.

6—Goodwin v. West, Cro. Car., 522.

7—Hammond v. Stewart, 1 Strange, 510; Chalmers v. Melville, 1 E. D. Smith, 502. Otherwise he will not be liable to an attachment for non-attendance: *Ibid.*

8—Wilkie v. Chadwick, 13 Wend., 49.

9—People v. Davis, 15 Wend., 602.

But the witness will be under no obligation to attend, unless his fees for travel and attendance were paid: *Hurd v. Swan*, 4 Denio, 75. Nor can a witness, though present in court, be compelled to be sworn as a witness until his fees are paid. Nor is he under any obligation to remain at court for any longer time than that for which his fees have been paid, or tendered to him; he is not bound to apply for his fees, or notify the party that he will

the suit, or by other competent testimony, to the satisfaction of the justice, that any person duly subpoenaed to appear before him in any cause shall have refused or neglected without just cause to attend as a witness in conformity to such subpoena, and that the testimony of such witness is material, as the deponent verily believes, the justice shall have power to issue an attachment to compel the attendance of such witness."¹⁰

Unless the subpoena has been served by a constable or sheriff, and a return made by him, there must be an affidavit or other competent evidence of service. And before issuing the attachment, the justice should satisfy himself, by due proof, that the witness has neglected or refused to attend without just cause, and that his testimony is material in the case. The proof for an attachment, it is said, may be made orally before the justice.¹¹

If the subpoena was served by a party, and proof of service and of the materiality of the testimony is made by affidavit, it should be annexed to the subpoena.

If the witness be near the place of trial, the attachment may be made returnable forthwith; but if he be at such a distance from it that the attachment cannot be served and returned in a reasonable time for continuing the cause open, the proper course would be to adjourn to such time as would be sufficient for the service and return of the attachment, and make it returnable at that time.¹²

§ 305. Attachment, how executed.—“Every such attachment shall be issued (executed) in the same manner as a warrant, and the fees of the officers for issuing and serving the same,

leave if they are not paid: *Ibid.* And it has been held, that a party in the cause, and in court, cannot be required to be sworn or to testify when called by the opposite party, unless his fees as a witness have been paid or tendered to him: *Hewlett v. Brown*, 1 Bosw., 655.

10—C. L., § 803.

11—*Baker v. Williams*, 12 Barb., 527.

12—*Edwards Treat.*, 2d ed., 79.

A party should see that his witnesses are in attendance before the

trial is commenced; if they are not, he should apply for an attachment at once. A justice might, perhaps, in his discretion, issue an attachment on an application made after the trial has commenced, but he would not then be authorized to adjourn the cause as he might have done had the motion been made at the proper time: *Aberhall v. Roach*, 3 E. D. Smith, 345; *Story v. Bishop*, 4 *Ibid.*, 423. But if a witness has been regularly subpoenaed, and attended court, and left it after the trial commenced, the jus-

shall be paid by the person against whom the same shall be issued, unless he shall show reasonable cause to the satisfaction of the justice for his omission to attend; in which case the party requiring such attachment shall pay all costs of such attachment, and the service of the same."¹³

The statute contains no provision directing the manner in which the payment of the fees for issuing and serving the attachment should be collected. The justice on the return of the attachment, should determine whether the witness or the party should pay them; and the one adjudged liable for them would be accountable in an action by the party if the witness is to pay, and by the justice and constable if the party is holden.¹⁴

OF THE PENALTY FOR NON-ATTENDANCE OR REFUSAL TO TESTIFY.

§ 306. **Witness may be fined for not attending.**—"Every person duly subpoenaed as a witness, who shall not appear, or who, appearing, shall refuse to testify, shall forfeit for every such non-appearance or refusal (unless some reasonable cause or excuse shall be shown on his oath, or the oath of some other person) a sum not less than one dollar, nor more than ten dollars."¹⁵

"Such fine may be imposed by the justice, upon the witness being before him, or his being brought before him on attachment; and the justice shall thereupon make and enter in his docket, a minute of the conviction and the cause thereof, and the same shall be deemed a judgment, in all respects, at the suit of the people of this state."¹⁶

tice may, in his discretion, hold the cause open until the witness can be attached and brought in, if that can be done in a reasonable time: *Rappleye v. Prince*, 4 Hill, 119.

13—C. L., § 804.

14—2 Cow. Treat., 2d ed., 864.

15—C. L., § 805. The proceedings to impose a fine under this and the next section are of a criminal nature: *Prentiss v. Webster*, 2 Doug., 5; see, *Matter of John Morton*, 10 Mich., 208; *Page v. Mitchel*, 13 Mich., 63; *Matter of Frederick Hall*, 10 Mich., 210.

16—C. L., § 806: *Hasbrouck v. Baker*, 10 Johns., 248; *Heermans v. Williams*, 11 Wend., 636. It has been

held, that the neglect of the witness to appear in obedience to the subpoena is a contempt, and that after termination of the suit the witness might be punished therefor, and that the justice might issue his warrant to bring the witness before him to receive sentence. And that the proceedings for the punishment of a defaulting witness may as well be had at the close of the suit as before, and at any time before the penalty is barred by the statute of limitations: *Robbins v. Gorham*, 25 N. Y., 588; but see, *Matter of Clark*, 12 Cush., 320. The validity of the conviction is complete when pronounced and the minutes thereof made

In case the witness does not appear, the penalty must be collected in an action for its recovery.¹⁷ In such action it must appear that the witness was material. The witness may show by the plaintiff's admission that he (witness) knew nothing about the matter in controversy. The omission to pay the witness his legal fees would be a reasonable excuse.¹⁸ Unless those fees are paid, an action cannot be sustained. Where less than the legal amount was paid the witness when he was subpoenaed, and it did not appear whether he objected at the time that the amount was insufficient, it was held, that the party must pay a witness enough at his peril, and therefore the action could not be sustained. If necessary that the witness remain in court beyond the time for which he has been paid, the party must pay additional fees, at the peril of losing him; the witness is not under any legal obligation to ask for them.¹⁹ Whether a witness, who at the time of service of the subpoena waives the payment of a part or the whole of his fees, is liable to an action, is, perhaps, questionable.

"Upon the imposition of such fine, and in default of payment thereof, with costs, the justice shall forthwith issue an execution directed to any constable of the county, commanding him to levy such fine, with costs, on the goods and chattels of the delinquent, and for want thereof to take and convey him to the jail of the county, there to remain until he shall pay such fine and costs; and the keeper of such jail shall keep such delinquent in close custody in such jail, until the fine and costs be paid, but such imprisonment shall not exceed thirty days."²⁰

"When money shall be collected on such execution, the constable shall return the same to the justice, and such justice shall pay over the amount of such fine to the county treasurer, to be distributed according to law."²¹

§ 307. **Witness liable in damages, when.**—"Every person subpoenaed as aforesaid, and neglecting or refusing to appear

up, and its validity is not affected by the failure of the justice to enter it in his docket: *Robbins v. Gorham*, 25 N. Y., 588; and see, *Hall v. Tuttle*, 6 Hill, 38; *Walrod v. Shutter*, 2 Comst. 134.

17—C. L., chap. 271.

18—*Courtney v. Baker*, 3 Denio, 27.

19—*Hurd v. Swan*, 4 Denio, 75.

20—C. L., § 807.

21—C. L., § 808.

or testify, shall also be liable to the party in whose behalf he shall have been subpoenaed, for all damages which such party shall sustain by reason of such non-appearance or refusal; and in all cases when any fees shall be paid to any person for attendance or travel as a witness, and such person shall fail to attend, he shall refund the amount paid."²²

§ 308. **Witness refusing to be sworn or to testify may be committed.**—"When a witness, attending before any justice in the cause, shall refuse to be sworn in the form prescribed by law, or to answer any pertinent or proper question, such justice may, by warrant, commit such witness to the jail of the county."²³

"Such warrant shall specify the cause for which the same is issued, and if it be for refusing to answer any question, such question shall be specified therein; and such witness shall be closely confined, pursuant to such warrant, until he submit to be sworn, or to answer, as the case may be."²⁴

If, for any reason, the justice has failed to acquire jurisdiction of the proceeding or cause, a commitment of a witness for refusing to testify would be void.²⁵

If the witness refuse to testify, the justice may immediately require him to show cause why a fine should not be imposed, and if no sufficient cause be shown, impose a fine. It must be shown or admitted that the subpoena has been duly served, as by the language of the previous section (§ 805) a fine can be imposed only upon a person who has been "duly subpoenaed as a witness."

Before the justice can commit a person who *refuses to be*

22—C. L., § 809.

In an action for damages occasioned by the defendant's non-attendance as a witness in obedience to a subpoena, the plaintiff is entitled to recover any damages immediately consequential on the non-attendance; as, for example, that occasioned by the postponement of the trial for which he was subpoenaed, on account of his absence. And it is no answer to such action, that the court from which the subpoena issued refused to impose a fine upon the defendant for disobeying the subpoena, but accepted his excuse:

Prentiss v. Webster, 2 Doug., Mich., 5; see, Hasbrouck v. Baker, 10 Johns., 248; Heermans v. Willfams, 11 Wend., 636. But, before an action will lie, it must be made to appear that the witness was a material one, and that the failure to try the cause, or the defeat of the party, arose from the absence of such witness: Hurd v. Swan, 4 Denio, 75; Courtney v. Baker, 3 *Ibid.*, 27.

23—C. L., § 984.

24—C. L., § 985.

25—Matter of John Morton, 10 Mich., 208. And the justice would be

sworn as a witness, it must be proved that he has been duly subpoenaed, for, unless he has been, he cannot be compelled to testify. If, however, a person not duly subpoenaed consent to be sworn, he may be committed if he refuse to answer a pertinent or proper question. In either case, the party at whose instance he attended must make oath that the testimony of such witness is so far material that without it he cannot safely proceed to the trial of such cause.

If the party, after being duly sworn, testify that the testimony of the witness is so far material, that without it he cannot safely proceed to the trial of the cause, and the witness still refuses to be sworn or to answer, the justice must commit him.

“The justice shall thereupon adjourn such cause at the request of the party in whose favor such witness attended, from time to time, until such witness shall testify in the cause, or be dead, or otherwise incapable of testifying as a witness.”²⁶

liable to an action for false imprisonment for any detention which the witness might be subjected to, under such void warrant of commitment: Page v. Mitchell, 13 Mich., 63, 68.

26—C. L., § 986. But a witness

cannot be detained in custody for refusing to be sworn or to testify after the cause or proceeding in which his testimony is required is discontinued: Matter of Frederick Hall, 10 Mich., 210.

CHAPTER XIX.

OF THE TRIALS OF ISSUES OF FACT, AND THE INCIDENTS THERETO.

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| OF TRIALS WITHOUT JURY. | § 329. When challenge is for cause, ground to be immediately assigned. |
| § 309. When and where trial to proceed. | § 330. Further as to when to be made. |
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| OF THE VENIRE, AND SETTLING THE JURY. | OF PROCEEDINGS ON THE TRIAL. |
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OF TRIALS BEFORE THE JUSTICE WITHOUT A JURY.

§ 309. When and where trial to proceed.—“Whenever issue shall have been joined in a suit before a justice, if no jury shall have been demanded by either party, the justice shall proceed to try such issue, to hear the proofs and allegations of the parties, and to determine the same according to law, as the very right of the case may appear.”¹

¹—C. L., § 811.

"Whenever a defendant who has been personally served with a summons, attachment, or writ of replevin, or who shall have procured an adjournment without having joined issue, shall neglect to appear and join issue, the justice shall proceed to hear the proofs and allegations of the plaintiff, and determine the same as above prescribed."²

The trial cannot be had at a place different from the one mentioned in the summons,³ unless both parties appear at the place appointed, when it may be adjourned to another place.⁴

§ 310. In case defendant fails to appear.—If the defendant does not appear on the return of process, the plaintiff must prove his demand in the same manner as if he had appeared and denied it.⁵ So, if the defendant does not appear after an adjournment without having joined issue, or if he fails to appear after issue joined upon a plea which denies the plaintiff's demand, as the general issue, or appear and refuses to

2—C. L., § 812.

3—Stewart v. Melgs, 12 Johns., 417.

4—Morrill v. Near, 1 Cow., 112.

But when both parties appear on the return of process, an adjourned day, the justice may adjourn the cause to a more convenient place of trial, if it is within reasonable distance and in the same town. Unless the parties sooner appear, the justice must, both on the return day and on any adjourned day, wait an hour before proceeding with the trial: See, *ante*, § 149; and, Shufelt v. Cramer, 20 Johns., 309; Stafford v. Williams, 4 Denio, 182; Sherwood v. Saratoga & W. R. R. Co., 15 Barb., 650. So, where a cause is held open to a particular time, as for the return of an attachment issued against a defaulting witness, the justice must, unless both parties shall be sooner present, wait one hour before proceeding with the trial: See, *ante*, § 149; Clark v. Garrison, 3 Barb., 372.

5—Van Duzor v. Linderman, 10 Johns., 106. And the evidence must be sufficient to show a cause of action, and to warrant a judgment, for if there should be an entire want of evidence, or a material defect in the proofs, the judgment will be reversed on *certiorari*: Northrop v. Huntley,

13 Wend., 85; Perkins v. Stebbins, 29 Barb., 523; Carter v. Dallimore, 2 Sand., 222; Swift v. Falconer, *Ibid.*, 640. But where the defendant does not appear, the plaintiff need not negative any affirmative defense which the defendant might have interposed, had he appeared; therefore no proof need be made to avoid the statute of limitations, or to show that no payment has been made, or to establish any other fact which might be used in answer to a defense, had one been set up: Humphrey v. Pearsons, 23 Barb., 313. The rule is the same where the defendant has appeared and put in a denial, and also set up an affirmative defense. If he does not appear at the trial and prove the affirmative defense, the plaintiff need only prove what is put in issue by the general denial. As to the affirmative defense the burden of proof is on the defendant, and until he gives evidence to prove the truth of it, the plaintiff need not negative it: *Ibid.* Unless the plaintiff's evidence shows the affirmative defense to be true, as, where the plaintiff declares upon a promissory note, which appears on its face to be barred by the statute of limitations; in such case, if the defendant sets up that defense at the joining of issue, then

plead. In all these cases the justice must hear the proofs and allegations of the plaintiff, and upon them render his judgment.⁶

§ 311. Proof by witness.—Every person offered as a witness before any testimony shall be given by him, shall be duly sworn or affirmed.⁷

The oath, to the witness, must be administered by the justice who tries the cause, and if he be sworn by another justice, it will be illegal,⁸ if objected to,⁹ otherwise not, as the parties may consent that a witness give his evidence without being sworn at all.¹⁰

§ 312. When judgment of non-suit may be rendered.—“Judgment of non-suit, with costs, shall be rendered against a plaintiff prosecuting an action before a justice of the peace, in the following cases:

1. If he discontinue or withdraw his action;
2. If he fail to appear, on the return of any process, within one hour after the same was returnable;¹¹
3. If after an adjournment he fail to appear within one hour after the time to which the adjournment shall have been made;
4. If he become non-suited on the trial.

A judgment of non-suit is a final disposition of the particular

even though the defendant do not appear at the trial, the defense must be allowed, unless the plaintiff shows that the demand has been continued in force, or that it has been revived or renewed in some legal manner: *Penfield v. Jacobs*, 21 Barb., 335; *Walrod v. Bennett*, 6 *Ibid.*, 144.

6—The general issue does not always deny the plaintiff's demand, as, where the plaintiff claims upon a note or written instrument made by the defendant, and filed with the justice; See, *ante*, § 191.

7—C. L., §§ 830, 10204, 10205, 10206.

8—*Perry v. Wyman*, 1 Johns., 520.

9—*Cobb v. Curtis*, 8 Johns., 470.

10—*Reed v. Gillett*, 12 Johns., 396. While the law does not permit a justice or judge to be a witness in a cause

on trial before himself, nor to make any facts within his own knowledge the basis of his judicial decisions: *Blanchard v. Richley*, 7 Johns., 199; nor allow his personal knowledge of facts to dispense with proof of them where such proof would be otherwise required: *Kermott v. Ayer*, 11 Mich., 183; yet it seems that by the consent of both parties the justice might be sworn in the case, or make a statement without oath, and act upon it: *Cobb v. Curtis*, 8 Johns., 470; see, *Morss v. Morss*, 11 Barb., 510.

11—The failure of the plaintiff to appear within the hour deprives the justice of jurisdiction except to render a judgment of nonsuit: *Brady v. Taber*, 29 Mich., 199; *Cagney v. Wattles*, 121 Mich., 469; 80 N. W., 245.

action in which it is entered, but does not necessarily bar a subsequent action for the same cause.¹²

If the plaintiff be satisfied that his proof is insufficient to maintain his action, he may elect to become non-suit at any time before the cause is finally submitted to the justice, but not after it is so submitted.¹³ But if the justice should consider the plaintiff's evidence insufficient to support the action, he cannot *compel* the plaintiff to be non-suited.¹⁴

§ 313. Generally, of when judgment to be rendered.—“In cases where a plaintiff shall be non-suited, discontinue or withdraw his action, and where a judgment shall be confessed, and in all cases where a verdict shall be rendered, or the defendant shall be in custody at the time of hearing the cause, the justice shall forthwith render judgment, and enter the same in his docket; in all other cases he shall render judgment and enter the same in his docket, within four days after the cause shall have been submitted to him for his final decision.”¹⁵

12—*Bowne v. Johnson*, 1 Doug., Mich., 186. If a judgment of nonsuit be announced by the justice under the apprehension that the plaintiff has not appeared, when he has, he may correct the announcement and proceed with the trial: *Hodges v. Bagg*, 81 Mich., 247; 45 N. W., 841. A written request of plaintiff without personal appearance by himself or attorney, is sufficient to authorize the justice to hold the case open for a few hours: *Wagner v. Kellogg*, 92 Mich., 616; 52 N. W., 1017.

13—*Hess v. Beekman*, 11 Johns., 457. If notice of set-offs has been filed, he cannot become nonsuited without the consent of the defendant: see, *ante*, § 273.

14—*Cahill v. K. M. Ins. Co.*, 2 Doug., Mich., 124, 133.

15—C. L., § 843; see, *post*, chap. xxvi.

In those cases where the justice may, under this section, render judgment within four days after the cause was submitted to him, he may decide it at any time within the four days. If he determines, when the cause is submitted to him, to decide it on some particular day within that time, this

is in legal effect a continuance of the cause until that day, and should be so announced to the parties, and should be so entered upon his docket. If he does not at the time of the submission of the cause determine on the day when he will render his judgment, he may render it at any time within the four days, when, upon due consideration, he becomes satisfied what judgment should be rendered; and, in such case, the court must be regarded as still open, so far as the particular case is concerned, and the parties bound to take notice when the judgment is rendered, and what the judgment is: *Draper v. Tooker*, 16 Mich., 74, 77. But the decision and judgment of the justice must be rendered within the four days, or the judgment will be void: *Watson v. Davis*, 19 Wend., 371; and see, *Bissell v. Bissell*, 11 Barb., 96; *Brady v. Taber*, 29 Mich., 199.

Under C. L., § 843, where a cause was tried before a justice without a jury on the 12th of the month, and he rendered judgment on the 17th, being the fifth day after the trial: *Held*, that the judgment was void,

During the time which the cause is under advisement, the justice ought to hold no communication with either of the parties. They are not in court for any purpose but to receive judgment.¹⁶

TRIALS BY JURY.

§ 314. When may demand jury trial.—"After an issue of fact joined, and before the first adjournment, and before the justice shall proceed to an investigation of the merits of the cause, by an examination of a witness, or the hearing of any other testimony, either of the parties, or the attorney of either of them, may demand of the justice that the cause be tried by a jury, and pay to the justice the lawful fees of the jurors."¹⁷

"Either party who shall not, at the time of joining issue in

notwithstanding the 16th day of the month, being the fourth day after the trial, was Sunday. The court say, the judgment *must* be rendered within four days after the cause is submitted to the justice, and if the fourth day is Sunday, then it must be rendered within three days after the case is submitted: *Harrison v. Sager*, 27 Mich., 476; see, *Weaver v. Lammon*, 62 Mich., 366; 28 N. W., 905. The same rule obtains in case of legal holidays: *Hemmens v. Bentley*, 32 Mich. 88. In cases tried before a justice without a jury he has no jurisdiction to render judgment after the fourth day. And even where the docket by mistake showed the judgment to have been rendered on the fifth instead of the fourth day, it was held that the docket entry could not be contradicted, and the judgment was held void: *Ibid.*; see also, *Galloway v. Corbett*, 52 Mich., 460; 18 N. W., 218; *Mudge v. Yaples*, 58 Mich., 310; 25 N. W., 297. In this state, where in an action for assault, the jury gave a verdict for the plaintiff on one day, but judgment was not rendered by the justice until the following day, *Held*, that it is enough to say, that where a cause is tried by jury their verdict is conclusive, and cannot be invalidated by any action or non-action of the justice. When the statute requires a justice to enter judgment immediately on such a verdict, it does

so on the ground that he has no judicial duty in such a case, and must act ministerially in recording their action. He cannot set it aside; and, if his entry of judgment is postponed, yet the law itself supplies it, whether entered or not, and its subsequent entry, in accordance with the verdict, is entirely proper: *Alt v. Lalone*, 54 Mich., 302; 20 N. W., 52; see, *Overall v. Pero*, 7 Mich., 315. But the provision of the statute requiring the justice to enter the judgment in his docket, is directory merely. The entry in the docket is a ministerial act, and is evidence of the judgment, but is not the judgment itself. The judgment is complete when pronounced, and until entered in the docket may be proved by the oath of the justice and from his minutes: *Hickey v. Hinsdale*, 8 Mich., 267; see, also, *Hall v. Tuttle*, 6 Hill, 38; *Walrod v. Shutter*, 2 Comst., 134. A judgment entered in the justice's minutes is not void because not forthwith entered upon the docket: *Saunders v. Tioga Mfg. Co.*, 27 Mich., 520.

16—*Hess v. Beekman*, 11 Johns., 457-8.

17—C. L., § 813.

Where a party has demanded a jury and paid their fees, he has no right, if the jury disagree, to insist on a trial by another jury without advancing an additional jury fee: *McGraw v. Sturgeon*, 29 Mich., 426. And

any cause, and before the same shall be adjourned, require a trial of such cause by jury, shall be deemed to have waived the same."¹⁸

After issue joined in a cause, the defendant said he would go on and try the cause, and the justice told the plaintiff to go on with his account. The plaintiff then asked the defendant if he would admit any of his account, and he did admit one or two of the charges. The plaintiff then called a witness, and after the justice had begun to administer the oath, the defendant demanded a venire, which the justice refused: *Held*, the defendant was too late in his application for a jury. An investigation had commenced. The justice had told the plaintiff to go on, in consequence of which he proceeded to prove some items by the admission of the defendant, and a witness was partly sworn before the call for a venire.¹⁹

OF THE VENIRE, THE SERVICE AND RETURN THEREOF.

§ 315. Procedure when demand for jury made.—“Upon such demand and payment of such fees to the justice, such justice shall direct some disinterested constable, or other proper person of the county, to write down a list of the names of eighteen inhabitants of the county qualified to serve as jurors in courts of record, who shall be in nowise of kin to the plaintiff or defendant, nor interested in such suit.”²⁰

if such fees are not paid the justice may try the cause without a jury: *Roberts v. Tremayne*, 61 Mich., 264; 28 N. W., 113; *McGraw v. Sturgeon*, 29 Mich., 426.

18—C. L., § 814. Where a party to a suit before a justice of the peace has failed to demand a jury at the time of joining issue and before adjournment of the cause, but calls for one on the adjourned day, it is competent for the justice, notwithstanding the objection of the opposite party, to order a jury to be summoned for the trial of the cause. The neglect to demand a jury with the time prescribed by law, is a waiver only of the right; the justice still may, in his discretion, order one: *Van Sickle v. Kellogg*, 19 Mich., 49. But after the defendant has demanded a jury, and paid the jury fee, his ab-

sence from further proceedings thereafter does not amount to a waiver of a jury, and the justice cannot proceed to try the case alone: *Boatz et al. v. Berg*, 51 Mich., 8; 16 N. W., 184. It is sufficient, if demand for a jury is made pursuant to the statute, that the jury fee be paid on the day to which the cause stands adjourned, at any time before the trial is entered upon by the swearing of witnesses: *Plank Road Co. v. Hopkinson*, 69 Mich., 10; 36 N. W., 797.

19—*Gale v. Barnes*, 1 Cow., 235. But where the justice had merely inspected the plaintiff's account, the court held that the trial had not commenced, and that it was not too late to call for a jury: *Olney v. Bacus*, 1 Johns., 142.

20—C. L., § 815. The justice ought not to designate a constable or other

§ 316. **Qualification of jurors.**—Persons having the qualifications of electors are qualified to serve as jurors.²¹ “In all elections, every male inhabitant of this state, being a citizen of the United States, every male inhabitant residing in this state on the twenty-fourth day of June, eighteen hundred thirty-five, every male inhabitant residing in the state on the first day of January, eighteen hundred fifty, every male inhabitant of foreign birth who, having resided in the state two years and six months prior to the eighth day of November, eighteen hundred ninety-four, having declared his intention to become a citizen of the United States two years and six months prior to said last named day, and every civilized male inhabitant of Indian descent, a native of the United States and not a member of any tribe, shall be an elector and entitled to vote; but no one shall be an elector or entitled to vote at any election unless he shall be above the age of twenty-one years, and has resided in this state six months and in the township or ward in which he offers to vote twenty days next preceeding such election: Provided, that in time of war, insurrection or rebellion no qualified elector in the actual military service of the United States or of this state, or in the army or navy thereof, shall be deprived of his vote by reason of his absence from the township, ward or state in which he resides, and the legislature shall have the power, and shall provide the manner in which and the time and place at which such absent electors may vote, and for the canvas and return of their votes to the township or ward election district in which they respectively reside.”²²

person to write the names and summon the jury, until the parties have had an opportunity to make all reasonable objections to such officer or person, if any such objection there may be: *Rice v. Buchanan*, 41 Barb., 147. The person selected to choose the jurors must be disinterested and impartial; this is a common law right: *People v. Felker*, 61 Mich., 114; 28 N. W., 83. The jurors may be summoned from the county at large: *Faulks v. People*, 39 Mich., 20.

21.—C. L., § 319. The proper time to make inquiries into the qualifications of the jurors is before trial

and if not made then, any objections to the jurors will be deemed to have been waived. The fact that a juror is an alien, and that this was not discovered until after judgment, is not, in civil cases, ground for the reversal of a judgment: *Johr v. People*, 26 Mich., 427. It is not a necessary qualification of the juror that he should be a taxpayer: *Stewart v. People*, 23 Mich., 63, 78-9.

22—Const. of Mich., Art. 7, § 1. If a man of foreign birth has declared his intention to become a citizen in due form of law, and the other conditions of age, residence within the

In making the list of names of persons to serve on a jury, the following direction of the statute should be observed: "In making such selection, they (the officers) shall take the names of such only as are not exempt from serving on juries, who are in possession of their natural faculties, and not infirm or decrepit, of good character, of approved integrity, of sound judgment, and well informed, and conversant with the English language, and free from all legal exceptions, and who have not made, and in whose behalf there has not been made, to the officers mentioned in the preceding section any application to be selected and returned as jurors."²³

§ 317. **Who exempt from serving on jury.**—The following persons shall be exempt from serving as jurors, to wit: The governor, lieutenant governor, secretary, treasurer and auditor-general of the state, the justices of the supreme court, all judges of courts of record, acting commissioner of internal improvement, commissioner of the land office, superintendent of public instruction, clerks of courts, registers in chancery, registers of deeds, sheriffs and their deputies, coroners, constables, all officers of the United States, attorneys and counselors at law, and solicitors and counselors in chancery, officers of the university, officers of colleges, settled ministers of the gospel, preceptors and teachers of incorporated academies, all superintendents, engineers and collectors of any canal or railroad authorized by the laws of this state, any portion of which shall be actually constructed and used, constant ferry-men, all members of any company of firemen organized according to law; all persons more than sixty years of age, and

state and voting precinct for the proper length of time are found to exist, this provision of the constitution confers the right of suffrage, and such person is, in this respect, qualified to act as a juror: *People v. Scott*, 56 Mich., 154; 22 N. W., 274; *People v. Rosevear*, 56 Mich., 158; 22 N. W., 276. Nothing will be presumed against the qualifications of a juror: *People v. Scott*, 56 Mich., 154; 22 N. W., 274. No person is qualified to be returned by the supervision as a juror whose name is not on the assessment roll and it is a good objection to a

juror that he is not assessed: *Stewart v. People*, 23 Mich., 63; *Schlacker v. Mining Co.*, 89 Mich., 253; 50 N. W., 839; *People v. Thacker*, 108 Mich., 652; 66 N. W., 562. This is not true of talesmen. The statute does not require that they be taxpayers: *Stewart v. People*, and *Schlacker v. Mining Co.* *supra*; *Reed v. Peacock*, 123 Mich., 244; 82 N. W., 53.

23—C. L., § 319. And further, as to the qualifications of jurors: See, *People v. Harding*, 53 Mich., 48, 51; 18 N. W., 555.

all other persons exempted by any other law of this state from serving on juries."²⁴

Members of the state troops and of the uniformed volunteer militia, who have performed military service in the manner and for the time prescribed by law, and shall have received from the state military board a certificate showing the performance of such service, are exempt from serving on juries.²⁵

"Any person who was a fireman in any incorporated city or village in this state, on the sixth day of February, one thousand eight hundred and forty-three, or at any time thereafter, and who shall have served for the term of seven years from that time, or from the time of his appointment, if appointed since that time, and every person who may hereafter be appointed a fireman in any such city or village, and serve as such fireman, shall, during the time of such service, be exempted from serving as a juror in any of the courts of this state, etc."²⁶

The state salt inspector and his deputies,²⁷ and keepers of poor-houses,²⁸ are also exempt.

§ 318. Who may be excused from serving on jury.—"The court to which any person shall be returned as a juror, shall excuse such juror from serving at such court, whenever it shall appear,

1. That he is exempt from serving on juries by the provisions of the preceding section; or,
2. That he is a practicing physician or surgeon, and has patients requiring his attention; or,
3. That he is a justice of the peace, or executes any other civil office, the duties of which are, at the time, inconsistent with his attendance as a juror; or,
4. That he is a teacher of any school, actually employed and serving as such; or,

24—C. L., § 335. The exemption under this statute is a personal privilege and such persons as are within the provisions of the statute are competent jurors as against objection on this ground: *People v. Rawn*, 90 Mich., 377; 51 N. W., 522. (Overruling a *dictum* in *People v. Bauman*, 52 Mich., 584; 18 N. W., 369, to the contrary.) If, however, a person within the provisions of this statute

is challenged because of that fact, it is not reversible error since the opposing party has no right to have such persons sit in the cause; especially if his peremptory challenges are not exhausted: *McGrail v. Kalamazoo*, 94 Mich., 52; 53 N. W., 955.

25—C. L., § 1607.

26—C. L., § 3472.

27—C. L., § 4944.

28—C. L., § 4520.

5. When, for any other reason, the interests of the public, or of the individual juror, will be materially injured by such attendance, or his own health, or that of any member of his family requires his absence from such court."²⁹

§ 319. **Selection of jurors, constable to be sworn.**—"The constable or other person directed to make such list, shall, before making the same, be sworn by the justice to select such persons according to his best judgment, and without favor or partiality to either party."³⁰

"From such list each party may strike off six names; and in case of the absence or refusal of either party to strike out, the justice shall strike out for him six names from said list; and the justice shall thereupon issue a venire, directed to any constable of the county, requiring him to summon the six persons whose names shall remain upon the list, to appear at a time and place to be named therein, to make a jury for the trial of the action between the parties named in such venire; and the constable shall serve such venire personally on each juror named therein, if to be found within his county."³¹

§ 320. **Parties may agree upon jurors.**—"The parties may agree upon six or any less number of jurors to try the cause; and in such case the justice shall direct in the venire the summoning of the persons so agreed upon, who, when summoned and appearing, shall compose the jury; and the justice shall make a minute of such agreement in his docket."³²

An agreement by the parties for the trial of a cause by a jury of less than six persons, is good, though not made until after the return of the venire, and when the jury is drawn.

29—C. L., § 336. It is in the discretion of the court, before a juror has been sworn in a cause, to excuse him for any reason personal to the juror, which seems to the court sufficient, even without challenge from either party: *People v. Carrier*, 46 Mich., 444; 9 N. W., 482; *Atlas Mining Co. v. Johnston*, 23 Mich., 36; *O'Neill v. Lake Superior I. Co.*, 67 Mich., 560; 35 N. W., 162. And this though parties have exhausted their peremptory challenges: *O'Neill v. Lake Superior I. Co.*, *supra*.

30—C. L., § 816. The officer chosen to write down the list of names from which the jury is to be chosen should be free from prejudices or hostility against either of the parties. Where there is serious doubt even of his fairness he should not be selected to choose jurors. This right of parties is a common law right and is not dependent upon statute: *People v. Felker*, 61 Mich., 114; 28 N. W., 83.

31—C. L., § 817.

32—C. L., § 818.

§ 321. **The venire, how served.**—The constable must serve the venire *personally* on each juror named therein, if to be found within his county.³³ The manner of service may be (as is the usual practice) by reading or stating the substance of the venire to each person named therein, care being had to state the name of the justice issuing the venire, and the names of the parties, together with the time and place of trial. The jurors should have a reasonable time to attend, after notice, as in case of witnesses.

§ 322. **Waiver of jury after venire issued.**—Though the party demanding a trial by jury has undoubtedly a right to waive such trial after a venire has been issued, yet, if the venire has been served and returned, the other party would have the right to insist that the cause should be tried by the jury thus returned, notwithstanding the party originally demanding such trial should waive it; or, if a jury should not be obtained on that venire, he might require that a new venire should be issued at his instance, if he had required a jury.³⁴

In an action against joint debtors, a venire mentioning only the defendant brought into court, without taking notice of the other, is sufficient.³⁵

The party at whose instance the venire is issued, cannot allege error in it.³⁶

CALLING THE JURY—CHALLENGES—SWEARING THE JURY, ETC.

§ 323. **When talesmen to be summoned.**—On the return of the venire, the justice will proceed to call the jurors.

“If any of the jurors named in the venire shall not be found, or shall fail to appear according to the summons, or if there shall be any legal objection to any one who shall appear, it shall be the duty of the constable, on being thereunto directed

33—Carman v. Newell, 1 Denio, 25; Keeler v. Delavan, 4 Barb., 317.

C. L., § 817. In case of loss of the first venire a second may be issued by the justices: Day v. Wilber, 2 Caines, 134, 137.

34—Edward's Treat., 1st ed., 90.

Absence from further proceedings by a party after demanding a jury cannot be construed as a waiver of his right to the jury trial: Boatz v. Berg., 51 Mich., 8; 16 N. W., 184.

35—Hutchins v. Cary, 4 Johns., 222.

36—Day v. Wilber, 2 Caines, 134.

by the justice, to summon a sufficient number of talesmen to supply the deficiency."³⁷

That is, the justice may require the constable to summon a sufficient number of the bystanders to complete the number required of those who are absent or set aside as incompetent. Should there still be a deficiency, the justice may issue a precept, requiring the constable to summon the number of jurors wanted. This is to be done under a precept in the nature of a writ of *tales* at the common law, and is in the same form as the *venire*, with this difference, that instead of naming the persons, it commands the constable to summon "*three (or other number wanted) inhabitants of the said county qualified to serve as jurors in courts of record, who are in nowise of kin to either the plaintiff or the defendant, nor interested in said suit, to appear, etc., to make so many of a jury, etc.*" The justice may, if necessary, issue this process from time to time, till there be a full jury.³⁸ Unless one of the jurors named in the *venire* appear, there cannot be talesmen.³⁹

If *no* jurors appear, or none are found competent, or if the *venire* is quashed, or not returned, or the array challenged for good cause, etc., a new *venire* must be issued from time to time, until a jury is obtained qualified to try the cause.⁴⁰

Where the parties agree upon a jury, the persons so agreed upon, when summoned and appearing, shall compose the jury.⁴¹ And when the jury is obtained in the other mode, it constitutes the jury, unless there shall be a legal objection to any one who shall appear.

§ 324. **Challenges, in general.**—Before the jury is sworn, if a party has any objection for any cause to any of the jurors, whether originally summoned as such or called as *talesmen*, he must state his objection to the justice, which is called a challenge. But no challenge can be taken until a full jury have appeared; and, if the challenges are taken previously, they are irregularly made.⁴²

37—C. L., § 819.

38—Cow. Treat., 2d ed., 885; see also, *Smith v. Suttis*, 2 Johns., 9; *Zeeley v. Yansen*, *Id.*, 385.

39—*Denbawd v. Woodley*, 10 Coke's Rep., 102.

40—Cow. Treat., 2d ed., 885;

Blanchard v. Richly, 7 Johns., 198;

Sebring v. Wheedon, 8 Johns., 460;

Tallman v. Woodworth, 2 Johns., 385.

41—C. L., § 818.

42—*King v. Edmonds*, 4 B. & Ald.,

Challenges are of two kinds: first, *peremptory*; second, *for cause*, which last includes under our practice what was known at the common law as challenges for *principal cause* and *to the favor*, this distinction not now being regarded. All are challenges for cause and tried in the same manner.⁴³

§ 325. **Peremptory challenges.**—These are such as are made without assigning any reason, and which the courts are compelled to allow.⁴⁴

“In all civil cases before justices of the peace, each party may challenge peremptorily two talesmen, and in all prosecutions in the name of the people of this state, the attorney appearing for the people may challenge peremptorily two talesmen, and the defendant may challenge peremptorily four talesmen.”⁴⁵

471. As to when objections to a juror should be made, etc.: *Sleight v. Henning*, 12 Mich., 376; *Bourke v. James et al.*, 4 Mich., 337. A party going to trial without objection, knowing of a juror's want of qualification, waives the objection: *Owners of Ship Milwaukee, v. Hale*, 1 Doug., 306; *Bush v. Dunham*, 4 Mich., 339; *Sleight v. Henning*, 12 Mich., 376; *Johr v. People*, 26 Mich., 427; *Bronson v. People*, 32 Mich., 34; *Clark v. Drain Commissioner*, 50 Mich., 618; 16 N. W., 167; *People v. Scott*, 56 Mich., 154; 22 N. W., 274; *Walker v. City of Ann Arbor*, 111 Mich., 1; 69 N. W., 87.

43—*Holt v. People*, 13 Mich., 226; *Stephens v. People*, 38 Mich., 739.

44—C. L., § 819. Prior to the Act of 1885, above quoted, the only provision under our law allowing peremptory challenges in matters not criminal, is found in the chapter of the Compiled Laws relating to the “Trial of Issues of Fact,” and allows a challenge of jurors in “civil cases” as well as in prosecutions. This does not apply to special proceedings not in the ordinary course of law, and which are regulated entirely by particular statutes. Challenges for cause are necessary in all inquiries by jury, but peremptory challenges in other than criminal proceedings, are confined to cases where the statute has directly provided for them: *Convers v. The*

Grand Rapids and Indiana Ry. Co., 18 Mich., 468.

45—C. L., § 820. The provisions of this statute are confined to talesmen. Peremptory challenges must be authorized by statute: *Matter of Convers*, 18 Mich., 459. In justice's court the trial must be had before the jury struck by the parties, unless there be challenge for cause, since there is no statute authorizing peremptory challenge to the original panel: *Eldridge v. Hubbell*, 119 Mich., 61; 77 N. W., 631; *Reed v. Peacock*, 123 Mich., 244; 82 N. W., 53. Peremptory challenges may be made at any time before the jury is sworn. The question of the order of challenge is one of practice and discretionary with the court. Peremptory challenge is a right secured by statute, of which neither party can be deprived until the jury are sworn: *Hamper's Appeal*, 51 Mich., 72; 16 N. W., 236; see, *Hunter v. Parsons*, 22 Mich., 96; *Jhons v. People*, 25 Mich., 499. Right to peremptory challenge is lost when the jury is sworn: *Thorp v. Deming*, 78 Mich., 124; 43 N. W., 1097; *Ayers v. Hubbard*, 88 Mich., 155; 50 N. W., 111. Each defendant who pleads separately by different counsel, has the separate right to all the peremptory challenges allowed by law. *Stroh v. Hinchman*, 37 Mich., 490. But where parties sued together appear by the

§ 326. **Challenges for cause and first, to the array.**—Challenges for cause are of two kinds, first, to the array; second, to the polls.

A challenge to the array is an objection to the whole panel in which the jury is arrayed, and is founded on some partiality or default in the officer or person who summoned or arrayed the panel.⁴⁶

The causes of challenge to the array are such as the following, viz.: that the officer is of kindred or affinity to the plaintiff or defendant, if the affinity continue; that one or more of the jury are returned at the nomination of the plaintiff or defendant; that an action of battery is pending at the suit of the officer against the plaintiff or defendant; that an action of debt is pending at the suit of the plaintiff or defendant, against the officer, but not if by the officer against the plaintiff or defendant, that the sheriff is counsel, attorney, officer, servant or gossip of either party; or is arbitrator in the same matter, and has treated thereof; that the plaintiff or defendant is tenant of the officer, or that the son of the officer has married the daughter of the plaintiff or defendant, or the like.¹

It is at least doubtful whether, under any circumstances, the array can be challenged in a justice's court. The constable who makes the list is to be "disinterested," and if no objection is made to him he will be presumed to be so, and the party precluded from questioning the fact of his being disinterested. If, however, the fact that he was interested was known at the time to the party, his consent will do away with all objections.² So, when the parties agreed upon the jurors,³ there could be no challenge to the array.

§ 327. **Second, to the polls.**—This is an exception to one or more of the jurors who have appeared, individually; and is for some defect or disqualification of the juror; or on account

same counsel, and after that right of peremptory challenge is exhausted, if other counsel take charge of the case for a part of them, the latter have no further right of challenge: *Fraser v. Jennison*, 42 Mich., 206; 3 N. W., 882.

46—3 Bla. Com., 359. A challenge to array must be in writing: *Ryder v. People*, 38 Mich., 269; *People v. Doe*, 1 Mich., 453.

1—3 Bla. Com., 359; *Pringle v. Huse*, 1 Cow., R., 432, 436, note.

2—*Watkins v. Weaver*, 10 Johns., 107.

3—C. L., § 818, *ante*, § 320.

of some supposed bias or partiality; or on account of some crime or misdemeanor which affects the juror's credit and renders him infamous.

Among the causes of challenge are, that the juror is not qualified as required by law; that he is not an elector, that he is an alien, or within the age of twenty-one, or is an idiot, or lunatic.⁴ Such were known, under the common law, as grounds for *principal challenge for defect*. Among the grounds for *principal challenge for bias or impartiality*, as it was known as the common law, are the following: That the juror is of kin to either party, within the ninth degree,⁵ or, according to Lord Coke, however remote the kindred, that there is affinity or alliance by marriage between the juror and one of the parties, if such affinity continue, or there be issue of the marriage alive; that the juror has an interest in the action, direct or collateral; that the juror has before given a verdict in the same cause,⁶ or upon the same title or matter, though between other parties; that he was chosen arbitrator in the same cause by one of the parties, and he had entered upon an examination of it, but otherwise if he were chosen indifferently by both parties; that he is a counselor, or servant, of either party; that he is a tenant of either party;⁷ that he has taken information of the case before he is sworn; that he has declared his opinion of the case beforehand;⁸ that since he has been returned, he has eaten or drank at the expense of one of the parties; that one of the parties has labored the

4—C., L., §§ 815, 319. *Hill v. People*, 16 Mich., 361. If a person appearing as a juror is intoxicated, the justice may, of his own motion, set him aside and refuse to swear him: *Bullard v. Spear*, 2 Cow., 430. It is competent for the court of his own motion, and against the objection of a party, to exclude an intoxicated person from acting as a juror. It is the duty of the court to carefully guard and protect the rights of parties in the selection of jurymen, and see to it that no person who is incompetent is allowed to sit in the case: *Torrent v. Yager*, 52 Mich., 506, 509; 18 N. W., 239.

5—3 Bla. Com., 363. The nephew of a party would be an incompetent

juror in the case, as the law presumes that he would be biased by the relationship: *Hasceig v. Tripp*, 20 Mich., 216, 218.

6—*Bourke v. Kneeland*, 4 Mich., 236.

7—*Hathaway v. Helmer*, 25 Barb., 29.

8—It is a good ground of challenge that the juror has expressed an opinion beforehand on the question in controversy: *Blake v. Millspaugh*, 1 Johns., 346; *Lord v. Brown*, 5 Denio, 345. And a juror who has formed an opinion upon a statement made to him by one of the parties, is not competent: *Rogers v. Rogers*, 14 Wend., 131. See, *post*, § 329, note 17.

juror, and given him money or other things for giving his verdict; but if the party only labor the jury to appear and act conscientiously, it is no matter of challenge whatever; that an action, implying malice or displeasure, is pending between the juror and one of the parties.

The principal challenges for crime or misdemeanor, as known to the common law, were, that the juror had been convicted for treason, felony, perjury, conspiracy, forgery, or other infamous crime, of which he had not obtained a pardon.⁹ These objections must be proved by the record. The foregoing were known as *principal* challenges because the fact appearing the juror was *prima facie* disqualified.

The challenge for favor, of the common law, is of the same nature with the principal challenge, but of an inferior degree. The general rule of law is, that the juror shall be indifferent;¹⁰ and if it appear probable that he is not so, this may be made the subject of challenge, either principal or to the favor, according to the degree of probability of his being biased. The cause of a principal challenge to the polls, we have seen, is such matter as carries with it, *prima facie*, evident marks of suspicion, either of malice or favor. But when, from circumstances, it appears probable that a juror may be biased in favor of or against either party, and yet such circumstances do not amount to matter for a principal challenge, it may then be made a challenge to the favor. The effect of these two species of challenge is the same, and as previously indicated, the distinction between them is not now recognized in our practice.¹¹

"In penal actions, for the recovery of any sum, it shall not be a good cause of challenge to the jurors summoned, or to any officer summoning them, that such juror or officer is liable to pay taxes in any county, city, village, township or district, which may be benefited by such recovery."¹²

"On the trial of every action in which a county shall be interested, the electors and inhabitants of such county shall be competent witnesses and jurors."¹³

9—3 Bla. Com., 363.

10—Wood v. Stoddard, 2 Johns. 194.

11—*Ante*, § 324.

12—C. L., § 10226.

13—C. L., § 2468. *Smith v. German Ins. Co.*, 107 Mich., 270; 65 N. W., 238, holding the act constitutional.

§ 328. **Service on former juries.**—By statute it is provided, that "it shall be a good cause for challenge to any juror, in any justice or police court in any city, township, or village in this state, in addition to the other causes of challenge allowed by law, that such person has served as a juror in such court more than three times in one year, previous to such challenge."¹⁴

Matter which merely exempts a man from serving on a jury, and does not disqualify him, cannot be a cause of challenge.¹⁵

§ 329. **When challenge is for cause, ground to be immediately assigned.**—In this state, it is now provided by law, that "in all cases of challenge for cause, such cause shall be immediately assigned, and the truth thereof shall be determined by the court."¹⁶

Of the effect of this provision, the supreme court say: "By this statute, the distinction between challenges for principal cause and to the favor is practically abolished. All are classed under the same general head of *challenges for cause*, and all are tried in the same manner. * * * But the court, in its decision, only declares that a sufficient cause for challenge does or does not exist, and is not required to classify it according to any previous distinctions. The sufficiency of the cause will still be determined by common law rules; but neither the party, in making his challenge, nor the court, in passing upon it, has any regard to the former classification."¹⁷

14—C. L., § 348. The fact of a juror's having previously served on three panels within a year, can scarcely be said to render him *incompetent* (except in the county of Wayne, where the statute, C. L., § 347, positively disqualifies him if he has served more than three times.) The object of the statute seems to be, to provide an easy mode of ridding courts of *professional jurors*; see, *Williams v. Grand Rapids*, 53 Mich., 271; 18 N. W., 811.

15—Hawkins, P. C., chap. 43, § 26; *Pringle v. Huse*, 1 Cow., 436, note 1, *ante*, § 317, note 24.

16—C. L., § 10238.

17—Holt v. People, 13 Mich., 224, 226-7. See, *ante*, §§ 324, 327. Prejudice disqualifies for jury service

and any reasonable examination tending to develop whether it exists or not is permissible. So *held* where the question to the juror was, "Suppose in this case, after the evidence is all introduced, you should believe that it was evenly balanced, so that there was as much for the plaintiff as for the defendant, which way would you be inclined to lean—against or in favor of the Company?" *Monaghan v. Agricultural F. Ins. Co.*, 53 Mich., 238; 18 N. W., 797; *Township of Otsego Lake v. Kirsten*, 72 Mich., 1; 40 N. W., 26. But, see, *People v. Caldwell*, 107 Mich., 374; 65 N. W., 213, where a requirement that counsel eliminate from the examination of the witness language which assumed that under such circumstances the juror

§ 330. Further, as to when to be made.—No challenge can be made until a full jury have appeared.¹⁸ Nor can either party challenge a juror after he has been sworn.¹⁹ Either

would be inclined to lean *either* way was upheld. One who has a prejudice against the enforcement of the law, involved in the case or against one of the parties should be rejected when challenged for such reason: *Theisen v. Johns*, 72 Mich., 285; 40 N. W., 727. So, where the action involves an alleged *illegal* sale of intoxicating liquors, one who says he is prejudiced against the sale of liquor: *Theisen v. Johns*, *supra*; where one testifies on his *voir dire*, that he "had talked with many different persons about the affair; had not discussed the merits of the case; the persons with whom he talked expressed an opinion to him; he had also expressed an opinion based upon what he had heard; had formed a sort of an opinion if what he had heard was true; that it would take some evidence to remove that opinion; but that it was not so fixed that he would not be governed by the evidence"; and on cross-examination that he "did not know as he had formed any opinion on the merits; might have formed some impression; possibly could not try the case as fairly and impartially as if hadn't heard of it, and formed the impressions; that he presumed he could not," he is not by such testimony shown to be incompetent. In a civil case the disqualification of a juror must clearly appear: *Rice v. Rice*, 104 Mich., 371; 62 N. W., 833. Under a plea of the statute of limitations, counsel have the right to examine jurors to discover whether they have prejudices against that defense, as a means of determining whether he will exercise his right to peremptory challenge: *Towle v. Bradley*, 108 Mich., 409; 66 N. W., 347. Further, upon examination of jurors for support of challenge for cause, see, *People v. Radley*, 127 Mich., 627; 86 N. W., 1029. One is not disqualified because belonging to the same general fraternal, social or religious organization as does one of the parties, if he does not belong to that particular lodge, club or church to which one of the

parties belongs. So held where one of the parties and the juror belonged to the Odd Fellows but not to the same lodge: *Reed v. Peacock*, 123 Mich., 244; 82 N. W., 53; *Free Masons*; *Purple v. Horton*, 13 Wend., 9; 27 Am. Dec., 167; *Lutheran Church*; *Barton v. Erickson*, 14 Neb., 164; 15 N. W., 206. That a person has a general social acquaintance with one of the parties is not sufficient to support challenge for cause: *Brennan v. O'Brien*, 121 Mich., 491; 80 N. W., 249. The trial court has a reasonable discretion to control the examination of jurors on this *voir dire*: *Ford v. Cheever*, 113 Mich., 440; 71 N. W., 837. The peremptory challenge of a juror, after a challenge for cause to the same juror has been erroneously overruled, will not cure the error if the party so challenging thereby exhausted his peremptory challenges: *Theisen v. Johns*, 72 Mich., 285; 40 N. W., 727. Not so if his peremptory challenges are not exhausted when the jury is sworn: *Sullings v. Shakespeare*, 46 Mich., 408; 9 N. W., 451. It will not vitiate a verdict that the court excuses a juror when it would be justified in refusing to sustain a challenge for cause to the juror, if this is done because the court is in doubt as to the impartiality of the juror: *Atlas Mining Co. v. Johnston*, 23 Mich., 36; *Commercial Bank v. Chatfield*, 121 Mich., 641; 80 N. W., 712, and cases cited in the opinion. For a very full discussion of the subject of the bias and prejudice as affecting the qualifications of jurors, see, note to *Com. v. Brown*, 147 Mass., 585, as re-reported in 9 Am. St. Rep., pp. 743-760.

18—*King v. Edmunds*, 4 B. & Ald., 471.

19—*Cow. Treat.*, 2d ed., 890; see, *Eggleston v. Smiley*, 17 Johns., 133. Where in a trial, after all the case was put in, the plaintiff was informed that one of the jurors was incompetent by reason of affinity to defendant, but no objection was taken, the court, in refusing a new trial for this reason,

party may challenge first; but whichever begins first must finish his challenges before the other begins, otherwise he is precluded from making any further challenges. If a juror be challenged and the challenge is overruled, or if upon the trial he is found indifferent, he may still be challenged by the opposite side.²⁰

§ 331. **How made.**—The challenge to the array must be in writing, setting forth the matter of the challenge with certainty and precision.²¹

Challenges to the polls are made orally. When the challenge is for cause, the cause must be stated immediately, and all the objections to the juror must be made at the same time; if one has been overruled, another will not be allowed to be made. It is irregular to question a juror without first interposing a challenge, and it is not error for the court to allow the juror thus questioned, but not challenged, to be sworn to try the cause.²²

§ 332. **How tried.**—If the facts alleged in the challenge are admitted, the question of their sufficiency is determined at once by the court,²³ who excludes the juror, or overrules the challenge.²⁴ If the facts alleged in the challenge are denied, the truth thereof shall be tried by the court. The juror may be examined upon his own oath as to his competency to sit in the cause,²⁵ but he cannot be interrogated as to such circum-

said that it was the duty of the party to make his objection as soon as he was informed of the juror's disqualification: *Sleight v. Henning*, 12 Mich., 376-7. And in a similar case, it was held that it was the duty of the counsel to ask the interposition of the court as soon as the objection to the juror was ascertained by him. By neglecting to do this, and electing to risk a verdict, the party was bound by it: *Bourke v. James, et al.*, 4 Mich., 339. These cases seem to imply, that when the fact of the juror's incompetency first comes to the knowledge of the party after the jury is sworn, he may still take the objection at any time before verdict: And, see, *People v. Damon*, 13 Wend., 351.

If a party neglects to appear at the trial, he waives all objection to the competency of the jurors, and an omis-

sion to challenge is like a waiver: *Clark v. VanVranken*, 20 Barb., 278. And by going to trial without objection, a party waives all objections on the ground of the want of proper qualifications of the jurors; at least, if he was aware of such want of qualification: *Owners of Ship Milwaukee v. Hale*, 1 Doug. Mich., 306. See, *ante*, § 324.

20—*Cow. Treat.*, 2d ed., 890.

21—*People v. Doe*, 1 Mich., 451; *Ryder v. People*, 38 Mich., 269.

22—*Crippen v. People*, 8 Mich., 117.

23—*People v. Vermilyea*, 6 Cow., 555; *People v. Vermilyea*, 7 Cow., 108.

24—*Clark v. Ostrander*, 1 Cow., 441, note.

25—*Pringle v. Huse*, 1 Cow., 432; *People v. Vermilyea*, 7 Cow., 108; *People v. Mather*, 4 Wend., 230.

stances as may tend to his own disgrace or discredit, as whether he has been convicted of crime.²⁶

A person called as a juror is presumed to be impartial and qualified, and the party challenging him assumes the burden of proving to the contrary.²⁷ A juror, to be competent, must not only be indifferent as to the issue he is to determine, but impartial between the parties.

When, upon a challenge to the polls, a juror is set aside for cause, his place must be filled by a talesman before the party can proceed with his challenges to the other jurors.

§ 333. **Number of jurors.**—The jury impaneled and sworn for the trial of a cause before a justice of the peace must consist of six persons; unless the parties agree upon a less number.²⁸

§ 334. **Swearing the jury.**—To each juror the justice is required to administer an oath or affirmation for the trial of the cause.²⁹

§ 335. **Jurors refusing to appear or serve.**—“Every person who shall be duly summoned as a juror, and shall not appear, nor render a reasonable excuse for his default, or appearing, shall refuse to serve, shall be subject to the same fine, to be imposed and collected with costs, in the same manner, and paid over for the same use, as hereinbefore provided in respect to a person subpoenaed as a witness, and not appearing, or appearing, and refusing to testify.”³⁰

A juror may be fined for non-attendance, after the close of the case as well as before.³¹

26—*Mechanics' & Farmers' Bank v. Smith*, 19 Johns., 115.

27—*Holt v. People*, 13 Mich., 224.

28—C. L., §§ 817, 818. By the act of 1861, How Stat. § 7622, the legislature attempted to give authority to the courts to continue a trial to verdict when, after a full panel had been sworn for the trial, a juror or more became incapacitated for further service and so the panel was reduced below the constitutional number. This act was declared unconstitutional in *McRae v. Grand Rapids L. & D. Ry. Co.*, 93 Mich., 399; 53 N. W., 561. The principle controlling in this decision

would make it impossible to compel a trial by a jury of less than six under any circumstances except by consent.

29—C. L., § 821. This oath or affirmation is required to be in the following form: that he is “well and truly to try the matter in difference between ———, plaintiff, and ———, defendant, and unless discharged by the justice a true verdict to give according to law and evidence.”

30—C. L., § 834.

31—*Robbins v. Gorham*, 25 N. Y. 588.

OF THE PROCEEDINGS ON TRIAL.

§ 336. Duty of party having the affirmative.—"After the jury shall be duly sworn, they shall sit together and hear the proofs and allegations of the parties, which shall be delivered publicly, in their presence."³²

The party who holds the affirmative of the issue to be tried, has the right to open the case; to introduce his evidence first; to give evidence in reply to the proofs of the opposite party, and to make the closing argument to the jury. And, generally, it is desirable that the party opening the case should make a brief statement to the jury as to the nature of the action, the issues to be tried, and then of the substance of the evidence to be given in proving the case. By this means, the justice and jury will be better prepared to see the relevancy and application of the evidence as the witnesses proceed with their testimony. But it is only a general view of the case that should be given. If, however, a party in opening omits to make a full statement of his case, this will not prevent him from introducing evidence as to all material points, even though some of those points were not mentioned in his statement.³³ It should not set forth the evidence in detail.³⁴ It should not be unfair and calculated to prejudice the jury unfairly.³⁵ After opening the case, the party holding the affirmative proceeds to introduce his evidence and the testimony of his witnesses.

§ 337. Duty of party opposing.—After the party holding the affirmative has closed his evidence, the opposite party may open his side of the case to the jury, by a statement of the grounds of his defense, and the nature of the evidence by which it is to be supported. It is a common practice in some courts that the defendant follows the opening statement of the plaintiff immediately with his own. There seems to be no objection to this practice and in some cases would seem to be advantageous. He will then introduce the testimony of his witnesses in the same manner that the other did. Each party should exhaust his testimony upon his affirmative

32—C. L., § 823.

33—*Nearing v. Bell*, 5 Hill, 291.

34—*Scrapps v. Reilly*, 35 Mich., 371.

35—*Porter v. Throop*, 47 Mich., 313;

11 N. W., 174.

case, when he has the case for that purpose. It will be only by favor of the court that he will be permitted to introduce evidence out of its order.³⁶ When the opposing party has rested, the party holding the affirmative may, by way of reply, introduce evidence rebutting to the defense. Testimony in reply, however, must be strictly in answer to the defense, and the witnesses called in support of it; the party holding the affirmative will not be allowed to go beyond that and give evidence in further support of his original case.³⁷ Rebutting evidence means not merely evidence which contradicts the witnesses of the opposite side. Evidence in denial of some affirmative case, or fact, which the opposite party has sought to prove, is rebutting.³⁸ Thus, where a defendant has attempted to prove a set-off, or release, the plaintiff, in rebutting, may prove that the alleged set-off had been paid, or that the release was obtained by fraud.

§ 338. Right to exclude witnesses from the court room.—When the cause is called on, or at any time during its progress, the justice, at the request of either party, may order such of the witnesses of the opposite party as have not yet been examined, or who are not under examination, to leave the court until they shall be called for in their order, so that each witness may be examined out of the hearing of other witnesses on the same side, who are to be examined after him.³⁹ The attorneys of the respective parties are not within the rule.⁴⁰ With respect to ordering the witness out of court, although this is clearly within the power of the judge or justice, and he may fine a witness for disobeying the order, the better opinion seems to be that his power is limited to the infliction of a fine, and that he cannot lawfully refuse to permit the examination of the witness.⁴¹ At least unless it is made to appear that the party calling such witness is shown in some way to be responsible for the violation of the court's order. This order may be general, applying to all witnesses of one party or to particular witnesses.

36—See, *post*, § 341, note 4.

37—Archbold's *Nisi Prius*, 41.

38—Silverman v. Foreman, 3 E. D. Smith, 322.

39—Southey v. Nash, 7 Car. & P., 632.

40—Everett v. Lowdham, 5 C. & P., 91; Pomeroy v. Badderly, Ry. & M., 430.

41—Cobbett v. Hudson, 1 Ell. & Blackb., 11; see, 6 C. & P., 741.

The court has no right to exclude the *parties to a cause* from being present at the trial, although they are to be examined as witnesses; but if they remain in court after having been ordered to leave it, the court may direct the jury to weigh the credit due to their testimony.⁴²

§ 339. Questions of competency of witnesses.—Where a witness appears for the purpose of being sworn, any objection to his competency that may exclude him from testifying, should be then made.

“If a witness, on being produced, shall be objected to as incompetent, such objection shall be tried and determined by the justice; and evidence may be given in support of, and against, such objection, as in other cases, or the proposed witness may be examined on oath by the party objecting; and if so examined, no other testimony shall be received from either party, as to the competency of such witness.”⁴³

§ 340. The oath or affirmation, how administered.—The oath prescribed by the statute,⁴⁴ is to be administered to the witness by the justice who tries the cause.

“The usual mode of administering oaths now practiced in this state, by the person who swears holding up the right hand; shall be observed in all cases in which an oath may be administered by law, except in the cases herein otherwise provided.”⁴⁵

“When the court, magistrate, or other officer before whom any person is to be sworn, shall be satisfied that such person has any particular mode of swearing, which is, in his opinion, more solemn or obligatory than holding up the hand, such court or officer may adopt that mode of administering the oath.”⁴⁶

“Every person conscientiously opposed to taking an oath, shall, when called on to take an oath, be permitted, instead of

42—1 Greenleaf's Ev., § 432, note; *Constance v. Brain*, 38 E. L. & Eq., 443. causes which formerly rendered a witness incompetent: See, *post*, chap. xxiv. “Of Evidence,” and C. L., §§ 10210, 10213.

43—C. L., § 829. The provisions of this section are now of but little practical importance. Since its enactment the legislature has, by subsequent laws, removed nearly all of those

44—C. L., § 830.

45—C. L., § 10204.

46—C. L., § 10205.

swearing, solemnly and sincerely to affirm, under the pains and penalties of perjury.'⁴⁷

The subject of evidence, and the rules relating to the examination of witnesses, will be treated of more at large in a subsequent part of this work.⁴⁸

§ 341. Order of introduction of evidence.—"Regularly, the party entitled to begin must exhaust all his testimony in support of the issue on his side, before the opposite testimony has been heard. He can afterwards introduce evidence in reply only. The judge often, for some particular reason, satisfactory to himself, departs from this strictness; but the party can never claim that he should do so, as a matter of right. He may grant or withhold the required indulgence, in his discretion."¹

The plaintiff has a right to reply to the defendant's evidence, by evidence to contradict, cut down, modify, explain, or in any way vary it; but beyond this he cannot go without the permission of the court, not even to supply a defect in his own evidence. A simple declaration of the plaintiff's counsel that he rests his case, cuts him off from all further evidence, except what shall be strictly proper by way of reply.² It would be so, also, on the part of the defendant.

If it appear that evidence has been inadvertently omitted, it is usual to admit it, even after the parties have gone through with the case, even at any time before the jury retire.³ But, when such evidence is admitted, the opposite party would have the right to introduce evidence to controvert it.⁴

47—C. L., § 10206.

48—See, *post*, chapters xx-xxiv.

1—Ford v. Niles, 1 Hill, 300; Shepard v. Potter, 4 *Ibid.*, 202; Hastings v. Palmer, 20 Wend., 225.

2—Leland v. Bennett, 5 Hill, 286.

3—Clark v. Vorce, 15 Wend., 193; People v. Mather, 4 Wend., 231.

4—Technically, no evidence, except in reply to the evidence of the opposite side, will be admissible after a party has rested his case. While the justice may refuse in such case to admit further evidence except in reply: Shepard v. Potter, 4 Hill, 202; yet this is a matter entirely within his discretion, and he may receive it

White v. Bailey, 10 Mich., 155; Detroit & Milwaukee R. R. Co. v. Van Steinburg, 17 Mich., 99; Hollister v. Brown, 19 Mich., 163. A witness may be recalled after the summing up of the cause has commenced, if the justice think it proper under the circumstances; and when there is a dispute as to what the testimony of a witness was, it is in the discretion of the court to allow him to be recalled to show how he testified: Dunckle v. Kocker, 11 Barb., 389. Parties sometimes omit, by accident, to introduce all their evidence before the close of the trial. And they sometimes dis-

§ 342. **Non-suit—discretionary with plaintiff.**—If, after the testimony in the case is given, the plaintiff thinks his evidence insufficient, he may submit to a non-suit, and this he may do at any time before the jury render their verdict.⁵ A justice cannot, however, compel the plaintiff to be non-suited. He has always a right, if he chooses, to go to the jury with his case.⁶

§ 343. **Argument to the jury.**—When the evidence is closed, the parties, or their counsel, if they see fit, address the jury upon the case; the party holding the affirmative of the issue, having the right to open and to make the closing argument. In discussing questions of law, whether before the court or before a jury, each party is entitled to see and examine the authorities cited by the other. And before making his closing argument, the party having the affirmative is bound to furnish his authorities to the other party, so that he may examine and discuss their relevancy or weight before the jury.

§ 344. **Charging the jury.**—The justice may, if he deem it necessary, instruct the jury as to the principles of law applicable to the case, the manner in which they must be applied, and their effect upon it. As this is designed merely as an assistance to the jury, the justice, in his discretion, will omit any part of it he may think unnecessary, while it is optional with him to omit it altogether.⁷ The justice cannot control the jury with instructions as to the law.⁸ If he assumes to instruct them it is advisory only. In practice he seldom does instruct them.⁹

mony after the close of the evidence, but before the cause has been finally submitted to the justice or jury. In such cases the justice may permit the introduction of the testimony even after the parties have declared the case closed: *Burger v. White*, 2 Bosw., 92. And it has been held that the justice may, in his discretion, receive further evidence on an adjourned day to which the cause was postponed for argument, the trial having taken place on a former day: *Heidenheimer v. Wilson*, 31 Barb., 637. But a party cannot claim such a privilege as a matter of right; and it is conceived that the justice ought not to allow it where the witnesses of the opposite party have left the court and can-

not be recalled, or where the proposed evidence would operate as a surprise upon him at a time when he cannot meet it by evidence which he may have, but which at the time is not within his reach.

5—*Platt v. Stever*, 5 Johns., 346; *Elwell v. McQueen*, 10 Wend., 522. But he cannot submit to a nonsuit if the defendant has given notice of set-off: See, *ante*, § 273.

6—*Cahill v. K. & M. Ins. Co.*, 2 Doug. Mich., 124.

7—*Delancy v. Nagle*, 16 Barb., 96.

8—*McNeill v. Scofield*, 3 Johns., 436; *Chamberlain v. Brown*, 2 Doug. Mich., 120.

9—*Chamberlain v. Brown*, 2 Doug. Mich., 120.

OF THE DELIBERATIONS OF THE JURY—THE VERDICT, ETC.

§ 345. **The procedure after evidence and arguments closed.**—

After hearing the proofs and allegations, the jury must be kept together in some convenient place, under the charge of an officer, until they shall agree upon their verdict.¹⁰

The jury may, however, if they see fit, give their verdict without retiring, and in that case an officer need not be sworn to attend them.¹¹ But if they leave the court to make up their verdict, the oath or affirmation prescribed by the statute must be administered to the constable.¹²

By consent of parties, the jury may retire without any person to attend them; and, in such case, neither party can afterwards object to the verdict, on *certiorari*, because the jury eat, drink, or admit other persons to their room.¹³

§ 346. **Right to take documentary evidence to jury room.**—

When the jury withdraw, they may take with them letters patent, deeds under seal, and exemplifications of depositions in equity, if the witness be dead; and, *with the assent of the parties*, they may take with them books or writings not under seal.¹⁴ But they cannot take with them evidence which has not

10—C. L., § 831.

It is not permissible for the officer in charge of the jury to be present in the jury room during the deliberations: *People v. Knapp*, 42 Mich., 267; 3 N. W., 927. And after the jury has retired to deliberate, it is highly improper for the justice to enter their room to advise or consult with them, whether requested by the jury to do so or not, without the consent of the parties or their attorneys: *Galloway v. Corblitt*, 52 Mich., 460; 18 N. W., 218. But it seems that the justice may, with the consent of the parties, and by request of the jury, visit their room and answer questions which they may desire to ask of him, relating to the matters upon which they are deliberating: *Smoke v. Jones*, 35 Mich., 409; see, also, *Hart v. Lindley*, 50 Mich., 20; 14 N. W., 682, and *Galloway v. Corblitt*, 52 Mich., 460; 18 N. W., 218.

11—*Fink v. Hall*, 8 Johns., 437. It is never necessary to require the jury

to withdraw unless they desire it: *Bottemly v. Goldsmith*, 36 Mich., 27-8; *The Milwaukee v. Hale*, 1 Doug. Mich., 306.

12—C. L., § 831. If the jury are left alone in the room where the trial was had, still an officer must be sworn as in other cases: *Douglas v. Blackman*, 14 Barb., 361.

13—*Tower v. Hewett*, 11 Johns., 134.

14—The justice may permit the jury, on retiring, to take with them any deposition or written instrument which has been properly proved and introduced in evidence: *Howland v. Willetts*, 5 Selden, 171. It is sometimes proper to allow the jury to take to the jury room documents which have been admitted in evidence; but it should only be allowed where the propriety of it is obvious, and in general not without consent of parties: *Kalamazoo N. M. Co. v. McAllister*, 36 Mich., 327; *Hewitt v. Flint & P. M. Ry. Co.*, 67 Mich., 61; 34 N. W., 639;

been shown to the court; and if the party for whom the verdict is afterwards given deliver such evidence to the jury, it will avoid the verdict, unless the jury do not look at it; but if delivered by the opposite party, or produced by one of the jurors, without having received it from the parties, it will not. In courts of record, the court will not permit the jury, after they have retired, to see a treatise on the law of the subject, even with the consent of the parties.¹⁵ This is because, in those courts, the jury is to receive the law from the judge; but in justice's courts, the jury being judges of the law, whether this rule is applicable to juries in those courts, *quaere*.

347. Misconduct of justice or jury which will defeat a verdict.—If the jury, after they have left the court, examine witnesses, even to the same points to which the same witnesses were before examined in court, it will avoid the verdict;¹⁶ unless by consent of parties;¹⁷ but they may return into court, on leave being granted by the justice, on application for that purpose, to hear evidence as to any matter of which they are in doubt;¹⁸ or to ask any question of the court; in which case the parties must be present, or at least have notice.¹⁹ Nor can the justice go to the jury room while they are deliberating and give them instructions, without the *express* consent of the parties. It is not enough that they know he is going and do not object.²⁰ But when, in such a

Harronn v. Chicago & W. M. Ry. Co., 68 Mich., 208; 35 N. W., 914 (memoranda of counsel), overruling *Miller v. Cuddy*, 43 Mich., 274; 5 N. W., 316. A failure to object to the taking of documentary evidence by the jury will operate as a waiver: *Chadwick v. Chadwick*, 52 Mich., 545; 18 N. W., 350. For other cases upon the taking of documentary evidence by the jury, see, *Walker v. Newton*, 130 Mich., 576; 90 N. W., 328, by consent;—*Wonderly v. Holmes Lumber Co.*, 56 Mich., 412; 23 N. W., 79; *Foster's Will*, 34 Mich., 21; *Bulen v. Granger*, 63 Mich., 311; 29 N. W., 718; *Bethel v. Linn*, 63 Mich., 464; 30 N. W., 84. The justice has no right to send his minutes of the evidence to the jury, at their request, unless the parties consent, and if he does so, the

judgment will be reversed: *Nell v. Abel*, 24 Wend., 185; *Kalamazoo N. M. Co. v. McAllister*, 36 Mich., 327.

15—*Burrows v. Unwin*, 3 Car. & P., 310.

16—*Vicary v. Farthing*, Cro. Ellz., 411, 412.

17—*Brown v. Cowell*, 12 Johns., 384.

18—*Blackley v. Sheldon*, 7 Johns., 32. For this purpose the witness who testified may be recalled, or the justice may read the evidence from his minutes: *Ibid*.

19—*Bunn v. Croul*, 10 Johns., 239; *Blackley v. Sheldon*, 7 *Ibid.*, 32; see, *Henlow v. Leonard*, 7 Johns., 200.

20—*Moody v. Pomeroy*, 4 Denio, 115; *Taylor v. Betsford*, 13 Johns., 487; *Smoke v. Jones*, 35 Mich., 409; *Galloway v. Corblitt*, 52 Mich., 461; 18 N. W., 218. If, however, the parties

case, the jury merely asked the justice if they could add anything to the plaintiff's demand, who answered *no*, it was not deemed sufficient to set aside the judgment.²¹

After the jury have retired, it is their duty to continue together until they return into court, without having any communication with any person, either on the subject of the case or any other. As a general rule, the mere separation of a jury after they have agreed on their verdict, unless there be some suspicion, and the slightest is sufficient, will not prejudice the verdict,²² but if they eat or drink at the expense of the party for whom they find a verdict, it avoids the verdict,²³ Where a juror, after the cause was committed to the jury, drank brandy, though in a trifling quantity, and as he stated, to cure the diarrhoea, the court set aside the verdict.²⁴ But where the jury, during the trial of a civil case, were allowed to separate, and one of them drank spirituous liquors, it was held not to be a ground for setting aside the verdict, it not appearing that in so doing he violated any express direction of the court, and there being no proof that he drank to excess, or upon the invitation or at the expense of either of the parties. It was also held, that an irregularity of the juror which would subject him to censure, whether in drinking spirituous liquors, separating from his fellows, or the like, should not overturn the verdict, unless there be some reason to suspect that the irregularity may have had an influence on the final result of the cause.²⁵ It is irregular for a jury, each to put down a sum which they find for the party, add the sums together, divide by the number of

consent it would not avoid the verdict: *Snyder v. Wilson*, 65 Mich., 340; 32 N. W., 642.

21—*Thayer v. Van Vleet*, 5 Johns., 111. But this is doubted: See, *Bunn v. Croul*, 10 Johns., 239, note. It is error if the officer having charge of the jury remain in the jury room during their deliberations: *People v. Knapp*, 42 Mich., 267; 3 N. W., 927.

22—*Horton v. Horton*, 2 Cow., 589; *People v. Douglass*, 4 *Ibid.*, 26.

23—*Co. Lit.*, 277; *Everitt v. Yonells*, 4 B. & Ad., 681; *Graham's Prac.*, 314.

24—*Brant v. Fowler*, 7 Cow., 562. But, see, *Wilson v. Abrahams*, 1 Hill, 207.

25—*Wilson v. Abrahams*, 1 Hill, 207. "The only safe rule must be to treat the jury as disqualified to settle the rights of litigants as soon as they cease to be guarded against unlawful contact with the outside world" after having retired to consider of their verdict. So said in a case where the jury at a hotel were permitted to converse and drink with others: *Churchill v. Alpena Circuit Judge*, 56 Mich., 536; 23 N. W., 211. It will not be permitted that the verdict in such a case can be defended by showing that the jury were uninfluenced by such circumstances: *Ibid.* A verdict is incurably vitiated if evidence of the

jurors, and adopt the quotient as their verdict.²⁶ But if the course be adopted merely for the sake of arriving at a reasonable measure of damages, the jurors not agreeing to abide by the result, it is no objection to the verdict.²⁷ So, where the jury left it to lot whether the verdict should be for the plaintiff or the defendant, and the lot eventuated in favor of the defendant, and the jury found accordingly, the verdict was set aside.²⁸

§ 348. **The verdict.**—"When the jurors have agreed upon their verdict, they shall deliver the same to the justice publicly, and thereupon the justice shall enter the same in his docket, and render judgment thereon."²⁹

When the jury return to the court, the justice should call over their names to ascertain if they are all present. The plaintiff also should be called, and, if not present, the jury may be discharged, and judgment of non-suit entered.³⁰ If plaintiff is present the justice should then ask the jury if they have agreed upon their verdict, and whether they find for the plaintiff or defendant. The foreman of the jury then delivers the verdict, and it is recorded. After noting the verdict, the justice says: "Listen to your verdict as the

public sentiment as to the case is allowed to reach the jury after they have taken the case: *Ibid.*

26—*Roberts v. Fallis*, 1 Cow., 238; *Harvey v. Rickett*, 15 Johns., 87; *Thomas v. Dickinson*, 2 Kern., 364. "The law contemplates that the jurors shall, by their discussions, harmonize their views if possible, but not that they shall compromise, divide and yield for the mere purpose of an agreement." "Jurors should agree if they can do so without sacrificing what any one of them believes are the just rights of the parties; but not otherwise": *Cooley, J., in Goodsell v. Seeley*, 46 Mich., 623; 10 N. W., 44. See, also, *Benedict v. Beef & Prov. Co.*, 115 Mich., 527; 73 N. W., 802.

27—*Dana v. Tucker*, 4 Johns., 487.

28—*Mitchell v. Ehle*, 10 Wend., 595.

29—C. L., § 832. The verdict of the jury is conclusive and cannot be invalidated by any action or non-action of the justice. The statute requires the justice to enter judgment immediately on the verdict on the

ground that he has no judicial duty in the matter and must act ministerially in recording the action of the jury. He cannot set the verdict aside or grant a new trial. And if his entry of judgment is postponed the law itself supplies it whether entered or not, and its subsequent entry in accordance with the verdict is proper: *Alt v. Lalone*, 54 Mich., 302; 20 N. W., 52.

30—If the plaintiff is not present when the verdict is rendered, any judgment entered upon it may be set aside: *Douglass v. Blackman*, 14 Barb., 381; *Shove v. Raynor*, 3 Denio, 77. But if the plaintiff were actually present, an omission to call his name will not be a sufficient error to reverse the judgment: *McEachron v. Randles*, 34 Barb., 301; *Oakley v. Van Horn*, 21 Wend., 305. A judgment rendered upon a verdict received in the absence of the plaintiff, though not absolutely void, cannot be questioned collaterally, still it is erroneous, and reversible on appeal: *Relyea v. Ramsay*, 2 Wend., 602; *Lamoure v. Caryl*, 4 Denio, 370, 373.

court has recorded it. You say you find, etc. (*as the verdict is*) and so say you all.” The verdict must be general for plaintiff or defendant; it cannot be special.³¹ As to the verdict in trespass on lands under the statute, see, *post*, ch. xxxvii.³²

The verdict is not final until it is recorded. Until then the jury may correct it; they may be polled by either party,³³ although a sealed verdict,³⁴ and any of the jurors may disagree to the verdict; and the justice may, of his own accord, send the jury back to reconsider their verdict.³⁵ The latter course is, however, unusual; and it is adopted only when the verdict is most manifestly wrong.

§ 349. Proceedings in trial not to be taken on Sunday, except that verdict may be received.—A trial must be closed and submitted to a jury on a week day, and not on Sunday.³⁶

“No court shall be opened or transact any business on the first day of the week, unless it be for the purpose of instructing or discharging a jury, or of receiving a verdict.”³⁷

31—Wylle v. Hyde, 13 Johns., 249.

32—When the declaration claims double or treble damages under some statute, the verdict ought to be general, but should state whether it is found for single damages, or for the whole amount of the double or treble damages, for, in the absence of such statement, the legal intendment will be that it was found for the whole, double or treble amount: *Livingston v. Platner*, 1 Cow., 175. The better practice is for the jury to find single damages, and for the court to double or treble them; although it would probably be equally good for the jury to assess the augmented damages, if the verdict shows that such assessment was in fact made: *Sedgwick on Damages*, 571.

33—*Fox v. Smith*, 3 Cow., 23; *Labar v. Kosslin*, 4 Comst., 547. The jurors must be unanimous in their verdict; and to ascertain whether they are all agreed, either party has the right to poll the jury at any time before the verdict is recorded. To poll a jury is to examine each juror separately as to his concurrence in the verdict, and at the request of either party the justice is bound to do it, which he does by calling each juror by name and asking him, “*Is this your verdict?*”

34—*Bunn v. Hoyt*, 3 Johns., 255;

Root v. Sherwood, 6 *Ibid.*, 68. If the verdict as rendered is informal, yet if it sufficiently indicated for which party the jury have found the issue, it will be the duty of the justice to enter the verdict in the proper form, according to the substantial finding: *Lamberton v. Foote*, 1 Doug. Mich., 102. And if the verdict as given is uncertain or indefinite, the justice may inquire of the jurors to obtain an express explanation as to what their verdict is: *Sleight v. Henning*, 12 Mich., 371, 377. And then he should enter it in due form: *Ibid.* The justice must construe and apply the verdict reasonably, in the light of all the proceedings: *Wilson v. McCrilles*, 50 Mich., 347; 15 N. W., 504.

35—*Blackley v. Sheldon*, 7 Johns., 32.

36—When a trial was commenced on Saturday and continued until two o'clock on Sunday morning, when it was submitted to the jury and they rendered their verdict at about three the same morning, it was held irregular and the judgment was reversed: *Pulling v. People*, 8 Barb., 384; *Butler v. Kelsey*, 15 Johns., 177.

37—C. L., § 1114; see, *ante*, § 133; *Malcolmson v. Scott*, 56 Mich., 465; 23 N. W., 166.

A verdict may be received on Sunday, but judgment should not be entered until Monday.³⁸ In the case of a trial commenced on Saturday, and not completed by midnight, the proper course would be to adjourn the cause to a suitable time on Monday, and then go on with the trial the same as on an adjournment from necessity, from one day to the next.³⁹

§ 350. Disagreement and discharge of jury.—"Whenever a justice shall be satisfied that a jury sworn in any cause before him cannot agree on their verdict, after having been out a reasonable time, he may discharge them; and thereupon a new jury shall be selected and summoned as hereinbefore directed, within forty-eight hours, unless the parties agree upon a longer time, or consent that the justice may render judgment on the evidence already before him, which, in such case, he may do."⁴⁰

The question as to the time of discharging a jury, is one which rests in the sound discretion of the court. "Juries should not," says Chief Justice Savage, "be discharged because upon the first comparing of opinions there happens to be a disagreement. Temperate discussion may produce unanimity, and time should be allowed for that purpose; but when such time has been allowed, and the court becomes satisfied that there is no reasonable prospect of an agreement by further discussion, it then becomes their duty to discharge."⁴¹

38—*Houghtaling v. Osborn*, 15 Johns., 119.

39—*Edw. Treat.*, 1st ed., 97.

40—C. L., § 833. Where a jury gave an informal verdict, but which sufficiently indicated for which party they found the issue, it was held that it was the duty of the justice to enter up the verdict in proper form, and enter judgment thereon, and that he could not refuse to do so, and issue a new venire for another jury: *Lamberton v. Foote*, 1 Doug., Mich., 102; *Roberts v. Tremayne*, 61 Mich., 265; 28 N. W., 113; *Boatz et al. v. Berg*, 51 Mich., 8; 16 N. W., 184.

41—*People v. Green*, 13 Wend., 55.

If the jury cannot agree, and are discharged, and either party wants a new jury, he must advance the fees therefor, or he will not be entitled to

have a second jury called: See, *ante*, § 350, n. 41. Where, after having been out one day, a jury announced they could not agree, the court would not discharge them and said to them that he was going away to be gone over Sunday and they had better agree that night. Held, that the verdict, which was soon thereafter rendered, was coerced and invalid: *Pierce v. Pierce*, 38 Mich., 412. So, where the jury announced that they were \$200 apart, and the court told them, "If that is the only difference it would be better for the county and the parties on both sides that one or both sides yield so as to come together. It would be unfortunate for all to have a disagreement when the difference is so small." Held to be error: *Goodsell v. Seeley*, 46 Mich., 623; 10 N. W., 44.

CHAPTER XX.

OF EVIDENCE—AND PARTICULARLY OF JUDICIAL NOTICE AND GENERAL RULES.

JUDICIAL NOTICE.

§ 351. Of what courts take judicial notice.

GENERAL RULES.

§ 352. What evidence is, and object of.

§ 353. Must be relevant.

§ 354. Substance of issue only need be proved.

§ 355. Variance.

§ 356. When variance disregarded.

§ 357. The burden of proof.

§ 358. The best evidence rule.

§ 359. The parol evidence rule.

MATTERS NOTICED JUDICIALLY.

§ 351. Of what courts take judicial notice.—There are certain facts which, by reason of their nature, the courts are assumed to know, and such need not be proven. Courts are bound to take notice judicially of what the law is. They will take notice not only of the printed statute books, but also of the journals of the legislature, in order to determine whether all the constitutional requisites to the validity of the statutes have been complied with in their enactment. No plea is necessary to bring to the notice of the court facts which the judges must judicially know, and in respect to which no proof could be given.⁴ They will take judicial notice of the public statutes, and disregard all allegations in pleadings which are inconsistent with them.⁵

4—*People v. Mahanny*, 13 Mich., 481. *Callaghan v. Chipman*, 59 Mich., 610; 26 N. W., 806; *Atty. Genl. v. Rice*, 64 Mich., 385; 31 N. W., 203; see, *Hanck's Case*, 70 Mich., 396; 38 N. W., 269. But not of foreign law: *Phelps v. American S. & L. Assn.*, 121 Mich., 344; 80 N. W., 120. But courts cannot take judicial notice of the by-laws of a corporation. Such by-laws must be averred and proved: *Portage Lake M. & B. B. Society v. Phillips*, 36 Mich., 22.

5—*People v. Raisin River & Lake Erie Ry. Co.*, 12 Mich., 389; *Hurlburt*

v. Brittain, 2 Doug., Mich., 191; see, also, *Groesbeck v. Seeley*, 13 Mich., 329, 340. But our courts cannot know judicially what are the provisions of the statutes of a foreign country: *G. W. R. Co. v. Miller*, 19 Mich., 314. Nor of the laws of a sister state: *Phelps v. American Sav., etc., Assn.*, 121 Mich., 343; 80 N. W., 120; *Chapman v. Colby*, 47 Mich., 46; 10 N. W., 74.

The courts will take judicial notice of the law under which a contract may be made with the state, but not that such a contract has in fact been made: *Houghton Co. v. Commissioners, etc.*,

Judicial notice will be taken of the political divisions of the state generally, and of the division of the state by government survey into townships numbered in ranges.⁶ And that the state, counties and townships are separate political organizations and corporations.⁷ And of the relative positions of the towns and counties, but not of their precise boundaries, further than they may be described in public statutes.⁸ But they will take notice that parts of the rivers and lakes surrounding the state are beyond its boundaries.⁹ Judicial notice will also be taken of acts organizing the several townships.¹⁰ A court will also take notice of its own officers, but not of the officers of another court.¹¹

23 Mich., 272. Courts are bound to take judicial notice of the laws of nature and of the human mind, at least such of them as are obvious to the common apprehension of mankind, as well as the more obvious dictates of common sense, and principles of human action, which are assumed as truths in any process of reasoning by the mass of sane minds. These constitute a part of the law of the land, and courts are bound judicially to know and apply them: *Lake Shore Ry. Co. v. Miller*, 25 Mich., 274.

Foreign Law.—While our courts cannot assume to know what any foreign law is, there is no principle which will justify them in holding anything void under a foreign law which is lawful here, until the variance is shown. To that extent our courts may presume a conformity between our laws and foreign laws. And in order to sustain the presumptive validity of foreign transactions, our courts, in the absence of proof to the contrary, hold them valid when conforming to the common law. But we can make no presumption that a contract valid under our law is not valid elsewhere: *Worthington v. Hanna*, 23 Mich., 534; see, *O'Rourke v. O'Rourke*, 43 Mich., 58; 4 N. W., 531.

But the courts of this state will take judicial notice that the supreme court of Massachusetts is a court of record: *Shotwell v. Harrison*, 22 Mich., 410. So, judicial notice will be taken that county clerks in the state of New York are clerks of the supreme

court of that state, and that that court is a court of record: *Morse v. Hewett*, 28 Mich., 481.

6—*Wright v. Dunham*, 13 Mich., 414; *People v. Maynard*, 15 Mich., 463; *Dexter v. Cranston*, 41 Mich., 448; 2 N. W., 674; *People v. Telford*, 56 Mich., 541; 23 N. W., 213; *People v. Waller*, 70 Mich., 237; 38 N. W., 261. But not the location of objects with reference to the boundaries of such political divisions: *Pine Saw Log Co. v. Sias*, 43 Mich., 356; 5 N. W., 414; *Schaale v. Wasey*, 70 Mich., 414; 38 N. W., 317; *Cicotte v. Anclaux*, 53 Mich., 227, 18 N. W., 793.

7—*Town of Lagrange v. Chapman*, 11 Mich., 499.

8—1 Greenl. Ev., § 6.

9—*Cummings v. Stone*, 13 Mich., 70.

10—*Ives v. Kimball*, 1 Mich., 308.

11—*Norvell v. McHenry*, 1 Mich., 227, 233. And a tax collector is bound to take notice of a general statute which exempts corporations from any except specific taxes: *Leroy v. East Saginaw City Ry. Co.*, 18 Mich., 233. A court will take judicial notice of the signatures of its officers and attorneys in proceedings pending in court. But they cannot take judicial notice of the genuineness of signatures of private persons and parties appended to acknowledgments of service of process: *Johnson v. Delbridge*, 35 Mich., 436.

The deputy auditor general being an officer known to the law, judicial notice will be taken of him, and of his official acts, and that a certificate pur-

A judge's personal knowledge of facts will not dispense with proof of them, where such proof would be otherwise required.¹²

GENERAL RULES—WHAT TO BE PROVED.

§ 352. **What evidence is and object of.**—Evidence is the means by which any alleged fact is established or disproved.¹³ It is that which ascertains the truth of the fact or point in issue.¹⁴ In all testimony, the object of the law is to enable the court or jury to know all that the witness knows, which is pertinent to the issue; and every rule of evidence is designed to secure this end.¹⁵ "A jury should be allowed to have placed before them all the means of knowledge which can be had; without involving the danger of leading them to form conclusions not based on solid truth, and not reliable as reasonably certain."¹⁶

porting to be made by him, was so made, and is of the same force as if made by the auditor general himself: *People v. John*, 22 Mich., 461. A court will not take judicial notice on demurrer, of the identity of attorney and complainant of the same name: *Belden v. Blackman*, 118 Mich., 445, 76 N. W., 979.

12—*Kermott v. Ayer*, 11 Mich., 183; see, *Clark v. Babcock*, 23 Mich., 164.

Courts will take judicial notice of the general duties and character of professional employments in those occupations which are classed as profession by popular usage or law: *Pennock v. Fuller*, 41 Mich., 153; 2 N. W., 176. Judicial notice must be taken of the ordinary rules and necessities of banking business: *American National Bank v. Bushey*, 45 Mich., 135; 7 N. W., 725. Courts will take notice of the methods of conducting and carrying on business at the present day; and applying well settled principles of the common law, will enforce new classes of agreements arising therefrom, unless they violate some rule of public policy: *Gregory v. Wendell*, 39 Mich., 337; see, *Cameron v. Blackman*, 39 Mich., 108.

The courts will also take judicial notice of the meaning of current phrases which everybody else understands: *Bailey v. Kalamazoo Publish-*

ing Co., 40 Mich., 251. So of the common abbreviations: *Dages v. Brake*, 125 Mich., 64; 83 N. W., 1034.

Negligence.—Courts will take judicial notice that no care is not due or reasonable care; and that, when no care has been used in approaching a known or threatened danger, and no effort has been made to ascertain or avoid it, that reasonable care has not been exercised, and that the party has been guilty of negligence: *Lake Shore & M. S. Ry. Co. v. Miller*, 25 Mich., 274, 294.

13—1 Greenl. Ev., § 1.

14—3 Bla. Com., 367.

15—*Reaublen v. Clcotte*, 12 Mich., 490.

16—*Evans v. People*, 12 Mich., 36. The proper test for the admissibility of evidence ought to be, whether it has a tendency to affect belief in the mind of a reasonably cautious person, who should receive and weigh it with judicial fairness: *Stewart v. People*, 23 Mich., 75.

But everything tending to influence a jury, if inadmissible in evidence, should be kept from the knowledge of the jury.

All incompetent testimony should be excluded. Its admission will be cause for reversal of the judgment. This rule could be but slight protection if counsel were permitted, by way of offering the incompetent testimony, to make a

§ 353. **Must be relevant to the issue.**—A primary rule in the production of evidence is, that the evidence offered must correspond with the allegations, and be confined to the point in issue. This rule supposes the allegations to be material and necessary. Surplusage, therefore, need not be proved. The term, *surplusage*, comprehends whatever may be stricken from the record, without destroying the plaintiff's right of action.¹⁷ It is not necessary, however, that the evidence should bear directly upon the issue. It is admissible if it tends to prove the issue, or constitutes a link in the chain of proof; although, alone, it might not justify a verdict in accordance with it.¹⁸ And, it seems that testimony should not always be excluded because its relevancy to the issue is not apparent at the time it is offered, if the party offering it will undertake to connect it with the issue by further evidence to be introduced in the course of the trial. But, unless the offer is coupled with such undertaking, the testimony should not be received, and not then if its introduction out of its order is likely to be seriously prejudicial, nor when from the circumstances there is any real question about the ability of the party to produce the evidence essential to the admission of that offered. And, if the proper testimony to connect such evidence with the issue, and to make it relevant, is not introduced before the close of the trial, the evidence should be excluded from the jury when

statement of it to the jury, or to state the same fully to the jury in their argument or otherwise. Where the offer would tend to prejudice the jury, the articles or evidence, if in writing, should be presented to the court and counsel for examination, without stating the purport or substance of it: *Scripps v. Reilly*, 38 Mich., 15, 16.

17—1 *Greenleaf's Ev.*, § 51.

18—*State v. McAllister*, 24 Me., 139. All evidence is required to be pertinent to the issue, and must either bear directly upon it, or form a link in a chain of facts which may authorize a jury to infer it. In determining the admissibility of any evidence, it must be decided by this tendency. When a witness is asked a question, the immediate inquiry is, what part of the issue

does this tend to prove? *Niles v. Rhodes*, 7 Mich., 402.

Evidence which tends to prove any part of the issue is admissible, even though standing alone it does not go far enough to make out a cause of action or defense. No single item of evidence can be rejected on the sole ground that it falls short of making a case. If it contributes to that end it must be received, and its sufficiency in connection with the other evidence must be determined on a review of the whole when the case is closed: *Collins v. Beecher*, 45 Mich., 436-8; 8 N. W., 97. But all evidence should have some legitimate tendency to establish or disprove the fact in controversy, and whatever has no such tendency should be rejected: *Stroh v. Hinchman*, 37 Mich., 497.

the case is given to them.¹⁹ The relevancy of evidence depends upon the issue to be tried;²⁰ and in determining the admissibility of evidence, it is indispensable to consider the object for which it is introduced, and the point intended to be established by it; and though evidence offered may have a tendency to prove a fact inadmissible or irrelevant under the issue, it cannot be excluded for that reason, if its tendency be also to prove a fact which is within the issue, or has been made relevant by the course of the examination.²¹

This rule excludes all evidence of *collateral facts*, or those which do not afford any reasonable presumption or inference as to the principal fact or matter in dispute; and the reason is, that such evidence tends to draw away the minds of the jurors from the point in issue, and to prejudice and mislead them.²²

But attendant circumstances, so far as they show the nature of the transaction, and give character to the principal fact in question, and tend to raise a presumption of the truth of the matters alleged in the issue, are relevant, and may be proved.

19—Dillin v. People, 8 Mich., 369; People v. Pitcher, 15 Mich., 399, 406. To make a question, apparently irrelevant, proper to be put as a link in the chain of evidence, it must be accompanied by a proposition to follow it up at the proper time by proof of other facts, which, if true, would make the question put legitimately operative: Wyngert v. Norton, 4 Mich., 286-9; see also, Shaw v. Davis, 7 Mich., 318, 321. If the evidence is objected to, the court may require the counsel offering it to show how it will become material, by stating what other facts are proposed to be proved in connection with the offered evidence; and unless, when so required, he does show how the evidence is material, it may be properly rejected: Roy v. Targee, 7 Wend., 359; People v. Millard, 53 Mich., 63; 18 N. W., 562; Roberts v. Pepple, 55 Mich., 367; 21 N. W., 319; Hoffman v. Harrington, 44 Mich., 183; 6 N. W., 225; The order of proof is within the discretion of the trial court which is not subject to review except for abuse: Dubois v. Campau, 24 Mich., 360; Hutchins v. Kimmel, 31 Mich., 126; Brown v. Marshall, 47 Mich., 576; 11 N. W., 392; Fells v. Barbour, 58 Mich., 49; 24 N. W., 672; Devereaux v. Phillips' Estate, 97 Mich., 104; 56 N. W., 228. When evidence is offered in its proper order it is not in the discretion of the court to reject it: Brown v. People, 17 Mich., 429. The rule is somewhat more strict in criminal cases: People v. Hall, 48 Mich., 482; 12 N. W., 665; People v. Millard, 53 Mich., 63; 18 N. W., 562. But it is no error to admit testimony which was irrelevant at the time of its admission, if it is afterwards made relevant and pertinent by other testimony subsequently introduced: Black v. Camden & Amboy Ry. & T. Co., 45 Barb., 40.

20—White v. Bailey, 10 Mich., 155.

21—People v. Doyle, 21 Mich., 221; Dalton v. Drogge, 99 Mich., 250; 58 N. W., 57; Cook v. Perry, 43 Mich., 623; 5 N. W., 1054. On the other hand an *omnibus* proposition involving competent and incompetent matter is properly rejected: Angell v. Loomis, 97 Mich., 5; 55 N. W., 1008.

22—1 Greenl. Ev., § 52. It is the duty of the court to exclude with care any irrelevant testimony: Strange v. People, 24 Mich., 9.

Facts do not occur singly, but always in connection with others. Every transaction owes its occurrence to some preceding circumstance, and in its turn becomes the cause of others. These surrounding circumstances, when so connected with the fact under investigation as to affect and explain its character, constitute parts of the *res gestae*, and are essential to be known in order to a right understanding of its nature, and may always be shown to the jury along with the principal fact.²³

And in any case where a witness has testified to a fact or transaction which, standing alone and entirely unconnected with anything which led to or brought it about, would appear in any degree unnatural or improbable in itself, without reference to the facts preceding and inducing the principal transaction, and which, if proved, would render it more natural and probable, *such* previous facts are not only admissible, but they

23—*People v. Jenness*, 5 Mich., 324. Thus, in cases where fraud is the subject of the investigation, the statements of the parties charged with it are permissible in evidence, if made before or at the time of the commission of the alleged fraudulent act. Otherwise, in a great majority of cases, fraud as a fact could not be shown. Such statements are admissible to show the intent and purpose of the act: *Wyckoff v. Carr*, 8 Mich., 47; and see, 8 Mich., 55, 61. And where an assignment was attacked as fraudulent, it was held, that the acts and declarations of the assignor, his circumstances and situation, the terms and provisions of the instrument, and any and all means of evidence which convince the mind of the existence of a fraudulent intent, were relevant. And even the subsequent acts and declarations of the parties to a transaction, are admissible for the purpose of showing its fraudulent character: *Baldwin v. Buckland*, 11 Mich., 380. But statements made by a party subsequent to a transaction, as to his motives and intentions, are not receivable in evidence to affect the right of others. It is only the intention declared at the time which, as a part of the *res gestae*, can bind or affect others: *Dawson v. Hall*, 2 Mich., 390. In personal injury case it is competent to show the entire surroundings of the place where the injury was

received: *Le Beau v. Telephone & T. C. Co.*, 109 Mich., 302; 67 N. W., 339. Where plaintiff was injured by a hammer he was using, what was said immediately after the injury, about the hammer or about the work, by a fellow workman to whom the hammer belonged was not part of the *res gestae*: *Dompler v. Lewis*, 131 Mich., 144; 91 N. W., 152. Evidence that defendant on leaving the house with the money stated that he was going to pay his mother, was not *res gestae* upon the question of payment: *Schulz v. Schulz*, 113 Mich., 502; 71 N. W., 854. In an action for wrongful discharge plaintiff's letter in answer to the letter of discharge contradicting charges of misconduct and inquiring as to scope of the discharge in *res gestae*: *Schaub v. Welded-Barrel Co.*, 125 Mich., 591; 84 N. W., 1095. What is spoken concerning the transaction not at the time or immediately after is not admissible: *Edwards v. Foote*, 129 Mich., 121; 88 N. W., 404. Other cases involving the question of *res gestae* are *Rutter v. Collins*, 96 Mich., 510; 56 N. W., 93; *People v. Hughes*, 116 Mich., 80; 74 N. W., 309; *Haviland v. Chase*, 116 Mich., 214; 74 N. W., 477; *Holman v. Union St. Ry. Co.*, 114 Mich., 208; 72 N. W., 202; *Webber v. Hayes*, 117 Mich., 256; 75 N. W., 622; *People v. McArron*, 121 Mich., 1; 79 N. W., 944.

constitute a necessary part of the principal transaction, a link in the chain of testimony without which it would be impossible for the jury properly to appreciate the testimony in reference to such principal transaction. And such previous facts should therefore be elicited by the examination of the party producing the witness. Any other rule in such a case, or to permit the evidence of an isolated transaction, which could only be made to appear probable by exhibiting the antecedent facts which induced it, and yet to exclude all those antecedent facts, would be unfair to the witness, and tend to suppress rather than elicit the truth.²⁴

Evidence to impeach the character of a witness called by the opposite party is always relevant; so is evidence to sustain the character of a witness thus attacked, and on cross-examination it may be shown that the witness is hostile to the opposite party, and has made statements indicating such hostility.²⁵

Evidence may be admissible as against one of two defendants, but not against the other; in such case it must be received, but it is to be limited in its effect to the defendant, against whom it is admissible.²⁶ Evidence clearly irrelevant may be excluded by the court on its own motion, even where neither party makes any objection to it.²⁷ But evidence relevant to the issue cannot be excluded because it was not referred to by counsel in opening the case or defense.²⁸

§ 354. The substance of the issue only need be proved.—A second rule is, that the substance only of the issue need be proved. If a party prove that, he has proved a substantial ground of action, and is entitled to his remedy. He will not be required to prove immaterial averments. The principle is, that all the *material* facts alleged in the declaration, which are put in issue, must be established by legal proof.²⁹

24—*People v. Jenness*, 5 Mich., 305.

25—*Newton v. Harris*, 6 N. Y., 345; *Starks v. People*, 5 Deno., 108.

26—*Fox v. Stone*, 8 Barb., 355; *Black v. Foster*, 28 *Ibid.*, 387. So, evidence which is admissible for one purpose cannot be rejected because it cannot be used for another: *John Hancock Mutual Life Ins. Co. v. Moore*, 34 Mich., 41.

27—*Corning v. Corning*, 6 N. Y.,

97; *Stockholm v. Robbins*, 24 Wend., 105.

28—*Nearing v. Bell*, 5 Ill., 291; see, *Sawyer v. Chambers*, 44 Barb., 42; *Sawyer v. Chambers*, 43 *Ibid.*, 622.

29—*Phillips on Ev.*, 4 Am. ed., 824. It is sufficient if the proofs correspond with and support the allegations as to those facts and circumstances which

But there is a difference between allegations of matter of *substance*, and allegations of matter of *description*, that is, allegations descriptive of the identity of that which is essential to support the claim or charge made. It is sufficient if the former be substantially proved; but the latter must be proved with strictness and precision. Thus, if the allegation be that the defendant *made* a promissory note on a certain day, the substance of the allegation is the *making of the note*, and the time when it was made is immaterial, and proof of making it on the precise day mentioned is not necessary; but if it is alleged that the note was made, *bearing date* on a certain day mentioned, then the allegation as to the date is descriptive of the note, and essential to its identity, and must be strictly proved.³⁰

A material averment is one that sets forth facts or circumstances which are necessary in point of law to give a right of action or to sustain a defense. If an averment can be stricken out without taking away the allegation of any fact necessary to sustain the action, it need not be proved. Thus, where a declaration alleged a warranty of soundness and breach, and further stated that the defendant knew of the unsoundness at the time of making the warranty, it was held that proof of the warranty and of the unsoundness was sufficient to maintain the action; for if the whole averment as to defendant's knowledge were stricken out, the declaration would still be sufficient to entitle the plaintiff to recover upon the breach of the warranty

are, in point of law, essential to the charge or claim: 4 Stark Ev., 1526. But facts proved, but not pleaded, are not in general of any avail to the party proving them; for the court must give judgment according to the allegations and proofs: Field v. The Mayor, etc., 2 Selden, 179; Kelsey v. Western, 2 Comst., 506; New York Central Ins. Co. v. National Protection Ins. Co., 20 Barb., 473. A cause of action must be as fully proved in a justice's court as in any other. A court has no right to assume a fact without evidence legally tending to prove it, or to dispense with the proof of any distinctive condition affixed to an agreement: Clcotte et al., v. Morse, 8 Mich., 424. In suits commenced by service of process, the defendant's oral admission, on the trial

before the justice, of plaintiff's cause of action, will authorize a judgment against him: Crouse v. Derbyshire, 10 Mich., 479. But if the defendant does not appear, the plaintiff must prove his cause of action in the same manner as if the defendant had appeared: Gilbert v. Hanford, 13 Mich., 40.

30—1 Greenl. Ev., §§ 56, 61; Harrington v. Worden, 1 Mich., 489; Lothrop v. Southworth, 5 Mich., 436. But a variance between the declaration and the proof in the date of a written instrument should be disregarded at the trial when the instrument is otherwise sufficiently described in the declaration, so that the defendant cannot be misled or surprised by the evidence: *Ibid.*

proved.³¹ So, in tort, for removing earth from plaintiff's land, whereby the foundations of his house were injured, the allegation of bad intent in the defendant is not necessary to be proved, for the cause of action is perfect, independent of the intention.³²

In proving the substance of the issue, the allegations of *time*, *place*, *quantity*, *quality*, and *value*, when not descriptive of the identity of the subject of the action, will, in general, be found immaterial, and need not be strictly proved as laid. Thus, in trespass to the person, the material fact is the assault and battery; the time and place where committed not being material unless made so by the nature of the defense, and the manner of pleading. So, in assumpsit, an allegation that a bill of exchange was *made* on a certain day is not descriptive, and therefore strict proof, according to the precise day laid, is not necessary. So, also, in trespass, proof of cutting the precise number of trees alleged to have been cut, or the precise value of the goods taken in trespass or trover, is not necessary.³³ Nor is it always necessary that the proofs should go to the same extent as the allegations in the declaration, provided they show a complete right of action to the extent to which they go. Thus, in assumpsit for debt on simple contract, the plaintiff may prove and recover a less sum than he alleges to be due; and where the declaration is general, for goods sold, work done, money paid, etc., and in all cases in which a general form of declaring is good, the plaintiff may prove and recover a part only of his declaration or count, either in kind, quality or value.³⁴ And in actions of tort, the general rule is, that it will be sufficient if part only of the allegations stated in the declaration be proved, provided what is proved affords a ground for maintaining the action, supposing it to have been correctly stated and proved; that is, it is enough if the same ground of action is proved as is laid in the declaration, although not to the extent there stated. But where the plaintiff declares specially upon a contract, the rule is different. For

31—Williamson v. Allison, 2 East., 446; 2 Cow. Treat., 2d ed., 918; and see, Twiss v. Baldwin, 9 Conn., 292.
32—Patton v. Holland, 17 Johns., 92.

33—Greenl. Ev., § 61.

34—2 Cow. Treat., 2d ed., 917, 923; McQuillin v. Cox, 1 H. Bla., 249.

unless the whole contract is proved, as stated in the declaration, the evidence will show a different contract and ground of action from that alleged, and the plaintiff will not be entitled to recover.³⁵

§ 355. **Variance.**—It being necessary to prove the substance of the issue, any departure from the substance in the evidence will be fatal, constituting what is called a *variance*; that is, a disagreement between the allegations and the proof, in some matter which in point of law is essential in order to maintain the action, or to sustain the defense.³⁶

Where the action is brought upon a contract, the contract ought to be stated correctly, and proved as stated; and if any part of the contract proved varies materially from that stated in the pleadings, the action must fail on account of the variance, for a contract is entire and indivisible. It will not, however, be necessary for the plaintiff to state all the several parts of the contract, which consists of distinct and collateral provisions, but only so much of the contract as contains the entire consideration for the act, and the entire act to be done for such consideration, including the time, manner, and other circumstances of its performance.³⁷ If the allegation be of an

35—1 Phil. on Ev., 4 Am. ed., 836, 837.

36—Stephen on Pleading, 107, 108.

37—1 Phil. on Ev., 4 Am. ed., 845, 851. But it is sufficient, in general, if the contract given in evidence agree, in substance and legal effect, with that stated in the declaration; and though the proof disclose circumstances and provisions beyond what is contained in the declaration, the variance will not be regarded, provided the matter omitted do not qualify or alter in any respect those which are alleged as the foundation of the action: *Ibid.*, 1 Cow., Hill and Edwards' note, p. 846; and see, Alvord v. Smith, 5 Pick., 232, 235; Henry v. Clelland, 14 Johns., 400. But the legal effect and identity of the contract must always be kept in view, and any variance in this respect, as to the promise or undertaking upon which the action is based or the consideration thereof, will be fatal: 1 C. H. & Edwards' notes, 846; see, Underwood v. Waldron, 12 Mich., 73. Thus, an al-

legation of a promise to pay absolutely on the death of A. cannot be sustained by proof of a promise to pay at that time if A. should leave the promisor sufficient funds to pay with: Roberts v. Peake, 1 Burr., 325. So, a declaration on a sealed bond will not permit evidence of one without seal, and an amendment would be necessary to avoid the effect of the variance: McCormick v. Bay City, 23 Mich., 457. And a declaration on a note with a proviso or condition, should set forth the condition or the variance will be fatal: Whitaker v. Smith, 4 Pick., 83. A declaration or notice alleging a joint contract with two, will not, in general, be supported by proof of a contract with one alone, but where the declaration was upon a promissory note made by two, and the notice of defense was that the note was given for the price of cattle sold by plaintiff to the defendants with warranty which has been broken, and claiming to recoup the damages, and the evidence was of

absolute contract, and the proof be of a contract in the alternative, at the option of the defendant; or a promise be stated to deliver merchantable goods, and the proof be of a promise to deliver goods of a second quality; or the contract stated be to pay or perform in a reasonable time, and the proof be to pay on a day certain, or on the happening of a certain event; or if the consideration be stated to be one horse, and the proof be of two horses; in these and the like cases the variance will be fatal.¹ And in an action of tort, where a contract is necessary to be stated in order to maintain the action as alleged, the contract must be correctly stated, and proved as stated.² When deeds, records, and other writings are declared upon, every part stated in the pleadings as *descriptive* of the instrument, must be exactly proved or it will be a variance, and this whether the parts set out at length were necessary to be stated

the sale of the cattle to one of the defendants alone, and that the other signed the note as surety: *Held*, that the variance was immaterial: *McHardy v. Wadsworth*, 8 Mich., 349. The allegation and proofs as to the names of the promisees must also correspond: thus, an allegation that the defendants acknowledged themselves indebted unto the "board of supervisors of the county of St. Joseph," is not sustained by a bond to "the supervisors of the county of St. Joseph;" the declaration not alleging that the bond was made to the plaintiffs by the name mentioned in the bond: *Board of Supervisors of St. Joseph v. Coffinbury*, 1 Mich., 355.

The consideration for the promise must also be set out accurately. If there be a material variance between the consideration averred and that proved, it will be fatal: 1 Chit. Pl., 10 Am. ed., 298, 299. Thus, where the consideration for a promise was stated as consisting of two parts, each of which was material and pertinent, but only one of which was proved: *Held*, that the variance was fatal to plaintiff's recovery, notwithstanding either would have been sufficient by itself to sustain the promise if it alone had been alleged as the consideration: *Tillman v. Fuller*, 13 Mich., 113. If there is any error in the description of the consideration, the whole contract

is misdescribed. Thus, in an action on a warranty, the declaration stated the consideration to be a yoke of oxen of the value of \$80 and a note for \$20, but the proof was that the note was for \$10 only, the variance was held to be fatal; that the particular statement of the amount of the note was matter of description, going to the identity of the note: *Harrington v. Worden*, 1 Mich., 488, 489. In this case it was held, however, that had the consideration been set forth with less particularity, or under a *videlicet* (to-wit), as, that the sale or warranty was for a valuable consideration, to-wit, for one yoke of oxen and a note for \$20, it would not have been necessary to prove the precise amount of the note: *Ibid.* The office of a *videlicet* is to mark that the party does not undertake to prove the precise circumstance alleged, or, precisely as alleged; and in such case he is not ordinarily held to the precise proof; whereas, if the allegation were made without the *videlicet*, he might be held to the precise proof of it: See, 1 Chitty on Pl., 10 Am. ed., 317, 318; 1 Greenl. Ev., § 60; *Lothrop v. Southworth*, 5 Mich., 446.

1—Gr. Ev., § 66.

2—Phll. on Ev., 849; *Weal v. King*, 12 East., 452; *Perry v. Aaron*, 1 Johns., 129; *Silver v. Kendrick*, 2 N. H., 160.

or not.³ Where, however, a pleading does not undertake to set out a writing by its tenor, or in the words of the instrument, but by its substance only, a variance between the allegations and the writings will not be material, provided they substantially correspond. Therefore a party should set out barely so much of a record, writing or contract, as will make out his action or defense according to its legal effect, and not *verbatim*, as in the papers themselves, for fear of a misdescription; as it is always sufficient to state the contract or writing according to its sense or legal effect without adopting its very words. But the substance should be truly stated, and proved as alleged, or the party will fail for the variance.⁴

§ 356. When variance may be disregarded.—But, to obviate in a measure objections arising from a variance between pleadings and proofs, the statute provides, in those cases where the variance is not such as to surprise or mislead a party at the trial, that:

“Every variance between process, pleadings, or any instrument in writing, recited or referred to in any other process, pleading or record, and every mistake in the name of any officer or other person, or in stating any day, month or year, or in the description of any property, in any pleading or record, shall be disregarded upon the trial of such cause, and after a verdict therein, unless such variance or mistake be calculated to surprise or mislead the adverse party, and to prevent his making due preparation for a full answer on the merits, to the matter concerning which such variance or mistake shall have been made.”⁵

3—4 Stark. Ev., 1587; *Seely v. Man-deville*, 7 Cranch, 208, 217; *Ferguson v. Harwood*, *Ibid.*, 408, 413. An instrument used upon the trial, is either set forth in the pleadings by its tenor, that is, in the words and language of the writing itself, or, it is described according to its substance and legal effect, or, it is simply brought forward in evidence to sustain allegations which do not expressly refer to it in any manner. If the instrument is set forth by its tenor, that is, *verbatim*, the allegations and instrument when proved must correspond strictly. But where

a pleading does not purport to set out an instrument in its precise words, but merely by its substance and legal effect, the rule is more liberal, and there will be no variance if the instrument proved and the one alleged correspond in all essential particulars: 1 Cow., Hill and Edwards' notes to Phil. on Ev., note 247.

4—2 Cow. Treat., 2d ed., 918.

5—C. L., § 10187. See, *Slater v. Breese*, 36 Mich., 77. Where the objection of variance is first raised when both sides have closed and the whole transaction has been gone over on

By this statute, a mistake in the date of the instrument declared on may be disregarded,⁶ and so a variance where rent was alleged payable at the end of the year, and the evidence was that it was payable half yearly.⁷

And in all cases, where the justice is satisfied that the variance was not calculated to mislead or surprise the party to his prejudice, he should disregard it.⁸

The statute would include all writings of every kind, "re-cited or referred to," in the pleadings, and which are necessary to be proved on the trial. By the term "property," it was probably intended to cover by it misdescriptions of personal property, as in trover and trespass of goods.⁹ Although the statute only extends to mistakes in setting out process, pleadings, and *instruments in writing*, the same rule is applied in relation to contracts by *parol*.¹⁰

In all cases where the justice decides to disregard the variance, it would be advisable, probably necessary, to amend the pleadings so that they should correspond with the proof.¹¹

Objections for variance must be made when the evidence is offered, or they will be held to be waived where the evidence is received and submitted to the jury without the objection being taken.¹²

§ 357. The burden of proof.—A third rule for the introduction of testimony is, that the point in issue is to be proved by the party who asserts the affirmative. And upon him is said to rest the burden of proof. A test for ascertaining upon

both sides so that no injury could arise the objection will not be sustained: *Stone v. Covell*, 20 Mich., 359; *McHardy v. Wadsworth*, 8 Mich., 349. See, further, upon the subject of variance: *Angell v. Loomis*, 97 Mich., 5; 55 N. W., 1008; *Hubbard v. Long*, 105 Mich., 442; 63 N. W., 644.

6—*Morris v. Wadsworth*, 17 Wend., 103.

7—*East Boston Timber Co. v. Persons*, 2 Hill, 126.

8—Where a declaration alleged that a bond was executed by P....., as principal, and others, as sureties, and the proof showed a bond executed by one B..... alone: *Held*, that as under the circumstances of the case the

defendant could not have been surprised or misled by the variance, it should be disregarded: *Rorabacker v. Lee*, 16 Mich., 169; see, also, *Lothrop v. Southworth*, 5 Mich., 446; *McHardy v. Wadsworth*, 8 Mich., 349.

9—1 Cow., Hill and Edwards' notes to Phil. on Ev., 872.

10—*East Boston Timber Co. v. Persons*, 2 Hill, 126.

11—*Rorabacker v. Lee*, 16 Mich., 175; see, *McCormick v. Bay City*, 23 Mich., 457.

12—*McHardy v. Wadsworth*, 8 Mich., 350; *Rorabacker v. Lee*, 16 Mich., 175-6; *Clement v. Comstock*, 2 Mich., 359.

which side the affirmative lies, is to consider which party would be entitled to a verdict if no evidence were given; for it is considered sufficient merely to deny an affirmative allegation until it is established by evidence.¹³ As a consequence of the rule, the party who has the affirmative holds the right to begin the evidence and to reply; and, having begun, he will, in general, be required to introduce all his evidence to establish his side of the case, and will not be permitted to use a part and reserve the remainder until his reply. But he will not usually be required in the opening to introduce evidence to rebut any anticipated defense; that may be reserved until the defendant has closed his proofs.¹⁴

There are some exceptions, however, to the rule that the burden of proof is upon the party holding the affirmative; or, in other words, it is sometimes necessary to prove a negative allegation to enable a party to maintain his cause; as, where a constable is sued for *not* taking goods on execution; or, for *not* arresting a man on a warrant; or, any officer for *not* doing his duty, whereby the party is injured; or, where the declaration alleged that the defendant *did not* attend a trial as a witness in obedience to a subpoena. So, where a party was charged with having shipped combustible articles on board plaintiff's ship, without giving notice of their nature, whereby the ship was burned; in these and the like cases, a party alleging the negative is obliged to prove it.¹⁵

But if the subject matter of the negative allegation is peculiarly within the knowledge of the other party, it will be taken as true, unless disproved by that party; as, where a

13—1 C., H. & Edwards' notes to Phil. on Ev., 810.

14—1 Greenl. Ev., § 74. The burden of proof in a will contest upon the issue of mental capacity is upon the proponents throughout the trial: *Prentiss v. Bates*, 93 Mich., 234; 53 N. W., 153. The burden of proof on an issue of fraud is on the person alleging it: *Hyde v. Shank*, 93 Mich., 535; 53 N. W., 787. Where a conveyance is shown to be fraudulent, the burden is upon a second grantee to show that he purchased in good faith and for a valuable consideration: *Schalble v. Ardner*, 98 Mich., 70; 56

N. W., 1105; *Berry v. Whitney*, 40 Mich., 65; *Letson v. Reed*, 45 Mich., 27; 7 N. W., 231; *Stevens v. McLachlin*, 120 Mich., 285; 79 N. W., 627; *Whelpley v. Stoughton*, 119 Mich., 314; 78 N. W., 137. Defense of payment to prior indorsee in an action by a subsequent indorsee, the note being produced with proof of protest, is inadmissible unless accompanied by proof that plaintiff is not a *bona fide* holder, and upon this issue the defendant has the burden: *Little v. Mills*, 98 Mich., 423; 57 N. W., 266.

15—2 Cow. Treat., 2d ed., 917.

party is charged with selling liquors, or exercising a trade or occupation, or the like, which the statutes do not permit, except by those licensed therefor. Here the party licensed can show it in his defense without inconvenience; whereas, if proof of the negative were required, the inconvenience might be great.¹⁶

§ 358. **The best evidence rule.**—A fourth rule of evidence is, that only the best evidence which the nature of the case will admit of, is admissible.¹⁷ Evidence of this character is termed *primary evidence*, and is that kind of proof which affords the greatest certainty of the fact in question, and bears upon its face no indication that evidence of a higher quality remains behind. All evidence falling short of this in its degree, is termed *secondary*, and cannot be substituted for evidence of a higher nature which the case admits of.¹⁸

The reason of the rule is, that an attempt to substitute the inferior for the higher evidence raises the presumption that the higher would give a different and unfavorable aspect to the case of the party introducing the lesser; that the higher evidence would make against the party neglecting to produce it.¹⁹ The ground of the rule is a suspicion of fraud where a party seeks to introduce inferior evidence when that of a higher character is attainable.²⁰

Therefore, as a general rule, the contents of a written instrument can only be proved by the production of the instrument itself, parol evidence of such contents being of a secondary or inferior nature. And it is in accordance with this rule that hearsay evidence is excluded.²¹

16—Smith v. Village of Adrian, 1 Mich., 495, 499.

17—People v. Lambert, 5 Mich., 360.

18—1 Greenl. Ev., § 84. The term "best evidence," is confined to cases where the law has divided testimony into primary and secondary classes. And there are no degrees of evidence except where some document or other instrument exists, the contents of which should be proved by an original rather than by other testimony which is liable to the danger of inaccuracy: Elliott v. Van Buren, 33 Mich., 53.

19—1 Phil. Ev., C. H. & Edwards' notes, 568; Platt v. Stewart, 10 Mich., 265.

20—U. S. v. Wood, 14 Peters, 431.

21—This rule does not prevent the use of parol evidence in arriving at the intention of parties where they have used equivocal words: Borden v. Fletcher's Estate, 131 Mich., 220; 91 N. W., 145. Where there is a bill of lading it is not permissible to show by parol where the goods were billed from: People v. O'Neill, 107 Mich., 556; 65 N. W., 540. An error in the introduction of secondary evidence is cured by the subsequent introduction of the primary evidence: Emlaw v. Traveler's Ins. Co., 108 Mich., 554; 66 N. W., 460. See, also, Meade v. Bowles, 123 Mich., 696; 82 N. W., 658.

This rule is satisfied, however, by the production of the best *attainable* evidence.²² Therefore, if an original paper is shown to be in the hands of the adverse party, who refuses to produce it after receiving a proper notice for that purpose; or, if a party shows that the original has been lost or destroyed without fault on his part, then the contents may be proved by a copy, or, if there is no copy, by oral testimony, because in such case the copy, or oral testimony, then becomes the best evidence that can be adduced.²³

Exceptions to the rule requiring the best evidence are permitted in some cases; as in the instances above stated. So, also, the records of the proceedings in courts, and all records, papers and entries of a public nature, required by law to be kept, may be proved by examined copies.²⁴ So, public officers may be shown to be such by evidence of their acting in that character, without producing written evidence of an election or appointment.²⁵ So, also, inscriptions on walls or monuments and surveyors' marks on boundary trees, etc., may be proved by secondary evidence, because of the inconvenience of producing them in court.²⁶

§ 359. The parol evidence rule.—A fifth rule of evidence is that where parties have deliberately put their engagements into writing, in such terms as import a legal obligation, without any uncertainty as to the object or extent of such engagement, it is *conclusively presumed* that their engagement, and

22—This would not be true in the sense that the best attainable evidence will always be received, as if it be hearsay or evidence by the opposing survivor of a deceased person.

23—1 Phil. Ev., 4 Am. ed., 569; New York Car Oil Co. v. Richmond, 6 Bosw., 213. Still, the law does not permit the tenor of the instrument in such cases to be made out by anything less than satisfactory evidence of all that is essential: Moulton v. Mason, 21 Mich., 364. But there are no grades of secondary evidence. Hence, in case of the loss of a private writing or paper, and no counterpart is legally presumed or required to exist, its contents may be proved as well by oral testimony as by a copy: Eslow v. Mitchell, 26 Mich., 500.

If secondary evidence is received when better is attainable, and no objection is made before the proofs are closed, no advantage can be taken of it afterwards: Burke v. Wilber, 42 Mich., 327; 3 N. W., 861.

But the general rule is, that a party is only required to produce the best evidence in his power. Hence, if a party cannot obtain record evidence, he may resort to such other evidence as may be within his reach: Scott v. Methodist Episcopal Church of Jackson, 50 Mich., 534; 15 N. W., 891.

24—C. L., § 10169. People v. Lambert, 5 Mich., 260.

25—Scott v. Detroit Y. M. S., 1 Doug., Mich., 110, 152.

26—1 Greenleaf Ev., § 94.

the extent and manner of their undertaking, were reduced to writing; and no evidence of other cotemporaneous facts is permitted tending to vary or contradict its terms, or to substitute a new or different contract for it.²⁷ Nor can such evidence be used to add to the terms of the instrument.¹ The rule excludes from the consideration of the court and jury every question except "what is the *meaning* of the words which the parties used." Not broadly what was their intention. The meaning indicated by the words used must be taken to have been the intention.² Or, as otherwise expressed, the rule is that "parol contemporaneous evidence is inadmissible to contradict or vary the terms of a valid written instrument."³ Thus, where a written contract to do

27—*Adair v. Adair*, 5 Mich., 205, 210; *McEwan v. Ortman*, 34 Mich., 325; *Spencer v. Bowen*, 41 Mich., 149; 1 N. W., 959; *Baker v. Morehouse*, 48 Mich., 334; 12 N. W., 170; *Seckler v. Fox*, 51 Mich., 92; 16 N. W., 246; *Carney v. Hotchkiss*, 48 Mich., 276; 12 N. W., 182; *Skeels v. Starrett*, 57 Mich., 350; 24 N. W., 98; *Norris v. Clark*, 33 Minn., 476; 24 N. W., 128.

An unambiguous contract cannot be varied in its legal effect by the understanding of the parties at or before its execution; and when the only question is as to its legal meaning, its construction cannot be aided by oral evidence of conversation between the parties: *Johnson v. Cranage*, 45 Mich., 14; 7 N. W., 188.

Thus, where a promissory note expressed upon its face a specific consideration as the consideration for which it was given, it was held, that the consideration named was a part of the contract itself, and could not be so varied by parol evidence as to show that a different consideration was in fact given: *Johnson v. Sutherland*, 39 Mich., 579.

Nor will it make any difference that the party never read the contract, where it does not appear that he was deceived or misled as to its contents, or that he objected to its terms: *McEwan v. Ortman*, 34 Mich., 325.

1—*Sutherland v. Crane*, Walker's Ch. R., 523. Parol evidence may sometimes be used in chancery to show fraud or mistake in drawing up the instrument: *Chambers v. Livermore*,

15 Mich., 381. And where there are circumstances and appearances rendering an alteration in a written instrument suspicious, the party relying on the document as altered is bound to explain it before he can recover: *Sheldon v. Hawes*, 15 Mich., 519.

The writing of a word over an erasure may or may not be suspicious. The presumption commonly is, where nothing suspicious on the face of the deed beyond the fact that an erasure is manifest, that the alteration was made before the deed was executed: *Munroe v. Eastman*, 31 Mich., 283; *Sirrine v. Briggs*, 31 Mich., 443. The mere fact that an alteration or interlineation has been made in the record of the deed or other public record must, in the absence of evidence showing the contrary, be presumed to have been done in a proper and legitimate manner: *Hommel v. Devlinney*, 39 Mich., 522, 525.

2—1 Spence Eq. Juris., 556; 1 Greenl. Ev., § 305; Ed. 16.

3—1 Greenl. Ev., § 275; *Fuller v. Parrish*, 3 Mich., 211, 214. "The legal effect of a written instrument, perfect in itself, and unambiguous in its terms, cannot be changed by parol evidence." *Jones v. Phelps*, 5 Mich., 222. So, evidence, that at the time of executing a promissory note, the parties made a contemporaneous verbal agreement, the effect of which was to change the note from an absolute and specific undertaking, according to its terms and legal import, to a defeasible or conditional engagement is inadmissi-

a piece of work omitted to state any time of performance, parol evidence of an agreement contemporaneous with the making of the writing, that the work should be completed within a specified time, was rejected as varying the terms of the writing.⁴ Neither can prior verbal agreements, which result in a written contract, be proved for the purpose of varying or modifying such contract, the presumption being that the parties

ble: *Hyde v. Tenwinkel*, 26 Mich., 93, 95. So, an indorser will not be allowed to show an oral agreement made at the time of indorsing, to change its legal import and change it into an undertaking subject to outside conditions: *Ortmon v. Canadian Bank*, 39 Mich., 518. And in the absence of fraud, evidence of a parol agreement not in writing, alleged to have been made at the time of the delivery of a deed, by which upon certain conditions the deed should be redelivered to the grantor and be of no effect, is inadmissible: *Beers v. Beers*, 22 Mich., 42; *Cline v. Hubbard*, 31 Mich., 237. Cannot change terms of payment of notes by parol: *Hutchinson v. Hutchinson*, 102 Mich., 635; 61 N. W., 60; *Citizens Sav. Bk. v. Vaughan*, 115 Mich., 156; 73 N. W., 143. If there is a real ambiguity in the words used, parol evidence of the surrounding circumstances is competent to develop the real meaning, but not a secret meaning of one of the parties: *Dunham v. Packing & P. Co.*, 100 Mich., 75; 58 N. W., 627. Conveyance described property as "part of Block B.:" It is incompetent to show that it was not a part of the block: *Thompson v. Smith*, 96 Mich., 258; 55 N. W., 886. It cannot be shown by parol that it was agreed that an advertisement contracted for in writing, might be discontinued if not satisfactory: *Cohen v. Jacobolce*, 101 Mich., 409; 59 N. W., 665. It is not permissible to show by parol that it was agreed that the permission to sublet in a written lease was qualified by agreement that there should not be a sublease for a saloon: *Harrison v. Howe*, 109 Mich., 476; 67 N. W., 527. Cannot inject a warranty into written contract of sale: *McCray Rep. & C. S. Co. v. Woods & Zent*, 99 Mich., 269; 58 N. W., 320. Where part only of the contract has been put in writing,

the portion which is oral may be shown by parol but not if contradictory of the writing: *Blackwood v. Brown*, 34 Mich., 4; *Hutchinson Mfg. Co. v. Pinch*, 107 Mich., 12; 64 N. W., 729; 66 N. W., 340. Where there is no ambiguity in a will it is not permissible to show by the scrivener, conversations with testator at the time it was made as bearing upon its construction: *De-frees v. Lake*, 109 Mich., 415; 67 N. W., 505. So, as to sale contract: *Hallett v. Gordon*, 122 Mich., 567; 81 N. W., 556. For illustrative cases of admission of parol evidence though there was a writing, see, *Cutler v. Steele*, 93 Mich., 204; 53 N. W., 521; *Liggett Spring & A. Co. v. Michigan B. Co.*, 106 Mich., 445; 64 N. W., 466; *Rawlings v. Fisher*, 110 Mich., 19; 67 N. W., 977; *Buhl v. Mechanics' Bank*, 123 Mich., 591; 82 N. W., 282; *Ada Dairy Assn. v. Mears*, 123 Mich., 470; 32 N. W., 258; *Borden v. Fletcher's Estate*, 131 Mich., 220; 91 N. W., 145. This rule excluding parol evidence when the effect of it is to vary the writing, does not apply to subsequent agreements if law does not require contract in writing; *Seamon v. O'Hara*, 29 Mich., 66.

4—*Stange v. Willson*, 17 Mich., 342; *Kelséy v. Chamberlain*, 47 Mich., 241; 10 N. W., 355. Where a written agreement to furnish merchandise does not state when it is to be furnished, evidence of a contemporaneous oral agreement fixing the time, is inadmissible: *Coon v. Spalding*, 47 Mich., 162; 10 N. W., 183. And where a contract fixes, expressly, the time of performance, it binds the parties, and no inquiry can be made as to what would have been a reasonable time for such performance: *Abell v. Munson*, 18 Mich., 306. It is not competent to show that notes were delivered on an

included in the writing all that they were finally willing to agree to, and that all previous agreements and understandings were merged in that contract.⁵

But a simple bill of sale, which is designed merely to show a transfer of title, does not embody the essential terms of the contract of sale so as to exclude parol evidence of what the contract was.⁶ And it may be shown by parol evidence that the property mentioned in a receipted bill of parcels was not to be delivered until paid for in the manner verbally agreed on at the time of sale.⁷ And that a bill of sale, absolute on its face, was given as a mortgage.⁸ Also, that a deed of lands, absolute in form, was given and intended between the parties as a mortgage.⁹ And that a negotiable promissory note was given for growing crops, with a verbal agreement that if the land, on measurement, fell short of a certain quantity, a corresponding deduction should be made from the note.¹⁰ And generally, where the parties have not intended to put their entire contract in writing, and have not done so, that portion not put in writing may be shown by parol.¹¹

agreement that if the maker of another note, assigned in consideration of the giving of the first named ones, should become bankrupt, the first named notes were to become void: *Central Sav. Bank v. O'Connor*, 132 Mich., —, 94 N. W., 11.

5—*Savacool v. Farwell*, 27 Mich., 308. Thus, where there was a written contract for the sale of land, evidence of a contemporaneous verbal agreement for the reservation of the crops growing on it, but not mentioned in the writing, is inadmissible: *Vanderkar v. Thompson*, 19 Mich., 82. And where previous to the conveyance of land, for a part of the price of which a mortgage was given, it was verbally agreed that the purchaser should have the land surveyed, and if it fell short of the amount agreed to be sold, that a corresponding deduction from the price should be indorsed on the mortgage; and the land falling short, *held*, that evidence of the verbal agreement was inadmissible, as it would contradict and vary the terms of the mortgage: *Martin v. Hamlin*, 18 Mich., 354.

6—*Picard v. McCormick*, 11 Mich., 68.

7—*Rowe v. Wright*, 12 Mich., 289. And a receipt or written acknowledgment of payment is not conclusive; it may be explained or set aside by parol evidence: *McAllister v. Engle*, 52 Mich., 56; 17 N. W., 694; *Vyne v. Glenn*, 41 Mich., 112; 1 N. W., 997.

8—*Fuller v. Parrish*, 3 Mich., 211. And that an assignment of a payment in a mortgage, absolute in form, was made as a security for money borrowed, and not as an unqualified transfer: *Hyler v. Nolan*, 45 Mich., 357; 7 N. W., 910; *Wadsworth v. Loranger*, Harr. Ch. R., 113.

9—*Emerson v. Atwater*, 7 Mich., 12; see, *Bowker v. Johnson*, 17 Mich., 42.

10—*Bennett v. Bidler*, 16 Mich., 150. And for principles somewhat analogous to those in the foregoing cases, see, *Bishop v. Felch*, 7 *Ibid.*, 371; *Harvey v. Cady*, 3 *Ibid.*, 432; *Batty v. Snook*, 5 *Ibid.*, 231; *Bowker v. Johnson*, 17 *Ibid.*, 42.

11—*Locke v. Willson*, — Mich., —; 98 N. W., 400 (Feb., 1904).

But parol evidence of general custom in regard to the performance of any particular kind of work or labor, or of any rule or usage adopted by a particular class of persons, cannot be given to vary the terms of a special written contract for such services, when the terms of such contract are explicit and clear,¹² although such proof of custom may be resorted to for the purpose of ascertaining the meaning with which a term of doubtful signification was used in a contract.¹³ And so where it cannot be ascertained from a deed which of two persons was intended as the grantee, parol evidence is admissible.¹⁴

12—*Harvey v. Cady*, 3 Mich., 431-2; see, also, *Ervin v. Clark*, 13 Mich., 10; *Greenstein v. Borchard*, 50 Mich., 434; 15 N. W., 540.

13—*Bancroft v. Peters*, 4 Mich., 619. Evidence of the sense in which equivocal words in a written contract were used for the purpose of explaining the contract is admissible only when words have been employed which are ambiguous or equivocal in meaning: *North Amer. Fire Ins. Co. v. Throop*, 22 Mich., 146.

14—*Stockton v. Williams*, Walk. Ch., 120; and *Stockton v. Williams*, 1 Doug., 546; *Campau v. Dewey*, 9 Mich., 381. Parol evidence may sometimes be given to identify the land intended to be conveyed: see, *Johnson v. Scott*, 11 Mich., 232; *Ives v. Kimball*, 1 Mich.,

308. A latent ambiguity in a deed or writing may be removed by parol evidence: *Vaughan v. Sheridan*, 50 Mich., 155; 15 N. W., 62. But parol evidence of marked trees and monuments not mentioned in the survey of a road is inadmissible to establish a line of road variant from that called for by the courses and distances in such survey: *Moore v. People*, 2 Doug. Mich., 420; and see, to the same effect, *Bruckner's Lessee v. Lawrence*, 1 Doug. Mich., 19. Where there is a want of certainty in an instrument, parol evidence of the circumstances attending the making of it has been admitted, not to contradict the written instrument, but to aid the court in giving a true construction: *Facey v. Otis*, 11 Mich., 213.

CHAPTER XXI.

OF EVIDENCE—CONTINUED; AND PARTICULARLY OF WRITTEN EVIDENCE.

IN GENERAL.

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IN GENERAL.

§ 360. Cases in which the law requires the written evidence.

—Written evidence being considered of a higher nature than oral testimony, it is a general rule that when written evidence of a fact exists, all parol evidence of it is excluded. In general, whenever a written instrument is made between parties, and is intended by them to contain the evidence and terms of their

consent or agreement, or wherever there exists a written document, which by the policy of the law is considered to contain the evidence of certain facts, the instrument or document is regarded as the best evidence of the agreement or facts which it records; and unless it is in the possession of the opposite party, and notice has been given to produce it, or it be proved to be lost or destroyed, secondary evidence of its contents is not admissible.¹ And the fact that a paper or entry belongs to a public office, and cannot be removed, is not allowed to open the door to parol evidence. The reason of the law requires the best evidence to be given that the nature of the case will admit of.²

The cases in which the law prohibits the substitution of oral testimony in place of written evidence, are:

1. Where the law requires any instrument to be in writing, such as records, public documents, official examinations, deeds of conveyance of land, wills, when required to be in writing, promises to pay the debt or answer for the default of another, etc., and all other writings required by the statute of frauds.

2. Where the parties have put their contracts and agreements in writing; as, in such cases the writing is tacitly agreed upon by the parties themselves as the only repository and proper evidence of their agreement.

3. And thirdly, oral evidence cannot be substituted for any writing the existence of which is disputed, and which is material either to the issue between the parties or to the credit of a witness, and is not merely the memorandum of some other fact.³

1—*People v. Lambert*, 5 Mich., 360.

2—*People v. Lambert*, 5 Mich., 360. If a witness be asked to testify respecting a transaction, before the question is answered it is competent for the other party to inquire and know whether the transaction be in writing; and if it is, the witness cannot be permitted to give parol evidence on the subject: *Rice v. Bixler*, 1 Watts & Serg., 445. And where the deed or writing to be proved is only collateral to the issue, the rule is the same as if it were directly in issue; parol evidence is not admissible: *Angel v. Rosenbury*, 12 Mich., 258.

3—1 Greenleaf's Ev., §§ 86, 87, 88.

As to some of those contracts and matters which the law requires to be in writing, see, C. L., chap. 258. Even the admission of a party will not be competent to prove the contents of a record, or of an instrument which the law requires to be in writing, unless made in open court for the purpose of obviating the production of the written evidence: *Welland C. Co. v. Hathaway*, 8 Wend., 480, 486; *Jenner v. Joliffe*, 6 Johns., 9; *Hasbrouck v. Baker*, 10 *Ibid.*, 248. Nor can a party be compelled to accept his adversary's admissions in lieu of record evidence:

But when the writing does not come within any of these classes, it is said there is no ground for excluding oral evidence. As, where a written communication is accompanied by a verbal one to the same effect, the latter may be received as independent evidence, though not to prove the contents of the writing, nor as a substitute for it. Thus payment of money may be proved by oral testimony, though a receipt was taken; and in trover, a verbal demand of the goods may be proved, though a demand in writing was made at the same time. And where the action is in tort for the conversion or detention of a note or document, its existence and contents may be proved without giving notice to the defendant to produce it, as in such case the pleadings give notice to the party that he is charged with the possession of the paper.⁴ So, also, a notice to quit may be proved orally, without calling upon the defendant on whom it was served to produce the original.⁵

PUBLIC LAWS, DOCUMENTS, RECORDS, ETC.

§ 361. **Statutes of this state.**—"The printed copies of all statutes, acts, and resolves of this state, whether of a public or private nature, which shall be published under the authority of the government, shall be admitted as sufficient evidence thereof in all courts, and in all proceedings within this state."⁶

§ 362. **Statutes of other states and territories.**—"Printed copies of the statute laws, and resolves of any other of the United States, or of any territory thereof or of any foreign state, if purporting to be published under the authority of the respective governments, or if commonly admitted and used as evidence in their courts shall be admitted in all courts, and in all proceedings within the state, as *prima facie* evidence of such laws and resolves."⁷

John Hancock Mut. Life Ins. Co. v. Moore, 34 Mich., 41; Kimball & Austen Mfg. Co. v. Vroman, 35 Mich., 321.

4—1 Greenleaf's Ev., §§ 89, 90; Rose v. Lewis, 10 Mich., 483.

5—Falkner v. Beers, 2 Doug. Mich., 117. Documents cannot be considered as proven by the testimony of a witness unless the adverse party is given the opportunity to inspect them, and to

cross-examine the witness concerning them: DeWitt v. Prescott, 51 Mich., 298; 16 N. W., 656.

6—C. L., § 10172. Where there is a discrepancy between an original law on file and the printed copies thereof, the former must prevail: Hulburt v. Merriam, 3 Mich., 144.

7—C. L., § 10173. As amended by Laws of 1885, page 79, Act 82: Laws

The acts of the legislatures of the several states may also be authenticated by having the seal of their respective states affixed thereto.⁸ Where it is provided, as under the laws of this state, that proof of the statutes of other states may be made by a printed copy, in addition to the mode pointed out by the act of congress, no reason which has been allowed to apply to proof of private documents by parol can be said to exist. Proof of such statutes must be made by a copy, either exemplified or otherwise, verified by oath, or by some method regarded in law as of equal validity.

The reported decisions of the courts of the several states are the only authorized exponents of their local statutes.⁹ And if farther explanation of them is needed, the true method is to call in the testimony of experts to make the exposition, but not to prove the contents of the law by them; and such experts shall be learned in the law.¹⁰ It is held that the common law, as in force in this state, will be presumed to prevail in other states and countries;¹¹ and that the laws of a sister state are the same as our own, until the contrary is shown;¹² but not that our local statutes have been adopted elsewhere.¹³ But in

of Pennsylvania may be proved by Brightly's Purden's Digest, a non-official compilation of the statutes, admitted in the courts of that state as *prima facie* evidence of the statute law of the state, and the construction of such statutes may be shown by its published reports: *People v. McQuaid*, 85 Mich., 123; 48 N. W., 161; *Rice v. Rankans*, 101 Mich., 378; 59 N. W., 660. If a volume of law contains on its title page the words "By authority," it thereby purports to have been published by the authority of the state: *Merrifield v. Robbins*, 8 Gray, 156; see, also, *Shotwell v. Harrison*, 22 Mich., 410; *Morse v. Hewett*, 28 Mich., 481; *Worthington v. Hanna*, 23 Mich., 534; *People v. Calder*, 30 Mich., 85; and, *ante*, § 358, notes. A printed volume of the laws of another state which purported on its title page to be "Printed by order of the governor," was held to be thereby sufficiently authenticated, and admissible in evidence: *Willt v. Cutler*, 38 Mich., 189.

8—Act of Congress of 1790; see, 1 C. L., 1897, p. 49; *People v. Lam-*

bert, 5 Mich., p. 360. Statutes of other states should be proved in the same manner as provided in the state law or in the Act of Congress, rather than by the testimony of a lawyer who has practiced within the state where they are in force: *Kopke v. People*, 43 Mich., 41; 4 N. W., 551.

9—*People v. McQuaid*, 85 Mich., 123; 48 N. W., 161.

10—*People v. Lambert*, 5 Mich., 349; see, also, 1 Greenl. Ev., §§ 487, 488.

11—*High's Case*, 2 Doug. Mich., 515; see, *Ellis v. Maxson*, 19 Mich., 186. See, *post*, § 364, notes.

12—*Crane v. Hardy*, 1 Mich., 62; *Jones v. Palmer*, 1 Doug. Mich., 379.

13—*Kermott v. Ayer*, 11 Mich., 184. And courts, therefore, cannot presume that the rate of interest in a foreign country is the same as that established by the laws of this state; *Ibid.* If any presumption exists as to the laws of another state, it is that they conform in substance to the general provisions of the common law; and in the absence of proof it cannot be presumed that another state has enacted

a prosecution for bigamy, where the validity of the first marriage depended upon its conformity with the laws of another state, which were shown to be in a statutory form, but were not produced, it was held that, as against the innocence of the accused, those laws could not be presumed to be the same as our own; and that in such case the rule applied, that no presumption could be made against the innocence of a party charged with crime.¹⁴

§ 363. Statutes of foreign countries.—The statute laws of a foreign country may, aside from the provisions of the amendment of 1885 above quoted, be proved by an exemplification under the seal of the state, or by a sworn copy.¹⁵ If our own government has in any case promulgated a foreign law or ordinance as authentic, that promulgation is sufficient proof.¹⁶ The evidence of an attorney from a foreign country cannot properly be received to show the terms of a statute of that country. Foreign statutes cannot be proved by parol without some showing why secondary evidence becomes necessary.¹⁷ The common law, as in force in this state, will be presumed to prevail in a foreign country, until the contrary is shown.¹⁸ It is necessary to prove foreign laws as facts.¹⁹

§ 364. Common law of other states and countries.—"The unwritten or common law of any other of the United States, or of any territory thereof, or of any foreign state or country, may be proved as facts by parol evidence; and the books of

any of the statutes of this state. And, as a parol contract to sell lands was good at common law, and is only made void by statute, therefore the courts of this state will not presume such a contract made in another state to be void without proof that the statutes of that state make it so: *Ellis v. Maxson*, 19 Mich., 186.

14—*People v. Lambert*, 5 Mich., 349, 364.

15—1 Greenl. Ev., § 448; *Packard v. Hill*, 2 Wend., 411; *Lincoln v. Buttell*, 6 Wend., 475. The proof may be made by some copy of the law which the witness can swear was recognized as authoritative in the foreign country, and which was in force at the

time: *Spaulding v. Vincent*, 24 Vt., 501.

16—*People v. Lambert*, 5 Mich., 361.

17—*Kermott v. Ayer*, 11 Mich., 184.

Where a foreign law is in question, nothing can be known of its purport until it is proved: *Chapman v. Colby*, 47 Mich., 46, 51; 10 N. W., 74.

18—*Hugh's case*, 2 Doug. Mich., 515; and see, *Jones v. Palmer*, 1 Doug. Mich., 380; *Crane v. Hardy*, 1 Mich., 63; *Ellis v. Maxson*, 19 Mich., 186; see observations as to these cases with reference to criminal prosecutions: *People v. Lambert*, 5 Mich., 363, 364.

19—*Morrissey v. People*, 11 Mich., 340; *Rice v. Rankins*, 101 Mich., 378; 59 N. W., 660.

reports of cases adjudged in their courts may also be admitted as evidence of such law."²⁰

The unwritten law must, from the nature of things, be proved by parol evidence.²¹ And the foreign common law must be proved by living witnesses.²² The usual course is to make such proof by the testimony of competent witnesses instructed in the laws, customs and usages, under oath.²³

§ 365. Ordinances of cities and villages.—"All laws, by-laws, regulations, resolutions and ordinances of the common council, or of the board of trustees of any incorporated city or village in this state, may be read in evidence in all courts of justice, and in all proceedings before any officer, body or board, in which it shall be necessary to refer thereto, either from a record thereof, kept by the clerk or recorder of such city or village, or from a printed copy thereof, purporting to have been published by authority of the common council or board of trustees, in a newspaper published in such city or village, or from any volume of ordinances, purporting to have been printed by authority of the common council or board of trustees of such city or village; and such record, certified copy, or volume shall be *prima facie* evidence of the existence and validity of such laws, regulations, resolutions and ordinances, without proof of the enactment, publishing, or any other thing concerning the same."²⁴

§ 366. Public documents—records, etc.—Books and records kept by persons in public offices, in which they are required by statute to write down particular transactions, occurring in the course of their public duties, and under their personal observation, and all papers and documents required by law

20—C. L., § 10174; *Barger v. Farnham*, 130 Mich., 487; 90 N. W., 281.

21—*People v. Lambert*, 5 Mich., 361.

22—*Morrissey v. People*, 11 Mich., 340, 341.

23—*Greenl. Ev.*, § 488. It is not necessary that the witness should be of the legal profession: *R. v. Dent*, 1 Car. & Kirw., 97. It may be proved by any person who is or has been in a position to render it probable that he would make himself acquainted with it; but there must be some special

ground for believing that the person who is offered is more than ordinarily capable of speaking on the subject: *Van der Donck v. Thelluson*, 8 M. G. & Scott, 812.

24—C. L., § 10193. This section places city and village ordinances upon the same footing with the statutes, so far as relates to the method of proving their contents: *Napman v. People*, 19 Mich., 352; see, *Shelden v. Hill*, 33 Mich., 172; *Van Alstine v. People*, 37 Mich., 524-5.

to be filed by any public officer in his office, or to be entered and recorded therein, and duly filed, entered or recorded therein, are admissible in evidence.²⁵

Such records and documents, however, on account of the inconvenience of removing them from the repositories provided for them by law, may be proved by certified copies, as will be hereafter noticed.²⁶ When such books and records are themselves introduced in evidence, they must be accompanied by proof of their official character, and that they come from the proper repository.²⁷ But a book of record, though kept by a public officer, is not evidence where there is no law requiring it to be kept, or declaring it to be evidence.²⁸

§ 367. Record must be proved as a whole.—When a record or document is offered in evidence, the whole thereof, or so much as is material to the point in issue, must be admitted if required. Thus, the record of a survey of a road being an entire thing, a part of the record of a survey cannot be admitted without allowing the whole survey to go to the jury.²⁹

25—1 Greenl. Ev., § 483.

26—See, also, C. L., § 10160. This section held not to apply where the originals would not prove themselves: *Shelden v. Merrill*, 69 Mich., 156; 37 N. W., 66; Nor when the question of the forgery of the original instrument is in issue: *People v. Swetland*, 77 Mich., 53; 43 N. W., 779. It is sufficient if the certificate conforms in substance to the requirements of the statute: *Bills v. Kessler*, 36 Mich., 60; *Huntoon v. O'Brien*, 79 Mich., 227; 44 N. W., 601. The certified copy must be accurate and entire: *Doyle v. Mizner*, 42 Mich., 338; 3 N. W., 968. See, further, *Tessman v. United Friends of Michigan*, 103 Mich., 185; 61 N. W., 261; *Hoffman v. Pack, W. & Co.*, 114 Mich., 1; 71 N. W., 1095. But copies of maps in the office of the commissioner of the state land office are not admissible in evidence unless accompanied by the field notes of the survey of the lands: *Wilson v. Hoffman*, 54 Mich., 246; 20 N. W., 37. And the commissioner's certificate must show that they are copies of maps or papers in his office: *Ibid.* As to maps from the office of the commissioner of the state land office, see, C. L., § 1305.

27—*Whitehouse v. Bickford*, 9 Foster, 471; *Hall v. People*, 21 Mich., 456. Thus, where the original records of the proceedings of a township board were offered in evidence: *Held*, that they were not admissible without proof of the official character of the board or of its members, and that the writings were the official records of the proceedings of the board; and that the recitals in the record stating the official character of the persons composing the board, and that the writing was a record of their proceedings, and was not sufficient evidence for that purpose: *Ibid.*

28—*Smith v. Lawrence*, 12 Mich., 431.

29—*Moore v. People*, 2 Doug. Mich., 420; and see, *Platt v. Stewart*, 10 Mich., 260; *Emery v. Whitwell*, 6 Mich., 475. So, the enrolled decree and proceedings in a suit in chancery, collected and attached together, as provided by the statute, constitute the record of the cause. When any part of it is read in evidence by one party, every other part of it is also evidence, and may be read by the opposite party: *Thayer v. McGee*, 20 Mich., 195.

§ 368. Affidavits made out of this state.—"In cases where by law the affidavit of any person residing in another state of the United States, or in any foreign country, is required, or may be received in judicial proceedings in this state, to entitle the same to be read, it must be authenticated as follows:

First. It must be certified by some judge of a court having a seal, to have been taken and subscribed before him, specifying the time and place where taken;

Second. The genuineness of the signature of such judge, the existence of the court, and the fact that such judge is a member thereof, must be certified by the clerk of the court, under the seal thereof; or,

Third. If such affidavit be taken in any other of the United States, or any territory thereof, it may be taken before a commissioner duly appointed and commissioned by the governor of this state to take affidavits therein, or before any notary public or justice of the peace authorized by the laws of such state to administer oaths therein. The signature of such notary public or justice of the peace, and the fact that at the time of the taking of such affidavit the person before whom the same was taken was such notary public or justice of the peace, shall be certified by the clerk of any court of record in the county where such affidavits shall be taken, under the seal of such courts."³⁰

§ 369. Records of foreign courts.—"The records and judicial proceedings of any court in the several states and territories of the United States, in any foreign country shall be admitted in evidence in the courts of this state, upon being authenticated by the attestation of the clerk of such court, with the seal of such court annexed, or of the officer in whose custody such records are legally kept, with the seal of his office annexed."³¹

30—C. L., § 10144. In the absence of the certificate required by this statute there is no presumption that a notary has authority to administer oaths: *Berkery v. Judge of Wayne Circuit*, 82 Mich., 160; 46 N. W., 436.

31—C. L., § 10145. *Capling v. Herman*, 17 Mich., 535.

The constitution of the United States requires full faith and credit to be given in every state to the records and judicial proceedings of other states; but this requirement does not extend to the giving of validity to those proceedings which in themselves are mere nullities. It is implied in judicial proceedings that the courts assuming to

§ 370. Copies of records of foreign courts.—"Copies of such records and proceedings in the courts of a foreign country, may also be admitted in evidence upon due proof:

1. That the copy offered has been compared by the witness with the original, and is an exact copy of the whole of such original;

2. That such original was in the custody of the clerk of the court, or other officer legally having charge of the same; and,

3. That such copy is duly attested by a seal, which shall be proved to be the seal of the court in which such record or proceeding shall be."³²

"The preceding sections³³ shall not prevent the proof of any record or judicial proceeding of the courts of any foreign country, according to the rules of the common law, in any other manner than that herein directed, nor shall they be construed as declaring the effect of any record or judicial proceeding, authenticated as therein prescribed."³⁴

§ 371. Records of courts of other states, rule of the federal statutes, etc.—By virtue of federal statute the records and judicial proceedings of courts of other states and territories of the United States may be proved by exemplified copies, attested by the clerk of the court, with the seal of the court annexed, if there be a seal, together with the certificate of the

act and to render judgment should have had competent authority to do so in the particular case; and when this authority is wanting, whatever is done is not judicial. It cannot, therefore, be within the protection of the federal constitution. And if the record by its recitals makes a *prima facie* case of jurisdiction, no one in another state or country is concluded thereby, but may show what the real fact was, and thus disprove the authority for making such a record: *Reed v. Reed*, 52 Mich., 121; 17 N. W., 720.

32—C. L., 10146.

33—The preceding sections are C. L., §§ 10144, 10145, 10146.

34—C. L., § 10147. See, act of Congress of May 26, 1790, and March 27, 1804, 1 C. L., 1897, p. 49. The

exemplification of a judgment of a foreign court which is admitted to have had common law jurisdiction of the subject matter, and which is authenticated by the seal of the court and the signature of the clerk, is sufficient both at common law and under our statute. The statute (C. L., § 10147) authorizes the proof of foreign judgments according to the rules of the common law: *Capling v. Herman*, 17 Mich., 524, 535.

A judgment rendered in a United States court, authenticated in the common law mode, and in the manner provided by the laws of this state, is admissible in evidence, notwithstanding the form of the authentication is not such as the acts of Congress require to make it evidence in all places: *Dean v. Chapin*, 22 Mich., 275.

judge, chief justice or presiding magistrate, as the case may be, that the said attestation is in due form.³⁵

§ 372. **Records of courts of this state.**—A common law record of a judgment in the circuit court not being necessary,³⁶ the files and journal entries in the case are deemed a substitute for such judgment record, and to constitute the record itself.³⁷ And a judgment of the circuit court is to be proved by such original files and journal entries.³⁸ Such original files, entries and records of the court may always be used in the same court without further authentication.³⁹ If the files have been lost, the calendar entries may be given in evidence to show the steps taken in the cause before judgment.⁴⁰ And where an indictment was lost or destroyed, parol evidence of its contents was held admissible.⁴¹ Journal entries of interlocutory orders and decrees in chancery are to be considered as originals, and are admissible in evidence without producing the enrollment.⁴²

35—Act of Congress of May 26, 1790, 1 C. L., 1897, p. 49. The record of a judgment of a court of record in another state cannot be impeached in this state by showing in opposition to its recitals that process was not served on the defendant, nor can proof be received to contradict any material fact appearing by such record, unless such proof would be received in the court in which the judgment was rendered: *Wilcox v. Cassick*, 2 Mich., 165; see, *Weeks v. Downing*, 30 Mich., 4.

36—*Kenyon v. Baker*, 16 Mich., 373.

37—*Norvell v. McHenry*, 1 Mich., 227, 232; *Emery v. Whitwell*, 6 Mich., 474. The setting aside of a default, and the proceedings based thereon, by the circuit court, forms no part of a common law judgment record: *Final v. Backus*, 18 Mich., 218. The enrolled decree and the proceedings in a suit in chancery, collected and attached together as provided by the statute, constitute the record of the cause: *Thayer v. McGee*, 20 Mich., 195.

38—*Prentiss v. Holbrook*, 2 Mich., 372, 374; *Crane v. Hardy*, 1 Mich., 56, and *Norvell v. McHenry*, 1 Mich., 227; *Kenyon v. Baker*, 16 Mich., 373. Proof of the final entry of judgment is not

sufficient evidence of a valid judgment. The files and previous entries should be shown, so that it may appear that the court acquired jurisdiction, and that the regular steps were taken to warrant a judgment. No presumption can arise in favor of a final entry of judgment that has no previous steps to explain or warrant it: *Ibid.*, *Kenyon v. Baker*, 16 Mich., 375; see *Kenyon v. Woodward*, 16 Mich., 326.

Where a judgment in one case is introduced in evidence in another cause, parol evidence is not admissible to supply jurisdictional defects; the record must be complete in itself: *Montgomery v. Merrill*, 36 Mich., 97.

39—*Crane v. Hardy*, 1 Mich., 56; *Norvell v. McHenry*, *Ibid.*, 227. When a court has jurisdiction of a cause, its proceedings cannot be impeached collaterally; nor, when of record, can there be any proof given in opposition to the record: *Clark v. Holmes*, 1 Doug. Mich., 390, 398.

40—*Norvell v. McHenry*, 1 Mich., 227.

41—*People v. Dennis*, 4 Mich., 609, 617.

42—*Lothrop v. Southworth*, 5 Mich., 436, 448.

§ 373. **Probate records.**—"Every probate court shall be a court of record, and have a seal; and each judge of probate shall keep a true and fair record of each order, sentence and decree of the court, and of all wills proved therein, with the probate thereof, of all letters testamentary and of administration, and of all other things proper to be recorded; and, on the legal fees being paid, shall give true copies of the files, records and proceedings of the court, certified by him under the seal of such court."⁴³

"All copies so attested shall be legal evidence in all the courts of law and equity in this state; and certificates of probate, of administration, or of guardianship, attested by the judge of probate, may be given in evidence, and have the same effect as any probate, letter of administration, or letter testamentary, or of guardianship, made out in due form of law."⁴⁴

§ 374. **Justices' courts, judgments, proceedings, etc., in this state.**—"A transcript from the docket of any justice of the peace, of any judgment had before him; of the proceedings in the cause previous to such judgment; of the execution issued thereon, if any, and of the return to such execution, if any, when certified by the justice having control of such docket, shall be evidence to prove the facts stated in such transcript."⁴⁵

The transcript would be insufficient if it be a transcript of

43—C. L., § 647. *Farrand v. Caton*, 69 Mich., 235; 37 N. W., 203. *Halre*, 29 Mich., 207; *Holcomb v. Tift*, 54 Mich., 647; 20 N. W., 627.

When an administrator sues, his letters of administration are competent evidence of the capacity in which he acts: *John Hancock Mut. L. Ins. Co. v. Moore*, 34 Mich., 41. And letters of guardianship, of the appointment and authority of the guardian: *Burrows v. Balley*, 34 Mich., 64. A transcript which is not certified as a transcript may be proved by the oath of the justice; but where neither certified nor otherwise proved, it is not admissible in evidence to prove a judgment: *Wilbur v. Goodrich*, 34 Mich., 84. As to supplementing a judgment record of a justice with other evidence of essential facts omitted, see, *Smalley v. Lighthall*, 37 Mich., 348. But oral proof cannot be given of matters which the law requires to be docketed: *Mudge v. Taples*, 58 Mich., 307; 25 N. W., 297; *Weaver v. Lammon*, 62 Mich., 366; 28 N. W., 905; *Stoll v. Padley*, 98 Mich., 13; 56 N. W., 1042.

44—C. L., § 648. Probate registers appointed under C. L., § 2554, are competent to make such copies: C. L., § 2555.

45—Where a justice, in pursuance of the statute (C. L., § 960), certifies a transcript of a judgment from the docket of a former justice, which he certifies is in his control, full credit will be given to such certificate, and it will be presumed that the docket is legally in his possession: *Facey v. Fuller*, 13 Mich., 527; see, *Jamison v. Burdick*, 26 Mich., 41; *Schlatterer v. Nickodemus*, 50 Mich., 315; *Goodrich v. Burdick*, 26 Mich., 41; *Schlatterer v. Nickodemus*, 50 Mich., 315;

the judgment merely. 'It must appear by it that the justice had jurisdiction of the person and the subject matter.'⁴⁶ Such transcript duly certified is evidence in all cases, even in actions

15 N. W., 489. The justice's return will be taken as true as to matters not required to be entered on the docket; *Weaver v. Lammon*, 62 Mich., 366; 28 N. W., 905.

In *Goodsell v. Leonard*, it was objected that a certified transcript of a justice's judgment was improperly admitted in evidence, for the alleged defect that it did not show that it had been compared with the original, and was a correct transcript therefrom and the whole of such original. But the court say, this certificate declares the transcript to be a "*transcript from the docket of B. . . . late a justice of the peace of G. . . . in said county, of the judgment rendered by him in the above entitled cause, and of all the proceedings had by and before him in the cause, so far as they appear upon his docket, which is in my possession, and of which docket and of said judgment I have control,*" and we think it fully complies with the law, C. L., § 960. This section is complete in itself, and the provisions of the general chapter on evidence do not have any application to qualify its provisions: *Goodsell v. Leonard*, 23 Mich., 374.

46—*Ben v. Borst*, 9 Wend., 292; *Allen v. Carpenter*, 15 Mich., 33. A justice's docket showing a judgment in an attachment case, but no affidavit or bond, and showing also an execution issued, but not its return, is not competent evidence in support of an execution sale, without proof of the files in the case, or of a proper search for them: *Hogsett v. Ellis*, 17 Mich., 351; see, *Gordon v. Ward*, 16 Mich., 363. In proving a judgment rendered against a defendant who did not appear, a transcript of the docket entry of the judgment was introduced, which showed that the summons was issued May 18, and was personally served May 22, and that judgment was rendered May 29; but the transcript did not show when the summons was made returnable or whether the suit had been kept alive by adjournment from the return day to the day of rendering judgment: *Held*, that it was competent

to introduce the summons in evidence to show that it was returnable on the 29th of May, the day when judgment was rendered. But when the summons was introduced, it was found that the constable's return of service indorsed thereon left it in doubt as to whether the service was personal or by copy: *Held*, further that it was competent to prove by the constable as to whether service was in fact personal, or by copy: *Smalley v. Lighthall*, 37 Mich., 348.

Mere irregularities or errors will not justify the rejection of a collateral judgment offered in evidence; to warrant such rejection, the defects must be such as to render the judgment jurisdictionally invalid: *Bigelow v. Barre*, 30 Mich., 1; see, *Hunt v. Strew*, 33 Mich., 85.

The record of a court of a justice of the peace consists of the entries upon his docket, every item of which is enumerated in the statutes. C. L., § 957. By the next section the justice may, if he chooses, though he is not bound to, state any other matters than those enumerated in and required by the previous section. By C. L., §§ 960, a transcript, duly certified, is made evidence, not only of the judgment, but of the proceedings previous to the judgment, "*to prove the facts stated in the transcript,*" but of nothing further; and though the statute does not expressly so declare, we see no reason to doubt that the docket itself, verified by the justice, would equally be evidence "*of the facts stated in it.*" The facts which the statute requires to be thus stated would, in all ordinary cases, be sufficient to show the jurisdiction of the justice. But a proceeding by attachment, which seizes a defendant's property before judgment or trial, is exceptional, and no jurisdiction exists to issue an attachment without an affidavit first made by the plaintiff, or some person in his behalf, and filed with the justice, showing the facts required by the statute; and this affidavit is made the basis of the suit, and a condition precedent to

against the justice.⁴⁷ It would not, however, be evidence, unless a *judgment* had been rendered.⁴⁸ It must appear from the transcript that the process was properly served, or that the defendant appeared, or it will not be evidence that the justice had jurisdiction.⁴⁹ But where the entry on a justice's docket does not show the time when the summons was served, and the files are lost, the time of service may be proved by the justice, the statute ⁵⁰ not requiring the time of service to be entered on the docket.⁵¹ If the justice enters upon his docket in regard to his own proceedings all that the statute requires, the ordinary presumption in favor of official action must support the proceedings.⁵²

The docket of a justice, or a transcript of the proceedings in a suit in which the jurisdiction of a cause and of the person of the defendant appears, is conclusive in evidence.⁵³ But the record of an inferior court may be contradicted to the extent of showing the want of jurisdiction of the person or of the subject matter.⁵⁴

"Whenever it shall become necessary, in any action or other proceeding before a justice of the peace, to give evidence of a

the exercise of the jurisdiction. While, therefore, in an attachment suit, the docket is evidence that a judgment has, in fact, been rendered in the suit, and of the proceedings entered upon the docket, it does not show any jurisdiction of the justice to render it. And in these special proceedings, jurisdiction is not to be presumed. Proof, therefore, of the justice's docket (which would be good as far as it goes), would not, without such affidavit, show a valid judgment: *Goodsell v. Burdick*, 26 Mich., 41.

47—*Maynard v. Thompson*, 8 Wend., 393; *Cornell v. Cook*, 7 Cow., 313.

48—*Townsend v. Chase*, 1 Cow., 115.

49—*Manning v. Johnson*, 7 Barb., 457; see, *Smalley v. Lighthall*, 37 Mich., 348.

50—C. L., § 957.

51—*Van Kleek v. Eggleston*, 7 Mich., 511.

52—*Peck v. Cavell*, 16 Mich., 9, 11. As to what a transcript to file in the circuit court should show, see same case, pp. 11, 12.

53—*Hard v. Shipman*, 6 Barb., 621; *Clark v. Holmes*, 1 Doug. Mich., 390; see, *Van Kleek v. Eggleston*, 7 Mich., 511. As to how far a judgment against the principal on a secured debt is evidence of liability against the surety; see, *Lee v. Wisner*, 38 Mich., 88.

54—*Clark v. Holmes*, 1 Doug. Mich., 390. But, in a suit upon a judgment rendered by a justice of the peace, the docket entry of the justice that the defendant appeared and pleaded in such action, cannot be disproved: *Facey v. Fuller*, 13 Mich., 5-7. Where a justice mistook a promissory note filed with him for a confession of judgment, and entered up a judgment as by confession thereon: *Held*, that in a suit upon the judgment, it was competent to introduce the files in the first case containing the note, for the purpose of showing the mistake, and that no valid judgment by confession had been entered: *Dodge v. Bird*, 19 Mich., 518.

judgment or other proceeding had before him, the original entry of such judgment or other proceeding, or a transcript thereof certified by him, shall be good evidence thereof before such justice.⁵⁵ The docket of a justice is evidence of itself, when the cause in which it is introduced is before himself, in the same manner as an original record would be in a court to which it belongs.⁵⁶ In such case no evidence is necessary that he was a justice at the time, and that the docket produced by him is his docket.⁵⁷

“The proceedings in any cause or matter, had before a justice, may also be proved by the oath of the justice; and in case of the death or absence of the justice, they may be proved by producing the original minutes of such proceedings, entered in a book kept by such justice, accompanied by proof of his handwriting, or they may be proved by producing copies of such minutes, sworn to by a competent witness, as having been compared by him with the original entries, with proof that such entries were in the handwriting of the justice.”⁵⁸

The justice cannot give parol evidence of the *contents* of his docket; the docket must be proved and verified by the oath of the justice.¹ After judgment is pronounced by the justice, and before the proceedings are entered on his docket, the minutes or memorandum of the justice, made at the time of giving judgment, and filed with the papers in the cause when proved by the justice, is competent evidence of the judgment.²

§ 375. Proceedings before justices of other states.—“The official certificate of any justice of the peace within any other state of the United States, of the proceedings and judgment in any case before him as such justice, with the certificate of the clerk of any court of record in the county or district in which such justice has executed his office, attested by his official seal, setting forth that the signature to the certificate of the justice is genuine, and that he was such justice at the date

55—C. L., § 959. See, Schlatterer v. Nickodemus, 50 Mich., 315; 15 N. W., 489.

56—Smith v. Frost, 5 Hill, 431.

57—Groff v. Griswold, 1 Denio, 432.

58—C. L., § 961.

1—Boomer v. Laine, 10 Wend., 525; *Ibid.*

Hickey v. Hinsdale, 8 Mich., 267, 273.

2—Hickey v. Hinsdale, 8 Mich., 267, 273. The entry in the docket is evidence of the judgment, but is not the judgment itself; one is a judicial and the other a ministerial or clerical act:

of such proceedings and judgment, shall be sufficient evidence of such proceedings and judgment.”³

The remarks above as to the sufficiency of the transcript of a judgment rendered by a justice in this state, are equally applicable to a certificate of a judgment rendered in another state. The statute giving authority to the justice to act, must be produced and proved; for, unless it appear that the subject matter of the suit was within his jurisdiction, and the proceedings in the cause conformable to the statute, the proceedings would be illegal.⁴

§ 376. Copies of records and documents in this state.—When the records or proceedings of one court are to be used in another court or proceeding in this state; and when any public records, documents and papers in this state are to be proved, they may be proved by copies or transcripts duly certified by the clerk or officer having the custody thereof. And for that purpose the statute provides, that: “Copies of all papers, records, entries and documents, required by law to be filed by any public officer in his office, or to be entered or recorded therein, and duly filed, entered or recorded according to law, certified by such officer to be a true transcript, compared by him with the original in his office, shall be evidence in all courts and proceedings, in like manner as the original would if produced.”⁵

3—C. L., § 10171. A properly certified transcript of a judgment rendered in another state, on personal service and personal appearance, is competent evidence of the judgment, in this state, and of the jurisdiction of the justice: *Campbell v. Wallace*, 46 Mich., 320; 9 N. W., 432. It will not be presumed that a “county clerk” is a clerk of a court of record and a certified transcript authenticated by such an officer is not admissible: *Howard v. Coon*, 93 Mich., 442; 53 N. W., 513. As to what is essential by way of seal, see, C. L., § 10175.

4—*Thomas v. Robinson*, 3 Wend., 267.

5—C. L., § 10169. *Ante*, § 366, note 26. See, *Bradley v. Silsbee*, 33 Mich., 328. A copy of a record will not be wholly rejected because the certificate

attached is confined to a portion of the document only; the copy will be evidence so far as it is properly certified: *Gillman v. Ropelle*, 18 Mich., 145. It is the duty of an officer certifying to a paper or instrument, to give an accurate copy of the entire document. He cannot certify to a legal conclusion. Thus in certifying to an instrument having a certificate of acknowledgment appended, he cannot certify that the paper is *acknowledged in the usual form*, as that would be certifying merely to a legal conclusion in respect to the acknowledgment. He must give an accurate copy of the certificate of acknowledgment: *Doyle v. Misner*, 42 Mich., 332, 338; 3 N. W., 968. Not only certified copies, but sworn copies, also, of original instruments on file in public offices, are admissible in evi-

§ 377. How records, documents, etc., certified.—"Whenever a certified copy of any affidavit, record, document or paper, is declared by law to be evidence, such copy shall be certified by the clerk or officer in whose custody the same is by law required to be, to have been compared by him with the original, and to be a correct transcript therefrom, and of the whole of such original; and if such officer have any official seal by law, such certificate shall be attested by such seal; and if such certificate be given by the clerk of any county, in his official character as such clerk, it shall be attested by the seal of the court of which he is clerk."⁶

"But the preceding section shall not be construed to require the affixing of the seal of any court to any certified copy of any rule or order made by such court, or of any paper filed therein, when such copy is used in the same court, or before any officer thereof; nor to require the seal of the supreme court to be affixed to a certified copy of any rule or order of that court, when used in any circuit court."⁷

§ 378. Certificates of conviction.—The certificate of a justice of a conviction for a criminal offense made and filed in the office of the county clerk, as required by law, or a duly certified copy thereof, is evidence in all courts and places of the facts therein contained.⁸

Such certificate is competent evidence of the facts therein

dence: *Pierce v. Rehfuß*, 35 Mich., 53; see, *Shelden v. Merrill*, 69 Mich., 156; 37 N. W., 66.

A copy of a chattel mortgage, certified by the township clerk to be a true and compared copy of the original on file in his office, and of the whole of such original, is sufficient to entitle the copy so certified to be received in evidence: *Bills v. Keesler*, 36 Mich., 69; see, C. L., § 9528.

6—C. L., § 10166. It is not necessary that the certificate shall be in exact verbal conformity with the statute; it will be sufficient if it contains in substance what the statute requires: *Bills v. Keesler*, 36 Mich., 69. But the mode of authenticating the documents, records and proceedings of any of the departments or courts of the United States, is governed by the laws

of the United States, and by the practice of such departments and courts, and not by the statutes of the state: *Gillman v. Rlopelle*, 18 Mich., 158; *Lacey v. Davis*, 4 Mich., 140. The statutes of the United States make certified copies, etc., equal in evidence to the originals: U. S. Rev. Stat., § 886; *Lee v. Wisner*, 38 Mich., 87.

This section, C. L., § 10166, does not apply to certificates to transcripts of justices' judgments: *Goodsell v. Leonard*, 23 Mich., 374.

7—C. L., § 10167.

8—C. L., §§ 1044, 1045, 1046. The certificate of conviction, if filed or duly certified, is the proper evidence of such conviction; if it has not been filed, then secondary evidence may be received: *People v. Benjamin*, 2 Parker C. R., 201, 212.

stated, although it does not contain evidence that the court had obtained jurisdiction over the person of the prisoner, and it cannot be contradicted by parol evidence, showing that there was no trial or conviction. Yet it seems that a certificate of conviction by a court of inferior jurisdiction may be so far contradicted as to prove that the court had no jurisdiction of the offense or of the person of the prisoner.⁹

§ 379. Certificates of marriage.—It is now provided that, "The record of any license to marry, or of any marriage certificate, in any county clerk's office, or a certified copy thereof, shall be *prima facie* evidence in any court or proceedings in this state, with the same force and effect as if the original were produced, both as to the facts therein contained and as to the genuineness of the signatures thereto."¹⁰

On a trial for bigamy, where it was sought to prove the first marriage by a marriage certificate, it was held that neither the certificate nor the record thereof was competent evidence on a criminal trial, where the defendant was entitled to confront the witnesses.¹¹

§ 380. Certificates of the registry of deeds and mortgages, etc.—The register [of deeds] shall certify upon every instrument recorded by him the time when it was received, and a reference to the book and page where it is recorded.¹²

§ 381. Notary certificates.—"The certificate of a notary public under his hand and seal of office, of official acts done by him as such notary, shall be received as presumptive evidence of the facts contained in such certificate; but such certificate shall not be evidence of notice of non-acceptance or non-payment in any case in which a defendant shall annex to his

9—People v. Powers, 7 Barb., 462; Clark v. Holmes, 1 Doug. Mich., 390.

10—C. L., § 8611.

11—People v. Lambert, 5 Mich., 349, 365. To constitute marriage, an actual ceremony of marriage is not essential to the establishment of the relation of husband and wife. It is sufficient that a man and woman of due competency, and in respect to

whom no impediment exists, consent to take each other as husband and wife and actually cohabit as such: Peet v. Peet, 52 Mich., 467; 18 N. W., 220; see, Hutchins v. Kimmell, 31 Mich., 126.

12—C. L., § 8986. The certificate required by this section, indorsed upon the instrument, is evidence of such record: Jakway v. Jennison, 46 Mich., 521; 9 N. W., 836.

plea an affidavit denying the fact of having received such notice."¹³

§ 382. Various other public records, documents, certificates, etc.—Certificates of the purchase of public lands, signed by the receiver, shall be evidence in any court in this territory, that the possession of the lands described in said certificate or certificates is in the person or persons, his, her, or their heirs or assigns, holding said certificate or certificates, as against any person or persons, not having a better title to such land than actual possession.¹⁴

"Certificates of purchase of university and school lands, issued pursuant to the provisions of law, shall entitle the purchaser to the possession of the lands therein described, and shall be sufficient evidence of title to enable the purchaser, his heirs or assigns, to maintain actions of trespass for injuries done to the same, or ejectment, or any other proper action or proceeding to recover possession thereof, unless such certificate shall have become void by forfeiture; and all certificates of purchase in force may be recorded in the same manner that deeds of conveyance are authorized to be recorded."¹⁵

Patents for lands.—When United States patents for land are recorded, as provided by law,¹⁶ the record thereof, or a certified transcript of such record, may be read in evidence.¹⁷ If the patent is lost, an exemplified copy of the record thereof,

13—C. L., § 2635; *Camp v. Carpenter*, 52 Mich., 375; 18 N. W., 113; *Sullivan v. Hall*, 86 Mich., 7; 48 N. W., 646. This certificate may be impeached for fraud: *Johnson v. Van Velsor*, 43 Mich., 208; 5 N. W., 265.

14—C. L., § 10200. The assignment of a land office certificate for the purchase of lands, when filed in the office of the commissioner of the general land office, in order to procure the issuing of a patent to the assignee, becomes a part of the records of the office, and may be proved by an exemplified copy, authenticated by the commissioner: *Clark v. Hall*, 19 Mich., 356. As to the mode of authenticating records and proceedings of the courts and departments of the United States, see, *Lacey v. Davis*, 4 Mich., 140; *Gilman v. Riopelle*, 18 Mich., 145; *ante*, § 377, note 6.

15—C. L., § 1342. A certificate of purchase of school lands executed by "A." for "B., Superintendent of Public Instruction," is not sufficient under the revised statutes of 1838. Nor is an instrument purporting to be an assignment of a certificate of purchase therein recited or described, although duly proved, any evidence of the certificate of purchase: *Lee v. Payne*, 4 Mich., 106.

16—C. L., § 8984.

17—C. L., § 8985. A patent of state swamp lands, issued by the governor under the seal of state, is admissible in evidence to prove title in the patentee, without proof of title in the state, or the authority of the governor to issue the patent: *Grant v. Smith*, 26 Mich., 201.

from the commissioner of the general land office, is competent evidence.¹⁸

Sheriff's certificate of sale of real estate on execution, and copies thereof duly certified by the register of deeds in whose office they are filed, are presumptive evidence of the facts stated in such certificates.¹⁹

Notices and advertisements which are required by law to be published in any newspaper, may be proved by the affidavit of the printer, his foreman or principal clerk, or by certified copies thereof.²⁰

Tax receipts.—A township treasurer's receipt for the payment of such taxes is an official paper, and *prima facie* evidence of such payment.²¹

Books of account kept in the office of the state treasurer, in which it was his duty to keep or cause an account of the receipts and disbursements of the state treasury to be kept, are competent evidence against him.²²

Printed reports of the state officers, printed by the state under their direction, are also evidence against such officers.²³

18—Burnham v. People, 3 Mich., 197; Lacey v. Davis, 4 Mich., 140, 150; see, Clark v. Hall, 19 Mich., 356; Gilman v. Riopelle, 18 Mich., 145; Boyce v. Stambaugh, 34 Mich., 348. As to impeaching a patent, see, Bruckner's Lessee v. Lawrence, 1 Doug., Mich., 19. Parol evidence of the contents of a U. S. patent of land, although lost or destroyed, is not admissible, because exemplified copies can be obtained from the government at Washington: Platt v. Haner, 27 Mich., 167.

19—C. L., § 9178. A properly recorded certificate is entitled to the same privileges as other conveyances: Drake v. McLean, 47 Mich., 102; 10 N. W., 126. One attacking such a certificate has the burden of showing that he is a *bona fide* purchaser: Atwood v. Bearss, 45 Mich., 474; 8 N. W., 55. Purchasers under an execution are "purchasers," though they have not yet received deeds: Atwood v. Bearss, *supra*.

20—C. L., §§ 10162, 10163, 10164, 10165. For requisites of the affidavit, etc., see the cases cited in the notes to these sections of Compiled Laws. An affidavit of the publication of a

notice of mortgage sale, made eight years after publication, has been held to be made at too late a day; although the party might still prove the publication in the ordinary way by the testimony of witnesses having knowledge of the publication: Mundy v. Monroe, 1 Mich., 68. And so where the proof of posting a notice may be made by affidavit, it was held that such an affidavit, made ten years after the posting was too late to make the proof in that manner: Woods v. Monroe, 17 Mich., 235, 242. Where statute required publication for six successive weeks, an affidavit of publication for "seven successive times" is not good: Perrien v. Feters, 35 Mich., 233. It is good proof if affidavit is made by the publisher: Vroman v. Thompson, 51 Mich., 452; 16 N. W., 808. This method of proof is not exclusive: Schlee v. Darrow Estate, 65 Mich., 362; 32 N. W., 717.

21—Johnson v. Scott, 11 Mich., 232, 244.

22—People v. McKinney, 10 Mich., 59, 96.

23—People v. McKinney, 10 Mich., 97-8.

§ 383. **Miscellaneous items of evidence.**—*Mathematical tables*, such as are in general use, are competent. *Almanacs* are among these;²⁴ *tables of mortality* are also in this class of evidence.²⁵

Poll-books.—The poll-books at an election are evidence.²⁶

Post-mark.—A post-mark on a letter is evidence of the date of sending it.²⁷ And, as proof of the receipt of its contents.²⁸ But it may be contradicted by parol evidence of the real date of posting.²⁹

Newspaper market reports are admissible in evidence to prove market values of commodities and merchandise. And a witness may testify as to such values from his knowledge derived from such newspaper quotations of market values.³⁰

A *map* of the location where an occurrence happened can only be used in connection with the testimony of a witness for the purpose of enabling the jury to understand clearly the facts testified to.³¹

Photographs.—Where the subject matter permits, the photograph may be used on the same principle as the map or drawing. Because it is a photograph it does not necessarily follow that it correctly represents the conditions to be shown. This proof, as in the case of any map or drawing, must be made before it is admissible.³²

24—Page v. Faucet, Cro. Eliz., 226, 227. No particular almanac is necessary: 1 Greenleaf Ev., § 162; ed. 16.

25—Such are only admissible upon the question of damages for personal injury when the injury is permanent: Mott v. Detroit, etc., Ry. Co., 120 Mich., 127; 79 N. W., 3. So in action for wrongful death: Jones v. McMillan, 129 Mich., 86; 88 N. W., 206; see, also, Wilkins v. Flint, 128 Mich., 262; 87 N. W., 195.

26—Rex v. Davis, 2 Strange, 1048; Queen v. Ledger, 8 Ad. & Ell., 535.

27—Abbey v. Lill, 5 Bing., 299; Rex v. Plumer, R. & R., 264; 1 Greenl. Ev., § 40.

28—Arcangelo v. Thompson, 2 Campb., 620; see, Woodcock v. Houldsworth, 16 M. & W., 124.

29—Stocken v. Collin, 7 M. & W., 515.

30—Sisson v. Cleveland & Toledo Ry.

Co., 14 Mich., 497; The Cleveland & Toledo Ry. Co. v. Perkins, 17 Mich., 301; Peter v. Thickstun, 51 Mich., 589, 593; 17 N. W., 68; Aulls v. Young, 98 Mich., 231; 57 N. W., 119.

31—Hoffman v. Harrington, 44 Mich., 183; 6 N. W., 225.

32—Leldlein v. Meyer, 95 Mich., 586; 55 N. W., 367. Where the originals are obtainable proof of handwriting by use of photographic copies is incompetent: Maclean v. Scripps, 52 Mich., 214; 17 N. W., 815; 18 N. W., 209; Matter of Foster's Will, 34 Mich., 21. A photograph of an assured to show condition of health held incompetent in Brown v. Metropolitan Life Ins. Co., 65 Mich., 306; 32 N. W., 610; see, also, Bedell v. Berkey, 76 Mich., 435; 43 N. W., 308. The Roentgen-ray photograph was held admissible in Bruce v. Beall, 99 Tenn., 303; 41 S. W., 445.

Professional and scientific books.—The reading of professional books as evidence, to the jury, is inadmissible. Scientific or expert testimony must be given by living witnesses, who can be cross-examined concerning their means of knowledge, and can explain in language open to general comprehension what is necessary for the jury to know.³³

Telephonic communications.—Such communications once proven are as effective as conversations between persons in the immediate presence of each other. Proof of them must identify persons communicating. This may be done by testimony that voices were recognized or by any other competent evidence to establish the fact.³⁴

Stenographer's notes of testimony.—There is no law making an official stenographer's notes of testimony evidence generally.³⁵ His minutes of testimony cannot, except by consent, be used in evidence, until their accuracy has been shown by his own oath or otherwise.³⁶ Nor until every reasonable effort has been made to discover the witness' whereabouts, and to produce him if he is within the jurisdiction of the court.³⁷

33—*People v. Hall*, 48 Mich., 480, 490; 12 N. W., 665. The rule in this state is, that medical books are not admissible as a substantive medium of proof of the facts they set forth: *Pinney v. Cahill*, 48 Mich., 584; 12 N. W., 862; *People v. Millard*, 53 Mich., 63; 18 N. W., 562. But where an expert witness refers to a medical book as authority for his opinions, it will be proper to read from that book to the jury, not to prove the facts it purports to set forth, but to disprove the statement of the witness, and to show the jury that the book does not contain what the witness ascribes to it, and thereby save them from being imposed upon by his assumptions and ignorance: *Ibid.* A medical expert may testify to the accepted facts of medical science. But in the examination of such a witness, it is not permissible for counsel to read to him from a medical book, before the jury, and then ask him whether such statements or reports as those contained in the paragraph read were found in medical books: *Marshall v. Brown*, 50 Mich., 148; 15 N. W., 55. And it is not allowable for a witness on direct or

cross-examination to relate before the jury the opinions, theories or statements found in professional or scientific books: *People v. Millard*, 53 Mich., 63; 18 N. W., 562. The only circumstances under which scientific works can properly be read in evidence are where the witness has based his opinions upon them and referred to them as authority: *Hall v. Murdock*, 114 Mich., 234; 72 N. W., 150.

34—*Deal v. State*, 140 Ind., 354; 39 N. E., 930; *Ogden v. Illinois*, 134 Ill., 599; 25 N. E., 755; *Deering v. Shumplik*, 67 Minn., 348; 69 N. W., 1088.

35—*Misner v. Darling*, 44 Mich., 438; 7 N. W., 77; *Edwards v. Heuer*, 46 Mich., 95; 8 N. W., 717.

36—*Edwards v. Heuer*, 46 Mich., 95; 8 N. W., 717.

37—*Mawlich v. Elsey*, 47 Mich., 15; 8 N. W., 587; 10 N. W., 57; see, *People v. Becker*, 48 Mich., 46-7; 11 N. W., 779. The stenographer's minutes of the testimony given upon a former trial of the cause, by a witness who has left the jurisdiction of the court, are admissible in evidence: *Stewart v. Bank of Port Huron*, 43 Mich., 257;

PRIVATE INSTRUMENTS, WRITINGS, ETC.

§ 384. **Deeds, etc., recorded.**—"All conveyances and other instruments authorized by law to be recorded, and which shall be acknowledged or proved as provided in this chapter,³⁸ and if the same shall have been recorded, the record, or a transcript of the record, certified by the register in whose office the same may have been recorded, may be read in evidence in any court within this state without further proof thereof; but the effect of such evidence may be rebutted by other competent testimony."³⁹

5 N. W., 302. But not until the stenographer has testified to their accuracy, or they have otherwise been authenticated and sworn to be correct: *Misner v. Darling*, 44 Mich., 438; 7 N. W., 77; *People v. Sligh*, 48 Mich., 54; 11 N. W., 782. Such minutes are not depositions; they are mere minutes of verbal testimony: *Seligman v. Ten Eyck's Estate*, 53 Mich., 289, 290; 18 N. W., 818; see, *People v. McKinney*, 49 Mich., 334; 13 N. W., 619. Testimony by the court stenographer that by the aid of his minutes he can give the testimony taken on a former trial "just as it was given in court" is sufficient proof of correctness: *People v. Macard*, 109 Mich., 623; 67 N. W., 968; see, also, *Lucker v. Liske*, 111 Mich., 683; 70 N. W., 421.

38—C. L., chap. 241.

39—C. L., § 8990.

The presumption of law is, that a person signing a deed uses his real name, and there is no presumption that he is known by different names. Therefore the record of a deed signed by *Harmon*, and acknowledged by *Hiram*, is not admissible in evidence as the deed of *Hiram*, without proof that the persons signing and acknowledging were in fact the same, the presumption in the absence of proof being that they were not the same: *Boothroyd v. Engles*, 23 Mich., 19.

A certificate of acknowledgment showing that the grantee appeared before the acknowledging officer and acknowledged that _____ executed the said deed, is defective in not showing that he, the grantor, acknowledged it. So, where an acknowledgment pur-

ported to be taken in another state before a commissioner appointed by the governor of this state, but no official seal of the commission was attached to the certificate, the acknowledgment was held to be defective: *Buel v. Irwin*, 24 Mich., 145. As to the effect of a record of a deed which omits to show that the instrument was sealed: See, *Starkweather v. Martin*, 28 Mich., 471, 481.

A deed purported to have been made in New York without witnesses, and acknowledged in 1843. The clerk's certificate verifying the acknowledgment was made in 1855, and did not purport to have been made by the clerk of a court of record: *Held*, that there is no law making such a certificate valid, and that the healing act of 1861 (C. L., §§ 9048-9051) has no reference to such a document: *Donahue v. Klassner*, 22 Mich., 254; but see, *Shotwell v. Harrison*, 22 Mich., 410, and *Morse v. Hewett*, 28 Mich., 481; *Healy v. Worth*, 35 Mich., 166; *Post v. Rich*, 36 Mich., 16.

As to when a seal is necessary to the authentication of a deed executed in another state, see, *Pope v. Cutler*, 34 Mich., 150. As to the sufficiency of a clerk's certificate, see, *People v. Marion*, 29 Mich., 32. A bill of sale given as security, and properly filed in the town clerk's office, may be proved by a sworn copy: *Pierce v. Rehfuß*, 35 Mich., 53; *Bills v. Kessler*, 36 Mich., 69. This section is not applicable when the issue is one of forgery of the original instrument: *People v. Swetland*, 77 Mich., 57; 43 N. W., 779. The deposition of a register of

“The term ‘conveyance,’ as used in this chapter, shall be construed to embrace every instrument in writing by which any estate or interest in real estate is created, aliened, mortgaged or assigned; or by which the title to any real estate may be affected in law or equity, except wills, leases for a term not exceeding three years, and executory contracts for the sale or purchase of lands.”⁴⁰

The record of a deed, void for defective execution, is inadmissible in evidence. The law makes conveyances properly executed and recorded, evidence; but the record of those not properly executed being entirely unauthorized, cannot prove the existence of the originals.⁴¹

When the record of a deed is admissible in evidence, the deed itself is also admissible without preliminary proof.⁴² The certificate of the acknowledgment of a deed, if regular on its

deeds as to contents of records in his office without giving copies is incompetent: *Angell v. Rosenbury*, 12 Mich., 241. This statute is applicable to recorded certificates of execution sale: *Drake v. McLean*, 47 Mich., 102; 10 N. W., 126. Our statute is peculiar in making the record of conveyances primary evidence, like the conveyance itself: *Bradley v. Silsbee*, 33 Mich., 330; *Mee v. Benedict*, 98 Mich., 270; 57 N. W., 175. A record is not notice for any purpose not declared by statute: *Burton v. Martz*, 38 Mich., 762; *Ramsdell v. Citizens L. & P. Co.*, 103 Mich., 93; 61 N. W., 275. A conveyance which bears the certificate of recording of the register is admissible without further proof: *Lacey v. Davis*, 4 Mich., 140; 66 Am. Dec., 524; *Webb v. Holt*, 113 Mich., 338; 71 N. W., 637.

40—C. L., § 8994; C. L. chapter 241. The register's certified transcript of the record is evidence only of what may be properly recorded, and not of any fact stated in an unauthorized memorandum entered on the record: *Farmers' & Mechanics' Bank v. Bronson*, 14 Mich., 361. The execution and delivery of a deed, when in issue, cannot be proved by parol; it is for the court, and not the witness, to say whether an instrument he calls a deed is such in law: *Thompson v. Richard*, 14 Mich., 172, 183. But a witness may be asked whether a deed or mort-

gage had been given; the question not calling for their contents: *Clemens v. Conrad*, 19 Mich., 170. The deposition of a register to the contents of a deed recorded in his office, without giving a copy, is inadmissible: *Angell v. Rosenbury*, 12 Mich., 241, 257.

41—*Farmers' and Merchants' Bank v. Bronson*, 14 Mich., 369; and see, *Dutton v. Ives*, 5 Mich., 515; *Galpin v. Abbott*, 6 Mich., 17. But where a recorded deed is made by several grantors, and is properly executed and witnessed as to a part of them, but defectively as to others, the record is evidence of the deed as to the former, but not as to the latter: *Hall v. Redson*, 10 Mich., 21. If a plat be actually, though not legally, recorded, it may be used for identifying lands described in deeds referring to it: *Johnstone v. Scott*, 11 Mich., 232. As to the effect to be given to imperfectly executed conveyances and the records thereof, see, C. L., §§ 9048, 9050, 9051; *Brown v. Cady*, 11 Mich., 535, and *Brown v. McCormick*, 28 Mich., 220. For further provisions as to recording deeds and mortgages, and the effect of the records as evidence, see, C. L., §§ 8982, 8983.

42—*Lacey v. Davis*, 4 Mich., 140, 150; *Webb v. Holt*, 113 Mich., 338; 71 N. W., 637.

face, is received without proof of the official character of the officer granting it, or of his signature, or that it was granted within the jurisdiction where he was authorized to act.⁴³

Powers of attorney to convey land, and executory contracts for the sale or purchase of lands, may be acknowledged or proved, and recorded the same as conveyances of land, and when so acknowledged or proved, as provided by law, and the record thereof, when recorded, or a transcript of such record duly certified, may be read in evidence in the same manner and with the like effect as a conveyance of land recorded or entitled to record.⁴⁴

§ 385. Other instruments, when acknowledged.—"Every written instrument, except promissory notes and bills of exchange, and except the last wills of deceased persons, may be proved or acknowledged in the manner now provided by law, for taking the proof or acknowledgment of conveyances of real estate, and the certificate of the proper officer endorsed thereon, shall entitle such instrument to be received in evidence on the trial of any action, with the same effect, and in the same manner, as if such instrument were a conveyance of real estate."⁴⁵

§ 386. Proof of execution, subscribing witness, etc.—If the instrument has not been so acknowledged or proved and certified, it must, except in those cases otherwise provided for by C. L., § 10199, be proved on the trial by a subscribing witness, if there be one, or if not, by proof of the handwriting of the party executing it, or by his admission that he executed the instrument; unless the case is one where the execution of it will be considered as admitted, if not denied on oath.⁴⁶

43—Thurman v. Cameron, 24 Wend., 87; Ives v. Kimball, 1 Mich., 308, 310. This rule applies to acknowledgments taken within the state. If taken without the state, see, C. L., §§ 8963-8965, 9050, 9051. When a lost and unrecorded deed will be presumed to have been duly executed, see, Godfrey v. Disbrow, Walker's Ch. R., 260; Goodell v. Labadie, 19 Mich., 88. For the effect of the recital of the consideration, see, Mowrey v. Vandling, 9 Mich., 39.

44—C. L., § 8995. As to proof of letters of attorney to convey lands, which were actually received in any register's office for record prior to March 1, 1847, see, C. L., § 8996.

45—C. L., § 10168; Cameron v. Culkins, 44 Mich., 531; 7 N. W., 157.

46—See, C. L., § 826. Providing that under certain circumstances, unless execution is denied under oath, the instrument proves itself: *ante*, § 199. It is not necessary to produce a subscribing witness to a lost instru-

If there be a subscribing witness to the execution of the instrument, he must be produced if practicable.⁴⁷ If he cannot be found, or his testimony cannot be used, his handwriting must be proved; or, if his handwriting cannot be proved, after diligent exertions for that purpose, proof of the handwriting of the party executing the instrument is admissible.⁴⁸ Where there are several subscribing witnesses, it is sufficient to call one of them.⁴⁹ An attesting witness may be dispensed with if he is out of the state.⁵⁰

ment. Such witnesses are not expected to be able in all cases to identify instruments, except such as bear their own genuine signatures, and are not presumed to know the contents of the papers they attest: *Eslow v. Mitchel*, 26 Mich., 500; *Raynor v. Norton*, 31 Mich., 210. Subscribing witnesses cannot identify anything but the original instrument signed by them: *Lee v. Wisner*, 38 Mich., 87. An objection to a deed that one of the subscribing witnesses signed by affixing his mark, is not tenable: *Brown v. McCormick*, 28 Mich., 217; see, *Comp. Laws*, § 50, sub-div. 17. A witness cannot be compelled to answer whether a signature shown to him is his, unless he is permitted to examine the paper to which it is attached: *North American Fire Ins. Co. v. Throop*, 22 Mich., 146. C. L., § 10199, referred to, provides that unless the law requires the instrument to be attested by subscribing witnesses, as an essential of validity, it is not necessary to call such witnesses, though the instrument be so attested. This would seem to admit the proof of deeds as between the original parties without calling the subscribing witnesses, such being valid instruments: *Baker v. Clark*, 52 Mich., 22; 17 N. W., 225; *King v. Carpenter*, 37 Mich., 369; *Price v. Haynes*, 37 Mich., 487; *Dougherty v. Randall*, 3 Mich., 581.

47—*Hollenbeck v. Flemming*, 6 Hill, 303. The right of a party to testify in his own behalf does not dispense with the necessity of calling the subscribing witness to prove the execution of a contract to which he is a party: *Hess v. Griggs*, 43 Mich., 397; 5 N. W., 427. See, *ante*, note 46.

48—*Jackson v. Waldron*, 13 Wend., 178, 196; *McPherson v. Rathbone*, 11

Wend., 96, 110. If the instrument was apparently executed in a foreign country, that fact raises a sufficient presumption that the subscribing witnesses are not within the jurisdiction of the court, so as to let in other evidence of the execution. And it seems that where a witness appears to have once resided within the jurisdiction of the court, an inquiry made at the place of his former residence, and amongst those who had formerly known him, and not finding him or gaining intelligence of him, raises the presumption that he is dead or beyond the jurisdiction of the court: *Valentine v. Piper*, 22 Pick., 89-90. If there are several subscribing witnesses, the absence of all must be shown before other proof of the execution can be resorted to: *Prince v. Blackburn*, 2 East, 250. Proof of the handwriting of the witness is sufficient if he be dead or out of the jurisdiction of the court, without proof of the handwriting of the parties: *Ibid.*; *Lusk v. Druse*, 4 Wend., 313; or blind: *Pedler v. Falge*, 1 M. & Rob., 258; or insane: *Currie v. Child*, 3 Camp., 283; *Iggulden v. May*, 9 Ves. Jun., 331. But not where he is unable to attend merely from illness: *Harrison v. Blades*, 3 Camp., 457. Nor because he is too aged or infirm to attend, for his deposition could be had: *Jackson v. Root*, 18 Johns., 60. Nor will the fact that the justice before whom the cause is tried is the only subscribing witness, and for that reason unable to testify, authorize other proof of the execution: *Jones v. Phelps*, 5 Mich., 218, 222; see, *Currie v. Child*, 8 Mich., 411; see, *post*, § 387.

49—*Jackson v. Gager*, 5 Cow., 385; *Russell v. Coffin*, 8 Pick., 143.

§ 387. **Subscribing witnesses, when dispensed with.**—But the rule requiring subscribing witnesses to be called to prove the execution of instruments witnessed by them, is now dispensed with in this state by legislative enactment, except in those cases where subscribing witnesses are required by law. The enactment is as follows:

“Whenever upon the trial of any action, civil or criminal, or upon the hearing of any judicial proceeding, a written instrument is offered in evidence, to which there is a subscribing witness, it shall not be necessary to call such subscribing witness, but such instrument may be proved in the same manner as it might be proved if there were no subscribing witness thereto, except in cases of written instruments to the validity of which one or more subscribing witnesses are required by law.”⁵¹

§ 388. **Handwriting.**—In proving handwriting in general, there is no rule which requires any particular amount of skill in the witness. Any one who has had the proper facilities, and who can swear to a knowledge of the handwriting in question, may be admitted.⁵² Knowledge of a person's handwriting may be acquired from seeing him write; and seeing him write but once has been held sufficient; or such knowledge may be acquired from letters and writings of the party in the possession of the witness, and which he knows to be genuine from their having been recognized by the writer, or from his having adopted and acted upon them as his, in business transactions.⁵³

50—Prince v. Blackburn, 2 East., 250; McPherson v. Rathbone, 11 Wend., 96; Jackson v. Gager, 5 Cow., 385.

51—C. L., § 10199. See, *ante*, p. 386, note 46.

52—Vinton v. Peck, 14 Mich., 287. Evidence as to the genuineness of handwriting given by a witness of the requisite experience and skill is admissible, and being so, must be considered, and given, in the light of all the evidence bearing thereon, just such weight as the court and jury deem it reasonably entitled to: University v. Rose, 45 Mich., 307; 4 N. W., 738; 5 N. W., 674; 7 N. W., 875.

A mark attached by one who cannot write, to his signature written by another, is evidence of an intention to

adopt the signature as his own. But this intention may be shown by any other clearly expressed act. If such a person directs another to sign for him, and it is done in his presence, it is good, whether he attach his mark or not: Just v. Wise, 42 Mich., 573; 4 N. W., 298.

53—Vinton v. Peck, 14 Mich., 287; see, also, 1 Greenl. Ev., § 577. Before being admitted to testify to the genuineness of a controverted signature from his knowledge of the handwriting of the party, a witness ought, beyond all question, to have seen the party write, or to be conversant with his acknowledged signature: Brigham v. Peters, 1 Gray, 139, 145-6. The evidence of one who testifies that he knows another's handwriting, either

If the witness has the proper knowledge of the party's handwriting, he may testify as to his opinion as to whether the writing in question has been altered or changed.⁵⁴

The value of a witness' belief must of course depend on circumstances, but it is proper to go to the jury like other questions upon the genuineness of writings. The jury may also examine the papers for themselves. At witness, it seems, may also testify to his opinion of the genuineness of the disputed writing from a comparison of such writing with other writings that are admitted or proved to be genuine. But the writings used for the comparison should be involved in the issue, or constitute a part of the records in the case; or at least their genuineness should be conceded. Upon this point the supreme court say, that "In the case of ancient documents proof by comparison has always been permitted, although the comparison can only be made by proving the genuineness of papers not involved in the cause. In other cases the rule has been inflexibly, and, we think, justly settled, that disputed papers which do not belong in the cause, and are not involved in the issue, cannot have their genuineness made a question of inquiry in the cause, and cannot, therefore, be made a basis of inquiry for either witness or jury. But where the papers used as a means of comparison are a part of the records in the cause, and undisputed, it is held that the jury can compare them, and that witnesses may also use them to form an opinion concerning handwriting. And we feel constrained to hold that a comparison of hands by witnesses, where there is an undisputed standard in the cause, or where documents are fairly before the jury upon the issue, is allowable."¹

from having seen him write, or from business correspondence apparently signed by him, is competent for the purpose of proving the latter's signature: *Empire Mfg. Co. v. Stuart*, 46 Mich., 482; 9 N. W., 527.

A witness' knowledge of handwriting cannot be tested by showing him real and what are claimed to be fictitious specimens; at least not unless both sides were agreed as to which were genuine and which were false, as this would raise issues which would complicate the case: *Howard v. Patrick*, 43 Mich., 128; 5 N. W., 84.

54—When the question to *when* an alteration or erasure was made depends entirely upon the inspection of the paper, the jury can determine upon their own inspection, and as well without as with the aid of experts: *Ives v. Leonard*, 50 Mich., 296; 15 N. W., 463.

1—*Vinton v. Peck*, 14 Mich., 237. Writings used as a standard of comparison must be admitted, or shown beyond dispute to be genuine: *People v. Cline*, 44 Mich., 295. Comparison with outside papers—that is, with papers not in the case, is not allow-

Where objection was made to the testimony of a writing master called to testify as to whether two papers were both written with the same ink, on the ground that he was not shown to be an expert in color, it was held that any experience in using pen and ink would qualify a person of ordinary capacity to form an admissible opinion concerning such identity, although it might be of small weight under doubtful circumstances.²

§ 389. **Wills.**—Wills which have been proved and certified as provided by law, and recorded in the probate court, and the record thereof, or a transcript of such record, certified by the

able: *Howard v. Patrick*, 43 Mich., 128; 5 N. W., 84. A disputed paper not in the case is not admissible as a standard of comparison of handwriting: *Van Sickle v. People*, 29 Mich., 61. Unacknowledged writing found in a diary belonging to a party, is not admissible as a standard of comparison to prove his handwriting: *Ibid.* Papers not in the case cannot be proved and received for the purpose of being used before the jury for the comparison of handwriting; nor is it proper to allow a jury to take disputed writings to their room to determine their genuineness by comparison there: *Foster's Will Case*, 34 Mich., 21. The signature in question may be compared by witnesses before the jury, with signatures of a party to papers in the case and admitted to be his. Signatures to papers not in the case cannot be used. Nor can a party be required to write his name in court for the purpose of comparison, nor be required to produce specimens of his handwriting for that purpose. *First Nat'l Bk. of Houghton v. Robert*, 41 Mich., 709; 3 N. W., 109. But where a witness had the defendant's signature in his possession, which the witness had seen defendant write, and therefore knew to be genuine, he was allowed to compare it with the signature in question, for the purpose of forming and giving his opinion as to the genuineness of that signature: *Worth v. McConnell*, 42 Mich., 473, 475; 4 N. W., 198; see, *People v. Cline*, 44 Mich., 290; 6 N. W., 671. Comparison can only be made with such writings as are part of the files

of the cause, or as are legally in evidence for some other purpose than that of such comparison: *People v. Parker*, 67 Mich., 222; 34 N. W., 720. But though papers are foreign to the case, yet if the party on cross-examination admits their genuineness they may be used: *Dietz v. Fourth Nat'l Bank*, 69 Mich., 287; 37 N. W., 220.

Where proof of handwriting is sought to be made by comparison of papers which are in evidence before the jury, they are not required to rely solely on the comparisons and testimony of experts, but may make their own inspections and comparisons, and use their own judgment thereon in arriving at their conclusions: *People v. Gale*, 50 Mich., 237; 15 N. W., 99.

Letter press copies of a person's handwriting are not admissible as standards of comparison: *Commonwealth v. Eastman*, 1 Ctsh., 189. Photographic copies of papers cannot be used to prove the handwriting of the originals if the originals themselves are obtainable: *Maclean v. Scripps*, 52 Mich., 218, 219; 17 N. W., 815; 18 N. W., 209.

2—*Vinton v. Peck*, 14 Mich., 296. In a chancery case, where there was evidence to show in whose handwriting certain interlineations were made, but none tending to show them to be in the handwriting of the defendant, it was held incompetent for the court upon its own unaided inspection, and contrary to the testimony, to find them to have been written by him: *Sheldon v. Hawes*, 15 Mich., 519.

judge of probate, may be read in evidence without further proof.³ The whole record, however, including the proofs, ought to be certified.⁴

§ 390. Books of account.—Charges provable by books of account must be for such things as are matters of book account, and are usually charged on books, such as for articles of property sold and delivered, services performed, and the use of anything hired and returned, as the use of horses, oxen, etc.⁵ The right to make the charge must exist at the time of delivering the articles, and arises in consequence of such delivery. But charges for matters not usually charged in books, as for not receiving goods pursuant to agreement; or the claim for damages for a tort; or breach of contract for the sale of land; or for the rent of land, are not admissible.⁶

This rule would exclude charges for money lent or paid, etc.⁷ But in this state the rule in respect to money charges has been changed by statute. They are now admissible. The provision is:

“In all trials, hearings, and proceedings in any cause or suit in any court, or before any officer, arbitrators, or referees, books of accounts, containing charges or entries for money paid, laid out, furnished or lent, shall be received and admitted as evidence, and deemed to be evidence of such charges and entries, and that such moneys were so paid, laid out, furnished, or lent, as is in such books charged or entered, and of the lia-

3—C. L., § 9297: *Ives v. Kimball*, 1 Mich., 308.

4—*Morris v. Keyes*, 1 Hill, 540.

5—1 Phil. Ev., Cow. & Hill's notes by Edwards, 376. And where a party can testify from his recollection as to the items charged in his books, it would seem that the books would not be admissible, as not being the best evidence: *Jackson v. Evans*, 8 Mich., 476.

In an action on implied assumpsit for work and labor, the entries made in plaintiff's time book by his foreman as to the number of days' work done, is admissible in connection with plaintiff's testimony that he knows the entries to be correct: *Peters v. Gallagher*, 37 Mich., 407.

The pass books and signature books of a savings bank, when aided by the testimony of the bank officers, are competent evidence to prove the existence of deposits: *People v. Hurst*, 41 Mich., 328; 1 N. W., 1027.

The contents of a bank blotter, being a book of original entries, and being required for constant use at the bank, may be shown without the production of the book itself, in ordinary cases where no question of genuineness is likely to arise requiring a personal inspection: *People v. Hurst*, 41 Mich., 331; 1 N. W., 1027.

6—Swift's Dig., 81, 582; 1 Cow. & Hill's notes to Phil. Ev. by Edwards, note 108.

7—*Low v. Payne*, 4 Comst., 247; *Case v. Potter*, 8 Johns., 211.

bility of the person charged therefor, in the same manner and to the same extent as books of account containing charges for goods, wares, or merchandise, sold and delivered, are received and admitted as evidence of sale and delivery of such goods and merchandise, and of the liability of the person charged therefor; Provided, this section shall not apply to cases where person acting or having acted as commission merchants or agents for the sale of produce, grain, or other property on commission, except as to the amount charged as commissions for selling, or buying such produce, grain or other property, unless accompanied by a voucher or receipt for the money so claimed to be laid out, or lent, or furnished."⁸.

Books, to be admitted in evidence, must appear to contain the first entries or charges of the party made at or near the time of the transaction to be proved, in other words, they must be the books of original entries, and when the contrary is discovered from the face of the book, or comes out on examination of the party, they ought to be rejected as incompetent evidence.⁹

It is no objection that the book is kept in the ledger form—that is, having a separate page for the account of each person; nor that the charges were all made upon a slate at the respective dates, and were duly transcribed into the book.¹⁰

8—C. L., § 10192. This statute does not authorize the use of books of account for the purpose of proving the manner of the entry of the heading of the account as corroboration of the particular theory of one party as to what the contract was: *Richards v. Burroughs*, 62 Mich., 117; 28 N. W., 755. Books of account are competent evidence to show to whom the goods were charged and to whom credit was given: *Montague v. Dougan*, 68 Mich., 98; 35 N. W., 840. It is not permissible to permit a party to put his book in evidence for an entry showing his version of a parol contract. *Collins v. Shaw*, 124 Mich., 474; 83 N. W., 146. Books of account may be received to show that note was for same amount as they, the books, show to be due, to corroborate the claim of its execution where the effect of the books was so limited: *Baker v. Halleck's Es-*

tate, 128 Mich., 180; 87 N. W., 100. This statute does not authorize the court, as a general rule, to compel the production of a party's books: *Cummer v. Kent Circuit Judge*, 38 Mich., 351. If there exist a trust relation the production of the books may be compelled: *Eddy v. Bay Circuit Judge*, 114 Mich., 668; 72 N. W., 890. See, further, upon this statute: *Lester v. Thompson*, 91 Mich., 245; 51 N. W., 893.

9—1 Cow. & Hill's notes by Edwards, p. 380, 381; see, *Prince v. Smith*, 4 Mass., 455; see, *Sickles v. Mather*, 20 Wend., 72. A pass book of a bank given a depositor is a book of original entries within this rule: *Kux v. Central M. Sav. Bk.*, 93 Mich., 511; 53 N. W., 828.

10—*Faxon v. Hollis*, 13 Mass., 427-8.

The entries must be in the book of the party, kept by him for the purpose of his daily accounts, generally, with all those persons who may have dealings with him, and must be made in conformity to his prevalent manner of keeping the book, and in a regular course with other charges.¹¹

To entitle the accounts to credit, the entries should be made without rasure, alteration or interlineation. When people make single entries only, the accounts should be fair and properly dated. When books are not regularly kept, where there appear to be razures, alterations, interlineations or additions, which cannot be plainly accounted for; and where the accounts are made out after a dispute has arisen, there is a strong presumption against their truth, and the party must have other proof to support his books to enable him to recover.¹²

Not only the day book, but if it appear in any way to be posted, the ledger must be produced, that the other party may have the benefit of any items entered therein to his credit.¹³ All the books containing entries relating to the account, when relied upon as furnishing evidence to sustain the account, should be produced. A party should no more be allowed to withhold a part of the account while he avails himself of another part, as evidence in his favor, than a part only of a deed or other document should be received in evidence. The fact that the account ran into two books cannot vary the principle.¹⁴ It is the same in legal effect as though the defendant had insisted upon sealing up one-half of the day book he offered, and having the remaining half received as evidence in his favor. The only proper or safe rule to apply in such a case, is that if a party in derogation of the fundamental and salutary rule of evidence, that one shall not be permitted to make a testimony for himself, seeks to introduce his own entries, in his own books, as evidence of the dealings to which

11—1 Cow., Hill & Edwards' notes to Phil. Ev., 381. There is no requirement of law that books upon which entries are made shall be of any particular kind, or the entries of any particular form. Thus, where an attorney's services were minuted in his register and other proper memorandum books, it was held sufficient for the purpose of an account current in the

law, and that the fact of his not having actually entered the *amount* of charges, or made regular entries on formal books of account, was immaterial: *Payne v. Walker*, 26 Mich., 63.

12—Swift's Digest, 729.

13—Prince v. Swett, 2 Mass., 569.

14—Pendleton v. Weed, 3 E. P. Smith, N. Y., 72.

they relate, he shall, at least allow the party to be affected by such evidence, the benefit of *all* the entries he has made.¹⁵

§ 391. **Proof, preliminary to the introduction of books of account.**—As to the preliminary proof essential to the introduction of the books it is sufficient if the books be shown to be, *first*, the books of the party whose books they are claimed to be; *second*, the books of original entry in which entries as to transactions of the kind in issue are generally kept; *third*, that the entries were made contemporaneously, or substantially so, with the transactions they record; *fourth*, that the entries were made by one having knowledge of the facts recorded. and *fifth*, that the books were correctly kept.¹⁶

§ 392. **Entries in other than books of account.**—Entries in books not strictly shop books or books of account but books kept in the regular course of one's business in which is entered

15—*Larue v. Rowland*, 7 Barb., 107; *Bigelow v. Saunders*, 22 Barb., 147-8; *Low v. Payne*, 4 Comst., 247; *Winants v. Sherman*, 3 Hill, 74. When once introduced, the books cannot be withdrawn, without the consent of the opposite party; they are then evidence for both parties: *Clinton v. Rowland*, 24 Barb., 634; see, *Vibbard v. Staats*, 3 Hill, 144.

16—Since the statute making parties competent witnesses a party can testify to the correctness of his books as well as another so far as he has knowledge: *Montague v. Dougan*, 68 Mich., 98; 35 N. W., 840. In order to entitle one to put his books of account in evidence, it must appear that he is usually precise and punctilious respecting the entries therein and that they purport to contain all the items of the account which are proper subjects of entry: *Countryman v. Bunker*, 101 Mich., 218; 59 N. W., 422. It is not now necessary in order to the introduction of books of account to call third parties to testify to their correctness through knowledge gained from having settled from them, as was necessary under the old rule: (see, *Jackson v. Evans*, 8 Mich., 476); *Seventh Day A. Pub. Assn. v. Fisher, Admr.*, 95 Mich., 274; 54 N. W., 759; *Montague v. Dougan*, 68 Mich., 98; 35 N. W., 840. A merchant's books

of account are not admissible when authenticated only by the bookkeeper who merely transcribed the entries from slips given him by salesmen, the bookkeeper having no personal knowledge of the sales: *Swan v. Thurman*, 112 Mich., 416; 70 N. W., 1023. In *Taylor v. Wolfenden & Co. v. Atkinson*, 127 Mich., 633; 87 N. W., 89, it was held, that where it was shown that the ledger entries were made from slips made out by the sales clerks in duplicate, one of which went to the delivery counter and the other to the bookkeeper, the slips being destroyed, such showing was not sufficient authentication; that it was further necessary to prove that no entries were made except from slips; that no such slips were sent to the bookkeeper except when the goods with a duplicate slip were sent to the delivery counter and were delivered. Where one under whose supervision books are made testifies that they are made at his dictation and that they are correct, they are admissible: *Union Cent. Life Ins. Co. v. Smith*, 119 Mich., 171; 77 N. W., 706. See, also, *Baxter v. Reynolds*, 112 Mich., 471; 70 N. W., 1039. Where the person making original entries and having personal knowledge of the transactions is beyond the jurisdiction of the courts, the books may be proven by showing them to be in the

a record of transactions as a part of the regular course of one's business are admissible under some circumstances. Weather bureau records, train dispatchers' records, etc., are illustrations. Such entries get their credit from the fact that they are a part of a regular routine of business. It is essential then, *first*, that such entries be found where, according to the established order of the business, of which they are a part, one would expect to find them; *second*, that they be made by one with knowledge of the fact and whose business it was to make them; *third*, that they were made substantially as of the time of the transaction they record.¹⁷

§ 393. **Proof of demands by affidavit, etc.**—"In all actions brought in any of the courts of this state, to recover the amount due on an open account, or upon an account stated, if the plaintiff or some one in his behalf, shall make an affidavit of the amount due, as near as he can estimate the same over and above all legal set-off, and annex thereto a copy of said account, and cause a copy of said affidavit and account to be served upon the defendant, with a copy of the declaration filed in the cause, or with the process by which such action is commenced, such affidavit shall be deemed *prima facie* evidence of such indebtedness, unless the defendant with his plea shall, by himself or agent, make an affidavit and serve a copy thereof on the plaintiff or his attorney, denying the same; and if the defendant in any action shall give notice, with his plea of a set-off, founded upon an open account, or upon an account stated, and shall annex to such plea and notice a copy of such account, and an affidavit made by himself or some one in his behalf, showing the amount or balance claimed by the defendant upon such account, and that such amount or balance is justly owing and due to the defendant, or that he is justly entitled to have such account, or said balance thereof, set off against the claim made by said plaintiff, and shall serve a copy of such account and affidavit, with a copy of such plea and notice, upon the plaintiff or his attorney, such affidavit shall

handwriting of such entrants, and that settlements have been made by such books and they had never been disputed. *Cameron Lumber Co. v. Somerville*, 129 Mich., 552; 89 N. W., 346. 17—1 Greenl. Ev., § 120a Ed., 16; *Meyer v. Brown*, 130 Mich., 449; 90 N. W., 285; see, also, *Sisson v. Cleveland & T. Ry. Co.*, 14 Mich., 497; *De Armond v. Neasmith*, 32 Mich., 231.

be deemed *prima facie* evidence of such set-off, and of the plaintiff's liability thereon, unless the plaintiff, or some one in his behalf, shall, * * * * before trial, make an affidavit denying such account, or some part thereof, and the plaintiff's indebtedness or liability thereon, and serve a copy thereof upon the defendant or his attorney, and in case of a denial of part of such set-off, the defendant's affidavit shall be deemed to be *prima facie* evidence of such part of the set-off as is not denied by the plaintiff's affidavit: Provided, that any affidavit in this section mentioned shall be deemed sufficient, if the same is made within ten days next preceding the issue of the writ or filing of the declaration or plea."¹⁸

RECORDS NOT MADE EVIDENCE, LOST RECORDS AND PAPERS, ETC.

§ 394. Records not made evidence by law.—A record or document is not of itself admissible as evidence of the matters therein stated, unless made so by law. Therefore, a book of

18—C. L., § 10191. Before the amendment of 1881 by which the proviso to this section was added, it was held that the affidavit of the amount due must be made at substantially the same time of the commencement of the suit. And that such an affidavit made several days before commencement of the suit was of no avail: *McHugh v. Butler*, 39 Mich., 185. If a plaintiff rests the proof of his case upon such an affidavit, he cannot, after the defense has rested and his affidavit is found defective, go back and prove his demand in the ordinary way as a matter of right. But the court may in its discretion permit him to do so: *Ibid.* Although the affidavit may not be in compliance with the statute, or may be so defective as to render it inadmissible in the absence of the defendant, or against his objection if present, yet if the defendant is present at the trial, and the affidavit is offered and received with his knowledge and without objection on his part, it will be too late, after both parties have rested, to claim that the affidavit proves nothing: *Locke v. Farley*, 41 Mich., 405; 1 N. W., 955. A declaration with the return of the officer indorsed showing that the affidavit and

account were duly served on the defendant, were competent evidence in establishing a *prima facie* case: *Bjorkquest v. Wagar*, 83 Mich., 226; 47 N. W., 235; *Morrill v. Blissell*, 99 Mich., 409; 58 N. W., 324. An affidavit showing the affiant is the treasurer of the plaintiff corporation is sufficient though it does not otherwise purport to be made by him on behalf of the corporation: *Forbes Lith. Mfg. Co. v. Winter*, 107 Mich., 116; 64 N. W., 1053. See, also, *Bullock v. Ueberroth*, 121 Mich., 293; 80 N. W., 39; *Mero v. Button*, 116 Mich., 680; 75 N. W., 89.

The affidavit authorized by this section, § 10191, like any other testimony, must be introduced in evidence to become operative, the statute making no provision for its being filed with the justice—until thus introduced, a defendant is not called upon to object to its sufficiency or regularity or to the return of service. But if he has appeared and is present when the affidavit is introduced, and is silent he waives all such objections.

A return which fails to show service of a copy of said affidavit, with the process by which the suit was commenced, if objected to, is insufficient

township plats found in the office of the register of deeds is not evidence where there is no law requiring it to be kept, or declaring it to be evidence.¹⁹ But a book kept by a county treasurer, containing entries of tax sales and the names of the purchasers, though not distinctly required by any statute, yet being necessary to the adequate performance of his duties, is admissible in evidence to prove the facts therein stated as an official book, if it appear to have been kept in the office as one of the regular office books for making such entries.²⁰

§ 395. **Non-existence of records, when presumed.**—The law presumes that all officers entrusted with public files and records will perform their official duty and keep them safely in their offices. Therefore, where a paper is not found where, if in existence, it ought to be deposited or recorded, the presumption arises that no such document has ever been in existence. Until this presumption is rebutted, it must stand for proof of such non-existence.²¹

There is no room for presumption for or against a matter where there is record proof thereof. Presumptions are never allowable where better evidence of a primary nature is required by law to be preserved.²²

§ 396. **Lost records and papers, certificate of search for.**—“Whenever any officer to whom the legal custody of any paper, document or record shall belong, shall certify that he has made diligent examination in his office for such paper, document or record, and that it cannot be found, such certificate shall be presumptive evidence of the facts so certified, in all causes, matters and proceedings in the same manner and with like effect as if such officer had personally testified to the same in the court, or before the officer before whom such cause, matter or proceeding may be pending.”²³

to authorize the introduction of the original affidavit in evidence. To be effectual as *prima facie* evidence the statute must be complied with. And the record must show such compliance, or competent proof must be made thereof: *Gordon v. Sibley*, 59 Mich., 250; 26 N. W., 485. See, *McGowan v. Lamb*, 66 Mich., 615; 33 N. W., 881.

19—*Smith v. Lawrence*, 12 Mich., 431; see, *F. & M. Bank v. Bronson*,

14 Mich., 371; *Bradley v. Silsbee*, 33 Mich., 328.

20—*Groesbeck v. Seeley*, 13 Mich., 341.

21—*Hall v. Kellogg*, 16 Mich., 135, 139; *Platt v. Stewart*, 10 Mich., 260.

22—*People v. Treadway*, 17 Mich., 485; see, *Stevenson v. Bay City*, 26 Mich., 44.

23—C. L., § 10170.

§ 397. **Lost records and papers, restoring.**—Provision is made by law for the restoration of lost records, papers and proceedings relating to causes or proceedings pending or determined in courts of record. For the mode of effecting such restoration and the effect to be given to such substituted records and papers, see C. L., §§ 10276-10280.²⁴

§ 398. **Lost records and writings, proof of.**—If a record is lost or destroyed, its contents may, after proof of such loss or destruction, be proved by parol evidence, unless it appears that there is other and better evidence.²⁵ And the same rule

24—The proceedings to restore or substitute must be upon notice to the parties to be affected thereby: *Montgomery v. Henry*, 10 Mich., 19. The contents of lost records of the court may be proved by secondary evidence; the statute, C. L., §§ 10276-10280, providing for restoring lost records, does not preclude such proof: *Drake v. Kinsell*, 38 Mich., 234, 235.

25—1 Greenl. Ev., § 509; *People v. Lambert*, 5 Mich., 349. The evidence of one who had been register of deeds, that he had seen an unrecorded deed supposed to be lost, among a quantity of unrecorded papers in the register's office, is competent as tending to prove the existence of such a deed: *Raynor v. Norton*, 31 Mich., 210. The contents of a complaint and warrant in a criminal case, lost after being returned into court, may be proved by secondary evidence; and witness to prove its contents may state the substance thereof without giving the exact words. *Commonwealth v. Roark*, 8 Cush., 210; and see, *Simpson v. Norton*, 45 Maine, 281; *Hall v. Manchester*, 40 N. H., 410. So the contents of a lost execution may be proved by oral testimony: *Rash v. Whitney*, 4 Mich., 495. There are no degrees in secondary evidence; and where an original paper is lost, and no counterpart is legally presumed or required to exist, its contents may be proved by parol as well as by a copy. But if a party fails to produce a copy known to be correct, if in his power to do so, it may well be regarded as bearing against the credit to be given to his oral testimony of the contents of the lost paper: *Eslow v. Mitchell*,

26 Mich., 500. When there is a dispute as to the contents of a lost agreement, the conversation between the parties at the time of putting the agreement in writing may be admitted as bearing upon the question of the actual contents of the paper: *North American Fire Ins. Co. v. Throop*, 22 Mich., 146, 155. But parol evidence of the contents of a lost U. S. patent of lands is not admissible, because an exemplified copy may be obtained of the proper department at Washington: *Platt v. Haner*, 27 Mich., 167. It is not necessary to produce a subscribing witness to a lost instrument to prove its contents, because such witnesses are not presumed to know the contents of the papers they attest: *Eslow v. Mitchell*, 26 Mich., 500; *Raynor v. Norton*, 31 Mich., 210. But when a paper has been destroyed by agreement of the parties interested in it under such circumstances as to make it unjust for either party to make any further claim under it, its contents will not be allowed to be proved for the purpose of making a further claim under it: *Gugins v. Van Gorder*, 10 Mich., 225. It is sufficient if the substance of the lost instrument is proven. But this rule does not allow the witness to give the sense or effect; he must give the words or the substance of them: *Hollness v. Deppert*, 122 Mich., 275; 80 N. W., 1094. It will not defeat the proof of contents of a destroyed instrument that the party desiring to prove it consented to its destruction where there was no reason to think its preservation necessary: *Davis v. Teachout's Estate*, 126 Mich., 135; 85 N. W., 475.

applies to private writings and papers. But before such evidence can be admitted, it must be shown that a diligent search has been made in all places where the record or writing was usually kept, and where it would be most likely to be found; and that such search has been unavailing. Such search must be made in good faith, and must be sufficient to raise, in the judgment of the court, a reasonable presumption of the loss or destruction of the instrument.²⁶ Where it was sought to prove by parol the contents of a bond and affidavit in an attachment suit, they not being found in the office of the justice who rendered the judgment, and no search having been made for them in the office of his successor, it was held that without such search the loss was not sufficiently proved to admit the testimony, as those papers should be, and perhaps might be in the office of the successor, notwithstanding he testified that he was very certain he had not received them.²⁷

§ 399. Papers in possession of opposite party.—If the instrument to be proved is in the possession or control of the adverse party, and he will not produce it, the document may be

26—1 Greenl. Ev., § 558; Hogsett v. Ellis, 17 Mich., 374; Higgins v. Watson, 1 Mich., 428. Proof that a letter had been entrusted to a prosecuting attorney, and that he had searched for it in the places where he believed he had reason to expect to find it, and did not find it, sufficiently establishes the loss of the letter to admit parol evidence of its contents: Stewart v. People, 23 Mich., 63. Where a witness has sufficiently explained his failure to preserve a paper, he may state its contents: People v. Sharp, 53 Mich., 523; 19 N. W., 168. Evidence from which a reasonable inference of loss may be drawn is sufficient: Howd v. Breckenridge, 97 Mich., 65; 56 N. W., 221. For other illustrative cases upon the question of proof of loss, see: Dillon v. Howe, 98 Mich., 168; 57 N. W., 102; Alfred Shrimpton & Sons, Ltd. v. Netzorg, 104 Mich., 225; 62 N. W., 343; Burt v. Long, 106 Mich., 210; 64 N. W., 60; People v. Pope, 108 Mich., 361; 66 N. W., 213; Wheeler v. Detroit, 127 Mich., 329; 86 N. W., 822; Thompson v. Flint & P. M. Ry.

Co., 131 Mich., 95; 90 N. W., 1037. The question of whether the evidence of loss is sufficient is for the court and not for the jury: Thomson v. Flint & P. M. Ry. Co., 131 Mich., 95; 90 N. W., 1037. Where the writing is beyond the jurisdiction of the court parol evidence will be received if reasonable effort has been made to procure it without avail. People v. Seaman, 107 Mich., 348; 65 N. W., 203. *Contra*, if no such effort has been made: Phillips v. United States Ben. Soc., 120 Mich., 142; 79 N. W., 1; 125 Mich., 186; 84 N. W., 57.

The burden of showing the loss of a written instrument is upon the party seeking to introduce secondary evidence of its contents, and no instrument can be said to be lost until careful search has been made for it: Hansen v. Am. Ins. Co., 57 Iowa, 741; 11 N. W., 670. But a *prima facie* showing of loss will be sufficient, unless the opposite party by cross-examination shows the search to be insufficient: Bottomley v. Goldsmith, 36 Mich., 27.

27—Hogsett v. Ellis, 17 Mich., 351, 374.

proved by an examined copy, or by parol evidence of its contents, after proof that it is in his possession or control, and that he has received notice to produce it.²⁸ Without such proof and notice the secondary evidence is inadmissible. As to his possession, slight evidence is sufficient.²⁹ The notice should be in writing; it must describe the instrument with sufficient particularity, so as to leave no reasonable doubt as to what paper is to be produced;³⁰ it should be served on the party or his attorney, if he has one;³¹ and it must be served a reasonable time before the trial.³²

But notice to produce may in some cases be dispensed with, as where the document tendered in evidence is a duplicate original,³³ and where the instrument to be produced is itself a notice, as a notice to quit.³⁴ Where, from the nature of the action, the defendant has notice that the plaintiff intends to charge him with the possession of the instrument, notice to

28—The refusal, after reasonable notice, to produce a document in the possession of the adverse party, and which the party demanding it is entitled to introduce in evidence, authorizes proof of its contents by secondary evidence. But it does not dispense with such proof as is attainable, nor allow the tenor of the instrument to be made out by anything less than satisfactory proof of all that is essential: *Moulton v. Mason*, 21 Mich., 369; see, *Sheldon v. Wood*, 2 Bosw., 269. Parol evidence of the contents of a letter mailed to a party or his agent cannot be given without notice to produce it: and it seems the party's testimony that he did not recollect of having received the letter, will not obviate the want of notice: *Ferguson v. Hemingway*, 38 Mich., 159.

29—2 Phil. Ev., 4 Am. ed., C. & H.'s notes by Edwards, 519, 525.

30—*Ibid.*, and *Rogers v. Custance*, 2 Moo. & R., 179. But notice by parol is said to be sufficient: *Ros. Cr. Ev.*, 10; *Kerr v. McGuire*, 1 Tiff. N. Y., 446.

31—*Houseman v. Roberts*, 5 C. & P., 394. It may be served on either the party or his attorney: *Greenl. Ev.*, § 562. And should be served person-

ally: *Rathbun v. Acker*, 18 Barb., 393.

32—*Utica Ins. Co. v. Caldwell*, 3 Wend., 296; *Gorham v. Gale*, 7 Cow., 739; *McPherson v. Rathbone*, 7 Wend., 216; *Hammond v. Hopping*, 13 Wend., 505-8-9. Where parties reside at a distance from the place of trial, a notice to counsel to produce papers which only allow time to communicate with clients by telegraph is insufficient; at least not if the necessity for the use of the papers was discovered in time to give earlier notice: *De Witt v. Prescott*, 51 Mich., 298; 16 N. W., 656.

33—Where contracts are executed in duplicate, each party retaining an executed copy, either may use his copy in evidence in a suit between the parties, as an original, without calling for the production of the other copy: *Cleveland & Toledo Ry. Co. v. Perkins*, 17 Mich., 296; *Crane v. Portland*, 9 Mich., 493.

34—1 *Greenl. Ev.*, § 561. Or a notice of dishonor of a bill of exchange. *Ibid.* A notice to quit may be proved by parol without calling on the defendant upon whom it was served to produce the original: *Falkner v. Beers*, 2 Doug. Mich., 117, 119.

produce need not be given, as for example, in trover for a bill of exchange.³⁵

§ 400. Corporate charters.—The production of the charter and proof of acts of user under it are sufficient to establish the existence of a corporation, where the charter confers corporate powers immediately and unconditionally. In such case it is not necessary to make proof of the organization under the charter.³⁶ But if the charter or act of incorporation prescribes any conditions and a compliance therewith, as precedent to the organization, a compliance with such conditions must be shown.³⁷ When corporations are organized under general laws, corporate existence may be proved by certified copies of their articles of association filed in the office of the secretary of state, or other place provided by law, or with the county clerk, when authorized to be filed there.³⁸

For the proving of corporations, the statute now provides "That in any suit or proceeding, civil or criminal, hereafter instituted in any of the courts of this state, wherein it shall become material or necessary to prove the incorporation of any company or corporation, or the existence of any joint stock company or association, whether the same be a foreign or do-

35—1 Greenl. Ev., § 561. Where trover is brought for the conversion of a promissory note, plaintiff is entitled to prove its existence and contents, without giving defendant notice to produce it: *Rose v. Lewis*, 10 Mich., 483. So, the defendant is entitled to the production, without notice, of all papers which formed any part of the contract under which the cause of action in suit arose: *De Witt v. Prescott*, 51 Mich., 298; 16 N. W., 656.

36—*Cahill v. Kalamazoo Mutual Ins. Co.*, 2 Doug. Mich., 124; *Way v. Billings*, 2 Mich., 397. The proof of user must necessarily consist of evidence of the acts of the corporation, showing that they are doing business under their charter: *Cahill v. Kalamazoo Mut. Ins. Co.*, 2 Doug., 135.

37—*F. & M. Bank v. Troy City Bank*, 1 Doug. Mich., 457, 465. See, *Lock v. Leonard Silk Co.*, 37 Mich., 479; as to the incorporation of re-

ligious societies: *Fredenburg v. Lyon Lake M. E. Church*, 37 Mich., 475; see, *Methodist Church of Newark v. Clark*, 41 Mich., 730, 736; 3 N. W., 207; *Allen v. Duffie*, 43 Mich., 1; 4 N. W., 427; *Druse v. Wheeler*, 22 Mich., 439; *Walrath v. Campbell*, 28 Mich., 111.

38—In case of such corporation, the general law under which the corporation is formed, and the articles of association made in pursuance thereof, are to be considered as the charter of the company: *Van Etten v. Eaton*, 19 Mich., 194. The corporate existence of national banking associations may be shown by certified copies of the organization certificate filed with the comptroller of the currency, and by his certificate that the bank has complied with the act of Congress "To provide for a national currency": *Thatcher v. West River Natl. Bank*, 19 Mich., 196.

mestic corporation, company, or association, evidence that such corporation, company, or association is doing business under a certain name shall be *prima facie* proof of its due incorporation or existence pursuant to law, and of its name.”³⁹

On plea of the general issue to an action by a corporation, the plaintiff must prove its corporate existence,⁴⁰ excepting in the cases mentioned in the following provision of the statute: “In suits brought by a corporation created by or under any statute of this state, it shall not be necessary to prove on the trial of the cause the existence of such corporation, unless the defendant shall have pleaded in abatement, or given notice under his plea to the action, that the plaintiffs are not a corporation, and annex thereto an affidavit of the truth of such plea or notice.”⁴¹

And any railroad, when sued by the name in which its business is conducted, shall not be permitted to deny, by plea or otherwise, that it is a corporation existing under such name.⁴²

The transactions and acts of a corporation may be proved by

39—C. L., § 10194. *Wilson Sewing Machine Co. v. Spears*, 50 Mich., 534; 15 N. W., 894. As against a plea of *nul tici corporation*, the plaintiff may make his *prima facie* case under this statute by showing that the corporation was doing business as such. Such evidence conclusively establishes the fact of one incorporation unless the defendant shall introduce some evidence to contradict it. In the absence of such plea no proof of incorporation is necessary: *Canal Street Gravel Road Co. v. Paas*, 95 Mich., 372; 54 N. W., 907. Where a body assumes to be a corporation, and acts under a particular name, a third party dealing with it under such assumed name is estopped to deny its corporate existence unless there are no facts which make it legally unjust to forbid such a denial: *Estey Mfg. Co. v. Runnels*, 55 Mich., 130; 20 N. W. Rep., 823; *Chapman v. Colby*, 47 Mich., 46; 10 N. W., 74. See, *Doyle v. Mizner*, 42 Mich., 337; 3 N. W., 968; and cases cited in note to C. L., § 10194.

40—*F. & M. Bank & Co. v. Troy City Bank*, 1 Doug. Mich., 457; *Owen et al.*

v. Farmers' Bank of Sandstone, 2 Doug., 134.

41—C. L., § 10471. See, *Smith v. Village of Adrian*, 1 Mich., 495. The plea of the general issue to a declaration by a corporation, admits the corporate existence of the plaintiff; *Garton v. Union City National Bank*, 34 Mich., 279. In a suit by a corporation in justice's court, by summons to answer the plaintiff, naming it by its corporate name, even if the declaration falls to allege the plaintiff to be a corporation, yet the summons and declaration taken together will be deemed a sufficient allegation that plaintiff is a corporation, so that, if the general issue is pleaded the plaintiff's corporate existence will be thereby admitted: *Wilson Sewing Machine Co. v. Spears*, 50 Mich., 534; 15 N. W., 894. And see, *Lake Superior Building Co. v. Thompson*, 32 Mich., 293; *Grand Rapids & Ind. Ry. v. Southwick*, 30 Mich., 446.

42—C. L., § 10439. See, *Grand Rapids & Ind. Ry. v. Southwick*, 30 Mich., 446.

entries made in its books.⁴³ And 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 render their acts binding.⁴⁴ The seal of a corporation affixed to an instrument is *prima facie* evidence that it was affixed by proper authority; and the contrary must be shown by the objecting party.⁴⁵

§ 401. **Partnerships, proof of.**—"In any suit or proceeding hereafter instituted in any of the courts of this state, wherein it shall become material or necessary to prove the co-partnership of any firm or association, the plaintiffs may cause to be served upon the defendant, with a copy of the declaration filed in the cause, or with the process by which suit is commenced, an affidavit stating that the plaintiffs were the persons comprising such partnership at the time the contract in question was made, or the cause of action accrued; and such affidavit shall be *prima facie* evidence of such existence of such partnership or association, unless the defendant shall file with his plea an affidavit denying the existence of such partnership or association."⁴⁶

43—*People v. Oakland Co. Bank*, 1 Doug. Mich., 282. The records of municipal action by a city council cannot be contradicted or supplemented by parol evidence. When the law requires such records to be kept, they are the only lawful evidence of the action to which they refer: *Stevenson v. Bay City*, 26 Mich., 44.

44—*Cabill v. K. M. Ins. Co.*, 2 Doug. Mich., 124.

45—*Benedict v. Denton*, Walk. Mich., Ch., 336.

46—C. L., § 10195.

In proving a co-partnership, it is not necessary to show the unity of interest of the members by direct proof. This fact may be established by circumstances: *Hadden v. Shortridge*, 27 Mich., 212. See, *Wattles v. Moss*, 46 Mich., 52; 8 N. W., 567.

Evidence of the admission of defendants that they were partners is competent, although not restricted to the precise time when the cause of action accrued: *Sager v. Tupper*, 38 Mich., 258, 262; *Armstrong v. Potter*, 103 Mich., 409; 61 N. W., 657. If reputation and hearsay are admitted

to prove a partnership without objection, the jury may consider it, and the opposite side will not afterwards be allowed to complain: 27 Mich., 212, *supra*.

To constitute one a partner as to third persons, it is not necessary that he should have agreed to share in the losses of the business. If he shares in the profits it is sufficient: *Sager v. Tupper*, 38 Mich., 265; *Hinman v. Littell*, 23 Mich., 484.

To constitute a partnership, there must be a community of interest in some lawful commerce or business, for the conduct of which the parties, (or partners) are mutually principals of and agents for each other, with general powers within the scope of the business: which powers, however, by agreement between the parties themselves, may be restricted at their option, to the extent even of making one the sole agent of the others and of the business. The test of partnership, as between the parties themselves, is their intent; and as between themselves they are never to be charged as partners unless by contract and with intent

they have formed a relation in which the elements of partnership as above indicated are found to exist. Participation in the profits of a business does not of itself make one a partner therein; and therefore is not decisive of that relation, except in so far as it is evidence of the relation of principal and agent between the persons taking the profits and those carrying on the business. A partnership cannot be implied as a matter of law, from a business relation, if the parties thereto have not made or intended to make a partnership contract and have done nothing to estop them from denying the existence of a partnership. While parties may incur obligations as partners to third persons by so holding themselves out to, and dealing with

them as partners and in such a way as to induce such persons to believe them to be and to trust and rely upon them as partners; yet there can be no partnership as to third persons when as between the parties themselves there is no partnership and the third persons have not been misled by concealment of facts, or by deceptive appearances, to rely upon them as partners: *Beecher v. Bush*, 45 Mich., 188; 7 N. W., 785.

A dormant partner is a secret partner; one who becomes such by a secret arrangement, while his associate is held out to the world as sole proprietor and manager of the business: *Beecher v. Bush*, 45 Mich., 203; 7 N. W., 785.

CHAPTER XXII.

OF EVIDENCE, CONTINUED, AND PARTICULARLY OF PRESUMPTIONS AND HEARSAY.

PRESUMPTIONS.

§ 402. In general.

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§ 410. The exception as to evidence of witnesses since deceased or absent.

PRESUMPTIONS.

§ 402. In general.—A presumption of any fact is properly an inference of that fact from other facts that are known. When the fact itself cannot be proved directly, that which comes nearest to the proof of it is the proof of the circumstances that necessarily and usually attend such fact, and from which it is inferred or presumed; that is, taken for granted until the contrary be proved.¹ In the order of nature, facts do not occur singly or independently but each is connected with some antecedent fact, or combination of facts, from which the fact in question follows as an effect from a cause.² Therefore, the ground of all presumptions is the necessary or usual connection between facts and circumstances.³

1—*Jackson v. Warford*, 7 Wend., 66.

2—*People v. Jenness*, 5 Mich., 324.

3—Thus the law presumes every man to intend the legal consequences which must naturally flow from his own voluntary acts, and every man is held responsible accordingly. If a debtor makes an assignment which, if carried out, must necessarily hinder and defraud his creditors, the legal presumption is, that the fraud was intended: *Pierson v. Manning*, 2 Mich., 454. And in all cases a mischief or wrong which is the natural and direct result of voluntary action, necessarily indicates a

voluntary wrong-doer, for the law rigidly holds all persons to the presumption that they intended such results as are to be expected from their conduct, whenever these results arrive: *Daily Post Co. v. McArthur*, 16 Mich., 452; see, *People v. Potter*, 5 Mich., 8; *People v. Carmichael*, 5 Mich., 10, 17; *People v. Scott*, 6 Mich., 296; *People v. Getchell*, *Ibid.*, 504.

In civil cases death may be presumed from circumstances, and it is not necessary to produce an eye witness to the fact: *John Hancock Mut. Life Ins. Co. v. Moore*, 34 Mich., 41;

§ 403. **Classification of presumptions.**—Presumptions are usually classified into *presumptions of law*, and *presumptions of fact*. Presumptions of law are either *conclusive* or *disputable*. This classification is based upon common experience, which has shown that when fact *a* or facts *a* and *b*, or facts *a*, *b*, and *c* are found fact *d* is, with more or less certainty, found also. As to certain conditions this is so universally true that the law has said when these conditions are shown it shall be conclusively presumed that fact *d* exists, and no evidence in such cases is permitted to show that, in the particular case, it does not exist. As to other conditions this common experience has not been so uniform in finding fact *d* to exist when the other facts are shown, as that it has seemed wise to ex-

Bailey v. Bailey, 36 Mich., 182. And a person may be presumed to be dead at the expiration of seven years from the time he was last heard of or known to be alive: Bailey v. Bailey, 36 Mich., 181. As to proving death within that period, see same cases.

The law will presume that the name used by a person in signing an instrument is his true name; thus, where a deed was signed by *Harmon*, and acknowledged by *Hiram*, the law will not presume that it was signed and acknowledged by the same person, without proof that such was the fact: Boothroyd v. Engles, 23 Mich., 19. See, Dillin v. People, 8 Mich., 368. But presumptions are never allowable when better evidence of a primary nature is required by law to be preserved; as, where a record of the fact is required to be kept: People v. Tredway, 17 Mich., 485. And if a paper is not found where, if in existence, it ought by law to be deposited or recorded, the presumption arises that no such document has ever been in existence: Hall v. Kellogg, 16 Mich., 135; see, Platt v. Stewart, 10 Mich., 260. No court or jury has a right to presume the existence of a fact without evidence legally tending to prove it directly, or tending to prove other facts and circumstances, from which the existence of the fact in question may be reasonably inferred. Clcotte et al. v. Morse, 8 Mich., 428. And all legal presumption must be reasonable: Hotchin v. Kent, 8 Mich., 529. There-

fore a person's motives are presumed to be good, and that he is honest in his transactions, in the absence of evidence showing fraud or improper motives, as this is the more reasonable: Fleming v. Slocum, 18 John., 403; Bank of Silver Creek v. Talcott, 22 Barb., 552. So the law presumes that a public officer will perform his official duty: Hall v. Kellogg, 16 Mich., 139; Blair v. Compton, 33 Mich., 424; *Ibid.*, 9. And for this reason fraud will not be presumed upon slight circumstances, nor from circumstances of an equivocal nature, but must be clearly proved, so as to leave no rational doubt upon the mind: Buck v. Sherman, 2 Doug. Mich., 176; Hollister v. Loud, 2 Mich., 324; see, Hubbard v. Taylor, 5 *Ibid.*, 155; Baldwin v. Buckland, 11 *Ibid.*, 380. At least the proof must create a reasonable belief—something more than a suspicion of fraud: Watkins v. Wallace, 19 Mich., 77. A particular fraud cannot be proved by presumption alone; but when a fraudulent act is shown to have been committed by one or more persons, presumption is allowable to show the complicity of others who have authorized or procured it to be committed: Dayton v. Monroe, 47 Mich., 193; 10 N. W., 196. In the absence of any showing to the contrary, the time of the delivery of a deed will be presumed to have been the same as the date of its acknowledgment: Johnson v. Moore, 28 Mich., 3.

clude evidence to show that in the particular case fact *d* does not exist; and yet it is so uniform as that the rule has been established that in these cases when the facts *a*, or *a* and *b*, or *a*, *b*, and *c* are shown, fact *d* shall be presumed to exist, in the absence of evidence that it does not, and evidence is admitted to show that in the particular case it does not exist. In these cases of presumptions of law, the facts upon which the presumptions are founded are given a probative force, *by reason of the rule of law*, which in the particular case they might not have, except for the rule; in the one case establishing fact *d* and excluding all evidence to show that it does not exist, and in the other, establishing fact *d* in the absence of evidence to show it does not exist. In the case of presumptions of fact, so called, the facts upon which it is founded are given their natural probative value unaided by any rule of law requiring any particular conclusion from them.

§ 404. **Conclusive presumptions of law, illustrations of.**—The statutes of limitations furnish illustrations of this class. It appearing that the obligation arose at a time anterior to the beginning of the period fixed by the statute, and that there has been no recognition of it within the statutory period, then it is conclusively presumed that the obligation is extinguished.⁴ Judicial records are conclusively presumed to be correct.⁵ Title by prescription is another illustration.⁶ Estoppels, discussed *post*, § 416, are also within the principle.

§ 405. **Disputable presumptions of law, illustrations of.**—Proof that an individual has acted notoriously as a public officer, raises the presumption of his appointment to the office and is *prima facie* evidence of his official character and right to perform the duties of the office, without producing his commission or appointment.⁷ Proof that he was reputed to be, and was acting as such officer at the time in question, is *prima facie* sufficient.⁸ The rule of law excluding parol proof when

4—See, *ante*, §§ 222 *et seq.*

5—Reed v. Jackson, 1 East, 355.

6—Uninterrupted occupation of lands for a period fixed gives rise to a conclusive presumption of title in the occupier: Big Rapids v. Comstock, 65 Mich., 78; 31 N. W., 811; Yelverton v. Steele, 40 Mich., 538.

7—1 Greenl. Ev., §§ 83, 92.

8—Scott v. Detroit Y. M. S., 1 Doug. Mich., 119, 152; McCoy v. Curtice, 9 Wend., 17. And so, evidence that a man officiated regularly as a minister or clergyman, may be received, and is sufficient *prima facie* to show that he was such: Goshen v. Ston-

there is written evidence, does not apply in these cases.⁹ And where it was shown that the person was acting as justice of the peace at the time in question, it was held to be sufficient evidence that he was such officer. The court said: "It is not usually necessary to prove more than this, and the acts of a person in the full enjoyment of public office do not require any further sanction. The actual legal right of an incumbent cannot be tried in a collateral action between third parties, and the user of an office may be proved by anyone who knows the fact."¹⁰ And it is not material how the question arises, whether in a civil or criminal case; nor whether the officer is or is not a party to the record.¹¹

Other common illustrations of this class of presumptions are found in the presumption of innocence;¹² that one intends the natural consequences of his acts;¹³ that a state of things shown to exist continues;¹⁴ that one absent from his home

ington, 4 Conn., 219; Berryman v. Wise, 4 Term. R., 366; Town of Vernon v. East Hartford, 3 Conn., 475; Hayes v. P., 25 N. Y., 390; State v. Rood, 12 Vt., 396.

9—Cahill v. Kalamazoo Ins. Co., 2 Doug. Mich., 124, 136. Where it was proved that a person who signed a policy of insurance, was acting as president of the insurance company, this was held sufficient evidence that he *was* such officer, and to bind the company: *Ibid.*, p. 136. Where the question of official character arises collaterally, parol evidence is admissible to show an actual incumbency *de facto*: Druse v. Wheeler, 22 Mich., 439; see, Walrath v. Campbell, 28 Mich., 117, and People v. Marlon, 29 Mich., 38. Persons in the actual and unobstructed exercise of office, must be held to be legal officers, except in proceedings where their official character is the issue to be tried as against themselves. Johns v. People, 25 Mich., 503; Keator v. People, 32 Mich., 484; Corrigan's case, 37 Mich., 66. And it will not be presumed that a *de facto* officer has neglected to make any necessary qualification: F. N. Bank of St. Joseph v. St. Joseph, 46 Mich., 256; 9 N. W., 838.

10—Facey v. Fuller, 13 Mich., 527,

531. And to this end evidence is admissible, not only to show that he exercised the office before or at the period in question, but also, limited to a reasonable time, that he exercised it afterwards: Doe v. Young, 8 Ad. & El. N. S., 63; Cabot v. Given, 45 Maine, 144.

11—1 Greenleaf Ev., § 92. It seems, however, that executors, in an action brought by themselves, cannot prove their office by general reputation: Middlesworth v. Nixon, 2 Mich., 425; Albright v. Cobb., 30 Mich., 355. When letters of guardianship are issued, the presumption is that they were regularly granted and after lawful proceedings had for that purpose: Burrows v. Bailey, 34 Mich., 64. A person actually obtaining an office with the legal *indicia* of title is a legal officer until ousted, so as to render his official acts valid as if his title were not disputed: Auditors v. Benoit, 20 Mich., 176.

12—Maher v. People, 10 Mich., 212; Monaghan v. Agricultural F. I. Co., 53 Mich., 238; 18 N. W., 797.

13—People v. Potter, 5 Mich., 1; Allison v. Chandler, 11 Mich., 512.

14—Ormsby v. Barr, 22 Mich., 80; Howland v. Davis, 40 Mich., 545.

and unheard of for seven years is dead;¹⁵ that all persons are sane;¹⁶ that officials have acted regularly,¹⁷ and the like.

HEARSAY EVIDENCE.

§ 406. **Definition of hearsay evidence.**—Hearsay evidence is evidence of the declarations of another not made under oath and subject to cross-examination, offered to prove the truth of the fact involved in the declarations. If offered to prove simply that the declarations were made, regardless of whether true or false, it is not hearsay. As where in defamatory action evidence of the speaking of the words alleged as slanderous is not hearsay. So, evidence that the plaintiff called the defendant a liar offered in mitigation of damages in an action for an assault provoked by the words. The defendant does not offer the evidence to prove that he, the defendant, is a liar, but to prove that plaintiff said so. The principal objections to hearsay evidence are, *first*, that the declarations offered were not made under oath; *second*, that the declarant, upon whose credit the declaration depends, is not subject to cross-examination.¹⁸

There are, however, some exceptions to the rule, where the circumstances of the case are such as to afford a presumption that the hearsay is true;¹⁹ such as, when the hearsay is a part

15—*Newman v. Jenkins*, 10 Pick., 515; *People v. Eaton*, 59 Mich., 559; 26 N. W., 702.

16—*People v. Garbutt*, 17 Mich., 9.

17—*Scott v. Detroit Young Men's Society*, 1 Mich., 119, 150; *Love v. Wood*, 55 Mich., 451; 21 N. W., 887; *Westbrook v. Miller*, 56 Mich., 148; 22 N. W., 256.

18—*Stockton v. Williams*, 1 Doug. Mich., 570; *Hamilton v. People*, 29 Mich., 173; *Ruggles v. Fay*, 31 Mich., 141; *Hunt v. Strew*, 33 Mich., 85. Thus, the statements of persons not witnesses, through whose hands a treasury note has passed, are not admissible in evidence, either for the purpose of identification, or to prove the note counterfeit, in a suit by one who has taken the note, to recover its value: *Atwood v. Cornwall*, 28 Mich., 336. In an action by a wife for alienation of husband's affections, the hus-

band's statements tending to show defendant's attitude toward the wife cannot be shown against defendant: *Derham v. Derham*, 125 Mich., 109; 83 N. W., 1005. Letters written by wife to defendant in a *crim. con.* case tending to show alienation of her affections by defendant are competent: *Dalton v. Dregge*, 99 Mich., 250; 58 N. W., 57. Statements made by wife to husband in absence of defendant tending to show defendant's guilt are not competent: *Ibid.* An inventory based in part on information received by the one making it from other persons is inadmissible: *Black v. Simon*, 116 Mich., 382; 74 N. W., 527.

19—1 *Greenleaf's Ev.*, §§ 98-99; *Roscoe's Cr. Ev.*, 4th Am. ed., 22. A judgment will not be reversed because hearsay testimony, which is *not irrelevant*, has been admitted without objection at the time. By allowing such

of the transaction in question, or relates to matters of public and general interest, or to ancient possessions, relationship, declarations against interest, and testimony of a deceased witness.²⁰

§ 407. Some exceptions to the rule—hearsay as a part of the transaction.—Where the inquiry is into the nature and character of a transaction, not only what was done, but what was said also, by both parties, during the continuance of the transaction, is admissible.²¹

A person's statements and expressions while suffering from ill health or physical injury, are sometimes admissible for the

evidence to be introduced without objection, a party treats it as competent, and is thereby precluded from raising the question on error: *Hadden v. Shortridge*, 27 Mich., 212.

20—*Stockton v. Williams*, 1 Doug., 570; 1 Phil. Ev. Ch. & Edwards' notes, 185, 201.

Where defendant referred the plaintiff to a third person for information upon a subject afterwards coming in controversy, the conversation had with the third person and his statements upon the subject referred to him, are a part of the *res gestae*, and admissible in evidence, notwithstanding the defendant may have been absent during the interview with the third person: *Beebe v. Knapp*, 28 Mich., 53.

21—*Stockton v. Williams*, 1 Doug. Mich., 570; 1 C. H. & Edwards' notes, 189, 202, note 81. When the state of mind, sentiment or disposition of a person at a given time becomes pertinent subjects of inquiry, his declarations and conversations, being a part of the *res gestae*, may be shown: *Barthelemy v. People*, 2 Hill, 248. Where evidence of an act done by a party is admissible, his declarations made at the time, having a tendency to elucidate or give character to the act, and which may derive a degree of credit from the act itself, are admissible as a part of the *res gestae*: *Sessions v. Little*, 9 N. H., 271. And so, when the declarations are so connected with a material fact as to explain or qualify it, or show the intent with which it was done: *Russel*

v. Frisbie, 19 Conn., 205; and see, *Dillon v. People*, 8 Mich., 357. But subsequent statements of a party of his motives and intentions will not be received; it is only what was said at the time of the transaction, which as a part of the *res gestae*, is admissible: *Dawson v. Hall*, 2 Mich., 390. Unless such statements bear against him: *Dillon v. People*, 8 Mich., 357. But where the allegation was that the wife, by undue influence induced her husband to make a will, evidence was admitted that he said he regretted the marriage; that he was not master at home; that he was afraid of his wife, and was compelled to submit to her demands: *Beaubien v. Cicotte*, 12 Mich., 450. A witness testifying to an occurrence, will not be permitted to state what a bystander, who is not a witness in the cause, said about the transaction at the time, as the bystander's statements or version of the affair would be merely hearsay: *Detroit & Milwaukee Ry. Co. v. Steinberg*, 17 Mich., 99, 107-8. But where the question was as to whether a bone had been fractured, and it was important to know whether the movement of the limb produced a grating sound, it was held that the remarks of bystander at the time the limb was being manipulated, showing that they heard such a sound, might be proved: *Hitchcock v. Burgett*, 38 Mich., 501. Nor can a witness' statements out of court be given in evidence to corroborate his own testimony: *Brown v. People*, 17 Mich., 429. But see, *Stewart v. People*, 23 Mich., 63.

purpose of showing his condition at the time, such statements being more in the nature of direct evidence than hearsay. Thus, in an action for an assault and battery, the plaintiff's complaints of pain and soreness, made to other persons, at the time and soon after the assault, are competent in his own behalf, in respect to the extent of the injury, when taken in connection with other testimony,²² and in case of malpractice, the patient's exclamations of pain and suffering, and her complaints as to the nature of her sufferings during and after the operation, were admitted. This being the only mode in which their nature and extent can be ascertained, such exclamations and statements are original evidence.²³

§ 408. **Pedigree.**—Hearsay is sometimes admitted to prove parentage, marriage, descent and relationship. But such evidence is confined to the declarations of deceased persons, who were connected by blood or marriage to the person to whom they relate.²⁴ Therefore, what has been said by servants and acquaintances of the family is not admissible.²⁵ But general reputation in the family, shown by surviving members of it, has been held admissible.²⁶ On the same principle, entries in a

22—Caldwell v. Murphy, 1 Kern 416; Werely v. Persons, 1 Tiff. N. Y., 344; Baker v. Griffin, 10 Bosw., 140; Aveson v. Kinnaird, 6 East., 188; Elliott v. Van Buren, 33 Mich., 49; Johnson v. McKee, 27 Mich., 471; Grand Rapids & Indiana Ry. Co. v. Huntley, 38 Mich., 503. A physician may testify to examinations of pain on an occasion when an examination was being made for purposes of treatment: Heddle v. City El. Ry. Co., 112 Mich., 547; 70 N. W., 1096; People v. Foglesong, 116 Mich., 556; 74 N. W., 730; Butts v. Eaton Rapids, 116 Mich., 539; 74 N. W., 872; Beath v. Rapid Ry. Co., 119 Mich., 512; 78 N. W., 537; Mott v. Detroit, etc., Ry. Co., 120 Mich., 127; 79 N. W., 3. But not, it seems, if the examination was made for the purpose of enabling him to testify: Grand Rapids & I. Ry. Co. v. Huntley, 38 Mich., 537; McKormick v. West Bay City, 110 Mich., 265; 68 N. W., 148.

23—Hyatt v. Adams, 16 Mich., 200.

And see, Johnson v. McKee, 27 Mich., 471; Elliot v. Van Buren, 33 Mich., 49. But exclamations of pain during an examination made by a physician for the purpose of enabling him to testify as to the extent of an alleged injury, are not admissible: Grand Rapids & Indiana Ry. Co. v. Huntley, 38 Mich., 537, 543-4.

24—1 Greenl. Ev., 103; Jackson v. Browner, 18 Johns., 37.

25—Johnson v. Lawson, 2 Bing., 86.

26—Doe v. Griffin, 15 East., 293. Family connection and membership, deaths, births, marriages and relationship, may be shown by the common understanding and traditions in the family and among relatives, and need not rest upon the direct personal knowledge of the witness: Van Sickle v. Gibson, 40 Mich., 173. Family history, as known and recognized in the family, seems not to be objectionable as hearsay: Fraser v. Jennison, 42 Mich., 206, 235; 3 N. W., 882.

family Bible, made by a deceased parent, inscriptions on tombstones and on pictures, and charts of pedigree, are admitted.²⁷

§ 409. **Matters of public and general interest.**—Hearsay is admissible in this class of cases, upon the principle that, in matters of public interest, all persons must be conversant; and rights which are common, are naturally talked of in community. The subjects to which such evidence is applicable are public prescriptions, customs, boundaries, highways, and the like. But hearsay under this head is admitted only in cases of ancient rights, and in respect to the declarations of persons supposed to be dead; the origin of the right being antecedent to the time of legal memory, and incapable of proof by living witnesses; the general rule being that facts, which from their nature and antiquity do not admit of proof by living witnesses, may be proved by hearsay. Such declarations, however, must have been made before any dispute arose. But in matters of mere *private right*, evidence of reputation or of common fame is inadmissible, and so of reputation or hearsay with respect to particular facts.²⁸ Therefore general hearsay and public reputation are admissible to prove which of two persons, claiming by the same name, were the grantees or reservees in a treaty.²⁹

§ 410. **Evidence of witnesses deceased, or out of the state.**—In some cases evidence of what a witness since deceased has sworn to, is admissible. In this case the objection that the declarant did not speak under oath and subject to cross-examination does not obtain, but it is still in its nature, when used, hearsay. To allow the admission of such testimony, it must be shown that a prior trial was had between the same parties and for the same cause of action.³⁰ To prove that fact the record is the best evidence, and must be introduced.³¹ It must also be proved that the witness is dead or unavailable.³²

27—1 Greenl. Ev., §§ 104, 105. It is competent for a person to testify to his own age: Cheever v. Congdon, 34 Mich., 196.

28—Stockton v. Williams, 1 Doug. Mich., 546, 570.

29—*Ibid.*, and Campau v. Dewey, 9 Mich., 381; see, Stockton v. Williams, 1 Doug. Mich., 546.

30—Wilbur v. Selden, 6 Cow., 162, 164; Osborn v. Bell, 5 Denio, 370.

31—Beals v. Guernsey, 8 Johns., 446; White v. Kibling, 11 Johns., 128.

32—Powell v. Waters, 17 Johns., 176; Wilbur v. Selden, 6 Cow., 162. When a witness has died, or is sick, insane, or beyond the jurisdiction of

The proof of what the deceased testified, may be made by any person who heard him, even though he took no minutes of the evidence.³³ An attorney or other person who took minutes at the time the witness testified, and swears to their accuracy, may state on a subsequent trial what the deceased swore to, although he cannot testify from his mere recollection without a reference to his minutes. It is sufficient if, after refreshing his recollection from his minutes, he can then state what the evidence given by deceased was.³⁴

It is not necessary to prove the precise words of the deceased witness. If the substance is fully given it is all that is required.³⁵

the court, his testimony given upon a former trial upon the same issue and between the same parties may be introduced: *Howard v. Patrick*, 38 Mich., 685-9; *People v. Sligh*, 48 Mich., 54; 11 N. W., 782. And the fact that the deposition of a witness, who at the time of the second trial of a case is beyond the jurisdiction of the court, has been taken by the consent of the parties, will not prevent his testimony on the former trial, as taken down by the stenographer, from being offered in evidence. *Labar v. Crane*, 56 Mich., 585, 23 N. W., 323.

As to whether it is competent to prove the testimony given on a former trial by a witness who is only temporarily absent from the state, where it does not appear that he had been subpoenaed, or that any effort had been made to procure his testimony or personal attendance at the trial; see, *Hiscock v. Norton*, 42 Mich., 320; 3 N. W., 868.

33—*Grimm v. Hamel*, 2 Hilt., 434.

34—*Van Buren v. Cockburn*, 14 Barb., 118; *Huff v. Bennett*, 2 Selden, 337; see, *Fisher v. Kyle*, 27 Mich., 454. A memorandum produced by a witness as to what a party swore to on a former trial, and made at that time, may be admitted in another trial as evidence of what such testimony was, but it is entitled to no greater weight than should be accorded to the evidence of the witness, if he were swearing from his own personal recollection of what was testified to on the former trial: *Spalding v. Lowe*, 56 Mich., 366; 23 N. W., 46.

35—*Chaffee v. Cox*, 1 Hilt., 79; *Clark v. Vorce*, 15 Wend., 193; *Clark v. Vorce*, 19 Wend., 232-3; *Burson v. Huntington*, 21 Mich., 415; see, also, *Halsey v. Sinsebaugh*, 1 E. P. Smith, 485; *Russell v. Hudson R. Ry. Co.*, 3 *Ibid.*, 134, 140; *Crawford v. Loper*, 25 Barb., 449.

CHAPTER XXIII.

OF EVIDENCE, CONTINUED, AND PARTICULARLY OF ADMISSIONS AND DEPOSITIONS.

ADMISSIONS.

- § 411. Classification.
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ADMISSIONS.

§ 411. **Classification.**—This branch of evidence may be divided into *direct* admissions, those which are made expressly for the purpose of being used in the particular suit, and *collateral* admissions, or those consisting in the acts or expressions of the party *aliunde* without reference to the suit.

§ 412. **By pleading.**—It is a rule of pleading that every *material* allegation in a declaration or other pleading, which is not traversed or denied by the opposite party, is admitted, so that the party is precluded at the trial from asserting, and the court or jury from finding the contrary. As the general issue is the only plea in bar, instances of this description, before judgment, are chiefly confined to cases where there is a plea in abatement or a demurer.¹

¹—A plea or notice of tender is an admission of the justice of the plaintiff's claim to the extent of the sum tendered: *Roosevelt v. N. Y. & H. R. Co.*, 45 Barb., 554.

Where a party agrees with the opposite party to admit a certain fact on the trial of the cause, he will be conclusively bound by such obligation.²

§ 413. **By record.**—Whatever a person has admitted or confessed on record, or whatever has been found by verdict, or by the court, against him, *in a court having jurisdiction of the cause* and parties, he is precluded from denying. Whatever is admitted on the record need not be proved, and cannot be disproved. If a defendant demur to the plaintiff's declaration, he is, unless the demurrer is withdrawn, precluded from denying any matter alleged in it; for a demurrer admits facts well pleaded, and the only question to be determined is the amount of damages.³

§ 414. **By tender.**—Where the demand is for a sum certain in money, or capable of being ascertained by mere computation a tender may be made. The effect of such tender is to admit every fact which it would be necessary for the plaintiff to prove to enable him to recover the amount so tendered.⁴ If the tender is so made before suit and is paid into court after action brought it belongs to the plaintiff absolutely; the defendant cannot reclaim it, though paid by mistake. So much of the plaintiff's claim is considered as stricken out of the declaration and he can only recover such excess as he is able to prove, if any.⁵ If tender is made after suit brought its effect is controlled by statute.⁶ This statute does not bar further prosecution of the action, but stops interest and subjects plaintiff to subsequent costs.⁷

2—The circuit court rule 39, requires such agreement to be in writing, and they should be in justices' courts unless made in open court. Where a plaintiff declares, in a suit commenced by process duly served, the defendant's oral admission at the trial, of the plaintiff's cause of action, is sufficient to authorize the justice to render judgment against him: *Crouse v. Derbyshire*, 10 Mich., 479.

3—See, *ante*, § 280. A party cannot be compelled to accept his adversary's admissions in lieu of record evidence unless he chooses to do so. *John Hancock M. Life Ins. Co. v.*

Moore, 34 Mich., 41; *Kimball & A. M. Co. v. Vroman*, 35 Mich., 321.

4—*Thompson v. Townsend*, 41 Mich., 346; 1 N. W., 1042.

5—*Thompson v. Townsend*, 41 Mich., 346; 1 N. W., 1042.

6—C. L., §§ 10405-10406.

7—*Rathbun v. Ranney*, 14 Mich., 382; *Wetherbee v. Kusterer*, 41 Mich., 359; 2 N. W., 45; *Snyder v. Quarton*, 47 Mich., 211; 10 N. W., 204; *Wilcox v. Lafin & R. P. Co.*, 44 Mich., 35; 5 N. W., 1091. For other cases on the law of tender, see, *ante*, § 242, *et seq.*

§ 415. **By deed.**—A party is estopped from averring the contrary to what he has expressly alleged in an instrument under his seal; thus, if he have entered into a bond to perform the covenants in an indenture, he cannot set up as a defense, that the indenture was never executed.⁸

A recital in a deed is evidence against the party executing it, or one claiming under him.⁹ A recited instrument is only evidence of so much as is recited; if any other portion of the deed is required in evidence, it must be produced and proved in the usual way.¹⁰ A recital is not allowed to operate as an estoppel, unless such recital is in the form of a direct and precise allegation.¹¹

§ 416. **Estoppel by matter in pais.**—This is the most important class of estoppels, and includes every act, representation, and course of conduct, upon the faith of which one party has induced the other to act, or by means of which he has acquired an advantage to himself.¹² As far as regards the transaction which has originated from such act, representation, or course of conduct, the party doing or pursuing it is concluded, as against the other, from averring the contrary.

When a party makes an admission with the intention to influence the conduct of another, and the latter acts upon it, and will be injured if the party is allowed to gainsay it, the admission is conclusive by way of estoppel.¹³ But it would be

8—Cunningham v. Mackenzie, 2 B. & P., 598.

9—Jackson v. Parkhurst, 9 Wend., 209; Hill v. Hill, 4 Barb., 419; Ford v. Grey, 1 Salk., 286. The recital of a fact in a deed, is, as against the grantee in the deed, and all persons claiming under him through that deed, evidence of the fact recited therein: Lorry v. Bank of Orleans, 9 Paige, 649; Demeyer v. Legg, 18 Barb., 14; Jackson ex. dem. Banyar v. Willson, 9 Johns., 92; see, Stockton v. Williams, 1 Doug. Mich., 546; Blanchard v. Tyler, 12 Mich., 339. But the recital of the consideration in a deed is not evidence of the real consideration in a suit by the vendor to enforce his lien for the purchase price: Mowray v. Vandring, 9 Mich., 39.

10—Gillett v. Abbott, 7 Ad. & Ell., 783.

11—Dempsey v. Tyler, 3 Duer, 73; Borst v. Corey, 16 Barb., 136; Huntington v. Havens, 5 Johns., Ch., 23.

12—Estoppel does not arise from silence or inaction unless the party knows there is occasion to act or speak: Griffin v. Nichols, 51 Mich., 575; 17 N. W., 63. The conduct relied upon to create an estoppel must have been influential in leading another to change his condition so that except for the estoppel he will be injured: Burdick v. Michael, 32 Mich., 246; Maxwell v. Bay City B. Co., 41 Mich., 453; 2 N. W., 639; Mizner v. Russell, 29 Mich., 229; Crane v. Reeder, 25 Mich., 303; Palmer v. Williams, 24 Mich., 328; De Mill v. Moffat, 49 Mich., 125; 13 N. W., 387.

13—Dezell v. Odell, 3 Hill, 216, 219; Rickard v. Sears, 6 Ad. & E.,

otherwise, of a declaration made to a third person, without any intention of influencing the conduct of the party, even though he afterwards heard of and acted on it.¹⁴

§ 417. **Admission by parties to the record.**—An admission is the statement or conduct of a party on the record, or one with whom he stands in privity as to the right involved, which when offered in evidence is against the interest of such party. The declaration or admissions of a party on the record are evidence for the opposite party.¹⁵ But when the plaintiff on the

469; see, *Heane v. Rogers*, 9 B. & C., 586. See note 12, *ante*.

14—*Reynolds v. Lounsbury*, 6 Hill, 534; *Strong v. Strickland*, 32 Barb., 284, 289; *Pennell v. Hinman*, 7 *Ibid.*, 644; *Dewey v. Field*, 4 Metc., 381.

15—*Crouse v. Derbyshire*, 10 Mich., 496; *Dawson v. Hall*, 2 Mich., 390; *Thompson v. Richards*, 14 Mich., 172. Admissions made by a party to the record, whether upon the witness stand or elsewhere, relative to matters material to the issue, may be given in evidence by the opposite party, and persons hearing the admissions, may be called to prove what was said, and if the admissions were reduced to writing at the time, in the exact language used, and if the writing is proven to be correct, the writing itself may be introduced as evidence of the admission: *Potter's appeal*, 53 Mich., 115; 18 N. W., 575. But a written agreement is not to be varied by the parol admissions of the party: *Hunt v. Thorn*, 2 Mich., 213, 223. Nor can a party be compelled against his will to accept his adversary's admissions in lieu of record evidence: *John Hancock Mut. Life Ins. Co. v. Moore*, 34 Mich., 41. And it is a general rule that verbal admissions are only receivable of facts provable by parol: *Lightfoot v. People*, 16 Mich., 512. An invalid written agreement, however, is admissible as a parol admission of the facts recited in it, but it is open to explanation and contradiction as parol evidence: *Hickey v. Hinsdale*, 12 Mich., 102. Where a defendant testifying admits that an alleged copy of a letter written by him is substantially correct, this is sufficient to make it evidence: *Kelley v.*

McKenna, 18 Mich., 381. An oral admission, made as evidence merely, in justice's court is not matter of record. Such admissions, made in open court, after issue joined, are, in the absence of mistake, or misapprehension, conclusive for the purposes of that trial, but do not preclude an appeal, and upon the trial on the appeal those oral admissions are to be proved the same as any other oral admissions: *Morrison v. Riker*, 26 Mich., 585. A party's statements cannot be proved in evidence in his own favor, but only so far as they are admissions against his own interest: *Page v. Stephens*, 23 Mich., 357. The declarations of a party respecting his ownership of property may be received in evidence in disparagement of his title, but not to prove ownership in himself. But where the nature of a person's possession is in dispute, his claim of ownership may be proved to show that he holds adversely, etc.: *Mich. Paneling Co. v. Parsell*, 38 Mich., 475. The declarations of a party against his own interest may be given in evidence as against him. But if only a part of his entire statement or conversation has been so given, he may show whatever has been omitted which bears upon the rest: *Vanneter v. Crossman*, 42 Mich., 404; 4 N. W., 216. The statement of a fact by one of the parties in the presence of the other and not denied, is admissible as evidence of the fact so stated: *Atwood v. Cornwall*, 28 Mich., 336; see, *Joselyn v. McAllister*, 25 Mich., 45. As to how far acquiescence in the acts of another will preclude a party, or be deemed equivalent to an admission, see, *Russell v. Miller*, 26 Mich., 1. Silence—

record has assigned his interest in the debt, or chose in action, of which the defendant had notice, evidence of admissions afterwards made by the plaintiff, as to the demands of the defendant against him, and which might impair the interest so assigned or prejudice the rights of the assignee, for whose benefit the suit is brought, are not admissible.¹⁶

Where an action was brought, in the name of the payee, upon a note not negotiable, and no evidence had been given, on the part of the plaintiff, that the payee was not the real owner of the demand; and defendants under plea of the general issue, and notice that the note was given for money won at playing cards, offered in evidence the written declaration of the plaintiff, that he had not then, and never had, any property in the note; that, at about the time it was given, the maker, and other persons, played at cards, and both parties informed him that the note was given for money won at cards; that it was made payable to him without his knowledge or consent; and that he did not know, at the time of making this statement, who was the owner of the note—*held*, that this statement was proper evidence. While it shows no cause of action in plaintiff, it shows none, legal or equitable, in any other person.¹⁷

If there are several parties on the same side, the admission of one of them will not affect the others unless there is a joint

when assent to be presumed from, to statements made in a person's presence: *Barry v. Davis*, 33 Mich., 515. The statement of a fact by one of the parties to a suit, in the presence of the other, and not denied, may be shown as evidence of an admission of the fact so stated: *Atwood v. Cornwall*, 28 Mich., 336. An admission of the genuineness of a signature is not necessarily an admission of the execution of the note to which it appears to be appended: *Mack v. Cole's Estate*, 130 Mich., 85; 89 N. W., 564. Admissions obtained by means of duress are not admissible: *Flagg v. People*, 40 Mich., 706.

16—*Frear v. Evertson*, 20 Johns., 142.

17—*Hogan v. Sherman*, 5 Mich., 60. Where one party has voluntarily made his trustee or agent the ostensible principal, and the only one capable of legal action, he will be bound by the

admissions of such trustee or agent. Where action is brought in the name of one person, for the benefit, as is claimed, of a *bona fide* assignee, the question whether there has been a *bona fide* assignment is not for the court, but for the jury; and the court, therefore, is not warranted in excluding the admissions of the nominal plaintiff, on the assumption that such assignment has been established by evidence: *Ibid.* If the owner of property stands by and quietly and without objection or making his rights known, sees another sell it as his own and receive pay for it, the owner will not be allowed thereafter to dispute the title of the purchaser. The rule is, that if one remain silent when in conscience he ought to speak, he will not be allowed to speak when in conscience he ought to be silent: *Mich. Paneling Co. v. Parsell*, 38 Mich., 480.

interest or common design between them, a mere community of interest is not sufficient.¹⁸

§ 418. **By parties in interest, though not on the record.**—The declarations, or admissions of the party interested, are in all cases receivable in evidence; but they must have been made while he had an interest, and they are receivable only so far as such interest is concerned.¹⁹

§ 419. **Admissions by co-trespassers.**—Where parties are established to be co-trespassers, or wrong-doers, or to have entered into the same criminal design, with a view to its establishment, the admission of one, as to the motives and circumstances of the trespass, will be evidence against all who are proved to have combined together for the common object.²⁰

§ 420. **By agents.**—The declarations, representations and admissions of an agent, made while acting within the scope of his authority, and in the discharge of his duties as agent, and with reference to such duties, and the subject matter of his employment, are admissible as evidence against his principal.²¹

18—Hackley v. Patrick, 3 Johns., 536; Whitney v. Ferris, 10 *Ibid.*, 66; Dawson v. Hall, 2 Mich., 390. And where the interest is joint, if the effect of the admission is to create an obligation, as, for example, where it is an admission that a condition precedent has been performed, it is evidence only against the party making it: Thompson v. Richards, 14 Mich., 172. Thus, one joint maker of a promissory note cannot by his admissions of payment or otherwise so bind the other as to take the note out of the bar of the statute of limitations as against the latter: Rogers v. Anderson, 40 Mich., 290. The declarations of a guardian, or next friend, are not admissible against the infant: Rex v. Mercer, 2 Stark, 366; Webb v. Smith, R. & M., 106. The declaration of a third person made in the presence of a party, and assented to by him, are admissible in evidence against him. And the assent of the party is presumed, if nothing is said by him inconsistent with that presumption: Com. v. Call, 21 Pick., 515.

19—1 Greenleaf Ev., § 180; see, Paine v. Stephens, 23 Mich., 357.

20—Daniels v. Potter, 4 C. & P., 262; Hough v. Marchant, 1 M. & M., 510; People v. Pitcher, 15 Mich., 403. The general rule is well settled that, where several persons are engaged in one common unlawful enterprise, whatever is said or done by any one of them in the prosecution of the common enterprise, or while it is still in progress, is evidence against all parties to it; but after the common purpose or enterprise has been fully completed or terminated, the statements of one or more of them in reference to anything connected with the past transaction, become as to the others *res inter alios*, mere hearsay, neither binding upon, nor evidence against any of the others, for the reason that they are no longer supposed to be acting with one common design, and one is in no sense the agent of the other: People v. Pitcher, 15 Mich., 403-4.

21—Benedict v. Denton, Walk., Ch., Mich., 336; Horner v. Fellows, 1 Doug. Mich., 54; Hunter v. Hudson River I. & M. Co., 20 Barb., 494; Milburn v. Belloni, 34 *Ibid.*, 607; Nelson v. Cowling, 6 Hill, 336. The ad-

Before such declarations or admissions can be admitted the agency must be established, and this cannot be done by general reputation.²²

Where a party adopts the acts or expressions of another, or makes use of what another asserts, he thereby gives it all the force of an admission by himself. As, where the defendant procured another to make an affidavit of certain facts in order

missions of an agent are only evidence against the principal when they constitute a part of the *res gestae*. They must accompany the transaction in which the agent acted. What he states at a subsequent time, as, after the close of the transaction, or when his agency is ended, is not admissible: *Converse v. Blumrich*, 14 Mich., 122; *Bowen v. School District*, 36 Mich., 149; *Horner v. Fellows*, 1 Doug., 54; *Thalhimer v. Brinckerhoff*, 4 Wend., 394; *Fogg v. Child*, 13 Barb., 246; *Budlong v. Van Nostrand*, 24 *Ibid.*, 25; *Isles v. Tucker*, 5 Duer, 303; and see, *Michigan Central Ry. Co. v. Coleman*, 28 Mich., 440; *Kimball v. Vroman*, 35 Mich., 310. So, as to officers of a corporation: *Beunk v. Valley City D. Co.*, 128 Mich., 562; 87 N. W., 793. An agent in charge of an elevator cannot make an admission of want of repair of such elevator: *Hall v. Murdock*, 119 Mich., 389; 78 N. W., 329. A statement by a telegraph operator that a message had not been delivered made to one entitled to know, is competent as an admission against the telegraph company: *Carland v. Telegraph Co.*, 118 Mich., 369; 76 N. W., 762.

Although the declarations of an agent when acting within the scope of his agency and made in connection with some transaction as such agent, are receivable in evidence as a part of the *res gestae*; yet his mere possession of chattels belonging to his principal, would not empower him to admit away his principal's title: *Michigan Panelling Co. v. Parsell*, 38 Mich., 475; see, *Cook v. Knowles*, 38 Mich., 316.

Admissions made during a suit by the former agent of one of the parties cannot be shown in evidence in the case unless for their bearing upon his own credibility as a witness: *Canadian Bk. v. Coumbe*, 47 Mich., 300;

11 N. W., 196. See, also, *Benner v. Felge*, 51 Mich., 568; 17 N. W., 60. The admissions of an agent made after the termination of his agency are not competent or relevant evidence against his principal: *North v. Metz*, 57 Mich., 612; 24 N. W., 759.

An agent to make an offer, is agent to receive the reply: *Ferguson v. Hemingway*, 38 Mich., 159.

22—*Perkins v. Stebbins*, 29 Barb., 523. The acts and declarations of one who assumes to be acting as the agent of another, are not evidence against the supposed principal until the fact of agency is established by other evidence: *Hatch v. Squier*, 11 Mich., 185; *Carpenter v. Continental Ins. Co.*, 61 Mich., 635; 28 N. W., 749. Proof that a person is clerk for another, does not establish his right to receive payment for his employer of demands not shown to have any connection with the business, and evidence that payment was made to such clerk of such demands, is not a sufficient showing of agency to authorize evidence of the admissions of such clerk of the payment thereof to him: *Bowen v. School District, &c.*, 36 Mich., 149.

Stipulations made by the attorneys in a cause will not bind their respective clients in other suits. Attorneys as the agents of the parties whom they represent in a cause, have authority, by virtue of such agency, to make admissions which will be binding upon the parties in that particular case, but they have no authority by reason of such relation to bind a person generally by admission of facts: *Isabelle v. Iron Cliffs Co.*, 57 Mich., 120; 23 N. W., 615; *Fletcher v. Chicago, etc., Ry. Co.*, 109 Mich., 364; 67 N. W., 330; *Evans v. Montgomery*, 95 Mich., 497; 55 N. W., 362.

to put off the trial, such affidavit was held admissible evidence against the defendant of the facts stated therein.²³

§ 421. **Admissions by partners.**—The admission of a person *proved to be a partner* with another as to matters relating to the partnership, is evidence against the other.²⁴ But the fact of the partnership must first appear or be proved *aliunde* in order to let in the admission of one as evidence against the other. The confession of a debt by one partner, however, after the dissolution of the partnership, is not admissible evidence against the other partners.²⁵

23—Johnson v. Ward, 6 Esp., 47; see, Gardner v. Moulton, 10 Ad. & Ell., 464. So, the statement of a fact by one of the parties in the presence of the other, and not denied, may be admissible in evidence of the fact so stated: Atwood v. Cornwall, 28 Mich., 336. And the filing of the affidavit of a physician as to cause of death is an admission by the beneficiary filing it that death was caused as therein stated: Wasey v. Travellers Ins. Co., 126 Mich., 120; 85 N. W., 459. See, also, John Hancock L. I. Co. v. Dick, 117 Mich., 518; 76 N. W., 9. So the testimony of an agent on an inquest is not competent as an admission against his principal: Andrews v. Tamarack Mining Co., 114 Mich., 375; 72 N. W., 242. So sometimes if he fail to deny a statement made by another: Matthews v. Forslund, 112 Mich., 591; 70 N. W., 1105; Connell v. McNett, 109 Mich., 330; 67 N. W., 344.

24—Nichols v. Downing, 1 Stark., 81; Walden v. Sherburne, 15 Johns., 409; Pennoyer v. David, 8 Mich., 407. A partner binds his firm only on the theory of an implied agency for the purpose of the mutual adventure, and the agency does not extend beyond what may be fairly regarded as coming within its reach: Hotchin v. Kent, 8 Mich., 528; see, Osborn v. Osborn, 36 Mich., 48. A partner's admissions cannot bind his associates in transactions foreign to the partnership; nor can his admissions bring such matters within the scope of the partnership business: Heffron v. Hannaford, 40 Mich., 305. The admissions of each of two persons made

on different occasions, that they were partners, is sufficient to establish the partnership: Chamberlin v. Fisher, 117 Mich., 428; 75 N. W., 931; Armstrong v. Potter, 103 Mich., 409; 61 N. W., 657.

25—Baker v. Stackpole, 9 Cow., 420. But the rule stated in the text as to the effect of the admission of a partner after dissolution, is somewhat modified in this state; upon that point our supreme court say, that "One partner, after dissolution of the firm, cannot, by his admission or contract, create a new partnership liability, nor for a like reason can he by his admission revive a claim against the firm which has been barred by the statute of limitations, since this is equivalent to a new contract. On the other hand, with the exception of claims barred by the statute of limitations and others coming within a similar reason, we think it equally clear on principle, that the admission of a partner, made after such dissolution, having reference to previous actual partnership dealings, or transaction, stands upon the same grounds, and is evidence against the firm in like manner, as if made before such dissolution. The dissolution cannot destroy the joint liability of the partners, nor alter their relations to third persons in respect to contracts made, or transactions which occurred before the dissolution. The dissolution acts upon future, not upon past transactions. As to persons whose claims have been contracted on the credit of the firm, the partnership, for all substantial purposes, continues until such claims have been satisfied. And persons who

In an action against persons as partners, the declarations of one are not admissible to prove the others to be partners; they are to be received as evidence of the fact only against the person making them.²⁶

§ 422. **By guardian.**—A guardian cannot bind his ward by admissions adverse to the ward.²⁷

§ 423. **Declarations by former owner of demand in suit.**—Declarations made by the former owner after parting with title are not admissible to effect the rights of one deriving title from him, although such former owner be dead. But where made by a former owner, while he still was the owner, they are competent against the subsequent purchaser.²⁸

§ 424. **Admissions by husband or wife.**—The admissions of the wife when she can be considered the agent of the husband, are evidence against him.²⁹ Therefore, where the wife has acted for her husband, and with his assent, in any department

have had dealings with the firm during its continuance, are, as to all matters touching such dealings entitled to the same benefit from the admissions of a single partner, whether made before or after the dissolution, unless shown to be false or fraudulent. But the admission of a single partner, after dissolution, of a pre-existing partnership liability, must be confined to cases, where there have been, *in fact*, previous partnership dealings with the plaintiff, or some transactions of the firm out of which a liability to the plaintiff might have originated; and the fact that there have been such dealings or transactions, must be shown by some general evidence at least, outside of the admission itself": *Pennoyer v. David*, 8 Mich., 407.

26—*Whitney v. Ferris*, 10 Johns., 66; *McPherson v. Rathbone*, 7 Wend., 219. The acts and declarations of a partner actually engaged in a venture in his own name, cannot be proved for the purpose of fixing a liability upon the partnership in respect to such venture: *Lockwood v. Beckwith*, 6 Mich., 168.

27—The guardian *ad litem*, of an infant defendant cannot bind his ward by admissions against his interest:

Cooper v. Mayhew, 40 Mich., 52. Nor can the natural guardian. The father is the natural guardian of his child, but he has no right to admit away the rights of the ward whose person is committed to his custody. He is guardian of the person of his child only, and has no control of his estate: *Power v. Harlow*, 57 Mich., 107; 23 N. W., 606.

28—And where personal property has been sold, the subsequent admissions and declarations of the former owner are not admissible to affect the title of the vendee: *Paige v. Stephens*, 23 Mich., 357; *Muncey v. Sun Insurance Office*, 109 Mich., 542; 67 N. W., 562; *Stansell v. Leavitt*, 51 Mich., 536; 16 N. W., 892; sec. 1 Greenl. Ev., § 190, ed. 16. The death of a party to a suit before it is brought to trial, does not exclude evidence of his admissions, nor affect the validity of a deposition taken during his lifetime: *Matson v. Melchor*, 42 Mich., 477; 4 N. W., 200. So as to entries in books of a deceased person: *Bliss v. Estate of Plummer*, 103 Mich., 181; 61 N. W., 263.

29—*Riley v. Suydam*, 4 Barb., 222; *Hopkins v. Mollinieux*, 4 Wend., 465.

of business, her admissions or acknowledgments are evidence to charge the husband.³⁰ But she cannot bind her husband by admissions unless they fall within the scope of the authority which may reasonably be presumed to have been derived from him.

The general rule is, that the wife's admissions will not bind the husband; except when acting as his agent. The declaration of husband and wife are subject to the same rule of exclusions which govern their testimony as witnesses.³¹ The wife is not bound, nor can she be affected by the admission of her husband as to her separate estate.³²

§ 425. **Admissions, extent of and how construed.**—The entire admission is to be taken together, and if, in relation to a debt, it amounts to a denial of any present indebtedness, it will not alone be proof of the debt.³³ So, if the admission be that

30—Clifford v. Burton, 1 Blng., 199; Petty v. Anderson, 3 Ibld., 170; Cotes v. Davis, 1 Camp. N. P., 485; see, Crosby v. Percy, 1 Camp., 304; Palethorp v. Furnish, 2 Esp., 511; and Gates v. Brower, 5 Selden, 205; Edgerton v. Thomas, *Ibid.*, 40.

31—1 Greenl. Ev., § 341; Dawson v. Hall, 2 Mich., 390. A wife's admissions, unless confined to acts of agency, cannot be used against her husband in an action on contract against him, except when they are *res gestae*, and admissible as acts and not as relations of facts: Rose v. Chapman, 44 Mich., 312; 6 N. W., 681. So, in an action involving a sale to a wife through her husband, his admissions made after his wife's title had vested, and when he was not acting in her business, cannot be used against her. His admissions as to past transactions cannot bind her unless they are a part of the *res gestae*: Stansell v. Leavitt, 51 Mich., 536; 16 N. W., 892.

When a married woman is not bound by a promissory note signed by her, her oral admission of liability thereon will not bind her—nor will her oral promise to pay it: Buhler v. Jennings, 49 Mich., 538; 14 N. W., 488.

32—Glover v. Alcott, 11 Mich., 470. As to when the wife will be

estopped by the act of the husband in the disposal of her separate property, see, Dann v. Cudney, 13 Mich., 239. Where business is conducted entirely by the husband, but in the name of the wife, she will be bound by the husband's statements and conduct in the course of the business, and notice to the husband is notice to her: Leland v. Collyer, 34 Mich., 418; see, Osborn v. Osborn, 36 Mich., 48. The wife is not affected by the statements of the husband relative to his purpose in transferring property to her: Whelpley v. Stoughton, 112 Mich., 594; 70 N. W., 1098; Blanchard v. Moors, 85 Mich., 380; 48 N. W., 542.

33—Thomson v. Austen, 2 D. & Ry., 358. The general rule is well settled that the whole of an admission must be taken together, though a jury are not bound to give equal weight to that which operates in favor of the party making it: Case v. Dean, 16 Mich., 22. Where there is conflicting testimony as to the admissions of parties, it is safer to trust to the inferences to be drawn from their conduct than to attempt to reconcile such a conflict without regard to their conduct. Their acts clearly shown are more reliable than any recollection of their words: Russell v. Miller, 26 Mich., 1.

the demand once existed, but had been paid, it will not alone be of any avail.³⁴ But where a party admits the existence of a particular debt or the accuracy of certain items charged against him, although, at the same time, he sets up an off-set of other items in his own favor, his admission is competent evidence to justify a recovery for the debt of items thus admitted, unless the alleged set-off is duly proved. Such a statement is an unqualified admission of a present indebtedness, although accompanied by an assertion of a counter demand in his own favor. But the assertion that a set-off exists does not prove its existence, although the admission may conclusively establish the debt or items claimed to be due from the party by whom the admission was made.³⁵

A party whose admissions and confessions are resorted to as evidence against him, has, in general, a right to insist that the whole should be taken together; but the part called out by him should relate to the point of fact inquired into on the other side.³⁶

Verbal admissions should be carefully scrutinized because of liability to error through failure correctly to understand or recollect the words used.³⁷

DEPOSITIONS.

§ 426. **Taking of how regulated—upon notice.**—The taking of depositions is now regulated by Act No. 180, Public Acts of 1895, being C. L., §§ 10136-10143. This act provides for the taking of depositions *de bene esse* and *in memoriam perpetuam*; and for taking them upon notice, by commission or under stipulation. The first section of the statute is as follows:

34—Smith v. Jones, 15 Johns., 229; upon the subject of inquiry must be see, also, Carver v. Tracy, 3 Johns., submitted to the jury: Nesbit v. 427; Fenner v. Lewis, 10 *Ibid.*, 38; Stringer, 2 Duer., 26; see, Halsey v. Jarvis, 7 Bosw., 461. And where

35—Delameter v. Pierce, 3 Denio, 315.

36—Garey v. Nicholson, 24 Wend., 350; Dorlon v. Douglass, 6 Barb., 451; Rouse v. Whited, 25 *Ibid.*, 279; Rouse v. Whited, 11 E. P. Smith, 170. Where a fact is sought to be shown by a party's declarations and admissions made in several different conversations, all the conversations bearing

plaintiff proves a demand for the payment of money in the hands of defendant, and a refusal, the defendant may show the reasons given for the refusal: Bennett v. Burch, 1 Denio, 141.

37—Hart v. Village of New Haven, 130 Mich., 181; 89 N. W., 677; People v. McArron, 121 Mich., 2; 79 N. W., 944.

“The testimony of any witness may be taken by deposition *de bene eesse*, in any civil cause or matter, begun or pending in any court of record, at law or in chancery, or before any probate court, or commissioners on claims appointed by any probate court; or arbitrators, referees or circuit court commissioner, or justice of the peace in the state of Michigan, or in any other civil proceeding, when the witness is, or is about to go or resides out of the state of Michigan, or is about to go or reside more than fifty miles from the place of trial, or beyond the jurisdiction of the court; or when the witness is sick, aged or infirm or where there is reasonable cause for apprehension that his testimony cannot be had at the trial of the cause, or where it is needed for use on hearing of motions, petitions, proceedings for injunctions, or upon any other interlocutory or other proceedings prior to final hearing of any cause; and in all cases where affidavits are permitted to be used in proceedings before the court; also when it is desired to take conditionally and perpetuate testimony in suits to be begun; and in any other case not above provided for when it shall appear to the court or judge thereof that the purposes of justice will be aided thereby.¹ The deposition may be taken be-

1—Under a statute similar to this so far as there being any requirement of a showing of ground or reason for taking the deposition as a prerequisite of its taking, it was held that no such showing was necessary. That it was sufficient if, before the deposition was put in evidence, some one of the reasons named in the statute, as ground for its taking, be made to appear. Such would seem to be the construction to be put on this statute: *Patterson v. Wabash, St. L. & P. Ry. Co.*, 54 Mich., 91; 19 N. W., 761.

Where a non-resident plaintiff in a civil action notifies defendant of his willingness to appear on the trial as a witness and to produce all books and papers in his possession relating to the subject of the litigation he cannot be compelled to submit to the taking of his deposition under this act merely to enable the defendant to enquire into the truth of his testimony before trial: *Young v. Kent Circuit Judge*, 116 Mich., 10; 74 N. W., 206.

Testimony may be taken by deposition under this statute for use on hearing of a motion for a new trial: *Eikhoff v. Wayne Circuit Judge*, 129 Mich., 150; 88 N. W., 397. Where a deposition was taken under a stipulation that it should be used only in case the witness should be unable to attend court it was held not to be error to receive the deposition where she made an affidavit of her inability which was opposed only by the unsworn statements of opposing counsel: *Styles v. Decatur*, 131 Mich., 444; 91 N. W., 622.

The admission of a second deposition, taken after due notice, to show facts not shown in the first, is in the discretion of the trial court: *Fredonia Nat'l Bank v. Tommel*, 131 Mich., 674; 92 N. W., 348. The deposition of the witness may itself be made to show the reason which justifies its taking or this may be made otherwise to appear when the deposition is offered.

fore any judge of any court of the United States, or of any state of the United States, or of any foreign country, or before any commissioner of a circuit court in Michigan, or of the United States, or of any state, or any commissioner for Michigan, or any consul, or consular officer, justice of the peace, officer, or notary public, authorized by the laws of this state, or of any other state, or of the United States, or by the laws of any foreign country, to administer oaths, not being of counsel or attorney for either of the parties, nor interested in the event of the cause. The seal of such court or official, or a certificate of such authority given under the seal of any court of record, shall be *prima facie* evidence of authority to act. Reasonable notice must first be given in writing by the party, his attorney or solicitor, proposing to take such deposition, to the opposite party, or his attorney of record, which notice shall state the name of the witness or witnesses, and the time and place of taking his deposition, and the name of the official before whom the same will be taken, and in all cases *in rem*, attachment or replevin, the person having the agency or possession of the property at the time of seizure, shall be deemed the adverse party, until a claim shall have been put in, or appearance entered in the cause; and whenever, by reason of the absence from the jurisdiction of the party, or want of an opposite attorney of record, or other reason, the giving of the notice herein required shall be impracticable, it shall be lawful to take such depositions as there shall be urgent necessity for taking, upon such notice as any judge authorized to hold courts within the jurisdiction where the suit is begun shall think reasonable, and direct.² Any person may be compelled to appear and depose as provided by this act, by the order or

2—Where notice was served on Jan. 10th for the taking of a deposition on Jan. 14th, 267 miles distant, court being then in session and a Sunday intervening, it was held not an abuse of the discretion of the court to reject the deposition for want of the "reasonable notice" of its taking required by the statute: *Drosowski v. Order of Chosen Friends*, 114 Mich., 178; 72 N. W., 169. Where the notice stated an intention to take the deposition on "written interrogatories attached," and none were attached and the deposition had been filed three months before the objection was made, it was held an admissible deposition: *Record Pub. Co. v. Merwin*, 115 Mich., 10; 72 N. W., 998. As to what is "reasonable notice" depends upon the circumstances of each particular case: See, *Harris v. Brown*, 63 Me., 51; *Trevelyan's Adm'r v. Loft*, 83 Va., 146; 1 S. E., 901; *Harris's Appeal*, 58 Conn., 492; 20 Atl., 617. Under the clause providing for cases where

process of any court, and to produce books and papers in the same manner as witnesses may be compelled to appear and testify in court.”³

This statute applies to all classes of proceedings in all kinds of tribunals in which it will become necessary to use evidence and supersedes all prior statutes on the subject.

§ 427. **By commission.**—Section 2 of the act provides for the taking of the deposition by commission in all cases where it might be taken by notice. This section requires that “upon affidavit showing reason therefor” “any circuit court commissioner in the state of Michigan, or the court in which such proceeding is begun or pending, or the judge, clerk or register thereof, or in any case pending before a justice of the peace, such justice” shall “issue a commission (upon which shall be printed section four of this act) for the taking of the testimony” of the witness before the person appointed in the commission. “Written interrogatories to be put to such witness by such commissioner may be attached to the commission; if attached, a copy thereof shall be attached to the notice, which shall in any case be given to the opposite party, or his attorney or solicitor, of the time and place of taking testimony under such commission. Cross and re-direct interrogatories, which it is desired the commissioner shall put to the witness, shall thereupon be promptly furnished to the respective parties, and to such commissioner. Where default or order *pro confesso* has been entered in the cause notices shall not be necessary.”⁴

the service under the general provision is “impracticable,” it seems to be required that a showing under oath be made of the circumstances rendering it impracticable.

3—Before a deposition taken in the absence of a party can be used it must appear that he was required to attend and has been put in default by the proper notice: *Campau v. Dewey*, 9 Mich., 409. It is purely a statutory proceeding and the statute must be substantially complied with: *Thompson v. Clay*, 60 Mich., 632; 27 N. W., 699. A notary public of another state is presumed to have authority to administer oaths: *Pinkham v. Cockell*, 77 Mich., 269; 43 N. W., 921.

4—This statute does not require the

settling of the interrogatories by the court or any officer before the cause or proceeding may be pending. Indeed it is not essential to this proceeding to take depositions by commission, that there be any written interrogatories. See sections 2 and 4 of the act. The person appointed by the commission is qualified by virtue of such commission to administer oaths and needs no other qualification. As to whether that clause of this section doing away with the requirement of the statute as to notice, in cases where default or orders *pro confesso* have been entered, should be construed as rendering notice unnecessary in cases where default has been taken subsequent to appearance, there may

§ 428. **Compelling attendance of witnesses.**—Section 3 gives courts of record of the state authority to “compel the attendance of witnesses and the giving of their testimony and the production of books, papers and other evidences, before the persons authorized to take testimony and also under commissions, or letters rogatory, issued out of any court of any other state, or of the United States, or of any foreign government or country.” Section 1 of the act gives authority to compel the attendance of witnesses whose depositions are to be taken to be used in proceedings in this state. This section 3 is to give such authority as to depositions to be used in courts outside this state.

§ 429. **Swearing, and examination of witness.**—Section 4 provides that “Each witness shall be sworn or affirmed by the officer or person empowered to take such testimony, to tell the truth, the whole truth, and nothing but the truth, concerning the matter at issue in the cause. Every witness may be examined, cross-examined, and re-examined, orally, and also so examined in addition to written, direct or cross-interrogatories. Examinations may be adjourned from time to time. Testimony may be written or taken stenographically and transcribed under direction of the officer so taking the same and shall be signed by the witness and certified as correct by the official before whom it is taken, but signatures of witnesses may be waived in writing by agreement of parties.

§ 430. **Return of the deposition.**—The deposition when taken shall be forthwith enclosed by the official before whom the same is taken and endorsed with the title of the court and

be some question: See, *Ketchum v. Kent Circuit Judge*, 115 Mich., 60; 72 N. W., 1110. The provision that “any person may be compelled to appear and depose” “by the order or process of any court,” etc., can have reference to depositions taken within the state only since a court of this state cannot have compulsory powers beyond the boundaries of the state, and no statute of the state can give such power to courts outside the state. As to the rights of parties if there is failure to appear on the part of either it can be said that if there is rea-

sonable time given for the other party to appear, and he does not appear, no rights are lost by assuming that he does not intend to appear: See, *Stockton v. Williams*, Wk. Ch., 120; *Wixom v. Stephens*, 17 Mich., 523. The officer taking the deposition may swear an interpreter when necessary: *Campau v. Dewey*, 9 Mich., 408. As to the taking of the deposition in narrative form, see, *Campau v. Dewey*, *supra*, where under a statute similar in its language, it was held that it was permissible at least unless objection were taken at the time.

cause, and that the deposition was taken and sealed up by him, and how it is to be sent, and he shall sign the endorsement, and the same shall be transmitted by mail or otherwise, to the court in which the cause is pending, and in case such deposition is taken for use before commissioners on claims appointed by any probate court, to such court, and then be opened by the court or clerk or register, and written notice thereof then given by mail or otherwise to the parties. Objections to notices of, or objections to the manner of taking the testimony, or of certifying or returning the deposition shall be regarded as waived unless made in writing within three days after knowledge or notice of the return thereof.’’⁵

§ 431. Depositions in perpetuam memoriam.—Section five of the act in question provides for the taking of testimony *in perpetuam memoriam* by any person who expects to be a party to a suit in a *court of record* and is not applicable in actions before justices of the peace. There is no provision of the law for the taking of depositions of this sort for use in justices’ courts.

§ 432. Taking of depositions by agreement.—Section six of the act authorizes parties to actions begun, or to be begun, to take testimony by deposition in such manner as they may agree, and they may by stipulation control the manner in which

5—An objection that notice was for taking the deposition on “written interrogatories attached,” and none were attached, must be made within the three days of the statute: *Record Pub. Co. v. Merwin*, 115 Mich., 10; 72 N. W., 989.

That no notice of the filing of the deposition was given will not defeat its use: *Knight v. Emmons*, 4 Mich., 555. Oral examination may be had though the deposition is taken by commission accompanied by written interrogatories. While this statute does not expressly require the reading over to the witness of the deposition after it has been written, yet such practice has been most strongly commended: See, *People v. McKinney*, 49 Mich., 355; 13 N. W., 619; *Godfrey v. White*, 43 Mich., 189; 5 N. W., 243. The only certificate specifically required by the

statute is one that the testimony transcribed from a stenographic report of the examination, when such is the procedure, is correct. It must be made to appear, however, in some way: (1) that the witness was sworn in the manner required by the statute; (2), how and by whom the witness was examined; (3), when and where the deposition was taken; (4), that the signature to the deposition is that of the witness unless the signing is waived by the written stipulation of the parties. In short, it must be made to appear that the requirements of the statute have been met, before the deposition can be used, and a certificate of the officer before whom it was taken is proper proof of these facts: See, *Bell v. Morrison*, 1 Pet. U. S., 354.

such deposition so taken shall be returned. It is difficult to conceive that there can be any limitation of this authority by construction. In civil cases parties can usually by agreement control the manner of producing and presenting the evidence to the court so long as they do not attempt to interfere with the orderly procedure of the trial.

§ 433. Use of, and authority of the court over.—In section seven provision is made that “Depositions taken under this act may be read and considered in evidence at the trial or on any hearing, and on appeals and retrials of the same cause of action, but the court shall have power to regulate the use, to prevent abuses thereof, and may order the retaking of testimony, or the production of the witness, if within the jurisdiction, notwithstanding that his deposition has been taken. In any case either party may obtain subpoena and compel the usual attendance and re-examination of the witness, notwithstanding his deposition has been taken, if he is within the jurisdiction of the court and able to attend, and give his testimony in the usual way for or at the trial.” The provisions of this section so far as they purport to give the court authority to require the presence of the witness are but a declaration of the law in the absence of such a provision. It has always been a good objection to the reading of a deposition that the reasons which authorized it to be taken no longer exist.⁶

§ 434. Fees for taking.—The provisions for fees for taking are found in section eight. Two dollars are allowed for “taking, certifying, sealing and forwarding: Ten cents for each one hundred words to be considered as costs in the case. For copies furnished to parties, three cents per hundred words. Each party is required to pay for his own examination, direct or cross in the first instance, but of course may tax them back at the rate aforesaid if he recover costs.”⁷

6—Emlaw v. Emlaw, 20 Mich., 11. the absence of any agreement as to

7—There is no requirement that compensation, the statutory rate would
copies of the deposition shall be furnished to parties, but if furnished, in doubtless control.

CHAPTER XXIV

WITNESSES, THEIR COMPETENCY, THEIR EXAMINATION AND IMPEACHMENT.

COMPETENCY.

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COMPETENCY OF WITNESSES.

§ 435. **Who competent.**—"No person shall be excluded from giving evidence in any matter, civil or criminal, by reason of crime, or for any interest of such person in the matter, suit, or proceeding in question, or in the event of such matter, suit or proceeding, in which such testimony may be offered, or by reason of marital or other relationship, to any party thereto; but such interest, relationship, or conviction of crime may be shown for the purpose of drawing in question the credibility of such witness, except as is hereinafter provided."¹

¹—C. L., 1897. § 10210. While qualify, it may be shown as affecting conviction of crime does not disqualify; *People v. Maun-*

§ 436. Parties as witnesses.—"On the trial of any issue joined, or in any matter, suit or proceeding in any court, or on any inquiry arising in any suit or proceeding in any court, or before any officer or person having by law, or by consent of parties, authority to hear, receive, and examine evidence, the parties to any such suit or proceeding named in the record, and persons for whose benefit such suit or proceeding is prosecuted, or defended, may be witnesses therein in their own behalf or otherwise, in the same manner as other witnesses, except as hereinafter otherwise provided; and the deposition of any such party or person may be taken and used in evidence under the rules and statutes governing depositions, and any such party or person may be proceeded against, and compelled to attend and testify, as is provided by law for other witnesses."²

§ 437. When heirs, assigns, etc., of deceased persons are parties.—"When a suit or proceeding is prosecuted or defended by the heirs, assigns, devisees, legatees, or personal representatives of a deceased person, the opposite party, if examined as a witness on his own behalf, shall not be admitted to testify at all to matters which, if true, must have been equally within the knowledge of such deceased person; and when any suit or proceeding is prosecuted or defended by any surviving partner or partners, the opposite party, if examined as a witness, in his own behalf, shall not be admitted to testify at all in relation to matters which, if true, must have been equally within the knowledge of the deceased partner,

ausau, 60 Mich., 21; 26 N. W., 797; People v. Foote, 93 Mich., 40; 52 N. W., 1036; People v. Hall, 48 Mich., 490; 12 N. W., 665.

The question of bias or prejudice as affecting the credibility as shown by conviction of crime, interest or relationship to parties is not a collateral one in such sense as that the answers of the witness so impeached are conclusive and not subject to contradiction: Helwig v. Lascowski, 82 Mich., 619; 46 N. W., 1033. The record of the conviction only, and not the testimony of witnesses as to his guilt, can be received as against the denial by the witness of his conviction or

guilt: People v. Maunsausau, 60 Mich., 21; 26 N. W., 797. See cases cited in the note to this section, 10210, of Comp. Laws.

2—C. L., § 10211.

The remainder of this section relates to testimony in criminal cases, and is omitted. The sections of this act, viz.: §§ 10210-10213, are repugnant to § 824, and therefore, now prescribe the only rule as to the competency and examination of parties: Gooderich v. Allen, 19 Mich., 250; see, Roberts v. Miles, 12 Mich., 305; Montague v. Dougan, 68 Mich., 100; 35 N. W., 840; People v. Van Alstine, 57 Mich., 82; 23 N. W., 594.

and not within the knowledge of any one of the surviving partners. No person who shall have acted as an agent in the making or continuing of a contract with any person who may have died, shall be a competent witness in any suit involving such contract, as to matters occurring prior to the death of such decedent, on behalf of the principal to such contract against the legal representatives or heirs of such decedent unless he shall be called by such heirs or legal representatives. And when any suit or proceeding is prosecuted or defended by any corporation, the opposite party, if examined as a witness in his own behalf, shall not be admitted to testify at all in relation to matter, which, if true, must have been equally within the knowledge of a deceased officer or agent of the corporation, and not within the knowledge of any surviving officer or agent of the corporation, nor when any suit or proceeding is prosecuted or defended by the heirs, assigns, devisees, legatees, or personal representatives of a deceased person against a corporation (or its assigns) shall any person who is or has been an officer or agent of any such corporation be allowed to testify at all in relation to matters which, if true, must have been equally within the knowledge of such deceased person: Provided, That whenever the words 'the opposite party' occur in this section it shall be deemed to include the assignors or assignees of the claim or any part thereof in controversy: And provided further, That whenever the deposition, affidavit or testimony of such deceased party taken in his lifetime shall be read in evidence in such suit or proceeding, that the affidavit or testimony of the surviving party shall be admitted in his own behalf on all matters mentioned or covered in such deposition, affidavit or testimony: And provided further, That when the testimony or deposition of any witness has once been taken and used (or shall have heretofore been taken and used) upon the trial of any cause, and the same was when so taken and used, competent and admissible under this act, the subsequent death of such witness or of any other person shall not render such testimony incompetent under this act, but such testimony shall be received upon any subsequent trial of such cause.'³

3—C. L., 1897, § 10212, as amended Acts, 1903, p. 36: *Gustafson v. Eger*, by Pub. Acts, 1901, p. 371, and by Pub. 132 Mich., —; 92 N. W., 893, a case of

agency; see, *Cook v. Stevenson*, 30 Mich., 242; *Chambers v. Hill*, 34 Mich., 525-8; *Schratz v. Schratz*, 35 Mich., 485; *Jones v. Beeson*, 36 Mich., 214; *Hart v. Carpenter*, *Ibid.*, 402; *Twiss v. George*, 33 Mich., 253. Under this statute, it is for the court and not the witness to determine whether the knowledge of the deceased in regard to the transaction was such as to permit or exclude his testimony. The court and not the witness is to decide on the competency of the testimony. The admissibility of the party's testimony does not depend upon the degree of his knowledge; that is, whether he knows more about the transaction or matter in question than the deceased knew; but he is prohibited from testifying at all upon matters which were within the knowledge of himself and the deceased alike. He is precluded from putting in evidence his account of a transaction known to both, when the death of the opposite party precludes his account from being heard also. Whenever there is a fact bearing upon the issue which was not in the knowledge of the deceased, and the party testifies to it, his right to give evidence to that fact does not entitle him to extend his testimony to other facts which were within the knowledge of the deceased: *Kimball v. Kimball*, 16 Mich., 211; see, *Wright v. Wilson*, 17 Mich., 192; *Moulton v. Mason*, 21 Mich., 364, 372.

Although testimony offered by a survivor may not fall within the literal terms of the prohibition of this statute, yet if it is within the policy of the prohibition it ought not to be allowed: *Mundy v. Foster*, 31 Mich., 313; *Downey v. Andrus*, 43 Mich., 72-3; 4 N. W., 628.

The rule that a party cannot testify to matters equally within the knowledge of a deceased opponent, does not apply when the action is against the surety of the deceased: *Lee v. Wisner*, 38 Mich., 82, 87. Nor prior to the recent amendments did the rule of exclusion apply to the testimony of a survivor as to the transactions between him on the one side and a surviving agent of the decedent on the other, not in the presence of the decedent: *Ward v. Ward*, 37 Mich., 253; *De Mary v. Burtenshaw's Estate*, 131

Mich., 326; 91 N. W., 647. Since the amendment of 1903 such surviving agent is incompetent.

A survivor cannot testify adversely as to his private dealings with a deceased person, even in rebuttal of another's testimony as to conversations between the survivor and the decedent, overheard by that other person: *Chadwick v. Chadwick's estate*, 52 Mich., 545; 18 N. W., 350; see, *Downey v. Andrus*, 43 Mich., 65; 4 N. W., 628. Nor can he testify as to the contents of lost letters which passed between him and the deceased: *Schratz v. Schratz*, 35 Mich., 485. But when a party whose testimony is objected to, would be excluded under the provisions of this section, C. L., § 10212, amended, Pub. Acts of 1901, p. 371, and 1903, p. 36 is giving testimony in a cause, and the opposite party calls out facts equally within the knowledge of the deceased, and afterwards seeks to prove the statements so made under oath in a controversy between the same parties, as admissions, he must be held to have waived the inhibition of the statute, and the witness may testify fully in respect to the subject matter of the admission, although it be equally within the knowledge of the deceased: *Smith's Appeal*, 52 Mich., 415, 419; 18 N. W., 195; *Fox v. Barrett's Estate*, 117 Mich., 162; 75 N. W., 440.

A corporation and the individual corporators composing it are distinct persons, and in a suit between a private corporation and the estate of a deceased person, it would seem that the corporators are not precluded by this section from testifying to matters equally in the knowledge of the deceased, unless they are officers or acting as agents of the corporation: *Rust v. Bennett*, 39 Mich., 521.

Because a witness testifies that certain things occurred in the presence of the deceased, it does not follow that the "survivor" of the statute is precluded from denying such occurrence: *Pillard v. Dunn*, 108 Mich., 301; 66 N. W., 45.

Objection under this statute may be waived and a failure to make the objection will operate as such waiver: *Barbier v. Young*, 115 Mich., 100; 72 N. W., 1096; distinguishing *McIlugh*

§ 438. **Competency and credibility distinguished.**—There are two kinds of exceptions to witnesses: to their *competency* and to their *credibility*. Exceptions to the credit of a witness are such as do not at all disable him from being sworn, but merely effect the degree of belief which the jury will give to his

v. Dowd's Estate, 86 Mich., 412; 49 N. W., 216.

A wife having dower and homestead interests in the property in question is disqualified where her husband is the surviving party and the controversy is over lands, which, if the claim of the husband is sustained, would be subject to such dower and homestead rights: *Laird v. Laird*, 115 Mich., 352; 73 N. W., 382. One in possession of personal property on the death of the owner, is the representative of the deceased within the meaning of the statute so as to disqualify the opposite party: *Burke v. Dunn*, 117 Mich., 430; 75 N. W., 931. A mere naked trustee is not disqualified under this statute: *Jenkinson v. Brooks*, 119 Mich., 108; 77 N. W., 640. Assignees for the benefit of creditors of one since deceased are not within the statute: *Marquette v. Wilkinson*, 119 Mich., 413; 78 N. W., 474. Nor does the contingent liability of sureties upon the bond of a custodian of city funds bring them within the statute in the absence of anything to show that the deceased principal was not solvent: *Marquette v. Wilkinson*, *supra*. It is not essential that one get rights directly from deceased in order to be within the prohibitions of this statute. An assignee of an heir of deceased, or of a prior assignee of deceased is within the statute: *Olin v. Henderson*, 120 Mich., 149; 79 N. W., 178; *Ripley v. Sellman*, 88 Mich., 189; 50 N. W., 143. It is not necessarily a disqualification that one is an officer or agent of a corporation. Such person is disqualified only when his testimony has reference to something as to which he has authority to act for the corporation: *Brennan v. Railroad Co.*, 93 Mich., 156; 53 N. W., 358; *Wallace v. Mystic Circle*, 121 Mich., 263; 80 N. W., 6. The grantee of deceased who takes in consideration that he pay debts of the grantor is disqualified to testify that an obligation in

suit was not included: *Seymour v. Wallace*, 121 Mich., 402; 80 N. W., 242. One entitled to have property transferred to him, but consents that it may be transferred to another, is within the prohibition of the statute: *Berry v. Adams*, 122 Mich., 17; 80 N. W., 792. That deceased may have been possessed of knowledge of facts inconsistent with the testimony offered is not enough to exclude the testimony. As, though deceased knew whether he was the owner of certain personal property, this would not prohibit the testimony of the opposite party to a transaction, at which deceased was not present, tending to show rights in the opposite party to such property: *Moore v. Machen*, 124 Mich., 216; 82 N. W., 892, and cases cited in the opinion. The testimony of parties to the litigation is competent, notwithstanding this statute, where the estate of the deceased will not be depleted, or increased by the result of the litigation, but it is a controversy between claimants: *Lorimer v. Lorimer*, 124 Mich., 631; 83 N. W., 609; *Seymour v. Wallace*, 127 Mich., 669; 87 N. W., 90. The presence of a third person does not remove the bar of the statute. Such third person is the only one competent to testify: *Taylor v. Bunker*, 68 Mich., 258; 36 N. W., 66; *Michels v. Underwriter's Ass'n.*, 129 Mich., 417; 89 N. W., 56. For other cases under this statute, see: *Ladd v. Brown*, 108 Mich., 105; 65 N. W., 520; *Slack v. Norton*, 111 Mich., 213; 69 N. W., 497; *Balley v. Holden*, 113 Mich., 402; 71 N. W., 841; *Schmitz v. Beals*, 115 Mich., 112; 73 N. W., 109; *Graham v. Alexander*, 123 Mich., 168; 81 N. W., 1084; *Sheldon v. Insurance Co.*, 124 Mich., 303; 82 N. W., 1068; *Dunn v. Dunn's Estate*, 127 Mich., 385; 86 N. W., 801; *Blodgett v. Vogel*, 130 Mich., 479; 90 N. W., 277.

See, also, cases cited in the notes to this section in C. L., § 10212.

evidence. Objections to the *competency* of a witness are against his being sworn at all on account of some inherent incapacity or defect, or as being against the policy of the law.

It is the province of the court to determine whether a witness is competent or the evidence admissible; and whatever antecedent facts are necessary to be ascertained for the purpose of deciding the question of competency or admissibility of evidence, as, for example, whether a child understands the nature of an oath, or whether the confession of a prisoner was voluntary, or whether a party can testify, the other being dead—these and other facts of the same kind are to be determined by the court and not by the jury.¹

As a general rule, the question of the admissibility of evidence, and what constitutes evidence, are questions for the court; the weight or effect to be given to the evidence is a question for the consideration of the jury.²

When evidence is submitted to a jury, as being on a certain point, it is for them and not for the court to determine whether it tends to establish that point or not. Whether it does so, in their opinion, may depend not alone upon that particular item

1—Phil. Ev., C. H., & Edwards' notes, pp. 1-6; *Kimball v. Kimball*, 16 Mich., 211. It is the province of the court to determine whether a witness or his evidence is competent; but when the question of competency depends upon a disputed fact, the question of fact may be left to the jury. Thus, it is not competent to require an attorney to disclose communications made to him by a client in relation to the affairs of the client, and the competency of the attorney to testify as to those matters is to be determined by the court: *Hartford Ins. Co. v. Reynolds*, 36 Mich., 502.

2—*Crane v. Litchfield*, 2 Mich., 340, 344; *Sebright v. Moore*, 33 Mich., 92; *Hayes v. Homer*, 36 Mich., 374. The materiality of evidence is a question of law, to be decided by the court: *People v. Hurst*, 41 Mich., 331; 1 N. W., 1097. And in trials without a jury the credibility and sufficiency of the testimony must also be determined by the court: *Edwards v. Nelson*, 51 Mich., 121; 16 N. W., 261; *Hylar v.*

Nolan, 45 Mich., 357; 7 N. W., 910; *Butts v. Davis*, 50 Mich., 310; 15 N. W. 486. But in jury trials the weight and effect of the evidence is for them to decide: *Winchester v. King*, 48 Mich., 280; 12 N. W., 220. At the old common law all questions of admissibility of evidence were for the decision of the court rather than the jury, though the court's decision involved the determination of intricate questions of fact. This rule has been modified in many jurisdictions, allowing the court to submit the preliminary evidence upon the question of admissibility to the jury with instructions to consider or reject the questionable evidence according as they find one way or the other upon the preliminary evidence: *Hartford Ins. Co. v. Reynolds*, 36 Mich., 406; *People v. Barker*, 60 Mich., 277; 27 N. W., 539; *People v. Swetland*, 77 Mich., 53; 43 N. W., 779; *People v. Howes*, 81 Mich., 396; 45 N. W., 961, are illustrative cases in Michigan.

of evidence, but upon that evidence considered in relation to the other evidence in the case, which may tend to qualify or explain it.³ And so, if there is conflicting testimony.⁴

When testimony is once before the jury, the credibility of every portion of it is for them to determine, and there is said to be no positive rule which entirely excludes the evidence of a witness from consideration on account of his willful falsehood as to some portions of it. Such disregard of his oath is enough to justify the belief that the witness is capable of any amount of falsification, and to make it no more than prudent to regard all he says with strong suspicion, and to place no reliance on his mere statements; but where corroborated by proofs or circumstances, the jury may give it such credit as it may appear to deserve.⁵

§ 439. Religious opinions do not disqualify.—"No person shall be rendered incompetent to be a witness on account of his opinions on matters of religious belief."⁶

This refers only to the competency, and not to the credibility of the witness.⁷ But by statute, "No person shall be deemed incompetent as a witness, in any court, matter or proceeding, on account of his opinions on the subject of religion; nor shall any witness be questioned in relation to his opinions thereon, either before or after he shall be sworn."⁸ Under this section it is incompetent to question a witness in reference to his opinions or belief upon the subject of religion, or in the existence of a Supreme Being, for the purpose of impairing his credibility; and if such questions are put and answered,

3—Perrott v. Shearer, 17 Mich., 54; law v. Emlaw, 20 Mich., 11. There is no rule of law which excludes from the consideration of the jury the uncorroborated statement of a witness who admits that he had perjured himself on a former trial. But his credibility under such circumstances is exclusively for the jury, and there is no rule of law which prevents them from giving credit to such a witness if they, in fact, do believe him: Fisher v. People, 20 Mich., 135; Elliott v. Van Buren, 33 Mich., 49; Hamilton v. People, 29 Mich., 173.

4—Brooke v. Grand Trunk R. W. Co., 15 Mich., 332.

5—Knowles v. People, 15 Mich., 412. All considerations concerning the credit due to witnesses are for the jury: Elliott v. Van Buren, 33 Mich., 49. Juries are not bound to give credit to sworn testimony, though unimpeached, if they do not in fact believe it to be true: Durant v. People, 13 Mich., 556. And the testimony of a witness, so far as his statements are incredible, ought to be disregarded, whether he is impeached or not: Em-

6—Const., Mich., Art. VI., § 34.

7—People v. Jenness, 5 Mich., 305.

8—C. L., § 10207.

the witness cannot be impeached by proof of former inconsistent statements which he denies having made.⁹

§ 440. **Husband and wife, competency of.**—"A husband shall not be examined as a witness for or against his wife without her consent; nor a wife for or against her husband without his consent, except in cases where the cause of action grows out of a personal wrong or injury done by one to the other, or grows out of the refusal or neglect to furnish the wife or children with suitable support within the meaning of act number one hundred and thirty-six of the session laws of eighteen hundred and eighty-three, and except in cases where the husband or wife shall be a party to the record in a suit, action or proceeding, where the title to the separate property of the husband or wife so called or offered as a witness, or where the title to property derived from, through or under the husband or wife so called or offered as a witness, shall be the subject matter in controversy or litigation in such suit, action, or proceeding, in opposition to the claim or interest of the other of said married persons, who is a party to the record in such suit, action, or proceeding; and in all such cases, such husband or wife who makes such claim of title, or under or from whom such title is derived, shall be as competent to testify in relation to said separate property and the title thereto, without the consent of said husband or wife, who is a party to the record in such suit, action or proceeding as though such marriage relation did not exist; nor shall either, during the marriage or afterwards, without the consent of both, be examined as to any communication made by one to the other during the marriage, but in any action or proceeding instituted by the husband or wife, in consequence of adultery, the husband and wife shall not be competent to testify."¹⁰

9—*People v. Jenness*, 5 Mich., 305, 319.

10—C. L., § 10213, as amended by Laws of 1885, vol. 1, p. 288; see, *Herrick v. Odell*, 29 Mich., 47. The common law rule that one of the married parties cannot testify for or against the other, has been so far modified by this statute as to permit one of them to so testify in case of the consent of the other, but leaving the latter

entirely free to give or withhold consent. Such testimony cannot be given even in favor of the other, without such consent: *Perry v. Lovejoy*, 49 Mich., 529; 14 N. W., 485. The rule that a husband may not testify against his wife without her consent, cannot be waived in her absence by the mere omission of her attorney to object to the testimony: *Hubbell v. Grant*, 39 Mich., 641. But where a wife sued

"But no person shall be *excluded* from giving evidence in any matter, civil or criminal * * * * by reason of marital or other relationship to any party thereto."¹¹

The common law reasons for the incompetency of husband and wife to testify for or against each other, were in part their legal identity of person and interest, but principally, as a question of social policy, to preserve domestic quiet and the peace and harmony of families. This common law disability, growing out of the marital relation, has (subject to certain specifications), been removed by the statute.¹²

The statute, in changing the common law rule, concerning the testimonial incapacities of husband and wife, has not made them competent witnesses for or against each other without restriction, but has prohibited either from testifying without the consent of the other;¹³ and from divulging mutual confidences without mutual consent. The right of the one to call

a firm in which her husband was a partner, making him one of the defendants, and he being in court at the time when she testified in her own behalf, and making no objection thereto, it was held that his consent was presumed: *Benson v. Morgan*, 50 Mich., 77; 14 N. W., 705. A wife's admissions, unless confined to acts of agency, cannot be used against her husband except where there are *res gestae* and admissible as acts, and not as relations of facts: *Rose v. Chapman*, 44 Mich., 312; 6 N. W., 681. By this statute in using the term "communication" in the last paragraph uses it in the sense of the "confidential communication" of the common law; and communications not of this character are not within the statute: *Hagerman v. Wigent*, 108 Mich., 192; 65 N. W., 756; *Ward v. Oliver*, 129 Mich., 300; 88 N. W., 631. Husband and wife are competent to testify in a suit between them, respecting a business transaction, without the consent of each other: *Dowling v. Dowling*, 116 Mich., 346; 74 N. W., 523. The wife is a competent witness against the husband in a prosecution under C. L., § 5923, for failure to support: *People v. Malsch*, 119 Mich., 112; 77 N. W., 638. But in an action against the husband to recover for support furnished the wife, the wife is not a competent witness against her husband: *Travis v. Stevens*, 127 Mich., 687; 87 N. W., 85. The first paragraph of this statute applies only during coverture. The coverture broken by death of one, the bar of this clause as to the other is released: *Ward v. Oliver*, 129 Mich., 300; 88 N. W., 631. Not so as to last clause: *Derham v. Derham*, 125 Mich., 109; 83 N. W., 1005. For other cases under this statute, see note to *Rice v. Rice*, 104 Mich., 382; 62 N. W., 833, where many of the Michigan cases are collected. See, also, *People v. Isham*, 109 Mich., 72; 67 N. W., 819; *McKenzie v. Lautenschlager*, 113 Mich., 171; 71 N. W., 489; *Wood v. Lentz*, 116 Mich., 275; 74 N. W., 462; *Whelpley v. Stoughton*, 119 Mich., 314; 78 N. W., 137. See, also, the notes to C. L., § 10213.

11—C. L., § 10210. This does not obviate the necessity of gaining the consent required by C. L., § 10213; *People v. Gordon*, 100 Mich., 518; 59 N. W., 322; *People v. Hall*, 48 Mich., 490; 12 N. W., 665; *People v. Maunsausau*, 60 Mich., 21; 26 N. W., 797.

12—*Grimm v. People*, 14 Mich., 307.

13—Except in cases as provided in the statute: C. L., § 10213.

the other as a witness in his or her behalf is a privilege accorded to them, to be used or not; solely at their option. If either is upon trial, the omission to call the other as a witness in his or her behalf, raises no unfavorable presumption against the accused party; nor can such omission be commented on before the jury. If such omission is to be treated as warranting the conclusion that his or her testimony would be adverse, then the privilege is entirely destroyed, and the other will have to be called at all events. The law, in permitting husbands and wives to testify on behalf of each other, cannot have contemplated that any moral coercion should enable others to force them into the witness box.¹⁴

Although neither husband nor wife may be examined as to any communication made by one to the other during marriage, without the consent of both, yet, what a person is overheard to say to his wife may be used in evidence against him.¹⁵ It is only where there is a valid marriage that the parties are excluded from testifying against each other.¹⁶

In case of personal violence, however, committed by the husband or wife against each other, the injured party is said to be a competent witness against the other to prove such violence.¹⁷ As, where the husband commits an assault and battery on the wife.¹⁸

§ 441. **Infants as witnesses.**—No particular age is required in practice under the common law to render the evidence of a child admissible. The competency of children is regulated not by their age, but by the degree of understanding which they appear to possess. A child of any age, if capable of distinguishing between good and evil, may be examined on oath, and a child of whatever age cannot be examined unless sworn.¹⁹ In a trial for murder, a child of seven years of age was

14—Knowles v. People, 15 Mich., 9 C. & P., 295, 667; People v. Sebring, 408, 413. 66 Mich., 705; 33 N. W., 808.

15—R. v. Stimm, 25 E. C. L., 532; 18—Soule's Case, 5 Greenleaf R., 6 C. & P., 510. 407; see, People v. Sebring, 66 Mich., 705; 33 N. W., 808; C. L., § 10213.

16—Ros. C. R. Ev., 148; Coleman v. State, 14 Mo., 157; see, Dixon v. People, 18 Mich., 84. 19—1 Greenl. Ev., § 367; State v. Whittier, 21 Maine, 341. But see, C. L., § 10205, referred to *post* in this section.

17—1 Whart. Am. Cr. Law, § 669; 2 Russell on Cr., 6 Am. ed., 984; State v. Davis, 3 Brevard, 3; R. v. Pearce,

deemed a competent witness, but the question of his credibility, the court say, was for the jury.²⁰

By Act 82, Pub. Acts, 1887, C. L., § 10215, the rule of the common law was changed and the testimony of children under ten years of age may be taken without oath on a promise to tell the truth. The statute was enacted following the decision of *Hughes v. Detroit, G. H. & M. Ry. Co.*, 65 Mich., 14; 31 N. W., 603, and is as follows: "Whenever a child under the age of ten years is produced as a witness, the court shall by an examination made by itself publicly, or separate and apart, ascertain to its own satisfaction whether such child has sufficient intelligence and sense of obligation to tell the truth, to be safely admitted to testify; and in such case such testimony may be given on a promise to tell the truth instead of upon oath or statutory affirmation, and shall be given such credit as to the court or jury, if there be a jury, it may appear to deserve." The discretion of the trial court in permitting the child to testify without being sworn will not be reviewed unless abused.²¹

§ 442. Deaf and dumb persons as witnesses.—A person who is deaf and dumb merely, if he has the use of his understanding, is not an incompetent witness, and he may give evidence by signs, through an interpreter.¹ But when the witness can write, it seems, it would be a more certain mode to make him write his answers to the questions put to him.² He should be examined through the medium he can best understand.³

§ 443. Persons intoxicated, as witnesses.—A person in a state of intoxication is not a competent witness, "And every

20—*Washburn v. People*, 10 Mich., 386; *R. v. Williams*, 7 C. & P., 320. It is not perceived why an infant is not a competent witness as well as an adult, so far as relates to "opinions on the subject of religion," nor why he is liable to "be questioned in relation to his opinions thereon" any more than an adult. The statute has no exception of that kind: See, C. L., § 10207. *Com. v. Mullens*, 2 Allen, 295. It has been held that a child between six and seven years of age may be properly examined as a witness in a criminal case, if the court is fully satisfied that the child is conscious of the duty to speak the truth, and if the jury is properly cautioned as to its statements: *McGuire v. People*, 44 Mich., 286; 6 N. W., 669.

21—*People v. Walker*, 113 Mich., 367; 71 N. W., 641; *People v. Beech*, 129 Mich., 622; 89 N. W., 363.

1—*R. v. Huston*, 1 Leach, 408; *Snyder v. Nations*, 5 Blackf., 295; *Commonwealth v. Hill*, 14 Mass., 207; *State v. De Wolf*, 8 Conn., 93.

2—*Morrison v. Leonard*, 3 C. & P., 127.

3—*Morrison v. Leonard*, 3 C. & P., 127.

court must necessarily have the power to decide, from their own view, the situation of the witness offered, whether he be intoxicated to such a degree as that he ought not to be heard."⁴ It would seem, however, where the issue requires it, the court will adjourn the case to enable the testimony of the witness to be secured.⁵

§ 444. **Idiots and lunatics as witnesses.**—Lunatics may be witnesses in their lucid intervals; idiots or insane persons cannot. When a lunatic is tendered as a witness, it is for the judge to examine and ascertain whether he is of competent understanding to give evidence, and is aware of the nature and obligations of an oath; if satisfied that he is, he should be sworn and examined.⁶ If such persons are offered as witnesses, evidence is admissible to show their incompetency.⁷

§ 445. **Clergymen, communications to, privileged.**—"No minister of the gospel, or priest of any denomination whatsoever, shall be allowed to disclose any confession made to him in his professional character, in the course of discipline enjoined by the rules of practice of such denomination."⁸ But admissions not made to a minister in his professional character, *in the course of discipline enjoined by his church*, would be admissible.⁹

§ 446. **Physicians, communications to, privileged.**—"No person duly authorized to practice physic or surgery shall be allowed to disclose any information which he may have acquired in attending any patient, in his professional character, and which information was necessary to enable him to prescribe for such patient as a physician, or to do any act for him as a surgeon."¹⁰

4—Hartford v. Palmer, 16 Johns., 143.
 5—1 Wharton's Cr. Law, § 753.
 6—Archbold Cr. Pr. & Pl., (151), 492.
 7—Livingston v. Kiersted, 10 John., 362.
 8—C. L., § 10180.
 9—People v. Gates, 13 Wend., 311.
 10—C. L., § 10181. The object of the statute is to enable persons to secure medical aid without betrayal of confidence: Grand Rapids & I. Ry. Co. v. Martin, 41 Mich., 671; 3 N. W., 173; People v. De France, 104 Mich., 570; 62 N. W., 709. Where the relation is such that no confidence is reposed the statute is not applicable: Scripps v. Foster, 41 Mich., 742; 3 N. W., 216; Briesenmeister v. Knights of Pythias, 81 Mich., 531; 45 N. W., 977; People v. Glover, 71 Mich., 307; 38 N. W., 874. It should not be understood that the patient must deter-

A physician, consulted by a person who had seduced a female, as to the means of procuring an abortion, is not by this section privileged from testifying.¹¹

§ 447. **Attorneys, communications to, privileged.**—Where an attorney is consulted on business within the scope of his profession, the communications between him and his client are strictly confidential, and the attorney should not be required, nor permitted, by any judicial tribunal to divulge them against his client, if the latter object to the evidence.¹² And if a communication should be made to an attorney in fact by a party, under an impression that such attorney had consented or agreed to act as the attorney of such party, such communication would be privileged, although the attorney himself may not have so understood the agreement. But to make the communication a privileged one, either in that case or where

mine at his peril whether the information he gives is necessary to enable the physician to give him medical aid. It is enough if the communication is made in good faith supposing it useful for that purpose: See, *Briesenmeister v. Knights of Pythias*, *supra*. A dentist is not within the provisions of the act: *People v. De France*, 104 Mich., 563; 62 N. W., 709. It was held in *Brown v. Insurance Co.*, 65 Mich., 306; 32 N. W., 610; 8 Am. St. Rep., 894, that a physician might testify as what the disease was for which he had treated a patient. In *Jones v. Life Assurance Co.*, 120 Mich., 211; 79 N. W., 204, the decision in the *Brown* case was limited to that particular case, and it was held in this, the *Jones* case, that the physician could not disclose for what he had treated his patient. To the same effect: *Lamiman v. Detroit C. S. Ry. Co.*, 112 Mich., 602; 71 N. W., 153; *Rose v. Supreme C. O. of P.*, 126 Mich., 577; 85 N. W., 1073. It is not competent for a physician or surgeon to testify to facts which have been communicated to him for the purpose of enabling him to perform his professional duty, or which in any way came or were brought to his knowledge for that purpose: *Briggs v. Briggs*, 20 Mich., 34, 41.

But the statute does not preclude

a physician from testifying to information acquired in attending a patient in his professional character, unless it appears that such information was necessary to enable him to prescribe for such patient as a physician, or to do some act for him as a surgeon. The common law gives no privilege from testifying in such cases: *Campau v. North*, 39 Mich., 506; *People v. Cole*, 113 Mich., 83; 71 N. W., 455.

A physician has no right to publish matters of professional confidence without the consent of the patient: *Sullings v. Shakespeare*, 46 Mich., 408; 9 N. W., 451.

The rule prohibiting physicians from disclosing information obtained in attending patients is a privilege belonging to the patient and continues indefinitely, and can be waived by no one but the patient himself: *Storrs v. Scougale*, 48 Mich., 386, 395; 12 N. W., 502; see, *Page v. Page*, 51 Mich., 88; 16 N. W., 245. But it may be waived by the patient, or by those who represent his interests after his decease: *Fraser v. Jennison*, 42 Mich., 206; 3 N. W., 882.

See, also, *Dotton v. Albion*, 57 Mich., 577; 24 N. W., 786, and cases cited.

11—*Hewitt v. Prince*, 31 Wend., 79.

12—1 Greenl. Ev., § 237; *Jenkinson*

v. State, 5 Blackf., 465.

the relation of attorney and client exists, it must have been made to the attorney by the party or client as his legal adviser, and for the purpose of obtaining his legal advice or opinion relative to some legal right or obligation.¹³ The privilege extends to information derived from the client by oral communications, or from books or papers shown to him by his client, or placed in his hand.¹⁴ But it does not extend to information derived from other sources or other parties, although obtained while acting as counsel or attorney.¹⁵ The protection extends to every communication which the client makes to his legal adviser for the *purpose of professional advice* or aid, upon the subject of his rights and liabilities. Nor is it necessary that any judicial proceedings should have been commenced or contemplated; it is enough if the matter in hand may by possibility become the subject of judicial inquiry.¹⁶ The rule extends to counselors, attorneys, interpreters, and the clerks of attorneys and counselors, acting as such;¹⁷ and the general rule must be observed, notwithstanding no fee was asked or expected by the counsel.¹⁸ But a person in no way connected with the attorney or counsel, present at a communication made to him by a client, may be required to testify.¹⁹ And communications made while seeking legal advice from a student at law in an attorney's office, he not being the agent or clerk of the attorney for the purpose, are said not to be protected.²⁰

Confidential communications between attorney and client are not to be revealed at any period of time, nor in actions between third parties, nor after the proceedings to which they referred are at an end, nor after the dismissal of the attorney. The privilege that the attorney shall not be examined upon such points as have been communicated to him in his professional capacity, is the privilege of the client and not of the attorney, and it never ceases.²¹ The privilege, however, is personal to

13—Alderman v. People, 4 Mich., 414, 422.

14—Crosby v. Berger, 11 Paige, 377.

15—Crosby v. Berger, 11 Paige, 377.

16—1 Greenl. Ev., § 240.

17—Jackson v. French, 3 Wend., 337; Taylor v. Foster, 2 C. & P., 195;

1 Greenl. Ev., § 239.

18—March v. Ludlam, 3 Sandf. Ch. R., 35.

19—Jackson v. French, 3 Wend., 337.

20—Barnes v. Harris, 7 Cush., 576,

578; Holman v. Kimball, 22 Vt. 555.

21—1 Phill. Ev., C. H. & Edwards'

notes, 134.

the client, and if he consent that the attorney may be examined, it does not lie with a third person to object.²²

It seems that this privilege is confined to communications having a lawful purpose. If a client confide to an attorney a criminal design, or the attorney be present when a public or private wrong is done by the client, the knowledge thus acquired is not privileged.²³ Thus, where a party sought professional advice or assistance to enable him to forge a contract, it was held that an attorney may testify to any communication made to him to obtain professional advice or assistance as to the commission of a felony or any other crime which is a *malum in se*.²⁴

22—*Merle v. Moore*, 2 C. & P., 275; *Benjamin v. Coventry*, 19 Wend., 353. The privilege is personal to the client, and he may waive it: *Hamilton v. People*, 29 Mich., 172. But disclosures to an attorney made in the presence of an outside party, are not privileged. And if the client has himself testified to his communications to his attorney, it seems this may operate as a waiver to that extent: *Hartford Ins. Co., v. Reynolds*, 36 Mich., 502. Communications made by one who has employed the attorney on behalf of another in the presence of that other are not privileged in a suit between the two: *Frank v. Morley's Estate*, 106 Mich., 635; 64 N. W., 577.

The privilege of secrecy as to what passes between attorney and client, is the privilege of the client, and he may waive it if he chooses. It does not prevent him from testifying to the advice of his counsel, nor the counsel from corroborating him: *Passmore v. Passmore's estate*, 50 Mich., 626; 16 N. W., 170. An attorney acting as friendly adviser of two persons, declining retainer from either, or to have anything to do with the matter if there was to be difficulty, is not an attorney in the sense that communications between him and the parties are privileged: *Evers v. White's Estate*, 114 Mich., 266; 72 N. W., 184. For other cases upon the question of the privileged communication between attorney and client, see, *Brinkerhoff v. Peek*, 114 Mich., 628; 72 N. W., 621; *Muske v. Pfenning's Estate*, 120 Mich., 474; 79 N. W., 795;

Lorimer v. Lorimer, 124 Mich., 631; 83 N. W., 609. Whether an attorney is a competent witness to impeach a witness, who is not a party, but who consulted the attorney, *quaere*, *Ford v. McLane*, 131 Mich., 371; 91 N. W., 617.

Matters of a public nature coming to the knowledge of the prosecuting attorney in his official character, not privileged: *Lange v. Perley*, 47 Mich., 352; 11 N. W., 193.

Communications made to a prosecuting attorney by the complaining witness in a criminal case for the purpose of invoking his official action, are not privileged so far as the witness is concerned. He is not the prosecutor's client, and cannot control the use of the communications which are made for the purpose of public justice: *People v. Davis*, 52 Mich., 569; 18 N. W., 362.

23—*Coventry v. Tanahill*, 1 Hill. 33; *Bank of Utica v. Mersereau*, 3 Barb., Ch. R., 528.

24—*People v. Blakely*, 4 Parker C. R., 176. Professional communications are not privileged when they are for an unlawful purpose, having for their object the commission of crime. They then partake of the nature of a conspiracy, or attempted conspiracy, and it is not only lawful to divulge such communications, but under certain circumstances it might become the duty of the attorney to do so. The interests of public justice require that no such shield from merited exposure shall be interposed to protect a person who

EXAMINATION OF WITNESSES.

§ 448. **When privileged from answering.**—"Any competent witness in a cause shall not be excused from answering a question relevant to the matter in issue, on the ground merely that the answer to such question may establish, or tend to establish, that such witness owes a debt, or is otherwise subject to a civil suit; but this provision shall not be construed to require a witness to give any answer which will have a tendency to accuse himself of any crime or misdemeanor, or to expose him to any penalty or forfeiture, nor in any respect to vary or alter any other rule respecting the examination of witnesses."²⁵

§ 449. **Examination of witnesses separately.**—When the cause is called on, or at any time during its progress, the court, at the request of either party, may order such of the witnesses as have not yet been examined, or who are not under examination, to leave the court until they shall be called for in their order, so that each witness may be examined out of the hearing of other witnesses, who are to be examined after him.²⁶ But an attorney in the cause, whose personal attendance in court is necessary, though a witness in the cause, is excepted from the order to withdraw.²⁷

takes counsel how he can safely commit a crime. The relation of attorney and client cannot exist for the purpose of counsel in concocting crimes. The privilege does not exist in such cases: *People v. Van Alstine*, 57 Mich., 69; 23 N. W., 594, 598.

25—C. L., § 10179. Provision is made in C. L., § 824, that either party may, in all cases in justices' courts, have the other sworn as a witness; that if the plaintiff refuse to appear on being subpoenaed, or, being present, refuse to swear, the case shall be dismissed; and if the defendant refuse to appear on being subpoenaed, or being present, refuse to swear, the plaintiff's demand shall be taken as confessed, no set-off allowed, and judgment entered accordingly, etc. But since the enactment of this section, the legislature by act 125, laws of 1861, and the amendments thereto (see C. L., §§ 10210-10213), making parties competent as witnesses, have superseded,

and in effect repealed the former § 824; and by the latter §§ 10210-10213, have prescribed the only rule that should govern as to the competency and examination of parties: *Gooderich v. Allen*, 19 Mich., 250. Parties are now to be subpoenaed and examined like other witnesses, and with the same effect: *Ibid.*; *Roberts v. Mills*, 12 Mich., 305.

26—*Southey v. Nash*, 7 C. & P., 632; *Commonwealth v. Knapp*, 9 Pick., 495, 499; 1 *Greenleaf's Ev.*, § 432.

27—*Everett v. Lowdham*, 5 C. & P., 91; *Pomeroy v. Badderly*, Ry. & M., 430. And so it is ordinarily, with experts and witnesses called as to character: 1 *Gr. Ev.*, § 432, n. 2. The question of the segregation of witnesses is left entirely to the discretion of the trial court and its exercise will not be reviewed except for abuse: *People v. Burns*, 67 Mich., 537; 35 N. W., 154.

If, after such an order, the witness do not withdraw, or if he afterwards comes into court and be present during the examination of some other witness, it is discretionary with the court whether it will allow him to be examined or not.²⁸

§ 450. **Interpreters.**—Persons incapable of speaking the English language must be sworn and examined through an interpreter.²⁹ A deaf and dumb person may be sworn and examined by means of signs and tokens; but when the witness can write, it would be better to make him write his answers to the questions put to him. The interpreter is sworn *truly to interpret between the court, the jury, the attorneys, and the witness in the cause*; the oath is then administered to the witness in English, and interpreted to him by the sworn interpreter, as it is pronounced by the court or clerk. The examination then proceeds in the same manner.

The interpreter should use care to translate the language used by the witness into English. It is not proper for the interpreter to put his conclusion as to what the witness means into English. He should give what the witness says and let the jury determine what he means.

§ 451. **Examination in chief—the leading question.**—Upon the examination of a witness in chief, the questions should relate to the matter in issue. He should, in general, be examined only upon matters of fact within his own knowledge. It is a general rule that the direct examiner is not entitled to examine by *leading questions*; that is, by putting questions in such form as to suggest to the witness the answer desired. While such is the rule, and under some circumstances violations of it are clearly reprehensible, yet there is danger that too much be made of the rule, which has its exceptions.

28—Parker v. McWilliams, 6 Bing., 683. But the right to exclude the testimony is rarely exercised: 1 Gr. Ev., § 432; People v. Piper, 112 Mich., 644; 71 N. W., 174. Unless the party whose witness it is, is in some way responsible for the failure to obey the order of the court, the witness should never be excluded. That would be to punish the party. The punishment should be of the witness for contempt.

29—It is not error to allow the next

friend of an infant party to act as interpreter for a witness who cannot speak the English language. But this should not be permitted except for satisfactory reasons, and whether it shall be allowed in any particular case, rests in the discretion of the court: Swift v. Applebone, 23 Mich., 252. Jurors cannot be allowed to interpret for witnesses: Lendberg v. Brother-ton Iron M. Co., 75 Mich., 84; 42 N. W., 675.

There is no real objection to the use of the leading question except as to matter where there is a real controversy. As to all introductory matter and all matters, which, though there is no real controversy concerning them, yet must be proved, the use of the leading question is rather to be encouraged than discouraged. Its use enables the examiner to get at once to the material matters and thus save much time of the court. The use of the leading question under the limitations suggested is in the direction of trying the real matters in dispute and eliminating controversies over matters about which there is no real question. Like many other questions connected with the examination of witnesses, this one of the use of leading questions is quite largely one for the trial court's discretion to be exercised in the interest of the reasonable dispatch of public business while protecting litigants against the testimony of the examiner when it should come from the witness.³⁰

In some instances the court will allow leading questions to be put upon an examination in chief, where it evidently appears that the witness wishes to conceal the truth, or to favor the opposite party.³¹ Thus, a party's own witness, who having given one account of the matter, when called on the trial gives a different account, may be asked by the party calling him whether he had given such account, stating it, to the attorney. And if a witness is hostile, or is in a situation which of necessity makes him adverse to the party calling him, counsel may, by permission of the court, examine him after the manner of a cross-examination, asking him leading questions. And where from the nature of the case, the mind of the witness cannot be directed to the subject of the inquiry, without

30—The following are illustrative cases on the subject of the leading question: *Morrissey v. People*, 11 Mich., 327; *McKeown v. Harvey*, 40 Mich., 226; *Bullard v. Hascall*, 25 Mich., 132; *Hart v. Brockway*, 57 Mich., 189; 23 N. W., 725; *People v. Jensen*, 66 Mich., 711; 33 N. W., 811. That a ruling on the leading question is not subject to review, see, *Campau v. Brown*, 48 Mich., 145; 11 N. W., 845; and *Lyon v. Chamberlain*, 41 Mich., 119; 1 N. W., 983, but

is a question entirely within the discretion of the trial court: *Fowler v. Fowler*, 111 Mich., 676; 70 N. W., 336; *Webb v. Feather's Estate*, 119 Mich., 473; 78 N. W., 550; *Bellows v. Crane L. Co.*, 119 Mich., 424; 78 N. W., 536.

31—It is in the discretion of the judge at the trial to permit a leading question to be put to one's own witness, when he is reluctant and hostile to the party calling him, or where he has exhausted his memory, without

a particular specification of it, as when he is called to contradict another as to the contents of a letter which is lost, and cannot, without suggestion, recollect the contents, the particular passage may be suggested to him. So, where a witness is called to contradict a former witness, who has stated that certain expressions were used, or such things were said, it is usual to ask whether those particular expressions were used, or such and such things were said, without putting the question in the general form, by inquiring what was said.³² The examiner is entitled to answers which are responsive and may rightfully refuse to accept such as are not.³³

§ 452. Reasons for recollection.—When a disputed fact is in question, it is competent for a witness to state as a reason for his recollection any circumstances occurring at the same time, which had a tendency to fix the occurrence upon his mind. The value of his recollection will depend entirely upon the degree of attention with which he observed the facts, and the reasons which operated on his mind to excite that attention and fix the facts in his memory.³⁴ And also, if, immediately after the occurrence, an eye witness has the subject especially brought to his attention in such a manner as particularly to impress it upon his memory, it is competent for him to state the circumstances then occurring, which tended to make his recollection more distinct than it would otherwise have been, although those matters would not be as important as circum-

stating the particular required; where it is a proper name, or other fact which cannot be significantly pointed to by a general interrogatory; or where the witness is a child of tender years, whose attention can be called to the matter only by a pointed or leading question: *Moody v. Rowell*, 17 Pick., 498; *McBride v. Wallace*, 62 Mich., 451; 29 N. W., 75. A witness cannot be examined as an unfriendly witness until it is made to appear that he is such: *People v. Lyons*, 51 Mich., 215; 16 N. W., 380. See, also, *Gilbert v. Michigan C. Ry. Co.*, 116 Mich., 610; 74 N. W., 1010.

32—*Starkle's Ev.*, 167-8; 1 Gr. Ev., § 435; see, *Beaubien v. Cloutte*, 12 Mich., 487-8.

33—*People v. Coffman*, 59 Mich., 1;

26 N. W., 207; *McCreery v. Green*, 38 Mich., 172; *Shaver v. Ingham*, 58 Mich., 649; 26 N. W., 162. If the answer given would be admissible if responsive, the objection that it is not responsive can only be made by the examiner: *Hamilton v. People*, 29 Mich., 173; *Merkle v. Bennington*, 58 Mich., 157; 24 N. W., 776.

34—*Detroit & Milwaukee Ry. Co. v. Steinberg*, 17 Mich., 107; *Angell v. Rosenbury*, 12 Mich., 257. "He should therefore be allowed to state any facts which had that effect, whether relevant to the issue or not:" *Ibid.*; *Angell v. Rosenbury*, 12 Mich., 257; *Grenell v. Michigan C. Ry. Co.*, 124 Mich., 141; 82 N. W., 843; *Burt v. Long*, 106 Mich., 210; 64 N. W., 60.

stances which called his attention to the subject *at the time* of the occurrence; yet, as affecting the credibility of his recollection, they might still have an important bearing. But in giving such reasons, the witness cannot be allowed to introduce hearsay before the jury, as, by stating what bystanders stated afterwards about the occurrence;³⁵ or to relate his own conversations reflecting on the motives of another witness.³⁶

§ 453. **Refreshing recollection.**—Where a witness's memory is at fault, he may, even during examination, read, or, if necessary, hear the contents of a document read, for the purpose of reviving his former recollection. And if, by that means, he obtains a recollection of the facts themselves as distinct from the memorandum, his statement is admissible in evidence.³⁷ Thus, in order to refresh a witness's recollection, his attention may be called to his testimony on a former trial, and counsel's minutes of the former testimony may be referred to and read for that purpose.³⁸

And even where a witness has no present recollection of a fact, he may testify from a paper which he recognizes and

35—*Detroit & Milwaukee Ry. Co. v. Van Steinberg*, 17 Mich., 107, 108.

36—*McBride v. Cicotte*, 4 Mich., 491.

37—*Butler v. Benson*, 1 Barb., 526, 535; 1 Stark. Ev., 4 Lond. ed., 177. And he may be required to look at memoranda or papers within his power, to aid his recollection: *Chapin v. Lapham*, 20 Pick., 467. It is not necessary that the memorandum should be read to the jury: *Raynor v. Norton*, 31 Mich., 210. But the opposite party has a right to examine the paper to see if it is such a memoranda as would be likely to refresh the memory of the witness as to the matter about which he is testifying: *Duncan v. Seeley*, 34 Mich., 369. And where a plaintiff testifying, was allowed to take his bill of particulars filed in the case and to answer the question whether the list of articles therein given was a correct list of those sold by him to the defendant, held competent: *Cool v. Snover*, 38 Mich., 562. See, *Hudnutt v. Comstock*, 50 Mich., 596; 16 N. W., 157.

38—*Beaublen v. Cicotte*, 12 Mich., 486. An attorney testifying, may, for

the purpose of proving what a witness testified to on a former trial, read the minutes taken by himself of the testimony given by the witness on that trial, if he can testify that he knew at the time that the minutes were correctly taken: *Fisher v. Kyle*, 27 Mich., 454. It is improper to hand to witnesses copy of their testimony taken on former trial, and after allowing them to read it then to examine them as to matters involved in such testimony: *Lorimer v. Lorimer*, 124 Mich., 631; 83 N. W., 609. It is not error to refuse to allow a witness to read her testimony given on a former trial before being called upon to testify: *Vosburg v. Brown*, 119 Mich., 697; 78 N. W., 886. *Crane Lumber Co. v. Bellows*, 116 Mich., 304; 74 N. W., 481, is a case where it was held that books and papers made in the general course of business under the supervision of the witness might be used by him to refresh his recollection. See, *Halsey v. Sinesbaugh*, 15 N. Y., 486. As to whether a witness may read to the jury from a paper he knows to be correct, for the purpose of refreshing his recollection, although

remembers to have seen when the fact was fresh in his memory, and which he then knew to contain a correct statement of such fact.³⁹

And a witness may sometimes testify from a memorandum, although he neither recollects the fact or the writing, if the writing is such as to enable him to state with certainty that it would not have been made, had not the fact in question been true. Such cases may occur, where a subscribing witness is called to prove the execution of a written instrument, of which he has no present recollection, but is certain he saw it executed from seeing his signature to the attestation, and he may speak in like manner from memorandum and entry-books.⁴⁰ The paper need not be in the handwriting of the witness.⁴¹ If he cannot speak independently of it, it must be produced in court, so that the opposite party may cross-examine from it.⁴²

recently copied by him from originals made by him some time before: See, *McCreery v. Green*, 38 Mich., 186; *Beaubien v. Cicotte*, 12 Mich., 459, 486.

39—1 Starkie's Ev., 4 ed., 177.

40—Starkie's Ev., 4 Lond. ed., 178; *Russell v. Coffin*, 8 Pick., 143; *Maugham v. Hubbard*, 8 B. & C., 14; 1 Greenl. Ev., §§ 436, 437.

41—A witness may refresh his recollection by a paper purporting to be written by his agent, and which he has acted on as authentic; and the handwriting need not be proved: *Watkins v. Wallace*, 19 Mich., 57.

A witness may refresh his recollection from memoranda copied from his books, notwithstanding the entries therein are not in his own handwriting, if he has a recollection of the facts and knows the entries to be correct: *Cameron v. Blackman*, 39 Mich., 108. Where a witness testifies that he has a complete recollection of the facts, it is no ground of objection that the memorandum used to refresh his memory was not taken from his own entries: *Ibid.* It is apparent that there are two conditions, quite distinct from each other, involved in this discussion of the subject of recollection. We have first the case of really stimulating recollection, so that the witness as he testifies actually brings back

to his mind the fact or occurrence and testifies to what he now is able to recall about it. In the second condition, by no effort of any sort, by the witness himself, or through the suggestions of others, is he able to recall the fact or transaction and yet he may be able to say with great positiveness that the fact does exist, or the transaction did occur. The seeing of one's name in one's own handwriting as an attesting witness on an old deed or conveyance is a common illustration. This last is really not a case of refreshing recollection at all. It isn't refreshed. In the first condition it matters not so much that the memorandum used be the memorandum of the witness if it really has such relation to the transaction and to the knowledge really possessed by the witness, as that it would naturally recall it to his mind. In such case it would be competent to use it though not actually made by him: *Beaubien v. Cicotte*, 12 Mich., 459; *Watkins v. Wallace*, 19 Mich., 57; *Cameron v. Blackman*, 39 Mich., 108; *Hudnutt v. Comstock*, 50 Mich., 596; 16 N. W., 157.

In the second condition it is apparent that the witness should not be permitted to testify from a memorandum which he does not personally know to be true.

42—1 Starkie's Ev., 4 Lond. ed., 174.

§ 454. **Knowledge, belief.**—A witness can testify to such facts only as are within his own knowledge,⁴³ but he is not required to speak with that certainty which excludes all possible doubt in his mind.⁴⁴

§ 455. **Opinion evidence.**—The general rule is that the witness must testify to facts, not to deductions or conclusions from facts; the drawing of these being for the court, or the jury, if there be one.⁴⁵ There are two conditions, however, under which the witness may be permitted to give his opinion or conclusion from facts: *First*, where the facts are of such a nature as that the jury, who are presumed to possess the ordinary measure only of skill and information in dealing with facts, are incapable of drawing conclusions from the facts in the particular case without the assistance of some one of special skill or learning. As where it is a question of the effect of the combination of certain chemicals, or the cause of certain physical symptoms.⁴⁶ *Second*, where the facts are of such a character as, that the witness, though he may have observed them, and received very definite impressions from them, yet is unable to give them to the jury as he observed them. As in case of the speed at which an object was moving; the question of whether a person seen was John Doe or Richard Roe, they having the same general appearance; as to whether the person seen was 'above or under six feet in height.⁴⁷ In the first case it is one of incompetency of the

43—Gibson v. Williams, 4 Wend., 320.

44—Mere impression does not rise to the dignity of evidence: People v. Gotshall, 123 Mich., 474; 82 N. W., 274.

45—Anderson v. Thunder Bay R. B. Co., 61 Mich., 489; 28 N. W., 518; Lemon v. Chicago & G. T. Ry. Co., 59 Mich., 618; 26 N. W., 791; Evans v. People, 12 Mich., 27; Harris v. Clinton, 64 Mich., 457; 31 N. W., 425; 8 Am. St. Rep., 842; Atherton v. Bancroft, 114 Mich., 241; 72 N. W., 208; Lindley v. Detroit, 131 Mich., 8; 90 N. W., 665; Page v. Beach, — Mich., —; 95 N. W., 981 (July, 1903).

46—People v. Hall, 48 Mich., 482; 12 N. W., 665; People v. Sessions, 58 Mich., 594; 26 N. W., 291; People v. Millard, 53 Mich., 63; 18 N. W., 562;

Tufts v. Verkuy, 124 Mich., 242; 82 N. W., 891; People v. Thacker, 108 Mich., 652; 66 N. W., 562. Expert evidence must be given by living witnesses. Books of experts are not competent evidence: People v. Hall, *supra*; People v. Millard, 53 Mich., 63; 18 N. W., 562; Marshall v. Brown, 50 Mich., 148; 15 N. W., 55.

47—Evans v. People, 12 Mich., 27, 35 (involving a question of existence of sickness), where is found an excellent discussion upon principle: Beaubien v. Cicotte, 12 Mich., 459; (a case of mental capacity); Laird v. Snyder, 59 Mich., 404; 26 N. W., 654; Rice v. Rice, 50 Mich., 448; 15 N. W., 545 (question of sanity); Kinney v. Dutcher, 56 Mich., 308; 22 N. W., 866 (permanency of physical injuries);

jury to draw the conclusion, having the facts, whereas in the second case it is an inability to give them the facts from which the conclusion is to be drawn. It is evident that in the first condition only a person of special learning, training, skill or experience would be competent to assist the jury, while in the second the person who has observed the facts, though having no special qualification, may express his opinion, if the facts are such as commonly come under the observation of ordinary persons. The first is the "expert" witness, the second the "lay" witness.

The expert witness may find himself in one of two positions: He may personally have observed the facts upon which his opinion is to be given, or the facts may not have been observed by him but have been brought to the court through other witnesses who did observe them. In the first case he may pronounce his opinion after it is shown that he observed the facts; in the second case he pronounces his opinion in answer to hypothetical questions embracing the facts testified to by other witnesses.

§ 456. Expert must be shown qualified.—Before the expert witness is permitted to give his opinion it must be made to appear to the court, that he is an expert, that he does possess the requisite skill, training or experience to enable him intelligently to pronounce an opinion upon the particular conditions presented. This showing of his qualification should precede his opinion. If the opposite party would attack his qualifications as such expert, whether by cross-examination or otherwise, it should be done before the opinion is taken. A showing that a witness has had the training generally regarded as sufficient to qualify one for pursuing some one of the professions, trades or occupations is sufficient to establish him as an expert in that particular field. It is not necessary that the witness shall have had experience with the particular conditions involved in the case in which his opinion is asked if he is generally informed respecting similar matters. That a physi-

Detroit & M. Ry. Co. v. Van Steenberg, 17 Mich., 99 (speed of railway train); Connell v. McNett, 109 Mich., 329; 67 N. W., 344 (value of horse); Rivard v. Rivard, 109 Mich., 98; 66 N. W., 681 (sanity); Lamb v. Lippincott, 115 Mich., 611; 73 N. W., 887 (sanity); People v. Casey, 124 Mich., 279; 82 N. W., 883 (sanity); Mertz v. Detroit E. Ry. Co., 125 Mich., 12; 83 N. W., 1036 (speed of car).

cian is a graduate of a reputable medical school is sufficient to show him competent to give his opinion upon questions of general medical science. It is not essential that he shall have had special training in the particular branch of medical science involved; though it may be shown that he has or has not had such special training as bearing upon the weight to be given to his opinion.⁴⁸

§ 457. **The hypothetical question.**—The hypothetical question need not embrace all the facts respecting which there is some evidence tending to establish them. A party must embrace in such question all the facts, material to the conclusion asked, which the jury *must* find because there is evidence requiring the finding. Beyond this he may embrace such facts, and such facts only, as the jury would be justified in finding from the evidence, and as are consistent with his theory of the case. And he may frame as many different hypothetical questions, within reasonable limitations, as there are materially different combinations of facts which the jury would be justified in finding and as are consistent with his theory of the case.⁴⁹

§ 458. **Objections to evidence.**—When a question to a witness is objected to, the reason for the objection should be stated.¹ A party objecting to evidence should state the true ground of his objection; and if he neglects to do so, and the grounds stated by him are untenable, the judgment should not be reversed on a new objection for the first time taken in the court of review,

48—An expert's qualification depends on his experience, not necessarily upon his belonging to a particular profession: *Peer v. Ryan*, 54 Mich., 224; 19 N. W., 961. The question of whether the offered expert is qualified is for the court: *Ives v. Leonard*, 50 Mich., 296; 15 N. W., 463. A physician need not to have had actual experience in poison cases to be competent to give opinion as to whether a given case is one of poisoning or not: *People v. Thacker*, 108 Mich., 652; 66 N. W., 562. See, *Pillard v. Dunn*, 108 Mich., 301; 66 N. W., 45, on qualification of expert on handwriting.

49—Experts cannot be examined upon theories contrary to the uncon-

tradicted facts of the case: *People v. Hall*, 48 Mich., 482; 12 N. W., 665. Hypotheses must be supported by evidence: *People v. Hare*, 57 Mich., 506; 24 N. W., 843; *Fraser v. Jennison*, 42 Mich., 206; 3 N. W., 882. The question need not be too minute as to details: *Kelley v. Richardson*, 69 Mich., 430; 37 N. W., 514. Such questions are not objectionable because long, if confined to facts material to the opinion desired: *Mayo v. Wright*, 63 Mich., 32; 29 N. W., 832. The proper practice in such case would be to write out the question: *Ibid.*

1—*Morrissey v. People*, 11 Mich., 332; *Lungerhausen v. Crittenden*, 103 Mich., 173; 61 N. W., 270.

if it is one that might have been obviated on the trial, had it there been taken.² And the reason for objecting to any witness, or to any question put to him, should appear in the bill of exceptions, or it cannot be presumed on error that it was erroneously overruled.

Objections to leading questions should be taken before the answer, and not after.³

The proper time to take an objection to the formal proof of a paper, is when it is offered in evidence; and if no objection is then made, and the paper is allowed to be read to the jury, the party offering it is always at liberty to infer that the other party is satisfied with its due execution, and proposes to raise no objection on that score.⁴ An objection to papers as incompetent or irrelevant, does not assail their genuineness, but impliedly admits it.⁵ And where a copy of a map is put in evidence without objection, the right to insist on the production of the original is thereby waived.⁶

Objection to irrelevant testimony may be made at any stage of the cause. It should always be excluded from the consideration of the jury, whenever called to the notice of the

2—*Young v. Stephens*, 9 Mich., 507; and see, *Rash v. Whitney*, 4 Mich., 495; *Gilbert v. Kennedy*, 22 Mich., 117. Where an objection is made and the reason stated, all other objections, if any, will be deemed waived. And a judgment will not be reversed for the admission of evidence which does not affect injuriously the plaintiff in error: *Hollister v. Brown*, 19 Mich., 163; see, *Hamilton v. People*, 29 Mich., 174. A general objection to the admission of an execution on the ground that it is not in proper form, or to the admission in evidence of the record of a judgment that the judgment was not properly rendered, without specifying the particular defect complained of, is too indefinite to be considered: *Jennison v. Haire*, 29 Mich., 207. And an objection to the admission of any documentary evidence, which fails to state the particular ground of incompetency, is too general: *Lobdell v. Merchants' & Manufacturers' Bank of Detroit*, 33 Mich., 408. A general objection to a document offered in evidence, that it is "incompetent, irrele-

vant and immaterial," seems to be insufficient. Some specific defect or objection should be pointed out: *Mich. State Ins. Co. v. Soule*, 51 Mich., 312; 18 N. W., 662. Thus, where a lease attested by a subscribing witness, was offered in evidence, it was objected to as incompetent and immaterial, and when upon error it was urged in support of the objection that the subscribing witness was not called to prove the execution of the lease, *held*, that this specific objection should have been pointed out in the court below so that the objection might have been removed by calling the subscribing witness: *Jochen v. Tibbells*, 50 Mich., 33; 14 N. W., 690. So a general objection that evidence is "incompetent" is properly overruled if competent for any purpose: *Gladstone Exch. Bank v. Keating*, 94 Mich., 429; 53 N. W., 1110.

3—*Morrissey v. People*, 11 Mich., 332-3, by Manning, J.

4—*Perrot v. Shearer*, 17 Mich., 53.

5—*Young v. Stephens*, 9 Mich., 507.

6—*Johnson v. Scott*, 11 Mich., 232.

judge. There can be no waiver which can make it proper to allow a case to be decided on issues not authorized by the pleadings, and the objection is never too late.⁷

§ 459. Cross-examination.—When a witness has been examined in chief, the other party has a right to cross-examine him.⁸ Such cross-examination may be conducted by leading questions. The rule which prevailed in the early jurisprudence of the state, limiting the scope of cross-examination to such matters as the witness has testified to on direct examination,⁹ has been abrogated by the later decisions. The rule now as to the range of legitimate cross-examination being that the cross-examiner may examine as to any matter, material to the issue, whether testified about on direct examination or not.¹⁰ The cross-examiner does not, as to such new matter, make the witness his own; he is not compelled to give credit to the witness as his own.¹¹

As to impeaching questions, see *post*, §§ 463-468.

§ 460. When privileged from answering.—Where the question on cross-examination would tend to expose the witness to a penal liability, or to a criminal charge, he cannot be required to answer.¹² If the answer may in any way criminate him, either by furnishing direct evidence of guilt, or by establishing one of many facts, which together may constitute a chain of testimony sufficient to warrant his conviction, the witness must be protected from answering, if he claim the

7—*Pennsylvania Mining Co. v. Brady*, 14 Mich., 265. Mich., 381, 442. See the strictures and criticisms upon the rule, by Christianity, J., in the latter case.

8—The testimony elicited on a legitimate cross-examination of a witness constitutes a part of his evidence given on his examination in chief, and both are alike to be treated as evidence given on the part of the party calling the witness: *Wilson v. Wagar*, 26 Mich., 452, 458; *Campau v. Traub*, 27 Mich., 277; *Schratz v. Schratz*, 35 Mich., 485. Where a party was examined as a witness on his own behalf, and then refused to submit to a cross-examination, his testimony was rejected, and held to be rightly so: *Page v. Stephens*, 23 Mich., 357.

9—*People v. Horton*, 4 Mich., 81-2; approved in *Campau v. Dewey*, 9

10—*Detroit & M. Ry. Co. v. Von Steinberg*, 17 Mich., 109; *People v. Barker*, 60 Mich., 279; 27 N. W., 539; *Ireland v. Cincinnati W. & M. Ry. Co.*, 79 Mich., 163; 44 N. W., 426; *New York Iron Mine v. Negaunee Bank*, 39 Mich., 644; *Hemminger v. Western Assurance Assn.*, 95 Mich., 355; 54 N. W., 949.

11—*New York Iron Mine v. Negaunee Bank*, 39 Mich., 644.

12—1 *Greenleaf Ev.*, § 451; *Beltinger v. People*, 8 Wend., 596-7; *Alderman v. People*, 4 Mich., 423; *Pitcher v. People*, 16 Mich., 149.

privilege. Nor can he be required to explain how he would be criminated by the answer, because the explanation would require the very disclosure against which the law protects him.¹³ But the privilege of declining to answer belongs to the witness alone, and not to the party.¹⁴ If the prosecution, to which the witness might be exposed, is barred by the lapse of time, the privilege ceases, and he is not protected from answering, notwithstanding his answer may tend to cast a very great degree of reflection upon his character and conduct.¹⁵ Nor is he protected, because the answer may tend to prove him subject to any civil liability or debt.¹⁶

§ 461. **Re-direct examination.**—After the cross-examination is closed, the witness may be re-examined by the party calling him upon all the topics upon which he was cross-examined. This gives an opportunity of explaining any new facts which have come out upon the cross-examination. Where a witness has been cross-examined as to declarations made by him, counsel have the right, on re-examination, to ask all questions which may be proper to draw forth an explanation of the sense and meaning of the expressions used by the witness on cross-examination, if they be doubtful in themselves, and also

13—*People v. Mather*, 4 Wend., 252-3-4; *Henry v. Bank of Salina*, 1 Comst., 83; *People v. Brewer*, 27 Mich., 134. But a witness has no privilege that excuses him from testifying to relevant facts that show him to be guilty of fraud or dishonesty, if not criminal. It is no excuse for his refusal to testify concerning them that they may exhibit him in a light that is not creditable. His dishonesty or fraud, when not criminal, may as well be proved by him as by any other person: *Jennings v. Prentice*, 39 Mich., 421.

14—*Commonwealth v. Shaw*, 4 Cush., 594; *Cloyes v. Thayer*, 3 Hill, 564; see, *Taylor v. Wood*, 2 Edw. Ch., 94. If a witness discloses a part of a transaction in which he is criminally concerned, without claiming his privilege, he must state the whole, if what he has disclosed is a part of the transaction, otherwise not: *Coburn v. Odell*, 18 Fost., 540; *Norfolk v. Gay-*

lord, 28 Conn., 369; *Foster v. Randall*, 11 Cush., 437; *Low v. Mitchell*, 18 Maine, 372. The witness cannot claim such privilege, where a further examination is necessary to understand the facts already voluntarily stated: *People v. Carroll*, 3 Parker C. R., 83; see, *Hamilton v. People*, 29 Mich., 173.

15—*People v. Mather*, 5 Wend., 252-5; *Close v. Olney*, 1 Denio, 319, 323; see, *Bank of Salina v. Henry*, 2 Denio, 156; *Henry v. Bank of Salina*, 1 Comst., 83; *Foster v. People*, 18 Mich., 272.

16—C. L., § 10179. If a witness decline to answer, on the ground that his answer will tend to criminate him, no inference as to his guilt or innocence is permitted on that account: nor can such refusal be commented on before the jury: *Carne v. Litchfield*, 2 Mich., 340; *Knowles v. People*, 15 Mich., 413; *Foster v. People*, 18 Mich., 273.

of the motive which induced the witness to use those expressions.¹⁷

And, after cross-examination, a witness may, by permission of the court, be re-examined by the party calling him, as well for the introduction of matter new in itself as for the purpose of explaining the expressions and motives of the witness, when the omission to examine as to such new matter, when first called, arose from inadvertence or other cause.¹⁸

§ 462. **Recalling witnesses, rebutting, etc.**—A party has a right to suppose that the evidence of the opposite side will be offered and received in its logical order and sequence;¹⁹ but the introduction of testimony, even out of the usual order of time, must to some extent be discretionary with the judge.²⁰ And it is discretionary with the court to allow a party, after his rebutting evidence is closed, to recall one of his own witnesses to give evidence which would have been proper when the witness was on the stand before.²¹ And so, after defendant had closed his testimony, plaintiff was allowed to call a witness to prove a fact deemed material; *held*, whether properly rebutting or not, the judge had a right to admit it. And whether, after the testimony is closed upon both sides, a party, without claim of right, may have a witness sworn and his evidence admitted, is a question of discretion, on which the decision of the court is final.²²

17—1 Starkie's Ev., 4 Lond. ed., 231. A question warranted by cross-examination may be asked on re-direct examination: *People v. Hare*, 57 Mich., 506; 24 N. W., 843. Where the cross-examination draws out a partial statement of facts it is proper on re-direct examination to supplement such statement with such other facts as serve to explain, complete, support or modify the statement: *Willcox v. Ney*, 47 Mich., 421; 11 N. W., 225; *Passmore v. Passmore*, 50 Mich., 626; 16 N. W., 170; *Wright v. Towle*, 67 Mich., 255; 34 N. W., 578.

18—*Clark v. Vorce*, 15 Wend., 193; and see, *Detroit & Milwaukee R. Co. v. Van Steinberg*, 17 Mich., 99, 112. But this rests in the discretion of the court: *Hemmens v. Bentley*, 32 Mich.,

89; but see, 1 Greenleaf's Ev., § 467.

19—*Brown v. People*, 17 Mich., 436.

20—*Com. v. Eastman*, 1 Cush., 217; *Detroit & M. Ry. Co. v. Van Steinberg*, 17 Mich., 99; *Torrent v. Damm*, 66 Mich., 105; 33 N. W., 49; *Kempsey v. McGinniss*, 21 Mich., 123; *Danielson v. Dyckman*, 26 Mich., 169; *Bulen v. Granger*, 56 Mich., 207; 22 N. W., 306; *Beebe v. Koshnic*, 55 Mich., 604; 22 N. W., 59.

21—*White v. Bailey*, 10 Mich., 155, 160. As to the order of testimony, in regard to mental capacity, see, *Taff v. Hosmer*, 14 Mich., 310; *People v. Garbutt*, 17 Mich., 9, 7, 19; *Hemmens v. Bentley*, 32 Mich., 89.

22—*Detroit & Milwaukee Ry. Co. v. Van Steinberg*, 17 Mich., 99; *Danielson v. Dyckman*, 26 Mich., 169.

IMPEACHMENT OF WITNESSES.

§ 463. **What it is and by whom—in general.**—Witnesses may not be impeached by the party calling them.²³ This does not prevent the party calling the witness from showing by other witnesses the fact to be otherwise than as testified to by the first.²⁴ To impeach a witness is to show that for some reason the statements made by him as a witness are not entitled to credit at the hands of the jury, or are not entitled to that measure of credit they would naturally have, except for the impeachment.

This impeachment may come through cross-examination of the witness or through the testimony of other witnesses called to the impeaching facts.²⁵

A witness may be impeached by showing *bias, corruption, error, inconsistent statements, mental incapacity, moral obliquity, or infamy.*²⁶

§ 464. **Impeachment of witnesses, by showing bias, corruption, etc.**—*Bias* may be shown by showing that the witness is interested in the litigation or stands in such relation to one of the parties, either in blood, by affinity, or through business or social associations as that he would naturally favor such party in his testimony or be prejudiced against him.²⁷

Corruption may be shown by evidence that the witness has said he was willing to testify regardless of the truth—by showing receipt of a bribe—or guilt of subornation.²⁸

23—1 Greenleaf Ev., § 442; see, Gibbs v. Linabury, 22 Mich., 479; Snell v. Gregory, 37 Mich., 500; Darling v. Thompson, 108 Mich., 215; 65 N. W., 754. This rule is not applicable to compulsory witnesses a party is required to call: See, People v. Case, 105 Mich., 92; 62 N. W., 1017.

24—Snell v. Gregory, 37 Mich., 500; 1 Green. Ev., § 443; Smith v. Smith, S. & Co., 125 Mich., 234; 84 N. W., 144; Darling v. Thompson, 108 Mich., 215; 65 N. W., 754.

25—Helwig v. Lascowski, 82 Mich., 619; 46 N. W., 1033 (conviction of crime); Wilbur v. Flood, 16 Mich., 40.

26—Michigan Pipe Co. v. Ina Co., 97 Mich., 493; 56 N. W., 849.

27—Crippen v. People, 8 Mich., 117; Geary v. People, 22 Mich., 220; Anderson v. Mich. Cent. Ry. Co., 107 Mich., 591; 65 N. W., 585; People v. Turney, 124 Mich., 542; 83 N. W., 273; Michigan C. M. Co. v. Wilcox, 78 Mich., 451; 44 N. W., 281; see, Marquette H. & O. Ry. Co. v. Kirkwood, 45 Mich., 51; 7 N. W., 209; Jones v. Portland, 88 Mich., 598; 50 N. W., 731; Hitchcock v. Moore, 70 Mich., 112; 37 N. W., 914.

28—Beaubien v. Clotte, 12 Mich., 484; 1 Green. Ev., § 450a, ed. 16.

Error may be shown by evidence that the fact is otherwise than as testified by the witness.²⁹

§ 465. **Impeachment of witnesses, by showing inconsistent statements.**—Impeachment by *inconsistent statements* is where it is shown that at some time prior to giving his testimony the witness has, either under oath or without oath, and either orally, or in writing, made statements which are inconsistent with such as he has made on the stand.³⁰ Prior conduct inconsistent with the attitude of the witness on the stand is competent for like reasons.

Before the inconsistent statement can be shown, if it was oral, the witness must have been asked whether, on the particular occasion, identified to the witness by giving the time, place and such other known circumstances as will recall the occasion, he made the statement now repeated to him.³¹ If it was in writing it must be produced, if available, and shown to the witness and he asked if it is his.³² This method of impeachment is not allowed as to collateral matter, but only as to matter material to the issue.³³

§ 466. **Impeachment of witnesses, by showing mental incapacity.**—*Mental incapacity*—A witness may be shown to have been in such mental condition as not to have been able to

29—1 Green. Ev., § 461e, ed. 16. This method of impeachment cannot be adopted as to collateral matter: *Hitchcock v. Burgett*, 38 Mich., 501; *Hamilton v. People*, 46 Mich., 188; 9 N. W., 247; *Driscoll v. People*, 47 Mich., 413; 11 N. W., 221.

30—Impeaching testimony spends its force in the contradiction. It has no effect affirmatively to establish any fact in the case: *Howard v. Patrick*, 38 Mich., 804; *Brown v. Dean*, 52 Mich., 267; 17 N. W., 837; *Catlin v. Michigan C. Ry. Co.*, 66 Mich., 358; 33 N. W., 515. Though the witness when interrogated does not deny, directly, the making of the inconsistent statement, but says he has no recollection of having made it, he may be impeached by showing that he did make it: *Pringle v. Miller*, 111 Mich., 663; 70 N. W., 345; *Jensen v. Mich. Cent. Ry. Co.*, 102 Mich., 176; 60 N. W., 57. If the witness admits the

making of the contradictory statement it is not competent to call witnesses to prove it: *Lightfoot v. People*, 16 Mich., 513; *Threadgool v. Litogot*, 22 Mich., 270. The question to the impeaching witness must be substantially identical with that put to the witness to be impeached: *DeArmond v. Neasmith*, 32 Mich., 231.

31—*Smith v. People*, 2 Mich., 415; *Johnston v. Disbrow*, 47 Mich., 59; 10 N. W., 79.

32—*Lightfoot v. People*, 16 Mich., 513; *Hamilton v. People*, 29 Mich., 198; *Maxted v. Fowler*, 94 Mich., 106; 53 N. W., 921; *The Queen's Case*, 2 Brod. & Bing., 286; see, *Zibbell v. Grand Rapids*, 129 Mich., 659; 89 N. W., 563.

33—*Driscoll v. People*, 47 Mich., 413; 11 N. W., 221; *Hamilton v. People*, 29 Mich., 173; *Hitchcock v. Burgett*, 38 Mich., 501.

have gained the information testified to by him. This may have been by reason of insanity, intoxication or other cause producing that effect. Or such incapacity may exist at the time of the trial and the witness be unable with accuracy, by reason of it, to recall and detail the facts.³⁴

§ 467. Impeachment of witnesses, by showing moral obliquity.—A witness may be impeached by evidence that he is unworthy of credit because of his bad moral character as respects truth and veracity.³⁵ The rule does not now permit an attack upon any other phase of character or upon the character of the witness for general moral worth.³⁶ Evidence to sustain this impeachment must be addressed to the general reputation of the witness for truth and veracity in the community where he is *generally known*, at the *time* of the trial or within a time reasonably near to that of the trial.³⁷

§ 468. Impeachment of witnesses, by showing conviction of crime.—*Infamy*—Closely akin to the last named method of impeachment is that by showing that the witness has been convicted of crime. At the common law this was a disqualification but it now, in this state, goes to the credit only.³⁸ A witness may be asked not only as to his conviction of crime but concerning any serious charge brought against him.³⁹

34—Mead v. Harris, 101 Mich., 585; 60 N. W., 284; see, Bowdle v. Detroit S. Ry. Co., 103 Mich., 272; 61 N. W., 529.

35—Leonard v. Pope, 27 Mich., 145 (not for *honesty*); Webber v. Hanke, 4 Mich., 198. In the last case the correct examination was outlined as being first, a question in following form: "Do you know what the general reputation of (*the witness to be impeached*) is for truth and veracity in the neighborhood where he resides?" and second, "What is that reputation?" The impeaching witness may be asked whether from such reputation he would believe the witness under oath: Hamilton v. People, 29 Mich., 173. The cross-examination of the impeaching witness may require him to give the names of persons speaking against the witness and what they

said: Annis v. People, 13 Mich., 516.

36—Leonard v. Pope, 27 Mich., 145 (not for *honesty*); Hamilton v. People, 29 Mich., 173; Calkins v. Ann Arbor Ry. Co., 119 Mich., 312; 78 N. W., 129 (failure to pay debts).

37—People v. Lyons, 51 Mich., 215; 16 N. W., 380 (throughout a large city); Hamilton v. People, 29 Mich., 173 (at more than one place if witness has recently changed domicile); Keator v. People, 32 Mich., 484 (no fixed domicile).

38—C. L., § 10210; Helwig v. Iasowski, 82 Mich., 619; 46 N. W., 1033, and cases cited in the opinion.

39—Driscoll v. People, 47 Mich., 417; 11 N. W., 221; Wilbur v. Flood, 16 Mich., 40. But it seems the impeaching matter must have some direct tendency to affect the credit of the witness: People v. Mills, 94 Mich.,

And it is not only necessary to show the conviction, but also the judgment.⁴⁰ A verdict of guilty on a charge of perjury did not, at the common law, without judgment, render the defendant infamous, so as to preclude his being a competent witness. Therefore, where the complainant at the hearing of a bill in chancery, for the purpose of discrediting the defendant, and destroying the effect of his sworn answer, offered evidence that defendant had been indicted and convicted by a jury for perjury, in swearing to the same answer it was held that such evidence was inadmissible for that purpose, for the reason that no judgment had been rendered on the verdict, the judgment having been arrested.⁴¹ Evidence of a conviction of an infamous crime in any other state or country would be admissible here for the purpose of discrediting a witness.⁴²

§ 469. Impeachment of witnesses, by showing general bad reputation.—The general reputation of every witness for truth and veracity is open to examination.⁴³ In impeaching the credit of a witness, the inquiry must be confined to his *general reputation* for truth, and not be permitted as to particular facts.⁴⁴ The inquiry must be as to his general reputation, where he is best known, and of those who can state what is *generally said* of the person by those among whom he dwells, or with whom he is chiefly conversant.⁴⁵

The correct general question to be asked of the impeaching witness on the subject is: "Do you know what the general reputation of (*the witness sought to be impeached*) is for truth and veracity in the neighborhood where he resides?"

630; 54 N. W., 488 (want of charity does not); so, *People v. O'Hare*, 124 Mich., 515; 83 N. W., 279; *Derwin v. Parsons*, 52 Mich., 425; 18 N. W., 200 (improperly approaching a judicial officer and buying votes). While the witness may be impeached by evidence of this sort given upon cross-examination it is not competent to introduce such evidence by other witnesses: *Driscoll v. People*, 47 Mich., 416; 11 N. W., 221.

40—*People v. Whipple*, 9 Cow., 707.

41—*Smith v. Brown et al.*, 2 Mich., 161.

42—*Com. v. Green*, 17 Mass., 516; *Com. v. Knapp*, 9 Pick., 496.

43—*Weber v. Hauke*, 4 Mich., 204.

44—1 Greenl. Ev., § 461. Where a witness is sought to be impeached by proof of general reputation, it must be for veracity, and reputation as to honesty is not admissible: *Leonard v. Pope*, 27 Mich., 145.

45—Where it was sought to impeach a witness who was well known all over a large city; held, that it was erroneous to limit the inquiry as to her reputation for truth and veracity to that immediate part of the city where she resided: *People v. Lyons*, 51 Mich., 215; 16 N. W., 380.

and secondly: "What is that reputation?" If the witness says he does not know what such reputation is, that is the end of the inquiry of him.

§ 470. **Evidence to sustain the witness.**—A party cannot bring evidence to confirm the character of a witness before the credit of that witness has been impeached, either upon cross-examination, or by the testimony of other witnesses.⁴⁶

But it seems that where the character of a witness for truth is attacked by general evidence of want of character for truth, it is competent for the party calling him to give general evidence of his good character.⁴⁷ But mere contradiction among witnesses at the trial is no ground for general evidence as to character for truth.⁴⁸ So it is competent to sustain a witness against an attack by evidence of inconsistent statements, by allowing him to explain the inconsistencies, or by calling other witnesses in denial of the making of such inconsistent statements. In general where an attack upon the credibility of a witness is made by the calling of witnesses to support the attack, it is competent to call witnesses in answer.

Nor is it competent to corroborate a witness, by proof that he has on other occasions made statements similar to those testified to by him in his examination in chief.⁴⁹ And where evidence not properly admissible has been contradicted by the opposite side, testimony corroborative of the first witness is equally inadmissible, although offered as rebutting merely to the contradictory evidence.⁵⁰

46—1 Starkie's Ev., 4th London edition, 252.

47—Although one who is called to sustain a witness, may say that he does not know what his reputation for truth and veracity is, yet if he would be likely to know if the witness' character in that respect had been the subject of unfavorable comment, he may be asked whether he had ever heard of his truth and veracity being questioned. The fact that a person's truthfulness has never been the subject of controversy, is very cogent evidence to prove him worthy of credit: *Lenox v. Fuller*, 39 Mich., 268. See, *McLaughlin v. Salley*, 46 Mich., 219; 9 N. W., 256.

48—*Russell v. Coffin*, 8 Pick., 143, 154; *Stark v. People*, 5 Denio, 106.

49—*Deshon v. Merchants Ins. Co.*, 11 Met., 199; *Brown v. People*, 17 Mich., 429. But as to such corroboration, where the other party has sought on cross-examination to impeach the witness, see, *Com. v. Wilson*, 1 Gray, 337, 340; and see, *Robb v. Hackley*, 23 Wend., 50; *State v. Winkley*, 14 N. H., 480; and see, *Stewart v. People*, 23 Mich., 63. A witness cannot support his own positive testimony purporting to be given upon his own knowledge, by testifying himself to other consistent facts which are immaterial in themselves and which like the fact sought to be corroborated rests entirely on his own oath: *Anderson v. Russell*, 34 Mich., 109.

50—*McBride v. Clotte*, 4 Mich., 478.

CHAPTER XXV.

DAMAGES.

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|-----------------------------|-------------------------------------|
| § 471. In general. | § 477. Profits as damages. |
| § 472. Exemplary damages. | § 478. Duty to minimize. |
| § 473. Stipulated damages. | § 479. For breach of contract. |
| § 474. Double damages. | § 480. For breach of sale contract. |
| § 475. Treble damages. | § 481. In actions for tort. |
| § 476. Interest as damages. | |

§ 471. **In general.**—Damage is a pecuniary allowance made, under rules of law, because of injuries suffered by him in whose favor the allowance is made, through the unlawful act of him against whom it is made.

As a general rule the injury must be the natural and proximate result of the act complained of and not a remote consequence only.¹

A second general rule is that the damages must be compensatory for the injury received—nothing more and nothing less. This rule excludes an allowance of damages on the theory of punishment of the defendant.²

Damages are known in the law as either general or special. General damages are such as the law implies or presumes to have accrued from the wrong complained of. Special damages are such as really resulted from the injury complained of but are not implied by law.³ General damages may be

1—*Shaw v. Hoffman*, 21 Mich., 151; 264; 51 N. W., 887; *Totten v. Burhans*, 91 Mich., 495; 51 N. W., 1119; *Clark v. Moore*, 3 Mich., 55; *Helser v. Langworthy v. Green Twp.*, 95 Mich., 10; 10 N. W., 60; *Cuddy v. Major*, 12 Mich., 368; *Wetmore v. Pattison*, 45 Mich., 439; 8 N. W., 67; *Hitchcock v. Pratt*, 51 Mich., 263; 16 N. W., 639; *Rajnowski v. Detroit B. C. & A. Ry. Co.*, 74 Mich., 20; 41 N. W., 849; s. c. 78 Mich., 681; 44 N. W., 335; *Doran v. Butler*, 74 Mich., 643; 42 N. W., 273; *Maywood v. Logan*, 78 Mich., 135; 43 N. W., 1053; *McKellar v. Monitor Twp.*, 78 Mich., 485; 44 N. W., 412; *Riley v. Littlefield*, 84 Mich., 22; 47 N. W., 576; *Eddy v. Courtwright*, 91 Mich., 264; 51 N. W., 887; *Totten v. Burhans*, 91 Mich., 495; 51 N. W., 1119; *Langworthy v. Green Twp.*, 95 Mich., 93; 54 N. W., 697; *Filler v. Smith*, 96 Mich., 347; 55 N. W., 999.

2—*Ten Hopen v. Walker*, 96 Mich., 236; 55 N. W., 657; *Haviland v. Chase*, 116 Mich., 214; 74 N. W., 477; *Boyd v. Haberstumpf*, 129 Mich., 137; 88 N. W., 386; *McChesney v. Wilson*, 132 Mich., 252; 93 N. W., 627; *Seuyvesant v. Wilcox*, 92 Mich., 233; 52 N. W., 465.

3—*Bateman v. Blake*, 81 Mich., 227; 45 N. W., 831.

recovered under a declaration showing the violation of plaintiff's right, and a general allegation that injury resulted. To recover special damages, however, it is essential that there be allegations showing that in the particular case injuries were caused not usually resulting from such conduct as is counted upon, and for which damages are asked.

Special damages cannot be recovered under a declaration containing a general allegation of damages only.⁴

One may be injured under such circumstances as that he can have no allowance of damages—*damnum absque injuria*—in the old phrase. Such is the case where there is injury without any violation of duty;⁵ so in case of injury resulting from the enforcement of the police regulations of the state.⁶ Again in case of injury resulting to another from that use of one's own lands which is lawful, as by digging a well which injures a neighbor's well.⁷

Nominal damages are given in cases where there has been a technical violation of another's right, but with no substantial injury shown.⁸

§ 472. Exemplary damages.—Exemplary damages are allowed because in the particular case the defendant in doing the act complained of, acted wilfully, maliciously or in reckless disregard of the rights of plaintiff. The theory of exemplary damages is not that they are an allowance for something in addition to that which will compensate for the actual injury; they are only compensatory. They are an allowance

4—Chandler v. Allison, 10 Mich., 460; Shaw v. Hoffman, 21 Mich., 151; Allen v. Kinyon, 41 Mich., 281; 1 N. W., 863; Shaddock v. Alpine P. R. Co., 79 Mich., 7; 44 N. W., 158; Kuhn v. Freund, 87 Mich., 545; 49 N. W., 867; Silsby v. Michigan C. Co., 95 Mich., 204; 54 N. W., 761; Beath v. Rapid Ry. Co., 119 Mich., 512; 78 N. W., 537; Smedley v. Soule, 125 Mich., 192; 84 N. W., 63.

5—Post v. Campau, 42 Mich., 90; 3 N. W., 272.

6—Grand Rapids v. Grand Rapids & I. Ry. Co., 66 Mich., 42; 33 N. W., 15.

7—For cases illustrating this rule further, see, Attorney General v. Evart

Booming Co., 34 Mich., 462; Upjohn v. Richland, 46 Mich., 542; 9 N. W., 845; National Copper Co. v. Minnesota M. Co., 57 Mich., 83; 23 N. W., 781; Highway Com'rs v. Ely, 54 Mich., 173; 19 N. W., 940; Gregory v. Bush, 64 Mich., 37; 31 N. W., 90.

8—Haven v. Beidler Mfg. Co., 40 Mich., 286; Ward's C. & P. L. Co. v. Elkins, 34 Mich., 439; Toll v. Wright, 37 Mich., 93; Graham v. Poor, 50 Mich., 153; 15 N. W., 61; Ellis v. Simpkins, 81 Mich., 1; 45 N. W., 646; Wyatt v. Herring, 90 Mich., 581; 51 N. W., 684; Detroit Gas Co. v. Moreton T. & S. Co., 111 Mich., 401; 69 N. W., 659; Sax v. Detroit, G. H. & M. Ry. Co., 129 Mich., 502; 89 N. W., 368.

in addition to such allowance as would be made if the injury were innocently inflicted, and so much in addition, as will compensate for the aggravation of the injury by reason of the malice or recklessness of the defendant.⁹

§ 473. **Stipulated damages.**—Under certain circumstances parties may, by their contract, fix the amount of damages to be recovered in case of a breach of it. In order that agreements of this sort be upheld, it must appear that the agreement is really one which fairly measures the injury resulting from the breach, and is not a provision in the nature of a penalty for failure to perform. It is not what the parties *intend* which determines whether the stipulation will be enforced or not, but the inquiry is whether the sum fixed is in fact in the nature of a penalty.¹⁰

The policy of the law is against allowing the parties to a contract to fix the amount of recovery for a breach of it by calling the agreed amount “damages” when in fact it is clearly a penalty or forfeiture for non-performance.¹¹ The principle of stipulated damages does not forbid reasonable provisions limiting the amount of recovery in certain cases. As in the case of contracts of carriage with express companies, stipulations limiting recovery in case of injury or loss in transportation to \$50 unless the value of the goods is declared at the time of the contract, are upheld.¹² So, in case of contracts with telegraph companies, stipulations limiting the amount of recovery for failure to properly transmit, in cases of unre-

9—*Scripps v. Reilly*, 38 Mich., 10; *Watson v. Watson*, 53 Mich., 168; 18 N. W., 605; *Stilson v. Gibbs*, 53 Mich., 280; 18 N. W., 815; *Ross v. Leggett*, 61 Mich., 445; 28 N. W., 695; *Wilson v. Bowen*, 64 Mich., 133; 31 N. W., 81; *Ford v. Cheever*, 105 Mich., 679; 63 N. W., 975; *Haviland v. Chase*, 116 Mich., 214; 74 N. W., 477; *Boyd v. Haberstumpf*, 129 Mich., 137; 88 N. W., 386; *McChesney v. Wilson*, 132 Mich., 252; 93 N. W., 627; *Peacock v. Oakes*, 85 Mich., 578; 48 N. W., 1082.

10—*Jaquith v. Hudson*, 5 Mich., 123; *First Cong. Ch. v. Walrath*, 27 Mich., 232. In the absence of statute, a stipulation for an attorney fee, found in a note or mortgage, to be

paid in case proceedings are taken to collect the same, is void: *Bullock v. Taylor*, 39 Mich., 137; *Myer v. Hart*, 40 Mich., 517.

11—*Davis v. Freeman*, 10 Mich., 188; *Richmond v. Robinson*, 12 Mich., 193; *Myer v. Hart*, 40 Mich., 517; *Dally v. Litchfield*, 10 Mich., 29; *Richardson v. Woehler*, 26 Mich., 90. It is against public policy to allow damages to be stipulated, otherwise than by a trial, unless where the real damages cannot be reasonably well ascertained: *Hubbard v. Epworth*, 69 Mich., 92; 36 N. W., 801.

12—*Smith v. American Express Co.*, 108 Mich., 572; 66 N. W., 479.

peated messages, to the amount paid for transmission, are upheld.¹³

§ 474. **Double damages.**—By statute in certain cases it is provided that double damages may be recovered. C. L., § 11653 makes such a provision in case of wilful or negligent setting of fire by which another is injured in his property.¹⁴ The statute giving damages in case of injury to the domestic animals or person of one by the dog of another, also provides for a double recovery.¹⁵ This statute does not contemplate such result except in case there is some fault in the owner. Injuries inflicted, therefore, by a rabid dog with no fault in the owner are not recoverable under this statute.¹⁶

The proper practice is to have the jury assess the amount of single damages and to apply, after verdict, to the court to have judgment entered for double the amount of the verdict.¹⁷

§ 475. **Treble damages.**—By statute it is also provided that in certain specified cases the plaintiff may recover treble damages. These damages are in their nature punitive and the presumption is against their recovery in cases not clearly within the statute, and which do not involve something like wilful wrong.¹⁸ The statute gives treble damages in case of trespass involving the cutting and despoiling of trees where it is not casual and involuntary.¹⁹ Under this statute the bur-

13—Birkett v. Western Union Tel. Co., 103 Mich., 361; 61 N. W., 645.

14—Boyd v. Rice, 38 Mich., 599. These damages may be doubled by the justice though the doubled damages exceeds the limit of his jurisdiction as fixed by the statute: Rosevelt v. Hanold, 65 Mich., 414; 32 N. W., 443; see also, Talley v. Courter, 93 Mich., 473; 53 N. W., 621.

15—C. L., § 5593. This statute does not supersede common law remedies: Monroe v. Rose, 38 Mich., 348. It is not necessary to aver knowledge in the owner or keeper of the dog that he was accustomed to do mischief: Newton v. Gordon, 72 Mich., 642; 40 N. W., 921; see, Snow v. McCracken, 107 Mich., 49; 64 N. W., 866.

16—Elliott v. Herz, 29 Mich., 202.

The constitutionality of this statute was upheld in Fye v. Chapin, 121 Mich., 675; 80 N. W., 797.

17—Swift v. Applebone, 23 Mich., 252. As to who is a "keeper" of a dog within the meaning of the statute, see, Jenkinson v. Coggins, 123 Mich., 7; 81 N. W., 974.

18—Shepard v. Gates, 50 Mich., 495; 15 N. W., 878; Michigan L. etc. Co. v. Deer Lake Co., 60 Mich., 143; 27 N. W., 10; Wallace v. Finch, 24 Mich., 255; Russell v. Myers, 32 Mich., 522; Kilgannon v. Jenkinson, 57 Mich., 325; 23 N. W., 830.

19—C. L., § 11204. Ward v. Rapp, 79 Mich., 469; 44 N. W., 934; Longyear v. Gregory, 110 Mich., 277; 68 N. W., 116. Interest may be included in this amount trebled: Gates v. Com-

den of showing that the trespass was casual and involuntary is on the defendant.²⁰

Another statute allows the recovery of treble damages for the forcible and unlawful ejection of one from lands or tenements, or, being out, for the forcible and unlawful keeping of one out of possession of lands or tenements.²¹ By still another statute it is provided that a complainant obtaining restitution of any premises under the provisions of Chapter 308 of the Compiled Laws of 1897, shall be entitled to an action of trespass or trespass on the case against the defendant, and may recover treble damages.²² It is also provided that in case a member of a board of registration shall falsely, maliciously or without credible information take the name of a person registered from the list of registered electors, the party aggrieved shall be entitled to recover treble damages for the injury.²³

§ 476. Interest as damages.—For any delay in making payment of money, interest is considered a proper compensation.²⁴ So, for failure to deliver at time agreed, interest on the value of the chattel may be allowed as compensation.²⁵ Interest will not be allowed for failure to pay at a particular time when the amount is not ascertained.²⁶ So, in an action of trespass under the statute, interest on the amount of the depreciation in value, by reason of the trespass, may be allowed.²⁷ In an action in case for negligence, resulting in the total loss of property involved, interest is properly allowed on

stock, 113 Mich., 127; 71 N. W., 515. The damages recoverable under this statute are for injuries to the freehold: *Achey v. Hull*, 7 Mich., 423.

20—*Hart v. Doyle*, 128 Mich., 258; 87 N. W., 219; *Gates v. Comstock*, 113 Mich., 127; 71 N. W., 515; *Michigan L. & I. Co. v. Deer Lake Co.*, 60 Mich., 143; 27 N. W., 10.

21—C. L., § 11206; *Wilson v. McCrillies*, 50 Mich., 347; 15 N. W., 504; *Mattice v. Brinkman*, 74 Mich., 705; 42 N. W., 172.

22—C. L., § 11175. This section is penal in its character and has no retroactive effect: *Newkirk v. Tracey*, 61 Mich., 180; 27 N. W., 884. That defendant acted in good faith will not

defeat treble damages under this statute: *Lane v. Ruhl*, 103 Mich., 38; 61 N. W., 347; see, also, *Crozler v. Allen*, 117 Mich., 171; 75 N. W., 300.

23—C. L., § 3561.

24—*Clark v. Craig*, 29 Mich., 398.

25—*Edwards v. Sandborn*, 6 Mich., 348.

26—*Lake Shore & M. S. Ry. Co. v. People*, 46 Mich., 193; 9 N. W., 249. So it may be allowed in an action for money paid without consideration under a land contract where the amount paid would not adequately compensate plaintiff: *Davis v. Strobbridge*, 44 Mich., 157; 6 N. W., 205.

27—*Gates v. Comstock*, 113 Mich., 127; 71 N. W., 515.

the value of the property lost.²⁸ So, where the action is for the conversion of chattels, interest may be allowed on the value of the property converted from the time of the conversion.²⁹

§ 477. **Profits as damages.**—As a general rule the loss of profits is not a proper element of damages where the amount of such profits is conjectural or speculative.³⁰ But where they can be ascertained with reasonable certainty they may be allowed as an element of damages.³¹ In order that prospective profits can be recovered the circumstances must be such as to show, that they were fairly within the contemplation of the parties at the time of making the contract, as the probable result of the breach complained of. As where it was known at the time, that the machinery was purchased to enable the purchaser to perform certain contracts then existing.³²

§ 478. **Duty of party asking damages to minimize them.**—Plaintiff in case of breach of a service contract by his unlawful discharge before the expiration of his term of service is under obligation to use reasonable diligence to secure other employment.³³

28—*Coan v. Brownstown Twp.*, 126 Mich., 627; 86 N. W., 130.

29—*Rough v. Womer*, 76 Mich., 375; 43 N. W., 573; *Wright v. Starks*, 77 Mich., 221; 43 N. W., 868; *Blaisdell v. Scally*, 84 Mich., 149; 47 N. W., 585; *Spoon v. Chicago & W. M. Ry. Co.*, 86 Mich., 309; 49 N. W., 35; *Woods v. Gaar, Scott & Co.*, 93 Mich., 143; 53 N. W., 14.

30—*Allis v. McLean*, 48 Mich., 428; 12 N. W., 640; *Petrie v. Lane*, 67 Mich., 454; 35 N. W., 70; *Davis v. Davis*, 84 Mich., 324; 47 N. W., 555; *Hutchinson Mfg. Co. v. Pinch*, 91 Mich., 156; 51 N. W., 930; *Hitchcock v. Knights of Maccabees*, 100 Mich., 40; 58 N. W., 640; *Taylor v. Cooper*, 104 Mich., 72; 62 N. W., 157.

31—*Burrell v. New York etc. S. Co.*, 14 Mich., 34; *Allis v. McLean*, 48 Mich., 428; 12 N. W., 640; *Goodrich v. Hubbard*, 51 Mich., 62; 16 N. W., 232; *Leonard v. Beaudry*, 68 Mich., 312; 36 N. W., 88; *S. C.* 80 Mich., 163; 45 N. W., 66; *Greenwood v. Davis*, 106 Mich., 231; 64 N. W., 26; *Liggett S. & A. Co. v. Michigan B. Co.*, 106 Mich., 445; 64 N. W., 466; *Fell v. Newberry*, 106 Mich., 542; 64 N. W., 499; *Barrett v. Grand Rapids V. W.*, 110 Mich., 6; 67 N. W., 976; *Industrial Works v. Mitchell*, 114 Mich., 29; 72 N. W., 25.

32—The rule is well stated in *Industrial Works v. Mitchell*, 114 Mich., 29: "Where notice is brought home to the contracting party that the goods are purchased to be put to a particular use, he is charged with the consequences of a failure to perform." An allowance of profits was made in this case.

33—*Harrington v. Gies*, 45 Mich., 374; 8 N. W., 87; *Owen v. Union Match Co.*, 48 Mich., 348; 12 N. W., 175; *Connor v. Hurley*, 112 Mich., 622; 71 N. W., 158; *Stearns v. Lake Shore & M. S. Ry. Co.*, 112 Mich., 652; 71 N. W., 148. It seems that the burden is upon the defendant to show that no effort was made, or what effort

So, in the case of eviction of a tenant; it is obligatory upon him to make a reasonable effort to secure other premises for the carrying on of his business.³⁴ This general principle is applicable wherever the plaintiff by reasonable effort can materially reduce the injury which otherwise he might suffer.³⁵ With much more force can it be said that the injured party must not wilfully or carelessly aggravate the injury.³⁶

§ 479. Damages recoverable for breach of contract—in general.—They should be such as may be said to fairly arise from the breach, or to have been within the contemplation of the parties when the contract was made, as the probable result of the breach.³⁷ Where there is partial performance of an unapportionable contract, the party in default may recover the value of anything done or furnished under the contract, from which the other party has derived substantial benefit through its appropriation by him, subject to the reduction of such amount by the amount of damages to which that other is entitled by reason of failure of performance.³⁸ In case of a breach of a labor contract by refusal to permit performance the injured party may recover for services actually performed, what they were reasonably worth, though in excess of the contract price.³⁹ Not so, however, when the failure to complete the contract was the failure of the party bringing the action. In such case the recovery can never exceed the contract price.⁴⁰

§ 480. Damages in case of breach of sale contract.—In case of failure of vendee to make payment of the purchase price

was made, by the plaintiff to get other employment: *Allen v. Whitlark*, 99 Mich., 492; 58 N. W., 470, decided upon the authority of *Farrell v. School District*, 98 Mich., 43; 56 N. W., 1053.

34—*Haines v. Beach*, 90 Mich., 563; 51 N. W., 644; see, *Talley v. Courter*, 93 Mich., 473; 53 N. W., 621.

35—*Gilbert v. Kennedy*, 22 Mich., 117; *Hopkins v. Sanford*, 41 Mich., 244; 2 N. W., 39; *Endriss v. Belle I. Co.*, 49 Mich., 279; 13 N. W., 590; *Wonderly v. Holmes L. Co.*, 56 Mich., 412; 23 N. W., 79.

36—*Dennis v. Huyck*, 48 Mich., 620; 12 N. W., 878.

37—*Clark v. Moore*, 3 Mich., 55; *Hopkins v. Sanford*, 38 Mich., 611; *Howe v. North*, 69 Mich., 272; 37 N.

W., 213; *Goddard v. Westcott*, 82 Mich., 180; 46 N. W., 242.

38—*Allen v. McKibbin*, 5 Mich., 449; *Wilson v. Wagar*, 26 Mich., 452; *Moon v. Harder*, 38 Mich., 566; *Gage v. Meyers*, 59 Mich., 300; 26 N. W., 522; *Wickes v. Swift E. L. Co.*, 70 Mich., 322; 38 N. W., 299; *Sheldon v. Leahy*, 111 Mich., 29; 69 N. W., 76; *Phelps v. Beebe*, 71 Mich., 554; 39 N. W., 761; *Wells v. Board of Education*, 78 Mich., 260; 44 N. W., 267.

39—*Hemmlinger v. Western A. Co.*, 95 Mich., 355; 54 N. W., 949. One cannot be forced to accept work not conforming to the contract: *Martus v. Houck*, 39 Mich., 431.

40—*Allen v. McKibbin*, 5 Mich., 449; *Wilson v. Wagar*, 26 Mich., 452.

the vendor is entitled to recover such price with the interest from the time when it should have been paid.⁴¹ The measure of damages in an action by the vendor where the vendee refuses to take or pay for goods and the vendor elects to retain the goods, is the difference between the contract price and the market price at the time and place of delivery under the contract.⁴²

The measure of damages in case there is a failure to deliver as agreed and the contract price has not been paid, is the difference between the value of the property at the time and place of delivery and the contract price.⁴³ In case the purchase price has been paid, the purchaser may recover the money paid, or he may have the full market value of the property at the time and place of delivery.⁴⁴ In case of breach of warranty of quality or failure to deliver goods of the description contracted for the measure of damages, in case the goods are taken by the purchaser, is the difference in value of the goods, had they been as contracted for, and their actual value as furnished.⁴⁵

§ 481. **Damages in actions for tort.**—For a discussion of the subject of damages in trover see, *post*, §§ 646, 647. For the rules in actions of replevin, see, *post*, Chap. xxxix. In actions for trespass to real property, see, *post*, § 620; in case of defective fences, *post*, § 627-9. In trespass for carrying away chattels the plaintiff may recover the value of that taken at the time taken,⁴⁶ with interest,⁴⁷ or the value of the use during

41—Cook v. Stevenson, 30 Mich., 242; Kelly v. Waters, 31 Mich., 404.

42—Brownlee v. Bolton, 44 Mich., 218; 6 N. W., 657; Williams v. Robb, 104 Mich., 242; 62 N. W., 352.

43—Haskell v. Hunter, 23 Mich., 305; Chadwick v. Butler, 28 Mich., 349; McKercher v. Curtis, 35 Mich., 478; Peters v. Cooper, 95 Mich., 191; 54 N. W., 694; Maxted v. Fowler, 94 Mich., 107; 53 N. W., 921; Leo Austrian & Co. v. Springer, 94 Mich., 344; 54 N. W., 50. This general rule is not applicable in case the article is not kept in the market or is prepared for a special purpose: Den Bleyker v. Gaston, 97 Mich., 354; 56 N. W., 763.

44—See, West Mich. F. Co. v. Dia-

mond G. Co., 127 Mich., 651; 87 N. W., 92.

45—Burdick on Sales, p. 213; Jackson Sleigh Co. v. Holmes, 129 Mich., 370; 88 N. W., 895. In case of the sale of fruit trees to be of a particular variety, and a breach by furnishing trees of a different variety, the measure of damages is the value that would have been added to the land if they had been of the variety contracted for, beyond its value with the trees of the variety furnished: Heilman v. Pruyn, 122 Mich., 301; 81 N. W., 97; Long v. Pruyn, 128 Mich., 57; 87 N. W., 88.

46—Kent County A. S. v. Ide, 128 Mich., 423; 87 N. W., 369.

47—Rathbun v. Rathbun, 14 Mich.,

the time the plaintiff was deprived of it,⁴⁸ or if it is not returned, he may recover its value and reasonable damages for its detention.⁴⁹ It would not be permitted that damages for the detention together with interest on the value should be recovered.

In actions to recover for personal injuries the plaintiff is entitled to recover compensation for all the injury received; for the consequences already experienced, and such as are reasonably certain to follow, including physical and mental suffering, anxiety, suspense, fright and for expenses of nursing and medical attention, for disfigurement or deformity, loss of time and of capacity to follow one's occupation or engage in any business or employment.⁵⁰ The plaintiff can only recover for injuries chargeable to the act complained of and not for suffering, the result of conditions for which the defendant is not responsible.⁵¹ Fright unaccompanied by immediate physical injury will not afford ground for an allowance of damages.⁵²

48—Hart v. Blake, 31 Mich., 278.

49—Haviland v. Parker, 11 Mich., 103.

50—Sherwood v. Chicago & W. M. Ry. Co., 82 Mich., 374; 46 N. W., 773; Kinney v. Folkerts, 84 Mich., 616; 48 N. W., 283; Ostrander v. Lansing, 115 Mich., 224; 73 N. W., 110; Lucas v. Michigan Central Ry. Co., 98 Mich.,

1; 56 N. W., 1039; Beath v. Rapid Ry. Co., 119 Mich., 512; 78 N. W., 537; Goucher v. Jamieson, 124 Mich., 21; 82 N. W., 663.

51—Schwingschlegel v. Monroe, 113 Mich., 683; 72 N. W., 7.

52—Nelson v. Crawford, 122 Mich., 466; 81 N. W., 335.

CHAPTER XXVI.

OF JUDGMENTS, COSTS AND TRANSCRIPTS.

OF JUDGMENTS.

- § 482. By confession.
- § 483. Of non-suit and discontinuance.
- § 484. Upon trial.
- § 485. Against joint debtors.
- § 486. In attachment suits.
- § 487. When to be entered.
- OF COSTS.
- § 488. Judgment to include.
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- § 492. Fees of jurors.
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- § 495. Taxation of costs.

OF FILING A TRANSCRIPT.

- § 496. In circuit courts—when may be demanded.
- § 497. Where to be filed.
- § 498. Effect of filing.
- § 499. Transcript from docket of one justice to that of another.

§ 482. Of judgments by confession.—“If any debtor shall appear before a justice of the peace without process, and confess in writing, signed by him in the presence of the justice, that he is indebted to another upon contract in a certain specified sum, it shall be lawful for such justice, with the consent of the creditor, to enter judgment on such confession against the debtor, for any sum not exceeding three hundred dollars.”¹

A justice can render judgment by confession, by this section, *only* in cases where the indebtedness arises “upon contract.”

The defendant must appear in *person* before the justice, in court,² and sign the written confession; and it must appear from the entry of the judgment, that the statute has been

1—C. L., § 705. Judgment by confession may be rendered notwithstanding suit was commenced by process. A confession of judgment that is sufficient without process is equally good with it: *Hollister v. Giddings*, 24 Mich., 501. A judgment confessed by an infant in his own name is void, and so is a judgment confessed by an infant's partner in the name of the firm. Partners have no implied au-

thority to confess judgments for each other: *Soper v. Fry*, 37 Mich., 236. The treasurer of a corporation has no implied power, as such, to consent to judgment against the corporation without the institution of suit: *Stevens v. Carp River Iron Co.*, 57 Mich., 427; 24 N. W., 160. See note to C. L., § 705.

2—*Bronaghin v. Throop*, 15 Johns., 476; *Tenney v. Filler*, 8 Wend., 569.

complied with, and that the confession *was signed* in the presence of the justice, or the judgment will be void.³

A confession of judgment must be for "a certain specified sum." A justice would have no power to enter judgment on

3—*Beach v. Botsford*, 1 Doug. Mich., 199; *Clark v. Holmes*, 1 *Ibid.*, 390; *Allen v. Carpenter*, 15 Mich., 32. A judgment on a confession not in writing is void: *Wilson v. Farrand*, 1 Mich., 157. In *Spear v. Carter and Rose* (1 Mich., 19), the entry of the judgment, after the title of the cause, was as follows: "Judgment by written confession of the above named defendants in favor of the above named plaintiff, for forty-eight dollars and eighteen cents, damages and costs of suit." The court said: "The statute authorized the entry of judgment, provided that such confession be in writing, signed by the person making the same, in presence of the justice, or one or more competent witnesses. But it does not appear that the defendants voluntarily appeared before the justice, or that he ever saw them, or that any writing signed by the defendants in the presence of the justice, or one or more competent witnesses, was before him. Nor does it appear what the cause of action was, upon which the judgment was entered. And, therefore, it does not appear whether the claim or cause of action was of such character as that, by the statute, the justice was authorized to enter judgment upon it. The statute provided a mode, *as the only mode*, in which judgment by confession could be entered. Until there has been a literal compliance with this provision of law, the justice cannot have jurisdiction of a defendant." *Wilson v. Farrand*, 1 Mich., 161. Such a judgment being void, the security for the stay of the execution would not be liable, as there would be no consideration to support his undertaking: *Wilson v. Farrand*, 1 Mich., 156.

Where in a confession the language was, "I *confess judgment* on a demand arising upon contract," &c., instead of "I am *indebted on*," &c., *held*, sufficient: *Kinyon v. Fowler*, 10 Mich., 16.

Where the entry of a judgment by

confession recited that the *parties appeared* before the justice, but omitted to state that the judgment was rendered by consent of plaintiff; *held*, sufficient; that this imported that the plaintiff was present and participated in the proceedings, and his consent was to be presumed: *Kinyon v. Fowler*, 10 Mich., 17, 19. In rendering a judgment by confession, the justice must strictly pursue the authority given him by the statute, and all the facts necessary to give him jurisdiction must affirmatively appear in his proceedings, and cannot be presumed: *Wilson v. Farrand*, 1 Mich., 160. The docket entry of a justice's judgment must be as certain in matters of substance as the judgment of a court of record: *Rood v. School District of Bloomfield*, 1 Doug. Mich., 502. The entry must show not only the determination of the court upon the subject submitted, but the parties in favor of and against whom it operates: *White-well v. Hover*, 3 Mich., 88; see the form of entry in this case at page 85. Where the entry of a judgment recited that, "It is therefore considered that the said P do recover against the said D the sum of," &c., *held*, that the docket did not clearly and conclusively show in whose favor and against whom the judgment was rendered, as it must do; and that it was not admissible to show by parol that P and D meant plaintiff and defendant: *Rood v. School District of Bloomfield*, 1 Doug., 502. Where judgment was confessed on a note, but the justice by error entered the judgment for only a part of the amount, *held*, that the note and debt upon which it was given were merged in the judgment, and that the judgment was a bar to a suit for the balance of the amount; that before stay or execution, the justice might probably have corrected the judgment by amendment, but that after execution on the judgment as entered, there was no remedy for the balance of the claim: *Town v. Smith*, 14 Mich., 348.

a confession for an uncertain and unliquidated amount.⁴ The confession should state that the damages confessed were upon *contract*.⁵ If there are two or more defendants, the confession must be signed by all.⁶ If the person giving the confession consent that execution issue before the time prescribed by the statute,⁷ add at the end of the confession, "and consent that execution issue upon said judgment immediately," or, at such other time as is agreed on.

The provision of the statute requiring the confession to be in writing⁸ applies only to cases where the parties appear voluntarily before the justice, without process having been issued. In cases where suit has been commenced by service of process, a confession of judgment or an admission of plaintiff's cause of action may be made orally in court without any of the formalities prescribed by that section.⁹

§ 483. Of judgments of nonsuit and discontinuance.—
 "Judgments of nonsuit, with costs, shall be rendered against a plaintiff prosecuting an action before a justice of the peace, in the following cases:

1. If he discontinue or withdraw his action;
2. If he fail to appear on the return of any process, within one hour after the same was returnable;
3. If, after an adjournment, he fail to appear within one hour after the time to which the adjournment shall have been made;
4. If he become nonsuited on the trial."¹⁰

As to contradicting the docket entry where the judgment was by mistake entered as upon confession, see, *Dodge v. Bird*, 10 Mich., 518; *ante*, § 374, note 46.

4—*Nichols v. Hewitt*, 4 Johns., 423.

5—C. L., § 705; see, *Loomis v. Foster*, 1 Mich., 165.

6—*Clark v. Holmes*, 1 Doug. Mich., 390.

7—C. L., § 862.

8—C. L., § 705.

9—*Crouse v. Derbyshire*, 10 Mich., 479. But such confessions or admissions must be made in court on the return day or some adjourned day of the cause, and to and in presence of the court while sitting in the cause: *Clark v. Holmes*, 1 Doug. Mich., 390.

The justice may render judgment against a party upon his oral admission of the cause of action made in open court and after issue joined, and if such admission be made without mistake or misapprehension, it should for the purpose of that trial be held conclusive: *Morrison v. Riker*, 26 Mich., 385, 387.

10—C. L., § 836. A judgment of non-suit is a final termination of the suit, but does not bar a subsequent action for same cause. While it finally disposes of that particular suit it is not *res adjudicata* as to the subject matter: *Bowne v. Johnson*, 1 Doug. Mich., 186. The court cannot compel a plaintiff to submit to a judgment of non-suit: *Cahill v. Kalamazoo M. I.*

Under the 2d and 3d subdivisions of this section, a judgment of nonsuit is not to be entered for the non-appearance of the plaintiff, unless the defendant appear and require such judgment to be entered. If neither party appear, the suit will be discontinued, but no judgment is, in such case, to be entered, and each party must pay his own costs.¹¹

It would seem that a plaintiff cannot discontinue or withdraw his action at any time other than when the parties are to appear before the justice, unless the defendant consent to it. By statute, the justice is required, when the plaintiff discontinues or withdraws his action, *forthwith* to render judgment.¹² If, before the return day of process, or the day to which the cause is adjourned, the plaintiff discontinues or withdraws his action, there is no mode of ascertaining the defendant's costs, in his absence, and therefore judgment of nonsuit cannot be given. A different construction of the section would enable the plaintiff to deprive the defendant of the costs to which he had been put in preparing for trial.¹³

§ 484. Of judgments upon trial.—“When the jurors have agreed upon their verdict, they shall deliver the same to the

Co., 2 Doug. Mich., 133. Where the plaintiff failed to appear within the hour and later the justice entered judgment for him it was set aside in mandamus proceedings: Cagney v. Wattles, 121 Mich., 469; 80 N. W., 245. If plaintiff submit to a voluntary nonsuit, as by failing to appear, he cannot appeal: Schulte v. Kelley, 124 Mich., 330; 83 N. W., 405. The statute requiring the justice to wait one hour for the appearance of the plaintiff has been extended by judicial construction to require the court to give the defendant a like opportunity to delay his appearance. The statute, however, makes no provision of this kind and a failure to do so would not avoid the judgment upon the theory that the court by so doing lost jurisdiction over the defendant. The judgment, however, might be reversed on special appeal or *certiorari*. Talbot v. Kuhn, 89 Mich., 30; 50 N. W., 791. By the non-appearance of the plaintiff within one hour after the time when the cause is returnable, or to which it

is adjourned, the justice loses jurisdiction of the case, except to render judgment of nonsuit and for costs against the plaintiff: Brady v. Taber, 29 Mich., 109. As to the time for plaintiff's appearance, see, *ante*, § 149. As to the absence of the justice beyond the time, see, *ante*, § 149, notes 32, 33. See, note to C. L., § 836, and Talbot v. Kuhn, 89 Mich., 30, 32; 50 N. W., 791.

11—Edwards' Treatise, 2 ed., 117.

12—C. L., § 843. But if the defendant has given notice of set-off, the plaintiff cannot discontinue or submit to a nonsuit without the consent of the defendant: See, *ante*, § 273. And note to C. L., § 843.

13—Where a cause was adjourned by consent of parties, without pleadings, and on the return day the justice refused to proceed with the cause: *Held*, that such refusal might be treated as a judgment of nonsuit, and might be appealed from: Patridge v. Lott, 15 Mich., 251.

justice publicly, and thereupon the justice shall enter the same in his docket, and render judgment thereon."¹⁴

"Judgment for the defendant, with costs, shall be rendered whenever a trial has been had and it be found by verdict, or by the decision of the justice, that the plaintiff has no cause of action against the defendant."¹⁵ "But whenever an action is brought against two or more persons, the plaintiff may at any time before the final submission of the cause to the justice or the jury, be allowed to discontinue the action as against any of the defendants, and thereupon to amend his declaration and proceed against the other defendant or defendants in a like manner as if the action had been originally brought against them alone. But the plaintiff shall not be required to discontinue as to any of them, but the jury shall show by its verdict, or the justice by his finding, in a trial without a

14—C. L., § 832. The justice has no control over the verdict; he must accept it as given; he cannot destroy its effect by refusal to enter judgment upon it: *Alt v. Lalone*, 54 Mich., 304; 20 N. W., 52. It has the effect of a judgment though there be no formal entry of judgment upon it: *Gainess v. Betts*, 2 Doug. Mich., 99. The judgment entry is not the judgment but the evidence of it: *Hickey v. Hinsdale*, 8 Mich., 267.

This rule that the justice must accept the verdict of the jury and enter the judgment accordingly, does not prevent his putting in proper language a verdict which is informal yet unambiguous: *People v. Foot*, 1 Doug. Mich., 102; *Smith v. Dodge*, 37 Mich., 357; *Willson v. McCrillies*, 50 Mich., 349; 15 N. W., 504; *Sleight v. Henning*, 12 Mich., 377; *Hendrickson v. Walker*, 32 Mich., 68. Where the verdict of a jury in replevin was, "This jury find for the plaintiff;" *Held*, that, though not a formal verdict in replevin, yet it was sufficiently indicated for which party the jury had found the issue, and that it was the duty of the justice to enter the verdict in the proper form according to the finding, and render judgment thereon: *People v. Foote*, 1 Doug. Mich., 102. Where the entry in a docket was, "The jury returned with a verdict for the plaintiff of eighteen dollars damages—

\$18.00—and costs of suit taxed at \$5.00," there being no other formal entry of judgment on the docket; *Held*, sufficient: that the finding of a verdict in a justice's court being in legal effect a judgment: *Gainess v. Betts*, 2 Doug. Mich., 98. And so, where the entry was, "After hearing all the evidence, the jurors returned a verdict for plaintiff for the sum of \$48.05 and costs of suit; damages, \$48.05; costs, \$7.63;" *Held*, that this entry was valid and of effect as a judgment, and sufficient to authorize execution: *Kelsey v. Detroit*, 8 Mich., 315; see also, *Zimmer v. Davis*, 35 Mich., 41. A judgment rendered and entered by the justice upon his minutes, is not void because not forthwith transcribed into his docket: *Saunders v. Tloga Manf. Co.*, 27 Mich., 520. An objection that the judgment is rendered for a trifling amount of interest in excess of the true amount, will not avoid it: *Bowen v. School District, &c.*, 36 Mich., 149. When a justice has rendered a judgment, he has no power to vacate it or set it aside, or to render a new judgment in the case; nor has the circuit court any power to require him by mandamus to do so: *O'Brien v. Tallman*, 36 Mich., 13; and notes to C. L., § 832.

15—C. L., § 837, as amended by Pub. Acts, 1901, p. 78.

jury, which of them are, and which of them are not liable to the plaintiff, and judgment shall be given accordingly." The effect of this statute would seem to avoid the effect of misjoinder of defendants at the common law, but does not change the rule as to misjoinder of plaintiffs.

When, upon the trial of a cause, either with or without a jury, and whether the defendant had appeared or not, a sum is found in favor of the plaintiff, judgment is to be rendered against the defendant for such sum, and the costs.

"When a balance shall be found in favor of a party, either by the verdict of a jury or upon a hearing before the justice, exceeding the sum for which the justice is authorized to give judgment, such party may remit and release the excess, and may take judgment for the residue."¹⁶

If the jury find a verdict of damages for the defendant, in a case in which he is not entitled to damages, as in an action for a tort, the defendant may remit the damages, and upon the justice entering in the docket that the defendant remits the damages, he may enter judgment for the defendant generally.¹⁷

§ 485. **Judgments against joint debtors.**—"If process shall have issued against two or more persons, jointly indebted, and shall have been personally served upon either of the defendants, the defendant who may have been served with process, shall answer to the plaintiff, and the judgment in such case, if rendered in favor of the plaintiff, shall be against all the defendants, in the same manner as if all had been served with process; but execution shall issue only in the manner hereinafter directed."¹⁸

16—C. L., § 844.

17—Burger v. Kortright, 4 Johns., 414.

18—C. L., § 840. At the common law, a judgment against one joint debtor alone on the joint demand operated as a merger of the demand into the judgment, and thereby extinguished the liability of the other joint debtor and all remedy against him: Candee v. Clark, 2 Mich., 255; Robertson v. Lynch, 18 Johns., 455; Pierce v. Kearney, 5 Hill, 82; 4 Selden, 413. But a judgment rendered under the

joint debtor act, in form against two joint debtors, only one of whom was served with process, is not an extinguishment of the demand sued upon, and an action may still be maintained against the debtor not served: Bone-steel v. Todd, 9 Mich., 371; Holcomb v. Tift, 54 Mich., 647; 20 N. W., 627; see, Storey v. Bird, 8 Mich., 316; Brooks v. McIntyre, 4 Mich., 316. Where suit is brought on a demand upon which several persons are jointly and severally liable, the plaintiff cannot treat it as a joint demand against

The above section applies only to cases in which the defendants are jointly *indebted*; and does not give any authority in cases of *tort*. Independent of statutory provisions, where process had issued against several, the justice could not try the cause unless the process had been served upon *all* the defendants.¹⁹ The declaration in a justice's court must agree with the process in respect to the number of the defendants.²⁰ But in an action for a *tort*, if the process has not been served personally on all the defendants, and those upon whom it was not so served do not appear, the plaintiff may declare against those only who were so served or appear.²¹ If, in such case, he should declare against *all* and obtain judgment against all, it would be erroneous.²²

When *one defendant* is brought into court, and he establishes a defence which is personal, as infancy, the plaintiff is not entitled to judgment against the *other* defendants upon whom process was not served.²³ The statute directs judgment to be against all the defendants, and there is no authority for giving a different judgment against those not served with process from that rendered against those in court. And judgment may be entered as well when the defendant not brought in is an *infant* as when he is an adult; and a judgment thus entered against an infant defendant will not be reversed, al-

a part of the defendants only; he must treat it as several against each or joint against the whole: therefore, where a judgment was entered jointly against two out of three joint and several obligors, it was held erroneous: *Winslow v. Herrick*, 9 Mich., 380. Where A sued B in debt founded upon a former judgment against B, it appeared on the trial that the action in which the former judgment was rendered was brought against B and C upon a joint promissory note signed by both B and C, but service was had on B only, the process being returned as to C not found, and that the judgment was rendered against B alone, he being the only one served; *Held*, that while this was an error for which the judgment might have been reversed upon *certiorari* or special appeal, yet it was not one which went to the jurisdiction

of the justice, and therefore not one for which the former judgment could be attacked collaterally in the present action founded upon it, while it remained unreversed: *Allen v. Mills*, 26 Mich., 123. A joint judgment cannot be entered against several defendants when service of process against a portion of them has neither been made or attempted: *Proctor v. Lewis*, 50 Mich., 329; 15 N. W., 495. A judgment against all partners is not void for want of service on all: *Hirsh v. Fisher*, — Mich., —; 101 N. W., 48; Oct., 1904.

19—*Rose v. Oliver et al.*, 2 Johns., 365.

20—See, *ante*, § 162.

21—C. L., § 775.

22—*Richards v. Walton*, 12 Johns., 434.

23—*Leggett v. Boyd*, 6 Wend., 500.

though entered without the appointment of a guardian.²⁴ "The act is framed upon the idea of the non-appearance of the debtor." In case the infant defendant is personally served with process, or appears, *then* a guardian must be appointed. When a suit is commenced against joint debtors, those served with process on appearing may confess judgment and bind the property of all the defendants. The judgment in such a case is entered against all the defendants, and the execution will conform to the judgment; but it can be enforced only against the joint property of the defendants, and the separate property of the party who confessed the judgment.²⁵

"Such judgment shall be conclusive evidence of the liability of the defendant who was personally served with process in the suit, or who appeared therein; but against every other defendant, it shall be evidence only of the extent of the plaintiff's demand, after the liability of such defendant shall have been established by other evidence."²⁶

In an action of debt upon such judgment, upon the general issue the judgment would not entitle the plaintiff to recover, without other evidence of liability against the defendant not brought into court in the first suit; the burden of proof would be upon the plaintiff to show the original indebtedness, and not upon the defendant to disprove it. "What the statute means is, that the record of the judgment shall not be allowed as of any manner of effect, unless the jury shall believe there

24—Mason v. Denison, 11 Wend., 612.

25—Pardee v. Haynes, 10 Wend., 630.

26—C. L., § 841. Where the docket showed a joint suit, and but one defendant served with process, and a judgment against the "defendant," *held*, that the statute C. L., § 840, requiring that when only one of two joint debtors is served, the judgment shall be in form against both; this finding against one sufficiently indicated what judgment the plaintiff was entitled to, and that his rights were not affected by the clerical error of the justice in entering the judgment against the "defendant" instead of against the "defendants." Zimmer v. Davis, 35 Mich., 89; Holcomb v. Tift, 54 Mich., 647; 20 N. W., 627. A

judgment on a joint obligation against two persons when only one of them was served with process, although joint in form is in no legal sense a joint obligation binding on both alike. It binds the defendant served, but does not conclusively bind the other. It does not merge the debt upon which it was founded so as to preclude its being sued over again as to both. And any proceeding against the defendant not served, in order to bind him would have to be on the original obligation, whether nominally on the judgment or not. In suing over such a judgment, it would be competent to sue the defendant served alone, and thus to treat the judgment as his sole obligation: *Ibid.*, Holcomb v. Tift, 54 Mich., 647; 20 N. W., 627.

was a joint liability on the cause of action, which it sets forth. If there be no evidence raising even a question of this for the jury, the record should be withdrawn from them altogether.'²⁷

§ 486. **Judgments in suits commenced by attachment.**—"A judgment obtained before a justice in any suit commenced by attachment, in which the defendant was not personally served, and did not appear, shall be only presumptive evidence of indebtedness in any suit which may be brought thereon, or in which the same may come in question, and may be repelled by the defendant.'²⁸

§ 487. **Of the time when judgment is to be entered.**—"In cases where plaintiff shall be nonsuited, discontinue or withdraw his action, and where a judgment shall be confessed, and in all cases where a verdict shall be rendered, or the defendant shall be in custody at the time of hearing the cause, the justice shall *forthwith* render judgment, and enter the same in his docket; in *all other* cases he shall render judgment and enter the same in his docket within *four* days after the same shall have been submitted to him for the final decision.'²⁹

The directions in the foregoing sections as to the *time* when or within which judgments are to be rendered, are mandatory, and must be strictly complied with. In those cases where the

27—Carman v. Townsend, 6 Wend., 206; Mervin v. Kumbel, 23 Wend., 293.

28—C. L., § 842. If defendant is personally served and appears defects in the levy or inventory will not defeat the judgment: Hunt v. Strew, 33 Mich., 88.

29—C. L., § 843. Under this section of the statute, a judgment of a justice of the peace in a cause tried by him, without a jury, rendered and entered in his docket on the fifth day after the trial, is void, even though the fourth day be Sunday; and such judgment is not the subject of general appeal: Harrison v. Sager, 27 Mich., 476; Brady v. Taber, 29 Mich., 199; Weaver v. Lammon, 62 Mich., 368; 28 N. W., 905; Galloway v. Corblitt, 52 Mich., 460; 18 N. W., 218; Mudge v. Yaples, 58 Mich., 310; 25 N. W., 297. But when a justice's judgment is rendered within the time that would be

proper in ordinary cases, it cannot be assumed on appeal, without proof that he has exceeded his jurisdiction by delaying judgment while the defendant was in custody; and if he in fact did so a further return to show it, should be applied for: Barker v. Wheeler, 44 Mich., 176; 6 N. W., 234. The rendition of judgment by a justice is a judicial act, for the performance of which it is necessary to hold court. Therefore, if a justice take four days after trial before himself in which to render judgment, he cannot render it on any of the legal holidays mentioned in C. L., § 4880, should such a holiday come within the four days, nor could he render it on the following day if the holiday should fall on Sunday, as in that case the statute makes the following day the holiday: Hemmens v. Bentley, 32 Mich., 89; see, C. L., § 843, note.

judgment is to be rendered forthwith, it must be done and the costs taxed at once; if it be delayed until a subsequent day the judgment will be void.³⁰ In those cases where the justice is allowed four days, he may render the judgment on any day within that time,³¹ but if delayed beyond the four days, the judgment will be of no effect.³² The direction for entering the judgment in the docket, however, is directory merely, and the judgment will not be invalidated if not entered within the time prescribed in the statute. To *render* judgment is one thing, to *enter* it another. The judgment is complete when pronounced, and until entered in the docket may be proved by the oath of the justice or from his minutes.³³

OF COSTS.

§ 488. **Judgment to be with costs.**—"Whenever a judgment shall be rendered by any justice of the peace against any party, unless otherwise herein provided, it shall be with costs of suits; but the whole amount of all the items of such costs shall not exceed ten dollars; and no counsel or attorney fee shall be taxed in favor of the prevailing party, except in those cases expressly provided by law."³⁴

"No costs shall be recovered by the plaintiff in actions upon

30—Sibley v. Howard, 3 Denlo, 72. Taxing costs is a judicial act, and a part of the act of rendering judgment: Supervisors Onandaga v. Briggs, 2 Denlo, 26; Saunders v. Tloga Mfg. Co., 27 Mich., 520. After judgment on a verdict for damages, a justice has authority to proceed on the same day to ascertain and determine the costs, and if necessary may, with consent of parties at least, hold the cause open a reasonable time even beyond that day for that purpose. The costs, in such cases, being an incident to the principal judgment, the determination of their amount relates back, and takes effect as of the time of the rendition of the judgment: Saunders v. Tloga Mfg. Co., 27 Mich., 520, and see, Hickey v. Hinsdale, 8 Mich., 267.

31—Draper v. Tooker, 16 Mich., 74.

32—Watson v. Davis, 19 Wend., 371; Bissell v. Bissell, 11 Barb., 96. As to the time of rendering judgment, see, *ante*, § 483.

33—Hickey v. Hinsdale, 8 Mich., 367, 372; C. L., § 961, and *ante*, § 374. A judgment rendered and entered by the justice in his minutes, is not void because not forthwith transcribed upon his docket: Saunders v. Tloga Mfg. Co., 27 Mich., 520.

34—C. L., §§ 838, 11230, providing for the taxation of additional costs for jurors in certain cases. Costs when made up, are an incident of the judgment, but are not so inseparable from the damages as to invalidate a justice's judgment, when excessive. Excessive costs when awarded by a justice's judgment, may be remitted: Whelpley v. Nash, 46 Mich., 25; 8 N. W., 570. Since the statute providing for attorney's fees in actions for labor debts has been declared unconstitutional (Chair Co. v. Runnels, 77 Mich., 111; 43 N. W., 1006; Burrows v. Brooks, 113 Mich., 307; 71 N. W., 460), there would seem to be little, if any, occasion for the applica-

judgments rendered in this state, unless good cause shall be shown therefor upon oath."³⁵

"Any party causing witnesses to be subpoenaed, and not swearing and examining them, if in attendance, shall pay the costs occasioned thereby, unless the use of such witness or witnesses be dispensed with by the admission of the opposite party; any party calling more than two witnesses to a fact not contradicted by any other witness, shall pay the costs occasioned by such supernumerary witness."³⁶

A defendant neglecting to set off a demand which might have been allowed him in the suit will be precluded from recovering costs in any action thereafter brought to recover such demand.³⁷

The costs which are to be included in the judgment are only those made by the party in whose favor the judgment is rendered; and it would be improper to include any costs made by the opposite party.³⁸

§ 489. Fees of justices of the peace in civil cases.—The following fees are prescribed by the statute for the services of justices of the peace:³⁹

"For a summons, warrant, or venire, fifteen cents; for trying each cause, one dollar for the first day; and for each additional day the sum of one dollar; for issuing a writ of replevin or

tion of the last clause of this statute. The costs referred to in this section are exclusive of and in addition to the allowance for jury fees paid as provided in C. L., § 11230.

The limitation of costs to ten dollars found in this section does not apply to special proceedings under C. L., §§ 10756 and 10770, providing for enforcing liens for services: *La Goo v. Seaman*, — Mich., —; 99 N. W., 303, (Apr., 1904).

25—C. L., § 839: *Whelpley v. Nash*, 46 Mich., 26; 8 N. W., 570.

36—C. L., § 825.

37—C. L., § 781; see, the section in full, *ante*, § 269. No costs can be recovered in a suit upon a demand which might have been set off in a previous suit by the other party: *Huntton v. Russell*, 41 Mich., 316; 2 N. W., 38.

38—*Dennison v. Collins*, 1 Johns.,

111. A justice of the peace acts judicially in determining the amount of costs to be taxed in favor of the prevailing party in suits tried before him: *Saunders v. Tloga Mfg. Co.*, 27 Mich., 520.

39—C. L., § 11226. Costs in proceedings before justices for forcible entries and detainers are taxed under the same rules as when brought before circuit court commissioners: *Dibble v. People*, 22 Mich., 371. The payment of the fee for making a return to an appeal may be waived by the justice and by making a return without it he does waive it. He, however, is not called upon to make his return until it is paid if he desires to insist upon it: *Wiley v. Judge of Allegan Circuit*, 29 Mich., 486; *Stevenson v. Kent Circuit Judge*, 44 Mich., 162; 6 N. W., 217.

attachment, twenty-five cents; for entering any cause upon the docket after return of process, twenty-five cents; and for making all other entries upon the docket in any cause not otherwise provided for, twenty-five cents; for each subpoena not exceeding four, ten cents; for swearing a jury, ten cents; for swearing each witness in a cause, ten cents; for entering every final judgment, twenty-five cents; for issuing execution, twenty-five cents; prospective costs for one execution may be taxed;⁴⁰ for every continuance or adjournment at the request of the party, fifteen cents; for drafting any bond or recognizance, requisite in any case before a justice of the peace, thirty-five cents; for approving any bond or recognizance, ten cents; for reducing the evidence, objections to evidence, and exceptions taken by either party, upon [the] trial of any cause, ten cents for each folio; for making and filing return upon appeal, one dollar; for taking depositions, examinations, or confessions, ten cents for each folio; for entering a discontinuance or satisfaction, ten cents; for entering every assignment of a judgment, fifteen cents; for entering an amicable suit, twenty-five cents; for appointing appraisers of estates of deceased persons, fifteen cents in each case; for marrying and making return thereof, two dollars; for taking acknowledgment of a deed or other instrument, twenty-five cents for each person acknowledging; for making a certified transcript of any judgment and of the proceedings in any cause, fifty cents; for certifying cause to the circuit court on plea of title, fifty cents; for making return on special appeal or certiorari, two dollars; and no justice of the peace shall receive any other fees or compensation for any services rendered in any civil cause than such as is hereinbefore provided."⁴¹

The term "folio" means one hundred words, counting every figure necessarily used, as a word; and every portion of a folio, when in the whole draft or paper there shall not be a complete folio, and when there shall be any excess over the last folio, is to be computed as a folio.⁴²

40—C. L., §§ 853 and 11244, and see, *Hollister v. Giddings*, 24 Mich., 501, 503.

41—C. L., § 11226.

42—C. L., § 11239: *Thornton v. Sturgis*, 38 Mich., 639.

§ 490. **Constables' fees in civil cases.**—Constables are entitled to the following fees for services:⁴³

“For serving a warrant, fifty cents; for serving a summons, twenty-five cents; for a copy of every summons delivered on request, or left at the dwelling of the defendant, in his absence, ten cents; for serving an attachment or writ of replevin, seventy-five cents; and for a copy thereof, and of the inventory of the property seized, twenty-five cents; for serving a subpoena, fifteen cents for service upon each witness summoned by him; for serving an execution on the body, or goods and chattels of the defendant, fifty cents; committing a defendant to prison on execution, fifty cents; for traveling in the service of process, ten cents for each mile necessarily traveled from the place of service to the place of return; summoning a jury, seventy-five cents; attending on a jury, fifty cents; for collecting and paying over money on executions, four per cent upon all sums not exceeding two hundred dollars, and for all sums over that amount, two per cent; advertising sale of property, fifty cents; selling property, fifty cents; for attending a circuit court at the request of the sheriff, one dollar and fifty cents for each day, to be paid out of the county treasury.”

“When any cattle or other live stock shall be taken in execution, it shall be the duty of the justice who issued the execution, or other justice charged with the duty of collecting the judgment whereon such execution issued, to allow the constable, for keeping of the same, a reasonable compensation, to be taxed and collected as other costs in the suit.”⁴⁴

No fees are allowed to an officer for traveling in order to serve process, unless the service is actually made.⁴⁵ If there are several defendants residing at the same place, the constable will be entitled to but one travel fee for serving any process upon them.⁴⁶

§ 491. **Sheriff's fees for performing duties of constables.**—“Any sheriff, under sheriff, or deputy sheriff of any county of this state, may and shall hereafter be fully authorized to serve or execute any and all process, civil or criminal, issued, or

43—C. L., § 11224.

45—*Ex parte* Wyles, 1 Denio, 658.

44—C. L., § 886: *Bushey v. Rath*,
45 Mich., 181; 7 N. W., 802.

46—*Prindle v. Harris*, 1 Wend., 104.

which may by law be issued by any justice of the peace, and to have and to exercise all the powers and duties of constables; and for such services they shall be entitled to the same fees as are now, or may be allowed by law to constables in like cases."⁴⁷

§ 492. **Juror's fees.**—"Each juror sworn in a justice's court, or before any officer in any special proceedings, allowed by law, or before any sheriff upon a writ of inquiry, shall be entitled to receive one dollar for each day's attendance, and one-half dollar for each half day's attendance as such juror, and the party requiring such jury shall be liable for the fees of such jury, and shall advance the fees for one day's attendance before the *venire* shall be issued, and the fees for each succeeding day before said jury shall be required to sit and hear testimony or give any verdict in the same. And in case the party so calling for a jury shall refuse at any time to advance the fees, the jury, if impaneled, shall be discharged, and said cause shall proceed as though no jury had been demanded in the first instance. And at the time of the discharge of such jury, the officer to whom such fees were advanced shall pay to each juror so much of said fees as he shall be entitled to, and return the balance, if there be any, to the party of whom it was received; and when the party requiring such jury shall prevail in such action or proceeding, the whole of the fees to which such jury shall be entitled, shall be taxed as costs in his favor, in addition to the costs provided by *section five thousand five hundred and seventy-three*, Compiled Laws of eighteen hundred and seventy-one, as amended by act ninety-six of the Session Laws of 1873."⁴⁸

§ 493. **Fees of witnesses, including garnishees.**—"For attending in any * * * justice court or before any person authorized to hold inquests on the view of dead bodies or before any officer, person or board authorized to take the examination of witnesses, seventy-five cents for each day and thirty-seven and a half cents for each half day. For traveling

⁴⁷—C. L., § 2595; see, *ante*, § 39. Comp. Laws of 1871, being C. L.,

⁴⁸—C. L., § 11230. The section § 838; see the section quoted *ante*, "*five thousand five hundred and seventy-three*" referred to in this section, § 477; see, McGraw v. Sturgeon, 29 Mich., 426, and *ante*, § 314. is an error; it should be § 5375 of the

at the rate of ten cents per mile in coming to the place of attendance, to be estimated from the residence of such witness, if within this state, or from the boundary line of this state, which such witness passed in coming, if his residence be out of the state; but this section shall not be so construed as to allow any fees to witnesses on behalf of the people in criminal prosecutions, or in suits for the recovery of fines, penalties or forfeitures. * * * * *

Under this section it matters not where a resident witness be when subpoena is served upon him, the fees are to be computed from his residence.

Garnishees are entitled to the same fees as witnesses.¹

§ 494. Double costs.—In actions against officers and in other cases hereafter mentioned, the defendant, if he obtain judgment, is in such cases entitled to recover what is usually called double costs, or, more correctly speaking, the taxed costs and one-half thereof in addition.²

“In the following actions, if judgment be rendered for the defendant upon verdict, demurrer, non-suit, non-pros, discontinuance of the plaintiff or otherwise, in any action, certiorari, writ of error, or other proceeding, such defendant shall recover the amount of his taxed costs, and one-half thereof in addition:

1. In actions against public officers appointed under the authority of this state, or elected by the people; or against any person specially appointed according to law, to execute the duties of such public officer; for or concerning any act done by such officer or person, by virtue of his office, or for or concerning the omission, by such officer or person, to do any act, which it was his official duty to perform;

2. In actions against any other person, for doing any act by the commandment of such officers or persons, or in their aid or assistance, touching the duties of such office or appointment;

3. In actions against any person, for making any sale, or doing any other act by authority of any statute of this state.”³

49—C. L., § 11221.

1—C. L., §§ 990, 994.

2—Double costs mean single costs and one-half of single costs in addition: *Gilbert v. Kennedy*, 22 Mich., 5.

3—C. L., § 11265. This provision

is independent of C. L., § 838; see, *ante*, § 488. And the party entitled to double costs may tax them notwithstanding that section: *Fuller v. Willcox*, 19 Wend., 351.

To obtain double costs an application should be made to the justice for that purpose, at the time of rendering judgment. If the fact that the act for which the defendant is prosecuted, was done by him as a public officer, is not apparent from and admitted by the pleadings, the justice will proceed in the presence of the parties to inquire into the defendant's right to double costs.⁴ When double or treble costs are awarded to the defendant, they belong to him, and the officers, witnesses and jurors are entitled only to the single costs allowed them by law for their services.⁵ If the party in the process under which the acts are done indemnifies the officer, and assumes the defence of the suit, &c., he, and not the officer, is entitled to the double costs.⁶

It is not, however, in all cases, that an officer is entitled to double costs, although he recover judgment. If he plead *jointly* with one sued with him, and judgment be in favor of both, he can recover single costs only; in such cases he must plead separately from the others.⁷ So, to be entitled to double costs, the defendant must recover upon the whole record, and when one issue is found for, and another against him, he recovers single costs only.⁸ Thus, if the officer is sued for taking several articles of property, and on the trial the taking of part of them is justified by his process, and for the other part judgment is in favor of the plaintiff, single costs only can be recovered.

§ 495. Taxation of costs.—Unless the parties agree upon the costs, the justice must determine the amount to which the prevailing party is entitled. The justice determines the amount from evidence presented, except as to his own, and the jury costs of which he has information as a matter of course. The costs of the constable or sheriff will usually be evidenced by his returns on the various writs and processes served by him. The witness' costs are shown by a bill showing the names of each,

4—2 Cow. Treat., 2 ed., 1028; Fuller v. Wilcox, 19 Wend., 351. But in this state it has been held that double costs are vested in the party by the judgment, and that no special order or finding of the court is necessary to entitle him to have them taxed: People v. Judge of Wayne Co., 14 Mich., 33.
5—C. L., § 11266.
6—McFarland v. McLean, 6 Wend., 297.
7—Wales v. Dowd, 2 Cow., 426.
8—Seymour v. Billings, 12 Wend., 285.

the residence of each, the distance of residence from the place of attendance, and the days in attendance.⁹

OF FILING A TRANSCRIPT.

§ 496. In circuit courts, when may be demanded.—“Whenever an execution may by law be issued upon any judgment rendered by a justice of the peace; for twenty dollars or over exclusive of costs, the party in whose favor such judgment shall have been rendered, his assignee or the attorney of either of the parties may make and deliver to the justice of the peace having the control of such judgment, an affidavit, setting forth in substance, that the deponent knows, or has good reason to believe, and does believe, that there are not sufficient goods and chattels liable to execution to satisfy such judgment, within the county in which such judgment was rendered, belonging to such person or persons against whom such execution may issue; and thereupon it shall be the duty of the justice of the peace having the control of such judgment, rendered by himself or any other justice, on the demand of any person in whose favor the same shall have been rendered, his assignee or the attorney of either of the parties to give a certified transcript of such judgment and of the proceedings in the case, so far as they appear upon the docket, together with the original security for stay of execution, if any such security shall have been given, and the original affidavit required by the preceding provisions of this section.”¹⁰

9—See, *Jeffery v. Hursh*, 58 Mich., 246, 258; 25 N. W., 176; 27 N. W., 7.

10—C. L., § 845. Before the amendment of 1867, a transcript could not be filed until after an execution issued by the justice had been returned unsatisfied: See, *Comp. Laws of 1857*, 3786; *Peck v. Cavell*, 16 Mich., 10. Nor could such execution under the former law be returned previous to the return day: *Ibid.* And it is apprehended that, under the law as it now stands, if an execution has been issued by the justice, it would be erroneous to file a transcript while the execution was out in the hands of the officer and before its return unsatisfied. But, in *Udell v. Kahn*, it is

held that the issue and return of an execution unsatisfied before the justice, is not now necessary to authorize the filing of a transcript. But if an execution has been returned unsatisfied that fact ought to appear on the justice's docket. But if he omits it, that will not invalidate the judgment. The transcript will be correct if it correspond with the docket: *Udell v. Kahn*, 31 Mich., 195. A transcript cannot be made and filed in the circuit court until the arrival of the time when an execution may be issued on the judgment. Hence in those cases where execution cannot issue until five days after the rendition of judgment (see, C. L., § 862), a transcript made and filed before that time, would be void:

A transcript must be a full and correct copy from the docket, showing the judgment and all the proceedings in the case, so far as they appear upon the docket, and must be certified by the justice.¹¹

O'Brien v. O'Brien, 42 Mich., 15; 3 N. W., 233; Vroman v. Thompson, 42 Mich., 306; 3 N. W., 306.

It is not necessary that the affidavit required by this section should state the amount due upon the judgment: Smith v. St. Joseph Circuit Judge, 46 Mich., 338; 9 N. W., 440. But it may do so; and in that case if the transcript with the affidavit is filed in the circuit court immediately, and before lapse of time would raise any presumption of payment of the judgment, no further affidavit of the amount due would be required on filing the transcript with the clerk: *Ibid.*, and Bigelow v. Booth, 39 Mich., 622; Udell v. Kahn, 31 Mich., 195. The affiant's signature to the affidavit is not necessary to its validity, if it is actually sworn to: Merrick v. Mayhew, 40 Mich., 196; see, Dickinson v. Simondson, 25 Mich., 113.

Affidavit, when and by whom to be made, requisites of, and consequences when defective: See, Berkery v. Circuit Judge, 82 Mich., 160; 46 N. W., 436.

11—C. L., § 845: Peck v. Cavell, 16 Mich., 9. Where the certificate of the justice was as follows: "I hereby certify that the above is a true transcript of the above judgment, and of the subsequent proceedings thereon, J.... T...., justice of the peace," the court said: "This certificate was insufficient to authorize the plaintiffs to request the transcript to be filed and docketed, or the clerk to file and docket it, and of course such judgment never became a judgment of such circuit court. It only shows that it is a true transcript of itself, which may well be true, and yet, no corresponding judgment to be found upon any justice's docket in the county, nor does it show that it is a transcript of the proceedings of any case, so far as they appear upon any docket. Now, the statute makes it the duty of the justice to certify both such judgment and proceedings, and is not satisfied

by a certificate of proceedings 'subsequent' to the judgment. Not only should the certificate conform to the requirements of the law in this respect, but it should affirmatively show what judgment and proceedings it certifies, as well as where such judgment remains, or is to be found, so that it may appear from such certificate that such judgment and proceedings were transcribed from his docket, and the judgment was rendered by him; or in case it is a transcript of a judgment rendered by another justice, of whose docket the certifying magistrate has the custody, that it is a transcript of the judgment and proceedings from the docket of such other justice, then in his custody." Jewett v. Bennett, 3 Mich., 198. If the transcript is a correct copy from the docket entries, it will be sufficient: Peck v. Cavell, 16 Mich., 11; Udell v. Kahn, 31 Mich., 195. It must be officially signed by the justice; his name appearing in the body of the instrument is not sufficient: Bigelow v. Booth, 39 Mich., 165. And the proceedings in regard to the transcript must conform strictly to the statute: O'Brien v. O'Brien, 42 Mich., 15; 3 N. W., 233; Doty v. Dexter, 61 Mich., 353; 28 N. W., 123; Wedel v. Green, 70 Mich., 643; 38 N. W., 638; Berkery v. Judge of Wayne Circuit, 82 Mich., 160; 46 N. W., 436. The transcript in order to entitle it to be filed in the circuit court must show a judgment which the justice had jurisdiction to render: Wedel v. Green, *supra*.

A transcript of a justice's judgment, when filed in the circuit court, has, for certain purposes, the effect of a circuit court judgment; but it is not a judgment rendered in that court: Weimelster v. Singer, 44 Mich., 406.

Where the certificate to a transcript given by a justice of a judgment rendered by another justice, declared the transcript to be a "transcript from the docket of H...., late a justice of the peace of the city of G.... B...., in

§ 497. **Where transcript to be filed.**—"If the plaintiff, his assignee, or the agent or attorney of either of the parties shall make an affidavit stating the amount due upon such judgment, it shall be the duty of the clerk of the circuit or district court for the county in which such judgment shall have been rendered, to file such transcript and security for stay of such execution in his office when requested, and to enter and docket the judgment in a book to be kept by him for that purpose, noting therein the time of receiving it and the amount sworn to be due."¹²

"Such judgment shall have the same effect as a judgment rendered in the circuit or district court, and may in the same manner be enforced, discharged and cancelled; and execution

said county, of the judgment rendered by him in the above entitled cause, and of all the proceedings had by and before him in the cause, so far as they appear on his docket, which is in my possession, and of which docket and the judgment I have control," it was objected that the certificate did not show that the transcript had been compared with the original judgment, and was a correct transcript therefrom, and of the whole of such original; *held*, that the certificate was sufficient under C. L., § 960; that that section was complete in itself, and the transcript fully complied with its provisions, and that the general chapter on "evidence" did not qualify the provisions of that section: *Goodsell v. Leonard*, 23 Mich., 374, *see, Allen v. Mills*, 26 Mich., 123.

12—C. L., § 846. An affidavit of the amount due upon the judgment at the time of filing the transcript is necessary to authorize the clerk to enter and docket the judgment: *Peck v. Cavell*, 16 Mich., 9; *Monaghan v. McKimmie*, 32 Mich., 40; *Bigelow v. Booth*, 39 Mich., 622. Such an affidavit, or evidence of the fact required to be shown thereby, that is the amount due, is a necessary jurisdictional fact. In order to give the clerk of the circuit court any authority to act in the premises: *Smith v. St. Joseph Circuit Judge*, 46 Mich., 338; 9 N. W., 440. This § 846 and § 845, seem to contemplate that two separate

affidavits may be filed in each case; one under § 845 when application is made to the justice for the transcript, and the other, under § 846 showing the amount due when the transcript is filed with the clerk, and there are cases where delay in filing the transcript might make it necessary. But a separate affidavit from that required by § 845 seems not to be required if that affidavit states the amount due upon the judgment, and is filed with the transcript with the clerk of the circuit court immediately after being sworn to, and before any presumption could arise of payments having been made between the making and time of filing the affidavit and transcript: *Smith v. St. Joseph Circuit Judge*, 46 Mich., 338; 9 N. W., 440; *Udell v. Kahn*, 31 Mich., 195, and *Bigelow v. Booth*, 39 Mich., 622; *Berkery v. Wayne Circuit Judge*, 82 Mich., 160, 165; 46 N. W., 436. It was too late to enter a stay of execution after an affidavit has been filed with the justice for a transcript for the circuit court. *Hitchcock v. Circuit Judge of Wayne County*, 96 Mich., 297; 55 N. W., 841. The transcript when filed in the circuit court does not become a new judgment; it is the old judgment to be controlled and enforced by the process of the circuit court. The statute of limitation runs from the entry of judgment by the justice and not from the filing of the transcript: *Wilcox v. Lantz*, 107 Mich., 1; 64 N. W., 735.

may be issued thereon against both the surety and the person against whom the judgment was rendered, or either of them, in the same manner as if execution were to be issued by the justice."¹³

§ 498. Effect of filing transcript.—After a transcript has been filed, all control over the judgment ceases on the part of the justice who rendered it.¹⁴ He would not be authorized to receive payment of it. In general, payment of a judgment may be made to the justice, unless the party has directed otherwise.¹⁵

Judgments rendered in suits commenced by attachment, would not probably be within these provisions as to filing transcripts, unless the attachment or summons had been personally served on the defendant, or he appeared in the suit. A judgment rendered without personal service or appearance, is only presumptive evidence of indebtedness, and may be repelled by the defendant, but it is hardly to be supposed that the trial of the indebtedness is to be made in an action of ejectment to recover the land sold upon the execution from the circuit court. In case there were several defendants, and part only were personally served with process, or appeared, an execution upon filing the transcript could be levied upon the lands of such parties only.¹⁶

§ 499. Transcripts of judgments from the docket of one justice to that of another justice.—“Whenever an execution may by law be issued upon any judgment rendered by a justice of the peace, the party in whose favor such judgment shall have been rendered, his agent, attorney, or assignee, may make and deliver to the justice of the peace having control of such judgment, an affidavit stating the amount due on said judgment, including a transcript fee of two dollars, which must be paid to

13—C. L., § 847. And is to be enforced, discharged, cancelled or affected by the statute of limitations in the same way as a judgment originally rendered in the circuit court: *Arnold v. Thompson*, 19 Mich., 333, and *Jewett v. Bennett*, 3 Mich., 199. The ten-year statute of limitations applies to the judgment when transcript filed: *Cole v. Potter*, — Mich., —; 97 N. W., 774 (Jan., 1904).

14—*Sholts v. The Judges, &c.*, 2 Cow., 506. After a transcript has been legally filed in the circuit court, it is not in the power of that court to allow an appeal from the justice's court, under C. L., § 909: *Davison v. Elliott*, 9 Mich., 252.

15—*Dexter v. Broat*, 16 Barb., 337.

16—See, C. L., §§ 875, 10372-10374.

the justice before any transcript shall issue, and setting forth in substance that the deponent knows or has good reason to believe and does believe that there is not sufficient goods and chattels liable to execution within the county in which said judgment was rendered, belonging to any person or persons against whom such execution may issue.”¹⁷

“Thereupon it shall be the duty of said justice to make a certified transcript of such judgment and the proceedings in the case so far as they shall appear on his docket, with a statement of the amount sworn to be due thereon, and send the same, with a fee of one dollar, by mail, postage prepaid, to any justice of the peace within this state to whom he shall be requested to send the same by the party procuring it. Provided, that no transcript shall issue upon such judgment, when there was no personal service.”¹⁸

“It shall be the duty of the justice of the peace to whom such transcript shall be sent, on receipt of the same, to enter said judgment in full upon his docket, noting thereon the time of receiving it, and the amount sworn to be due thereon.”¹⁹

“Such judgment shall have the same force and effect as if it had been rendered by the justice so receiving it in the first instance, and may in the same manner be enforced, discharged, and cancelled, and execution may issue for the amount due as upon any other like judgment on said docket.”²⁰

17—Public Acts, 1885, p. 284, sec. 19—C. L., § 850.
1; Am. 1889, p. 274; C. L., § 848. 20—C. L., § 851.
18—C. L., § 849.

CHAPTER XXVII.

OF EXECUTIONS AND THE PROCEEDINGS THEREON.

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OF THE FORM OF EXECUTION, WHEN TO BE ISSUED AND WHEN RETURNABLE.

§ 500. In general.—“Upon any judgment being rendered before a justice of the peace, he shall issue execution thereon, if requested, at the time and in the manner hereinafter pre-

scribed, which shall be dated on the day when it actually issued, and be made returnable in sixty days thereafter.”¹

§ 501. **In case of death of one of the parties.**—If defendant in execution die after levy and before sale, the sale may be held as if he were alive. If he die before levy made, no further proceedings shall be had under the execution. If there are several defendants against whom execution may have issued, and one dies or if the execution run against a defendant and his surety for the stay of execution and the defendant die, the execution shall be executed upon the property of the surviving defendant, or of the surety for stay, as the case may be.² In case defendant die before execution issues it may nevertheless issue against the surety for stay of execution.³ If plaintiff die after the execution has issued it shall be executed and returned as if the plaintiff were living.⁴

§ 502. **In attachment, defendant not served.**—“It shall be the duty of any justice of the peace issuing an execution upon a judgment obtained before him, in any suit commenced by attachment in which the defendant was not personally served, and did not appear, to direct the constable taking charge of the same, to levy the debt or damages with interest and costs on the goods and chattels so attached, and to bring the money obtained therefor, excepting his fees, before such justice, at the time and place therein mentioned, and pay over the same to said justice, to render to the party who recovered the same so much thereof as shall be necessary to pay his said damages and costs, retaining the surplus money, if any there shall be in his hands, for the defendant, to be paid said defendant at any time when called for within two months from the rendition of such judgment: Provided, Said defendant does not call for said surplus money within the two months aforesaid, it shall

1—C. L., § 852. But no execution can issue on a judgment against a township, or against any township officers in any action prosecuted by or against them in their names of office: C. L., § 10482. An execution may issue at any time within six years after the execution of the judgment: C. L., § 878. But not after the judgment is barred by the statute of limitations: Jerome v. Williams, 13 Mich., 521; Parsons

v. Wayne Circuit Judge, 37 Mich., 287. An execution should never issue except requested: Percival v. Jones, 2 Johns. Cases, 50; Taylor v. Trask, 7 Cowen, 249; Gold v. Bissell, 1 Wend., 210. It will be presumed to have issued on request: Peck v. Cavell, 16 Mich., 9; see, Foster v. Willey, 27 Mich., 224.

2—C. L., § 857.

3—C. L., § 858.

4—C. L., § 859.

be the duty of the justice having charge of the same to deposit such surplus money in the treasury of the township, giving notice to the township clerk in which such judgment was rendered, whose duty it shall be to charge the same to the treasurer of the township.”⁵

“If the defendant, his agent, or his legal representative, entitled to the possession of such money, shall appear within six years after the rendition of such judgment, and establish, by his own affidavit or otherwise, to the satisfaction of the township treasurer, his right thereto, then he shall be entitled to receive the money, and shall give his receipt therefor, and the township board, when settling with such treasurer, shall give him credit for said receipt: Provided, That in cities the money shall be paid into the city treasury, with like effect and like notice as above provided in the payment into the township treasury.”⁶

§ 503. Against principal and surety.—“Whenever it shall appear from the docket, or on the trial, that any of the defendants are sureties, the justice shall note the same on the execution; and it shall be the duty of the officer executing the same, first, to levy on the goods of the principal, and if enough of such goods shall be found to satisfy the execution, no levy shall be made on the goods of the surety.”⁷

Unless the principal is made defendant in the suit, and judgment rendered against him, no such endorsement will be made.

“Every officer having an execution in his hands for collection, upon an affidavit being served upon him, made by any co-defendant in such execution, his agent or attorney, showing the principal debtor therein, shall first exhaust all the personal estate of said principal debtor, which may be turned out by any one of the defendants, before selling the property of any other defendant who may be surety in the demand upon which the judgment was rendered.”⁸

§ 504. To whom and how directed, form of, etc.—“Such execution shall be directed to any constable of the same county,

5—C. L., § 898.

6—Public Acts, 1873, page 85; C. L., § 899.

7—C. L., § 879. This section and the one immediately following do not

apply to sureties for stay of execution: Sweeney v. Lustfield, 116 Mich., 696; 75 N. W., 136.

8—C. L., § 880.

and shall command him in the name of the people of the state of Michigan, to levy the debt or damages, with interest and costs, of the goods and chattels of the person or persons against whom the same shall be issued (excepting such goods and chattel as are by law exempted from execution), and bring the money before such justice, at the time and place therein to be mentioned, to render to the party who recovered the same."⁹

§ 505. **Against the body.**—"In all cases where by the provisions of this chapter, an execution may be issued against the body of any person, it shall, *if the judgment creditor requires it*, contain a further command to the constable, that if no such goods or chattels can be found, or not sufficient to satisfy such execution, he shall take the body of the person against whom the same shall be issued, and convey him to the common jail of the county, there to remain until such execution shall be

9—C. L., § 853. A sheriff or his deputy may serve an execution issued by a justice, although not directed to him, as the statute expressly empowers sheriffs to serve the process which constables may execute: C. L., § 2595; see, *ante*, § 39; Foster v. Wiley, 27 Mich., 244, 249; Faulks v. People, 39 Mich., 200. The omission in a justice's execution of the year in which the judgment was rendered will not vitiate the execution, it being in all other respects regular: Perkins v. Spaulding, 2 Mich., 157. And it seems that the omission of the plaintiff's name in the execution will not render it void if the writ is indorsed with the title of the cause, giving there the names of the parties correctly, as the indorsement under our practice is usual, if not necessary, and when put on forms a part of the process sufficiently for all purposes of identification: McGuire v. Galligan, 53 Mich., 453; 19 N. W., 142. So, the omission from a justice's execution, of the name of the county or of any township or city does not invalidate it, at least when the defendant does not complain of it; and as against a stranger resisting the claims of a purchaser at a sale under the execution, the defect may be cured and the judgment identified by parol evidence: Elliott v. Hart, 45

Mich., 234; 7 N. W., 812. Where the judgment was in replevin, but the execution issued was in form in assumpsit, held to be erroneous. Williams v. Vall, 9 Mich., 162. The levy must be made before the writ is returnable. It must be so made as to identify or give means of identifying the property levied on so as to make the property chargeable to the officer. There must be manual seizure or such assertion of control as may be made effectual to bring and keep the property within the dominion of the law for sale on execution: Quackenbush v. Henry, 42 Mich., 75; 3 N. W., 262. As to levy on partner's interest, see, Sirrine v. Briggs, 31 Mich., 445; Hutchinson v. Dubois, 45 Mich., 143; 7 N. W., 714. As to levy in case where there are exemptions, see, *post*, §§ 526, *et seq.*

An execution which commands the officer, in addition to the legal costs, to collect twenty-five cents for the execution, although this is not authorized under the statute providing for including the fees for an execution in the taxed costs, is not for that reason void. The officer must be presumed to know that by law the twenty-five cents is not collectable, and this command may be treated as surplusage: Hollister v. Giddings, 24 Mich., 501.

paid and satisfied, or he be discharged by due course of law.”¹

“An execution issued by a justice of the peace may authorize the arrest and imprisonment of the person against whom the judgment is rendered in the following cases:

1. When the action in which such judgment was rendered shall have been commenced by warrant;
2. When the judgment was rendered in an action of replevin, trespass, trover, or action on the case for tort;
3. In case of fraud or breach of trust, when the debt arises on contract, or is founded on a contract express or implied;
4. In an action for money collected by public officers, or in any professional employment;
5. When the plaintiff, or some one in his behalf, shall at or after the time of rendering the judgment, make and file with the justice an affidavit, setting forth the facts and circumstances which would have entitled him to a warrant against the defendant, according to the provisions of this chapter, or such facts and circumstances shall appear from the proceedings, or the evidence on the trial of the cause.”²

An execution against the body cannot be issued on a judgment for costs against a plaintiff, where the action was such that if judgment had been rendered in the plaintiff's favor, *he* could not have had execution against the body of the defendant; as upon an execution in any suit or proceeding for the recovery of money due upon *contract*.³

§ 506. **Not against body of female, except, etc.**—“Any justice of the peace having jurisdiction, and before whom any female may have been convicted of violating any of the pro-

1—C. L., § 854. For the cases in which execution may issue against the body, see, C. L., §§ 860, 888. The execution itself need not recite that it was rendered in such an action as would authorize its running against the body: *Fruitport Twp. v. Muskegon Circuit Judge*, 90 Mich., 23; 51 N. W., 109. This statute requires actual confinement and one out at ball is not imprisoned within the meaning of this statute: *Miller v. Strabbing*, 92 Mich., 300; 52 N. W., 453; *Griffin v. Helme*, 94 Mich., 494; 54 N. W., 173; *Ruslewski v. Michalski*, — Mich., —; 98 N. W., 1 (Jan., 1904). But the

body of a husband could not probably, be taken on an execution issued on a judgment rendered against husband and wife, in an action for tort committed by the wife: C. L., § 10352.

In case the execution issues against the body, the clause directing the imprisonment must be confined to the principal defendant and must not include the surety for stay of execution if there be one.

2—C. L., § 860.

3—See, *People v. Onondaga*, C. P., 9 Wend., 430; *Phelps v. Barton*, 13 Wend., 68.

visions of chapter sixty-nine of the Compiled Laws of eighteen hundred and seventy-one, embracing an act entitled 'An act to prevent the manufacture and sale of spirituous or intoxicating liquors as a beverage,' may issue an execution against the body of such female, and she shall be subject to all the like penalties and proceedings mentioned in said act as are males: Provided, That for no other cause shall a female be arrested or imprisoned upon any execution issued by a justice of the peace."⁴

"No female shall be imprisoned on any process in any civil action except in actions for the violation of any of the provisions of an act entitled 'An act to prevent the manufacture and sale of spirituous or intoxicating liquors as a beverage,' the same being chapter sixty-nine of the Compiled Laws of 1871, in which actions she shall be liable to the same punishment as a male."⁵

§ 507. **Interest on judgments.**—*Interest* may be allowed and received upon all judgments at law for the recovery of any sums of money, and upon all decrees in chancery for the payment of any sums of money, whatever may be the form or cause of action or suit in which such judgment or decree shall be rendered or made; and such interest may be collected on execution, at the rate of five per cent per annum: Provided, That on a judgment rendered on any written instrument, having a different rate, which was a legal rate at the date of the execution of such instrument, the interest shall be computed at the rate specified in such instrument.⁶

When the interest is more than five per cent, the justice will indorse on the execution a direction as to the rate of interest, thus, "Collect interest on the within judgment at the rate of *seven* per cent per annum," or such other rate as was specified in the written instrument on which the judgment was rendered; or such direction may be inserted in the execution.

4—C. L., § 889; see, *People ex rel Strickland v. Bartow*, 27 Mich., 68. The chapter 69 referred to has been repealed.

5—C. L., § 10342. But chap. 69 of the Compiled Laws of 1871 is now repealed.

6—C. L., § 4865, as amended by W., 59.

Pub. Acts, 1903, p. 252. Interest is allowable under this section upon claims allowed by commissioners on claims against the estates of deceased persons and upon costs allowed an appellant from probate court: *Hayden v. Hefferan*, 99 Mich., 263; 58 N.

§ 508. **Where execution has been stayed, etc.**—"In all cases where security shall have been given for the stay of execution, as hereinafter provided, if the debt or damages, with interest and costs, shall not be paid within the time limited by law therefor, execution shall be issued by the justice on application of the judgment creditor, his agent or attorney, against both principal and surety for the stay, with the same effect as if the judgment had been rendered against both such principal and surety upon a joint liability, after the return of process personally served, except that no such execution shall be issued against the body of the surety." ⁷

§ 509. **Procedure in case of death of defendant.**—If the judgment debtor dies before execution is issued, no proceedings could, formerly, have been had by execution on the judgment, and of course none against the surety for stay of execution. This rule is changed by the following section: "When security is given for the stay of execution, and the defendant against whom the judgment was rendered shall die before execution is issued against him, it shall be lawful to issue execution against the surety alone." ⁸

"In case the defendant in the judgment shall die before execution shall have been issued thereon, execution may nevertheless be issued against the surety for stay of execution." ⁹

The proper course, in such case, would be to note on the execution the death of the defendant, and direct the officer to levy the execution on the property of the surety. Formerly, if the *plaintiff* died before execution had been levied, no further proceedings could be had, but now if the plaintiff die after the execution has *issued*, the same shall be executed and returned, as if the plaintiff were living. ¹⁰

"When the defendant in an execution shall die after levy and before sale, the property levied on shall be sold in the same manner as if he was alive; but if no levy has been made in such case, such execution shall be returned without further proceedings; but if an execution shall have issued against several defendants, and some of them die thereafter, or against the defendant in the judgment and his surety for the stay of

7—C. L., § 855. See, *Sweeney v. Lustfield*, 116 Mich., 607; 75 N. W., 136.

8—C. L., § 856.

9—C. L., § 858.

10—C. L., § 859.

execution, and the defendant in the execution shall die before levy, the execution may be executed upon the property of the surety." ¹¹

In case the execution issues against the body, the clause directing the imprisonment must be confined to the defendant, and must not include the surety. ¹²

A slight variance between the execution and the judgment will not render the execution void; as where the amount of the judgment varied fifty cents from the execution. ¹³ A justice has no power to amend an execution issued by him, after it has been executed. ¹⁴

The remarks heretofore made, *ante*, § 138, in relation to the protection of the officer by the process, apply to executions. An execution *void on its face* would afford no protection to the officer. If a constable having two executions, one valid and the other void, should sell property, he would, after selling enough of the goods to satisfy the valid one, be liable as a wrong-doer for the goods sold beyond that amount. ¹⁵

§ 510. **When execution to issue.**—"In the cases mentioned in the preceding section (C. L., § 860), ¹⁶ and also in suits commenced by attachment, execution shall, on application of the person in whose favor the judgment was rendered, his agent or attorney, be issued forthwith after the rendition of the judgment, unless such execution may be and is stayed as hereinafter provided." ¹⁷

"Upon all judgments rendered by justices of the peace, except in cases mentioned in the two last preceding sections (C. L., §§ 860, 861), executions shall issue at the expiration of five days from the rendering of the judgment, unless such execution shall be stayed as hereinafter provided; and such execution shall not issue sooner without the consent, in writing, of the person against whom the judgment was obtained, or the proof in the next section specified." ¹⁸

11—C. L., § 857. See, *Hochgraef v. Hendrie*, 66 Mich., 557; 34 N. W. 15. But where property has been attached and the defendant dies before execution issued, it seems that execution may still be levied on the property attached, and that it may be sold: see, *ante*, § 91, note 4.

12—C. L., § 855.

13—*Borland v. Stewart*, 4 Wend., 568; *Jackson v. Page*, *Ibid.*, 585.

14—*Toof v. Bentley*, 5 Wend., 276.

15—*Aldred v. Constable*, 6 Ad. & El., N. S., 370.

16—*Ante*, § 505.

17—C. L., § 861: See, Pub. Acts, 1899, p. 308.

18—C. L., § 862. But C. L., § 860.

"If the party obtaining such judgment shall make it appear, by his own oath, or other competent testimony, to the satisfaction of the justice, that such party will be in danger of losing the amount recovered by him, unless execution issue sooner than is prescribed in the last preceding section, such justice shall issue execution immediately, unless the same be stayed by the party against whom the same was rendered, as herein-after provided."¹⁹

The mere oath of the party that he believes he is in danger of losing the debt would not authorize the justice to issue an execution under this section. Where execution was issued upon such an oath, the court said: "We are clearly of opinion that it was never contemplated by the statute that execution should be awarded on this evidence alone. The justice should require proof of facts and circumstances tending to show danger, and an award based solely upon such evidence as appears in the docket entry under consideration is clearly erroneous, and would be reversed if under review on *certiorari*." "But, suppose this evidence was incompetent, and that the only evidence upon which the justice could properly act, under the statute, was proof of facts and circumstances, we still think the award of execution was erroneous merely, and not void."²⁰

§ 511. **Of the application for execution.**—"Application for such execution may be made at the time of rendering the judgment; or, if a reasonable notice be given to the adverse party of the intention to apply for such execution, such application may be made at any time after the judgment shall have been rendered."²¹

If application for execution be made at the time of rendering judgment, notice of the application need not be given. But if the award of execution is after the cause is determined, and the parties have left the justice's office, it would be irregular without notice.²²

provides that upon all judgments mentioned in that section, execution shall issue forthwith. So, C. L., § 901, authorizing the immediate issue of execution on judgments for labor debts was enacted after C. L., §§ 860, 861, and such executions are not governed by those sections: See, *Grand Rapids Chair Co. v. Runnells*, 77 Mich., 111;

43 N. W., 1006. An execution cannot issue on a judgment barred by the statute of limitations: *Jerome v. Williams*, 13 Mich., 521.

19—C. L., § 863.

20—*Rash v. Whitney*, 4 Mich., 495.

21—C. L., § 864.

22—*Rash v. Whitney*, 4 Mich., 495.

The notice need not specify the time of making the application, but it must be given a reasonable time under all the circumstances, before the application. The defendant can prevent the issuing of the execution by giving security.²³ It is, however, advisable to state in the notice the time at which the application will be made.

The notice, in general, should be served personally, but it is not, in all cases, necessary. If it be shown that the defendant is out of the way, keeps beyond the reach of notice, and that it has been given to persons from whom he would probably receive it, as his wife, or some one of his family of suitable age and discretion, at his dwelling house, that would be enough.²⁴

The evidence in support of the application for the execution is not required to be in writing. It may be by parol. Nor is the justice required to set forth in his docket the facts stated, in support of the application.²⁵

The defendant cannot come in and contest the issuing of an execution by cross-examining the plaintiff or anybody else who should make the oath of danger. The plaintiff is to prove facts sufficient to convince the justice. From this alone is the justice to judge.²⁶

An execution may be issued upon any judgment recovered before a justice of the peace, at any time within six years after such judgment shall have been rendered, for the collection of the whole or any part of such judgment remaining unpaid.²⁷

OF SECURITY FOR STAY OF EXECUTION.

§ 512. When allowed.—"The party against whom any judgment shall be recovered, may stay the execution thereon, until the expiration of the time hereinafter prescribed, by giving to the party in whose favor judgment was obtained, and filing with the justice within five days after the justice shall be authorized to issue execution thereon, security in writing, with one or more sufficient sureties, satisfactory to the judgment creditor or the justice for the payment of the money, with interest and costs, at or before the expiration of four months

23—Moulton v. Kavana, 21 Wend., 648.

24—Moulton v. Kavana, 21 Wend., 648.

25—Rash v. Whitney, 4 Mich., 495.

26—Moulton v. Kavana, 21 Wend., 648, 650.

27—C. L., § 878.

from the commencement of the suit, if such money shall not exceed fifty dollars, exclusive of costs; and at or before the expiration of six months, if such money exceeds fifty dollars, exclusive of costs.”²⁸

§ 513. **When stay not allowed.**—“No stay of execution shall be allowed in the following cases, except at the option of the plaintiff:

1. In actions against any corporation, except at the option of the plaintiff;
2. In any official bond, or bond given to secure the faithful discharge of the duties of any trust, as to the principal in such bond;
3. On judgments against justices of the peace, sheriffs, constables, or other officers, for money by them collected, or received as such justice, sheriff, constable, or other officer;
4. On any judgment against a constable for failing to make return, making a false return, or failing to pay over money collected in his official capacity;
5. On judgments against bail for the stay of execution;
6. On judgments in favor of bail, who have been compelled to pay money on account of their principal;
7. On judgments obtained by constables on undertakings executed to them for the delivery of property;
8. Against an individual for money deposited with him;
9. Upon judgments for costs only;
10. In actions of replevin; but in all such cases executions shall issue forthwith.”²⁹

“When judgment shall be rendered against two or more persons, any of whom are sureties for other or others in the contract on which the judgment is founded, there will be no stay

28—C. L., § 865. If the stay of execution be for a longer time than that prescribed in the statute, it is void; and if, in such case, the property of the surety for the stay should be seized on an execution against him, the justice would be a trespasser: *Shadbolt v. Bronson*, 1 Mich., 85. Notwithstanding the stay, suit may be commenced and maintained upon the judgment, immediately after putting in the stay, although the time for which execution is stayed has not ex-

pired. *McDonald v. Butler*, 3 Mich., 558. But a party putting in stay of execution cannot appeal thereafter from the judgment: *People v. Judges*, etc., 1 Mich., 134. A stay of execution cannot be entered after the affidavit for transcript has been filed; *Hitchcock v. Wayne Circuit Judge*, 96 Mich., 297; 55 N. W., 841. See, *Lustfield v. Ball*, 103 Mich., 17; 61 N. W., 339.

29—C. L., § 866.

of execution on the judgment if the surety or sureties, or any of them, object at the time of rendering the judgment, unless the bail for the stay of execution will undertake specially to pay the judgment, in case the amount thereof cannot be collected of the principal defendant.”³⁰

Nor shall any stay of execution be allowed in case of judgments rendered for personal services performed by the plaintiff.³¹

§ 514. Form of stay.—“In all cases where stay of execution is allowed by law, the party entitled thereto shall have stay of execution, by his surety or sureties becoming such security on the docket of the justice, in substantially the following form: ³²

I, E.... F...., hereby acknowledge myself surety for the payment to the plaintiff by the defendant of the above judgment, with interest and costs thereon, at or before the expiration of months from the commencement of said suit.

E.... F....

Dated the day of, 19..

Witness,

L.... M...., *Justice of the Peace.*

And such entry shall have the effect of a judgment, and execution may issue thereon in the manner prescribed in this chapter, and an action of assumpsit may be brought thereon.”³³

§ 515. Recalling execution.—“In all cases where stay of execution is allowed by law, if execution shall have issued within the five days hereinbefore specified, if the judgment

30—C. L., § 868.

31—C. L., § 901, and *Grand Rapids Chair Co. v. Runnells*, 77 Mich., 111; 43 N. W., 1006.

32—C. L., § 867. This section does not require that the security entered into shall follow precisely the form given; it will be sufficient if it is the same in substance, and omits nothing that the statute makes requisite. But the surety must sign the stay in the presence of the justice, and he must attest the execution of it, otherwise the stay will be void: *Cox v. Crippin*,

13 Mich., 502; see, *Jerome v. Williams*, 13 Mich., 522, 525, 526; *Hollister v. Giddings*, 24 Mich., 501. Where the surety for the stay does not become such by signing this undertaking on the docket it would seem that this security must be executed and acknowledged before the justice who rendered the judgment, and be witnessed by him: *Cox v. Crippen*, 13 Mich., 502.

33—C. L., § 867: *Cox v. Crippen*, 13 Mich., 508.

debtor shall, within that time, give security for the stay of execution as aforesaid, the justice shall make an order recalling the execution; and if the same has been levied upon property, such property shall, upon the production of such order to the constable, be forthwith released therefrom, and returned to the person from whom it was taken; and if the judgment debtor be in custody thereon, the officer in whose custody he may be, upon the production of such order, shall forthwith discharge him therefrom.”³⁴

§ 516. When execution may be issued, notwithstanding the stay.—“When any person who has become security for stay of execution, shall, before the expiration of such stay, remove out of the county, the justice by whom the judgment was rendered, or the justice having the right to issue the execution on the judgment, shall, on demand, and on proof of such removal by the oath of the party, or otherwise, issue execution upon such judgment, against the goods and chattels of the party against whom the judgment was rendered.”³⁵

The removal from the county of the security for stay of execution should be clearly made out by the oath of the party, or by some other witness.

Again, “when any security for the stay of execution shall become apprehensive that, by delaying the execution until the full time of such stay, he may be compelled to pay the judgment, it shall be lawful for him to make and file affidavit of that fact before the justice authorized to issue execution; whereupon the justice shall issue execution against the judgment debtor: Provided, That such surety shall not thereby be discharged from liability, but may be proceeded against after the expiration of the time of stay, in the same manner as if execution had not issued as aforesaid.”³⁶

To justify the issuing of an execution in such a case, an *affidavit* must be made by the surety, in the form prescribed by the preceding section.

34—C. L., § 869: *Hitchcock v. Wayne Circuit Judge*, 96 Mich., 297; 55 N. W., 841. 36—C. L., § 871. See, *Sweeney v. Lustfield*, 116 Mich., 696; 75 N. W., 136.

35—C. L., § 870.

§ 517. **Further security for stay.**—"If the judgment debtor shall, in either of the cases mentioned in the two preceding sections, within five days after levying such execution, give further security for the stay of execution during so much of the first stay as remains then unexpired, and shall pay the costs of the execution issued against him as aforesaid, it shall be the duty of the justice to take such further security, and recall the execution; and the person who became security shall first be proceeded against, until it shall appear by the return of the constable that he had no goods and chattels on which to levy or satisfy the judgment, before proceedings shall be had against the security first given." ³⁷

§ 518. **Security insufficient.**—"At any time before the stay of execution shall expire, if the justice having authority to issue execution shall become satisfied that the security is insufficient, it shall be lawful for him to cause written notice thereof to be given to the defendant; or if he be absent, that the same be left at his residence, requiring him to give additional security; if such defendant shall not have given additional security on or by the third day after the giving of such notice, such fact shall be entered on the docket, and he shall immediately issue execution against the defendant for the collection of the judgment; if within five days after the issuing of such execution, security to the satisfaction of the justice is given, and the defendant shall pay the costs of the execution issued against him as aforesaid, the execution shall be recalled and stayed until the expiration of the original stay." ³⁸

§ 519. **Execution and transcript for benefit of surety.**—"When any judgment shall have been satisfied, by any person who shall have become surety for the stay of execution thereon, such judgment shall remain good and valid in law, for the use of such security, who, at any time thereafter, may sue out execution on such judgment, against the goods and chattels of the defendant, for the use of such security, which shall be so endorsed by the justice; such security shall also be entitled to a transcript of such judgment, for his own use, which shall have the same force and effect as transcripts in other cases." ³⁹

37—C. L., § 872.

39—C. L., § 873.

38—C. L., § 874.

§ 520. **Of executions against joint debtors.**—"When a judgment shall be obtained against joint debtors, upon process which was not personally served upon all the defendants, execution may be issued in form against all; but the justice shall endorse thereon the names of such of the defendants who did not appear in the suit, as were not personally served with process of warrant, summons, or attachment." ⁴⁰

"Such execution shall not be served upon the persons of the defendants whose names are endorsed thereon; nor shall it be levied upon the sole property of any such defendant, who neither appeared in the suit nor was personally served with such process; but it may be collected of the several property of any defendant who appeared or was served personally with process, or of the joint or copartnership property of all the defendants." ⁴¹

If the process has been served by *copy* on any who do not appear, it will be, as regards the execution, as no service.

OF SERVING EXECUTIONS.

§ 521. **Duty of officer on receipt of execution.**—On the receipt of an execution by a constable, it is his duty to proceed, in a reasonable time, to collect the sum thereby directed to be levied on the goods and chattels of the person against whom the execution is issued, and if no such goods and chattels can be found, or not sufficient to satisfy the execution, to take the defendant, in case the execution so direct, and commit him to jail. ⁴² It is the duty of the constable to search for property

40—C. L., § 875.

41—C. L., § 876.

42—But he can make a levy or take the defendant only within the time limited for the return of the execution: C. L., § 891. An officer can search for and seize property on execution only within his county. He cannot perambulate the state to make levies or to perform other civil duties as incident to the collection of executions running within the county. And sales of personal property on executions are to be made only in the proper county of the officer to whom the writ is directed: *Alvord v. Lent*, 23 Mich., 373. An officer serving an execution must

execute it in such a manner as to do as little mischief to the debtor as possible, and where it is important to the debtor to have his exemption set off to him immediately, it is the officer's duty to have it done promptly. To seize and hold the whole of a debtor's property, so as to preclude him from engaging in his ordinary business, or from keeping house, when the enforcement of the process does not at all require it, or to seize and hold a greatly excessive amount of property unnecessarily and to the injury of the debtor, cannot be justified: *Handy v. Clippert*, 50 Mich., 355; 15 N. W., 507. An officer is not liable

to satisfy it before he takes the person of the defendant. His right to take the body depends upon the contingency of there being no property to be found. If, without searching or inquiring for property, he immediately, upon receiving the execution, arrests the defendant, he does it at his peril; and if it is shown that the defendant had property in his open and visible possession, which was subject to the execution, and might, with reasonable diligence, have been found by the officer, he is undoubtedly liable to an action for making the arrest. A constable has in all cases a reasonable time to search for property before he is bound to arrest the defendant in the execution; and if he acts in good faith, he will incur no responsibility in omitting to take the body until search can be made. There may be cases in which no actual search is necessary. Where the defendant in the execution declares he has no property, he has no right to complain if the constable credits his assertion and proceeds accordingly.⁴³

In such an action, however, the officer will be presumed to have searched for property, and the burden is thrown upon the defendant in the execution, of showing that he had property clearly subject to the execution, and that he disclosed the fact to the constable, who, notwithstanding, refused to take it.⁴⁴

"Goods and chattels" mean not only all movable personal property as contradistinguished from real estate, but includes demands and choses in action. Choses in action, however, like promissory notes, bills of exchange, and the like, are not subject to execution.⁴⁵ "Current gold and silver coin may be taken in execution, and paid to the creditor as money col-

for proceeding in good faith to serve an execution after he has been told by the defendant that an appeal has been taken where the justice insists that the appeal has not been perfected. He has a right to rely on his process until he is officially notified that it has been superseded: *Foster v. Wiley*, 27 Mich., 245.

43—*Hollister v. Johnson*, 4 Wend., 639.

44—*Barhydt v. Valk*, 12 Wend., 145.

45—*Burrill's Law Dic.*, "Goods." *People v. Board of Auditors, &c.*, 5

Mich., 223-4. But it seems that a lease or estate in lands for a term of years is such a chattel interest as may be levied on and sold on execution the same as goods and chattels: *Buhl v. Kenyon*, 11 Mich., 249. The interest of a lessee in personal property may be sold on execution, and the purchaser is entitled to the beneficial use of it during the term: *Van Antwerp v. Newman*, 2 Cow., 543. And the interest of the lessor may be sold subject to the right of the lessee: See, *Goodright v. Forrester*, 8 East, 567.

lected, and shall not be exposed to sale thereon.”⁴⁶ “Any bills or other evidence of debt, issued by any moneyed corporation, and circulated as money, may be taken in execution and paid to the creditor at their par value as money collected, if he will accept them, otherwise they shall be sold as other chattels.”⁴⁷

• § 522. **Levy on mortgaged property.**—“When goods or chattels shall be pledged by way of mortgage or otherwise, for the payment of money, or the performance of any contract or agreement, such goods or chattels may be levied upon and sold on execution against the person making such pledge, subject to the lien of the mortgage or pledge existing thereon; and the purchaser at such sale shall be entitled to pay to the person holding such mortgage or pledge the amount actually due thereon, or otherwise perform the terms and conditions of the pledge, at any time before the actual foreclosure of such mortgage or pledge, and on such payments or performance, or a full tender thereof, shall thereupon acquire all the right, interest and property of which the defendant in execution would have had in such goods or chattels if such mortgage or pledge had not been made.”⁴⁸

46—C. L., § 10316.

47—C. L., § 10317. *Black v. Ward*, 27 Mich., 101.

48—C. L., § 10318. See, *Smith v. Menominee Cir. Judge*, 53 Mich., 560; 19 N. W., 184; *Kritzer v. Sweet*, 57 Mich., 620; 24 N. W., 764; *Williams v. Raper*, 67 Mich., 430; 34 N. W., 890. Formerly it was held in this state that a chattel mortgage conveyed the whole legal title of the property to the mortgagee conditionally, and that upon breach of condition the title of the mortgagee became absolute; and that having the general title, he was entitled to the immediate possession of the property to hold until condition broken, unless it was otherwise stipulated in the mortgage. And that an officer could not levy upon a mortgaged property whether in the possession of the mortgagor or mortgagee, even if the mortgage was not due, unless the mortgage contained an express stipulation permitting the mortgagee to retain possession for a definite period, nor then if that period had elapsed: *Tannahill v. Tuttle*, 3 Mich.,

104; *Eggleston v. Mundy*, 4 Mich., 295; *Bacon v. Kimmel*, 14 Mich., 201.

But it is now held that a chattle mortgage is a lien and security merely; and not a sale or transfer of the title to the property: *People v. Bristol*, 35 Mich., 28, 33; *Grove v. Wise*, 39 Mich., 161; *Brink v. Freehof*, 40 Mich., 613; *Haynes v. Leppig*, 40 Mich., 606. And a levy of execution upon the mortgaged property is now expressly authorized by C. L., § 10318, and such levy may be made at any time before foreclosure of the mortgage: *Nelson v. Ferris*, 30 Mich., 497; *Cary v. Hewitt*, 26 Mich., 228. And the right continues until redemption is cut off by the foreclosure: *Haynes v. Leppig*, 40 Mich., 605. It is only the right of redemption that can be taken on the execution: *Bayne v. Patterson*, 40 Mich., 659. But this leviable right pertains to the whole property, and is not apportionable: *Worthington v. Hanna*, 23 Mich., 534. Upon a levy of execution the officer has the right to take possession of the goods and chattels from the mortgagor, and de-

A mortgage of goods which are not in existence, or which do not belong to the grantor at the time of executing the mortgage, is void,¹ unless the grantor ratify the grant by some new

tain them in safe and convenient custody, as against the mortgagee for the time prescribed by law for bringing them to sale on the execution: *Cary v. Hewitt*, 26 Mich., 228. The law aims to secure, as far as practicable, the application of the debtor's property to both demands, the mortgage and the levy, upon principles of justice: *Wilson v. Montague*, 57 Mich., 638; 24 N. W., 851; see, *Smith v. Menominee Circuit Judge*, 53 Mich., 563; 19 N. W. 184. See, further also, as to levies, and sale of mortgaged chattels: *Wilson v. Montague*, 57 Mich., 638; 24 N. W., 851; *Walker v. White*, 60 Mich., 428; 27 N. W., 554; *Merrill v. Denton*, 73 Mich., 628; 41 N. W., 823; *Hyde v. Shank*, 77 Mich., 517; 43 N. W., 890; *Rosenfield v. Case*, 87 Mich., 295; 49 N. W., 630; *Anderson v. Cook*, 100 Mich., 621; 59 N. W., 423. If the validity of the mortgage is denied by the execution creditor the levy need not be made subject to the mortgage: *Williams v. Raper*, 67 Mich., 427; 34 N. W., 890. Replevin lies at once and without demand by the mortgagee against the officer levying in defiance of the mortgage: *Merrill v. Denton*, 73 Mich., 628; 41 N. W., 823.

In case of a pledge of property, a levy on the pledged property in the hands of the pledgee after the debt became due and before foreclosure, would be proper under this section, as delivery and possession of the property always accompany a pledge. By a *pledge*, says Judge Cowen, the *special* property in the goods only passes to the pledgee, the general property remaining in the pledgor: 1 Cow. Treat., 2 ed., 302. If the mortgagee sell part of the property by virtue of the power in the mortgage, for sufficient to pay the mortgage debt, with interest and expenses, all his right to the residue of the property is extinguished: *Ibid.*, 305. Commencing an attachment suit for a debt secured by mortgage, by seizure of mortgaged property, does not discharge the mortgage, but is a waiver of forfeiture: *Thurber v. Jewett*, 2 Mich., 295, 305; see, *Tannahill v. Tuttle*, 3 Mich., 104. The mort-

gagor of a chattel mortgage having upon the day the mortgage debt become due, tendered the amount to the mortgagee, is entitled to the possession of the property mortgaged: *Fuller v. Parrish*, 3 Mich., 211; see, *Moy-nahan v. Moore*, 9 Mich., 9; *Eslow v. Mitchell*, 26 Mich., 500.

The statute authorizing a levy upon the interest of the general owner of personal property incumbered by security allows the purchaser to acquire the mortgagor's interest, only on paying the amount due or performing the conditions. The rights of mortgagees can only be divested by the payment or tender of payment of their whole debt. Where a levy is made on personal property covered by a chattel mortgage, the statute does not permit the officer to sell it in parcels. It only allows the sale to be made subject to the lien of the mortgage or pledge existing thereon, and it is only on payment or tender of payment or performance, that the purchaser obtains any rights whatever against the mortgagee; neither the officer nor purchaser has any right to dispose of any single article or part of the mortgaged property by itself, or in advance of such payment. The right lawfully sold by the officer, is the right of redemption. Therefore, where, under a levy on a stock of goods subject to mortgage, the officer sold the goods in parcels to different persons, he became a trespasser, and the sale was held to be an unlawful conversion, and that the mortgagees were not bound to follow the property, but might hold the officer in damages for the injury to their security: *Worthington v. Hanna*, 23 Mich., 530. It may be necessary, and it is not illegal in levying on mortgaged chattels to take possession of distinct articles separately, but a levy on a part only is incomplete, and would not justify a sale of the distinct articles separately: *Harvey v. McAdam*, 32 Mich., 477. In levying upon mortgaged property it is the duty of the officer to levy on all the property covered by the mortgage and that can be found within his jurisdiction,

act done by him with that view, after he has acquired the property in them.²

A pledge is defined to be a bailment of personal property, as a security for a debt or engagement. Whether the debt be due presently or upon time, the rights of the parties to the pledge are the same. The pledgee, on non-payment of the debt, may either file a bill in chancery for a foreclosure and proceed to a

and to sell it in one lot or parcel subject to the mortgage; and after levying upon a part of the property a reasonable time must be given him to find and levy upon the rest of it: *Baldwin v. Talbot*, 46 Mich., 19; 8 N. W., 565; *Laing v. Perrott*, 48 Mich., 298; 12 N. W., 192; *Ganong v. Green*, 71 Mich., 7; 38 N. W., 661. A sale of chattels given under a prior mortgage is not a conversion as against the subsequent mortgagee: *Grimes v. Rose*, 24 Mich., 416.

An execution creditor who has levied upon property subject to a prior mortgage, has the right to redeem therefrom as soon as he acquires a lien by the levy of his execution, and is not required to wait until he has purchased the property on execution sale; and upon redeeming, he has the right to be subrogated to the rights of the mortgagee, and is entitled to demand and receive an assignment of the mortgage: *Lucking v. Wesson*, 25 Mich., 443.

The right of an officer acquired by a levy on mortgaged property is not lost by delay in advertising the sale of the property, if requested to do so by the mortgagee who intends to replevy it: *Baldwin v. Talbot*, 46 Mich., 19; 8 N. W., 565.

But a mortgagee of chattels may maintain trover against any person wrongfully interfering with his right to the possession of the mortgaged property, even before condition broken: *Grove v. Wise*, 39 Mich., 161.

The assignee of a chattel mortgage holds the same interest and has the same rights in the mortgaged property, and in case of a levy thereon is entitled to the same protection as the mortgagee: *McLaughlin v. Smith*, 45 Mich., 277; 7 N. W., 908; *Mayer v. Souller*, 48 Mich., 411; 12 N. W., 632.

1—*Jones v. Richardson*, 10 Metc.,

481; see, *Moody v. Wright*, 13 Metc., 29; *Barnard v. Eaton*, 2 Cush., 303; *Codman v. Freeman*, 3 Cush., 309; *Rice v. Stone*, 1 Allen, 569; *Barnard v. Eaton*, 2 Cush., 294; *Chesley v. Joselyn*, 7 Gray, 490; and see, *Grimes v. Rose*, 24 Mich., 416. But where a merchant mortgages his stock of goods, and expressly provides in the mortgage that it shall cover not only the goods then in stock, but also all future purchases and additions to the stock, the mortgage will, as between mortgagor and mortgagee, be a lien upon both the goods on hand when the mortgage was given, and also upon such goods as shall thereafter be added to the stock; and a purchaser from the mortgagor of the stock and additions thereto, with knowledge of the mortgage and its provisions, will take the same subject to the lien of the mortgage upon the whole, additions and all: *American Cigar Co. v. Foster*, 36 Mich., 368; *Robson v. M. C. R. Co.*, 37 Mich., 70; *People v. Bristol*, 35 Mich., 28; *Cadwell v. Pray*, 41 Mich., 307; 2 N. W., 52. But to subject after acquired property to the lien of a chattel mortgage it must come within its descriptive words. Thus, where it was provided in the mortgage that it should cover, "Also all the stock, goods, wares and merchandise that the said parties of the first part may add to or get for use in said business," etc., it was held that the words "add to" and "get for use" would not include goods purchased or bargained for, to be used in the business, but which never came into the actual possession of the mortgagor, and were therefor never put into the stock of mortgaged goods: *Curtis v. Wilcox*, 49 Mich., 425; 13 N. W., 803.

2—*Lunn v. Thornton*, 1 M. G. & S., 379.

judicial sale, or he may sell without judicial process, upon giving reasonable notice to the pledgor to redeem, and of the intended sale. And if the pledgor cannot be found and notice cannot be given to him, judicial proceedings to authorize a sale must be resorted to.

. The constable may take actual possession of the goods pledged, and hold the same until he sells, because the goods must be present at the sale, and within view of those attending it. But after the sale the pledgee is entitled to the possession of the goods until the purchaser redeems them.³

§ 523. **Levy on partnership property.**—On an execution against one of several partners, the constable may take the goods of the partnership in execution, and sell the individual share or interest of the defendant, and in so doing he may take possession, remove and deliver the entire property taken to the purchaser under the execution.⁴ The purchaser is, by the sale, entitled to the interest in the goods of the partner against whom the execution was issued, encumbered with the joint debts of the partnership, and subject to account for the full value in favor of the partners, or through them to creditors.⁵

Although the constable may seize the whole, he can sell only the interest of him against whom the judgment and execution was, without subjecting himself to an action of trover by the other partners, in which they would recover the *value* of their individual shares in the property sold.⁶ The same consequence

3—Bakewell v. Ellsworth, 6 Hill, 484; Stief v. Hart, 1 Comst., 20. But when the object of the pledge has been performed the pledge ceases to be operative, and the whole beneficial interest in the property pledged, becomes absolute in the true owner of the equity of redemption: Ward v. Ward, 37 Mich., 256.

4—Phillips v. Cook, 24 Wend., 389; Scrugham v. Carter, 12 Wend., 131; Waddell v. Cook, 2 Hill, 47. Upon such a sale the purchaser becomes a tenant in common with the other partners: *Ibid*.

5—Walsh v. Adams, 3 Denio, 125; Phillips v. Cook, 24 Wend., 389.

6—Waddell v. Cook, 2 Hill, 47; Walsh v. Adams, 3 Denio, 125; Bates v. James, 3 Duer, 45. An execution against only one of the partners of a firm cannot be levied upon specific

articles of the partnership stock only. The levy in such case must be upon the partner's interest in the whole stock, for the only individual interest he has is his share in what shall remain after the partnership debts are paid and the accounts between the partners are adjusted: *Sirrine v. Briggs*, 31 Mich., 443-5; and see, *Haynes v. Knowles*, 36 Mich., 407. The interest of a partner in partnership property is not an interest in specific articles belonging to the firm, but only an interest in the surplus that shall remain after the debts of the firm are paid. His share is not separable from the share of his co-partner, for he has no separate property in the assets of the firm. His share is also subject to the final adjustment of accounts between the partners themselves.

would follow in any case where the defendant had a right to a portion only of the property levied on, and the officer should sell the whole property. It is, therefore, advisable, in all cases, to sell only the interest of the defendant.

§ 524. **Levy on growing crops.**—Corn or other crops, growing or sown on the ground, which go to the executor, may be sold upon the execution; but clover or grass cannot. Any product of the soil, raised annually by labor and cultivation, belongs to the executor, and may be taken in execution.⁷ As the trees belong to the heir, so does the fruit which they bear, not gathered, as apples, pears, etc., and it is not liable to execution.⁸ Nor can the defendant in the execution authorize the levying of an execution upon trees, grass or fruit growing upon his land, before severance; and a levy upon and sale of them, upon their being turned out by the defendant, would be void.⁹

If any levy of an execution can be made upon a partner's interest in the partnership property it must be so made and enforced as to protect the rights of others. One man's interest must not be sacrificed because another who is associated with him in business happens to be in debt. Specific articles must not be taken on the execution because the specific chattels are owned by the firm and not by either of the partners. The utmost extent of the officer's right if he can levy at all, must be to seize the interest of the partner, whoever it may be, subject to all the partnership debts and to the final accounting. Each partner has an entire as well as a joint interest in the whole of the joint property. A levy, then, to affect the interest of a partner, cannot touch a specific portion of the goods, nor the whole, because the other partner has an interest and property in every part, as well as the whole, coupled with a right resting in contract to use them for the purpose for which the partnership was instituted. One partner is, therefore, entitled to bring replevin for the whole property if he is deprived of the possession of it by a seizure on execution for the individual debt of another partner. *Hutchinson v. Dubois*, 45 Mich., 143; 7 N. W., 714.

Whether in case of the levy of an execution on a partner's undivided interest in partnership assets, an ac-

counting should not be had before sale, or whether on the other hand the officer might at once proceed to sell that which he has levied upon, namely, the undivided, unsettled and undetermined interest of the judgment debtor: *Quacre*; *Hutchinson v. Dubois*, 45 Mich., 146; 7 N. W., 714.

An officer making a levy, is as much bound to respect and set out exemptions from execution where the property is that of a partnership, as in other cases: *Walte v. Mathews*, 50 Mich., 392; 15 N. W., 524; see, *post*, note 22, § 526.

7—*Penhallow v. Dwight*, 7 Mass., 34; *Evan v. Roberts*, 5 B. & C., 829. It is competent for an officer who has levied on a growing crop after the land has been conveyed by the execution debtor, to show in defense to an action of replevin brought against him by the grantee of the land to recover the crop, that the conveyance was fraudulent and void as against the creditor in his execution, and he is not required first to have the conveyance set aside in a direct proceeding for that purpose: *Pierce v. Hill*, 35 Mich., 194.

8—*Bank, &c., v. Cray*, 1 Barb., 542; 2 Bla. Com., 122-3; *Evans v. Roberts*, 5 B. & C., 829; *Smith v. Jenks*, 1 Denio, 580.

9—*Bank of Lansingburg v. Cray*, 1 Barb., 542.

If, however, the defendant be not the owner, but the tenant of the land, grass and fruit may be taken in execution.¹⁰

“When a levy shall be made upon grain while growing, or on any unharvested crops, by virtue of any execution, the officer making such levy shall file a notice of said levy in the office of the township clerk of the township, or city clerk of the city, or city recorder of cities having no officer known as city clerk, where such grain or crops are at the time of making such levy; and such clerk or recorder shall file said notice in his office, in the same manner as he is required by law to file a chattel mortgage; and such notice shall be constructive evidence to all persons of the interest of the plaintiff in the execution, and shall be entitled to the same fees therefor, to be paid by plaintiff in the execution, and shall be collected as costs in the case, and no sale of said crops or grain shall be made until the same shall be ripe or fit to be harvested, and any levy thereon by virtue of an execution issued from a circuit court, or by a justice of the peace, shall be continued beyond the return day thereof, if necessary, and remain in life, and the execution thereof may be completed at any time within thirty days after such grain or other unharvested crops shall be ripe or fit to be harvested.”¹¹

§ 525. **Levy on fixtures.**—Fixtures annexed to the freehold cannot be taken, for they are not goods and chattels.¹² Therefore, upon an execution against *the owner of the land*, fixtures put up in a house upon it, which would go to the heir, and not to the executor, cannot be taken by the constable; but fixtures which may be removed by the *tenant* may be seized and sold on

10—Smith v. Jenks, 1 Denio, 580.

11—C. L., § 10321; see, King v. Moore, 10 Mich., 538. As a general rule growing crops are a part of the realty, but for the purpose of levy and sale upon execution, the statute treats them as personalty: Preston v. Ryan, 45 Mich., 530; 7 N. W., 810. Where lands have been conveyed to defraud creditors, while a crop was growing, the crop itself may be levied upon and sold on execution by a creditor, without taking any proceedings to have the conveyance declared fraudulent: Pierce v. Hill, 35 Mich., 194. And the officer may show the fraudu-

lent character of the conveyance in defense of his levy: *Ibid.* An officer has no authority for threshing wheat he has levied upon in the mow, before selling it: Stillson v. Gibbs, 40 Mich., 42. Where an execution is levied on growing crops the fact that the execution is filed with the justice after being indorsed with the levy and a second execution issued, will not operate to defeat the levy: Fryer v. McNaughton, 110 Mich., 22; 67 N. W., 978.

12—An engine on brick wall in building is not personalty: People v. Jones, 120 Mich., 283; 79 N. W., 177.

an execution against *him*.¹³ Property fixed to demised premises, by the tenant, for manufacturing purposes, is personal property.¹⁴ So, copper stills, kettles, steam tubs, etc., created by a *tenant* for the purpose of carrying on the business of distilling, though fixed to the premises.¹⁵ So, a cider mill and press erected by a *tenant* at his own expense, and for his own use, in making cider on the demised premises.¹⁶ A building erected by one person on the land of another, under an agreement or understanding that it may be removed, is personal property.¹⁷

§ 526. What property exempt from execution.—“The following property is exempt from levy and sale under any execution, or upon any other final process of a court: ¹⁸

13—Watson's Sheriff, 180: see, Walker v. Sherman, 20 Wend., 639. A bar, bar fixtures, cupboard, bowling alley, ways and racks, attached by a tenant to a building occupied by him as a saloon under a lease, have been held to be permanent fixtures, and so annexed to the freehold as to belong to it, and become the property of the landlord, and not removable by the tenant, or one to whom he has sold them as personal property; hence they could not be taken on execution against the tenant: O'Brien v. Kusterer, 27 Mich., 289; Adams v. Lee, 31 Mich., 440.

14—Raymond v. White, 7 Cow., 319. See, Adams v. Wilson, 31 Mich., 440; Kerr v. Kingsbury, 39 Mich., 150; Wheeler v. Bedell, 40 Mich., 603; Stokoe v. Upton, *Ibid.*, 581; Bewick v. Fletcher, 41 Mich., 625; 3 N. W., 162; Morrison v. Berry, 42 Mich., 389, 397; 4 N. W., 731; Crippen v. Morrison, 13 Mich., 23; Jones v. Detroit Chair Co., 38 Mich., 92.

15—Reynolds v. Shuler, 5 Cow., 323.

16—Holmes v. Tremper, 20 Johns., 20; Walker v. Sherman, 20 Wend., 638, 639.

17—Smith v. Benson, 1 Hill, 175; Ashmun v. Williams, 8 Pick., 402.

18—C. L., § 10322. Smith v. Smith, 52 Mich., 539; 18 N. W., 347; Charpentier v. Bresnahan, 62 Mich., 360; 28 N. W., 916; Wood v. Bresnahan, 63 Mich., 614; 30 N. W., 206. The

object of this statute is beneficial, and should as far as practicable be construed beneficially and liberally for the debtor: Alvord v. Lent, 23 Mich., 371; Stewart v. Welton, 32 Mich., 56, 60; Wilson v. Bartholomew, 45 Mich., 41; 7 N. W., 227. And the beneficial purpose should not be frittered away by constructions which would destroy their value: Rosenthal v. Scott, 41 Mich., 633; 2 N. W., 909; Skinner v. Shannon, 44 Mich., 87; 6 N. W., 108; Hutchinson v. Whitmore, 90 Mich., 263; 51 N. W., 451. If the property is exempt the simple fact of offering it for sale does not change it or render it the less exempt: O'Donnell v. Segar, 25 Mich., 373. And the owner may keep it, and use it, or sell it, as his necessities may require without objection from creditors: Rosenthal v. Scott, 41 Mich., 633; 2 N. W., 909. If it consists of the \$250 selected from a stock of goods after failure or suspension of business he may hold it for such reasonable time as circumstances require before starting again, or he may sell it or offer it for sale at once: *Ibid.*; Harris v. Haynes, 30 Mich., 140. Where the exemption depends upon the uses to which the property is devoted, it is not necessary that it should be in use all the time: O'Donnell v. Segar, 25 Mich., 378. Nor will a party be deprived of his exemptions by disposing of all his property, except that which is exempt. He may change his occupation to one allowing greater ex-

First, All spinning wheels, weaving looms with the apparatus, and stoves put up and kept for use in any dwelling house;

Second, A seat, pew, or slip, occupied by such person or family, in any house or place of public worship;

Third, All cemeteries, tombs, and rights of burial, while in use as repositories of the dead;

Fourth, All arms and accoutrements required by law to be kept by any person; all wearing apparel of every person or family;¹⁹

Fifth, The library and school books of every individual and

emptions, and sell property not exempt and place the proceeds in exempt property, without subjecting himself to the charge of fraud: *Ibid.*

Creditors have no right as against exempt property. And it is of no concern to them as to what disposition the debtor may make of it. The fact that it may be covered by a void or fraudulent chattel mortgage does not destroy the exemption: *Walte v. Mathews*, 50 Mich., 392; 15 N. W., 524. A debtor may dispose of his exempt property as he pleases, and such disposal cannot subject it to execution or affect the exemption: *Buckley v. Wheeler*, 52 Mich., 1; 17 N. W., 216; *Anderson v. Odell*, 51 Mich., 492; 16 N. W., 870; *Freehling v. Bresnahan*, 61 Mich., 541; 28 N. W., 531; *Fischer v. McIntyre*, 66 Mich., 683; 33 N. W., 762.

The exemption continues after the suspension of the business, in the carrying on of which the property was used, and while removing to another locality with intention of renewing the same business: *Harris v. Haynes*, 30 Mich., 140; *O'Donnell v. Segar*, 25 Mich., 378. But whether the rule would be the same while removing to another state, *Quære: Ibid.* If, however, the owner has lost his residence in this state by changing it to another before levy made, he will have lost the exemption as to property remaining in this state after the change, as the statute was intended only for residents: *McIlugh v. Curtis*, 48 Mich., 262; 12 N. W., 163. Property exempt from execution cannot be reached by garnishee process: *Wilson v. Bartholomew*, 45 Mich., 43; 7 N. W., 227.

The purchaser of exempt property obtains a title which overrides any levy subsequent thereto, and also any prior levy, unless it be on a claim for unpaid purchase money: *Buckley v. Wheeler*, 52 Mich., 1; 17 N. W., 216. The law gives the wife a remedy to protect exempt property only when the husband fails to assert the right: *Harley v. Procunier*, 115 Mich., 53; 72 N. W., 1099. One partner may execute a chattel mortgage on partnership property in the firm name and it will cover the property against the exemptions of individual parties: *Robards v. Waterman*, 96 Mich., 235; 55 N. W., 662. The husband may deal with the property exempt under subdivision eight as he pleases without the assent of the wife: *Betz v. Brenner*, 106 Mich., 89; 63 N. W., 970; *Miller v. Miller*, 97 Mich., 153; 56 N. W., 348; *Cullen v. Harris*, 111 Mich., 20; 69 N. W., 78. So with sewing machines exempt under C. L., § 10359: *Singer Mfg. Co. v. Cullaton*, 90 Mich., 639; 51 N. W., 687. A piano is not household goods, furniture or utensils within the statute: *Kehl v. Dunn*, 102 Mich., 582; 61 N. W., 71. An unbroken two-year-old colt is not exempt where owner has a team beside: *Hogan v. Neumelster*, 117 Mich., 498; 76 N. W., 65. Lands used as a cemetery are within the exemption law though owned by a private corporation: *Avery v. Forest Lawn Cem. Co.*, 127 Mich., 125; 86 N. W., 538. See, C. L., § 10324.

19—The exemption of all wearing apparel is absolute; there seems to be no limit to the amount: *Elliott v. Whitmore*, 5 Mich., 536.

family, not exceeding one hundred and fifty dollars, and all family pictures;

Sixth, To each householder, ten sheep, with their fleeces, and the yarn or cloth manufactured from the same; two cows, five swine, and provisions and fuel for the comfortable subsistence of such householder or family for six months;²⁰

Seventh. To each householder, all household goods, furniture and utensils, not exceeding in value two hundred and fifty dollars;²¹

20—The word "householder" means the head, master, or person who has the charge of and provides for a family, and does not apply to the subordinate members or inmates of the household: *Browne v. Witt*, 19 Wend., 475, 476. It is not necessary, however, that the head of the family should be with it, for when he had left the state, leaving his wife and children living together, it was held that he was, notwithstanding a *householder*: *Woodward v. Murray*, 18 Johns., 400. In the same case it was decided that the exemption continued, although the family were removing from one place to another. "To say that a family, while in the act of removal, and on the highway, may be deprived of their bed and their cow, on execution, because they did not, for a time, inhabit a dwelling house, would be a perversion of the statute. So long as they remain together, as a *family*, without being broken up and incorporated into other families, the privilege remains." A person having and providing for a household is a "householder," and the character is not lost by a temporary ceasing of housekeeping: *Griffin v. Southerland*, 14 Barb., 456; see, *O'Donnell v. Segar*, 25 Mich., 367. And where a widow lives with her infant children, and provides for them, she is a householder, and a cow kept and used by her for the support of her family, is exempt to her as a householder: *Brigham v. Bush*, 33 Barb., 596. The fleeces, or the yarn or cloth manufactured from the fleece of *ten sheep*, are exempted from execution while in the hands of a householder, whether he be or be not the owner of the sheep:

Hall v. Penney, 11 Wend., 44. Swine exempt when alive, are protected from execution when killed for the use of the family: *Gibson v. Jenny*, 15 Mass., 205. The exemption of provisions for family use for six months would protect potatoes planted for that purpose while growing and before they are dug, the same as when taken out of the ground and stored: *Carpenter v. Herrington*, 25 Wend., 370. But on this point, where an exemption was claimed for corn and potatoes which had just appeared above the ground after planting, the supreme court of this state were equally divided: *King v. Moore*, 10 Mich., 538. The exemption of six months' provisions for a householder and his family is for the benefit of those of his children who are over age as well as those who are under, if they reside with their father and have no home elsewhere: *Stillson v. Gibbs*, 53 Mich., 280; 18 N. W., 815. The right to determine which two of several cows belonging to a married man shall be exempt rests with the husband and is not subject to the consent of the wife: *Harley v. Proctor*, 115 Mich., 53; 72 N. W., 1099.

21—A clock would come within the description of household furniture: *Wilson v. Ellis*, 1 Denio, 466. A boarding house keeper who is a householder is entitled to the same exemptions as any other householder. And household furniture purchased for the purpose of keeping a boarding house, will be exempt to the amount of \$250, even against a judgment for the purchase price: *Vanderhorst v. Bacon*, 38 Mich., 699; see, *Wood v. Bresnahan*, 63 Mich., 614; 30 N. W., 206.

Eighth. The tools, implements, materials, stock, apparatus, team, vehicle, horses, harness or other things to enable any person to carry on the profession, trade, occupation or business in which he is wholly or principally engaged, not exceeding in value two hundred and fifty dollars;''²²

"The word *team*, in this subdivision, shall be construed to mean either one yoke of oxen, or a horse, or a pair of horses, as the case may be.''²³ But, "The property exempted in the subdivision, of which this act is amendatory, shall not be exempt from any execution issued upon a judgment rendered for the purchase money for the same property, and any sale of such property after the commencement of a suit to recover the purchase price thereof, and the filing of the notice hereinafter required, shall be null and void as against such an execution: Provided, The plaintiff in any suit shall file or cause to be filed with the clerk of the city, village, or township in which the owner of such property resides, a notice in which he shall state the time when such suit was commenced, the amount claimed to be due, that the suit is brought to recover the purchase money for the property, a description of the property sought to be reached, and the name of the defendant. At the time of filing such notice the party filing the same shall pay to the clerk the sum of twenty-five cents, and said clerk shall endorse upon such notice the date of filing the same, and make the same record as in case of chattel mortgages.''²⁴

22—A married woman who supports her family or contributes thereto by the employment of a team, has the same right to claim it as exempt from execution that a man would under like circumstances: *McHugh v. Curtis*, 48 Mich., 262; 12 N. W., 163. Each member of a firm against which execution is levied, may claim for himself the amount of property exempted by law. And if two partners select the same piece of property, the officer may, as to that property, select for them: *Skinner v. Shannon*, 44 Mich., 86; 6 N. W., 108.

A carpenter may hold lumber exempt, although he may intend to use it in the building of a house for himself: *Hutchinson v. Roe*, 44 Mich., 389; 6 N. W., 870. And a farmer may claim seed wheat under exemption, as prop-

erty used in his business: *Stillson v. Gibbs*, 46 Mich., 216; 9 N. W., 254. Pool tables are not exempt as property pertaining to the business of saloon keeping: *Goozen v. Phillips*, 49 Mich., 7; 12 N. W., 889.

23—C. L., § 10323. See, *Ostrander v. Packer*, 35 Mich., 430.

24—C. L., § 10324, as amended by Laws of 1885, Act 159, p. 214. But the purchaser of a note given for the purchase price of the property is not entitled to claim that as to his judgment on such note, the property, though otherwise exempt, is liable to execution, by virtue of the exception in favor of purchase price claims: *Shepard v. Cross*, 33 Mich., 96. The term "mechanical tools," used in the foregoing 8th subdivision, includes a dentist's tools and instruments, and

Ninth. "A sufficient quantity of hay, grain, feed and roots, whether growing or otherwise, for properly keeping for six months the animals in the several subdivisions of this section

exempts them: *Maxon v. Perrot*, 17 Mich., 332. Where an exemption is claimed of articles used by a debtor in carrying on his occupation or business, it is not essential that they should be absolutely necessary; if they are reasonably adapted to aid him, and are actually used by him in such business, it is sufficient. Nor is it necessary that the debtor should have one engrossing pursuit requiring all, or most, of his time. If his entire business occupies only a portion of his time, still he is entitled to the exemption. If the debtor carries on several kinds of business, and the articles are suitable for and used in carrying on only one of those kinds of business, the exemption can be claimed only for that business in which he is principally engaged. But if he pursues two separate kinds of business, and the articles claimed as exempt are used to enable him to carry on both, that would furnish a much stronger reason for the exemption. And it has been held that a horse and wagon used by the debtor in making collections and closing up a former business, and also in cultivating a small piece of land, may be claimed as exempt for these purposes: *Kenyon v. Baker*, 16 Mich., 373; see, *Morrill v. Seymour*, 3 Mich., 64. In determining which is the principal business when a party is engaged in two or more occupations, regard is not to be had as to which is the most profitable or productive; but that on which the party chiefly relies for a livelihood, and which engrosses the most of his time and attention during the course of the year, is to be deemed his principal business: *Smalley v. Marten*, 8 Mich., 529; see, *Worman v. Giddey*, 30 Mich., 151. A person entitled to a team to carry on his business, has a right to select instead thereof, any other property to the amount of \$250, needed in his business, though without a team he might be obliged to change the mode of conducting that business: *Wyckoff v. Wyllis*, 8 Mich., 48. And to secure the ex-

emption it is not required that the articles should be absolutely necessary to carry on the business: *Stewart v. Welton*, 32 Mich., 56. It is incumbent on a party in replevin who seeks to recover a yoke of oxen as exempt from execution, under C. L., § 10322, to show: 1st, that he owned or was entitled to the possession of the oxen; 2d, that he was engaged in some kind of business or employment which required the use of a team, or yoke of oxen; and 3d, that he had no other team, or none which together with this would exceed \$250 in value, or if they did that he had taken the proper course to select these oxen, or that he had been wrongfully prevented from making such selection under C. L., §§ 10325, 10326. The mere fact that a man offers exempt property for sale, will not deprive him of the exemption; but if he buys it and holds it rather for sale or speculation than for the particular use which exempts it, and it is not in fact needed or kept for such use, it will not be exempt. In replevin for a team claimed as exempt from execution, the question of the occupation of the plaintiff relates only to the time of and previous to the taking complained of, and his occupation at any subsequent time is immaterial. It is not fraudulent for a man to sell property not exempt for the purpose of, and actually investing the proceeds in property which is exempt under the statute. Such a transaction would not deprive him of the exemption in the newly acquired property so long as his occupation is such as the statute requires in order to give the exemption, and the property is actually needed by him in that occupation. One who is engaged in an occupation which renders his team exempt, does not lose that right of exemption while moving from one place to another within the state for the purpose of resuming the same occupation at the place of his destination: *O'Donnell v. Segar*, 25 Mich., 387. So, one who has failed in the hardware and tinning business, and

exempted from execution, and any chattel mortgage, bill of sale, or other lien created on any part of property above described, except such as is mentioned in the eighth subdivision of this section, shall be void, unless such mortgage, bill of sale or lien be signed by the wife of the party making such mortgage or lien, if he have any."²⁵

"All sewing machines owned by individuals and kept for the actual use of themselves or their families, shall be exempt from levy and sale on execution, not exceeding one such machine for each family, etc.;"²⁶

"No property, except as exempted by the state constitution, shall be exempt from levy or sale, under an execution, issued upon a judgment obtained before any justice of the peace, for work, labor, or services done or performed by any woman, when such amount does not exceed the sum of twenty-five

made an assignment, reserving certain tinners' tools and machines as exempt, must, in the absence of proof that he has gone into other business or relinquished his former occupation, be held entitled to retain them as exempt, notwithstanding he has done little or nothing in the business for four months after the assignment: *Harris v. Haynes*, 30 Mich., 140. To establish a right of exemption under subdivision eight, the business in which the debtor is wholly or principally engaged must be shown: *Murphy v. Mulvena*, 108 Mich., 347; 66 N. W., 224.

25—C. L., §10322. The ninth subdivision does not exempt any more hay, grain, feed, roots, etc., than is necessary for six months' keeping of such of the animals mentioned therein, as the debtor has at the time of the levy: *King v. Moore*, 10 Mich., 538.

In the case of *Holman v. Gillett*, 24 Mich., 414, it is said that the provisions of this statute making any chattel mortgage, bill of sale or other lien created on exempt property void unless the same is signed by the wife, etc., refers only to such conveyances, pledges or conditional sales as are intended as a security, or which give a lien for that purpose, and not to absolute sales which are by no statute required to be in writing, and that so far as this provision is concerned, it

does not interfere with the right of the husband to make an absolute sale of such property, as he may of personal property, not thus exempt, and that the assent of the wife need not be in writing when the husband makes an absolute sale. But in *Snyder v. People*, it is said in referring to this statute, that the husband is precluded from selling or encumbering such personal chattels as are exempt by law from execution unless with the wife's assent, and that if he attempts to do so, she may bring action to recover the same in her own name: *Ibid.*, *Snyder v. People*, 26 Mich., 110. And see, *Ingersoll v. Gage*, 47 Mich., 121; 10 N. W., 135.

In this state a wife has special statutory rights in such household goods as would be exempt from execution; and if the husband leaves her, he cannot get possession by writ of replevin: *Smith v. Smith*, 52 Mich., 538; 18 N. W., 347.

26—C. L., § 10359. The husband may dispose of or encumber a sewing machine without the wife's consent: *Singer Mfg. Co. v. Cullaton*, 90 Mich., 639; 51 N. W., 687; 3 Howell's Statutes, §§ 7717a, 7717b, 7717c, providing for special exemptions in case of labor debts was held unconstitutional in *Burrows v. Brooks*, 113 Mich., 307; 71 N. W., 460.

dollars, exclusive of costs. In entering any such judgment, the justice shall recite on the docket that the same was rendered for the personal services and work of said plaintiff, and the same fact shall also be recited in any execution issued thereon; and in addition to all other costs allowed by law, the plaintiff in any such suit shall recover an attorney's fee of five dollars, to be taxed with the other costs in the cause, and to be collected in the same manner as such other costs are collected.''²⁷

§ 527. **Exemption is personal privilege.**—The exemption of personal property from execution is a personal privilege of which the owner only can take advantage.²⁸ Formerly, this exemption might be waived by the debtor, and even his assent subsequent to a levy on property exempt by the statute, would render the levy valid.²⁹ And such seems to be the law now, in respect to the property mentioned in the eighth subdivision, and in respect to the property of all persons, except householders who are married. But a householder who has a wife cannot waive the exemption to any property, or turn it out on execution, except that mentioned in the eighth subdivision, and should he attempt to do so, and should the property be sold, the wife could maintain an action to recover it.³⁰

§ 528. **Selection of exempt property.**—“When a levy shall be made upon property of any class or species which is exempt by law from execution to a specified amount or value, the officer levying such execution may make an inventory of the whole of such property belonging to the person against whom the execution shall be issued, and cause the same to be appraised at its cash value, by two disinterested freeholders of the township where the property may be, on oath, to be administered by him to such appraisers.”³¹

27—C. L., § 900.

28—Mickles v. Tousley, 1 Cow., 114; see, Smith v. Hill, 22 Barb., 656.

29—Hewes v. Parkham, 20 Pick., 90.

30—Kling v. Moore, 10 Mich., 538. C. L., § 8692, and notes. Exemptions from execution being intended for the benefit of the family, a joint replevin by husband and wife to recover exempt property is admissible under the

statute which authorizes the wife to sue alone in such cases: Shepard v. Cross, 33 Mich., 96.

31—C. L., § 10325.

When an execution is levied upon property of any class or kind which is exempt by law to a specified amount or value, the whole property levied upon must be inventoried and appraised, and the defendant must be

"Upon such inventory and appraisal being completed, the defendant in execution, or his authorized agent, may select from such inventory an amount of such property not exceeding, according to such appraisal, the amount or value exempted by law from execution; but if neither such defendant nor his agent shall appear and make such selection, the officer shall make the same for him."³²

"The appraisers mentioned in the twenty-eighth section of this chapter, shall be entitled to fifty cents each for their serv-

allowed to select his exemptions therefrom; and it will be no defence to the officer to show that the defendant owned other property of the same class or species equal to the amount of his exemptions that was not levied upon. If the defendant fails to make his selection the officer must make it for him: *Elliott v. Whitmore*, 5 Mich., 536, 537; 8 Mich., 49; *Ostrander v. Packer*, 35 Mich., 430; *Vanderhorst v. Bacon*, 38 Mich., 672; *Sheldon v. Rounds*, 40 Mich., 427. In such case where no inventory and appraisal has been made, the owner will be entitled to recover from the officer the value of the property levied upon, not exceeding the amount or value of the exemption to which he was entitled: *Town v. Elmore*, 38 Mich., 305; *Stillson v. Gibbs*, 53 Mich., 280; 18 N. W., 815. Nor is it any excuse to the officer that the debtor gave no notice that he claimed exemptions: *Vanderhorst v. Bacon*, 38 Mich., 672. But the debtor can have no advantage from the officer's failure to inventory and appraise the property unless his *status* is such as to entitle him to an exemption, notwithstanding the property may belong to what is usually known as the exempt class: *Ferguson v. Washer*, 49 Mich., 390; 13 N. W., 788. But it is not necessary, in levying execution in one county, upon the property of a debtor exempt to a certain amount or value, that the whole property of the debtor of the same class situate in other counties should be levied upon and appraised and the debtor's exemptions selected out of the whole mass of property found in both or all the counties: *Alvord v. Lent*, 23 Mich., 369, 371. The appraisers must be disinterested persons: *Bayne*

v. Patterson, 40 Mich., 658; and the appraisal and inventory should be made in the place where the goods are found: *Vanderhorst v. Bacon*, *supra*. It seems that the inventory and appraisal may be delayed up to the time of noticing the property for sale, if no inconvenience or disadvantage is thereby caused to the debtor: *King v. Moore*, 10 Mich., 545. As to what will amount to fulfillment of the officer's duty to allow the debtor to select his exemptions, see, *Jones v. Peek*, 101 Mich., 389; 59 N. W., 659.

32—C. L., § 10326. The debtor does not waive the exemption by remaining silent and not claiming it when a levy is made: *Vanderhorst v. Bacon*, 38 Mich., 669; nor by giving a receiptor after levy; nor by the receiptor's surrendering the property to the officer: *Ibid*.

If a portion of the property which a debtor has a right to select as exempt, is encumbered by a chattel mortgage, and a portion of the same class is unencumbered, the debtor has a right to make his selection from that portion not covered by mortgage: *Bayne v. Patterson*, 40 Mich., 658. And this right is not affected by his having covered his other property not exempt, with a fraudulent mortgage: *Baldwin v. Talbot*, 43 Mich., 11; 4 N. W., 547. Nor is he precluded from making his own selection by the fact that he has property in another county belonging to the exempt class: *Ibid*.

The levy is not rendered invalid because the officer does not inventory property of the debtor located in another county: *Alvord v. Lent*, 23 Mich., 371.

ices, and six cents per mile for traveling, in going only, for which the plaintiff in the execution shall be liable to them, and the amount of their travel and fees shall be collected upon the execution."³³

"Whenever the defendant in an execution shall have cows, sheep, swine or other animals or articles, some of which are exempt by law from sale on execution, and some of which are not so exempt, the officer may take all of such horses, cows, sheep, swine or other animals or articles into his possession, and the defendant or his authorized agent may, immediately, on being notified of the levy, select so many thereof as are exempt by law from execution, but if the defendant be absent, or neglect to make such selection on being notified, the officer shall make the same for him."³⁴

§ 529. **Successive levies.**—Goods in the custody of the law cannot be taken in execution. Therefore goods and chattels which have been taken upon execution, by *one* officer, cannot be levied upon by *another*.³⁵ But, if an officer, after having levied upon property with one execution, receives a second, the first levy is sufficient for both executions.³⁶ Where a constable, having in his hands an execution against the property of M, levied on a horse and advertised it for sale, and prior to the day of sale an attachment came to his hands against the property of M, by virtue of which he attached the same horse, which was sold on the execution, and a sufficient sum was raised to pay the execution, and a surplus was left to pay the amount due in the attachment suit, and after the sale of the horse, judgment was obtained in the attachment suit, and execution was issued thereon to the constable, who levied on the same money which he had received on the sale of the horse he had sold, it was held, that such money might be applied to satisfy the execution in the attachment suit; that the lien of the attachment on the horse, by operation of law, became transferred, after the sale, to the surplus money in the hands of the constable, and that such surplus money was the property of M,

33—C. L., § 10327.

34—C. L., § 10328.

35—Hartwell v. Bissel, 17 Johns., 128.

36—Russell v. Gibbs, 5 Cow., 390.

and liable to levy and sale on the subsequent execution against M.³⁷

§ 530. Property fraudulently transferred or encumbered.— The officer may seize goods which have been fraudulently sold or conveyed away; for such sale is void against creditors, and a principal badge of fraud is the defendant's continuing in possession.³⁸ Upon this subject, it is declared by statute that "Every sale made by a vendor, of goods and chattels in his possession, or under his control, and every assignment of goods and chattels by way of mortgage or security, or upon any condition whatever, unless the same be accompanied by an immediate delivery, and be followed by an actual and continued change of possession of the things sold, mortgaged or assigned, shall be presumed to be fraudulent and void, as against the creditors of the vendor, or the creditors of the person making such assignment, or subsequent purchasers in good faith, and shall be conclusive evidence of fraud, unless it shall be made

37—Wheeler v. Smith, 11 Barb., 345.

38—C. L., § 9533. It is held that since the enactment of C. L., §§ 9523-9529 inclusive, this section has no effect or application to anything else than absolute sales, mortgages and instruments intended to operate by way of security being controlled by C. L., §§ 9523-9529 inclusive: Cooper v. Brock, 41 Mich., 488; 2 N. W., 660; Buhl Iron Wks. v. Teuton, 67 Mich., 623; 35 N. W., 804. This section applies to sales of chattels only, not to transfers of real estate: Haug v. Third Nat'l Bk., 95 Mich., 249; 54 N. W., 888. As to when a sale or transfer of property will be deemed fraudulent as against creditors: See, the notes to this § 9533. A sale of property to a *bona fide* purchaser, will not be invalidated by the fact that the vendor made it with intent to hinder and defraud creditors: Spring Lake Iron Co. v. Waters, 50 Mich., 13; 14 N. W., 679.

Property sold to pay an honest debt due to the purchaser, even though such purchaser is the wife of the vendor, is lawful, notwithstanding it may cut off the redress of all other creditors, and although intended to do so: Jordan v. White, 38 Mich., 256; Hill v. Bowman,

35 Mich., 191; Bank of Fenton v. Whittle, 48 Mich., 1; 11 N. W., 756; Leppig v. Bretzel, 48 Mich., 321; 12 N. W., 199. And a chattel mortgage given and received to secure an honest debt, will be valid, notwithstanding it may have been made by the mortgagor with a fraudulent intent as to his other creditors, unless the mortgagee participated in the fraudulent purpose: Andrews v. Fillmore, 46 Mich., 315; 9 N. W., 431. A party is presumed to intend the natural and necessary consequences of his own acts, and, when prejudice to the rights of creditors results, the act is constructively fraudulent, notwithstanding good motive or intentions: Schalble v. Ardner, 98 Mich., 72; 56 N. W., 1105. The fraudulent character of a sale is not necessarily changed because a part of the consideration was indebtedness owing to the purchaser: Gumberg v. Trench, 110 Mich., 451; 68 N. W., 236. For other cases upon this subject see Ryan v. Meyer, 108 Mich., 638; 66 N. W., 667; Preston Nat'l Bank v. Pierson, 112 Mich., 435; 70 N. W., 1013; Kock v. Bostwick, 113 Mich., 302; 71 N. W., 473; Township of Maple Valley v. Foley, 113 Mich., 622; 71 N. W., 1086.

to appear, on the part of the persons claiming under such sale or assignment, that the same was made in good faith, and without any intent to defraud such creditors or purchasers."³⁹ "The term 'creditors,' as used in the preceding section, shall be construed to include all persons who shall be creditors of the vendor or assignor at any time whilst such goods and chattels shall remain in his possession, or under his control."⁴⁰

The question of fraudulent intent, the statute declares, shall be deemed a question of fact, and not of law.⁴¹

39—C. L., § 9520. See, *Hasey v. White Pigeon Beet Sug. Co.*, 1 Doug., Mich., 194.

The change of possession contemplated, is an open, visible, substantial change, and must be such as to give notice to the public that there has been a change of ownership: *Doyle v. Stevens*, 4 Mich., 93; *Sheldon v. Warner*, 26 Mich., 403, 408. As to delivery and change of possession of ponderous and bulky articles, see, *Anderson v. Brennehan*, 44 Mich., 198, 202; 6 N. W., 222; *Alderton v. Buchoz*, 3 Mich., 322; *Carpenter v. Graham*, 42 Mich., 191; 3 N. W., 974. In case of a gift or sale from husband to wife while living together, the question of change of possession must be considered in connection with the circumstances of the case. As between them there can in general be no open and visible change of possession. And it will be sufficient if she establish her right by a fair preponderance of evidence: *Davis v. Zimmerman*, 40 Mich., 24; *Judge v. Vogel*, 38 Mich., 508; *Kipp v. Lamoreaux*, 81 Mich., 304; 45 N. W., 1002; *Jansen v. McQueen*, 105 Mich., 201; 63 N. W., 73. Because there is no change of possession it does not necessarily follow that the sale is fraudulent. Presumptively it is, but it may be shown that it is not: *Molitor v. Robinson*, 40 Mich., 200; *Buhl Iron Works v. Teuton*, 67 Mich., 623; 35 N. W., 804; *Kipp v. Lamoreaux*, 81 Mich., 299; 45 N. W., 1002; *Hopkins v. Bishop*, 91 Mich., 328; 51 N. W., 902; *Hauser v. Beatty*, 93 Mich., 502; 53 N. W., 628. It is sufficient to avoid the sale that there is a fraudulent intent in the seller only if there is no change of possession: *Kipp v. Lamoreaux*, 81 Mich., 305; 45 N. W., 1002.

A sale of personal property without delivery and actual and continued change of possession, etc., is presumed fraudulent: *Haynes v. Leppig*, 40 Mich., 609. If the vendor is allowed to remain in possession, and exercise dominion over and appear to the world as the owner of the property, and thereby gain the credit which that character would give, the sale will be void as to subsequent purchasers in good faith: *Sheldon v. Warner*, 26 Mich., 403. But want of change of possession, is only *prima facie* evidence of fraud: *Molitor v. Robinson*, 40 Mich., 200; *Feary v. Cummings*, 41 Mich., 376; 1 N. W., 946. A sale may be good as between parties but not against creditors, either upon proof of an actual intent to hinder, delay, or defraud them, or upon the statutory presumption of such intent where the requisite delivery and change of possession are wanting: *Hatch v. Fowler*, 28 Mich., 212; *Webster v. Bailey*, 40 Mich., 643.

As to subsequent purchases, etc., see, *Wetherel v. Spencer*, 3 Mich., 123; *American Cigar Co. v. Foster*, 36 Mich., 368. Notice, etc., what sufficient, see, *Grimes v. Rose*, 24 Mich., 421; *Kohl v. Lynn*, 34 Mich., 361.

40—C. L., § 9521.

41—C. L., § 9536; *Jackson v. Dean*, 1 Doug., 519; *Pierson v. Manning*, 2 Mich., 445; *Oliver v. Eaton*, 7 Mich., 108, 157; *Baldwin v. Buckland*, 11 Mich., 391. An illegal act prejudicial to the rights of others, is a fraud upon such rights, although the party denies all intention to commit a fraud: *Kirby v. Ingersol*, Har. Ch., Mich., 172. Fraud in fact, or an express intent to commit fraud, is not necessary in order to render a conveyance fraudulent as

The fact that there was a good consideration for the conveyance is involved in its being made in good faith. Therefore a party claiming under a bill of sale, must prove that a consideration was paid or existed. To prove this, neither the recital of a consideration in the instrument nor what parties said on that subject at the time the instrument was executed, is evidence against creditors.⁴² Where a debtor has made an assignment of his property, which was void upon its face as against creditors, and the plaintiff had bought the property of the assignee, and verbally agreed to pay for it at certain rates in his notes, on time; but before making any payments or giving any notes, the property was taken on attachment against the fraudulent assignor; *held*, that the verbal promise to pay was not sufficient to protect the title of the purchaser against the attachment. As against the action of an attaching creditor, no one but a purchaser for a valuable consideration actually passed can claim title to property which has been fraudulently assigned. It is not sufficient that the purchaser has verbally promised to pay for the property, or has given his written obligation, not negotiable, for such payment.⁴³

There must be an actual and continued change of possession, as well as a nominal and constructive change. A construction which would allow the vendor to remain in possession of the goods, and sell them as the agent of the purchaser or assignee, would render the statute for the prevention of frauds a mere nullity.⁴⁴

against creditors: It is sufficient if the effect of the conveyance is to delay or hinder creditors in the collection of their debts: *Buck v. Sherman*, 2 Doug., 176; *Pleron v. Manning*, 2 Mich., 445; but see, *Hollister v. Loud*, 2 Mich., 309.

42—*Tift v. Barton*, 4 Denio, 171. To constitute a *bona fide* purchaser, he must buy the property for a valuable consideration, which must be paid or delivered before notice of any fraud, defect, or want of title in the vendor, and before notice of the claims of any other parties in the title or interest purchased: *Dixon v. Hill*, 5 Mich., 404; *Warner v. Whittaker*, 6 Mich., 133; *Blanchard v. Tyler*, 12 Mich., 339; *Stone v. Welling*, 14 Mich., 514. No

one is protected as a *bona fide* purchaser, who has not made payment before notice. It is not enough if he purchases without notice, if he pays after notice: *Palmer v. Williams*, 24 Mich., 328; *Kohl v. Lynn*, 34 Mich., 360. But as a fraud is never to be presumed, a person who pays value is to be deemed as the rightful holder of the property, unless he is shown to have had such knowledge as would make him guilty of bad faith: *Miller v. Finley*, 26 Mich., 249.

43—*Dixon v. Hill*, 5 Mich., 404.

44—*Butler v. Stoddard*, 7 Paige, 166. The question of fraud arising from want of delivery and a continued change of possession of goods sold or assigned by way of security, is a ques-

§ 531. **Of transfer without delivery or recording.**—"Every mortgage, or conveyance intended to operate as a mortgage, of goods and chattels, which shall hereafter be made, which shall not be accompanied by an immediate delivery, and followed by an actual and continued change of possession of the things mortgaged, shall be absolutely void as against the creditors of the mortgagor, and as against subsequent purchasers and mortgagees in good faith, unless the mortgage, or a true copy thereof, shall be filed in the office of the township clerk of the township, or city clerk of the city, or city recorder of cities having no officer known as city clerk, where the mortgagor resides, except when the mortgagor is a non-resident of the state, when the mortgage, or a true copy thereof, shall be filed in the office of the township clerk of the township, or city clerk of the city, or city recorder of cities having no officer known as city clerk, where the property is."⁴⁵

§ 532. **The filing of instrument.**—When, the office of the town clerk being vacant, a person who had charge of the office

tion of fact: *Jackson v. Dean*, 1 Doug., 519; *Snook v. Davis*, 6 Mich., 156; *Oliver v. Eaton*, 7 Mich., 108.

45—C. L., § 9523. See notes 38 and 39, § 530, *ante*. This statute does not apply to an assignment of open accounts, but only to mortgages of goods and chattels capable of delivery: *Preston Nat'l Bk. v. Smith M. P. Co.*, 84 Mich., 364; 47 N. W., 502; *Farrell F. & M. Co. v. Preston Nat'l Bk.*, 93 Mich., 582; 53 N. W., 831. An instrument, if by the surrounding circumstances shown to have been intended as security, will be construed a mortgage: *Cooper v. Brock*, 41 Mich., 488; 2 N. W., 660. The following are cases illustrating the rule that such are treated as mortgages: *Talcott v. Crippen*, 52 Mich., 633; 18 N. W., 392; *Weed v. Mirick*, 62 Mich., 414; 29 N. W., 78; *First Nat'l Bk. v. Weed*, 89 Mich., 357; 50 N. W., 864; *Read v. Horner*, 90 Mich., 152; 51 N. W., 207; *Hudson v. McKale*, 107 Mich., 22; 64 N. W., 727; *Beckman v. Noble*, 115 Mich., 523; 73 N. W., 803. The following cases illustrate that class which are not treated as mortgages: *Booth v. Oliver*, 67 Mich., 664; 35 N. W., 793; *Lake Superior, etc. Iron*

Co. v. McCann, 86 Mich., 106; 48 N. W., 692. A chattel mortgage will not be fraudulent merely because the mortgagee knew of a contemplated assignment by the debtor for the benefit of his creditors, and that his mortgage would postpone or cut off the claims of other creditors, and though the mortgagee also knows that the debtor expects that the mortgage will shield him, if there is no collusion to accomplish this: *Kalamazoo Spring etc. Co. v. Winans, Pratt & Co.*, 106 Mich., 198; 64 N. W., 23, and cases cited in the opinion. This statute does not permit a transaction, which is in substance a mortgage, to have the effect of a sale, however disguised, to the prejudice of parties dealing with the debtor, in the absence of statutory notice to such parties: *Damm v. Mason*, 98 Mich., 237; 57 N. W., 123. To this case in the original report is a valuable note on the general subject. A bill of sale given for the accommodation of the vendor, and assigned by his direction to secure a loan to himself, will be treated as a mortgage from the vendor to the assignee: *Pinch v. Willard*, 108 Mich., 204; 66 N. W., 42. Among the later cases on the gen-

received a chattel mortgage brought to the office to be filed, indorsed it "Filed Oct. 20, 1845," and placed it among the chattel mortgages in the office; *held*, that this was a valid *filing* of the mortgage, within the meaning of the statute. "It is a mistake to suppose that the marking or endorsing on the paper the time of filing it, is the substantial thing, or the act of filing. Such indorsement is merely a memorandum of the time of the filing, and not the filing itself. The filing consisted in presenting the mortgage at the office and leaving it there, and depositing it in the proper place with the papers in the office."¹

§ 533. **Effect of actual notice of prior incumbrance.**—Where one, at the time of taking a conveyance or mortgage of goods, receives direct and express notice that another party holds a prior mortgage on the property, or if the prior mortgagee is in possession of the property, it is sufficient notice to put such subsequent mortgagee upon inquiry as to the extent of such lien, and in that case he takes the property subject to the first mortgage.²

eral subject are *Vining v. Millar*, 116 Mich., 144; 74 N. W., 459; *Ferguson v. Wilson*, 122 Mich., 97; 80 N. W., 1006; *Hammel v. First Nat'l Bk.*, 129 Mich., 176; 88 N. W., 397; *Watson v. Mead*, 98 Mich., 330; 57 N. W., 181, and note to this case in 98 Mich., 331.

As to filing, see, *Watson v. Mead*, *supra*, and note; *Wade v. Strachan*, 71 Mich., 466; 39 N. W., 582; *Manwaring v. Jenlson*, 61 Mich., 141; 27 N. W., 899. As to renewal, see, *Briggs v. Mette*, 42 Mich., 12; 3 N. W., 231; *Eddy v. McCall*, 71 Mich., 497; 39 N. W., 734; *Chapey v. Mathews*, 104 Mich., 103; 62 N. W., 141; and see, *Sheldon v. Warner*, 26 Mich., 403; *Hurd v. Brown*, 37 Mich., 484; *Kohl v. Lynn*, 34 Mich., 360. But a chattel mortgage, given in good faith, will be held void for want of giving immediate possession of the goods, only where rights have arisen or injury has resulted from the want of a change of possession. In the interval before possession was given: *Walte v. Mathews*, 50 Mich., 392; 15 N. W., 524. A partnership having a definite local abiding place, may be said to reside there for the purpose of determining the proper place for filing a chattel mortgage

given by the firm in the firm name, and as a partnership mortgage: *Hubbardson Lumber Co. v. Covert*, 35 Mich., 254; C. L., § 9523.

1—*Bishop v. Cook*, 13 Barb., 326.

2—*Doyle v. Stevens*, 4 Mich., 87.

The appointment of a clerk of the mortgagor of a stock of goods, as agent of the mortgagee, for the purpose of taking care of and selling them, where there is no announcement of change in business, no change of books, and no other apparent change of ownership or possession, is not a change of possession within the meaning of the statute. The change of possession contemplated is an open, visible, substantial change, and must be such as to give notice to the public that there has been a change in the ownership: *Ibid.* A chattel mortgage of a stock of goods which leaves the mortgagor in possession, and by inference authorizes him to sell in the usual course of business, is good as between the parties, and is not necessarily fraudulent as to creditors: *Gay v. Bidwell*, 7 Mich., 519; *Oliver v. Eaton*, 7 Mich., 108. But a chattel mortgage covering specific chattels and "all other personal property that may be owned or

§ 534. **Filing to be renewed at end of year.**—"Every such mortgage shall cease to be valid, as against the creditors of the person making the same, or subsequent purchasers or mortgagees in good faith, after the expiration of one year from the filing of the same, or a copy thereof, unless within thirty days next preceding the expiration of the year, the mortgagee, his agent or attorney, shall make and annex to the instrument or copy on file as aforesaid an affidavit, setting forth the interest which the mortgagee has, by virtue of such mortgage, in the property therein mentioned; upon which affidavit the township or city clerk shall endorse the time when the same was filed."³ Provided, That such affidavit being made and filed before any purchase of such mortgaged property shall be made, or other mortgage received or lien obtained thereon in good faith, shall be as valid to continue in effect such mortgage as if the same were made and filed within the period as above described."

"The effect of any such affidavit shall not continue beyond one year from the time when such mortgage would otherwise cease to be valid, as against subsequent purchasers and mortgagees in good faith; but within thirty days next preceding the time when any such mortgage would otherwise cease to be valid as aforesaid, a similar affidavit may be filed and annexed as provided in the preceding section, and with the like effect."⁴

§ 535. **Effect of failing to re-file.**—The omission to re-file a chattel mortgage does not render it invalid as against pur-

acquired" during a time specified is void as to subsequent good faith attaching creditors or purchasers: *Ferguson v. Wilson*, 122 Mich., 97; 80 N. W., 1006. See further as to mortgage of after acquired property: *Hammond v. First Nat'l Bk.*, 129 Mich., 176; 88 N. W., 397. Nor is a chattel mortgage, otherwise valid, rendered void by an express provision in it that the mortgagor may continue to sell from the mortgaged stock the same as if the mortgage had not been given: *Wingler v. Sibley*, 35 Mich., 231. And it may be shown, to sustain the mortgage, that it was executed in good faith, and to secure an actual indebtedness, and without any intent to defraud: *Sweetzer v. Mead*,

5 Mich., 107. But a creditor is not in a position to attack such a mortgage as fraudulent, unless he was a creditor at the time it was given: *Gay v. Bidwell*, 7 Mich., 519.

3—C. L., § 9526. The filing of an affidavit does not operate as an extension of the credit of the sum secured in the mortgage: *Dane v. Malory*, 16 Barb., 46; *Fuller v. Acker*, 1 Hill, 473. Nor does the omission to file the affidavit invalidate the mortgage as against the mortgagor: *Wetherel v. Spencer*, 3 Mich., 123. See, C. L., § 9526.

4—C. L., § 9527: *Manwaring v. Jenison*, 61 Mich., 141; 27 N. W., 899.

chasers or mortgagees *intermediate the original filing and the omission to re-file*. "Subsequent" means after the time when it ought to be again filed to preserve its validity.⁵ Nor does it affect its validity as against a *subsequent* mortgagee or purchaser with notice that the mortgage is unpaid.⁶

§ 536. **Priority of executions.**—"Any execution or attachment issued out of any court, not being a court of record, if actually levied, shall have preference over any other execution or attachment issued out of any court, whether of record or not, which shall not have been previously levied."⁷

§ 537. **Levy, how made.**—To constitute a levy, the officer should enter upon the premises where the goods of the defendant are, and take actual possession of them (if they are such of which possession can be taken). The goods should be brought within his view, and subjected to his control, and it is proper also, if not necessary, that an inventory should be taken of them; the officer should assert his title to the goods by virtue of the execution; and his acts as to the asserting of his rights and the divesting of the possession of the defendant, should be of such a character as would subject him to an action as a trespasser but for the protection of the execution; they should be public, open, and unequivocal, and nothing should be done to cast concealment over the transaction.⁸ But the mere cir-

5—Meech v. Patchin, 14 N. Y., 71; see, Wetherell v. Spencer, 3 Mich., 123.

6—Hill v. Beebe, 13 N. Y., 556. The omission to file the affidavit does not give priority or preference to a subsequent mortgagee or purchaser with notice that the prior mortgage is unpaid: Wetherell v. Spencer, 3 Mich., 123. Though a mortgage is taken from the clerk's files, yet, if it be returned again, a person purchasing the property after its return to the files cannot hold it against the mortgagee: Woodruff v. Phillips, 10 Mich., 500.

7—C. L., § 10315.

8—Beckman v. Lansing, 3 Wend., 450; Watts v. Cleaveland, 3 E. D. Smith, 553. A levy cannot rest in mere undivulged intention to seize property; there must be possessory acts to indicate a levy: Camp v.

Chamberlain, 5 Denio, 198. The officer must assume dominion over the property, and have it within his power and subject to his immediate seizure: Price v. Shipps, 16 Barb., 585; Green v. Burke, 23 Wend., 490; Roth v. Wells, 2 Tiff. N. Y., 471. And it seems that an officer cannot make a valid levy on property not in his view: Van Wycke v. Pine, 2 Hill, 666. But it is not necessary that there should be a manual interference with the property to constitute a levy. It is sufficient if the property is present and subject to the control of the officer, and that he there openly and publicly states that he levies upon the property, and asserts his authority over it by virtue of the execution and levy: Barker v. Blinniger, 4 Kern, 270; Green v. Burke, 23 Wend., 490, 492. There must be such manual seizure or assertion of control as may

cumstance of the officer's omitting to proclaim or to give notoriety to his levy at the time it is made, is not of itself fraudulent so as to impair its effect, although directed by the plaintiff to conceal the levy, if everything else was done to constitute a levy. The endorsement by the officer upon the execution of the levy is evidence, and frequently the only evidence in his power of the levy.⁹

§ 538. **Breaking doors.**—The officer cannot break open the outer door of the dwelling house of the defendant to make execution on his goods, or the goods of any member of the family who have their ordinary residence there;¹⁰ nor can he open the door, though it be only latched, although the owner be absent,¹¹ or knock, and when the door is a little open, thrust in with violence. But if the outer door be open and the officer enters, he may afterwards break an inner door, or trunks, to take goods.¹² If the execution of the process has been properly commenced, the outer door may be broken, if necessary, for the purpose of continuing and completing the execution.¹³ And, it seems, the protection extends to the property of a guest within the house unless he has gone there to avoid the process held by the officer.¹⁴

If, after a peaceful entrance at the outer door of the defendant's dwelling house, the officer or his assistants be locked in, he may break open the outer door to get out. Goods may be taken through the windows of the house if they are open.¹⁵ The officer may break open the outer door of a store, barn, or outhouse, not connected with or within the same curtilage with

be made effectual to bring the property and keep it within the dominion of the law. The levy must be so made as to either actually identify, or give means of identifying the property so that the levying officer may be charged with it: *Quackenbush v. Henry*, 42 Mich., 75; 3 N. W., 262. See, also, *Grover v. Buck*, 34 Mich., 520; *Patch v. Wessels*, 46 Mich., 249; 9 N. W., 269; *Lee v. Maxwell*, 98 Mich., 496; 57 N. W., 581.

9—*Butler v. Maynard*, 11 Wend., 548.

10—*Oystead v. Shed*, 13 Mass., 520; *Curtis v. Hubbard*, 1 Hill, 336; *Curtis v. Hubbard*, 4 Hill, 437; *People v.*

Hubbard, 24 Wend., 369; *Illsley v. Nichols*, 12 Pick., 270. A levy effected by committing a trespass is bad. Thus, where the officer unlawfully broke into a house to make a levy on property therein, it was held that the levy could not be sustained: *Balley v. Wright*, 39 Mich., 96. As to breaking doors, see, *Stearns v. Vincent*, 50 Mich., 209; 15 N. W., 86.

11—*Curtis v. Hubbard*, 1 Hill, 336.

12—*Lee v. Gansel*, 1 Cowp., 1; *Hutchison v. Birch*, 4 Taunt., 619, 625.

13—*Glover v. Whittenhall*, 6 Hill,

597.

14—*Curtis v. Hubbard*, 1 Hill, 336.

15—*Bing. on Ex.*, 244.

the dwelling house, without a previous demand and refusal of admission.¹⁶

§ 539. Indemnity to officer.—"Whenever there shall be any reasonable doubt as to the ownership by a judgment debtor of any goods or chattels, or as to their liability to be taken upon an execution, the officer holding such execution may require of the judgment creditor sufficient security to indemnify him for taking such goods and chattels thereon; and if such security be refused, such officer shall not be liable for omitting to take such good and chattels."¹⁷

§ 540. Disposition of property after levy.—The goods after the levy may be left with the defendant at the risk of the plaintiff, or of the officer, or security for a delivery at a future day may be taken.¹⁸ Leaving the property in the possession of the defendant for a reasonable time, and without any improper motive, after the levy, is not in itself fraudulent, and the rights of the plaintiff and the officer are not affected by it.¹⁹ The officer is not, however, under any obligation to take security; and where the officer leaves the goods with the debtor, either with or without a receipt from some third person, he assumes the risk of answering to the creditor if the property be lost through the negligence or any wrongful act of the debtor. If a receipt be taken, which, either through defect of form or the insolvency of the receiptor, proves to be of no value to the officer, he must still answer to the creditor for the loss of the goods. But he is not liable for any losses by theft, robbery, or other accident, unless it is connected with his own negligence. The constable cannot maintain an action against

16—Haggerty v. Wilber, 16 Johns., 287.

17—C. L., § 10349. See, Smith v. Cicotte, 11 Mich., 383.

18—Ray v. Harcourt, 19 Wend., 495. When animals are taken upon execution, the constable has no authority to work them to pay the expense of keeping them: Bushey v. Rath, 45 Mich., 181; 7 N. W., 802. The statute provides for the manner in which the officer is to be compensated for the expense of keeping cattle and live

stock when taken on execution: See, C. L., § 886.

An officer levying upon unthreshed wheat in the mow has no authority to thresh it before sale: Stillson v. Gibbs, 46 Mich., 215; 9 N. W., 254. And if he does so he will be held responsible for any that may be wasted by reason of removal and threshing: Stillson v. Gibbs, 53 Mich., 280; 18 N. W., 815.

19—Butler v. Maynard, 11 Wend., 552.

the receiptor, unless he is answerable over to the creditor.²⁰ Therefore, it is a good defence in an action against the receiptor, that the property has been taken from his possession by the rightful owner, a third person,²¹ as the officer would have no right to hold it under the execution. So, if the goods have been destroyed by fire under circumstances which would preclude a recovery by the plaintiff in the execution against the officer.²² But the receiptor cannot, under any circumstances, defend himself upon the ground of an excessive levy. This is a question between the officer and the execution debtor. Where goods seized by a constable upon an execution were delivered to a third person, on his giving a receipt promising to re-deliver them by a given day, and when the day arrived he refused to deliver them, claiming that the goods, at the time of the levy and receipt, were his own, it was held that he was estopped from setting up title in himself, unless he should show that he was drawn into the admission of an adverse title by fraud, or perhaps by some gross mistake of fact, or that he interposed his claim at the time of the levy, and signed the receipt, in terms, without prejudice to his right.²³ The officer cannot take a receipt, or any other security, for the re-delivery of the property, which will give him a remedy beyond his own liability to the plaintiff in the execution; at least, the amount is all he can recover on the receipt.²⁴ If at the time the levy is

20—*Browning v. Hanford*, 5 Hill, 588.

21—*Harvey v. Lane*, 12 Wend., 563; *Edson v. Weston*, 7 Cow., 278.

22—*Browning v. Hanford*, 5 Hill, 588.

23—*Dezell v. Odell*, 3 Hill, 215.

24—*Browning v. Hanford*, 5 Hill, 588. In an action of trover by an officer against a receiptor of property taken by the officer on execution, it is not necessary that the declaration should allege that the judgment upon which the execution issued was still in force when the property was demanded of the receiptor; this may be shown upon the trial. In such an action the receiptor cannot question the regularity of the judgment upon which the execution issued, nor can he deny having received the property receipted for by him.

In trover by an officer against a receiptor who has receipted for the property by the procurement and at the request of the execution debtor, the measure of damages is the amount collectible upon the execution. If the property is worth so much; if it is not worth so much, then the damages would be the value of the property. Where the receipting is procured by and with the assent of the debtor, the officer is entitled to recover no more damages than will be sufficient to satisfy his execution. He would not be entitled to the surplus if the value of the property should exceed that amount, because in such case he would not be liable over to the debtor for the surplus. Nor would he be entitled to include in his damages any charge for time or services, except the fees allowed by law for serving the execu-

made the receiptor claims the property, he cannot set up his title in bar of the action on the receipts, though he might do so, to reduce the damages.²⁵ But after the goods have been re-delivered to the officer by the receiptor, according to his undertaking, he may recover them from the officer.

By leaving the property with another and taking a receipt, the officer does not part with his interest, but only his possession. The receiptor holds as his delegate or bailee, on the terms specified in the receipt; upon the officer becoming entitled to a re-delivery according to those terms, the force of the receipt is completely gone, and his property acquired by the levy reverts. If the receiptor detain it, the officer may bring replevin or trover for the wrong,²⁶ or he may take possession of them without suit.²⁷

§ 541. Endorsement of levy.—"The constable, after taking goods and chattels into custody by virtue of an execution, shall endorse thereon the time of levying the same, and immediately give public notice by advertisement signed by himself, and put up at three public places in the city, village or township where such goods and chattels were levied upon, and in case the sale be made in any other city, village or township than that in which the levy was made, also in the city,

tion, even by agreement with the debtor. If the officer should levy upon and take possession of the property and deliver it to a receiptor without the consent of the execution debtor, then in trover against the receiptor the officer might possibly recover the whole value of the property, although exceeding the amount due upon the execution, on the ground of his liability over to the debtor for the surplus. But this may be questioned. If, instead of trover, the officer should sue the receiptor upon his contract in the receipt to return the property, or in default thereof to pay the amount collectible on the execution, he would be entitled to recover the latter amount, irrespective of the value of the property receipted: *Burk v. Webb*, 32 Mich., 173.

The officer or any one authorized by him may demand the property of the receiptor, and it is at his option to return the property or pay the

execution. If he does neither, the officer may sue in trover or upon the contract. The officer would not be required to accept the property after the return day of the execution, as it would then be too late to sell it: *Bowen v. Culp*, 36 Mich., 224.

A mistake in describing the property intended to be receipted, which did not or could not mislead the parties, cannot be taken advantage of by the receiptor when sued in trover for the property. Nor is it necessary that the receipt should set forth in detail, or describe minutely or with particularity, the parties to the cause, the court, and other facts appearing in full in the execution.

25—*Bursley v. Hamilton*, 15 Pick., 40.

26—*Dezell v. Odell*, 3 Hill, 215.

27—*Miller v. Adslit*, 16 Wend., 351-352.

village or township where said goods and chattels are to be sold, when and where they will be exposed for sale; and the said officer shall in no case remove said goods and chattels out of the county where said levy shall have been made."²⁸

The endorsement of the levy will be *prima facie* evidence, for the officer, of a levy, even against third persons,²⁹ although the execution has not been returned.³⁰

§ 542. Notice of sale.—“Such notice [of sale] shall describe the goods and chattels, and shall contain the names of the parties to the suit upon which the execution issued, and shall be put up at least five days before the time appointed for the sale.”³¹

As to the time, place and manner of sale, a sound discretion is vested in the officer. It is indispensably necessary to the due administration of justice that the exercise of this discretion should never be under the direction of one party, so as to oppress and bring ruin on the other. The officer is bound to con-

28—C. L., § 881. As to whether the indorsement of levy is conclusive as to the time when it was made, and as to whether parties claiming prior liens on the property may dispute it: See, *Nall v. Granger*, 8 Mich., 450.

Reasonable delay in giving notice of sale, when at the request of the execution debtor, will not invalidate the levy: *Baldwin v. Talbot*, 46 Mich., 21; 8 N. W., 565.

As to the officer's discretion relative to the length of time property may be held before sale; expense of keeping, etc.: see, *Bird v. Perkins*, 33 Mich., 28, 32. If the levy is upon a part only of the property covered by a chattel mortgage, it will be the officer's duty to delay the sale for such reasonable time as may be required to enable him to find and levy on the balance of the mortgage property, if it is in his bailiwick: *Baldwin v. Talbot*, 46 Mich., 19; 8 N. W., 565.

As to what is deemed a public place, see, *People v. Lagrange*, 2 Mich., 190.

Where, upon a levy, the property is delivered to a recepter, the officer, or any one authorized by him may demand a return of the property; and it is optional with the recepter whether to return it or pay the execution. If he does neither, the officer may sue

upon the receipt: *Bowen v. Culp*, 36 Mich., 224.

29—*Cornell v. Cook*, 7 Cow., 310. The question whether an officer has levied upon a complete title or only upon an incumbered interest is one of intent as to which the officer need make no statement beyond the indorsement on his writ which is the evidence of his final action whatever his intent may have been: *Wallen v. Rossman*, 45 Mich., 333; 7 N. W., 501. And it seems that an officer who levies subject to a mortgage can afterwards change the levy: *Ibid.*

30—*Glover v. Whittenhall*, 2 Denio, 633. When the endorsement of the levy described the property as being “about twenty-five acres of wheat on the ground on the farm of Veeder Colgrove, in the township of *Madison*, now occupied by the defendant,” and it appeared that the farm occupied by the defendant, on which the wheat was, was in *Dover* the mistake in the name of the township was held to be immaterial: *Perkins v. Spaulding*, 2 Mich., 157.

31—C. L., § 882. *Manwaring v. Jenison*, 61 Mich., 143; 27 N. W., 899; *Ganong v. Green*, 64 Mich., 488, 491; 31 N. W., 461.

sult his own judgment, to act firmly but temperately, and in no case can he, without just reprehension, lend himself to the views of either party, or become the instrument to avenge their real or imaginary wrongs.³²

§ 543. **Sale, when and how made.**—"At the time and place so appointed, or at such other time as the sale may be adjourned to within the life of the execution, the goods and chattels being present, and pointed out to the inspection and examination of the bidders, the constable shall expose them to sale at vendue to the highest bidder."³³

This section requires the goods and chattels to be present at the sale; therefore, a sale of property not present would pass no title.³⁴

On the sale, the property must be specifically designated. Where a constable sold thirteen sheep, of a flock of twenty-one

32—McDonald v. Nelson, 2 Cow., 170. The officer has a large discretion in determining the time, place and manner in which he shall offer the property levied on, for sale: Stillson v. Gibbs, 40 Mich., 42. But where a levy is on wheat or grain in the mow, it seems that the officer would not be authorized to thresh it before offering it for sale: *Ibid.*

33—C. L., § 883. If the purchaser at any execution sale fraudulently colludes with the officer to prevent competition at the sale, and is thereby enabled to purchase the property at much less than its value, the sale will be held void: Aldrich v. Maitland, 4 Mich., 205. So where the purchaser, knowing of a chattel mortgage on the property, procures the officer to ante-date his levy prior to the making of the mortgage, for the purpose of defeating the title of the mortgagee, the sale will be of no effect: Nall v. Granger, 8 Mich., 450.

34—Cresson v. Stout, 17 Johns., 116; see, Baker v. Case, 19 Mich., 220. This must, however, be received with some qualification; thus, where the whole property consisted of more than a hundred articles, some of which were present, some in the barn and some in the fields, and elsewhere on the farm, and all was sold in one parcel. On the argument it was ob-

jected that the sale was void because the property was not present. The court said: "A part of it was in the house; some was in the barn, and some was in the fields and elsewhere on the farm. The whole could not be gathered, so as to be brought into view at one time, without incurring great and useless expense. The sale was made on the farm, and some property was actually present and in view. If the officer had previously declared what property in particular was to be sold, and had pointed it out to the persons in attendance, I think the whole should be deemed present and in view, within the meaning of the statute." Tift v. Barton, 4 Denio, 171; see, Bruce v. Westervelt, 2 E. D. Smith, 440. If a part of the property sold is present at the sale, and the remainder absent therefrom, the sale will be good as to the former, though void as to the latter: Lindendoll v. Doe, 14 Johns., 222. And it is held that the interest of a pledgor in goods cannot be sold unless the goods are present at the sale: Bakewell v. Ellsworth, 6 Hill, 484; Stief v. Hart, 1 Comst., 20. The sale of a growing crop at a place a half or three-quarters of a mile from the field, and from which the crop could not be seen, is invalid: Winfield v. Adams, 34 Mich., 437.

or twenty-two, designating them only as the best and fattest, it was decided that he had no power to sell in such a manner, or to authorize the purchaser to select thirteen from the flock, and that the sale was void.³⁵

The proper course is, to sell so much property only as will satisfy the execution, and which can conveniently and reasonably be sold separately.³⁶ This rule does not apply when the sale is of the interest of a mortgagor;³⁷ in such case the sale may, and should be, of *all* the articles in one lot. Unless one man purchased the whole, he would not acquire the equity to compel other purchasers to contribute towards the satisfaction of the mortgage debt. The purchaser of a part of the property would have no right to redeem *pro tanto*. The mortgagee could not be compelled to receive a part of the debt and relinquish the lien as to a part of the property.³⁸

"No constable shall, directly or indirectly, purchase any goods or chattels, upon any sale made by him upon execution; and every such purchase shall be absolutely void."³⁹

If the constable deliver the goods sold upon an execution to the purchaser without receiving the money, he is liable for the amount, although the purchaser refuses to pay for them.⁴⁰ Where the plaintiff purchases at the sale, the constable may lawfully deliver the goods to him, without receiving the

35—Warring v. Loomis, 40 Barb., 484. The property sold must be separated from the mass with which it is mixed; thus the sale of a certain number of pounds of hay, part of a larger bulk in stack, but not separated, has been held void: Stevens v. Eno, 10 Barb., 95.

36—Hewson v. Deygert, 8 Johns., 333. It is not necessary to sell each article separately. It is the duty of the constable to sell the property in such lots and parcels as to command the highest price; and if he willingly sacrifices the property by disregarding his duty, he will be liable to the party injured: Perkins v. Spaulding, 2 Mich., 161. And he can sell so much property only as is sufficient to satisfy the execution, costs and expenses: Allen v. Kinyon, 41 Mich., 281; 1 N. W., 863.

37—Whenever the interest of the judgment debtor in the property to be sold is special and limited, it is the constable's duty to declare that fact to the bidders, and by express words to confine the sale to such title and interest as the debtor may really possess: Eggleston v. Mundy, 4 Mich., 303.

38—Tliff v. Barton, 4 Denio, 171; see, Manning v. Monaghan, 9 E. P. Smith, 530. If the sale is of the debtor's interest in property covered by a chattel mortgage, the whole of the mortgaged property must be sold together in one lot or parcel, subject to the mortgage: Baldwin v. Talbot, 46 Mich., 21; 8 N. W., 565.

39—C. L., § 887.

40—Denton v. Livingston, 9 Johns., 96.

money.⁴¹ But when there is a dispute between creditors as to which execution the money is to apply, the constable may refuse the plaintiff's bid if he intend to insist on the money, or he should re-sell on the plaintiff's refusing to pay the money. He cannot recover the money of the plaintiff after having delivered the property to him.⁴²

"When the defendant in an execution shall die after levy and before sale, the property levied on shall be sold in the same manner as if he was alive; but if no levy has been made in such case, such execution shall be returned without further proceedings; but if an execution shall have issued against several defendants, and some of them die thereafter, or against the defendant in the judgment and his surety, for the stay of execution, and the defendant in the execution shall die before levy, the execution may be executed upon the property of the surety."⁴³

§ 544. **Adjournment of sale.**—The officer may adjourn the sale to a different place from that appointed for it, even after the sale has commenced. It is in his discretion to do so, and if that discretion is not abused, the sale will be valid.⁴⁴ So, if no bidders attend, he should postpone the sale, and give notice to the party in whose favor the execution is, who should attend and bid himself.⁴⁵

RETURN OF THE EXECUTION.

§ 545. **How made.**—"The constable shall return the execution, and pay the debt or damages, and costs levied, to the justice who issued the same; or in case of his death, absence or removal from office, then to the justice having the custody of his docket, returning the surplus, if any, to the person against whom the execution issued."⁴⁶

41—Nichols v. Ketcham, 19 Johns., 84; Russell v. Gibbs, 5 Cow., 390.

42—Russell v. Gibbs, 5 Cow., 390, 396.

43—C. L., § 857. But if property was attached, it seems that a levy may be made and the property sold after the decease of the owner: See, Hochgraef v. Hendrie, 66 Mich., 557; 34 N. W., 15.

44—C. L., § 883. Tinkom v. Purdy, 5 Johns., 345.

45—Pixley v. Butts, 2 Cow., 421; and see, McDonald v. Nellson, 2 Cow., 139, 190.

46—C. L., § 884. The return is not conclusive as to the date of the levy as to those claiming prior liens upon the property: Nall v. Granger, 8 Mich., 450; Winfield v. Adams, 34 Mich., 437. Neither the justice nor the constable has authority, without special directions from the party entitled to the money, to receive anything in payment

"Where any constable shall not have been able to levy on any goods and chattels, until there shall not be time sufficient after the levy to advertise for sale, he shall return with the execution a schedule of all such goods and chattels."⁴⁷

"No constable shall levy upon, or sell any property, or imprison a defendant, upon any execution, after the time limited therein for its return, except as is provided in the next section."⁴⁸

"Whenever an execution is returned by an officer having the same, that he had levied on property, but there was not sufficient time after such levy to advertise and sell the same, the justice may renew such execution, etc."⁴⁹

§ 546. Procedure in case of body execution.—"For want of sufficient goods and chattels, whereon to levy, the constable shall, *in the cases authorized by law, if the execution require it*, take the body of the person against whom the execution shall have issued, and convey him to the common jail of the county, the keeper whereof is hereby required to keep such person in safe custody in jail until the debt, or damages and costs shall be paid, or he be thence discharged by due course of law."⁵⁰

§ 547. In case term of office of officer expires before return.—"Every constable to whom any execution shall have been delivered, and whose term of office shall expire before the time within which the return or collection of such execution is required by law, shall proceed thereon in the same manner, and shall have the same powers in relation thereto, as if his term of

of the judgment but gold and silver, or such money as is by law made a legal tender. If he receive bank notes in payment without such direction he renders himself liable to the party in lawful money for the amount received: *Heald v. Bennett*, 1 Doug. Mich., 513; *Hooker v. State ex rel Haynes*, 7 Blackford, 272. If the constable take a promissory note in satisfaction of an execution, without the authority of the plaintiff, it is void as between the constable and the maker; and the plaintiff may sue the constable. But if the plaintiff ratify the transaction, the note will be valid in his hands, and if he sue the officer

for money had and received, the note, it seems, would become valid as between the officer and the maker: *Armstrong v. Garrow*, 6 Cow., 463. As to how far a constable's return may be contradicted or impeached, see, *Nall v. Granger*, 8 Mich., 450.

47—C. L., § 885. See, C. L., § 892 as to the form of the schedule, &c., see, *post*, § 549. "Of renewing executions."

48—C. L., § 891. *Burk v. Webb*, 32 Mich., 182; *Rowen v. Culp*, 36 Mich., 224.

49—C. L., § 892. See, *post*, § 549. "Of renewing executions," &c.

50—C. L., § 888.

office had not expired; and such constable and his sureties shall be liable for any neglect of duty, and for moneys collected upon such execution, in the same manner and to the same extent as if the term of office of such constable had not expired."⁵¹

"If any constable to whom any execution shall have been delivered, shall die, become insane, or by sickness, or otherwise, be incapable of completing the service and return thereof, before such writ shall have been fully executed, any other constable may proceed thereon in the same manner that the constable to whom such writ was originally delivered might have done."⁵²

§ 548. **Effect of a levy.**—Before closing the subject of executions, the effect of a levy in satisfying a judgment will be noticed. A levy on property sufficient to pay an execution is said to be presumptively a satisfaction of the judgment, and so our supreme court have decided.⁵³ To this rule there are several exceptions. It will not be a satisfaction if the levy was abandoned by the request of the defendant and for his benefit,⁵⁴ nor if the property be released from the levy by the act of the defendant, as by his pretending that the property is owned by others,⁵⁵ or otherwise defeated by the misconduct of the defendant. The loss or destruction of the property after it is taken out of the debtor's possession by virtue of the

51—C. L., §§ 893, 987.

52—C. L., § 894.

53—*Farmers' & Mechanics' Bank v. Kingsley*, 2 Doug. Mich., 379; and see cases there cited. In this case, Ransom, Ch. J., says: "Upon the most thorough investigation I 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 in sufficient 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 levy is such 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 has 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:" *Farmers' & Mechanics' Bank v. Kingsley*, 2 Doug., at p. 402. Where the claimant of property levied upon, by his own unlawful acts, prevents the application of the property to the satisfaction of the execution, he cannot claim that the levy has satisfied the judgment: *Nelson v. Ferris*, 30 Mich., 497. See, *People v. Hopson*, 4 Denio, 574; *Dunphy v. Whipple*, 25 Mich., 10.

54—*Ostrander v. Walter*, 2 Hill 329.

55—*The President, &c., v. Hallett*, 8 Cow., 192.

process would be a satisfaction. Where the judgment was satisfied by the sale of a horse on the execution, and the defendant recovered in an action of trespass against the plaintiff the value of the horse, the defendant insisting that it was exempt from execution, the judgment was held to be revived by the recovery, and the plaintiff was entitled to recover in an action of debt upon it. In a court of record, the plaintiff would, in such case, be allowed to amend or strike out the return on the execution and to have a new execution. As a justice has no power to order such an amendment, the only remedy the party has is an action on the judgment.⁵⁶

The constable cannot pay off the plaintiff in the execution with his own money and retain a levy and enforce it afterwards upon the property for his own benefit.⁵⁷

§ 549. Of renewing executions, and the issuing of further executions.—“If any execution be returned unsatisfied in whole or in part, a further execution for the amount remaining due may be issued upon the request of the plaintiff, or party interested therein, or the justice may renew the same by an endorsement thereon to that effect, signed by him, and dated when the same shall be made, which shall be deemed to renew the execution in full force, in all respects, for sixty days; if any part of such execution has been satisfied, the justice shall endorse on the execution the sum remaining due thereon.”⁵⁸

A further execution should not be issued until the previous one is duly returned.⁵⁹ If a justice issue a second execution upon the representation of the plaintiff that the former one was lost, when in fact it had been paid, he will be a trespasser.⁶⁰ So, if an execution is returned satisfied, a new execution cannot issue; the party must resort to his action on the judgment, if the fact be that the judgment is not satisfied by the proceedings on the execution.⁶¹ The return must be in writing; verbal

56—Piper v. Elwood, 4 Denio, 165, 175.

57—Reed v. Pruyn, 7 Johns., 426. See, Sherman v. Boyce, 15 Johns., 443; Bigelow v. Provost, 5 Hill, 566; Carpenter v. Stillwell, 1 Kern., 61, 67.

58—C. L., § 877. Bigelow v. Barre, 30 Mich., 1.

59—Cumston v. Field, 3 Wend., 382. A second execution cannot be issued.

where a first has been levied on growing crops and after being indorsed with the levy, is filed with the justice. The theory of abandonment of the levy under the first cannot be sustained on such evidence alone: Fryer v. McNaughton, 110 Mich., 22; 67 N. W., 978.

60—Lewis v. Palmer, 6 Wend., 367.

61—Piper v. Elwood, 4 Denio, 165.

information by the constable that the execution was unsatisfied would not be sufficient to authorize the issuing of a further execution. A levy upon property sufficient to pay an execution is presumptively a satisfaction of it;⁶² if, therefore, it appear upon the execution that a levy has been made, it must appear from the return that the property has been sold, or otherwise accounted for legally, or a new execution cannot issue.

An execution cannot be renewed without a return by the constable, which would authorize the issuing of another execution.

The further execution may be, in form, the same as the one first issued, directing the collection of the full amount of the judgment; and in case anything was collected upon the prior execution, the justice should endorse thereon the amount remaining due.⁶³

“Where any constable shall not have been able to levy on any goods and chattels, until there shall not be time sufficient after the levy to advertise for sale, he shall return with the execution a schedule of all such goods and chattels.”⁶⁴

“Whenever an execution is returned by an officer having the same, that he had levied on property, but there was not sufficient time after such levy to advertise and sell the same, the justice may renew such execution, or issue another execution and annex thereto a copy of such return, and such property may be sold on the renewed or alias execution, in the same manner as on the first execution; and if such property be insufficient, other property may be levied on to satisfy such execution, either before or after such sale. In case the officer who levied upon the property shall be living and in office, the renewed or alias execution shall be executed by him.”⁶⁵

A copy of the return and schedule must be annexed, by the justice, to the renewed or new execution. This copy should be certified by the justice to be a copy of the return made by the constable on the previous execution, and of the schedule of the property levied upon by the constable by virtue of such execution.

62—F. & M. Bank v. Kingsley, 2
Doug., 378: see, *ante*, § 548, note 53.
63—2 Cow. Treat., 2 ed., 1041.

64—C. L., § 885.
65—C. L., § 892.

In case the constable who served the prior execution is *living and in office*, the renewed or new execution must be delivered to him; if not, to any other constable.

§ 550. Of setting off executions.—"Executions between the same parties, upon judgments recovered in their own right, may be set off, one against another, if required by either party, in the following manner: When one of the executions is delivered to a constable to be served, the person who is the debtor therein may deliver his execution to the same constable, and such constable shall apply the amount thereof, so far as it will extend, or so far as it may be necessary, to the satisfaction of the first execution; and the balance due on the larger execution shall be collected and paid in the same manner as if there had been no set-off."⁶⁶

§ 551. Of the liabilities of the constable and his sureties.—"A constable, upon his election or appointment, shall execute, with sufficient sureties, to be approved by the supervisor or clerk of his township, an instrument in writing, by which he and his sureties shall jointly and severally agree to pay to each and every person who may be entitled thereto all such sums of money as the said constable may become liable to pay on account of any neglect or default of said constable in the service or return of any process that may be delivered to him for service or collection, or on account of any misfeasance of the said constable in the discharge of, or failure of said constable to faithfully perform any of the duties of his said office."⁶⁷

The responsibility of the sureties is co-extensive with that of the constable, and they are liable whenever he is liable to the party in whose favor an execution has been delivered to him.⁶⁸

The sureties of the constable are not answerable beyond the default of their principal in his official duties.⁶⁹ When a party instructs an officer to depart from the line of duty which his process and the law impose upon him, the officer becomes the

⁶⁶—C. L., § 897.

⁶⁷—C. L., § 2364. *Robertson v. Baxter*, 57 Mich., 131; 23 N. W., 711. Not necessary that any specific obligee be named in the bond: *Bay County v. Brock*, 44 Mich., 45; 6 N. W., 101;

see, *Eaton Rapids v. Stump*, 127 Mich., 1, 3; 86 N. W., 438.

⁶⁸—*Sloan v. Case*, 10 Wend., 370.

⁶⁹—*Gorham v. Gale*, 7 Cow., 739, 746.

private agent of the party; and the sureties would not be answerable for his acts or default.⁷⁰

§ 551a. **Neglect to return execution.**—"If a constable shall neglect or refuse to return an execution, and pay over the moneys by him collected, within five days after such execution shall have been paid, or shall neglect to levy an execution, or otherwise execute the same according to law, the party in whose favor such execution was issued, or who shall be entitled to such moneys, may maintain an action of assumpsit in his own name upon the instrument of security given by such constable and his sureties; and in such suit the amount of the execution, with interest from the time of the rendition of the judgment upon which the same was issued, shall be recovered; and execution shall issue forthwith, and no stay of execution shall be allowed."⁷¹

If an execution is delivered to a constable, he cannot avoid any liability which may subsequently accrue upon it by delivering it over to another officer.⁷²

In declaring against a constable and his sureties for neglect-

70—Ibid.; *Mickles v. Hart*, 1 Denio, 548.

71—C. L., § 890. This statute authorizes an action on the constable's bond before a justice though the penalty of the bond be an amount beyond the jurisdiction of the justice. The recovery, however, must be limited to the jurisdiction of the justice: *Montgomery v. Martin*, 104 Mich., 390; 62 N. W., 578. An officer though indemnified is not compelled to levy, if in good faith he believes the levy would be unlawful. If sued upon his bond he can defend with the illegality: *Coville v. Bentley*, 76 Mich., 250; 42 N. W., 1116. As to the constable's liability: See, *Frost v. Welch*, 1 Mich., 30; *Dunphy v. Whipple*, 25 Mich., 11; and as to pleadings, *Clark v. Gleason*, 30 Mich., 158.

When an execution is issued to a sheriff and he fails to return it, the debt is assumed to be lost, and the creditor is *prima facie* entitled to recover of him the full amount. But the officer is nevertheless allowed to make the one excuse for not performing his duty,—that the defendant had no prop-

erty from which the money could be made. And in case of a sale of property under the execution, the officer has no right to refuse to return his doings on the writ because of any supposed invalidity of the title sold; he is not concerned with the question whether the purchase will be available or not: *Dunphy v. Whipple*, 25 Mich., 11. But an officer does not render himself liable in trespass for proceeding in good faith to serve a justice's execution, after he has been told by the defendant that an appeal has been taken, where the justice insisted that the appeal had not been perfected. The officer has a right to rely on his process until he is officially notified of its having been superseded: *Foster v. Wiley*, 27 Mich., 245. An execution regular on its face protects an officer acting under it when proceeded against as a wrong-doer. But in order to support a claim to property under an execution levy, the officer must show that it was issued upon a valid judgment: *Adams v. Hubbard*, 30 Mich., 104.

72—2 Cow. Treat., 2 ed., 1088.

ing to serve and return a justice's execution, it will be sufficient to allege generally that the judgment was duly given,⁷³ but under such an averment it would be required to prove the judgment, and that the justice had jurisdiction of the *person* of the defendant, and of the *subject matter*, as also the issuing of a valid execution. But if the constable had *collected* the money, it would not be competent for him or his sureties to say that the execution was issued without authority, when they are called upon to account for the money which the constable has received by virtue of it.⁷⁴ If, however, the execution was void on its face, he could not be compelled to pay over the money to the plaintiff.

§ 552. Of the remedy of security for stay of execution against judgment debtor, after payment of judgment by him.—"When any judgment shall have been satisfied, by any person who shall have become surety for the stay of execution thereon, such judgment shall remain good and valid in law, for the use of such security, who, at any time thereafter, may sue out execution on such judgment, against the goods and chattels of the defendant, for the use of such security, which shall be so endorsed by the justice; such security shall also be entitled to a transcript of such judgment, for his own use, which shall have the same force and effect as transcripts in other cases."⁷⁵

When, in such case, an execution is issued for the benefit of the security for stay of execution, the justice should endorse it as being issued for the surety.

The execution, by the terms of the statute, is to be issued against the *goods and chattels only* of the defendant.

73—C. L., § 770; see, *ante*, § 166.

75—C. L., § 873. See, *Sweeney v.*

74—*Lawton v. Irwin*, 13 Wend., 136; *Lustfield*, 116 Mich., 696; 75 N. W., 233; *Burk v. Webb*, 32 Mich., 178. 136.

CHAPTER XXVIII.

OF THE REMOVAL OF CAUSES BY CERTIORARI.

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| § 553. Proceedings for. | § 558. Service on the justice. |
| § 554. Allegation of errors. | § 559. Stay of execution. |
| § 555. Allowance of the writ. | § 560. Return to the writ. |
| § 556. Bond, on allowance. | § 561. Amended return. |
| § 557. Filing affidavit—issuing writ. | § 562. Proceedings in circuit court. |

§ 553. **Proceedings for removal.**—"In all cases of judgments rendered by a justice of the peace, whether issue was joined before the justice or not, either party may remove such judgment by a writ of certiorari, into the circuit or district court for the county in which the judgment was rendered."¹

1—C. L., § 935. See, *Morrison v. Emsley*, 53 Mich., 564; 19 N. W., 187; 23 N. W., 314; *Mann v. Tyler*, 56 Mich., 564; 19 N. W., 145; *Antlau v. Nadeau*, 53 Mich., 460; 50 N. W., 302; *White v. Boyce*, 88 Mich., 349; 18 N. W., 218; *Galloway v. Corbitt*, 52 Mich., 460; 13 N. W., 781; *Erie Preserving Co. v. Witherspoon*, 49 Mich., 377. The statutory writ of *certiorari* lies only to review judgments rendered by justices of the peace in the exercise of original jurisdiction: *Warner v. Porter*, 2 Doug., 358. It is in substance a writ of error: *McOmber v. Chapman*, 42 Mich., 117; 8 N. W., 288. The writ is never a matter of right, and can only issue upon satisfying the circuit court commissioner or circuit judge, that there has been error committed: *Young v. Kelsey*, 46 Mich., 114; 9 N. W., 453; *Meads v. Copper B. M.*, 125 Mich., 456; 84 N. W., 615. The allowance of the writ to a justice of the peace from the supreme court is exceptional and will only be made to prevent a failure of justice: *White v. Boyce*, 88 Mich., 349; 50 N. W., 302; *Citing, Adams v. Abram*, 38 Mich., 302, and *Withington v. Southworth*, 26 Mich., 381. Interest as a taxpayer merely will not justify

application particularly where the amount is small: *Vanderstolph v. Boylan*, 50 Mich., 330; 15 N. W., 495.

A party may remove a cause by *certiorari* although he did not appear before the justice. By neglecting to appear he waives nothing: *Campau v. Fairbanks*, 1 Mich., 152. *Certiorari* is the proper proceedings to get rid of a void judgment: *Lake Shore & Michigan Southern Ry. Co. v. Hunt*, 39 Mich., 469. And so the writ will issue to review the proceedings of a circuit court commissioner to dissolve an attachment issued by a justice of the peace: *Zook v. Blough*, 42 Mich., 387.

A separate writ of *certiorari* is necessary to bring up for review any alleged errors in ancillary proceedings by garnishment; but such proceedings will fall to the ground when judgment in the principal case is set aside: *Withington v. Southworth*, 26 Mich., 381. Garnishee proceedings may be revived upon a writ of *certiorari* sued out by the defendant in the principal case, in his own name and in his own behalf if the latter's rights are cut off without his having an opportunity for a hearing: *Wilson v. Bartholomew*, 45 Mich., 41; 7 N. W., 227; see, *Campau v. Button*, 33 Mich., 525,

"The party intending to apply for such certiorari, shall give the justice notice in writing within five days after the rendition of the judgment, of his intention of removing the cause to the circuit court or district court by certiorari; and shall, within thirty days, make or cause to be made an affidavit, set-

and *Vanderstolph v. Boylan*, 50 Mich., 330, 331.

As to whether a person not a party to a suit, but injuriously affected thereby, may remove the cause by *certiorari*, see the three cases last above cited. And as to when the statutory writ may have the force of and operate as a common law writ of *certiorari*, see the same cases.

The statutory *certiorari* does not lie in special proceedings, as in the case of a judgment for a penalty under a village law: 2 Doug., 358, *supra*. Nor in cases where the law provides for an appeal only: *People v. Farwell*, 4 Mich., 556.

The office of a *certiorari* is to review questions of law, and not questions of fact. And in examining into the evidence, the appellate court does so, not to determine whether the probabilities preponderate one way or another, but simply to determine whether the evidence is such that it will justify the finding as a legitimate inference from the facts proved: *Jackson v. People*, 9 Mich., 120; *McGraw v. Schwab*, 23 Mich., 13; *Overpack v. Ruggles*, 27 Mich., 65; *Hinkley v. Weatherwax*, 35 Mich., 510. And a judgment will not be reversed on *certiorari* for any technical omission, imperfection or defect in the proceedings not affecting the merits, or for errors that did not and could not have worked an injury to the party complaining: *Berry v. Lowe*, 10 Mich., 9, 14.

Upon *certiorari*, questions of law only can be tried: *Higley v. Lant*, 3 Mich., 612; *Berry v. Lowe*, 10 Mich., 9; *McGraw v. Schwab*, 23 Mich., 13; and there can be no reversal of the judgment except for errors of law: *Parsons v. Dickinson*, 23 Mich., 56.

The writ is not given to enable parties to have a technical review of all the justices's rulings, but to afford a speedy and inexpensive remedy for

substantial faults. Where the alleged errors of the justice go to the foundation of the action, it is proper to review them on *certiorari*; but where they occur in the course of the trial, and are of such a nature that they might be obviated on a new trial, then a new trial is the proper remedy. And where the case is one to be determined on disputed facts, the party dissatisfied with the judgment should appeal instead of seeking a reversal on technical grounds without the investigation of the merits: *Erie Preserving Co. v. Witherspoon*, 49 Mich., 377; 13 N. W., 781; *Ritter v. Daniels*, 47 Mich., 617; 11 N. W., 409. This writ should not be resorted to unless the alleged errors go to the foundation of the action: *Galloway v. Corblitt*, 52 Mich., 460; 18 N. W., 218.

The remedy by *certiorari* is not to be encouraged when alleged errors are such as might have been obviated on a trial on appeal in the circuit and nothing will be taken by intendment in favor of errors assigned upon it: *Howell v. Shepard*, 48 Mich., 472; 12 N. W., 661; *Mann v. Tyler*, 56 Mich., 564; 23 N. W., 314.

A writ of *certiorari* should not issue where the errors relied on do not reach the substance of the controversy; nor where the objection is that the justice excluded testimony. In such a case an appeal is the proper remedy where justice can be done to both parties by a retrial of the cause: *Morrison v. Emsley*, 53 Mich., 564; 19 N. W., 187; *Carver v. Detroit & S. P. R. Co.*, 126 Mich., 458; 85 N. W., 1082. *Certiorari* held proper where writ of replevin was quashed upon an erroneous determination that the description of property in the writ was insufficient: *Proper v. Conkling*, 67 Mich., 244; 34 N. W., 560. So to review an error in permitting peremptory challenge to jurors in the panel struck by the parties: *Eldridge v. Hubbel*,

ting forth the substance of the testimony and proceedings before the justice, and the grounds upon which an allegation of error is founded."²

119 Mich., 61; 77 N. W., 631. So where there was an entire failure to show a cause of action: *Bullock v. Ueberroth*, 121 Mich., 293; 80 N. W., 39.

Under a statutory *certiorari*, there can be no reversal of a justice's judgment except for matters affecting the merits of the case: *Hinman v. Eakins*, 26 Mich., 80.

Certiorari is not a flexible remedy; all that can be done under it is to quash or refuse to quash the proceedings: *Whitbeck v. Hudson*, 50 Mich., 86; 14 N. W., 708. It does not secure a new trial, but ends the proceedings: *Knapp v. Gamsby*, 47 Mich., 377; 11 N. W., 204. When a justice's judgment is reversed on *certiorari*, the whole case falls: *Morrison v. Emsley*, 53 Mich., 564; 19 N. W., 187.

2—C. L., § 936. See *Rodman v. Clark*, 81 Mich., 466; 45 N. W., 1001, and note to C. L. § 936. One is not entitled to a common law *certiorari* after the expiration of the statutory period: *Jacobs v. Wayne Circuit Judge*, 132 Mich., 55; 92 N. W., 783 (Dec., 1902). *Mandamus* is proper to quash a writ of *certiorari* issued after the statutory period: *Jacobs v. Wayne Circuit Judge*, *supra*. An affidavit for *certiorari* made by an attorney who took charge of all the proceedings in the case throughout, is sufficient, notwithstanding it does not state that the affiant is the agent or attorney of the party in whose behalf the affidavit was made: *Scofield v. Cahoon*, 31 Mich., 206. The affidavit should not be entitled, though if entitled in the suit in the justice's court it would not be objectionable: *Whitney v. Warner*, 2 Cow., 499. But if entitled in the circuit court, it would be erroneous. Where neither the affidavit on which the writ issue, nor the return of the justice, which purports to give all the evidence in the case, shows that any objection was taken to any of the evidence introduced on the trial, or to any process, pleading or proceeding before the justice, or that any question of law was raised on the trial, and the

only error complained of in the affidavit is that the testimony given on the trial demanded a different verdict from the one rendered, and the testimony being such as to warrant the verdict found by the jury, no question of law is presented by the proceedings for the circuit court to pass upon. Such affidavit, though sufficient for a general appeal, furnishes no proper basis for the writ of *certiorari*: *McGraw v. Schwab*, 23 Mich., 13; *Nichols v. Cowles*, 3 Cow., 345. The affidavit for the writ must show what questions of law were raised before the justice, and his rulings thereon: *McGraw v. Schwab*, 23 Mich., 13. And the grounds on which the allegations of error are founded, that is, in what the alleged errors of the justice consist: *Welch v. Bagg*, 12 Mich., 43. No errors can be considered except such as are set forth and alleged in the affidavit: *Higley v. Lant*, 3 Mich., 613; *Fowler v. Detroit & Milwaukee Ry. Co.*, 7 Mich., 79; *Lake Superior Building Co. v. Thompson*, 32 Mich., 293; *Witherspoon v. Clegg*, 42 Mich., 284; 4 N. W., 209; *Case v. Frey*, 24 Mich., 251; *Grand Trunk Ry. Co. v. Russ*, 47 Mich., 500; 11 N. W., 289; *Bigelow v. Brooks*, 119 Mich., 208; 77 N. W., 810; *Westbrook v. Blood*, 50 Mich., 443; 15 N. W., 544; *Wilson v. McCrillies*, 50 Mich., 347; 15 N. W., 504; *Matthews v. Forslund*, 113 Mich., 416; 71 N. W., 854; *Farrah v. Bursley*, 100 Mich., 552; 59 N. W., 245. Such statement of the grounds of the allegations of error must be made as will inform the court and opposite party of the nature of the questions intended to be raised: *Fowler v. Detroit & Milwaukee Ry. Co.*, 7 Mich., 79. No errors can be presumed that are not alleged and affirmatively shown by the justice's return: *Witherspoon v. Clegg*, 42 Mich., 284; 4 N. W., 209. Nor will any allegation of error raising only the question of the weight of evidence be considered: *Smoke v. Jones*, 35 Mich., 409. As to what the affidavit should show when the justice has influenced the jury by an erron-

§ 554. **Allegation of errors.**—It is not always necessary to set forth the grounds upon which an allegation of error is founded. When it appears from the affidavit that questions concerning the regularity of the proceedings, the admission or rejection of the evidence, or the like, were made and decided on the trial, that will be substantial compliance with the statute without specifying, at the close of the affidavit, the particular grounds of error on which the party relies.³ But when the error relied on is, that *the evidence did not warrant the verdict*, it is not enough to detail in the affidavit the facts proved, but the party must specifically state that such is the ground upon which the allegation of error is founded.⁴

§ 555. **Allowance of the writ.**—“Such affidavit shall, within thirty days after rendering such judgment, be presented to one of the circuit judges, or to a circuit court commissioner of any

eous charge, see, *Chamberlin v. Brown*, 2 Doug. Mich., 120, 121, 122. A party is bound by the allegations in his affidavit for the writ: *Carver v. Detroit & S. P. R. Co.*, 126 Mich., 458; 85 N. W., 1082. An affidavit, indorsed with an allowance of the writ and filed with the clerk, cannot be used for the allowance of a second writ: *Sherwood v. Arnold*, 80 Mich., 270; 45 N. W., 134.

3—*People v. Columbia C. P.*, 6 Wend., 554. A statement of the points relied on for error, besides setting forth the testimony and proceedings before the justice, is not necessary when the alleged errors consist in the proceedings set forth: *Ibid.*: *People ex rel Leggs v. Onnondaga C. P.*, 8 Wend., 509.

4—*People ex rel Roe v. Suffolk C. P.*, 18 Wend., 550. A ground of error in the affidavit, “That the court erred in rendering judgment in favor of the plaintiff, and against the defendant,” is too general; the object of the statute is, to require such a statement of the grounds of the allegation of error, as will inform the court and the opposite party of the nature of the questions intended to be raised: *Fowler v. Detroit & Milwaukee Ry. Co.*, 7 Mich., 79, 83. The affidavit must state in what the error of the justice in rendering the judgment consists, that

the officer in allowing the writ, and the court afterwards in deciding the case, may not be required to look through the whole case, to see if there is not something on which it may be reversed. Thus, an allegation “That there was no evidence to sustain the verdict,” is too general. When the objection is, want of evidence, the particular fact of which there was no evidence before the justice should be stated in the affidavit: *Welch v. Bagg*, 12 Mich., 42, 43; see, *Hinkley v. Weatherwax*, 35 Mich., 510; *L. S. Bldg. Co., v. Thompson*, 32 Mich., 293.

An affidavit for *certiorari* should present the rulings objected to as they actually occurred, as in a bill of exceptions. It should not combine in one recital a series of detached rulings on points that were not connectedly presented. To make a recital of facts as a single proposition, or connected chain of propositions, when in truth they were never presented together, but were detached rulings during the trial, is objectionable, not only as incorrect in form, but as separating each ruling from its own circumstances and belongings. And an allegation of error based upon the alleged refusal of a magistrate to allow proof of certain propositions, recited together in an affidavit for *certiorari*, is not support-

county of this state, and if he be satisfied that an error has been committed by the justice or jury in the proceedings, verdict or judgment, he shall allow the certiorari, by endorsing his allowance thereon.’⁵

§ 556. **Bond on allowance of the writ.**—“The party obtaining such certiorari shall execute to the opposite party a bond, with one or more sufficient sureties, to be approved by the judge or commissioner who allowed the certiorari, or by the justice who rendered the judgment, in a penalty of at least fifty dollars, where the whole amount of the judgment or debt or damages and costs shall not exceed twenty-five dollars; and where the judgment for debt or damages and costs shall exceed the sum of twenty-five dollars, then the penalty of said bond shall be in double the amount of said judgment, if such judgment was rendered against the party applying for such certiorari, conditioned to prosecute such certiorari to effect, and abide the judgment of the circuit or district court therein, and pay the debt or damages and costs that shall be awarded against him.’⁶

“The party procuring the certiorari need not execute the bond in the last section mentioned, if the same shall be executed by two or more sureties. The sufficiency of the surety or sureties shall be approved by the person allowing the certiorari, or the justice on whose judgment the certiorari is brought.’⁷ No such bond shall be approved unless the surety or sureties thereto justify their pecuniary responsibility in writing and under oath, which said justification shall be by said justice or person allowing the certiorari, endorsed on said bond, or the responsibility of such surety or sureties is admitted in writing by the opposite party or his attorney, and endorsed on said bond.

“If the judgment was in favor of the person applying for such certiorari, then such bond shall be in a penalty of at least

ed by a return which shows that they were not presented or ruled upon as one offer, and that the proofs were rejected for different reasons: *Knapp v. Gamsby*, 47 Mich., 375; 11 N. W., 204.

5—C. L., § 937.

It seems that a *certiorari* may be allowed by a circuit court commissioner, although the proceedings did not occur in his county: *Loder v. Littlefield*, 39 Mich., 374.

6—C. L., § 938.

7—C. L., § 939.

fifty dollars, conditioned to pay such costs as shall be awarded against him, in case such judgment shall be affirmed.”⁸

If the party obtaining judgment procures the writ, the penalty of the bond will be fifty dollars.

It is to be noticed that by the amendment of C. L., § 939, by Act 244 of Pub. Acts, 1895, it is now required that the surety justify under oath and in writing on the bond, or that his responsibility be admitted in writing by the opposite party and the same be endorsed on the bond.

§ 557. **Filing affidavit—issuing writ.**—“The affidavit, after the allowance of the certiorari shall have been endorsed thereon, and within ten days after such allowance, shall be filed in the office of the clerk of said circuit or district court, and thereupon a writ of certiorari shall be issued by such clerk, within three days after the filing of such affidavit.”⁹

§ 558. **Service of certiorari on the justice.**—“Such writ of certiorari shall, within ten days after it shall have been issued, or within such other time as the officer allowing the same shall direct at the time of allowing the certiorari, be served upon the justice by whom the judgment was rendered, together with the bond given, and a copy of the affidavit on which the certiorari was allowed; and the sum of two dollars shall be paid to the justice for his fees for making a return to the certiorari, and no certiorari shall be of any effect until all the preceding requisitions shall have been complied with.”¹⁰

§ 559. **Stay of execution.**—“If the certiorari, bond and copy of the affidavit shall be served on the justice before an execution shall have been issued, it shall stay the issuing of the same; and if the execution shall have been issued, but not collected, the justice shall grant the party requiring it a certificate of the issuing of such certiorari, which, on being served

8—C. L., § 940.

9—C. L., § 941. The affidavit, with the allowance of the writ endorsed thereon, must be filed with the clerk of the circuit court before the writ issues, otherwise the *certiorari* will be a nullity, and will be set aside: *People v. Judge Cass Circuit Court*, 2 Doug. Mich., 116.

10—C. L., § 942. Service of a writ of *certiorari* made on a justice on Sunday, is void: *Anderson et al. v. Birce*, 3 Mich., 280. Where a writ of *certiorari* is to be served within ten days it will be ineffectual if ten days elapse between the day of its issue and the date of its service: *Morrison v. Emsley*, 53 Mich., 564; 19 N. W., 187.

on the officer in whose hands the execution may be, shall suspend such execution."¹¹

§ 560. **Justice's return to the certiorari.**—"The justice, before the return day of such certiorari, or within ten days after the service of such certiorari, shall make return thereto in writing, and file the same; in which return he shall truly and fully answer to all the facts set forth in the copy of the affidavit on which the certiorari was allowed."¹²

The justice to whom a certiorari is directed cannot move to

11—C. L., § 943. Where a suit was commenced by attachment, whether the *certiorari* discharged the attachment, considered but not decided: *Willson v. Williams*, 18 Wend., 581.

12—C. L., 944. The case is heard on the return alone: *Dooley v. Ellbert*, 47 Mich., 615; 11 N. W., 408. But in his answer to a writ of *certiorari* the justice is only required to make return to the matters specified in the affidavit for the writ: *Lake Superior Building Co. v. Thompson*, 32 Mich., 293. When the allegation of error, is the entire want of evidence upon any specified point, it is the duty of the justice to return fully all the testimony relating thereto: *Hitchcock v. Sutton*, 28 Mich., 86. And in such case it will be presumed that the return does contain all the evidence upon that point: *Ibid.* Where a justice, in his return to a writ of *certiorari*, certifies the evidence as follows: "I do certify the following to have been the evidence before me in the above entitled cause;" *held*, that it must be presumed from such a return that the whole evidence is returned: *Cicotte v. Morse*, 8 Mich., 424. Where only a part of the testimony taken upon a trial was reduced to writing, and the justice was therefore unable to return the whole of it, it was held that the presumption would be that there was sufficient to sustain the judgment: *Gray v. Wilcox*, 56 Mich., 58; 22 N. W., 109.

The return of the justice as to what constitutes the evidence in the case is conclusive, even as against the affidavit for the allowance of the writ: *Rawson v. McElvalne*, 49 Mich., 194; 13 N. W., 513. The return to a writ

must be assumed to be correct: *Young v. Kelsey*, 46 Mich., 414; 9 N. W., 453; *Galloway v. Corbitt*, 52 Mich., 460; 18 N. W., 218; *Mann v. Tyler*, 56 Mich., 564; 23 N. W., 314.

It is not necessary that the return should show that there was an entry of judgment on the verdict of the jury: *Gaines v. Betts*, 2 Doug., 98. But the fact that security for costs was given, together with the original undertaking therefor should be returned with the answer to the writ: *McLean v. Isbell*, 44 Mich., 133; 6 N. W., 210. If the justice fails to return fully as to all the allegations of error in the affidavit for the writ, the remedy is by an application to the court for an order for a further return: *Hitchcock v. Sutton*, 28 Mich., 86; *Marquette and Pacific Rolling Mill Co. v. Morgan*, 41 Mich., 296; 1 N. W., 1045.

A statement appended to the return to a writ of *certiorari* of what purports to be further testimony in the case, which, though signed by the justice, is not dated, and does not otherwise purport to be a part of the return, but is inconsistent with and contradictory of the return itself, and not appearing to be made in pursuance of any order for a further return, will not be considered as a part of the record: *Powers v. Russell*, 26 Mich., 179. A justice cannot supply a jurisdictional fact in his return to a writ of *certiorari* by certifying to its existence when his docket does not show it: *Noyes v. Hillier*, 65 Mich., 636; 32 N. W., 872; *King v. Bates*, 80 Mich., 367; 45 N. W., 147. The appellate court cannot presume that there was no evidence to support a judgment against a return stating that the plain-

quash it. He must obey it at his peril.¹³ If, however, the preliminary steps required by the statute are not all complied with, he may refuse to make a return.¹⁴ The return should contain a concise statement of all the formal proceedings in the cause. The return must also "truly and fully answer to all the facts set forth in the copy of the affidavit." He must return to these facts that they are true or untrue, according to the best of his recollection and belief; and he will not be excused from thus returning on his affidavit that he has no minutes and remembers nothing by which he can so return.¹⁵ The return must contain a complete history of the proceedings in itself. It would be irregular, and would be set aside, if it merely refer to and adopt the affidavit, stating that the facts set forth in it are true or untrue.¹⁶ The justice should return such facts only as are within his own knowledge.¹⁷ Nor is he bound to return as to matters of which he is not presumed to have any knowledge; as, the conduct of the jury after they have retired.¹⁸ The return need not be under seal; it is sufficient if it is under the hand of the justice.¹⁹

"The justice shall cause the certiorari, the bond, and the copy of the affidavit on which such certiorari was allowed, and his return to the same, to be attached together and filed in the office of the clerk of the court from which the writ of certiorari was issued."²⁰

The certiorari, bond and copy of affidavit being attached together, the justice should indorse the writ with a statement to the effect that the execution of the writ appears by the writings therewith returned.

§ 561. **Amended returns.**—"The court may compel such justice to make or amend such return by rule, attachment, or mandamus, as the case may require."²¹

tiff was sworn in his own behalf: Sullivan v. Hall, 86 Mich., 7; 48 N. W., 646. See, Twp. of Fruitport v. Judge of Muskegon Circuit, 90 Mich., 20; 51 N. W., 109.
 13—Van Patten v. Onderkirk, 2 Johns., Cases, 108.
 14—People v. Onondaga C. P., 7 Wend., 516; People *ex rel* Reynolds v. Rensselaer, 11 Wend., 174. So he need not make return if the bond is not filed with him within the statutory period: Sherwood v. Arnold, 80 Mich., 272; 45 N. W., 134.
 15—Schuyler v. Warner, 1 Cow., 59.
 16—Mann v. Swift, 3 Cow., 61.
 17—Mosely v. Landon, 2 Johns., 193.
 18—Anonymous, 3 Calnes, 106.
 19—Scott v. Rushman, 1 Cow., 212, note b.
 20—C. L., § 945.
 21—C. L., § 946. Amended return,

When a rule is obtained in the circuit court for the justice to amend his return, it specifies the particulars in which the return is sought to be amended, and these the return must answer.

§ 562. **Proceedings in the circuit court.**—"When such return shall be so filed with the clerk, the cause may be brought on to argument, at any term of the court thereafter without any assignment or joinder in error, unless there be an allegation of error in fact, and without furnishing any other copy or copies of the affidavit, certiorari, and return to the court or the opposite party, than those filed with the clerk."²²

"The court shall proceed to give judgment in the cause as the right of the matter may appear, without regarding technical omissions, imperfections or defects in the proceedings before the justice, which did not affect the merits; and may affirm or reverse the judgment, in whole or in part, and execution shall issue thereon, as upon other judgments rendered in the circuit or district court."²³

Mann v. Tyler, 56 Mich., 566; 23 N. W., 314.

The circuit court may order a further return of its own motion: Gordon v. Sibley, 59 Mich., 250; 26 N. W., 485.

22—C. L., § 947. See, Berry v. Lowe, 10 Mich., 11; Welch v. Bagg, 12 Mich., 42.

23—C. L., § 948. Gray v. Willcox, 56 Mich., 58-62; 22 N. W., 109. It will be presumed on the hearing in the circuit court that there was evidence to sustain the findings in the court below, though none appears from the return to the *certiorari*, unless the return shows that the *whole* testimony in the case is returned: Gaines v. Betts, 2 Doug., 98; Snow v. Perkins, 2 Mich., 238; see, Cicotte v. Morse, 8 Mich., 424. The circuit court will not, on *certiorari*, reverse a judgment on the ground that there was no evidence to warrant it, 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: Gaines v. Betts, 2 Doug. Mich., 98. The judgment of the justice will not be set aside, for any technical omission, imperfection, or de-

fect that did not go to the merits, nor for any errors that did not and could not have worked an injury to the party complaining. If the alleged error is a total want of evidence to prove some fact necessary to sustain the judgment, the court will look into the testimony to see if there was such evidence. If there was, it will not weigh it, or inquire into its sufficiency, but affirm the judgment. If the return shows no such evidence, and it appears that *all* the evidence before the justice was returned, the judgment will be reversed on the ground that the justice erred, in law, in rendering the judgment he did without evidence: Berry v. Lowe, 10 Mich., 14, 15; Welch v. Bagg, 12 Mich., 41; and see, Hyde v. Nelson, 11 Mich., 353; Higley v. Lant, 3 Mich., 612; Cicotte v. Morse, 8 Mich., 424; Linn v. Roberts, 15 Mich., 443; McGraw v. Schwab, 23 Mich., 12; Parsons v. Dickinson, 23 Mich., 56; Hinman v. Eakins, 26 Mich., 80.

And if the plaintiff's own testimony set forth in the return, shows that he was not entitled to any judgment, the judgment against him will not be reversed for technical errors: Burnham

"If the judgment be affirmed, costs shall be awarded to the defendant in error; if it be reversed, costs shall be awarded to the plaintiff in error; if the judgment be affirmed in part, the costs, or such part as to the court shall seem just, may be awarded to either party."²⁴

"No judgment of a justice shall be reversed merely for the omission or misrecital of an oath, or on account of any fees having been improperly allowed by such justice, nor on account of the informality or insufficiency of any bond that shall have been given by the party bringing the certiorari: Provided, Another bond, to be approved by the court, shall be given within such time as the court shall direct."²⁵

"If a judgment, rendered before a justice, be collected, and

v. Gilder, 34 Mich., 246. A justice's judgment on its merits, should not be reversed on *certiorari*, on the admission or rejection of evidence, unless it clearly appears that the party against whom judgment was given was injured by the ruling: *Whaley v. Gale*, 48 Mich., 193; 12 N. W., 33.

In deciding finally on *certiorari*, all defects not affecting the merits will be disregarded: *Young v. Kelsey*, 46 Mich., 414; 9 N. W., 453; *Whelpley v. Nash*, 46 Mich., 25-6; 8 N. W., 570.

See, further, as to the proceedings on *certiorari* in the circuit court, notes to C. L., § 948.

If the judgment below is approved, interest may be added thereto up to the time of affirmance, and a new judgment may be entered in the circuit court against the plaintiff in the *certiorari* and his sureties for that amount; and such new judgment will stand as a substitute for the judgment rendered by the justice: *McDermid v. Redpath*, 39 Mich., 372. The interest added may include interest upon the costs awarded in the court below: *Whelpley v. Nash*, 46 Mich., 25, 27; 8 N. W., 570.

The law which allows a judgment to be rendered against a surety on appeal or *certiorari* does not make that the only proper method of holding him, and when he objects to such a judgment he cannot complain if it is vacated. And if the bond is sued upon,

a suit against one of the obligors is good if the non-joinder of the others is not pleaded in abatement: *Porter v. Leach*, 56 Mich., 40; 22 N. W. 104.

See, further, as to the judgment to be rendered on *certiorari*: Notes to C. L., §§ 949, 950, and *Dooley v. Ellbert*, 47 Mich., 615; 11 N. W., 408; *Rodman v. Clark*, 81 Mich., 466; 45 N. W., 1001. The practice of resorting to review by *certiorari* to reach errors that can be more justly corrected on appeal is criticized by our supreme court: See, *Galloway v. Corbitt*, 52 Mich., 460; 18 N. W., 218; *Mann v. Tyler*, 56 Mich., 567; 23 N. W., 314; *O'Hara v. Merman*, 79 Mich., 226; 44 N. W., 599; *Stoll v. Padley*, 98 Mich., 18; 56 N. W., 1042; *Forbes L. Mfg. Co. v. Winter*, 107 Mich., 118; 64 N. W., 1053; *Bullock v. Ueberroth*, 121 Mich., 296; 80 N. W., 39, and cases cited in the opinions in these cases.

24—C. L., § 949. Where the judgment is affirmed, that should be the judgment and not a judgment *de novo* entered: *Dooley v. Ellbert*, 47 Mich., 615; 11 N. W., 408. The circuit court cannot render judgment for costs of the suit incurred before justice: *Berry v. Lowe*, 10 Mich., 16.

25—C. L., § 950. *Antiau v. Nadeau*, 58 Mich., 461; 19 N. W., 145. So a failure of the sureties to justify as required by law is not jurisdictional: *Hatch v. Christmas*, 68 Mich., 87; 35 N. W., 833. See, *Stoll v. Padley*, 100 Mich., 405; 59 N. W., 176.

afterwards be reversed, the court shall award restitution of the amount so collected, with seven per cent interest from the time of collection; to justify such award the party claiming shall present satisfactory evidence of the fact of such collection having been made to the court, at the argument of the cause."²⁶

²⁶—C. L., § 951. See, *People ex rel* Doug. Mich., 302. See, *Whelpley v. Willing v. Jackson* Cir. Ct. Judges, 1 Nash, 46 Mich., 25; 8 N. W., 570.

CHAPTER XXIX.

OF APPEALS TO THE CIRCUIT COURT.

§ 563. In what cases may appeal.	§ 568. Payment of costs and fees.
§ 564. The affidavit for.	§ 569. Service of affidavit and bond.
§ 565. Appeal after five days.	§ 570. Return to the appeal.
§ 566. Bond on appeal.	§ 571. Filing return.
§ 567. In case justice vacates office.	§ 572. When appeal not dismissed.

§ 563. In what cases may appeal.—“Any party to a judgment rendered by a justice of the peace, conceiving himself aggrieved thereby, may appeal therefrom to the circuit or district court for the county where the same was rendered, in the following cases:

1. Where final judgment was rendered on an issue of law joined between the parties;
2. Where final judgment was rendered on an issue of fact joined between the parties;
3. Where the defendant did not appear and plead, and final judgment was rendered for the plaintiff on the merits of his claim;
4. Where a judgment of non-suit has been rendered.”¹

1—C. L., § 902. This provision allowing an appeal in case of nonsuit is held not to apply to a voluntary nonsuit as where a plaintiff fails to appear: *Schulte v. Kelly*, 124 Mich., 330; 83 N. W., 405. Where, on the adjourned day, the justice refused to proceed with the cause, *held*, that the refusal might be treated as a judgment of nonsuit, and that an appeal might be taken: *Pattidge v. Lott*, 15 Mich., 251. So, the decision of the justice dismissing a suit on motion for want of jurisdiction, for an alleged defect in the summons, is equivalent to a judgment of nonsuit, and is appealable: *People v. Judge of Wayne Circuit*, 30 Mich., 98. But a party who has put in a stay of execution cannot appeal from the judgment: *People v. Judges of Macomb Circuit Court*,

1 Mich., 134. Nor after a transcript has been filed; *Davison v. Elliott*, 9 Mich., 252. But an appeal which has been dismissed for failure to pay the entry fee may, in the discretion of the circuit court, be reinstated notwithstanding a transcript has been filed and execution issued: *Aldrich v. Judge of Clinton County*, 49 Mich., 609; 14 N. W., 565. The party in interest, and for whose benefit the suit is brought may appeal: *Wilson v. Davis*, 1 Mich., 156. One of several plaintiffs or defendants may appeal, and the refusal of his co-parties to join in the appeal cannot preclude him from appealing in his own behalf: *People on relation of Keal v. Judge of Wayne Circuit*, 36 Mich., 331. The right to appeal is not confined to the party to the record; thus, the assignee of a

§ 564. **The affidavit for appeal.**—"The party appealing under the provisions of the preceding section, shall, within five days after the rendition of the judgment, present to the justice an affidavit made by himself, his agent, or attorney, before any person authorized to administer oaths, stating that such judgment is not in accordance with the just rights of such party, as the person making such affidavit verily believes; and in case there shall be any objection to the process, pleadings, or other proceedings, and to the decision of the justice thereon, which would not be allowed to be made on the trial of the appeal, the same may be set forth specifically in the affidavit."²

note not negotiable, who sues in the name of the payee, is a party within the meaning of the statute, and may appeal: *Lassell, Ex parte*, 8 Cow., 119; see, *People ex rel Seymour v. Monroe C. P.*, 1 Wend., 19. One of several defendants, it is said, may appeal, and the bond recognizing him as impleaded with the others would be proper: *Meech v. Judges, etc.*, 1 Wend., 90; see, *Tower v. Lamb*, 6 Mich., 362. But the whole cause as to all is said to be removed by the appeal: *Bates v. Conkling*, 10 Wend., 389; see, *People ex rel Cross v. Onondaga C. P.*, 7 Cow., 493. Where one of two defendants appealed, neither appearing in the court below, but both joining in a plea and trial on the merits in the appellate court, *held*, that an objection that the appeal was taken by one only was waived: *Shaw v. Moser*, 3 Mich., 71; see, *Tower v. Lamb*, 6 Mich., 362. But taking an appeal is not such an appearance in the cause as waives an objection to the jurisdiction of the justice over the person of the appellant: *Shaw v. Moser*, 3 Mich., 71. Where the plaintiff appeared by his next friend before the justice, and the defendant appealed the cause, and no question being made in the appeal papers as to the regularity of such appearance, it will be assumed in the appellate court that the appointment of the next friend and his appearance before the justice were regular: *Kearney v. Doyle*, 22 Mich., 294. As to amendments after appeal, see, *Evers v. Sager*, 28 Mich., 47. The procedure by appeal rather than by *certiorari*

should be used to reach errors that are committed upon the trial: *Forbes Lithograph Co. v. Winter*, 107 Mich., 116; 64 N. W., 1053; *Bullock v. Ueberroth*, 121 Mich., 296; 80 N. W., 39, and cases cited in the opinions in these cases.

2—C. L., § 903.

The appeal must be taken within five days from the *rendition* of the judgment; and if a justice takes time to render his decision, but does not state at what time within the four days allowed him for that purpose, he will give judgment, he may render it on any day within that time, and the parties must take notice of the time of its rendition in order that they may take their appeal within the five days of its *actual* rendition: *Draper v. Tooker*, 16 Mich., 74. The affidavit and bond on appeal must be presented to the justice within five days after the rendition of the judgment, and the fact that the fifth day falls on Sunday does not authorize the taking of such appeal on the following day: *Dale v. Lavigne*, 31 Mich., 149. See, *Franks v. Smith*, 45 Mich., 326; 7 N. W., 906. But the parties may, by stipulation, enlarge the time for appeal in those cases where the court, on cause shown, might allow an appeal after the time fixed by the statute: *Climie v. Odell*, 20 Mich., 12. The circuit court may allow an appeal after the expiration of the five days where the appellant was led to believe by the opposite party that he was going to appeal: *Potter v. Lapeer Circuit Judge*, 119 Mich., 522; 78 N. W., 536. So the appear-

The affidavit, strictly, should not be entitled at all; but if entitled in the suit in the justice's court, it will not be objec-

ance of appellee in the circuit court and noticing the case for trial waives the objection that the affidavit and bond were not filed in time: *Goodin v. Van Haaften*, 130 Mich., 386; 90 N. W., 23. The want of the affiant's signature to the affidavit will not invalidate it, if it was actually sworn to: *Dickinson v. Simondson*, 25 Mich., 113; *Merrick v. Mayhue*, 40 Mich., 196. When the affidavit is sworn to before the justice who rendered the judgment, his omission to sign the jurat will not defeat the appeal. But if sworn to before any other officer, such an omission would be fatal: See, *Dickinson v. Simondson*, *supra*, and *Bradley v. Andrews*, 51 Mich., 100, 102; 16 N. W., 250. And it seems that the fact that the affidavit was sworn to before a notary who was an attorney for the appellant is not sufficient cause for dismissing the appeal peremptorily: *Ibid.*: *Bradley v. Andrews*, 51 Mich., 100, 16 N. W., 250. And in fact it has been held that the inadvertent omission to make oath to the affidavit is not so fatal as to preclude remedy under C. L., § 924. See, *Hamilton v. Jennison*, Judge, 52 Mich., 409; 18 N. W., 193. And if in such the appellee appears and notices the cause for trial, the error will be waived: *Ibid.*

The affidavit for an appeal, required by the statute, cannot be waived or dispensed with by the appellee. And where the jurat to an affidavit for an appeal was, "Sworn and subscribed this fourth day of May, A. D. 1858, C. . . . P. . . ., justice of the peace," omitting the words "before me," *held*, to be a nullity by reason of the omission, and that the circuit court acquired no jurisdiction of the appeal: *Smart v. Howe*, 3 Mich., 590; see, *ante*, § 51, note 22, and see note to C. L., § 903.

General appeals.—If the affidavit for the appeal is general, and relates only to the judgment on the merits upon an issue of fact, and does not set forth or complain of any matters connected with the process, or any question arising upon it before the justice, nor of any decisions or rulings

of the justice, but complains only of the judgment on the merits, the appeal will carry up only the issue of fact for a retrial; and the appellate court can take no notice of errors in the process or of any erroneous decisions of the justice. Errors relating to the merits alone, can be corrected only by a retrial on the merits in the appellate court: *Chappee v. Thomas*, 5 Mich., 56.

Special appeal.—But a party may avail himself on appeal, of objections to errors in the proceedings and erroneous rulings and decisions of the justice in the course of the cause, distinct from the judgment on the merits; to this extent giving the appeal the characteristics of a *certiorari*. But to give the appeal this effect he must specially set forth in his affidavit, the particular matters and errors complained of; and it seems, that there must have been a decision of the justice upon the process, pleadings or other proceedings, to authorize the deponent to set them forth in the affidavit, or to avail himself of them in this form of appeal: *Chappee v. Thomas*, 5 Mich., 53; see, *McGraw v. Sturgeon*, 29 Mich., 430; *Manhard v. Schott*, 37 Mich., 234. But, on special appeal the party is not confined to the objections actually made before the justice; it is sufficient if the objections are set forth in the affidavit, whether made before the justice or not. And, if the objection is one that goes to the jurisdiction, the party is not obliged to appear before the justice to make it, but may certify it up, either by special appeal or by *certiorari*: *Wright v. Russell*, 19 Mich., 346; see, note to C. L., § 903.

Special appeals can only be to review the action of the justice on points, which would not be allowed to be made on the trial of the appeal: *Dalton v. Laudahn*, 30 Mich., 351. But the statute implies at least, that there must have been a decision of the justice thereon, either expressly or impliedly, to authorize the appellant to set them forth in the affida-

tionable.³ But if entitled in the circuit court, the appeal will be dismissed.⁴

§ 565. Appeal after five days.—"Appeals may be authorized by the circuit court, or by the circuit judge at chambers, after the expiration of five days, when the party making the appeal has been prevented from taking the same by circumstances not under his control. And in all such cases where the party in whose favor such judgment was rendered appears by an attorney or agent it will be sufficient to serve such attorney or agent with the notices of all subsequent proceedings in said cause and all orders made by said court or judge may be served on said attorney or agent. And such service shall have

vlt: *Maxwell v. Deens*, 46 Mich., 37; 8 N. W., 561; *Benjamin v. Dodge*, 50 Mich., 41; 14 N. W., 675; *Peterson v. Fowler*, 76 Mich., 262; 43 N. W., 10.

Special grounds set forth in an affidavit for an appeal will be deemed to be truly stated unless in some way controverted by the return: *Brown v. Kelly*, 20 Mich., 32. See, *Lymburner v. Jenkinson*, 50 Mich., 490; 15 N. W., 562.

A special appeal does not lie where there is no question of jurisdiction, and the case is in condition to be retried on the merits: *Benjamin v. Dodge*, 50 Mich., 41; 14 N. W., 675. Errors of fact must be rectified in some other way: *Lymburner v. Jenkinson*, 50 Mich., 489-90; 15 N. W., 562. That the justice wrongfully held that the plaintiff's declaration was sufficient in law cannot be taken advantage of on special appeal: *Stevens v. Harris*, 99 Mich., 230; 58 N. W., 230.

Rulings of the justice on the admission of evidence are not subject to review in the circuit court on special appeal: *Albert v. Sutton*, 28 Mich., 2; *Webster v. Williams*, 69 Mich., 135; 37 N. W., 62. Nor rulings on the trial concerning the summoning and swearing of witnesses: *McGraw v. Sturgeon*, 29 Mich., 426, 430; *Dalton v. Laudahn*, 30 Mich., 349. Questions which arose on the trial cannot be made the ground of such an appeal for reversing the judgment without a trial at the circuit: *Man-*

hard v. Schott, 37 Mich., 244. The statute does not contemplate a review on special appeal, of errors which do not involve such decisions by the justice, either express or implied, in the exercise of jurisdiction: *Maxwell v. Deens*, 46 Mich., 37; 8 N. W., 561.

Mere irregularities before the justice cannot be considered on special appeals. But if a party wishes to plant himself upon those he must resort to the writ of *certiorari*. Questions of jurisdiction, however, are open to him on special appeal: *Deltz v. Groesbeck*, 32 Mich., 303; *Fowler v. Hyland*, 48 Mich., 179; 12 N. W., 26.

A special appeal takes the case up for retrial on the merits, in case the special objections are not sustained: *Fowler v. Hyland*, 48 Mich., 179; 12 N. W., 26. An order in the appellate court overruling the special appeal and directing that the cause stand for trial on the merits, is not a final judgment from which error will lie to review it: *Brady v. Toledo A. & N. M. Ry. Co.*, 73 Mich., 457; 41 N. W., 503; *Dodge v. Nichols*, — Mich., —; 98 N. W., 737 (Mar., 1904); *Tompkins v. Bowen*, 123 Mich., 377; 82 N. W., 51.

The objection that the attorney for the plaintiff did not prove his authority, is properly raised on special appeal: *Woodbridge v. Robinson*, 49 Mich., 228; 13 N. W., 527.

3—*Whitney v. Warner*, 2 Cow., 499.

4—*Nichols v. Cowles*, 3 Cow., 345; see, dismissal of appeals, *post*, § 572.

the same effect as though the same was made on the party in whose favor such judgment may have been rendered."⁵

§ 566. Bond on appeal.—"The party appealing under the provisions of the preceding section shall also, within five days

5—C. L., § 909. As amended by Laws of 1891, Act 73, p. 77. This amendment of 1891 is not retroactive: *Danville Stove Co. v. Circuit Judge*, 88 Mich., 244; 50 N. W., 140. It was not intended by this section to give a general discretion to the circuit court to allow appeals in any case after five days, where in their judgment it would be equitable, or when the party had made a mistake or drawn an erroneous inference; but only in those cases where the party had been prevented from appealing within the five days by circumstances beyond his control. Thus, where at the close of a trial the justice took time to give judgment, which he rendered the next day, and the party, supposing that he would render judgment on the fourth day, did not inquire what the decision was until the fifth day after said fourth day; *held*, that he was too late to appeal, and that it was not a case within the discretion of the circuit court to allow an appeal: *Draper v. Tooker*, 16 Mich., 74. Nor can the circuit court allow an appeal after a transcript if the judgment has been legally filed: *Davison v. Elliott*, 9 Mich., 252. The fraudulent antedating of a judgment whereby a party is misled as to the time within which he has the right to appeal, thus causing him to lose an appeal, is sufficient ground for the allowance of a special appeal: *Hall v. Howard*, 39 Mich., 219. Circumstances beyond a party's control include a case where he, or some member of his family, is seriously ill: *Braastad v. A. H. Day I. M. Co.*, 54 Mich., 258; 20 N. W., 43. So, where the party did not hear of the judgment until after five days: *Capewell v. Baxter*, 58 Mich., 571; 25 N. W., 493. The absence of the justice is not sufficient to authorize the granting of an appeal after five days unless it appears that he could not take advantage of the provisions of C. L., § 910, by leaving the affidavit and bond with some mem-

ber of the justice's family of suitable age: *Combs v. Judge of Saginaw Circuit*, 99 Mich., 234; 58 N. W., 71. Deception by one's co-defendant is sufficient to justify allowance after five days: *Potter v. Lapeer Circuit Judge*, 119 Mich., 522; 78 N. W., 536. Acceptance of service of notice of application without the state for leave to appeal gives no authority to consider such application: *Danville S. & M. Co. v. Judge of Kent Circuit*, 88 Mich., 244; 50 N. W., 140. The application for the allowance of an appeal, where the five days allowed by law for appealing has expired, although not a regular suit or action, is nevertheless a special proceeding materially affecting the legal rights of the judgment creditor; and the circuit court or judge cannot proceed to allow the appeal without obtaining jurisdiction over the judgment creditor appellee, as in other legal proceedings, and this can be acquired only by personal service of the notice required, and not by mail. Whether, without some statute to authorize it, a substituted service could be had when no other is possible, *quaere*. In applications for leave to appeal, an order to show cause is the better practice, so that the court can see that the hearing shall be put forward long enough to give the opposite party ample time to prepare to show cause against the motion: *McCaslin v. Camp*, 26 Mich., 390; see note to C. L., § 909. The only method of reviewing the action of the circuit court in passing upon the application for leave to appeal is by mandamus: *Vincent v. Bowes*, 78 Mich., 316; 44 N. W., 276. And mandamus will only lie when there has been an abuse of discretion: *Vincent v. Bowes*, *supra*. The Detroit justice's courts act (Local Acts, 1895, Act No. 460), does not give the circuit court discretionary power with respect to dilatory appeals: *Goldhamer v. Wayne Circuit Judge*, 107 Mich., 259; 65 N. W., 97.

after the rendition of the judgment, deliver to the justice a bond or recognizance to the adverse party, in conformity with the following provisions:

First, It shall be in a penalty not less than fifty dollars, and not less than double the amount of the judgment, excluding costs;

Second, It shall recite the judgment so far as to exhibit the names of all the parties, the character in which they prosecuted or defended before the justice, the amount recovered, and the name of the justice;

Third, It shall contain a condition that the appellant will prosecute his appeal with all due diligence to a decision in the circuit court, and that if a judgment be rendered against him in such court, he will pay the amount of such judgment, including all costs, with interest thereon, and if his appeal shall be discontinued or dismissed, that he will pay the amount of the judgment rendered against him, if any, in the justice's court, including all costs, with interest thereon;

Fourth, It shall be executed by the appellant, with one or more sufficient sureties, or by two or more sufficient sureties without the appellant. Such bond or recognizances may be taken by the justice by whom the judgment was rendered, or by any other justice of the peace of the same county, or by the county clerk of the same county,"⁶ etc.

"No justice of the peace or county clerk shall take any bond

6—C. L., § 904; see, *Weiss v. Wayne Judge*, 50 Mich., 158; 15 N. W., 63. Where there are several appellants the bond must be signed by all, or such as do not execute the bond will not be heard in the appellate court: *Jopp v. Kegel*, 83 Mich., 50; 46 N. W., 1027. Plaintiff's appeal bond in a replevin suit is a cumulative remedy in favor of the defendant. It does not supersede or take the place of the replevin bond given on the commencement of the suit: *Brabon v. Pierce*, 34 Mich., 39. On an appeal taken by a corporation, a bond executed by two individual obligors is sufficient, if otherwise regular in form, although one of the obligors is named in the bond as principal instead of surety: *People ex rel. Detroit & B. Plank Road Co. v. Wayne Circuit Judge*, 27 Mich., 303. In appeal cases the parties are not entitled, under C. L., § 929, to introduce new causes of action by amendment or by the filing of new proceedings; still they may do this by stipulation between them, but if such new cause of action is introduced by agreement or stipulation, the sureties in the appeal bond will be discharged: *Evers v. Sager*, 28 Mich., 47. A justice's neglect to make return within ten days after an appeal is perfected, does not preclude a remedy on the appeal bond: *Nowlin v. Tibbits*, 44 Mich., 77; 6 N. W., 118. The bond operates as a stay of proceedings: *Hascall v. Brooks*, 105 Mich., 385; 63 N. W., 413. Judgment against the surety cannot exceed the penalty in the bond: *Vreeland v. Loeckner*, 99 Mich., 93; 57 N. W., 1093. Formal

or recognizance on appeal, as hereinbefore provided, unless the person or persons entering into the same as surety, justifies his or their responsibility in writing and under oath, which justification shall be by said justice indorsed on said bond.”⁷

“Such justification shall not be necessary when the opposite party, or his attorney, admits the pecuniary responsibility of such surety or sureties to be sufficient; and it shall be the duty of the justice, at the time of taking such bond or recognizance, to certify whether the surety justified, or his responsibility was admitted as aforesaid.”⁸

§ 567. In case office of justice vacated before appeal.—

“When the term of office of a justice shall expire, or otherwise become vacant, between the rendition of a judgment by him and the time limited for appealing, such justice may take and approve the bond or recognizance, and it shall be his duty to make return to such appeal in like manner as if he was in office at the time of taking such bond or recognizance, and of making such return.”⁹

§ 568. Payment of costs and fees to the justice.—“The appellant shall, within the said five days, in addition to the making and filing of an affidavit and bond, pay to the justice the costs of the judgment, together with the sum of one dollar for making his return to said appeal, and the farther sum of three dollars as clerk and entry fee, to be paid by said justice to the clerk of the court to which said appeal is taken, which sum, three dollars, shall be paid by the justice to the clerk of the court at the time of delivering the papers pertaining to the appeal, to said clerk, and no appeal shall be allowed until the foregoing conditions are complied with, and all species of appeals ordered or directed by any court or judge, shall be and are hereby made subject to the same provisions of payment.”¹⁰

defects in the appeal bond are waived by general appearance: *Sherwood v. Ionia Circuit Judge*, 107 Mich., 136; 64 N. W., 1045; *Goodin v. Van Haften*, 130 Mich., 386; 90 N. W., 23.

7—C. L., § 905; *Cole v. Wayne Circuit Judge*, 106 Mich., 692; 64 N. W., 741.

8—C. L., § 906.

9—C. L., § 908.

10—C. L., § 907. The costs to be paid are those included in the judgment, and those only: *Ex parte*, *Beadlestone*, 7 Cow., 507. If the plaintiff appeal from a judgment in his favor, he must pay to the justice the costs for which judgment was given; nor can he deduct the fees of witnesses

§ 569. **Service of affidavit and bond.**—"The affidavit and bond or recognizance, in case of the absence from his dwelling house of the justice by whom the judgment was rendered, may be served on any member of his family of suitable age, and the costs and fees may be paid to such person."¹¹

"On such certificate being presented to the officer holding the execution, he shall forthwith release the property, or the body of the party against whom the same was issued, which may have been taken; and if such party may have been committed to prison, upon service of the like certificate upon the jailor, he shall release him from imprisonment."¹²

§ 570. **Return to the appeal.**—"Within ten days after any appeal shall have been made, the justice shall make a return of the proceedings had before him to the circuit or district court for the county, in which shall be stated:

1. The title of the cause, and the character in which the parties prosecuted or defended before him;
2. The demand of the plaintiff; and if his declaration was in writing, a copy thereof shall be set forth;
3. The plea of the defendant, and any notice of set-off or

which he has paid: *People ex rel. Lincoln v. Saratoga C. P.*, 1 Wend., 282. The justice cannot charge the costs; the money must be actually paid: *La Farge, ex parte*, 6 Cow., 61. And paid to the justice; payment to the party in whose favor judgment was rendered, would not avail anything: *Ex parte, Stephens*, 6 Cow., 69. By C. L., § 923, the fact of a return having been made is conclusive evidence that the fees have been paid. The payment of one dollar to the justice for making return to the appeal is not necessarily a jurisdictional fact, since the justice may waive it; but if not paid, or the payment waived by the justice, he is under no obligation to make the return, and no court has the right to compel him to do so, and he may issue execution the same as if no appeal had been attempted: *Wiley v. Judge of Allegan Circuit*, 29 Mich., 487; *Swarthout v. Saginaw Circuit Judge*, 99 Mich., 347; 58 N. W., 315. The justice, while he may waive payment of the fees, cannot waive the payment of the costs, including the jury

fee, if there was one, as a condition of appeal: *Swarthout v. Saginaw Circuit Judge, supra*.

A justice's receipt for "the fees and costs on appeal of case," so binds him that he must make return to the appeal, even though the fee for making it has not in fact been paid. The appellant has a right to rely on the receipt, and cannot be deprived of his appeal by a misunderstanding with the justice: *Stevenson v. Kent Circuit Judge*, 44 Mich., 162; 6 N. W., 217.

This decision was before the amendment of 1883 to § 907.

11—C. L., § 910; see, *Combs v. Saginaw Circuit Judge*, 99 Mich., 234; 58 N. W., 71.

12—C. L., § 911. Where the party against whom the judgment was rendered, had paid the amount of it to the officer having the execution before the service of the certificate, it was held, that the constable was justified in returning the money to the appellant: *Seymour v. Dascome*, 12 Wend., 584. See, *Bushey v. Raths*, 45 Mich., 181; 7 N. W., 802.

matter of defence given by him, and all other proceedings of the parties upon which a trial was had or an issue was formed; and if in writing, copies thereof shall be set forth;

4. If the trial was by jury, the names of the jurors and their verdict;

5. The judgment rendered, and the time of rendering the same; and,

6. The time when the affidavit and bond of recognizance hereinbefore required were delivered to the justice, and the fees of the justice were paid."¹³

"The justice, in addition to the particulars required by the preceding section, shall make a full and complete return as to all matters stated and set forth in such affidavit mentioned in the latter part of the preceding section one hundred and eighty-four, and shall also return copies of all processes, returns, pleadings and affidavits upon which any process issued or motion was made, and so much of the evidence and proceedings as may be necessary fully to exhibit the questions, motions and decisions, made and presented in such cause."¹⁴

13—C. L., § 912. This section makes a provision for the return of all matters required to be returned, where the appeal is on the merits, and the affidavit is not special. And the return provided for in this section, where the affidavit is general and upon the merits only, is not required to contain the process, nor to refer to it. And if returned, the court could not, in such cases, take judicial cognizance of it, because its return is neither required nor authorized, and it would constitute no part of the record upon which the court could act: *Chappee v. Thomas*, 5 Mich., 57, 58; see as to the requirements for a return and the effect of deficiencies therein: *Moore v. Hansen*, 75 Mich., 564; 42 N. W., 981.

14—C. L., § 913. The preceding section 184 is, C. L., § 903; see the section *ante*, § 564. This, C. L., § 913, is intended to apply only to the return in answer to the special affidavit provided for by the latter portion of C. L., § 903, and to compel the justice to make a full and complete return to the special matters contained in the affidavit: *Chappee v. Thomas*, 5 Mich., 57, 58.

Where the return of the justice showed that the cause was tried before him without a jury on the 12th, and that he rendered judgment on the 17th, held that it would not be presumed, in support of the judgment, that the cause was not submitted to him until the 13th, there being nothing to show that such was the fact: *Harrison v. Sager*, 27 Mich., 476; see, also, *Hodges v. Bagg*, 81 Mich., 243; 45 N. W., 841. Where the return fails to state whether the pleadings were oral or written it will be presumed that they were oral, since if they were in writing the statute requires copies to be returned: *Kerr v. Bennett*, 109 Mich., 546; 67 N. W., 564. It is a good return that the declaration was lost and that attached is as near as it can be reproduced: *Carver v. Smith*, 113 Mich., 207; 71 N. W., 528. A return is not fatally defective because the justice has not signed at the end if he has written his own name in the caption: *Smart v. Howe*, 3 Mich., 590. He should make no return of facts coming to his knowledge after the trial: *Savler v. Chipman*, 1 Mich., 116.

The justice should not ordinarily undertake to decide as to the validity of the appeal; but leave it for the determination of the circuit court. But if there be a palpable want of compliance with the provisions of this statute; as, if the affidavit and recognizance are not served within five days after the rendition of the judgment, or the costs and his fees be not paid within that time, he may disregard the appeal, and not make a return. But the justice should in no case undertake to decide, as to the sufficiency, in form, of the bond or recognizance, if one be duly entered into; as the circuit court has the power to amend it, or to allow a new one to be made.

§ 571. Filing return in the circuit court.—"Within ten days after the appeal shall be duly made, the justice shall file with the clerk of the circuit or district court, his return made as above directed, together with all papers filed with him by either party relating to the cause, and the affidavit and bond or recognizance delivered to him by the appellant."¹⁵

§ 572. Under what circumstances appeal shall not be dismissed.—"No appeal shall be dismissed on account of any informality or imperfection in the bond or recognizance, executed by or on behalf of the appellant, if he and his sureties consent to amend the same, or if another sufficient bond, to be approved by the court, shall be filed; and in such case the court shall amend or receive such bond accordingly."¹⁶

"No appeal shall be dismissed on the ground that the costs of the justice have not been paid, nor upon any other ground than such as shall have been expressed in the notice; but in all cases, the fact of a return having been made by a justice, shall be conclusive evidence of such fees having been paid."¹⁷

15—C. L., § 914. Without a return, the circuit court gets no jurisdiction over the cause itself, and cannot try it, though it has jurisdiction to inquire into the facts for the purpose of ascertaining whether the fees to the justice for making the return have been paid or waived by the justice, or whether the bond or recognizance, or the affidavit, has been duly made and filed with the justice, or the appeal in any other way duly taken; and if so, to compel return. But in ascertaining these facts the appellate court must get them from the justice him-

self, by calling upon him, upon cause shown by affidavit, to state the facts bearing on the question: and the court and the parties must upon this question and in this proceeding, be governed by the justice's return to such facts: *Wiley v. Judge, etc.*, 29 Mich., 487.

16—C. L., § 922; *Cole v. Wayne Circuit Judge*, 106 Mich., 694; 64 N. W., 741.

17—C. L., § 923; *Swarthout v. Saginaw Circuit Judge*, 99 Mich., 347; 58 N. W., 315.

"No appeal shall be dismissed on the ground of a defective affidavit, nor because the same does not conform to the provisions of this chapter. Provided, The appellant, his agent or attorney, shall make an affidavit which shall conform to said provisions." ¹⁸

For proceedings to appeal in case of the death, removal or disability of the justice before whom the cause was tried, or of a vacancy in his office, see, C. L., §§ 973 to 977, inclusive.

18—C. L., § 924.

Under these sections, C. L., §§ 922, 924, an appeal from a justice of the peace cannot be dismissed absolutely for defects and informalities in the affidavit and bond for appeal, where the appellant tenders a new and proper affidavit and bond. The proper practice on a motion to dismiss an appeal for such defects, is to make an order ~~not~~, that the appeal be dismissed unless within a time specified a new and correct affidavit and bond be filed: *People v. Judge of Wayne Circuit*, 27 Mich., 303.

Where the affidavit for appeal was sworn to before a notary who was the

attorney for the appellant, it was held that the defect was one of those which might be cured by filing a new affidavit: *Bradley v. Andrews*, 51 Mich., 100; 16 N. W., 250. And so where there was an entire omission to make oath to the affidavit: *Hamilton v. Jennison, Judge*, 52 Mich., 409; 18 N. W., 193. The defective affidavit which under this section (§ 924) the party is to be allowed to supplant with one which is sufficient, is an affidavit which is fatally defective; for if it is not fatally defective, it is of course sufficient, and no new one is needed: *Ibid.* See notes to this, C. L., § 924.

CHAPTER XXX.

OF AMENDMENTS.

- | | |
|---|-------------------------------------|
| § 573. Power of court to allow. | § 579. After verdict. |
| § 574. The statute liberally construed. | § 580. Of judgments and executions. |
| § 575. Of process. | § 581. Death before judgment. |
| § 576. Of declarations. | § 582. Death after judgment. |
| § 577. Of pleas. | § 583. Marriage before judgment. |
| § 578. May be made on the trial. | |

§ 573. The power of the court to allow amendments.—A justice's court possesses the same power as to amendments, as courts of record,⁵ before judgment.⁶

"The court in which any action shall be pending, shall have power to amend any process, pleading, or proceeding in such action, either in form or in substance, for the furtherance of justice, on such terms as shall be just, at any time before judgment rendered therein."⁷

§ 574. The statute remedial and liberally construed.—In the language of Campbell, J., "this statute of amendments is the basis of all modern relaxation of rules of practice; and the manifest object of that statute is, to give parties who are met with such objections as ought to have been raised by demurrer on a trial, the right of amendment on reasonable terms, and to make a verdict, where no point has been previously made at all, valid to rectify all defects that are not so radical as to leave nothing to amend, and to treat the record as if it had been actually amended."⁸ This statute has uniformly received a liberal construction in the carrying out of the object so declared.⁹ Amendments which deprive the

5—Brace v. Benson, 10 Wend., 213; W. Ry. Co., 77 Mich., 136, 154; 43 N. W., 911.
Babcock v. Lipe, 1 Denio, 139.

6—Near v. Van Alstine, 14 Wend., 9—Beecher v. Wayne Circuit Judges, 230; see, Farrand v. Bentley, 6 Mich., 70 Mich., 363; 38 N. W., 322; Portsmouth Sav. Bk. v. Hart, Circuit Judge, 282-4. 83 Mich., 646; 47 N. W., 595; Smith

7—C. L., § 10268. Attachment affidavits cannot be amended: Freer v. v. Pinney, 86 Mich., 492; 49 N. W., White, 91 Mich., 74; 51 N. W., 807. 305; Smith S. & Co. v. Grosslight, 123

8—Schindler v. Milwaukee L. S. & Mich., 87; 81 N. W., 975.

opposite party of no substantial right and do not take him by surprise should, if in the furtherance of justice, be allowed;¹⁰ amendments will not be allowed to prejudice third persons as to rights acquired before the amendments.¹¹ The matter of amendment under this statute is submitted to the discretion of the trial court and its action will not be reviewed except for abuse of that discretion.¹² This statute is applicable to statutory proceedings as well as to proceedings according to the course of the common law.¹³ The court may allow an amendment of a disclosure in a garnishee case at any time before judgment upon due notice to the opposite party.¹⁴ Where a defect is such that an amendment would have been permitted if raised on the trial an objection based thereon raised for the first time on appeal, will not be considered.¹⁵ The provisions of this statute are as applicable to justice's courts as to courts of record.¹⁶ The action of the trial court upon questions of amendment will not be reviewed upon mandamus.¹⁷

§ 575. **Amendments of process.**—The date of a summons may be amended.¹⁸ A mistake in, or the omission of the return day, cannot be amended. If the amount claimed in the summons exceed one hundred dollars, or three hundred dollars, as the case may be, the summons would be a nullity, and could not be amended; it would be otherwise, probably, if no sum

10—*People v. La Grange Twp. Bd.*, 2 Mich., 191; *Lyman v. Becannon*, 29 Mich., 466; *Collins v. Beecher*, 45 Mich., 436; 8 N. W., 97; *Chapman v. Colby*, 47 Mich., 47; 10 N. W., 74; *Smith v. Sherman*, 52 Mich., 637; 18 N. W., 394; *Portsmouth Sav. Bk. v. Hart*, Circuit Judge, 83 Mich., 651; 47 N. W., 595; *Wood v. Metropolitan L. Ins. Co.*, 96 Mich., 437; 56 N. W., 8; *Tuller v. Ginsburg*, 99 Mich., 137; 57 N. W., 1099; *Edwards v. Three Rivers*, 102 Mich., 154; 60 N. W., 454; *Hoban v. Cable*, 102 Mich., 213; 60 N. W., 466.

11—*Montgomery v. Merrill*, 36 Mich., 97.

12—*Pratt v. Montcalm Circuit Judge*, 105 Mich., 499; 63 N. W., 506, and cases cited in the opinion; *Hoyt v. Wayne Circuit Judge*, 117 Mich., 172; 75 N. W., 295.

13—To attachment proceedings: *Barger v. Smith*, 41 Mich., 144; 1 N. W., 992; see, *Kidd v. Dougherty*, 59 Mich., 244; 26 N. W., 510, and *Sarmiento v. The Catherine C.*, 110 Mich., 120; 67 N. W., 1085.

14—*Dunn v. Detroit Savings Bk.*, 118 Mich., 547; 77 N. W., 6.

15—*Foley v. Dwyer*, 122 Mich., 587; 81 N. W., 569.

16—*Kidd v. Dougherty*, 59 Mich., 243; 26 N. W., 510; *Barber v. Smith*, 41 Mich., 144; 1 N. W., 992.

17—*St. Clair Tunnel Co. v. St. Clair Circuit Judge*, 114 Mich., 417; 72 N. W., 249.

18—See, *ante*, § 37; *Bradbury v. Van Nostrand*, 45 Barb., 194; see *Arnold v. Maltby*, 4 Denio, 498.

were mentioned.¹⁹ Where the christian name of one of the plaintiffs in the summons did not agree with the name mentioned in the written direction to the justice to issue it, it was held that the summons might be amended by inserting the right name.²⁰ An attachment may be amended by inserting the amount of the debt sworn to which the justice has omitted to insert at the time of issuing the writ.²¹

§ 576. **Amendment of declarations.**—While the parties are forming the pleadings to join issue, the justice may and ought to allow either party to amend, until the pleadings are rendered perfect. Where non-joinder of other defendants is pleaded in abatement, the plaintiff cannot amend his declaration by adding the name omitted.²² Where a fictitious name is used, and there is a plea of misnomer interposed, or the defendant's name is otherwise ascertained, the declaration and summons or other process, etc., may be amended according to the truth.²³ In a suit by or against a copartnership, if the names of all the several partners are not known, it may be commenced in the partnership name of the plaintiffs or defendants, and the plaintiffs or defendants shall have the right at any time before pleadings are closed to amend the same by inserting the names of the parties composing such copartnership.²⁴

A declaration may be amended after issue joined and the adjournment of the cause even, by adding a new count.²⁵ But

19—See, *ante*, § 37. A summons, it seems, cannot be amended by increasing the amount of damages claimed, after verdict: *Kenyon v. Woodward*, 16 Mich., 326.

20—*Brace v. Benson*, 10 Wend., 213; see, *Stanton v. Leland*, 4 E. D. Smith, 88; *Agreda v. Faulberg*, 3 *Ibid.*, 179; *Final v. Backus*, 18 Mich., 218, 229.

21—*Near v. Van Alstine*, 14 Wend., 230; and *ante*, § 80; as to amendment of process, see, *ante*, § 32, note 30.

22—*The Commission Co. v. Russ*, 8 Cow., 122.

23—See, *ante*, § 29; C. L., § 765.

24—C. L., § 764; *ante*, § 24; see, *Kimball v. Vroman*, 35 Mich., 310. For other cases illustrating the application of this statute, see, *Willett v.*

Michigan C. Ry. Co., 114 Mich., 411; 72 N. W., 260; *Arndt v. Bourke*, 120 Mich., 263; 79 N. W., 190; *Hathaway v. Detroit, T. & M. Ry. Co.*, 124 Mich., 610; 83 N. W., 598; *Brown v. Owosso*, 130 Mich., 107; 89 N. W., 568.

25—*Babcock v. Lipe*, 1 Denio, 139. And a declaration may be amended by adding new counts, so as to allege the contract or wrong in a different manner, but a new cause of action cannot be introduced by amendment: *People ex rel, Drew v. Judges of Washtenaw*, 1 Doug., Mich., 434. "So long as the plaintiff adheres to the contract or injury originally declared upon, an alteration of the modes in which the defendant has broken the contract or caused the injury is not an introduction of a new cause of action. The

in such case the justice should require the plaintiff to consent to an adjournment, unless the defendant shall not desire one.²⁶

§ 577. **Amending pleas.**—The defendant may amend by *adding a plea* or notice after issue joined. The justice in such case should require his consent to an adjournment, and if he refuses this, should not allow the amendment.²⁷ And a defendant may be allowed to amend by pleading the statute of limitations.²⁸ A plea in abatement cannot be amended.²⁹

test is whether the proposed amendment is a different matter—another subject of controversy—or the same matter more fully or differently laid to meet the possible scope and varying phases of the testimony": *Strang v. Branch Circuit Judge*, 108 Mich., 229; 65 N. W., 969; *Stanley v. Anderson*, 107 Mich., 384; 65 N. W., 247. A declaration on the common counts cannot be amended so as to set forth a new and distinct cause of action upon a special contract which has become barred by the statute of limitations since the original declaration was filed: *People, etc., v. Judge of Newaygo Circuit*, 27 Mich., 138; see, *People ex rel, Long v. Wayne Cir. Judge*, 27 Mich., 164; *Pratt v. Judge of Montcalm Circuit*, 105 Mich., 499; 63 N. W., 506; *Nugent v. Judge of Kent Circuit*, 93 Mich., 462; 53 N. W., 620; *Flint & P. M. Ry. Co. v. Wayne Circuit Judge*, 108 Mich., 80; 65 N. W., 583.

But if proof of the matter introduced by the amendment might be given under the declaration before amendment it may be allowed, though the statute has run: *Flint & P. M. Ry. Co. v. Wayne Circuit Judge*, 108 Mich., 80; 65 N. W., 583. Nor can a declaration be so amended as to change the cause of action, as, from trover to assumpsit: *People v. Judge of Wayne Co.*, 12 Mich., 206. Or by adding count for tort to a declaration in assumpsit: *Doyles v. Pelton*, — Mich., —; 96 N. W., 483 (Sept., 1903). Nor, after verdict, can the amount of damages claimed in the declaration be increased by amendment: *Kenyon v. Woodward*, 16 Mich., 326. As to amending as to damages

see, *ante*, p. 33. The statute, C. L., § 920, allowing amendments to the pleadings, or the filing of new pleadings in the circuit court or upon an appeal from a justice's court, does not warrant the introduction of a new cause of action, or such a variation of the plaintiff's claim as would have ousted the justice of jurisdiction, if made in the court below, as by increasing the ad-damnum beyond the limit of his jurisdiction: *Evers v. Sager*, 28 Mich., 47.

26—*Colvin v. Corwin*, 15 Wend., 537; *Jennings v. Sheldon*, 53 Mich., 431; 19 N. W., 132. As to amending on trial on account of variance between proofs and pleadings: See, *ante*, § 356. A bill of particulars may be amended: *ante*, § 288.

27—*Colvin v. Corwin*, 15 Wend., 537. In a suit upon a promissory note, the court has power to allow defendant to amend his plea by putting in an affidavit denying the execution of the note declared upon: *Polhemus v. Ann Arbor Savings Bank*, 27 Mich., 44; *Freeman v. Ellison*, 37 Mich., 458. So an amendment of the plea, in an action on a bond for the jail limits, so as to be able to show that the principal was within the jail limits when the suit was begun should be allowed: *Smith S. & Co. v. Grosslight*, 123 Mich., 87; 81 N. W., 975. See, further: *Baker v. Michigan Mut. P. Assn.*, 118 Mich., 431; 76 N. W., 970.

28—*Ripley v. Davis*, 15 Mich., 75, 79. But such an amendment is in the discretion of the justice: *Ibid.*; *Shank v. Woodworth*, 111 Mich., 642; 70 N. W., 140; see, *ante*, § 225, note 23.

29—*Trinder v. Durant*, 5 Wend., 72.

§ 578. **May be made on the trial.**—Amendments on the trial may be allowed by the justice where the ends of justice will be promoted thereby, but upon such terms as will protect the rights of the opposite party.³⁰

“If such amendment be made to any pleading in matter of substance the adverse party shall be allowed an opportunity, according to the course and practice of the court, to answer the pleading so amended.”³¹ An amendment may entitle the opposite party to an adjournment.

Bonds required in legal proceedings, may also be amended.³²

§ 579. **Amendment after verdict.**—“When a verdict shall have been rendered in any cause the judgment thereon shall not be stayed, nor shall any judgment upon confession, default, *nihil dicit*, on *non sum informatus*, be reversed, impaired or in any way affected, by reason of the following imperfections, omissions, defects, matters or things, or any of them, in the pleadings, process, record or proceedings, namely:

1. For any default or defect in process; or for misconceiving any process, or awarding the same to a wrong officer; or for the want of any suggestion for awarding process, or for any insufficient suggestion;

2. For any imperfect or insufficient return of any sheriff or other officer, or that the name of such officer is not set to any return actually made by him;

3. For any variance between the original writ, bill, plaint and declaration, or between either of them;

4. For any mispleading, miscontinuance or discontinuance, insufficient pleading or misjoinder of issue;

5. For the want of any warrant of attorney by either party; except in cases of judgment by confession, where such warrant is expressly required by law;

30—Hurtford v. Holmes, 3 Mich., 465. And so in case of variance: *ante*, § 355. An amendment of the declaration may be allowed at the commencement of the trial, when it is objected that the declaration sets forth no cause of action. And it is in the discretion of the court to allow an amendment to the declaration after the evidence is all in, when the object

is merely to avoid a variance, if evidence of the whole transaction has been given, and the amendment could not tend to defeat the ends of justice or operate as a hardship or surprise upon the defendant: Detroit, Hillsdale & Indiana Ry. Co. v. Forbes, 30 Mich., 165.

31—C. L., § 10269.

32—C. L., § 10410.

6. For any party under twenty-one years of age, having appeared by attorney, if the verdict or judgment be for him;

7. For the want of any allegation or averment on account of which omission, a special demurrer could have been maintained;

8. For omitting any allegation or averment of any matter, without proving which the jury ought not to have given such verdict;

9. For any mistake in the name of any party or person, or in any sum of money; or in the description of any property; or in reciting or stating any day, month or year, when the correct name, time, sum or description shall have been once rightly alleged, in any of the pleadings or proceedings;

10. For a mistake in the name of any juror or officer;

11. For the want of a right venue, if the cause was tried by a jury of the proper county;

12. For any informality in entering a judgment, or making up the record thereof; or in any continuance or other entry upon such record;

13. For any other default or negligence of any clerk or officer of the court, or of the parties, or their counsellors or attorneys, by which neither party shall have been prejudiced."³³

"The omissions, imperfections, variances and defects in the preceding sections of this chapter enumerated, and all others, of the like nature, not being against the right and justice of the matter of the suit, and not altering the issue between the parties or the trial, shall be supplied and amended by the court where the judgment shall be given, or by the court into which such judgment shall be removed by writ of errors."³⁴

33—C. L., § 10272.

Subdiv. 1. Bogue v. Prentiss, 47 Mich., 124; 10 N. W., 136; Coe v. Hinkley, 109 Mich., 608; 67 N. W., 915.

Subdiv. 4. Elliott v. Farwell, 44 Mich., 186; 6 N. W., 234; Schafer v. Boyce, 41 Mich., 256; 2 N. W., 1.

Subdiv. 5. Benallick v. People, 31 Mich., 204.

Subdiv. 7. Hoard v. Little, 7 Mich., 468; Kean v. Mitchell, 13 Mich., 213; Smith v. Cowles, 123 Mich., 4; 81 N. W., 916.

Subdiv. 8. Barton v. Gray, 57 Mich., 623; 24 N. W., 638.

Subdiv. 9. Bole v. S. & M. Lumber Co., 77 Mich., 239; 43 N. W., 873.

Subdiv. 11. Grand Rapids & I. Ry. Co. v. Southwick, 30 Mich., 446.

Subdiv. 12. Ferton v. Feller, 33 Mich., 199; Savings Bank v. Widdicombe, 114 Mich., 639; 72 N. W., 615.

Subdiv. 13. Bogue v. Prentiss, 47 Mich., 124; 10 N. W., 136; Bewick v. Fletcher, 39 Mich., 29; Coe v. Hinkley, 109 Mich., 608; 67 N. W., 915.

34—C. L., § 10273; and see notes to this section in Comp. Laws.

This statute of jeofails, including § 10270 (providing what defects may be cured after judgment) must be read as a whole and reaches formal defects only or those by which "neither party shall have been prejudiced."³⁵

§ 580. **Amendment of judgment and executions.**—Where the justice, after the trial, and while the parties were present, made up, *entered in his docket*, and declared judgment for the plaintiff for \$49.98 damages, besides costs, and the justice on his return home from the place of trial, discovering that he had made a mistake of ten dollars in favor of the plaintiffs, altered his docket accordingly; the court held that the judgment was perfect and complete before the parties separated, that his power did not extend to the amendment or alteration of a judgment after it had been perfected, that that could not be done, even if the parties were present, without their consent.³⁶

An amendment of an execution returnable in thirty instead of sixty days, cannot be made after it has been levied upon property. The execution was void, and no protection even to the officer.³⁷

"All returns made by any sheriff or other officer, or by any court or subordinate tribunal, to any court, may be amended in matter of form by the court to which such returns shall be made, in their discretion, as well before as after judgment."³⁸

§ 581. **Death before judgment.**—If a sole plaintiff or defendant die before final judgment, the action abates. But when there are several plaintiffs or defendants in any personal action, the cause of which survives, either by the common law, or by the provisions of this chapter, and any of them shall die before

35—*Denison v. Smith*, 33 Mich., 158.

36—*People v. Delaware*, C. P., 18 Wend., 558; see, *Sperry v. Major*, 1 E. D. Smith, 361. After the rendering and recording of a judgment, the jurisdiction of the justice to amend it has ceased. The justice could not correct the name of the defendant by amendment, even with his consent: *Foster v. Alden*, 21 Mich., 507; see, *O'Brien v. Tallman*, 36 Mich., 13.

37—*Toof v. Bentley*, 5 Wend., 276.

An execution cannot be amended after it has been levied or executed: *Ibid.*

38—C. L., § 10271. A justice may permit a constable to amend his return to a summons: *Perry v. Tynen*, 22 Barb., 137. And so the return to an attachment, or the inventory: *Churchill v. Marsh*, 4 E. D. Smith, 369; *Wilcox v. Sweet*, 24 Mich., 355; *Haynes v. Knowles*, 36 Mich., 409; *Kidd v. Dougherty*, 59 Mich., 243; 26 N. W., 510.

final judgment, the action shall proceed at the suit of the surviving plaintiff or against the surviving defendant, as the case may be.³⁹

§ 582. Death after judgment.—If a sole plaintiff or defendant die after judgment and before execution, the action is not thereby abated; but an action must be brought on the judgment, before an execution can issue.⁴⁰ “When an action is authorized or directed by law to be brought by or in the name of a public officer, or by any trustee appointed by virtue of any statute, his death or removal shall not abate the suit, but the same may be continued by his successor, who shall be substituted for that purpose by the court, and a suggestion of such substitution shall be entered on the record.”⁴¹

§ 583. Marriage before judgment.—By statute, when any action is brought by an unmarried woman, either alone or jointly with others, and she shall be married before final judgment, her husband may, on his own motion, be admitted as a party to prosecute the suit with her, and with the other plaintiffs, if there be any, in like manner as if he had originally joined in the suit.⁴²

“If a female defendant marry at any time before final judgment, her husband may, on his own application, or on the application of the plaintiff, be made a co-defendant in the suit; but if such husband be made a defendant on the application of the plaintiff, he shall have the same right to contest the fact of his marriage, as if the suit had been originally brought against him as husband of such female defendant.”⁴³

If the husband appear and consent to be made co-defendant, that would give the justice jurisdiction over him; but there is no mode by which he can be compulsorily made to appear in such case, as defendant in an action before a justice of the peace.⁴⁴

39—C. L., § 10121. In suit against principal and sureties on a bond the death of the principal does not defeat the suit as against the sureties: *Healy v. Newton*, 96 Mich., 228; 55 N. W., 666. The administrator of a surviving partner, one of whom dies pending the suit, is not a necessary party: *Van Kleeck v. McCabe*, 87 Mich., 599; 49 N. W., 872.

40—*Johnson v. Parmele*, 17 Johns., 271; see, *Woodcock v. Bennet*, 1 Cow., 771; and *ante*, § 509.

41—C. L., § 10132.

42—C. L., § 10130. As to suits by married women: See, *ante*, § 178.

43—C. L., § 10131.

44—*Colegrove v. Breed*, 2 Denio, 125.

CHAPTER XXXI.

OF ACTIONS BY AND AGAINST EXECUTORS AND ADMINISTRATORS.

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| § 584. In what cases may sue in justice's court. | § 586. Actions for tort. |
| § 585. On contract, with executors. | § 587. Declarations by executors. |
| | § 588. The evidence. |

§ 584. In what cases may sue in justice's court.—Actions against executors and administrators as such, except in the cases specially provided by law, are not cognizable by justices of the peace.¹ Jurisdiction to inquire into and settle claims against the estate of the deceased is vested in the probate court, and no action can be commenced against an executor or administrator, except actions of ejectment, or other actions to recover the seizin or possession of real estate, and actions of replevin.² But, in a suit by executors or administrators before a justice, on a demand of the estate, the defendant may set off any claim he may have against the deceased, and if the set-off is established, and the defendant is entitled to judgment, such judgment must be rendered against the plaintiffs in their representative character, &c.³

Executors and administrators may sue, but cannot be sued as such in justice's court.

In the case of personal contracts which *run not with the land*, where the party with whom they were made is dead, the executor of such party is entitled to maintain an action for the breach of them. But it is otherwise if the covenants run with the land.⁴

1—C. L., § 704. Justices of the peace have no jurisdiction in suits against executors and administrators, either as principal defendants or garnishees for the recovery of the distributive amounts due creditors under C. L., § 9408: Basom v. Taylor, 39 Mich., 682.

2—C. L., § 9381; Singer Mfg. Co. v. Benjamin, 55 Mich., 330, 21 N. W., 358; 23 N. W., 25; Willard v. Van Leeuwen, 56 Mich., 17; 22 N. W., 185. The manifest object of these statutes is to protect the executor and administrator from being harassed with suits by creditors of the estate and compel presentation of claims before commissioners, on claims, and at the same time permit the trial of title to real and personal property during the settlement of the estate: Singer Mfg. Co. v. Benjamin, 55 Mich., 330; 21 N. W., 358; 23 N. W., 25.

3—C. L., § 780.

4—Webb v. Russell, 8 Term. R., 401. 403; Brandon v. Pate, 2 H. Bl., 310.

Executors may sue in their representative character, in all cases where the money, when recovered, would be assets.⁵ Such personal actions as are founded upon any obligation, contract, debt, covenant, or other duty, survive the death of the testator, and are transmitted to his executor.⁶

The common law rule, that *personal actions die with the person*, has never been applied to causes of action on contracts. But no action can be maintained by an executor or administrator upon an express or implied promise to the deceased where the damage consisted entirely in the personal suffering of the deceased, without any injury to his personal estate. Thus, for a breach of promise of marriage merely.⁷

Replevin will lie for or against executors, where the goods taken away continue still in specie in the hands of the wrongdoer, or of his executor.⁸

§ 585. On contracts made with executors, etc.—Executors or administrators may sue on contracts entered into with themselves, in all cases where the money, when recovered, would be assets. An executor may sue for goods sold by him as executor;⁹ for money paid by him as such;¹⁰ for money had and received to his use as executor;¹¹ upon an account stated with him respecting money due to him as executor;¹² for money lent by him as executor.¹³

The personal representatives may also sue in many cases upon a cause of action occurring in their own time, upon a contract made with the deceased in his life-time, on which the deceased himself could not have sued. Thus, if A covenant with B to make him a lease of certain lands by a certain day, and B dies before the day, and before a lease is made, upon refusal on the day to grant the lease to the executor, he may sue on the covenant.¹⁴

5—King v. Thom, 1 Term. R., 487;
Petrie v. Hannay, 3 *Ibid.*, 659.

6—Wheatly v. Lane, 1 Saund., 216,
a. n., 1.

7—Chamberlain v. Williamson, 2 M.
& S., 408.

8—LeMeson v. Dixon, W. Jon., 173;
Wheatly v. Lane, 1 Saund., 217, n. 1.

9—Cowell v. Watts, 6 East., 405.

10—Ord v. Fenwick, 3 East., 104.

11—Petrie v. Hannay, 3 Term. R.,
659; Smith v. Barrow, 2 *Ibid.*, 477.

12—Heashall v. Roberts, 5 East.,
150; Richardson v. Griffin, 2 Chitt. R.,
325.

13—Webster v. Spencer, 3 B. & A.,
365.

14—Went. Exrs., 188; 1 Saund. Pl.
& Ev., 5 Am. ed., 1110.

§ 586. **Actions by, for torts.**—It is a maxim of the common law that *actio personalis moritur cum persona*. Therefore, at common law, executors could not sue in the case of torts. The statute has very materially changed the rule of the common law. It provides that in addition to the actions which survive by the common law, the following shall survive, that is to say: actions of replevin and trover, actions for assault and battery, or for false imprisonment, or for goods taken and carried away, and actions for negligent injuries to the person, and for damage done to real and personal estate.¹⁵ When any action mentioned in the preceding section shall be prosecuted to judgment *against* the executor or administrator, the plaintiff shall be entitled to recover only for the value of the goods taken, or for the damage actually sustained, without any vindictive or exemplary damages, or damages for any alleged outrage to the feelings of the injured party.¹⁶ By statute enacted in 1897,¹⁷ it is provided that *assumpsit* will lie to recover for an injury to the person, property or rights of any party, resulting from the fraudulent representations or conduct of another, in all cases where an action on the case for fraud or deceit might by law be brought; and that such actions should survive. Any action for the malfeasance, misfeasance, or non-feasance of a sheriff or any of his deputies may be prosecuted against the executors or adminis-

15—C. L., § 10117. See, *Bigelow v. Kalamazoo*, 97 Mich., 121, 125; 56 N. W., 339, and *Van Brunt v. Cincinnati, J. & M. Ry. Co.*, 78 Mich., 530; 44 N. W., 321. That clause of this statute with reference to "damage done to real and personal estate" was intended to include only those cases where the injury is occasioned to property by the direct wrongful act of a party upon the property: *Stebbins v. Dean*, 82 Mich., 385; 46 N. W., 778. An action for malpractice survives: *Norris v. Judge of Kent County*, 100 Mich., 256; 58 N. W., 1006. The right of action for negligent injuries given by this statute is an entirely different action from that given to personal representatives under C. L., § 10428, for pecuniary injury resulting from his negligent killing: *Hurst, Admr., v. Detroit City Ry.*, 84 Mich., 539; 48 N. W., 44.

Actions for injuries sustained from defective highways given by C. L., § 3441, survive by virtue of this section 10117; *Rachs v. Detroit*, 90 Mich., 92; 51 N. W., 360; *Roberts v. Detroit*, 102 Mich., 67; 60 N. W., 450. An executor or administrator may bring the action when the right accrued but was not sued upon in the decedent's lifetime: *Rogers v. Windoes*, 48 Mich., 628; 12 N. W., 882.

16—C. L., § 10118.

17—C. L., §§ 10421 and 10422. A declaration under this statute should plead the statute though it is not essential that it should: *Hallett v. Gordon*, 128 Mich., 364; 87 N. W., 261. An action will lie under this statute against an agent for fraudulent representations by which plaintiff was induced to contract with the principal: *Hallett v. Gordon*, *supra*.

trators of such sheriff, in like manner as if the cause of action survived at common law.¹⁸

§ 587. **Declarations in actions by executors, etc.**—In any declaration by an executor or administrator, as such, he should describe himself accordingly in the commencement, though it will be sufficient if the fact appear in other parts of the declaration.¹⁹ But when the cause of action accrues after the death of the testator, or intestate, the executor or administrator may sue as such or not, at his option.²⁰ Executors who contract for the sale of their testator's effects, or make any other agreement in their representative character, are not bound to declare in that capacity, but may sue in their individual right.²¹

In stating a debt or promise to an administrator or executor, the word "as" executor, &c., must be inserted, or the omission will be fatal even after verdict.²² It is not enough to say "executor," or "being executor."²³ In actions of debt, the words "owes to" should be omitted in the commencement of

18—C. L., § 2588.

19—*Gallant v. Bonteflower*, 3 Doug. (Eng.) 36; see, *Patchen v. Willson*, 4 Hill, 57.

20—*Ibid.*; and *Grissel v. Robinson*, 3 Bing. N. C., 10; see, *Bright v. Currie*, 5 Sandf., 433; and cases cited. If the goods of the deceased be tortiously taken or wrongfully converted after his death, the executor or administrator may sue for them in his own name without describing himself as executor or administrator: *Patchen v. Willson*, 4 Hill, 57; *Reynolds v. Collin*, 3 Hill, 441. And an executor can maintain a suit in his own name or as executor on a note given to him as executor for a debt due to the testator at the time of his decease, but if such action is brought by the executor in his own name, the defendant cannot set off a demand which existed against the testator at the time of his death: *Merritt v. Seaman*, 6 N. Y., 168; *Root v. Taylor*, 20 John., 137; *Balley v. Burton*, 8 Wend., 350; *Mercen v. Smith*, 2 Hill, 210. It is competent for an executor or administrator to sue either in his individual or representative character, for money

had and received after the death of the testator or intestate, for the use of the estate, but in order to recover for money received in the lifetime of the deceased, the executor or administrator is required to sue in his representative character, and to allege that it was received to the use of the deceased: *Barnum v. Stone*, 27 Mich., 334.

21—*Bassington v. Ault*, 2 Bing., 177.

22—*Heashall v. Roberts*, 5 East., 150; *Powley v. Newton*, 2 Marsh., 151.

23—*Ibid.*; see *Middlesworth v. Nixon*, 2 Mich., 425. Where the declaration commences "C.... H. M...., executor of the last will and testament of J.... S...., deceased, plaintiff in this suit, by A.... K...., his attorney, complains," &c., but nowhere else in the declaration described the plaintiff *as executor*; held, that the suit was brought by the plaintiff in his individual capacity merely, and that the words "executor of," &c., were to be regarded merely as a description of the person of the plaintiff, and did not constitute it the declaration of the plaintiff *as executor*: *Merritt v. Seaman*, 2 Selden, 168, 171.

the declaration; it should be that the defendant "detains" only,²⁴ where it was held that the allegation might be rejected.

If the plaintiff sue as executor or administrator in trespass to the goods of the deceased, after his death, he may declare that the deceased was possessed of the goods, and the trespass committed after his death, to the damage of the executors or administrators,²⁵ or as the property in the goods draws to it the possession in law, they may declare on their own possession as executors.²⁶ So in trover, where the goods are taken and converted after the testator's death, and before the executor has obtained possession of them, he may either sue in his own name without alleging himself executor,²⁷ or he may sue as executor, and declare either that the testator was possessed of the goods, and the defendant after his death converted them, or he may allege that he himself was possessed as executor, and the defendant converted them.²⁸

After the conclusion, to the damage, &c., a profert of the letters testamentary, or letters of administration, should be made; unless where the plaintiff is unnecessarily described as executor. But the omission is ground of special demurrer only.²⁹

If it is material for the plaintiff to avail himself of a promise or acknowledgment, or other cause of action, since the death of the testator, a count to meet it should be inserted.³⁰

The estate of the testator or intestate vests in the executor or administrator from the time of the death, and the letters testamentary or of administration relate back to that time, and authorize the bringing of any appropriate action in relation to the property, for any cause of action which may have existed or arisen between the death and granting of letters.³¹

24—Collett v. Collett, 2 Dowl., 211; Hope v. Bague, 3 East., 2.

25—1 Saund. Pl. & Ev., 5 Am. ed., 1117.

26—2 Saund., 47 n.

27—Jenkins v. Plomb, 6 Mod., 181.

28—2 Saund., 47 n.; Fraser v. Swansea C. Co., 1 Ad. & E., 354.

29—1 Saund. Pl. & Ev., 1117; Vickery v. Bier, 16 Mich., 53.

30—Tanner v. Smart, 6 B. & C., 608; Sarell v. Wine, 3 East., 409.

31—Welchman v. Sturgis, 13 Ad. & Ell., N. S., 552. The one in possession of personal property of an intestate may maintain trover for the conversion of it against a mere wrong-doer, or one having no better right than himself; and if the one in possession die, his administrator may also maintain trover for a conversion of the property after his intestate's death, and prior to his appointment as administrator. Until administration and distribution of the estate, the next of kin of an intestate

§ 588. **The evidence.**—The cause of action is proved as in ordinary cases.

The plea of the general issue, in general, admits the character in which the plaintiff sues.³² But it would not be an admission of his character if the cause of action accrued subsequently to the letters of administration or letters testamentary being granted as in trover, on the possession of the testator, and conversion in the time of the plaintiff.³³ In such case, strict proof of title is necessary, except where the executor, &c., had *actual* possession of the goods, which alone is *prima facie* evidence of title.³⁴

In general, therefore, if the defendant would controvert the fact of the plaintiff's being executor or administrator, he must plead that he is not.

The plaintiff's character as executor may be proved by the letters testamentary, or a certified copy under the seal of the probate court.³⁵ The probate alone would not be evidence for that purpose, because if any person named executor in the will refuses to accept the trust, or neglects to give bond as required by law, he is prohibited from intermeddling or acting as executor.³⁶

The fact that the plaintiff is *administrator* is proved by the letters of administration or a certified copy under seal of the probate court.

The defendant, when this question is in issue, must prove that the grant of letters was *void*, it is not sufficient to show them to be *voidable*. Thus he may prove that the person upon

has no more right to the possession of the personal property of the intestate than any other stranger: *Cullen v. O'Hara*, 4 Mich., 132.

32—*Thyme v. Protheroe*, 2 M. & S., 553; *Vickery v. Bler*, 16 Mich., 50. But where, after the plea of the general issue, the plaintiff dies and the suit is revived by his administrator, the plea does not admit his official character; he must prove that he is administrator: *Ibid.*

33—*Hunt v. Stevens*, 3 Taunt., 113.

34—1 Saund. Pl. & Ev., 5 Am. ed., 1126.

35—C. L., § 648. Proof of administration granted upon an estate, and of whom are administrators or executors,

does not fall within the rule applicable to the proof of official character in the case of public officers, where it is in general sufficient *prima facie*, so far as the rights of third persons are concerned, to show that an individual has acted notoriously as such public officer. The appointment of administrators being the judicial action of a court of record, it should be proved by the letters of administration themselves, or by the record, or a certified copy of the proceedings, or of the appointment, as the action of courts is proved in other cases: *Albright v. Cobb*, 30 Mich., 360; *Middlesworth v. Nixon*, 2 Mich., 425.

36—C. L., § 9313.

whose estate the letters are granted is still living,³⁷ or that the probate court has not otherwise jurisdiction of the estate. He may also show that the letters were revoked, or that the office had terminated in any other manner.³⁸

In all other points the evidence is the same as when the action is brought by and against persons in life.

37—Allen v. Dundas, 3 Term. R., administration were granted in another 130; Woolley v. Clark, 5 B. & A., 744. state: Vickery v. Bler, 16 Mich., 50. Or that the letters testamentary or of 38—C. L., § 9334.

CHAPTER XXXII.

OF THE PUNISHMENT OF FRAUDULENT DEBTORS.

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| § 589. Not to be imprisoned when, | § 593. Arrest of defendant. |
| § 590. When a warrant may be applied for. | § 594. Proceedings after arrest. |
| § 591. Affidavit necessary. | § 595. The judgment. |
| § 592. Warrant to issue when. | § 596. Proceedings on application for discharge. |

§ 589. Not to be imprisoned in suits on contract, except, etc.
—“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 a 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 expressed or implied, or for the recovery of any damages for the non-performance of any contract.”¹

“The preceding section shall not extend to proceedings as for contempts to enforce civil remedies; nor to actions for fines, penalties, or forfeitures, or on promises to marry, or for mon-

1—C. L., § 9553. The constitutionality of this act was attacked in *Dummer v. Nungesser*, 107 Mich., 481; 65 N. W., 564, upon the following grounds: 1—As in conflict with art. 6, sec. 33, of the constitution prohibiting imprisonment for debt founded upon contract; 2—As in conflict with art. 6, sec. 31, prohibiting the imposition of cruel and unusual punishment; 3—As in conflict with art. 6, sec. 28, guaranteeing certain rights to one charged with crime, and 4—as in conflict with art. 6, sec. 1, vesting judicial power in certain courts not including circuit court commissioners. The act was upheld as against the first attack because the constitutional provision expressly excepted cases of fraud; as against the second because the debtor has it in his own power to secure his release by

complying with the terms of the statute; as against the third because the proceeding is not criminal, and as against the fourth, upon the authority of *Streeter v. Paton*, 7 Mich., 341, because they were not “courts” within the meaning of that term as used in the constitution. See, *Fuller v. Bowker*, 11 Mich., 204. A party against whom a judgment for costs in an action or contract was rendered is protected from imprisonment by this section: *Phelps v. Barton*, 13 Wend., 68. A person cannot be held for false imprisonment for suing out a proceeding under this act, unless the proceeding was actually void, notwithstanding he may have acted from bad and indefensible motives, and the process may have been irregular and improvidently issued: *Johnson v. Maxon*, 23 Mich., 129.

eyes collected by any public officer, or for any misconduct or neglect in office, or in any professional employment.''²

Nor does it extend to suits founded in *tort*, although a contract may be set forth as the inducement to the plaintiff's right of action.³ Nor to a case of bailment, where the bailee has rendered himself liable to be, and is sued in trover instead of assumpsit on the contract of bailment.⁴ Where the plaintiff recovered, on a declaration containing counts in trover and assumpsit, upon all the counts, the defendant cannot be imprisoned on the judgment.⁵ But in such case the plaintiff may be imprisoned for the costs.⁶

An attorney prosecuted in assumpsit for not paying over money collected for his client, is within the exception of § 9554. His omission to pay over the money collected to his client is professional misconduct and neglect.⁷

Suits against physicians, surgeons, &c., for misconduct or neglect in any professional employment, are also excepted. Actions for wrongs, to persons individually, or to their relative rights, to their personal or real property, actions of trover, trespass or replevin, are not within the first section, for these do not arise upon any contract.⁸

§ 590. When a warrant may be applied for.—"In all cases, where by the preceding provisions of this chapter a defendant cannot be arrested or imprisoned, it shall be lawful for the plaintiff who shall have commenced a suit against such defend-

2—C. L., § 9554. Since the enactment of this statute, this exemption from imprisonment has been extended by the constitution, so that there is now no power to arrest in some of the cases mentioned in this section. The statute has not been altered to conform to the constitution: *Badger v. Reade*, 39 Mich., 771. As to whether the proceedings under the fraudulent debtors' act are of a civil or criminal character was left in doubt in *Bromley v. People*, 7 Mich., 472. But in *Johnson v. Maxon*, 23 Mich., 129, it was held that the proceedings under this act are not criminal in such a sense as to render the act unconstitutional because of its authorizing the proceedings to be had before a judicial officer without a jury, and in *Wayne County v. Randall*, 43 Mich., 137; 5

N. W., 75, the proceedings under this act were specifically held not to be criminal. See, also, *Bronson v. Newberry*, 2 Doug., 38.

3—*McDuffie v. Beddoe*, 7 Hill, 578.

4—*Suydam v. Smith*, 7 Hill, 182.

5—*Brown v. Treat*, 1 Hill, 225; *Suydam v. Smith*, 7 *Ibid.*, 182.

6—*Miller v. Scherder*, 2 Comst., 262.

7—*Stage v. Stevens*, 1 Denio, 267. But the failure of an agent to pay over moneys which he has been employed to collect, is not misconduct or neglect in a professional employment within the meaning of § 9554, unless the agent is an attorney at law: *Bronson v. Newberry*, 2 Doug., 38.

8—*Prac. Directions, &c.*, under Non. Imp. Act., p. 4.

ant, or shall have obtained a judgment or decree against him in any court of record, or justice's court, to apply to any judge of the court in which such suit is brought, or to any circuit judge or circuit court commissioner, or to any justice of the peace before whom such suit is pending or judgment obtained, or before whom such proceedings shall have been transferred, for a warrant to arrest the defendant in such suit.''⁹

§ 591. **The affidavit for the warrant.**—“No such warrant shall issue unless satisfactory evidence shall be adduced to such officer, by the affidavit of the plaintiff, or of some other person or persons, that there is a debt or demand due to the plaintiff from the defendant, and specifying the nature and amount thereof as near as may be, for which the defendant, according to the provisions of this chapter, cannot be arrested or imprisoned, and establishing one or more of the following particulars:

1. That the defendant is about to remove any of his property out of the jurisdiction of the court in which the suit is brought, with intent to defraud his creditor or creditors; or,

2. That the defendant has property or rights in action, which he fraudulently conceals, or that he has rights in action, or some interest in any public or corporate stock, money, or evidence of debt which he unjustly refuses to apply to the payment of any judgment or decree which shall have been rendered against him, belonging to the complainant; or,

3. That he has assigned, removed or disposed of, or is about to dispose of any of his property, with the intent to defraud his creditor or creditors; or,

4. That the defendant fraudulently contracted the debt, or incurred the obligation, respecting which such suit is brought.''¹⁰

9—C. L., § 9555. The “preceding provisions” referred to are C. L., §§ 9553, 9554. As to when a suit shall be deemed to be commenced, see, *ante*, § 20; Johnson v. Comstock, 6 Hill, 11. It is no objection to proceeding under this statute that the time for issuing execution upon the judgment has not yet arrived: People v. The Recorder, &c., 6 Hill, 429. Nor that an execution has been issued and a

levy made upon” the property of the judgment debtor: Johnson v. Maxon, 23 Mich., 129. These proceedings must be taken before the justice before whom the civil action is pending: Stensrud v. Delamater, 56 Mich., 145; 22 N. W., 272. As to competency of the justice to act in proceedings under this section, see, Clark v. Wicksell, 81 Mich., 45; 45 N. W., 377.

10—C. L., § 9556. It is not necessary

The demand must be a judgment founded upon contract, or a demand due upon a contract express or implied, or for the recovery of damages for the nonperformance of a contract.¹¹

Affidavits of other persons beside the applicant may be taken to substantiate the facts relied upon to prove the alleged fraud.¹²

The affidavit will vary according to the class of frauds which are alleged against the defendant. As many, whether one or more, as can be substantiated, should be stated. The affidavit as to these must not be in the disjunctive; that is, it must not charge that the debtor has "rights in action, *or*, some interest in some public *or* corporate stocks, money, *or* evidences of debt." It should state that there are effects in all the forms mentioned in the statute, or in some one or more of them, specifying which. This may not in *all* cases be necessary, where the creditor gives the reason why he cannot comply with such requirement. When he shows that there was tangible property which had been converted into something else which he cannot trace, he may then add his belief that the avails exist in some of the forms mentioned in the statute, without specifying the particular one. If he *knows* that the debtor has property in such a form that it cannot be reached by execution, he must of necessity be able to specify the particular form in

that the creditor sought to be defrauded should be a judgment creditor: *People v. Underwood*, 16 Wend., 546; *Johnson v. Maxon*, 23 Mich., 129. Nor in demanding choses in action of the debtor under the second subdivision of this § 9556 is it necessary to specify to him particularly what choses in action he is required to appropriate to pay the judgment: *Stewart v. Bidlecum*, 2 Comst., 103. Something more than immoral conduct must be shown, and more than mere constructive fraud: *Watson v. Hinchman*, 42 Mich., 29; 3 N. W., 236. It is no legal objection to the affidavit that it is made by the plaintiff's attorney; nor that the affiant does not specifically state that it is made on his personal knowledge if it does not appear that the facts are such that he could not have personal knowledge of them: *Dummer v. Nungesser*, 107 Mich., 481; 65

N. W., 564. The jurisdiction to issue the warrant is made by the statute to depend on the proof being satisfactory to the officer to whom the application for the warrant is made. And the warrant will not be void, provided there is evidence, however slight, in the affidavit for the warrant, tending to show each of the statutory requisites or grounds for issuing the same: *Johnson v. Maxon*, 23 Mich., 129.

As to what the affidavit must show: *Marble v. Curran*, 63 Mich., 283; 29 N. W., 725; *Proctor v. Prout*, 17 Mich., 475; *Badger v. Reade*, 39 Mich., 771; *Sheridan v. Briggs*, 53 Mich., 569; 19 N. W., 189; *Paulus v. Grobben*, 104 Mich., 42; 62 N. W., 160.

11—C. L., § 9553.

12—C. L., § 9556. See, *Marble v. Curran*, 63 Mich., 283; 29 N. W., 725.

which the property exists; and he should specify instead of swearing in the alternative. If he does not know, and only arrives at his conclusions by a process of reasoning, he should give the facts on which his inference is based.¹³

§ 592. **Warrant to issue, when.**—"Upon such proof being made to the satisfaction of the officer to whom the application shall be made, he shall issue a warrant under his hand, in be-

13—*People v. Van Valkenburgh*, 6 Hill, 429; *Vredenburg v. Hendricks*, 17 Barb., 179; *Broadhead v. McConnell*, 3 Barb., 175. The officer should, as a matter of propriety and prudence, require clear and cogent evidence before issuing the warrant: *Johnson v. Maxon*, 23 Mich., 137. The affidavit must make out a *prima facie* case: *Matter of Teachout*, 15 Mich., 346. But the warrant will not be void for want of jurisdiction, if the affidavit has a legal tendency to make out a proper case in all its parts, though the proof is slight and inconclusive: *Ibid.* See same principle: *People v. Lynch*, 29 Mich., 280; *Horn v. Wayne Circuit Judge*, 39 Mich., 20; *Supé v. Francis*, 49 Mich., 266; 13 N. W., 584.

The affidavit must set forth such facts and circumstances within the knowledge of the affiant as will authorize the justice who is to issue the warrant to find such a state of facts as is required by the statute to authorize the proceeding; and if the complainant is not personally acquainted with and cognizant of the facts and circumstances relied on, he must procure the affidavit of some one who is. And the affidavit must show on its face with reasonable certainty, that the affiant has personal knowledge of the facts set forth. The warrant cannot issue upon hearsay, nor upon statements however positive, founded merely on hearsay: *Proctor v. Prout*, 17 Mich., 473; *Brown v. Kelley*, 20 Mich., 23; *Marble v. Curran*, 63 Mich., 283; 29 N. W., 725. But see, *Dummer v. Nungesser*, 107 Mich., 481; 65 N. W., 564, holding that it is sufficient if the allegations are positive in character though there be no specific allegation that affiant is making the statement upon personal knowledge: See, also, *Paulus v. Grobben*, 104 Mich., 42; 62 N. W., 160.

This section does not require the affiant to attach documentary evidence of facts within his own knowledge: *Paulus v. Grobben*, *supra*.

The affidavit must set up facts on knowledge, and not on belief, and if complainant does not know the facts, other affidavits must be produced from those who do know them. And the facts must be specified and not general, so that a defendant may know precisely what he is called on to controvert: and they must be stated as a witness would be allowed to state them on the stand, not inferentially, but directly and positively: *Badger v. Reade*, 39 Mich., 771.

The affidavit will be insufficient if it sets forth merely by way of recital that the respondent is indebted to the parties commencing the proceeding: *Matter of Lee*, 49 Mich., 629; 14 N. W., 683.

It is not necessary that creditors proceeding under the first, third or fourth clauses of C. L., § 9556, have carried their suits to judgment before applying for a warrant: *Johnson v. Maxon*, 23 Mich., 138-9. But if the claim is in judgment it is necessary to set forth such a judgment as will authorize the proceeding, and to confer jurisdiction it must be brought distinctly within the statute. The judgment must be accurately identified, and while the affidavit may stand in lieu of an exemplified copy, it should give the same information as to its identity. The form of the action, the claim upon which the judgment was rendered and its date, must be set forth: *Badger v. Reade*, 39 Mich., 771. For further cases bearing upon the requisites of the affidavit, see notes to C. L., §§ 722-724, 9996, 9999. No one can be held under this statute for a constructive fraud: *Watson v. Hinchman*, 42 Mich., 29; 3 N. W., 236. Nor where he is

half of the people of this state, directed to the sheriff or any constable of the county within which such officer shall reside, therein briefly setting forth the nature of the complaint, and commanding the officer to whom it shall be directed, to arrest the person named in such warrant, and bring him before such officer without delay; which warrant shall be accompanied by a copy of all affidavits presented to such officer, upon which the warrant issued; which shall be certified by such officer, and shall be delivered to the defendant at the time of serving the warrant by the officer serving the same.”¹

The justice must deliver to the officer with the warrant, certified copies of all affidavits presented to him upon which the warrant issued, to be delivered by the officer to the defendant at the time of serving the warrant.

§ 593. Arrest of the defendant.—“The officer to whom such warrant shall be delivered, shall execute the same by arresting the person named therein, and bringing him before the officer issuing such warrant; or in case of the absence or inability of such officer, before some other officer, having jurisdiction in the case, and shall keep him in custody until he shall be duly discharged, or committed as hereinafter provided.”²

§ 594. Proceedings after arrest.—Upon being brought before the officer, unless the defendant controvert the facts and circumstances on which the warrant issued, or comply with some of the requirements of the tenth section, the officer must commit him. In such case, the case is made out on the part of the plaintiff by the evidence on which the warrant is issued. The allegations of the defendant controverting or denying the facts on which the warrant issued, must be verified by his own oath or by proof introduced on his part; he may verify his allegations by his own affidavit, or he may introduce his proof

guilty of no personal delinquency himself, and the act complained of is that of another, as a partner, etc.: *Ibid.*

1—C. L., § 9557. *Johnson v. Maxon*, 23 Mich., 136. A warrant issued after suit commenced by attachment, is not made void by the fact that there is a preceding levy under the attachment; but as to whether the pro-

ceedings under the warrant should continue in such case; see, *Johnson v. Maxon*, 23 Mich., 141-2; *Willison v. Desenberg*, 41 Mich., 156; 2 N. W., 201.

2—C. L., § 9558. The officer cannot make the arrest out of the county in which the justice resides: *Moak v. DeForest*, 5 Hill, 605.

without being sworn himself; but unless he make the affidavit, or introduce the proof, he must be committed. A mere denial, without affidavit or proof, amounts to nothing. The complainant is not required to produce proof to substantiate his charges until after they have been controverted by the defendant's affidavit or proof.³

In case the defendant verifies his allegations by his own affidavit, the complainant proceeds to prove his allegations. For this purpose he may examine the defendant on oath, touching any fact or circumstances material to the inquiry. The answer of the defendant on such examination must be reduced to writing, and subscribed by him.⁴ It would be advisable to reduce to writing the whole of the testimony taken on the hearing.

During the proceedings on the complaint, an adjournment of the hearing of the allegations and proofs of the parties may be made for reasonable cause. What shall be deemed such cause, rests, of course, much in the discretion of the officer. Probably the rules that prevail in courts of record respecting the postponement of trials would afford a satisfactory guide. Such adjournment is not limited as to time. In case of an adjournment the justice may take recognizance, with *surety*, from the defendant for his appearance, etc.⁵

"The officer conducting such inquiry shall have the same authority to issue subpoenas for witnesses and to enforce obedience to such subpoenas, and to punish witnesses refusing to testify, as are conferred by law upon such officers in case [cases] of other proceedings before them, and the defendant shall be entitled to a jury of six jurors, if he demand one, to try the issue joined in the matters charged or alleged against

3—*Ex parte*, Spencer v. Hilton, 10 Wend., 608; see, C. L., § 9559. The tenth section referred to is C. L., § 9562. When the respondent is brought in he may controvert the allegations and verify his denial by affidavit, in which case only a further examination is had on the facts. The whole issue is upon the allegations of the complaint and the result depends upon those and their truth, which is held admitted if not denied: Badger v. Reade, 39 Mich., 773.

4—C. L., § 9559. When complainant examines the defendant, his answers must be signed; but when examined on his own behalf, it is not required: Willison v. Desenberg, 41 Mich., 158-9; 2 N. W., 201.

5—Prac. Directions, p. 23, see, C. L., § 9559. If defendant refuses to give the recognizance, he may be committed to jail during the adjournment: *Ibid*.

him in the affidavit or affidavits exhibited to or before the said officer conducting such inquiry, which jury shall be selected and summoned in the same manner, as near as may be, as in the trial of criminal cases before justices of the peace, and the said officer shall have the same power in relation to the selection, summoning and swearing such jury and conducting such jury trial, as near as may be, as is given to justices of the peace in the trial of criminal causes before them."⁶

§ 595. **The judgment.**—If, after a hearing of the evidence on either side, the justice is satisfied that the allegations of the complainant are substantiated, etc., he is to commit the defendant,⁷ unless prevented by the defendant in some of the modes prescribed by the next section.

Upon complying with either of the conditions of the 10th section,⁸ the defendant is to be discharged.⁹

As the form and nature of the security mentioned in the second subdivision are not prescribed, it is presumed that any pledge of personal property, or mortgage of real estate, or the undertaking of any responsible person, might, according to the circumstances, be deemed satisfactory. But the most safe and prudent course, would be to take a bond or note for the payment of the amount, which can be very readily ascertained. It will include the plaintiff's debt, the costs of the suit, and the fees of the justice and sheriff or constable on the complaint.¹⁰

This bond must be in a penalty not less than twice the amount of the debt or demand claimed, with such surety or sureties as shall be approved by the justice.

Any defendant committed is to remain in prison until he shall have complied with some of the requirements of the eleventh section.¹¹

6—C. L., § 9560.

7—C. L., § 9561. The whole issue is upon the allegations in the complaint, the truth of which is held admitted if not denied: *Badger v. Reade*, 39 Mich., 773.

It is competent for the officer, and good practice to put his determination in writing, and explain upon the record the way he passed upon the facts: *Watson v. Hinchman*, 42 Mich., 28; 3 N. W., 236. Before the amendment of 1881, see, C. L., § 9561, allowing

a jury and appeal, the magistrate's finding as to facts, was conclusive, provided there was any evidence tending to sustain the allegation: *Willison v. Desenberg*, 41 Mich., 159; 2 N. W., 201.

8—C. L., § 9562. *Marble v. Curran*, 63 Mich., 287; 29 N. W., 725.

9—*Townsend v. Morrell*, 10 Wend., 577.

10—*Prac. Directions, &c.*, p. 22.

11—C. L., § 9563, which is as follows: "Any defendant committed as

§ 596. **Proceedings upon application for discharge.**—Upon application by affidavit to the justice for his discharge, it will be prudent to require notice to be given to the complainant, as he may have objections to urge against the application. The mode of effecting the discharge would be by a *superseas*.¹²

The phrase "legal costs and expenses," in the fourteenth section, means only legal taxable costs in criminal cases.¹³

The removal, concealment, or disposal of property exempt from execution cannot be the ground for a complaint or proceeding under the statute.¹⁴

The sixteenth section gives the measure of damages in an action on a bond given under the tenth section, and the nineteenth compels all persons to testify in relation to any fraud prohibited by that chapter.

above provided, shall remain in custody in the same manner as other prisoners on criminal process until a final judgment shall have been rendered in his favor in the suit prosecuted by the creditor, at whose instance such defendant shall have been committed, or until he shall have assigned his property and obtained his discharge, agreeably to the provisions of either of the one hundred and forty-second or of the one hundred and forty-third chapter of the revised statutes (C. L., 1897, chapters 262 and 263); but such defendant may be discharged by the officer committing him, or any other person authorized to discharge the duties of such officer, on defendant paying the debt or demand claimed, or giving security for the payment thereof, as provided in the tenth section of this chapter, or on his executing the bond mentioned in the third subdivision of said section; but any defendant committed, or ordered to be committed, may at any time within twenty-four hours after the making of such order, appeal therefrom to the circuit court of the county, provided said defendant shall enter into a recognizance to the people of the state of Michigan in a sum not less than five hundred dollars, with one or more sufficient sureties, to be approved by said officer, conditioned to appear before said court on the first day of the next term thereof and

prosecute his appeal to effect; and abide the order and judgment of said court, and the officer from whose order or judgment an appeal is taken shall thereupon discharge the said defendant from custody or order his discharge, and shall make a special return of the proceedings had before him, and shall cause the affidavit or affidavits and warrant and the return, together with the recognizance, to be filed in the said circuit court on or before the first day of the next term thereof, to be holden for said county, and as perfecting said appeal by giving such recognizance. The said circuit court shall thereupon have full jurisdiction of said case, the same as was held by the officer below before whom such proceedings were commenced, and may conduct the same to a final hearing and determination in like manner with the same right to the defendant to demand to have a trial by jury." See, *Clark v. Mikesell*, 81 Mich., 50; 45 N. W., 377.

12—*Prac. Directions*, p. 25.

13—C. L., § 9569. The provisions of this statute apply only to property that may be removed or concealed, and not to real estate: *Atty. Gen. v. Police Justice, etc.*, 41 Mich., 224; 2 N. W., 25; see, *Potter v. Richards*, 10 Wend., 607.

14—C. L., § 9567. See, *County of Wayne v. Randall*, 43 Mich., 137; 5 N. W., 75.

CHAPTER XXXIII.

OF CONTEMPTS AND THE PUNISHMENT THEREOF.

§ 597. When may punish for.
§ 598. How may punish.

§ 599. Warrant may issue.

§ 597. **When may punish for contempt.**—"In the following cases a justice of the peace may punish, as for criminal contempt, persons guilty of the following acts:

1. Disorderly, contemptuous, or insolent behavior towards such justice, while engaged in the trial of a cause, or in the rendering of any judgment, or in any judicial proceeding, which shall tend to interrupt such proceedings, or to impair the respect due to his authority;

2. Any breach of the peace, noise, or other disturbance, tending to interrupt any official proceedings of a justice;

3. Resistance wilfully offered by any person in the presence of a justice, to the execution of any lawful order or process made or issued by him."¹

§ 598. **How may punish.**—"Punishment for contempts, in the foregoing cases, may be by fine not exceeding twenty-five dollars, or by imprisonment in the county jail not exceeding five days, or both, in the discretion of the justice; but no person shall remain imprisoned for the non-payment of such fine more than ten days."²

"No person shall be punished for a contempt before a justice until an opportunity shall have been given him to be heard in his defence; and for that purpose, a justice may issue a war-

1—C. L., § 980. Unless the justice has jurisdiction of the cause, he cannot punish for a contempt. There can be no contempt where there is no authority: *Piper v. Person*, 2 Gray, 120.

2—C. L., § 981. A judgment punishing a contempt which provides that respondent should "pay a fine of \$25,

within one hour, and, in default of the payment of said fine within the time specified that he be imprisoned in the common jail of the county for the period of five days" is bad for being in the alternative: *Turner v. Smith*, 90 Mich., 309; 51 N. W., 282; *Sloman v. Judge of Wayne Circuit*, 95 Mich., 264; 54 N. W., 869.

rant to bring the offender before him; or, if the contempt was committed in the presence of the justice, he may cause the offender forthwith to be arrested therefor, without issuing any process in the first instance.”³

“Upon convicting any person of contempt, the justice shall make a record of such conviction, stating therein the particular circumstances of the offence; and the warrant of commitment for any contempt shall also state the circumstances of the offence, or it shall be void.”⁴

§ 599. Warrant may issue.—If any person guilty of contempt has left the court before being called upon to show cause why he should not be punished for it, a warrant must issue for his arrest.⁵

If he is still present in court, he may be required to answer without any warrant being issued.

After making the record of conviction, the justice will make out a commitment, if the judgment requires that respondent be imprisoned, which he will deliver to a constable as his authority for taking respondent into custody and delivering him to the keeper of the jail.

3—C. L., § 982.

4—C. L., § 983. The justice acts judicially in convicting for contempt, and it is held in New York, under a statute like ours, that no civil action can be maintained against the justice for the conviction. The proceedings, however, must be regular, and show upon their face a compliance with the statute: See, *Robbins v. Gorham*, 26 Barb., 586; *Robbins v. Gorham*, 25 N. Y., 588; also, *Mather v. Hood*, 8 Johns., 44; and see, *Mallory v. Benjamin*, 9 Howard, 419.

5—This warrant will be served in

the same manner as a civil warrant. When the offender is brought before the justice, he should state distinctly to the offender the offence with which he is charged, and call upon him for his defence. If the offender can show any facts which will excuse his conduct from being considered as contemptuous, the justice may discharge him. But if he fails or refuses to do so, the justice will proceed to convict him. No evidence is necessary in such a case, since the justice proceeds entirely upon matters which occurred in his presence.

CHAPTER XXXIV.

OF THE JUSTICE'S DOCKET.

§ 600. What shall be entered in.

§ 601. Filing papers and indexing judgments.

§ 600. What shall be entered in the docket.—"Every justice of the peace shall keep a docket, in which he shall enter:

1. The title of all causes commenced before him.¹
2. The time when the first and subsequent process was issued against the defendant, and the particular process issued;²
3. The time when the parties appear before him, either without process, or on the return of process;³
4. When the pleadings are made orally, a concise statement of the declaration of the plaintiff, the plea of the defendant, the further pleadings of the parties, if any, and the issue joined;⁴

1—Justice enters judgment against Peter Mayo in a suit begun against Peter Mayhue. *Held*, error might be amended by following the summons: Merrick v. Mayhue, 40 Mich., 196.

2—The date of the service of the summons need not be shown in the docket: Van Kleek v. Eggleston, 7 Mich., 514. If docket does not show when summons issued the judgment is void on its face: Purdy v. Law, 132 Mich., 622; 94 N. W., 182.

3—Although the statute does not strictly require, it yet the justice should make his docket show in what manner the parties appeared, whether by attorney or in person: Morton v. Crane, 39 Mich., 520. The docket must show the hour as well as the day of appearance. Failure as to either is fatal to the judgment: Mudge v. Yaples, 58 Mich., 307; 25 N. W., 297. Where, however, the process is returnable "forthwith" it is sufficient

if the day of appearance is given though the hour is not: Fruitport v. Judge of Muskegon Circuit, 90 Mich., 20; 51 N. W., 109. If defendant does not appear on the adjourned day the docket must show that plaintiff appeared within one hour of the time to which the adjournment was taken: Post v. Harper, 61 Mich., 436; 28 N. W., 161. If time of appearance not shown it is to be assumed that there was no appearance: Purdy v. Law, 132 Mich., 622; 94 N. W., 182.

4—When on entering the substance of an oral declaration the justice made a mistake which was not calculated to mislead, *held*, not to vitiate the judgment: Smoke v. Jones, 35 Mich., 409. Where a docket recited that the plaintiff declared "orally in assumpsit on the common counts, and specially in writing," it cannot in an action on the judgment, be assumed that, in declaring specially, he added

5. Every adjournment, stating on whose motion, and to what time and place;⁵

6. The issuing of a venire, stating at whose request, and the time and place of its return;

7. The time when a trial was had, the names of the jurors returned summoned who did not appear, and the fines imposed upon them, if any;

8. The names of the jurors who appeared and were sworn, the names of the witnesses sworn at the request of either party, stating at whose request; the objections, if any, made to the competency of a witness, and the decision thereon;

9. The verdict of the jury, and when received;

10. The judgment rendered by the justice, and the time of rendering the same;

11. The time of putting in any stay of execution, and the name of the surety or sureties therefor;

12. The time of issuing execution, and the name of the officer to whom delivered.⁶

13. The return of every execution, and when made;

14. The fact of an appeal having been made from any judgment rendered by him, and the time when made;

a count on a cause of action not cognizable by the justice, or that, even if he did, the judgment was rendered upon the bad count: Schlatterer v. Nickodemus, 50 Mich., 315; 15 N. W., 489. Where the defendant notifies the justice orally what his defense is he should enter it in due form on his docket unless imperfect in substance, and even in such a case he should be allowed to amend his statement of defense: Eddy v. Manshaun, 42 Mich., 532; 4 N. W., 286.

5—The neglect of the justice to record in his docket the place to which a cause is adjourned, is a clerical irregularity for which the judgment cannot be reversed, if the defendant was not misled and appeared and answered: Whelpley v. Nash., 46 Mich., 25; 8 N. W., 570. Where docket entry shows that a motion to adjourn was overruled and case adjourned to one o'clock such entry is sufficient though no date is given, it being fairly to be inferred that it is a holding

open till one o'clock of the same day: Loder v. Reed, 129 Mich., 180; 88 N. W., 389. A holding over of the case from day to day is not technically an adjournment, within the meaning of that term in this clause of the statute, so as to make necessary the entries required in cases of adjournment: Woempener v. Ketchum, 110 Mich., 34; 67 N. W., 1106. The failure of the docket to show *place* to which the cause is adjourned is fatal to a judgment rendered on the return day, the defendant not then appearing: Waldron v. Palmer, 104 Mich., 556; 62 N. W., 731. It will not be presumed that the adjournment was to the office of the justice: Waldron v. Palmer, *supra*. To the same point: Fitzhugh v. Rivard, 109 Mich., 154; 66 N. W., 947.

6—A failure to comply with this provision *held* not to vitiate an execution properly issued: Grand Rapids Chair Co. v. Runnells, 77 Mich., 117; 43 N. W., 1006.

15. The fact of his having given a transcript of the judgment to be filed in the clerk's office, and the time when the same was given.'⁷

"The several items in the preceding section enumerated, shall be entered under the title of each cause to which they respectively relate; and in addition thereto, the justice may enter any other proceedings had before him in such cause, which he shall think it useful to enter in such docket."⁸

7—C. L., § 957. A docket entry which recites the date and return day of the summons, but contains no other date except that at the end of it, which is the same as the return day of the summons, and does not state on what day the parties were called and plaintiff appeared and defendant failed to appear, is not sufficient to comply with C. L., § 957; it was not the intent of this statute to leave the time of appearance to be referred to the date of the judgment in cases where, from anything appearing on the face of the record, the two acts might have occurred on different days. A docket entry which does not show on what day the plaintiff appeared, does not show that he appeared within an hour after the time of return of process; and, as under C. L., § 836, a failure of the plaintiff to appear within that time works a discontinuance, such docket entry fails to show that the justice was authorized to render judgment, and is therefore not admissible to prove the validity of the judgment: *Redman v. White*, 25 Mich., 523.

As to the docket, see, further, *King v. Bates*, 80 Mich., 367; 45 N. W., 147; *Hodges v. Bagg*, 81 Mich., 243; 45 N. W., 842; *Talbot v. Kuhn*, 89 Mich., 30; 50 N. W., 791; *Township of Fruitport v. Muskegon Circuit Judge*, 90 Mich., 20; 51 N. W., 109.

8—C. L., § 958.

The docket entry of a justice's judgment is not technically a record, but it has all the effect of a record, and should be made in language as explicit and certain, as to matters of substance, as a judgment record of the circuit court. There should be no doubt or uncertainty as to the parties; who they are, plaintiff and defendant, and in whose favor, and against whom.

the judgment was rendered, should clearly and conclusively appear from the docket itself: *Rood v. School District, &c.*, 1 Doug., 502; *Howard v. People*, 3 Mich., 209; see, *Whitwell v. Emory*, 3 Mich., 88; *Aldrich v. Maitland*, 4 Mich., 205. The record of the court of a justice of the peace consists of the entries required by the statute to be made in his docket: *Goodrich v. Burdick*, 26 Mich., 39. An oral admission made as evidence merely in a justice's court, is not a matter of record: *Morrison v. Riker*, 26 Mich., 385. And, in a legal point of view, it is as necessary for a justice to sign, officially, any judgment rendered by him, as for a judge of a court of record to sign officially, the daily proceedings and judgments entered upon the journal kept by the clerk thereof: *Howard v. People*, 3 Mich., 207. Where the entry of judgment on the docket was followed immediately by the entry of a stay of execution in the same case, each being dated separately, but both dates being the same; *held*, that it was inferable from the docket that both entries were made at the same time, as one transaction, and that the official signature of the justice being appended at the foot of the entry of the stay, the judgment was not void for want of signature, nor the stay for want of attestation: *Hollister v. Giddings*, 24 Mich., 501.

The entry by the justice of the proceedings in a cause, in his docket, is a ministerial and not a judicial act and the statute requiring such entries, is directory merely: *Hickey v. Hinsdale*, 8 Mich., 267, 272; *People v. Lowell Township*, 9 Mich., 147-8. As the docket entry of a judgment is not the judgment itself, but only the evidence of it, it seems that the time

of entry whether at the rendition of the judgment, or subsequently, is not material: 8 Mich., 272. But it has been held that a justice could be required by a mandamus to enter the verdict of a jury and judgment thereon in accordance therewith: *Lamberton v. Foot*, 1 Doug., 102.

The docket entries should include everything necessary to show that the justice had jurisdiction, both as to the subject matter and the person, and all the proceedings required to constitute a valid judgment: *Barnes v. Harris*, 4 N. Y., 385; *Goodrich v. Burdick*, 26 Mich., 39; see, *Allen v. Carpenter*, 15 Mich., 33. A justice's docket record must disclose jurisdiction, and all docket matters which the law imperatively requires to be entered, but it must be construed fairly and reasonably, and in view of the fact that the justice is not to be expected to be a legal expert or master of legal forms. And as to whether the language of the entries does or does not show all these things, is a subject of construction. Reasonable certainty, or certainty to a common intent, is all that is necessary: *Vroman v. Thompson*, 51 Mich., 452; 16 N. W., 808.

A justice cannot give himself jurisdiction to proceed as in case of personal service, or preclude a defendant from proving the truth, by reciting in his minutes or docket that there was personal service, when the service was not personal and the evidence of service before him failed to show that it was: *Smalley v. Lighthall*, 37 Mich., 348. But, if a justice enters upon the docket all that the statute requires him to enter, the ordinary presumption in favor of the correctness of his official action, must support the judgment: *Peck v. Cavell*, 16 Mich., 11. Therefore a judgment will be sustained although the docket does not show the day on which process was served, the statute not requiring that to be entered on the docket, and if it becomes necessary to show sufficient service, that may be done by parol or by the return of the officer, endorsed upon the process; and for the same reason a judgment cannot be impeached because the docket does not show to whom the note upon which it was rendered, was payable, or

whether it was negotiable: *Van Kleck v. Eggleston*, 7 Mich., 511. As to the form of the docket entries in this case, see, *Ibid.*, 512. Where an issue was tried by a jury, and the justice entered the subsequent proceedings as follows: "After hearing all the evidence, the jurors returned a verdict for plaintiff for the sum of \$48.05, and costs of suit. Damages, \$48.05; costs, \$7.63." Held, that this entry was in effect a judgment, and sufficient to authorize the issue of an execution thereon: *Overall v. Pero*, 7 Mich., 315. And so, where the entry was, "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);" but no formal judgment was rendered thereon; held, that the verdict itself was the judgment of the law in the case, and that execution might issue: *Gaines v. Betts*, 2 Doug., 98.

Where execution can issue only after five days from the rendition of the judgment unless upon proof of facts showing a necessity therefor, the justice need not enter the proof in his docket: *Rash v. Whitney*, 4 Mich., 495. Nor is it necessary that the docket should show that an execution was issued at the request of the plaintiff, as that will be presumed: *Peck v. Cavell*, 16 Mich., 9.

Entries in the docket, of facts coming within the personal knowledge and observation of the justice, cannot be disproved; as that the parties appeared, or pleaded, etc.. *Facey v. Fuller*, 13 Mich., 532. After a judgment has been entered in the docket, and the parties have left the presence of the justice, he has no power to amend the record of the judgment: *Foster v. Alden*, 21 Mich., 507; *King v. Bates*, 80 Mich., 367-8; 45 N. W., 147.

Amendment of docket entries by the justice, whether competent: See, *Nicolls v. Lawrence*, 30 Mich., 395, 399. And see, *King v. McKenzie*, 51 Mich., 461; 16 N. W., 813. A justice cannot amend his docket after it is once made up and officially signed by him: *Kluck v. Murphy*, 115 Mich., 128; 73 N. W., 128. Parol proof is inadmissible to vary or explain a justice's docket as to give him a jurisdiction not apparent on its face: *Mudge v. Yaples*, 58 Mich., 307; 25 N. W., 297.

§ 601. **Filing papers and indexing judgments.**—"Every justice shall carefully preserve and file all affidavits and papers delivered to him to be filed in any cause."⁹

"Every justice shall keep an alphabetical index of all judgments entered in his docket book, in the course of any judicial proceedings had before him, in which shall be inserted the names of the parties to each judgment, and the page of his docket where such judgment is entered."¹⁰

For the transfer of causes and proceedings in relation thereto, see chapter VIII., ante, and C. L., §§ 964-977, inclusive.

"When the same justice shall be re-elected and qualified to fill the vacancy occasioned by the expiration of his own term of office, his authority shall be considered as having continued without interruption; and all business commenced by or before him during his former term of office, may be prosecuted and completed in the same manner as if such former term had not expired."¹¹

To establish a valid judgment the docket must show that the justice acquired and retained jurisdiction and omissions in this regard cannot be supplied by reference to the files in the	case: <i>Rasch v. Bissell</i> , 106 Mich., 106; 64 N. W., 7. 9—C. L., § 962. 10—C. L., § 963. 11—C. L., § 965.
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PART II.

More Specifically of the Several Actions Cognizable by Justices of the Peace.

CHAPTER XXXV.

OF TRESPASS TO THE PERSON.

ASSAULT AND BATTERY.

§ 602. Definition.

§ 603. General issue, action for.

§ 604. Evidence in.

§ 605. Exemplary damages.

§ 606. Defense of possession.

§ 607. Notice of justification.

FALSE IMPRISONMENT.

§ 608. Definition.

§ 609. Defense under general issue.

ASSAULT AND BATTERY.

§ 602. *Definition.*—An assault is an attempt with force or violence to do corporeal injury to another, accompanied with such circumstances as denote at the time an intention, coupled with the present ability, of using actual violence. There need not be even a direct attempt at violence; but an indirect preparation towards it, under the circumstances mentioned, such as drawing a sword or bayonet, or even laying one's hand upon his sword, would be sufficient.¹ Riding after a person, and obliging him to run away into a garden to avoid being beaten, was holden to be an assault.² Where a school-master took very indecent liberties with a female scholar of thirteen, who did not resist, but it was against her will, it was holden to be an assault and battery.³ Making a female patient strip naked under pretence that the defendant, a medical man, cannot otherwise judge of her illness, if he takes off her clothes, is an assault.⁴ The intention of the party must co-operate with the act, to constitute an assault.⁵ If A lays his hand upon his sword, and says to another, "If it were not assize time I would not take such language from you;" this is not an assault, be-

1—3 Bla. Com., 120; Hayes v. People, 1 Hill, 351; Drew v. Comstock, 57 Mich., 176; 23 N. W., 721.

2—Martin v. Shoppe, 3 C. & P. 373; Stephens v. Myers, 4 C. & P., 349.

3—R. v. Nichols, 1 R. & R. C. C., 130.

4—R. v. Rosinski, 1 R. & M. C. C., 19.

5—It need not be a specific intent against the person injured. It is sufficient if the intent was to unlawfully injure another: Talmadge v. Smith, 101 Mich., 370; 59 N. W., 656.

cause it is obvious he did not at the time intend to do him any corporeal hurt.⁶ Mere words do not constitute an assault.⁷

A *battery* is any injury whatever, no matter how small, that is actually done to the person of another, in an angry, revengeful, rude, or insolent manner, as by spitting in his face, or in any way touching him in anger, or violently jostling him out of the way, and the like.⁸ The least touching of another's person wilfully or in anger is a battery.⁹ If the act constituting the battery were done without due caution, or in a negligent manner, it is a trespass, although the party had no design by it to do an injury to any person.¹⁰ But when the act is inevitable, and the conduct of the defendant is without fault, it does not constitute a legal battery.¹¹

If two persons are fighting, and one of them unintentionally strikes a third, he is answerable in trespass; and the absence of intention will avail only in mitigation of damages.¹² If a man ride an unruly horse, for the purpose of breaking it, in a place much frequented by people, and the horse run away with the rider, and run over a man and hurt him, trespass will lie. But if under ordinary circumstances, a horse take fright, run away with his rider, and run against a man, it would not be a battery in the rider.¹³ The party first attacked cannot maintain this action against the other party, if he uses so much violence to

6—1 Saund. Pl. & Ev., 141; see, *Blake v. Barnard*, 9 C. & P., 626; *Regina v. St. George*, *Ibid.*, 483.

7—1 Russ. on Crimes, 750; *Queen v. Nun*, 10 Mod. R., 187. An assault is an inchoate violence to the person of another, with the present means of carrying the intent into effect. Threats are not sufficient; there must be violence actually offered within such a distance as that harm might ensue if the party was not prevented. An act done with intent to commit an assault is not sufficient, if the purpose is abandoned or the party is prevented from carrying out his purpose, while at a distance too great to make an actual assault. An attempt to commit violence although accompanied by acts preparatory thereto, is not sufficient to constitute an assault. There must also be present ability to carry out the intent, and the act done must be criminal and sufficiently proximate

to the deed intended: *People v. Lilley*, 43 Mich., 521; 5 N. W., 982; *Nelson v. Crawford*, 122 Mich., 466; 81 N. W., 335.

An intentional shooting a person with a pistol loaded with ball is an assault: *People v. Mortimer*, 48 Mich., 37; 11 N. W., 776. Forceful resistance to an officer includes an assault: *People v. Haley*, 48 Mich., 495; 12 N. W., 671; *People v. Warner*, 53 Mich., 78; 18 N. W., 568.

8—1 Hawk, C., 32; s. 2; *Queen v. Cotesworth*, 6 Mod. R., 172; *Ford v. Skinner*, 4 C. & P., 239; *Pursell v. Horn*, 8 Ad. & E., 604.

9—3 Blackstone's Com., 120.

10—1 Archbold N. P., 378.

11—*Wakeman v. Robinson*, 1 Blng., 213; *Bullock v. Babcock*, 3 Wend., 391.

12—*James v. Campbell*, 5 C. & P., 372.

13—*Gibbon v. Pepper*, 2 Salk., 637.

the other, exceeding the bounds of self-defence, that he would not be justified under a plea of *son assault demesne*, were he the defendant.¹⁴

Not only the person who actually committed the assault, but also all who ordered or incited him to commit the act, or procured it to be committed, and all present aiding or abetting the commission of it, are liable.¹⁵

§ 603. **General issue—the evidence under it.**—Under this plea, the plaintiff must prove the assault and battery stated in his declaration; the manner in which it was committed, the defendant's conduct and expression, the degree of violence used, and the extent of the injury. The day or place mentioned in the declaration is immaterial; the plaintiff may give evidence of an assault and battery, at any time or place.¹⁶ If there is but one count in the declaration, the plaintiff, after proving one assault will not be permitted to waive that and prove another.¹⁷ So, when the action is against several for a joint trespass, after proving a trespass by some, the plaintiff will not be allowed to prove another by all; or, after proving a trespass against some of them only.¹⁸ The injuries stated in the declaration are to be proved, and no other injury not set forth in the declaration can be proved, if it might have been set forth. Under the words "other wrongs to the said plaintiff then and there did," damages and matters which naturally

14—Elliott v. Brown, 2 Wend., 497.

15—Britton v. Cole, 1 Salk, 408-9. Any person who is present at the commission of a trespass, encouraging or exciting the same by words, gestures, looks, or signs, or who in any way or by any means countenances or approves the same, is in law deemed to be an aider and abetter, and liable as principal; and proof that a person is present at the commission of a trespass, without disapproving or opposing it, is evidence from which, in connection with other circumstances, it is competent for the jury to infer that he assented thereto, lent to it his countenance and approval, and was thereby aiding and abetting the same. But if he is only a spectator, innocent of any unlawful intent, and does not act to countenance or approve those who are actors, he is not to be held

liable on the ground that he was a looker-on and did not use active measures to prevent the unlawful acts: Miller v. Sweltzer, 22 Mich., 394-5. If one is sued for an assault in which several participate, it is competent to prove what the others, though not parties to the suit, did, that the jury may judge whether the defendant was acting in concert with them, and as to whether he should be held for the whole damage: Miller v. Sweltzer, 22 Mich., 391.

16—1 Saund. Pl. & Ev., 5 Am. ed., 152. That is within the statute of limitations.

17—Sante v. Pricket, 1 Camp., 471, 473.

18—Tait v. Harris, 6 C. & P., 73; Tait v. Harris, 1 M. & R., 282; Wynne v. Anderson, 3 C. & P., 596.

arise from an assault, or cannot with decency be stated, may be proved.¹⁹

In a joint action against several, the damages cannot be severed so as to give more damages against one than the other; but a verdict may be given against all the defendants to the amount which the jury think the most guilty ought to pay.²⁰ If separate suits are brought against the persons who committed the act, the plaintiff may recover separately against each, but he can have but one satisfaction; he has his election which judgment to collect, and the other wrong-doers will be obliged to pay the costs of the suit against them respectively.²¹

The plaintiff is not bound to prove the whole of the facts as stated in his declaration; proof of part will entitle him to a recovery; thus the defendant may be found guilty of an assault only, though an assault and battery be stated.²²

§ 604. **Evidence in mitigation.**—The defendant may give in evidence in mitigation of damages what was said at the time, to

19—1 Saund. Pl. & Ev., 153, 154. A permanent bodily infirmity caused or aggravated by an assault and battery, is properly provable, under a declaration averring sickness and pain to have been caused by the assault, and needs no other or fuller averment: *Johnson v. McKee*, 27 Mich., 471. In such a case the injured person's statements concerning present feelings and sufferings are admissible in evidence, but his relations of past sufferings would not be: *Ibid.*, *Johnson v. McKee*, 27 Mich., 471; see, *Hyatt v. Adams*, 16 Mich., 200. In actions of trespass, malice and attendant circumstances may be proved in aggravation of damages; and the rule is the same where the facts in aggravation might have been made the ground of a separate action: *Druse v. Wheeler*, 22 Mich., 439. Proof of a subsequent desire to settle is not relevant upon the question of original liability for an assault, and does not disprove malice at the time of its commission: *Johnson v. McKee*, 27 Mich., 471.

Special Damages.—Where in an assault and battery case, the declaration averred, "that the plaintiff, because of the wounds, bruises and injuries inflicted on him by the de-

fendant, was greatly hindered and prevented from doing and performing his work and business and looking after and attending to his necessary affairs and avocations for a long space of time," etc., it was sought to show that plaintiff was a farmer owning a grass farm; that when assaulted he was about half through cutting his hay; that he was bothered about help, and, that the cutting was delayed because of his injury and that the crop of hay was damaged in consequence: *held*, that the allegations in the declaration were not sufficiently specific to cover this kind of damage. That where the damages are such as do not follow the injury as a necessary consequence, they should be specifically alleged in the declaration; that this is a rule of fairness, that the defendant may know what case it is intended to make against him, and be prepared to meet it, if it is false or falsely colored: *Helser v. Loomis*, 47 Mich., 18-19; 10 N. W., 60.

20—*Brown v. Allen*, 4 Esp., 158; *Hill v. Goodchild*, 5 Burr., 2790.

21—*Livingston v. Bishop*, 1 Johns., 290; *Boardman v. Acer*, 13 Mich., 77.

22—*Buller's Nisi Prius*, 94; *Elliott v. Van Buren*, 33 Mich., 49.

show the intention or object of the parties; for everything which passes is part of the transaction on which the plaintiff's action is founded.²³ But the acts or declarations of the plaintiff, at a different time, or any antecedent facts which are not fairly to be considered as part of one and the same transaction, though they may have been ever so irritating and provoking, are not admissible. The provocation must be so recent and immediate as to induce a presumption that the violence done was committed under the immediate influence of the feelings and passions excited by it.²⁴

§ 605. **Exemplary damages.**—The fact that the defendant had been indicted and fined, and the fine paid, would not prevent the plaintiff from recovering exemplary damages; and it seems that such evidence is not admissible in mitigation, if the plaintiff object. In such a case the court say: "The recovery of such damages (exemplary) ought not to be made dependent on what has been done by way of criminal prosecution, any more than what may be done. Nor are we prepared to concede that either a fine, an imprisonment, or both, should be received in evidence to mitigate damages. True, if excluded, a double punishment may sometimes ensue; but the preventive lies with the criminal rather than the civil courts. The former have ample power, if they but choose to exert it, of preventing any great injury from excess of punishment."²⁵

23—1 Saund. Pl. & Ev., 156. Abusive and provoking language uttered some days previous to an alleged assault and battery, will not excuse or justify it. Such language addressed to the defendant or members of his family might sometimes excuse an immediate assault and battery provoked thereby, or might authorize the jury to deal leniently with the defendant. But provoking words cannot be allowed as a justification for blows given after the blood has had time and opportunity to cool: *Helser v. Loomis*, 47 Mich., 17; 10 N. W., 60. Insulting words will not justify an assault or battery: *Goucher v. Jamieson*, 124 Mich., 21; 82 N. W., 663. As to uncontrollable anger and excitement: See, *People v. Mortimer*, 48 Mich., 37; 11 N. W., 776; *Welch v. Ware*, 32 Mich., 77.

But one who commits an act, of unlawful force and thereby brings on a conflict in which he assaults another, cannot justify the assault by showing that the person assailed was reputed to be violent, and that he acted in self-defense: *People v. Miller*, 49 Mich., 23; 12 N. W., 895.

24—*Lee v. Woolsey*, 19 Johns., 319; see, *Beardsley v. Maynard*, 4 Wend., 336; *Maynard v. Beardsley*, 7 *Ibid.*, 560. But in an action by husband and wife for an assault upon the wife, no act or words of the husband, unless the wife was privy to and participated in them, can be proven in mitigation of damages: *Everts v. Everts and wife*, 3 Mich., 580.

25—*Cook v. Ellis*, 6 Hill, 466. As to exemplary damages, see, *Allison v. Chandler*, 11 Mich., 542. Exemplary damages are such added or increased

§ 606. **Notice of defense of possession.**—Upon this notice the defendant must prove, 1.—That at the time of the trespass he was in possession of the house mentioned in the plea, as by carrying on business, or living in the house.²⁶ 2.—That the plaintiff was in the house at the time of the alleged assault. It seems to be immaterial whether he was making a noise or disturbance, as is usually stated in a notice, or not; for no man without authority by law can lawfully remain in the house or close of another after the occupier has required him to leave it; for although the plaintiff is in the house or close, by license of the defendant, by a request to leave it the license is determined, and the plaintiff's continuance there is illegal.²⁷ If, however, it were an inn, in which the public have a right to go and remain at proper hours, it would be different; for then it must be shown that the plaintiff was making a great noise and disturbance, or otherwise misbehaving himself, to justify the inn-keeper in turning him out.²⁸ 3.—That before the assault was committed, the defendant, or some person for him, requested the plaintiff to leave the house, and that the plaintiff refused to do so. If a person enter a house with force and violence, the person whose house is entered may turn him out (using no more force than is necessary) without previously requesting him to depart; but if the person enter quietly, such a request is necessary before he can be turned out.²⁹

damages as are allowed by reason of the aggravated character of the injury consequent upon the peculiar circumstances of the case. Whether called "exemplary," "punitive," "vindictive," "compensatory" or "added" damages the important question is, what is the character of the wrong suffered or of the injury sustained, and if it can be compensated for in money what is the amount which will so compensate: *Ross v. Leggett*, 61 Mich., 445; 28 N. W., 695. Further upon this question of exemplary damages, see, *Elliott v. Van Buren*, 33 Mich., 49; *Welch v. Ware*, 32 Mich., 77; *Scripps v. Reilly*, 38 Mich., 10; *Watson v. Watson*, 53 Mich., 168; 18 N. W., 605; *Stillson v. Gibbs*, 53 Mich., 280; 18 N. W., 815; *Willson v. Bowen*, 64 Mich., 133; 31 N. W., 81; *Baumler v. Antiau*, 65 Mich., 31; 31 N. W.,

888; *Jastrzemski v. Marxhausen*, 120 Mich., 677; 79 N. W., 935. See, *ante*, § 472.

26—*Cook's Case*, Cro. Car., 537; *Dean v. Hogg*, 10 Bing., 345; 1 Saund. Pl. & Ev., 158.

27—*Jelly v. Bradley*, 1 C. & M., 270; see, *Scribner v. Beach*, 4 Denio, 448.

28—*Archbold's Nisi Prius*, 384.

29—*Tullary v. Reed*, 1 C. & P., 6; *Weaver v. Bush*, 8 Term. R., 78; *Scribner v. Beach*, 4 Denio, 448. But no more force must be used than is reasonably necessary for the purpose: See, *Com. v. Clark*, 2 Mete., 23; *Commonwealth v. Goodwin*, 3 Cush., 154. See, *Phillips v. Jamieson*, 51 Mich., 153; 16 N. W., 318. An intruder with or without title cannot by getting a foothold in a single room of a house in the peaceable occupancy of another,

§ 607. **Notice of justification.**—Under a notice that the plaintiff first assaulted the defendant, the defendant will be required to show that the plaintiff committed the first assault, and that it was such as to require the defendant's self-defense and the consequent assault on the plaintiff. Every assault will not justify every battery; but it is matter of evidence whether the assault was proportionate to the battery. It is necessary to prove an assault commensurate with the trespass sought to be justified.³⁰

If a parent in a reasonable and proper manner chastise his child, or a master his servant, or a school-master his scholar; or if a man gently lay his hands on another, and thereby stay him from inciting a dog against a third person; or if I beat one who wrongfully endeavors with violence to dispossess me of my lands or goods, or of the goods of another delivered to me to be kept for him, and will not desist upon my laying my hands gently on him; or, if a man beats one who makes an assault upon the person of his wife, parent or child; in all these cases the party may justify,³¹ if the battery was not greater than was necessary; and in all these cases, notice of the defense must be given. So as to justification by authority of law, without or under legal process.³²

FALSE IMPRISONMENT.

§ 608. **Definition.**—Every confinement of the person is an imprisonment, whether it be in a common prison or in a private house, or even by forcibly detaining one in the streets.³³ False imprisonment consists in such imprisonment without authority.³⁴ This jurisdiction of the justice is seldom invoked.

and then obstructing the occupants' entry into the main structure, claim that he has such a constructive possession of the whole as will authorize him to assault the occupant when removing the obstructions: *Soule v. Hough*, 45 Mich., 418; 8 N. W., 50, 159. See, *People v. Adams*, 52 Mich., 105; 17 N. W., 715. A person will be justified in using just sufficient force to protect his property and possession, but no more: *Carter v. Sutherland*, 52 Mich., 597; 18 N. W., 375. See, *Ayres v. Birch*, 35 Mich., 501.

30—1 Saund. Pl. & Ev., 5 Am. ed., 156; *Buller's N. P.*, 18; *Reece v. Taylor*, 4 N. & M., 470. The degree of force permissible in self-defense must depend on circumstances: *People v. Doe*, 1 Mich., 451.

31—*Leeward v. Basille*, 1 Ld. Raym. 62; *Atkinson v. Crouch*, 1 Salk., 407; 3 Salk., 47; *Pond v. People*, 8 Mich., 150, 176.

32—1 Chit. Pl., 10 Am. ed., 501.

33—*Archbold's N. P.*, 571.

34—And such detention will be unlawful unless there be sufficient au-

Actions of this sort are usually brought in courts with more extended jurisdiction as to damages.

thority for it, arising either from some process of the courts of justice or from some warrant of a legal officer having power to commit under his hand and seal, and expressing the cause of commitment; or arising from some other special cause sanctioned from the necessity of the thing, either by common law or by statute: *Crowell v. Gleason*, 10 Me., 325. Words are not usually sufficient to constitute an imprisonment: *Fuller v. Bowker*, 11 Mich., 212, 213. An actual manual arrest of the person is not necessary to constitute false imprisonment. A demonstration of physical violence, which to all appearance can only be avoided by submission, operates as effectually, if submitted to, as if the arrest had been forcibly accomplished: *Brushaber v. Stegeman*, 22 Mich., 266. An arrest and an imprisonment exist where a party submits to an arrest without requiring the officer to resort to actual violence. The mildness of the imprisonment only bears on the amount of the damages: *Josselyn v. McAllister*, 25 Mich., 45. Though manual seizure is not essential to an arrest yet there must be some sort of personal coercion: *Hill v. Taylor*, 50 Mich., 549; 15 N. W., 899. This action will not lie, where the warrant is sufficiently regular on its face to protect the officer against one who made the complaint upon which the warrant issued, his attorney or the officer himself, though the magistrate may not have had the facts sufficient to authorize its issue if he had jurisdiction to issue the process if the showing were sufficient: *Wheaton v. Beecher*, 49 Mich., 348; 13 N. W., 769; *Hill v. Taylor*, 50 Mich., 549; 15 N. W., 899. The action will not lie against one called by the sheriff to assist to make an arrest, unless after being so commanded he act wantonly; and this, though the sheriff is acting without sufficient authority: *Flrestone v. Rice*, 71 Mich., 377; 38 N. W., 885. So, where the complaint and warrant charge no offense, the question of probable cause is wholly immaterial except upon the measure of damages: *Livingston v. Burroughs*, 33 Mich., 511; *Colter v. Lower*, 35 Ind., 285; 9 Am. Rep. 735; *Rich. v. McInerny*, 103 Ala., 345; 15 So., 663; 49 Am. St., 32. If an imprisonment is under legal process, an action for false imprisonment cannot be sustained. An action for malicious prosecution may be sustained if the prosecution was without probable cause and malicious: *Rich. v. McInerny*, *supra*. An action for false imprisonment on an illegal arrest in a civil action may be maintained before the proceedings are terminated by a judgment: *Josselyn v. McAllister*, 22 Mich., 300. But a voluntary going with an officer to a magistrate, without any declaration by the officer that he arrested him, would not be sufficient to constitute an imprisonment; nor would the voluntary giving of bail, where there had been in fact no arrest; nor the remaining in the county where the party had given a void bond for the jail limits: *Fuller v. Bowker*, 11 Mich., 204. In all cases of false imprisonment, the jury are entitled and required to give such general damages as they deem appropriate under the circumstances for the arrest and detention, as well as any special damages which are fully proved, and they are never confined to give either nominal or special damages if there has been a real personal injury, and every deprivation of liberty is so regarded: *Page v. Mitchell*, 13 Mich., 68; see, *Teft v. Windsor*, 17 Mich., 486. Where a party is arrested upon a complaint and warrant which does not set forth any offense known to the law, the person making the complaint is liable for false imprisonment, notwithstanding he may have believed that there was just cause for making the complaint; and evidence that he acted in good faith, supposing there was just cause for the prosecution, is no defense except to shield him from exemplary damages. Exemplary damages may be allowed when the defendant is guilty of fraud, malice, gross negligence or oppression: *Livingston v. Burroughs*, 33 Mich., 511. In an action for a false imprisonment, the

§ 609. Defense under the general issue.—The general issue is a sufficient plea only when the defendant did not imprison the plaintiff; of any other defense notice must be specially given.

recovery will not be limited to nominal damages, because there is no allegation or proof of special damages: *Josselyn v. McAllister*, 22 Mich., 300. And in a case where exemplary damages are allowable, they can only be measured by the sound discretion of the jury. An averment in a declaration that an imprisonment of the plaintiff had been effected by means of threats and violence, is a sufficient averment of malice to permit proof of it, and to justify a recovery or an aggravation of damages on that ground: *Bushaber v. Stegeman*, 22 Mich., 266. Where a person is sued for a malicious arrest and false imprisonment, his statements made after the arrest, concerning his motives and doings in re-

gard to the proceedings, are receivable as admissions against him to show malice; and all of his conversation with and threats to the party arrested, in advance of the arrest, should be received against him for the same purpose: *Josselyn v. McAllister*, 25 Mich., 45; see, also, 22 Mich., 300. When a person is sued for false imprisonment for causing the arrest of another, he has the right to show in mitigation of damages the statements and information upon which he acted, and the sources of that information, so that the jury may judge of the good faith and care with which he acted: *Livingston v. Burroughs*, 33 Mich., 511-514.

CHAPTER XXXVI.

OF TRESPASS TO PERSONAL PROPERTY.

§ 610. When action lies.

§ 612. By and against whom.

§ 611. Defense under general issue.

§ 613. Joint trespassers.

§ 610. Under what circumstances the action lies.—Trespass lies to recover damages for *immediate* wrongs, accompanied with *force*, to personal property, by destroying, damaging, taking away, detaining, or converting it. To sustain trespass, the injury must be *immediate* and not *consequential*; that is, the act complained of must itself occasion the injury; it must not be a mere consequence of that act.¹ If one throw a log into the highway, and, in the act of throwing, it hit another, trespass lies; but if, after it is thrown into the highway, an injury ensue in consequence of its being in the way, *case* would be the proper form of remedy for it. The act must be committed with force, but the *degree* of force with which it was done will make no difference. The *intent* with which the act is done is immaterial; though the injury arise from accident, trespass lies.²

1—Thus, trespass is the proper action for an injury to plaintiff's cow, caused by defendant's setting his dog on her: *Wood v. LaRue*, 9 Mich., 158. And a sheriff or officer who levies execution on the goods of a stranger to the judgment is liable in this action therefor: *Weber v. Henry*, 16 Mich., 399, 403. The representatives of a deceased partner, before the partnership business is settled and the debts paid, and before they have been let into joint possession by the surviving partner, have only an equitable interest in the partnership property, and are not tenants in common in law, and a right of action for trespass to the property is vested, during this interval, solely in the surviving partner: *Pfeffer v. Stalner*, 27 Mich., 537. So trespass lies for injury to a horse

caused by failure of defendant to turn to the right as required by law: *Evers v. Sager*, 28 Mich., 47. For cutting rope used with ferry: *Runnells v. Pentwater*, 109 Mich., 513; 67 N. W., 558; for cutting trolley wire: *Saginaw St. Ry. Co. v. Michigan Central Ry. Co.*, 91 Mich., 660; 52 N. W., 49; in case of levy on property of stranger to the process though the writ valid: *Heyman v. Covell*, 36 Mich., 157. So where unthreshed wheat was levied upon and the officer levying threshed it before making sale: *Stilson v. Gibbs*, 40 Mich., 42.

2—*Gulle v. Swan*, 19 Johns., 381; *Wilson v. Smith*, 10 Wend., 324; *Perclival v. Hickey*, 18 Johns., 257. In general, however, where goods and personal property have been wrongfully taken and disposed of, so that tres-

§ 611. **Defense under the general issue.**—The general issue is sufficient unless the defendant rely upon matter in justification or excuse, in which case notice of such matter must be given.³ The defendant cannot, under the general issue, show property out of the plaintiff in a stranger.⁴

When the general issue only is pleaded, the plaintiff must prove his right to the property injured, the injury, that defendant committed the injury, and the damages.

§ 612. **By and against whom.**—The plaintiff must either have been in actual possession of the property at the time of the

pass or trover would lie, the owner may waive the tort and sue in assumpsit for the value of the property; see, *Ward v. Warner*, 8 Mich., 508, 519; *Fiquet v. Allison*, 12 Mich., 328. If a trespasser takes property and sells or disposes of it wrongfully, and receives moneys or money's worth for it, the owner may waive the tort and affirm the sale as made in his behalf, and recover the proceeds in an action of assumpsit. But if the trespasser still retain the property in his possession, assumpsit will not lie for the value of it; the law will not imply a promise when the circumstances repel all implication in fact of any promise to pay: *Watson v. Stever*, 25 Mich., 386; see, *Barnum v. Stone*, 27 Mich., 332; *Tolan v. Hodgeboom*, 38 Mich., 624; *McLaughlin v. Salley*, 46 Mich., 219; 9 N. W., 256; *Bowen v. Rutland School District*, 36 Mich., 149; *Detroit v. Michigan Pav. Co.*, 36 Mich., 335. Waiving the trespass and suing in assumpsit is an election to regard the defendant as owner of the property: *Nield v. Burton*, 49 Mich., 53; 12 N. W., 906. See, further, upon right to waive the tort and bring assumpsit: *post*, § 683. *Tuttle v. Campbell*, 74 Mich., 652; 42 N. W., 384; 16 Am. St., 652; *Newman v. Olney*, 118 Mich., 545; 77 N. W., 9; *Grinnell v. Anderson*, 122 Mich., 533; 81 N. W., 829; *Castner v. Darby*, 128 Mich., 241; 87 N. W., 199; *St. John v. Antrim Iron Co.*, 122 Mich., 68; 80 N. W., 998; *Hallett v. Gordon*, 122 Mich., 567; 81 N. W., 556; 82 N. W., 827 (by statute). See, *post*, § 671 and notes.

3—*Demle v. Chapman*, 11 Johns.,

132; *Root v. Chandler*, 10 Wend., 110; see, *Esty v. Smith*, 45 Mich., 402. In trespass for taking goods, a defense that they were taken under an attachment against a third person, alleged to be the owner, is not admissible under the general issue without notice of the special defense: *Rosenbury v. Angell*, 6 Mich., 508. Nor is the defense of license admissible except under notice: *Vanderkarr v. Thompson*, 19 Mich., 82. In an action against a justice for issuing an execution against a man's property, it is not enough to show the judgment and execution and that he was such justice, but it must appear that the necessary proceedings were taken to give him jurisdiction of the parties and the cause of action. And so a supervisor, when justifying in trespass for the taking of personal property under his warrant for the collection of taxes attached to a tax roll, must show, not only that he was supervisor at the time, and signed warrant as such, but also that the assessment roll came from the board of supervisors as provided by law, and that the various taxes levied had been certified to him for assessment by the proper authorities: *Clark v. Axford*, 5 Mich., 182.

4—*Alken ads. Buck*, 1 Wend., 466; *Hanmer v. Wilsey*, 17 Wend., 91. But everything in mitigation of damages may be shown under the general issue: *Delevan v. Bates*, 1 Mich., 97. All the circumstances may be shown under the general issue: *Sutherland v. Ingalls*, 63 Mich., 620; 30 N. W., 342.

trespass, or he must have a general or special property in the goods, and the right to immediate possession.⁵ Actual possession is enough to sustain the action against a mere wrongdoer, and against all except the owner.⁶ The general ownership of property gives a constructive possession, but unless the plaintiff, in such case, has the right of immediate possession, at the time of the trespass, the action cannot be sustained.

A sheriff or constable, having duly seized goods under an execution, has such a special property in them that he may maintain trespass for an injury to them. But the plaintiff in an execution has no lien upon property in the goods, and can have no action for the injury.⁷ Where a constable sues and attempts to build up a title under the process, he must show a good judgment or regular proceedings, as well as regular process. When there is a defect of jurisdiction, or the proceedings are void for any other cause, he cannot maintain the action, at least against the defendant in the execution.⁸ Any one who has a right of property in the goods sufficient to maintain trover may maintain trespass.⁹ A receiptor of goods on execution cannot maintain trespass or trover,¹⁰ unless he has engaged to deliver them by a certain day, or pay the amount of the execution.¹¹

The same rule applies in this action as in actions for trespass on lands, with respect to the defendants. Trespass will not lie against a person for the taking of property by his servant, by

5—Putnam v. Wyley, 8 Johns., 422; Alken v. Buck, 1 Wend., 466.

6—Hanmer v. Willsey, 17 Wend., 91. The plaintiff may maintain trespass if he has at the time of the act such a title as draws after it a constructive possession: Walcot v. Pomeroy, 2 Pick., 121; Ayer v. Bartlett, 3 Pick., 156; Howe v. Keeler, 27 Conn., 538. A bare possession is sufficient to enable the plaintiff to recover in trespass against a wrongdoer who takes the property out of his possession without authority: Cook v. Howard, 13 Johns., 276; Demie v. Chapman, 11 *Ibid.*, 132; Jackson *ex dem.* Feller v. Feller, 2 Wend., 466; Butts v. Collins, 13 *Ibid.*, 143; Potter v. Washburn, 13 Vt., 558; Hanmer v. Willsey, 17 Wend., 91; Barker v. Chase, 24 Maine, 230.

7—Barker v. Mathews, 1 Denio, 335.

8—Dunlap v. Hunting, 2 Denio, 643; but see, Blackley v. Sheldon, 7 Johns., 32.

9—See, title, "Trover." Where one whose property has been wrongfully taken from him, replevied it, but being nonsuited in the replevin suit, the defendant had judgment against him for the value of the property: *held*, that he still might bring trespass for the taking of the property, and recover damages not only for the detention of the property while the defendant had it, but also its value as assessed in favor of the defendant in the replevin suit: Haviland v. Parker, 11 Mich., 103.

10—Dillenbeck v. Jerome, 7 Cow., 294.

11—Miller v. Adsit, 16 Wend., 335.

mistake, when no direction or authority is given by the principal to take the particular property in question, and there is no subsequent assent to the taking.¹² A principal is not liable in trespass for the act of his agent, unless he authorized it beforehand, or subsequently assented to it, with knowledge of what had been done.¹³

The plaintiff in an execution is not liable if the constable levy upon the property of a third person, unless he interfere with the levy, or assent to what has been done by the officer.¹⁴ Nor is a plaintiff in any case liable for the issuing of a process unless he directed or sanctioned it.¹⁵

A person, not being an infant, or *feme covert*, who, after the commission of the trespass, committed for his use and benefit, assents to it, becomes a trespasser.¹⁶

The intent with which the trespass was committed may be taken into consideration, in giving damages, either to enhance or mitigate them.¹⁷

When notice of special matter is given, the evidence will depend upon the notice. A return of the property taken, though

12—*Broughton v. Whalon*, 8 Wend., 474; see, *Smith v. Webster*, 23 Mich., 298.

13—*Freeman v. Rosher*, 13 Ad. & El., N. S., 780. A master is not liable for the willful act of his servant: *Chandler v. Broughton*, 1 C. & M., 29. But where he orders his servant to do an act the natural consequence of which is a trespass, the master is liable, notwithstanding the servant uses ordinary care, and the master directed him not to trespass: *Gregory v. Piper*, 9 B. & C., 591.

14—*Averill v. Williams*, 1 Denio, 501.

15—*Gold et al. vs. Bissell*, 1 Wend., 210. But it seems that he will be liable for illegal process, if he directed or assented to its issue: see, 2 Saund. Pl. & Ev., 5 Am. ed., 1117, 1118.

16—2 Saund. Pl. & Ev., 5 Am. ed., 1121; see, *Newsom v. Hart*, 14 Mich., 283.

17—*Sears v. Lyons*, 2 Starkie's R., 218. But if a person unlawfully in-

jure the property of another, he is liable for the damages without regard to the intention with which the act was done: *Amick v. O'Hara*, 6 Blackf., 258. And it is immaterial whether he actually contemplated the damages which resulted or not. He must be held to have contemplated all the damages which legitimately resulted from his illegal act: *Allison v. Chandler*, 11 Mich., 542; see, *Gilbert v. Kennedy*, 22 Mich., 117. If a trespass was committed while the defendant was acting in good faith and under an honest belief that he had a legal right to do the act complained of, the plaintiff can recover only the actual damages sustained by him, and not damage of a punitive character: *Allison v. Chandler*, 11 Mich., 542. Absence of bad faith can never excuse a trespass, though the existence of bad faith may sometimes aggravate it. Every one must be sure of his legal right when he invades the possession of another: *Cubit v. O'Dett*, 51 Mich., 351; 16 N. W., 679.

accepted by the plaintiff, is no bar to the action; it will avail only in mitigation of the damages.¹⁸

The act must amount to a trespass when done, if a trespass at all. The relation back of the title of a defendant in trespass who satisfies a judgment against him cannot so affect third persons as to make them trespassers as to acts done before the judgment was satisfied.¹⁹

Where trespass *de bonis asportatis* for a conversion of goods is brought and judgment obtained against defendant, and satisfied, the effect is to pass title to goods converted to the defendant.²⁰

§ 613. **Joint trespassers.**—In general, where one of several joint trespassers or other wrong-doers is used, and a recovery had against him for the full amount of the injury committed by all, and he is compelled to pay the whole amount, such payment operates to discharge the other joint trespassers, but gives claim for contribution from the others for any share or part of the damages paid by him.²¹ But the rule that there is no contribution between joint tort-feasors, does not apply to a case where the party asking contribution is a tort-feasor only by inference of law; but is confined to cases where it must be presumed that the party knew he was committing an unlawful act.²²

18—*Hanmer v. Wilsey*, 17 Wend. 91.

19—*Bacon v. Kimmell*, 14 Mich. 201. The doctrine of relation is remedial. Its use is to prevent wrongs and punish trespass. It can never have the effect to make that a wrong which was innocent when done: *Flint & P. M. Ry. Co. v. Gordon*, 41 Mich. 420; 2 N. W., 648; *Goetchius v. Sanborn*, 46 Mich., 330; 9 N. W., 437.

20—*Bacon v. Kimmell*, 14 Mich. 201.

21—*Merryweather v. Nixan*, 8 Term. R., 183, 186; *Andrews v. Murray*, 33 Barb., 354.

22—*Conventry v. Barton*, 17 Johns., 142; *Stone v. Hooker*, 9 Cow., 154.

If separate judgments are obtained against several persons who were jointly liable for the same trespass, the suing out of an execution upon one of them is an election by the plaintiff to enforce that judgment, and he cannot enforce the others. The case differs from that where it is the question of enforcing a single judgment against several defendants: *Boardman v. Acer*, 13 Mich., 77; *Kenyon v. Woodruff*, 33 Mich., 310, 315.

CHAPTER XXXVII.

OF TRESPASS TO REAL PROPERTY.

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§ 614. **Definition.**—Every unwarrantable entry upon the land of another, whether it be enclosed or not, is a trespass. Even shooting at game on another's land, though without an actual entry, is in law a trespass.¹ The owner of cattle is liable in trespass for their entering upon the land of another.²

1—One who anchors his boat in waters outside of the navigable portion of a stream, throws out decoys and engages in duck hunting from the boat is a trespasser as against the riparian owner: *Hall v. Alford*, 114 Mich., 165; 72 N. W., 137. One who breaks a store or dwelling for service of a writ of replevin on goods therein, after having first demanded admission, is not guilty of trespass: *C. L.*, §§ 10655 and 752; *Rentschler v. Fox*, 130 Mich., 498; 90 N. W., 275.

2—*Wells v. Howell*, 19 Johns., 385; *Adams v. Freeman*, 12 *Ibid.*, 408; *Blake v. Jerome*, 14 *Ibid.*, 406. Where a person makes an excavation by his neighbor's land, into which the land from its own weight and of necessity must fall, and does immediately after fall, trespass will lie against him therefor: *Buskirk v. Strickland*, 47 Mich., 389; 11 N. W., 210. The projection of the eaves of a building over the lands of another held not a

trespass: *Bureau v. Marshall*, 55 Mich., 234; 21 N. W., 304. The cutting off of a portion of plaintiff's line fence from the top, is a trespass though it may improve the fence: *Fisher v. Dowling*, 66 Mich., 370; 33 N. W., 521. The throwing of earth excavated from a drain on the lands of plaintiff outside the boundaries of that portion taken for the drain is trespass: *Clark v. Wiles*, 54 Mich., 323; 20 N. W., 63. One taking fish from a small lake nearly surrounded by the lands of plaintiff, a public usage to do so prevailing, is not a trespasser: *Marsh v. Colby*, 39 Mich., 626. Trespass will lie in case of riparian owner against one entering and cutting ice: *Clute v. Fisher*, 65 Mich., 48; 31 N. W., 614. See also, *Lorman v. Benson*, 8 Mich., 18. As to right of vendee in a land contract to bring trespass, see, *Pfistner v. Bird*, 43 Mich., 14; 4 N. W., 625; *Witheral v. Muskegon Booming Co.*, 68 Mich., 48; 35 N. W., 758.

§ 615. **Who may bring the action.**—The person in actual possession of land, whether that possession is legal or not, may maintain this action against a wrong-doer.³ A person having title to land, although not in the actual possession of it, may maintain trespass against any one not having title.⁴ A lessor cannot maintain this action against a stranger while there is a tenant in possession.⁵ The action must be brought by the lessee. Trespass lies for an entry upon land and an ouster of the plaintiff, but damages can be recovered only for the simple entry and ouster, and not for the continuance of the trespass; damages for the latter are not recoverable until after the plaintiff has gained possession by re-entry.⁶ Whoever has an exclusive right in the soil, as to a crop of wheat growing thereon, may maintain trespass.⁷

§ 616. **Against whom the action may be brought.**—The same rule prevails in civil actions for trespass, as in criminal pro-

One who enters under a tax certificate and cuts timber is a trespasser: *Busch v. Nester*, 62 Mich., 381; 28 N. W., 911. A highway commissioner who cuts and carries away shade trees from in front of plaintiff's premises, they not obstructing the highway, is a trespasser: *Clark v. Dasso*, 34 Mich., 86. Not so if it appear that what he did was lawfully performed by virtue of the possession of the public and in furtherance of the needs of public travel: *Wolf v. Holton*, 61 Mich., 550; 28 N. W., 524.

3—*Graham v. Peat*, 1 East., 244; 3 Burr., 1563; *Carpenter v. Mason*, 12 Ad. & E., 629; *Revett v. Brown*, 5 Bing., 9; *Inhabitants of Barnstable v. Thacher*, 3 Metc., 239; *First Parish in Shrewsbury v. Smith*, 14 Pick., 297; *Kempton v. Cook*, 4 Pick., 305; *Hurd v. West*, 7 Cow., 752; *Orser v. Storms*, 9 *Ibid.*, 687; *Gourdier v. Cormack*, 2 E. D. Smith, 200; *Althous v. Rice*, 4 E. D. Smith, 347; *Newcombe v. Irwin*, 55 Mich., 620; 22 N. W., 66; *O'Brien v. Cavanaugh*, 61 Mich., 368; 28 N. W., 127; *Hoffman v. Harrington*, 44 Mich., 183; 6 N. W., 225. Not so a mere intruder as against one showing title: *Vial v. Hofen*, 106 Mich., 160; 64 N. W., 11; see, *Newcomb v. Love*, 112 Mich., 115; 70 N. W., 443. Nor

a vendee in a land contract who has neither actual nor constructive possession: *Moyer v. Scott*, 30 Mich., 345; *Gates v. Comstock*, 107 Mich., 546; 65 N. W., 544; *Des Jardins v. Thunder Bay R. B. Co.*, 95 Mich., 140; 54 N. W., 718.

4—*Van Rensselaer v. Radcliff*, 10 Wend., 639; *Hubbel v. Rochester*, 8 Cow., 115; *Van Deusen v. Young*, 29 Barb., 9; *Putnam v. Wyley*, 8 Johns., 432; *O'Brien v. Cavanaugh*, 61 Mich., 368; 28 N. W., 127. A party having title to unoccupied lands is constructively in possession, and may maintain trespass against one who without his license, and without color of title, enters and cuts timber: *Safford v. Basto*, 4 Mich., 406; see, *Cummings v. Freer*, 26 Mich., 129. Constructive possession cannot exist where there is an actual adverse possession: *Miller v. Wellman*, 75 Mich., 353; 42 N. W., 843; *Ruggles v. Sands*, 40 Mich., 561.

5—*Llenow v. Ritchie*, 8 Pick., 235; *Campbell v. Arnold*, 1 Johns., 511; *Wickham v. Freeman*, 12 *Ibid.*, 183.

6—*Holmes v. Seely*, 19 Wend., 507.

7—*Austin v. Sawyer*, 9 Cow. R., 39. Where one is in possession of lands of another, there being no complaint that he holds them wrongfully,

ceedings for misdemeanors, in respect to defendants. In misdemeanors, all persons who order or incite others to commit the offense, or procure it to be committed, and all persons present, aiding and abetting in the commission of it, are principals, as fully as the person by whose hand it is actually committed; so, in trespass, all persons who order or procure it to be done, or incite others to do it, are guilty of the trespass.⁸ Where the defendant ascended in a balloon, which descended a short distance from the place of its ascent, into the plaintiff's garden, and the defendant being entangled and in a perilous situation, called for help, and a crowd of people broke through the fence into the plaintiff's garden, beat and trod down his vegetables, flowers, etc., it was held that though the ascension in a balloon was a lawful act, yet, as the defendant's descent, under the circumstances, would ordinarily and naturally draw the crowd into the plaintiff's garden, either from a desire to assist him, or to gratify a curiosity which he had excited, he was answerable for all the damages done to the plaintiff's garden.⁹

It is no defense to the action of trespass that the defendant acted in good faith though it may affect the question of the amount of the damages.¹⁰ In common with other causes of action which survive, causes of action for injuries to real estate may be assigned.¹¹

§ 617. **The declaration.**—The declaration should particularly describe the land. A general description would be sufficient unless the defendant should plead title, and thereby remove the cause to the circuit court, in which case the defendant would prevail in that court, upon proving title to any land in the township mentioned in the declaration.¹² To avoid this

he is not liable in trespass for using them in the ordinary way, for the purpose for which they are adapted: *Burnham v. Gilder*, 34 Mich., 246.

8—1 Archb. N. P., 304; 2 Saund. Pl. & Ev., 1117; see, *Smith v. Webster*, 23 Mich., 298.

9—*Guille v. Swan*, 19 Johns., 381; *Percival v. Hickey*, 18 Johns., 257.

10—*Isle Royale Mining Co. v. Hertin*, 37 Mich., 332; *Cubit v. O'Dett*, 51 Mich., 347; 16 N. W., 679; *Estey v. Smith*, 45 Mich., 402; 8 N. W., 83.

11—*Finlay v. Backus*, 18 Mich., 218; *Grant v. Smith*, 26 Mich., 201; *Gates v. Comstock*, 107 Mich., 546; 65 N. W., 544.

12—*Ellice v. Boyer*, 8 Wend., 503; *Tuthill v. Clark*, 11 Wend., 642; *McFarlane v. Ray et al.*, 14 Mich., 465. But where the plaintiff declares describing the premises by metes and bounds, it is not necessary that he should, on trial, show title to every part; it is enough if he show title to that part of the close in which the

and other difficulties, the declaration should carefully describe the land on which the trespass was committed.

§ 618. **By statute—treble damages.**—"Every person who shall cut down or carry off any wood, underwood, trees or timber, or shall girdle or otherwise despoil or injure any trees on the land of any other person, without the leave of the owner thereof, or on the lands or commons of any city, township, village or other corporation, without license therefor given, shall be liable to the owner of such land, or to such corporation, in three times the amount of damages, which shall be assessed therefor in an action of trespass, by a jury, or by a justice of the peace in the cases provided by law."¹³

trespass was committed: *King v. Dunn*, 21 Wend., 253. "In this state a declaration in trespass for breaking and entering plaintiff's close, without asserting and describing the title in the plaintiff to the lands, is not such a claim of title as, under the statute (C. L., § 11257) is admitted by the plea of the general issue. The land is the close of the plaintiff if he had peaceable possession, even though he had no title, and is not the plaintiff's close if the defendant is in peaceable possession. Under such a declaration the plaintiff relies upon his possession and the defendant may disprove it under the general issue": *Ostrom v. Potter*, 104 Mich., 115; 62 N. W., 170; *Vandoozer v. Dayton*, 45 Mich., 247; 7 N. W., 814. If the action is brought by an assignee the declaration must allege the assignment: *Gates v. Comstock*, 107 Mich., 546; 65 N. W., 544. A declaration alleging that the "defendant with force and arms the lands and premises of the said plaintiff situated (*describing them*), broke and entered," etc., is not a sufficient allegation of title in plaintiff. It is only such an allegation as would be made by one relying upon *possession* to support his action: *Orris v. Kempton*, 105 Mich., 229; 63 N. W., 68.

13—C. L., § 11204. Treble damages are not allowable under this statute where the trespasser has probable cause for supposing he has title in himself, or that he has authority from the real owner to do the act complained of: *Russell v. Myers*, 32 Mich.,

522; see, C. L., § 11205. This statute was not framed to protect *possessory* rights, but was made to give the *owners of the fee* a right to sue in trespass for the injuries mentioned in the section, done to their inheritance. If the party in possession, whether owner or tenant, seeks damage for the disturbance of his possession, he is still left to his common law action for that. But under this section, the damages which are allowed to be trebled are not damages to the possession, but to the freehold. And it is no defense that the alleged trespasser was in possession of the land at the time of committing the acts complained of: at most it would be important only for the purpose of preventing the trebling of the damages in case it were shown that he had reason to believe that he owned the land. The plaintiff's damages under this section would include not merely the value of the timber or wood cut and carried away, etc., but such damages as occurred to the freehold by their destruction. When the action is merely for carrying away timber already cut, the damages could not well go beyond its value; but where standing trees are cut down, the rule of damages should fairly be the amount of which the value of the estate is diminished by their destruction. And it would seem that the declaration under this section should expressly aver the plaintiff's ownership in the fee, and that such ownership must be strictly proved, unless informal proof

"If, upon the trial of any such action, it shall appear that the trespass was casual and involuntary, or that the defendant had probable cause to believe that the land on which such trespass was committed was his own; or that such wood, trees or timber were taken for the purpose of making or repairing any public road or bridge; judgment shall be given to recover only the single damages assessed."¹⁴

is admitted without objection: *Achey v. Hull*, 7 Mich., 423; *Reynolds v. Maynard*, — Mich., —; 100 N. W., 174 (June, 1904). But if the declaration contains a statement of ownership sufficient to support proof of a holding by the plaintiff in fee simple, an objection that his title is not alleged with that directness and certainty dictated by the rules of pleading is purely technical, and should be raised only by demurrer: *Clark v. Field*, 42 Mich., 345; 4 N. W., 19.

In order to recover treble damages under this statute, the declaration or some count in it must be framed upon the statute. Pleading the statute is stating the facts which bring the case within it, and counting on it, is making express reference to it by apt terms to show the source of right relied on: *Howser v. Melcher*, 40 Mich., 185.

Where a defendant in trespass for cutting timber on the land of plaintiff, had in good faith accepted by letter plaintiff's offer to sell him the land, but which acceptance, by delay of mail did not reach plaintiff until after he had sold the land to another, all the acts of trespass being after the acceptance and before defendant had notice of the sale to the third person: *held*, that this was no defense to a recovery of single damages; but that if the defendant made his acceptance in good faith and committed the alleged trespass in the belief that his letter of acceptance would secure to him the title of the land, then he was not a trespasser within the punitive operation of the statute (C. L., § 11204), and was liable only for single damages: *Wallace v. Finch*, 24 Mich., 255. In an action under this section, 11204, the burden is on the plaintiff to show that the cutting was without leave of the owner: *Padman v.*

Rhodes, 126 Mich., 434; 85 N. W., 1130. On the other hand the burden is on the defendant under section 11205 to show that the trespass was casual and involuntary if he would escape the penalty of treble damages: *Michigan L. & I. Co. v. Deer Lake Co.*, 60 Mich., 143; 27 N. W., 10; 1 Am. St., 491; *Hart v. Doyle*, 128 Mich., 257; 87 N. W., 219. Treble damages under this statute are in their nature punitive and cannot be given where the injury arises from mere neglect; there must be active misconduct: *Michigan L. & I. Co. v. Deer Lake Co.*, 60 Mich., 143; 27 N. W., 10; 1 Am. St., 491. In New York it is held, under a similar statute, that the owner of land subject to the life estate of another cannot, during the continuance of the life estate, have treble damages for a trespass committed by one who enters by permission of the tenant for life: *Van Dusen v. Young*, 29 N. Y., 9.

14—C. L., § 11205. Under a declaration containing a count for a common law trespass and a count for a statutory trespass under the preceding § 11204, if the jury return a general verdict of guilty, without stating under which count they find, a judgment for single damages only can be rendered. In such case it is not competent for the court to apply the verdict to the count under the statute and then proceed to render judgment for treble the single damages returned by the jury. In such a case, in order to authorize a judgment for treble damages, it is necessary that the jury return with their verdict, that they find the defendant guilty under the count upon the statute: *Osborn v. Lovell*, 36 Mich., 245.

Notwithstanding there may be only a single count in the declaration, claiming treble damages, yet if the

"And in all cases where a party has a right of action for the taking of timber, or other trespass on lands, or for any injury to lands, whether direct or consequential, it shall be lawful for the party having such right of action to waive the tort and bring assumpsit therefor."¹⁵ And such suit may be commenced by attachment.¹⁶

"If any person shall be ejected or put out of any lands or tenements in a forcible and unlawful manner, or being put out, be afterwards holden and kept out by force, or with strong hand, he shall be entitled to maintain an action of trespass, and shall recover therein three times the amount of damages assessed by the jury or a justice of the peace in the cases provided by law."^{16a}

This section applies only to damages for a forcible eviction and detainer. The taking and conversion of personal property, though committed at the same time, and forming a part of the same transaction, is distinct and different in its nature from an eviction and detainer. If the declaration claims damages for both the eviction and the taking or injury to personal property, the plaintiff, if he wishes to avail himself of the benefit of the statute, must take a separate assessment of the damages occasioned by the eviction and detainer, and of those occasioned by the taking and conversion of the personal property.

proof show that the trespass comes within any of the exceptions in § 11205, judgment for single damages only can be rendered. The jury can find and assess single damages only, and then if the proofs show that the trespass comes within any of the exceptions mentioned in the statute, the single damages will be the amount for which recovery may be had; but if the proofs fail to bring the trespass within any of those exceptions, then the justice will treble the damages and render a judgment for that amount: *Clark v. Field*, 42 Mich., 342; 4 N. W., 19.

15—C. L., § 11207.

16—C. L., § 11208.

16a—C. L., § 11206. A lessee of lands, if in possession, as well as the owner, may maintain an action under this section; therefore, a tenant for years will be entitled to recover treble damages against his landlord for a wrongful and forcible entry under cir-

cumstances specified in the section: *Shaw v. Hoffman*, 21 Mich., 151. A tenant who has been unlawfully evicted from a barn which he occupied as a livery and boarding stable, by his landlord, who destroyed the barn, may recover damages for the proper length of time for the loss of profits from boarding the horses of others as well as the difference in cost of keeping his own horses and of hiring them boarded, where such damages were the natural and proximate consequence of the trespass and eviction complained of; and in a case coming within the statute, such damages may be trebled. But damages to personal property in a barn from which one has been unlawfully evicted, and kept out, cannot be trebled under the statute: *Shaw v. Hoffman*, 25 Mich., 162; *Wilson v. McCrillis*, 50 Mich., 347-8; 15 N. W., 504; *Kilgannon v. Jenkinson*, 57 Mich., 325; 23 N. W., 830.

Unless he does so, the damages for the eviction and detainer cannot be trebled.¹⁷

To entitle the defendant to treble damages under either of the sections, 11204 or 11206, he must declare upon the section under which he claims the damages. But, if the declaration contains a count upon the statute, and a general count or claim for damages for a trespass or injuries for which the statute does not give treble damages, and damages are assessed by the jury, generally, upon all the counts, or for both claims, the damages cannot be trebled.¹⁸

It will be a decisive objection that the declaration does not refer to the statute. "This is essential, as notice to the defendant of the extent to which the plaintiff claims; otherwise the former cannot be prepared to narrow the claim by bringing himself within the provisions of the act.¹⁹ The declaration should refer to the statute, so that the defendant may be apprised of the extent of the demand; and unless the defendant, upon the trial, shall bring himself within the proviso of § 11205, the jury will if it find him guilty of the trespass alleged, assess *single damages*, and upon this finding, the damages are to be trebled by the court." If the jury find that the case is within the second section, they should so state in their verdict, to prevent the trebling of the damages.²⁰

17—Thayer v. Sherlock, 4 Mich., 173, 176.

18—Benton v. Dale, 1 Cow., 160; Moores v. Allen, 2 Wend., 247; Thayer v. Sherlock, 4 Mich., 173; Howser v. Melcher, 40 Mich., 185; Hiltchcock v. Pratt, 51 Mich., 263; 16 N. W., 639. In such case the jury should specify in their verdict the amount of damages awarded under the count upon the statute, and the amount awarded on the other count or claims; then the damages awarded under the former count may be trebled: *Ibid.*, Thayer v. Sherlock, 4 Mich., 176, 177. Under a declaration containing a count for a common law trespass, and a count for a statutory trespass claiming treble damages, if a general verdict of guilty is returned, it is not competent for the court to apply the verdict to the count under the statute and proceed to render judgment for treble the damages. In such case the

judgment on the verdict must be for the single damages only: Osborn v. Lovell, 36 Mich., 246; Russell v. Myers, 32 Mich., 522; see, Clark v. Field, 42 Mich., 342; 4 N. W., 19. Under the general issue pleaded to a declaration under the statute claiming treble damages, the defendant may give evidence that the trespass was involuntary and made under a *bona fide* claim of right, and he need not give notice of this defense under the plea. In tort whatever goes in mitigation of damages may be given in evidence under the general issue: Osborn v. Lovell, 36 Mich., 246.

19—Brown v. Bristol, 1 Cow., 176; Newcome v. Butterfield, 8 Johns., 343; Howser v. Melcher, 40 Mich., 185.

20—Newcome v. Butterfield, 8 Johns., 343; King v. Havens, 25 Wend., 420; see, Swift v. Applebone, 23 Mich., 252. As to the construction of C. L., § 11175, providing for treble damages

§ 619. **The evidence.**—Under the plea of the general issue the plaintiff will have to prove: 1, the trespass; 2, the place in which it was committed, so as to make it correspond with the description of it in the declaration; 3, possession of the place, and 4, the damage.

1. *He must prove the trespass.* This may be done by some person who was present at the time and saw it committed, or by the admissions of the defendant, or in any manner connecting the defendant with the transaction. The time of the commission of the trespass is immaterial, if it was before the commencement of the suit. But evidence of only one trespass can be given, unless the declaration contain several counts, or the trespass is stated to have been committed on such a day, and “on divers other days and times between that day and the day of the commencement of the suit.” In such case, the plaintiff may prove as many acts of trespass of the nature laid in the declaration, as he has counts, or as were committed between the first day mentioned and the commencement of the suit, as he can; or at his option, he may in the last case give evidence of a single trespass committed at some other time, but he cannot do both.²¹ The latter mode of stating a trespass would be improper if the trespass must necessarily all have been done at one time, as taking a horse. But in such a case the plaintiff cannot recover but for one trespass.²² Under the allegation of “other wrongs,” the plaintiff cannot prove anything not stated in the declaration, unless it could not with decency be mentioned in it.²³

2. *It must be proved to have been committed by the defendant, or by his orders, or at his instigation.* In an action of trespass against several defendants, it was held that to entitle the plaintiff to a verdict against all the defendants as joint trespassers, it must appear that they acted in concert in committing the trespass complained of; that if some aided and assisted the others in the trespass, all were equally guilty; or if some employed the others to commit the trespass, or assented to the

to be recovered in an action of trespass by complainant obtaining restitution of premises, see, *Lane v. Ruhl*, 103 Mich., 38; 61 N. W., 347.

21—1 Saund., 24; *Jamieson's Assignees v. Hodson*, 1 Starkie, 151;

Gilbert v. Kennedy, 22 Mich., 5; *McDiarmid v. Caruthers*, 34 Mich., 49.

22—2 Saund. Pl. & Ev., 5 Am. ed., 1094.

23—1 *Ibid.*, 153, 154.

trespass committed by the others, having an interest therein, they were all jointly guilty; that they must be convinced from the evidence that all the defendants were acting in concert in the trespass in question, or they could not all be found guilty; but it would not be material if they have unequal interests in the avails of the trespass, for all those who confederated to do an unlawful act are deemed guilty of the whole, although their share in the profits may be small; but if any of the defendants were not guilty at all, or if any of them, though guilty, were acting separately and for themselves alone, without any concert with the others, they ought to be acquitted, and those only found guilty who were acting jointly.²⁴ The mere assent of a party to a trespass committed does not always render him a trespasser; *it must have been committed for his benefit*, or a subsequent assent to or adoption of it will not have that effect.²⁵ If the action be against several, and the plaintiff give evidence of a trespass by all, he cannot afterwards give evidence of another trespass by some of them only, even although he offer to waive the first trespass; or if he give evidence of a trespass in which some only of them are implicated, he shall not afterwards be allowed to give evidence of another trespass by all.²⁶ If the plaintiff elect to prove a trespass against some only of several defendants, the rest are entitled to an acquittal, and may be acquitted immediately; so if at the close of the plaintiff's case there is no evidence against one defendant, the plaintiff may then elect to go on against the other defendant only.

3. *It must be proved that the trespass was committed in the close described in the declaration.* A material variance in this respect will be fatal. In trespass for breaking and entering the plaintiff's close, "and then and there" taking and carrying away his goods, the plaintiff cannot recover, even for the goods, unless he prove an entry into his close, and a taking of the goods therefrom. The breaking and entering the close in such

24—*Williams v. Sheldon*, 10 Wend., 654; see, *East v. Cain*, 49 Mich., 473; 13 N. W., 822.

25—*Willson v. Barker*, 4 B. & Ad., 614. *Ropps v. Barker*, 4 Pick., 239; and *Van Leuven v. Lyke*, 1 Comst., 515,

26—*Howe v. Willson*, 1 Denio, 181. 517.
But a separate count for taking and

case, is the substantive allegation, the substantial ground of action, and the rest is laid as matter of aggravation.²⁷ A declaration that defendant's horse broke and entered plaintiff's close, and injured plaintiff's horse therein, need not allege that the defendant's horse was accustomed to kick and fight, and that defendant knew it.²⁸ The rule, that a *scienter* must be alleged in the declaration, does not apply where the mischief is done by such animals while committing a trespass upon the land of another.²⁹

4. *Possession of the close by the plaintiff at the time the trespass was committed.* The plaintiff must prove *actual* or *constructive* possession of the premises, to sustain his action.³⁰ The plaintiff may so frame his declaration as to avoid proof of possession in justice's court. Thus, where a claim of title is made in the declaration, the statute provides that unless the defendant interposes a plea of title and delivers to the justice a bond as therein directed, the justice shall have jurisdiction of the cause, and shall proceed therein, and the defendant shall be precluded in his defense from all evidence drawing in question the title to lands, and any claim to title to lands made by the plaintiff in his declaration, and therein

27—Dunkle v. Kocker, 11 Barb., 387.

28—Van Leuven v. Lyke, 1 Comst., 515.

29—Higby v. Williams, 16 Johns., 215; Tait v. Harris, 6 C. & P., 73; Hogarth v. Jackson, 2 *Ibid.*, 596.

30—But it seems not necessary that the plaintiff should show possession to every part of the land described in the declaration; it is sufficient if he has possession of that part where the trespass was committed: King v. Dunn, 21 Wend., 253. While, as a general rule, possession is necessary to maintain an action of trespass on lands, yet possession alone is sufficient for that purpose against a mere wrongdoer or trespasser: Althous v. Rice, 4 E. D. Smith, 347; Smith v. Milles, 1 Term. R., 480; Gourdlar v. Cormack, 2 E. D. Smith, 200; Hoyt v. Gelston, 13 Johns., 141; Hurd v. West, 7 Cow., 752; Orser v. Storms, 9 *Ibid.*, 687. And particularly in cases where the plaintiff is in the peaceable and exclusive possession, he may, whether

he has title or not, maintain the action for a trespass upon it against any person except the real owner, or a person who has the right to the possession: Palmer v. Aldridge, 16 Barb., 131; Jackson v. Hazen, 2 Johns., 22; Jackson v. Harder, 4 *Ibid.*, 203, 211. But actual possession is not necessary if plaintiff is the owner of the land and entitled to immediate possession: Alken v. Buck, 1 Wend., 466; Putnam v. Wyley, 8 Johns., 432. A party having title to unoccupied lands is constructively in possession, and may maintain trespass against one who enters without license or color of title: Safford v. Basto, 4 Mich., 406. Where a plaintiff sues for trespass upon wild and uncultivated lands, which are not in the actual possession of any one, he must necessarily show his title, and thus make out a constructive possession: Hubbel v. Rochester, 8 Cow., 115; Hamilton v. Accessory Transit Co., 26 Barb., 46; Main v. Cooper, 11 E. P. Smith, 180, 184. See, *ante*, § 615 and notes.

described, shall be deemed to be admitted by the defendant.³¹ A claim of *actual* possession merely in the declaration would not probably be of any avail under this section. The question of actual possession is not one of title within the statute, and this the justice is authorized to try and determine.³² Where objection was made that the plaintiff in the justice's court failed to show himself in the *actual possession* of the land, the court said: "The evidence was abundantly sufficient to establish the plaintiff's actual possession of the premises in question. It was shown that the lots on which the trespass was committed, had been used as the wood lot to the farm on which the plaintiff lived for about twenty years; that during all that time, the plaintiff and his father, under whom he claimed title, had cut their fire-wood, saw-logs and rail-timber on the lot, and had also made maple sugar thereon, and had a house thereon for that purpose; that it was the only wood-lot the plaintiff had, and had been used as such for twenty years; that it was not fenced, nor was there any clearing upon it. The precise dimensions or contents of the lot are not given; but it is fair to be inferred, from the evidence, that it was not larger than was required for the purpose of fuel, fencing, etc., for the farm to which it was attached. The plaintiff had all the possession which can be had of a wood-lot, reserved and used exclusively for fuel, fencing, etc. A constant and uninterrupted use for those purposes, is undoubtedly sufficient to constitute an actual possession, and to enable the plaintiff to maintain trespass for an encroachment upon it."³³ But there are cases in which the plaintiff cannot maintain an action at all

31—C. L., § 786. A declaration in trespass for *breaking and entering the plaintiff's close*, without asserting and describing a title in the plaintiff to the lands, is not such a claim of title as, under the statute, is admitted by the plea of the general issue. The land was the close of the plaintiff if he had peaceable possession, even though he had no title, and was not the plaintiff's close if the defendant was in peaceable possession. Under such a declaration the plaintiff relies upon his possession, and the defendant may disprove it under the general issue: *Vandoover v. Dayton*, 45 Mich., 247;

7 N. W., 814. But if the plaintiff claims and describes a title in himself in his declaration, it seems that the defendant under the general issue merely, will not be allowed to dispute it or claim any right of possession in himself inconsistent thereto, either before the justice or on appeal. *Ibid.*: *Gay v. Hults*, 55 Mich., 328; 21 N. W., 357.

32—*Ehle v. Quackenboss*, 6 Hill, 537; *Dewey v. Bordwell*, 9 Wend., 65.

33—*Machin v. Geortner*, 14 Wend., 239; see, *Jackson v. Myers*, 3 Johns., 388; *Clowes v. Hawley*, 12 *Ibid.*, 485.

without showing a *title*; these are when he is not in actual possession at the time of the commission of the trespass.³⁴ In such case he must make out a constructive possession by showing an actual title. He must do so where the land is entirely wild, vacant or common; indeed, in all cases where a *pedis possessio* cannot be shown.³⁵ It is to such cases and some others the section³⁶ applies; by which "If it appear on the trial, from the plaintiff's own showing, that the title to the land is in question, *which title shall not be admitted* by the defendant, the justice shall certify the cause and papers to the circuit or district court," etc. The preceding remarks, as to showing title, have no application to cases of trespass on land tried by a justice, where any claim of title to the land is made by the plaintiff in his declaration and therein described.

§ 620. **The damages—in general.**—The intent with which the trespass was committed, may be taken into consideration in giving damages. Where the defendant had entered upon the land as a surveyor, to measure off a portion of it, which had been sold for quit rent, he was allowed to show these facts in mitigation of damages, as they tended to show that the trespass was not wilful and malicious, and that the defendant entered under an honest though mistaken belief that his entry was lawful.³⁷ It is provided by statute, that in certain cases the

34—Hubbel v. Rochester, 8 Cow., 115.

35—Willoughby v. Jenks, 20 Wend., 98, 98.

36—C. L., § 787. Ostrom v. Potter, 71 Mich., 44; 38 N. W., 670.

37—Willoughby v. Goertner, 14 Wend., 239. Where one commits a trespass, it is immaterial whether he expected damages to result or not. He must be held to contemplate all the damages which legitimately follow from his illegal act. And if, from the nature of the case, the amount of the damages cannot be estimated with certainty, or only a part of them can be so estimated, all the circumstances of the case, having any tendency to show the probable amount of damages, may be placed before the jury, so as to enable them to make the most intelligible and probable estimate which the nature of the case

will permit. Where, by defendant's trespass, the plaintiff was deprived for the remainder of his term, of premises leased by him, he is not limited in damages to such sum as the term might be worth to others, or to the difference between the rent he was paying and the fair rental of the premises. If the premises were of much greater and peculiar value to him on account of the business he had established there, and the resort of customers to that particular place and the good will of the place in his trade or business, and if the trespass rendered the place untenable whereby he was obliged to remove to another place of business, he is entitled to show that his business fell off in consequence, and how much, and to have damages accordingly: Allison v. Chandler, 11 Mich., 542; see, Drune v. Wheeler, 22 Mich., 439. So, where

plaintiff shall recover three times the amount of the damages which shall be assessed therefor by the jury or justice. The mode of proceeding under the statute is this: the jury, or justice, find him guilty of the trespass alleged, and assess the single damages *in terms*, and this is to be trebled by the court and judgment rendered for the amount.³⁸ The verdict is, that the jury find the defendant guilty, and assess him single damages therefor to the amount of dollars.

§ 621. **Defense under the general issue.**—It is competent for the defendant to prove that he did not commit the trespass, or order or procure it to be committed, or that it was not committed in the place described in the declaration, or that the plaintiff was not in possession of the land at the time the trespass was committed, or any matter in mitigation of the damages. But he cannot set up any title in himself, or a third person to the premises; and if any claim of title to the land is made by the plaintiff in his declaration, and therein described, it is admitted by the defendant,³⁹ otherwise it would

by defendant's trespass, plaintiff was deprived of pasture which he was using, to fatten beef cattle, and for want of the pasture the cattle lost in flesh and quality of the beef; *held*, that he was not limited in damages to the market value of the pasture of which he was deprived, but that he might receive the difference between the value of the cattle as they were and what they would have been at the end of the pasture season if they had had the benefit of the pasture, and also such expense as he was necessarily put to in providing pasture elsewhere for the cattle. In an action of trespass the declaration being full and specific as to the means by which the damages claimed were occasioned, evidence of damages concerning which the declaration is silent, and contained no allegations which would include them, is inadmissible: *Gilbert v. Kennedy*, 22 Mich., 117. For a discussion of the measure of damages in trespass, see that case. Where drain proceedings were invalid, damages in trespass for the construction of the drain

would be nominal if in fact the drain as constructed was a benefit rather than an injury if plaintiff did not intend to fill up the drain; but if plaintiff did intend to fill it up as not desiring the same, the cost of doing so is a proper element of damages: *Burtraw v. Clark*, 103 Mich., 383; 61 N. W., 552. In case of willful trespass with cutting timber an allowance of interest from the commission of the trespass is permissible: *Gates v. Comstock*, 113 Mich., 127; 71 N. W., 515. The motive and reasons for entering plaintiff's close may be shown as affecting the question of damages: *Carter v. Bedortha*, 124 Mich., 548; 83 N. W., 277.

38—See, *ante*, § 618, and notes, and cases cited; and *Swift v. Applebone*, 23 Mich., 252.

39—C. L., § 786. *Ostrom v. Potter*, 104 Mich., 115; 62 N. W., 170; *Sands v. Manistee Circuit Judge*, 116 Mich., 9; 74 N. W., 178. So he may prove anything in mitigation of damages: *Carter v. Bedortha*, 124 Mich., 548; 83 N. W., 277.

not be. A declaration setting forth *possession* of the land merely, would not be such a "claim of title," as to excuse the plaintiff from proving his right to recover, in the same manner as he must if no claim of title had been made in the declaration. The term "title," here, as well as in other places in the chapter, would not embrace the fact of possession, nor any right founded on possession alone.⁴⁰

§ 622. **Notice of title to land.**—"In every action where the title to lands shall in anywise come in question, the defendant may give notice thereof, under the general issue, upon the return day, or any adjourned day of such action, and may also give notice of any other matter of defense to the action."⁴¹

This notice may be given not only in actions for trespass on lands, but in all actions where the defense involves the trial of a question of title to lands. The defense that the place in which the trespass was committed is a private or public way, involves the title, and cannot be tried by a justice,⁴² not even by consent of the parties.⁴³ A plea in abatement in an action

40—Ehle v. Quackenboss, 6 Hill, 537; see, Vandoozer v. Dayton, 45 Mich., 247; 7 N. W., 813. If the defense is licensed to enter notice of it must be given: Vanderkarr v. Thompson, 19 Mich., 82; Senecal v. Labadie, 42 Mich., 126; 3 N. W., 296; license to enter for one purpose is no defense if entry is for another: Kent County Ag. Soc. v. Ide, 128 Mich., 423; 87 N. W., 369. Statute of limitations must be pleaded: Bellows v. Butler, 127 Mich., 100; 86 N. W., 533.

41—C. L., § 782. Jackson v. Souther, 82 Mich., 648; 46 N. W., 1027. After a plea of title interposed, the plaintiff cannot amend his declaration. Therefore, the declaration should describe the lands upon which the alleged trespass was committed; if it does not, and if on such plea or notice the defendant, at the trial in the circuit court, proves himself to be the owner of any lands in the same township where plaintiff's lands lie, he will defeat the action: McFarlane v. Ray, *et al.* 14 Mich., 465. The claim of title of plaintiff is to be deemed admitted unless the notice is given:

Van Doozer v. Dayton, 45 Mich., 247; 7 N. W., 814; Ramsby v. Bigler, 129 Mich., 570; 89 N. W., 344. Tenancy is a species of title within the meaning of that term in the statute: Van Doozer v. Dayton, *supra*, C. L., §§ 782 and 789 contemplate a trial in the circuit court upon the merits where the justice certifies the case and it is not proper practice to dismiss the case because it is determined that title does not come in question: Dolahanty v. Lucey, 101 Mich., 113; 59 N. W., 415; Newcombe v. Irwin, 55 Mich., 520; 22 N. W., 66; Taylor v. Montcalm Circuit Judge, 122 Mich., 692; 81 N. W., 965.

A party may, for the purpose of identifying and proving his title to personal property, show that it was taken from off certain lands and that he was the owner thereof, but this does not bring the matter of the title to land in question: Hart v. Hart, 48 Mich., 175; 12 N. W., 33.

42—Striker v. Mott, 6 Wend., 465; see, Brooks v. Delrymple, 1 Mich., 145; Randall v. Crandall, 6 Hill., 342.

43—Striker v. Mott, 6 Wend., 465.

of trespass on land of non-joinder of a tenant in common with the plaintiff, is a plea showing that the title to lands will come in question, and, if verified, must be received by the justice.⁴⁴ It would seem that such a defense must be pleaded, as the general issue would be a waiver of it.

"Such plea and notice shall be in writing, and signed by the defendant or his attorney, and delivered to the justice."⁴⁵ This defense is not confined to the action of trespass to land only; it may be interposed in all actions where title to lands is involved.

§ 623. **Proceeding, where notice of title to a portion of counts only.**—"If the plaintiff's declaration in a suit before a justice shall contain several counts or causes of action, to one or more of which a defense, bringing in question the title of lands, shall be interposed by the defendant, and he shall tender a plea and notice to such count [court], and deliver a bond as above provided, the justice shall discontinue proceedings for such cause of action; and for the other causes of action the justice may continue his proceedings."⁴⁶

Thus, if the plaintiff's declaration contain, as it may, several causes of action, as for an entry on lands, and also for taking away and injuring personal property, unconnected with an entry on lands, and the defendant wishes to plead title to lands to a part only, as, for instance, to the entry on the lands, the plea of the general issue with notice of the title should be confined to that part, and to the residue, that is, the count or counts for taking, etc., the personal property, he may plead the general issue, or any other plea, or not plead at all, and the justice as to such residue will proceed and try it as in other cases.⁴⁷ The costs in such cases would abide the event of the suit before the justice.

44—Austin v. Hall, 13 Johns., 286; 6 Hill, 342; Riggs v. Sterling, 51 Mich., 159; 16 N. W., 320. see, East v. Cain, 49 Mich., 473; 13 N. W., 822.

45—C. L., § 783. The notice of title under the plea must be in writing. An oral notice would not be in compliance with the statute, and the justice should disregard it and proceed with the cause: Randall v. Crandall,

46—C. L., § 790. See, Riggs v. Sterling, 51 Mich., 159; 16 N. W., 320; Dolahanty v. Lucey, 101 Mich., 117; 59 N. W., 415.

47—Edwards' Treatise, 2 ed., 69.

§ 624. **Bond with plea and notice.**—"At the time of tendering such plea and notice, the defendant, with at least one sufficient surety to be approved by the justice, shall enter into a bond to the plaintiff, in a penalty of at least two hundred dollars, conditioned that such defendant will pay any judgment that may be rendered against him in such action in the circuit court of such county, and shall also pay the plaintiff's costs legally incurred at that time, not exceeding the amount allowed by law in justice's courts, and also the sum of one dollar to the justice for certifying the cause to the circuit court, together with the sum of two dollars as an entry fee for the use of the county, which last sum shall be paid to the clerk of the county by said justice at the time such justice shall certify the cause to the circuit court.⁴⁸

"Such bond shall be delivered and such fees and costs shall be paid to the justice at the time of tendering such plea and notice, and the justice shall thereupon, without further proceeding, certify the cause and papers to the circuit court of the county where the same may be tried; and the costs so paid by the defendant shall be allowed to him if he recover costs in the action in that court."⁴⁹

On a notice of title in an action for a trespass to land described in the declaration, the defendant is entitled to a verdict, if he establish a title to *that part* of the land on which trespass was committed, and is not bound to prove a title to the whole land.⁵⁰

"If such bond be not delivered and such fees and costs paid as herein directed, the justice shall have jurisdiction of the cause, and shall proceed therein, and the defendant shall be precluded in his defense from all evidence drawing in question the title to lands; and any claim of title to lands made by the plaintiff in his declaration, and therein described, shall be deemed to be admitted by the defendant."⁵¹

48—C. L., § 784.

49—C. L., § 785: *Gay v. Hults*, 55 Mich., 327; 21 N. W., 357. If the justice certifies the case without receiving sufficient to pay costs and without approving the bond the certification is ineffective: *Hindeman v.*

Spaulding, — Mich., —; 100 N. W., 901 (Oct., 1904).

50—*Smith v. Royston*, 8 M. & W., 381; *Kling v. Dunn*, 21 Wend., 253.

51—C. L., § 786. See, *Gay v. Hults*, 55 Mich., 328; 21 N. W., 357.

If the defendant does not give the bond, the notice of title amounts to nothing, and the action goes on just as though title had never been mentioned. The defendant cannot avail himself of it, though it was received at joining issue without objection. The defendant cannot set up a title on a trial, because the statute says he shall not.⁵² By not giving the bond the defendant only admits title, if stated in the declaration.

“When a suit is removed from a justice by the delivery of a plea and notice, and a bond as above provided, the plaintiff in such suit shall not be permitted to declare or to give evidence only for the same cause of action whereon he relied before the justice, and the plea and notice of the defendant shall be the same which he tendered before the justice.”⁵³

§ 625. Title in issue on plaintiff's own showing.—“If it appear on the trial from the plaintiff's own showing, that the title to lands is in question, which title shall not be admitted by the defendant, the justice shall, without further proceeding, certify the cause and papers to the circuit or district court of the county where the same shall be tried; and the party in whose favor judgment shall be rendered in the circuit or district court, shall recover costs, which shall include his costs before the justice.”⁵⁴

The section of the statute of New York upon which the cases hereinafter cited arose, enacts that, “If it shall appear on the trial, from the plaintiff's own showing, that the title to lands is in question, which title shall be disputed by the defendant, the justice shall dismiss the cause,” etc. It will be noticed that the words in our statute are, “Which title shall *not be admitted*

52—Randall v. Crandall, 6 Hill, 342.

53—C. L., § 788. In New York it has been held that where defendant pleads title to a declaration for trespass on lands, in justice's court, the plaintiff, if he prosecute the suit in the common pleas, might there declare particularly by describing the land, although the declaration in the justice's court was general, and contained no description of the land: People v. Albany C. P., 16 Wend., 123; but

see, to the contrary, McFarland v. Ray et al., 14 Mich., 465, 470. See, also, Gay v. Hults, 55 Mich., 329; 21 N. W., 357; Labeau v. Labeau, 61 Mich., 84-5; 27 N. W., 861.

54—C. L., § 787: Gay v. Hults, 55 Mich., 327; 21 N. W., 357, holding that the offer of deeds in evidence of right of possession showed title in question. See, Brooks v. Delrymple, 1 Mich., 145, and Ross v. Finlay, 27 Mich., 268; Graydon v. Church, 7 Mich., 44.

by the defendant.” In case the declaration sets forth any claim of title to lands made by the plaintiff, the defendant would be precluded in his defense from any evidence drawing in question the title to lands. In some cases it will be necessary for the plaintiff to prove a title to land, in order to maintain his action. Thus, if an action be brought for a trespass on land of which the plaintiff has no actual possession, as, for instance, wild lands, he will be compelled, unless he has set forth in his declaration his claim of title to the lands, to prove a title to them, and thus make out a constructive possession. Proof of title may be necessary in other actions beside trespass on lands, and it is to such cases this section applies. When the title is not pleaded before the justice, he is not ousted of jurisdiction, because it may be necessary to prove title; unless such title shall be disputed (shall not be admitted) by the defendant.⁵⁵ If the party will entitle himself to a dismissal, he must call the justice’s attention specifically to the objection, by at least disputing the title claimed. If he admits this, it is a waiver and virtual assent that the evidence of title shall be received; and that the title, as made out, shall pass without being drawn into dispute. The statute is founded on the impropriety of a title to land being tried and determined by a justice’s court. If it be conceded, or be assumed by both parties, thus passing without dispute on the trial, the plaintiff does not in the words of the statute show it to be in question. There is, in fact, no question about it; and the evil of trying the title does not arise. The justice has jurisdiction of the subject matter, as it is presented by the pleadings, and it is in the election of the defendant whether he shall retain it. The defendant may move a dismissal; and probably, under the statute, disputing the title would be equivalent to that. But if he omit to do so, he comes within the rule that consent takes away error.⁵⁶

§ 626. Of judgment.—“If the judgment in such suit in the circuit or district court shall be for the plaintiff, he shall re-

⁵⁵—*Bellows v. Sackett*, 15 Barb., Jenks, 20 Wend., 96; *Whiting v. Dudley*, 96; *Browne v. Scofield*, 8 *Ibid.*, 241; *Iley*, 19 Wend., 373.
⁵⁶—*Koon v. Mazuzan*, 6 Hill, 44; *Koon v. Mazuzan*, 6 Hill, 44; *Mazuzan, Ibid.*, 271; *Willoughby v.* 271.

cover double costs; if it be for the defendant (other than judgment of nonsuit), and the presiding judge of the court before which the issue is tried, shall certify that the title to lands did not come in question, the defendant shall not recover costs, but shall pay costs to the plaintiff.'⁵⁷

§ 627. Trespass in case of defective fences—at common law.—At the common law, a man was not bound to fence his lands against cattle, but the owner of the beasts was bound to restrain them, and was answerable for any trespass which they might commit upon the lands of another. And it was a matter of no moment whether the cattle came in from the highway, or from the land of the owner of the beasts, or through the land of a third person. Such was the general rule.⁵⁸

And now, in relation to such animals as cannot be restrained by those enclosures which farmers of experience would pronounce proper and sufficient fences, the owner would be bound to keep them within his own close, and would be answerable for all injury arising from their being abroad.⁵⁹ By statute, "When any person is injured in his land, by sheep, swine, horses, asses, mules, goats or neat cattle, he may recover his damages in an action of trespass, or trespass on the case, against the owner of the beasts, or against the person having the care and control of such beasts, or by distraining the beasts doing the damage, and proceeding therewith as hereinafter directed; but if the beasts shall have been lawfully on the adjoining lands, and shall have escaped therefrom in consequence of the neglect of the person who has suffered the damage, to maintain his part of the division fences, the owner or person having the control of the beasts shall not be liable for such damage."⁶⁰

To the above mentioned rule of the common law, there are three exceptions: 1, By statute; 2, By agreement; 3, By prescription. The first two only have any application here.

57—C. L., § 789. See, *People v. Wayne Cir. Judge*, 14 Mich., 33; and *Gay v. Hulst*, 55 Mich., 327; 21 N. W., 357. Double costs in such cases consists of the usual single costs and one-half thereof in addition: *Gilbert v. Kennedy*, 22 Mich., 519.

58—*Stafford v. Ingersol*, 3 Hill, 38.

59—*Bush v. Brainard*, 1 Cow., 79, note a.

60—C. L., § 10691. See, 20 Mich., 368.

§ 628. **Trespass in case of defective fences—by statute.**—*By statute*, “all fences four and one half feet high and in good repair, consisting of rails, timber, boards, wire or stone walls or any combination thereof, and all brooks, rivers, ponds, creeks, ditches and hedges, or other things which shall be considered equivalent thereto, in the judgment of the fence viewers, within whose jurisdiction the same may be, shall be deemed legal and sufficient fences.”⁶¹

“The respective occupants of lands inclosed with fences, shall keep up and maintain partition fences between their own and the next adjoining enclosures, in equal shares, so long as both parties continue to improve the same.”⁶²

This statute relates to *partition* fences between the owners or occupants of *adjoining* lands only.⁶³ The remedy given by the statute is not limited to the owner of the fee, but any person occupying land, and interested in making and maintaining a division fence, be his estate or interest in the premises what it may, is entitled to avail himself of the provisions of the statute.⁶⁴ The neglect to build or repair, as required by the statute, renders the parties liable, in damages, for injuries arising from such neglect. But before the party can be made liable for defect of his partition fence, the proportion which he is bound to build or repair must be assigned, by agreement or pursuant to the statute,⁶⁵ and until this is done neither party is obliged to maintain any part of it.⁶⁶ When the proportions are ascertained, the liability of the parties begins. Then the party in default in making or keeping in repair his proportion of the fence is liable for any injury to the owner of the adjoining

61—C. L., § 2415. As amended by Pub. Acts, 1903, p. 123, to include wire fences. See, 21 Mich., 407.

62—C. L., § 2416. See, for an interpretation of this statute, Johnson v. Wing, 3 Mich., 167; Aylesworth v. Herrington, 17 Mich., 417; Lantis v. Reithmiller, 95 Mich., 45; 54 N. W., 713.

63—Stafford v. Ingersol, 3 Hill, 38.

64—Bronk v. Becker, 17 Wend., 320.

65—C. L., § 2419.

66—Bush v. Brainard, 1 Cow., 79, note a.; Aylesworth v. Herrington, 17 Mich., 417. Where one of two owners of adjoining lands put cattle on his

own lands, from which they entered upon the lands of the other, there being no partition fence, it was held that he was liable therefor: Johnson v. Wing, 3 Mich., 163. And it is apprehended that this is the rule now, unless, by agreement between the adjoining owners, or by assignment under the statute, the respective portions of the fence to be maintained by each has been assigned to him, and the cattle entered by reason of defect in the fence assigned to the plaintiff to be maintained by him: See, C. L., § 2436, and Aylesworth v. Herrington, 17 Mich., 417.

land by reason of his cattle going on to such land, and the owner of the adjoining land, not in fault, is not liable for any injury arising from cattle going from his land upon the land of the one who is in fault. The rule would be the same in case the cattle going from the land of the latter on the land of the other were *lawfully* on the land of the party in default.⁶⁷ In such case, to excuse himself, the owner of the cattle must show, not only that the fences which the adjoining proprietor was bound to maintain were out of repair, but also that the cattle passed over such defective fence.⁶⁸

The statute further provides that, "No person shall be entitled to recover any sum of money, in any action at law, for damages done upon lands by any beast or beasts, unless the partition fences by which such lands are wholly or in part enclosed, and belonging to such person, or by him to be kept in repair shall be of the same height and description as is required by the provisions of section one, chapter eighteen, of the Revised statutes of eighteen hundred and forty-six, being section six hundred and five of the Compiled Laws."⁶⁹

67—*Stafford v. Ingersoll*, 3 Hill, 38.

68—*Deyo v. Stewart*, 4 Denio, 103.

69—C. L., § 2436. The supreme court, in construing this, and C. L., § 2416, *held*, that the purpose of the provisions was to compel every person to discharge his duty in regard to partition fences at the peril of such losses as he might suffer from the depredations committed in consequence of his neglect, by the beasts of those persons to whom the duty was owing—the adjacent occupant; that the duty of any person to keep up a partition fence is created by statute in favor and for the protection of the adjoining proprietor; and that before that duty can become fixed so as to require him to keep in repair any particular portion of such partition fence, it must appear: *first*, that the adjoining proprietor improves his land; and, *second*, that either by consent or by the action of the fence viewers, a portion of the partition fence between them has been assigned to him to keep in repair. Adjoining proprietors are at liberty, if they see fit, to dispense with partition fences altogether, and if such fences are

erected, no particular portion thereof belongs to either to be kept in repair by him, until in some legal mode the partition is made. Until one or the other has taken the necessary steps to effectuate such division, it is to be presumed he is satisfied to trust his property to such securities as the rules of the common law can give him, and to respond in damages under those rules, if his beasts commit injury on the lands of other persons; that until an apportionment and division, neither occupant is required to keep any fence on any part of the line between them, but each is liable in trespass if his cattle go upon the land of the other, whether there be any partition fence or not. So where the cattle of C went on to the lands of A, and from thence on to the adjoining premises of B, there being no fence between the lands of A and B, nor any apportionment of the respective parts of the partition fence to be maintained by each, *held*, that no matter whether C's cattle were lawfully on the land of A or not, he was liable in trespass to B: *Aylesworth v. Harrington*, 17 Mich., 417. And it would seem from the

§ 629. **Trespass in case of defective fences—in case of special agreement.**—An agreement settling the proportions of the partition fence would, doubtless, have the same effect as an assignment under the statute; though in order to be effectual, it must be made by the parties to the suit, or those under whom they claim.⁷⁰

As against a highway, where cattle have no right to run, no fence at all is necessary to enable the owner of the land to maintain trespass. The only right which the public acquire by laying out a highway is to pass and repass thereon; the fee of the land subject to this right still remains in the owner, and he receives no compensation for anything else. For no other purpose have the public any right there. The owner of cattle cannot turn them into the highway to graze or pasture there on the lands of others.⁷¹

If any person shall determine not to improve any part of his lands adjoining any partition fence that may have been divided according to the provisions of this chapter, and shall give six months' notice of such determination to all the adjoining occupants of lands, he shall not be required to keep up or support any part of such fence during the time his lands shall lie open and unimproved.⁷²

The effect of this section, is to place the parties in the same situation as they were by the common law; the party giving the notice is bound to keep his cattle on his own premises, and if they pass on to the adjoining land where the fence assigned him is located, he will be liable in trespass.⁷³

§ 630. **License, what is, and effect of.**—A license to enter on land is a mere authority, personal to the grantee, and revocable at the will of the grantor,⁷⁴ unless upon a valuable considera-

above case that a proprietor is not required under any circumstances to fence against the beasts of any person whose premises do not adjoin his.

In an action between adjacent owners for trespass by cattle, the plaintiff cannot recover if the responsibility for the support of the line fence has been divided under C. L., § 2416, and the cattle entered in consequence of his failure to keep up his share; but the defendant has the burden of proving that such division was made: *East v. Cain*, 49 Mich., 473; 13 N. W., 822.

70—*Burger v. Kortright*, 4 Johns., 414; *Rust v. Low*, 6 Mass., 97; *Bush v. Brainard*, 1 Cow., 79; note *a*; *Aylesworth v. Harrington*, 17 Mich., 417; *Talmadge v. The Rensselaer & S. R. R. Co.*, 13 Barb., 493.

71—*Stackpole v. Healey*, 16 Mass., 33; *Wells v. Howell*, 19 Johns., 385. See, C. L., § 2271.

72—C. L., § 2432.

73—*Holladay v. Marsh*, 3 Wend., 142.

74—*Ex parte*, *Coburn*, 1 Cow., 568; *Mumford v. Whitney*, 15 Wend., 380;

tion. It is an authority to do a particular act, or series of acts, upon another's land, and conveys no interest therein; it is executory, and may be revoked at pleasure; but acts done under it before the revocation are no trespass.⁷⁵ It is founded in personal confidence, and not assignable. This doctrine is applicable only to the *temporary* occupation of land, and confers no right or interest in the land. If A agrees with B that he may enter upon his land and occupy it for a year, that is not, properly speaking, a license merely; it is more—it is a lease. If an interest greater than a *temporary* occupation was to be created, it might be an easement, as, a right of way; such an easement is or may be a permanent interest in the land, and must be founded upon grant. Such an interest is not properly a license; it may be assigned and cannot be revoked. It cannot be granted by parol.⁷⁶ The statute⁷⁷ declares that no *estate* or *interest* in land, other than leases, for a term not exceeding one year, etc., shall be created, etc., unless by act or operation of law, or by a deed or conveyance in writing, etc. Notwithstanding this statute, however, a *parol* grant of an estate or interest therein mentioned, would not be absolutely void; it would operate as a license and protect the party, to whom it was given, in all acts done under it prior to its revocation.⁷⁸ An agreement to sell land, whether in writing or not, is not of itself a license to enter, nor does an actual license to enter, confer a right to cut the timber.⁷⁹

Druse v. Wheeler, 22 Mich., 439. A license is a permission to do some act or series of acts on the land of the licensor, without having any permanent interest in it. It is founded on personal confidence, and is not therefore assignable; it may be in writing or by parol; it may be without consideration; it is subject to revocation and is not within the statute of frauds: *Morrill v. Mackman*, 24 Mich., 279; as to revocation, see, *Hitchens v. Shaller*, 32 Mich., 496.

75—*Miller v. Reeves*, 1 Mich., 111; *Wetherbee v. Green*, 22 *Ibid.*, 311; *Miller v. Auburn & Syracuse Ry Co.*, 6 Hill, 61; *Pierpont v. Barnard*, 2 *Seid.*, 279. A mere license to enter upon land and cut timber need not be in any particular form, nor will it confer any legal right to do so; but

it will protect the licensee so far as he has acted under it before revocation: *Wetherbee v. Green and others*, 22 Mich., 311; *Haskell v. Ayres*, 35 Mich., 89. A contract for the future sale and conveyance of land gives no present right of possession to the vendee without special provisions to that effect: *Druse v. Wheeler*, 22 Mich., 439; and see, *Druse v. Wheeler*, 26 Mich., 189.

76—*Mumford v. Whitney*, 15 Wend., 380.

77—C. L., § 9509.

78—*Miller v. Auburn & Syracuse Ry. Co.*, 6 Hill, 61.

79—*Suffern v. Townsend*, 9 Johns., 35; *Cooper v. Stower*, *Ibid.*, 331; *Eggleston v. New York & H. R. R. Co.*, 35 Barb., 162, 167; *Erwin v. Olmsted*, 7 Cow., 299.

Where it appeared that the defendant had bought some hay being on plaintiff's land, and by the terms of sale, to which the plaintiff was a party, the buyer was to be allowed to enter at any time to remove it, it was held that after the sale, the plaintiff could not countermand the license, that it was an essential part of the contract and irrevocable; and that the defendant having broken open the gates (which had been locked by the plaintiff to prevent defendant from entering), entered and took away the hay, was justified in so doing.⁸⁰ "If a man takes my goods and carries them into his own land, I may justify my entry into the said land to take my goods again; for they came there by his own act."⁸¹ But a right to come in and remain for a certain time on the land of another, can be granted only by deed; and a parol or written license to do so, though money be paid for it, is revocable at any time, and without paying back the money.⁸² The preceding case,⁸³ was a case of not mere license, but of a license coupled with an interest. The hay, by the sale, became the property of the defendant, and the license to remove it became irrevocable by the plaintiff.

Where an authority to enter on land is given by law, and the party after the entrance abuses the license thus obtained, he becomes a trespasser from the beginning; but when the entry is by the license in fact of the other party, an abuse of that license will not have that effect.⁸⁴ One who stands in a street, on soil belonging to the owner of an adjoining lot, and there uses abusive and insulting language towards him, is there wrongfully, and is a trespasser, but not *ab initio*.⁸⁵

§ 631. Individual cannot justify that he was abating a public nuisance.—A private person cannot justify damaging the property of another, on the ground that it is a nuisance to a public right, unless it does him a special injury. If there be a nuisance in a public highway, a private individual cannot of his own authority, abate it, unless it does him a special injury, and he can only interfere with it so far as is necessary to ex-

80—Wood v. Manly, 11 Ad. & Ell., 34.

81—Patrick v. Colerick, 3 M. & W., 484.

82—Wood v. Ledbitter, 13 M. & W., 838.

83—Wood v. Manly, 11 Ad. & Ell., 34.

84—Dumont v. Smith, 4 Denio, 319; Allen v. Crofoot, 5 Wend., 506; Van Brunt v. Schenck, 13 John., 414; Adams v. Rivers, 11 Barb., 390.

85—Adams v. Rivers, 11 Barb., 390.

ercise his right of passing along the highway; and without considering whether he must show that the abatement of the nuisance was absolutely necessary to enable him to pass, we clearly think that he cannot justify doing any damage to the property of the person who has improperly placed the nuisance in the highway, if, avoiding it, he might have passed with reasonable convenience.⁸⁶

86—Wetmore v. Tracy, 14 Wend., 250; Harrower v. Ritson, 37 Barb., 301; Rogers v. Rogers, 14 Wend., 131; Drake v. Rogers, 3 Hill, 604; Hart v. Mayor of Albany, 9 Wend., 571; Denning v. Roome, 6 Wend., 651; Koon v. Mazuzan, 6 Hill, 271; Dimes v. Petley, 15 Ad. & Ell., N. S., 276; and see, Welsh v. Stowell, 2 Doug. Mich., 332; and Clark v. Lake St. Clair Ice Co., 24 Mich., 508. An encroachment on a public way is not necessarily a legal nuisance, an owner of the soil may use it in any way which does not interfere with the public convenience. A public nuisance cannot be lawfully abated by a private person unless he has suffered some special damage not common to others: Clark v. Lake St. Clair Ice Co., 24 Mich., 508.

CHAPTER XXXVIII.

TROVER.

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| § 632. Nature of the action. | § 640. When refusal of demand not conversion. |
| § 633. Having title without possession. | § 641. A lien will justify retention. |
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| § 636. Conversion through wrongful taking. | § 644. Conversion by tenants in common. |
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§ 632. **Nature of the action.**—Trover is a form of remedy adopted for the recovery of damages for an injury occasioned to a person having the property in, or right of possession of, personal property, through a wrongful conversion by the defendant of such property.

Trover is in general a concurrent remedy with trespass for the *unlawful* taking and conversion of goods. Trover may often be brought where trespass cannot; as where goods are lent or delivered to another to keep, and he refuses to deliver them on demand, trespass does not lie, but the proper remedy is trover. So where the taking is lawful, or at least excusable, trespass cannot be supported, but the owner must bring trover.¹

1—1 Chitty's Pl., 10 Am. ed., 161: And where property is wrongfully taken from the possession of the owner and sold, he has his election to bring replevin or to recover its value in trover: Eggleston v. Mundy, 4 Mich., 295. Trover lies for the conversion of personal property or chattels only: 2 Saund. Pl. & Ev., 1155. It will not lie for fixtures while attached to the freehold: Felcher v. McMillan, 103 Mich., 494; 61 N. W., 791. Though, after they have been severed from the freehold, trover will lie for them: Minshall v. Lloyd, 2 M. & W., 450:

Weeton v. Woodcock, 7 *Ibid.*, 14. And so it will lie for detached portions of machinery which are not attached to the freehold, although the principal part of the machine may be: Davis v. Jones, 2 B. & Ald., 165. But where plaintiff constructed and placed a steam engine and its appurtenances in a mill on the land of another, thus attaching it to the land, but under an agreement that he should be secured by a chattel mortgage upon the engine for the purchase price of it, and that until the execution of the mortgage he should remain the owner of the en-

A bona fide purchaser of goods, tortiously taken, is not liable to the owner in trespass, but only in trover. So of any person who comes to the possession of the goods by delivery and without fault on his part.² Two or more persons cannot be joined as defendants in trover where distinct acts against each in which the other is not concerned are relied on.³

This action may be maintained for the injury suffered, although the owner has repossessed himself of the property. In

gine, and the chattel mortgage was given according to the agreement; *held*, that trover would lie against a subsequent purchaser of the land with knowledge of the mortgage and claim of the plaintiff, upon his refusal to deliver the engine to plaintiff under the chattel mortgage: *Crippen v. Morrison*, 13 Mich., 23.

Trover will lie for a chattel note wrongfully converted: *Hicks v. Lyle*, 46 Mich., 488; 9 N. W., 529. And for a promissory note: *Ibid.*: *Rose v. Lewis*, 10 Mich., 583; and for bonds: *Barnum v. Stone*, 27 Mich., 332; and for timber cut by one claiming under a void tax deed: *Moret v. Mason*, 106 Mich., 340; 64 N. W., 193. And so it will lie against the bailee of note, who without authority gives it up to the maker to be canceled: *Ibid.*, *Hicks v. Lyle*, 46 Mich., 488; 9 N. W., 529. Trover will also lie for the conversion of a certificate of stock: *Morton v. Preston*, 18 Mich., 60; *Daggett v. Davis*, 53 Mich., 35; 18 N. W., 548; *Hine v. Bay City C. Bank*, 119 Mich., 448; 78 N. W., 471; *McDonald v. McKinnon*, 104 Mich., 428; 62 N. W., 560. And so it will lie for shares of stock converted by means of a wrongful use of the certificate representing them: *Ibid.* Trover will not lie for a conversion of money unless there is an obligation on defendant's part to return the specific money intrusted to his care: *Alfred Shrimpton & Sons v. Culver*, 109 Mich., 577; 67 N. W., 907. And a wife may maintain this action for an animal belonging to her husband but exempt from execution, when unlawfully seized and sold by a pound master: *Ingersoll v. Gage*, 47 Mich., 121; 10 N. W., 135. Nor is her right to sue in her own name

for such property limited to cases in which the husband has encumbered the property, or in which it is taken on final process of a court: *Ibid.* As to when a venter may maintain trover for machinery that the purchaser has attached to the freehold, but which was purchased upon the agreement that the title should not pass until it was paid for; see, *Ingersoll v. Barnes*, 47 Mich., 105; 10 N. W., 127. An executor may bring trover for property converted in his testator's life-time: *Rogers v. Windoes*, 48 Mich., 628; 12 N. W., 882. So the action will lie for sheep let on contract to be returned in four years doubled in number: *Dietrich v. Hoefelmeir*, 128 Mich., 145; 87 N. W., 111. And for logs, upon which a contractor has a common law lien, and they are taken from his possession by the general owner without his permission: *Haughton v. Busch*, 101 Mich., 267; 59 N. W., 621; and for timber cut by one claiming under a void tax deed: *Moret v. Mason*, 106 Mich., 340; 64 N. W., 193.

As to when trover will not lie for animals taken *damage feasant*: see, *Norton v. Rockey*, 46 Mich., 460; 9 N. W., 492.

2—*Barret v. Warren*, 3 Hill, 348. Trover is a transitory action, and lies against the original trespasser who cut the trees: *Greeley v. Stillson*, 27 Mich., 153. A right of action in trover is assignable: *Brady v. Whitney*, 24 Mich., 154. Judgment for a joint conversion cannot be entered against a defendant who had not been served with process: *McLean v. Isbell*, 44 Mich., 129, 6 N. W., 210.

3—*Strawbridge v. Stern*, 112 Mich., 16; 70 N. W., 331.

this action, as in trespass, the return and acceptance of the property, by the plaintiff, either before or after the bringing of the suit, will avail only to reduce the damages.⁴

§ 633. **One with title, though without actual possession, may maintain trover.**—He who has an absolute or general property may support this action, although he has never had the actual possession; for it is a rule of law that the *property* in personal chattels draws to it the *possession*, so that the owner may bring either trespass or trover, at his election, against any stranger who takes them away. In like manner a man who has delivered goods to a carrier or other bailee, and so parted with the actual possession, may maintain trover for a conversion by a stranger, for the owner has still possession in law against a wrong-doer, and the carrier, or other bailee, is no more than his servant.⁵ This rule, however, does not apply unless the person having the general property has also a right to possession.

If a bailee of goods, for a particular purpose, transfer them to another, in contravention of that purpose, the general owner may maintain trover against that person, even although he be

4—Murray v. Burling, 10 Johns., 172; McGraw v. Sampliner, 107 Mich., 141; 64 N. W., 1060. The declaration in trover need not set out the nature of the plaintiff's title, nor the evidences of it. These are matters of evidence merely. Thus, where plaintiff claimed under a chattel mortgage, *held*, that it was not necessary to allege that fact: Harvey v. McAdams, 32 Mich., 472; and see, Burrows v. Keays, 37 Mich., 430.

5—To maintain trover, the plaintiff must have a general or specific property in the thing converted: Stephenson v. Little, 10 Mich., 433. And the actual possession, or the right to possession at the time of conversion. Possession is actual when the thing is in the immediate occupancy of the party; and constructive, when a man claims to hold by some title, without having the actual occupancy: 1 Walt's Law and Prac., 814, 815. In order to maintain trover the plain-

tiff must have either the actual possession of the property or the immediate right to it: Stevenson v. Fitzgerald, 47 Mich., 186; 10 N. W., 185. And he must show his ownership or title and right of possession: Ribble v. Lawrence, 51 Mich., 569; 17 N. W., 60. The possession by the wife of personal property belonging to the husband during his temporary absence, is the possession of the husband and the wife cannot in her own name bring trover to recover for its conversion: Janauscheck v. Eddy, 108 Mich., 190; 65 N. W., 752.

The question as to whether the plaintiff in trover is the owner of the property, or whether he has done anything which will estop him from making such claim, or proclaiming the right of possession, is to be determined from the evidence by the jury: Ashman v. Epsteine, 50 Mich., 360; 15 N. W., 509. And so, when there is conflicting evidence as to the

a *bona fide* vendee.⁶ So if a person having a lien on goods wrongfully part with them, the owner's right to the possession revives, and he may maintain trover for them.⁷

A verbal gift of a chattel, without actual delivery to the donee or his agent, does not pass the property to the donee.⁸ But, it seems that such gift by deed would transfer the property without actual delivery.⁹ A delivery, however, may be inferred from circumstances, the same as in other cases.¹⁰

An action of trover is maintainable to recover the value of goods which have been stolen from the plaintiff, and which the defendant has innocently purchased, although no steps have been taken to bring the thief to justice; for the obligation which the law imposes on a person to prosecute the party who has stolen the goods, does not apply when the action is against a third party innocent of the felony.¹¹

If goods are taken *feloniously*, the felon acquires no title and can convey none to a *bona fide* purchaser.¹² The term *feloniously* does not apply to larceny only, but to all cases in which the obtaining of the property was under such circumstances as to render the person obtaining liable to an indictment for a felony.

A sale of goods, procured through the fraud of the vender, will not operate to change the property if the defrauded party so elect.¹³ It is equally voidable as between the parties, whether the fraud in its nature be indictable or not.¹⁴ But

sources of title: *Stansell v. Leavitt*, 48 Mich., 225; 12 N. W., 179. A plaintiff in trover, who has assigned his title to the property after conversion, can only recover nominal damages, unless there has been some special damage caused by the taking or detention: *Brady v. Whitney*, 24 Mich., 154.

6—*Wilson v. King*, 2 Camp., 335; *Loeschman v. Machin*, 2 Stark., 311.

7—*Nash v. Mosher*, 19 Wend., 431; see, *Mount v. Williams*, 11 Wend., 77.

8—*Noble v. Smith*, 2 Johns., 52; *Pearson v. Pearson*, 7 Johns., 26; *Grangiac v. Arden*, 10 Johns., 293. As to when a gift becomes effectual, see, *Duncombe v. Richards*, 46 Mich., 166; 9 N. W., 149.

9—Irons v. Smallpiece, 2 B. & A., 551.

10—*Grangiac v. Arden*, 10 Johns., 293.

11—*White v. Spetigue*, 18 M. & W., 603; *Neal v. Isaacs*, 4 B. & C., 334; See, *Gimson v. Woodfull*, 2 C. & P., 41.

12—*Mowrey v. Walsh*, 8 Cow., 238; *Andrew v. Dieterich*, 14 Wend., 31.

13—*Noble v. Adams*, 7 Taunt., 59; as, where the vender obtained them by false pretenses: 1581; and see, *Irving v. Motly*, 7 Bing., 543; *Duclos v. Ryland*, 5 Moo., 518; see, also, *Fitch v. Newberry*, 1 Doug. Mich., 13.

14—*Cary v. Hotelling*, 1 Hill, 311. Where plaintiff sued in trover for a

though goods are obtained by a fraudulent purchase, and therefore the sale is voidable as to the purchaser, and can be taken on execution against him, yet if the the latter sell them to a *bona fide* purchaser, without notice of the fraud, the property passes to the vendee.¹⁵

The vendee of goods cannot sustain trover for them, unless the right of property be vested in him at the time of the conversion of them. The principle that runs through all the cases is, that where something remains to be done, as between buyer and seller, or for the purpose of ascertaining either the quantity or price, there is no delivery.¹⁶ In such case a complete present right of property does not attach in the buyer, and consequently he cannot maintain trover as against the seller.

When goods are sold to be paid for, by the contract, at the time of delivery, in cash or notes, and the property is delivered by the vender, without at the time requiring the notes or the cash, or annexing any condition to the delivery, and there is no fraud to avoid the contract, such delivery is a waiver of the condition, and the property passes to the vendee.¹⁷

In the case of a sale of a chattel not in existence, as upon a contract to build a carriage, though the purchaser pays the whole price in advance, he acquires no property till it is finished and delivered to him.¹⁸ But when the materials of another are united to materials of mine, by my labor, or the labor of another, and mine are the principal materials, and those of the other only accessory, I acquire the right to property in the whole by right of accession.¹⁹

horse which defendants obtained from him in exchange for a worthless promissory note, which they represented to be good and the maker responsible; *held*, that to maintain trover in this case it was not necessary for the jury to find that the defendants *knew* that their representations as to the note and the maker thereof were false provided they found that the defendants believed them to be false, or that they made them recklessly, without any knowledge or belief as to the truth of their representations, intending to deceive and defraud the

plaintiff: *Beebe v. Knapp*, 28 Mich., 53.

15—*Mowrey v. Walsh*, 8 Cow., 238.

16—*Rappleye v. Mackle*, 6 Cow., 250; *Ward v. Shaw*, 7 Wend., 404.

17—*Chapman v. Lathrop*, 6 Cow., 110; *Lupin v. Marie*, 6 Wend., 77; see, *Marston v. Baldwin*, 17 Mass., 606.

18—*Mucklow v. Mangles*, 1 Taunt., 318; *Carruthers v. Payne*, 5 Bing., 270; *Gregory v. Stryker*, 2 Denio, 628.

19—*Merritt v. Johnson*, 7 Johns., 473; *Gregory v. Stryker*, 2 Denio, 628.

A landlord has such a property in timber wrongfully cut down during a lease, as to enable him to support trover, *if it be removed*. But it does not lie for injuries to land or other real property, even by a severance of a part of what properly belongs to the freehold, unless there has also been an asportation.²⁰

Proof by plaintiff of his having a special property in the goods will suffice to enable him to maintain this action. A bailee under a general bailment,²¹ or even a gratuitous bailee,²² has a sufficient property to enable him to recover. So a mortgagee under a chattel mortgage may maintain this action for a conversion of the mortgaged property.²³

§ 634. Actual possession alone sufficient to support the action.—Possession alone gives the possessor such a property as will enable him to maintain this action against a wrong-doer.²⁴ The finder of a chattel has such property as will enable him to maintain trover.²⁵ The proof of right of possession is the same as in trespass.

§ 635. Proof of conversion essential.—A conversion before the commencement of the action is essential to the support of it.²⁶ It may be either: 1st, by wrongfully taking chattels;

20—Gordon v. Harper, 7 Term. R., 13; 1 Chitt. Pl., 146-7.

21—Burton v. Hughes, 2 Bing., 173; Sutton v. Buck, 2 Taunt., 302; Green v. Clarke, 2 Kern., 343.

22—Nichols v. Bastard, 2 C. M. & R., 659; Bouverie v. Miles, 1 B. & Ad., 39. Thus a person intrusted with goods to take care of them though without compensation: Faulkner v. Brown, 13 Wend., 63.

23—Canfield v. W. J. Gould & Co., 115 Mich., 461; 73 N. W., 550.

24—Cullen v. O'Hara, 4 Mich., 132. Thus, until administration and distribution, the next of kin of an intestate has no more right to the possession of the personal property of the estate than a mere stranger; but if the next of kin or any other person has possession of the personal prop-

erty of an intestate, he may maintain trover for its conversion against a mere wrong-doer, or one having no better right than himself: *Ibid*.

25—Mathews v. Harsell, 1 E. D. Smith, 393. And a person in possession of estrays may maintain trover against any one who takes them away, unless it be the true owner: Hendricks v. Decker, 35 Barb., 298; see, Hartman v. Proudft, 6 Bosw., 194. The possession, by the wife, of personal property belonging to the husband during his temporary absence, is the possession of the husband, and the wife cannot, in her own name, bring trover to recover for its conversion: Janauscheck v. Eddy, 108 Mich., 190; 65 N. W., 752.

26—Storm v. Livingston, 6 Johns., 44; see, Beebe v. Knapp, 28 Mich., 53;

2dly, by some other illegal assumption of ownership, or by illegally using or misusing it; or 3dly, by a wrongful detention.

§ 636. **Conversion through wrongful taking.**—A tortious taking is, of itself, a conversion, and, in such case, no demand is necessary in order to maintain the action.²⁷

Trover lies against a carrier who delivers goods to a wrong person, though by mistake,²⁸ or if any conversion can be proved.²⁹ An abuse of a possession originally lawful, or a breach of the trust under which the property was placed in the defendant's hands, is a conversion.³⁰ If a bailee sell the goods, it is a conversion.³¹

Bissell v. Starr, 32 Mich., 297; *Bendetson v. Moody*, 100 Mich., 554; 59 N. W., 252.

27—*Farrington v. Payne*, 15 Johns., 431; *Tompkins v. Halle*, 3 Wend., 406. Trover for goods sold without the owner's authority or ratification, may be maintained against the purchaser without any formal demand: *Hake v. Buell*, 50 Mich., 89; 14 N. W., 710. One who, though in good faith, saws the logs of another and mingles the lumber with his own, as if it were his own, is guilty of conversion: *Crane Lumber Co. v. Bellows*, 116 Mich., 304; 74 N. W., 481. An officer who, levying on property exempt up to a certain value, fails to allow the defendant in execution to select his exemptions, is guilty of conversion of such portion as he sells: *Parker v. Canfield*, 116 Mich., 94; 74 N. W., 296. So one who in any way participates in an unlawful taking is guilty of conversion: *Davidson v. Kolb*, 95 Mich., 469; 55 N. W., 373. There can be no conversion while the party complaining is in actual possession and using the property in the place and manner contemplated by the parties: *Felcher v. McMillan*, 103 Mich., 494; 61 N. W., 791. Demand and refusal do not necessarily amount to conversion: *Felcher v. McMillan*, 103 Mich., 494; 61 N. W., 791. An invalid attempt to foreclose a chattel mortgage does not constitute a conversion where the property is bid in by the mortgagee and remains in his

possession: *Brown v. Mynard*, 107 Mich., 401; 65 N. W., 293. A mere levy without taking possession from owner is not a conversion which will support trover: *Kunze v. Cox*, 113 Mich., 546; 71 N. W., 864. A delay for the purpose of reasonable consideration and consultation is not such a refusal of a demand as will amount to a conversion: *Flannery v. Brewer*, 66 Mich., 509; 33 N. W., 522.

28—*Hawkins v. Hoffman*, 6 Hill, 586; *Packard v. Getman*, 4 Wend., 613. Property covered by a chattel mortgage, and which is taken out from its operation by the fraudulent contrivance of the mortgagor, is wrongfully converted, and an action of trover may be brought for it: *Matter of Hicks*, 20 Mich., 280.

29—*Packard v. Getman*, 6 Cow., 757.

30—*Murray v. Burling*, 10 Johns., 172. Thus, if a person hires a horse to go to a particular place, and goes beyond it, from which an injury results, the action is a conversion: *Fish v. Ferris*, 5 Duer, 49; *Dishbrow v. Tenbroeck*, 4 E. D. Smith, 397; *Fisher v. Kyle*, 27 Mich., 454. Conversion does not necessarily imply a complete and absolute deprivation of property; there may be a deprivation which is only partial or temporary, and where the property of the plaintiff remains in or is restored to him. The difference between such a case and one of total deprivation of the property, is one affecting the damages only. In

§ 637. Conversion through wrongful exercise of dominion.

—If a person exercises a dominion over the property in exclusion, or in defiance of the plaintiff's right, it is a conversion, whether for his own or another person's use.³² Therefore, a servant is liable in trover, though the conversion be done for the benefit and by order of his master.³³ But it does not lie for the taking of too many goods on execution.³⁴

§ 638. Conversion through wrongful detention.—In cases where the defendant came lawfully into the possession of chattels but refuses to surrender that possession on demand made after the right has ceased, there is such a conversion as will sustain the action.

§ 639. Demand, when necessary.—Where the property came into the possession of the defendant by delivery or finding, or in any lawful manner, there must be a demand of it by the plaintiff, and a refusal by the defendant to deliver it up, to constitute a conversion,³⁵ and, in all cases where the plaintiff is not prepared to prove a wrongful taking or assumption of property by the defendant, he must prove a demand and refusal.³⁶ If there has been no actual conversion, a demand and

one case the damages are for the whole value of the property, and in the other it is commonly less: *Daggett v. Davis*, 53 Mich., 38; 18 N. W., 548.

31—*Nash v. Maher*, 19 Wend., 431. So, a refusal to deliver property received in store at the bailor's risk, to be returned or redelivered when called for, is a conversion: *Bates v. Stansel*, 19 Mich., 91.

32—*Bristol v. Burt*, 7 Johns., 254; *Murray v. Burling*, 10 *Ibid.*, 172; *Wheeler v. Raymond*, 5 Cow., 233; *Allen v. Crary*, 10 Wend., 349; *Fonda v. Van Horne*, 15 *Ibid.*, 633; see, *Whitney v. McConnell*, 29 Mich., 13. Where an officer levies an attachment on property not belonging to the defendant in the writ, inventories it, has it appraised, and subjects it to his control, such intermeddling is a conversion, and renders him liable in trover: *Cook v. Hopper*, 23 Mich., 511, 514; and see, *Worthington v. Hanna*, 23 Mich., 530. So, a defendant in replevin who has obtained judgment for a return of the property, may maintain

trover for any of such property not found and recovered on an execution issued for its return. The defendant is not confined to his remedy on the replevin bond: *Smith v. Demarrais*, 39 Mich., 14.

33—*Stephens v. Elwall*, 4 M. & S., 529. So it lies for a levy on goods not liable to execution: *Connah v. Hale*, 23 Wend., 462; *Bates v. Conkling*, 10 *Ibid.*, 391.

34—*Lea v. Telfer*, 1 C. & P., 146.

35—2 Saund. Pl. & Ev., 5 Am. ed., 1160; *Bates v. Conkling*, 10 Wend., 389; see, *Thompson v. Moesta*, 27 Mich., 182; *Whitney v. McConnell*, 29 Mich., 13.

36—*Nixon v. Jenkins*, 2 H. Bl., 135. A demand and refusal constitute *prima facie* evidence of conversion: *Boyle v. Roche*, 2 E. D. Smith, 336, 339; *Lockwood v. Bull*, 1 Cow., 322; *Blissell v. Starr*, 32 Mich., 297. But they are not necessarily conclusive; the presumption of conversion arising from a refusal, may be rebutted by evidence which shows that there was

a refusal will not lay a foundation for the action of trover, unless the party have the property demanded in his possession at the time of the refusal, so that he can comply with the demand; in such cases, the party aggrieved must resort to his remedy by a special action on the case, or *assumpsit*, as the case may be.³⁷

A demand may be either verbal or in writing; if in writing it is sufficient if left at the defendant's house.³⁸ If there be a verbal, and also a demand in writing, at the same time, and neither referring to the other, evidence of the verbal demand is sufficient, without producing that which was in writing.

A demand of payment for the goods is a sufficient demand.³⁹ If the demand be made by a third person for the plaintiff, it must be proved that he was duly authorized to make it.⁴⁰ Where property is entrusted to one to keep on the joint account of two or more owners, one alone, without the authority of the others, cannot lawfully demand it.⁴¹ So, in case of bailees, a demand of, and a refusal by one of them, is not sufficient to charge both; it would be otherwise if the defendants are partners, as then a refusal by one would be evidence of a conversion by both.⁴² When several joint owners of a chattel deliver it to a third person, he may retain it until all the joint owners require him to return it. If a common carrier obtains possession of goods wrongfully, or without the consent of the owner, express or implied, he has no lien on them for freight, and if, on demand, he refuses to deliver them to the owner, such owner may bring trover for their value.⁴³

no conversion, as in case of a party who was not in possession of the property at the time of the demand: *Andrews v. Shattuck*, 32 Barb., 396. Or, where a compliance with the demand was impossible: *Hill v. Covell*, 1 Comst., 522; and where reasonable time was not given to comply with the demand a failure to comply is not conversion: *Felcher v. McMillan*, 103 Mich., 494; 61 N. W., 791. See, *Pierce v. Underwood*, 112 Mich., 186; 70 N. W., 419.

37—*Kelsey v. Griswold*, 6 Barb., 438.

38—*Logan v. Houlditch*, 1 Esp., 22; *Manhattan Co. v. Osgood*, 1 Cow., 69; see, *Rogers v. Weir*, 7 Tiff. N. Y., 463.

39—*La Place v. Aupoix*, 1 Johns. cases, 407; *Thompson v. Shirley*, 1 Esp., 31.

40—2 Saund. Pl. & Ev., 1160; *Guntton v. Nurse*, 2 Brod. & B., 447.

41—*May v. Harvey*, 13 East., 397.

42—*Mitchell v. Williams*, 4 Hill, 13.

43—*Flitch v. Newberry*, 1 Doug. Mich., 1.

§ 640. **When refusal of demand not conversion.**—If the refusal be from a *bona fide* doubt as to the plaintiff being entitled to the goods,⁴⁴ or, where the demand is not made by the plaintiff himself, whether the party making is authorized to do so,⁴⁵ or where any reasonable excuse is *bona fide* made, showing that the party does not wish to appropriate the goods to his own use, or in exclusion of the real owner, the refusal is no evidence of conversion.⁴⁶ So, where the defendant at first refused to give up the goods, but afterwards tendered them before action brought.⁴⁷

§ 641. **A lien will justify retention.**—If the person in whose possession the goods are, has a lien upon them for a debt due to him from the owner, the plaintiff cannot recover without a payment or tender of the money, before bringing the action.⁴⁸ But if one having a lien upon goods, when they are demanded of him, claim to retain them upon a different ground, making no mention of the lien, a tender of the amount of the lien is not necessary.⁴⁹ A party having a lien upon goods may transfer the possession of them, subject to the lien, to a third person, who may lawfully hold them until the lien is paid.⁵⁰

§ 642. **Conversion by accession.**—Property in goods may be acquired by accession; which includes the acquisition of property proceeding from the admixture or confusion of goods.

The common law will not allow one man to gain a title to the property of another upon the principle of accession, if he took the other's property wilfully as a trespasser.⁵¹ As against a trespasser the original owner of the property may seize it in its new shape, whatever alteration of form it may have undergone, if he can prove the identity of the original material. Where

44—Green v. Dunn, 3 Campb., 215, n.

45—Tuttle v. Gladding, 2 E. D. Smith, 157.

46—Archbold N. P., 459.

47—Hayward v. Leaward, 1 M. & Scott, 459; see, Bailey v. Adams, 14 Wend., 201. Demand and refusal to deliver property, do not of themselves constitute conversion, but they are evidence of it to go to the jury: Daggett v. Davis, 53 Mich., 38; 18 N. W., 548.

When, upon a demand for property,

the defendant replies that he will neither admit nor deny the claim, and will neither consent nor forbid that the plaintiff may take it away, there is a sufficient refusal to establish a conversion: Ingersoll v. Barnes, 47 Mich., 104; 10 N. W., 127.

48—2 Saund. Pl. & Ev., 1161; Collier v. Shepard, 19 Barb., 305.

49—Boardman v. Sill, 1 Camp., 410; see, Bush v. Lyon, 9 Cow., 52.

50—Nash v. Mosher, 19 Wend., 431.

51—2 Kent's Com., 363; see, Salisbury v. McCoon, 3 Comst., 379.

A entered upon the land of B, and cut down trees, and made shingles of them and carried them away, it was held that the property in the shingles was in B.⁵² So where a trespasser cut wood on another's land, and converted it into charcoal, it was held that the charcoal belonged to the owner of the land.⁵³ So, when one takes trees wrongfully from the land of another, and saws them into boards or plank, the owner of the trees may take the boards or plank or bring trover for them, and the value of the boards or plank will, in such case, be the measure of the damages. The rule in case of a wrongful taking is, that the taker cannot, by any act of his own, acquire title, unless he either destroy the identity of the thing; as by changing money into a cup, or grain into malt; or annexing it to and making it part of some other thing, which is the principal; or changing its nature from personal to real property, as when it is worked into a dwelling-house. Thus, cloth made into a garment, leather into shoes, trees squared into timber, and iron made into bars, may be reclaimed by the original owner, in their new and improved state.⁵⁴

If one wrongfully take another's grain and manufacture it into whisky, the property is not changed, and the whisky belongs to the owner of the original material, and a creditor having an execution against the owner of the corn may seize the whisky, and sell it to satisfy his debt.⁵⁵ It was held in this case that if a chattel wrongfully taken retains its original form and substance, or may be restored to its original materials, it belongs to the original owner; and this rule, it seems, holds against an innocent purchaser from the wrongdoer, without regard to the increased value bestowed by him upon the chattel. But if the chattel be converted by an *innocent* purchaser or holder, into a thing of a *different species*, as where wheat is made into bread, olives into oil, grapes into wine, the original owner cannot reclaim it. But there is no such distinction in favor of a *wilful* wrong-doer. He can acquire no property in the goods of another by any change wrought in them by his labor or skill, however great the

52—Betts v. Lee, 5 Johns., 348.

55—Salsbury v. McCoon, 3 Com-

53—Curtis v. Groat, 6 Johns., 169. stock, 379.

54—Brown v. Saxe, 7 Cow., R., 95.

change may be, provided it can be proved that the improved article was made from the original material.⁵⁶

§ 643. **Conversion by confusion of goods.**—With respect to the case of a *confusion* of goods, where those of two persons are so intermixed that they can no longer be distinguished, the common law gives the entire property to him whose property was originally invaded, and its distinct character destroyed.⁵⁷ If a mortgagor of goods, who is entrusted with the possession, intermix them, purposely or through want of proper care, with his own goods, so that they cannot be distinguished, and consigns them for sale to a third person, who sells them, the mortgagee is entitled to recover of the consignee the value of the whole.⁵⁸ “If one wilfully intermixes his money, corn, or hay with that of another man, *without his approbation or knowledge*, or casts gold in like manner into another’s melting pot or crucible, our law to guard against frauds allows no remedy in such a case, but gives the entire property, without any account, to him whose original dominion is invaded, and endeavored to be rendered uncertain without his own consent.⁵⁹

§ 644. **By tenants in common.**—One tenant in common cannot maintain trover against the other for a thing still in his

56—But it seems that where a person innocently and supposing he has the right so to do takes property, though actually belonging to another, and by his own labor bestowed upon it substantially changes or destroys its identity and greatly enhances its value, the original owner cannot reclaim it. See the question discussed at length in *Wetherbee v. Green*, 22 Mich., 311.

57—2 Kent’s Com., 364; *Wingate v. Smith*, 7 Shep., 287; see, *Stephenson v. Little*, 10 Mich., at page 441, and opinion of Campbell, J., in same case; see, *Johnson v. Ballou*, 25 Mich., 460; *Wetherbee v. Green*, 22 Mich., 311, 317.

58—*Willard v. Rice*, 11 Metc., 493; *Couch v. Ingersoll*, 2 Pick., 298; see, *People v. Bristol*, 35 Mich., 33-4.

59—2 Bla. Com., 405. Mingling the wheat or goods of two persons in a common mass, so as not to be distinguishable, if with the knowledge

and consent of both parties, makes them tenants in common of the whole, and the disposal of the entire mass by one of the co-tenants subjects him to an action of trover by the other for his share: *Nowlen v. Colt*, 6 Hill, 461. So if a party store his grain in an elevator with the grain of others in a common mass, in accordance with the usage by which each person is to receive not the identical grain stored by him, but an equal amount of like quality, and if the owner of the elevator dispose of the whole without the consent of the party storing, he is liable in trover for an amount of grain equal to that stored by the party: *Erwin v. Clark*, 13 Mich., 10. One who, though in good faith, saws the logs of another and mingles the lumber with his own, as if it were his own, is guilty of conversion: *Crane Lumber Co. v. Bellows*, 116 Mich., 304; 74 N. W., 481.

possession, for the possession of one is the possession of both.⁶⁰ But if one tenant in common destroy the thing in common, the other may bring trover.⁶¹ But converting the article owned in common to its general and profitable application, as grinding wheat into flour, is not a conversion.⁶² A sale by one of two tenants in common of the *whole* of the property has been held a conversion.⁶³ But a sale by one of his share only is not.⁶⁴

§ 645. **Defense under the general issue.**—Under the general issue, the defendant may dispute the plaintiff's property in the goods; he may show title in a third person though the plaintiff was in possession;⁶⁵ he may show his right of possession to them at the time of the alleged conversion; he may deny that there was any conversion; or show any ground of defense which proves that the conversion was lawful; or that the action was not maintainable for any cause, except that it was barred by the statute of limitations.⁶⁶

60—Holliday v. Causel, 1 Term. R., 658; Smith v. Stokes, 1 East., 363; McElroy v. O'Callaghan, 112 Mich., 124; 70 N. W., 441.

61—St. John v. Standring, 2 Johns., 468; Gilbert v. Dickerson, 7 Wend., 449; Sheldon v. Skinner, 4 Wend., 525.

62—2 Saund. Pl. & Ev., 1164.

63—Wilson v. Reed, 3 Johns., 175; Hyde v. Stone, 9 Cow., 230; White v. Osborn, 21 Wend., 72; Benedict v. Howard, 31 Barb., 569.

64—St. John v. Standring, 2 Johns., 468. Where a tenant raises crops on shares on the land of another, to be divided between them, the tenant and landlord are, until a division, tenants in common of the crops raised. And if, when the crops are ripened, either takes possession of the whole, excluding the other from having his share and denying his right to such share, it is a conversion, and trover will lie; or the party excluded may waive the tort and sue in assumpsit for the value of his share: Flquet v. Allison, 12 Mich., 328. So, where two owned a quantity of logs, and one of the co-tenants was bound to the other by contract to deliver and divide the joint property at a certain place, but

appropriated it to his exclusive use under circumstances which rendered a delivery in the manner agreed upon impracticable; *held*, that this amounted to a conversion, and trover would lie: Ripley v. Davis, 15 Mich., 75. One tenant in common of chattels can maintain an action of trover against his co-tenant, after demand made that he be admitted to his rights as co-tenant, and a refusal to recognize such rights, coupled with a distinct claim of entire ownership: Grove v. Wise, 39 Mich., 161; and see, Bray v. Bray, 30 Mich., 479. No demand is essential where one tenant in common asserts ownership in entirety as against his co-tenant, coupled with a denial of the right of the other to hold at all: Williams v. Rogers, 110 Mich., 418; 68 N. W., 240.

65—Stephenson v. Little, 10 Mich., 433; Ribble v. Lawrence, 51 Mich., 572; 17 N. W., 60; Westbrook v. Miller, 64 Mich., 129; 30 N. W., 916; Seymour v. Peters, 67 Mich., 415; 35 N. W., 62; Wessels v. Beeman, 87 Mich., 481; 49 N. W., 483.

66—In trover, the right of property is in issue; and to sustain the action the plaintiff must prove property in himself, either general or spe-

§ 646. **Measure of damages.**—The measure of damages, in general, is the value of the property at the time of the conversion, to which interest may be added.⁶⁷ Special damages

cial. Possession is evidence of property, but in this action it does not preclude the defendant from showing property in a third person; and this may be done under the general issue in trover. *Stephenson v. Little*, 10 Mich., 433. But a defense that the property was taken or held upon an attachment or other legal process, cannot be shown under the general issue without notice of such justification under that plea. *Fry v. Soper*, 39 Mich., 727. But such notice was held not necessary where an officer sought to justify upon an execution levy on a mortgagor's interest in chattels, and the defendant mortgagee's interests were not attacked or questioned: *McLaughlin v. Smith*, 45 Mich., 277; 7 N. W., 908. But the plaintiff's possession merely is sufficient to enable him to maintain trover against one who has no better right, or who has taken the property out of his possession without any right; a mere stranger, or one who has himself no right of possession, cannot question the possession of another person: *Cullen v. O'Hara*, 4 Mich., 132. The defendant is entitled to dispute either the plaintiff's ownership or right to the possession of the property, or both: *Ribble v. Lawrence*, 51 Mich., 572; 17 N. W., 60. Thus, in trover against a sheriff for chattels seized upon execution, the defendant can show, to defeat the action, that the plaintiff had no general or special property in the goods, nor any possession of them. And the nature of the plaintiff's pretended possession can be inquired into upon his cross-examination: *Stearns v. Vincent*, 50 Mich., 209; 15 N. W., 86. But it seems to be laid down as good law, that one who has peaceable possession of chattels by claim of right may maintain trover against a wrongdoer, that is a person who takes them from him having no good title, and converts them to his own use, and that not only is plaintiff's possession in such case, evidence of title in his favor, but the wrongdoer will not be

suffered to defend by showing title in a third person with whom he does connect himself: *Ibid.* And a mortgagor of chattels may maintain trover against a person who, without any right, takes the chattels out of his possession and converts them, and it is no defense that the mortgagee had a right of possession at the time: *Parkhurst v. Jacobs*, 17 Mich., 302. A mortgagee of chattels who sold them before condition broken, was held liable in trover for not restoring them upon a lawful tender of the amount due. Such a sale was unlawful, and could not exonerate the mortgagee from the duty of having the property on hand ready to be returned at that time: *Eslow v. Mitchell*, 26 Mich., 500; see, *Wilkey v. Cox*, 25 Mich., 116; and *Thompson v. Moesta*, 27 Mich., 183.

67—*Dillenback v. Jerome*, 7 Cow., 294. Where there are no special circumstances which require a different measure of damages to be applied, it is proper to award to the plaintiff the value of the property at the time of the conversion, with interest from that time: *Ripley v. Davis*, 15 Mich., 80. Thus, where there was a refusal to deliver on demand wheat received in store, to be returned when called for, the measure of damages was held to be the value of the wheat on the day of the demand, and a subsequent rise in the value of wheat before suit was not allowed to increase the damages: *Bates v. Stansell*, 19 Mich., 91. The damages for the conversion of a quantity of wheat was held to be its value at the time of the conversion, less the cost of threshing and marketing of it: *Jackson v. Evans*, 44 Mich., 510; 7 N. W., 79. So the measure of damages for the conversion of property purchased in good faith from a willful trespasser, is its value when first taken under the defendant's control: *Tuttle v. White*, 46 Mich., 485; 9 N. W., 528. If the plaintiff can be indemnified by a sum of money less than the full value of the prop-

erty, as when he has only a special property, subject to which the defendant is entitled to the goods, that sum is the measure of damages; but, if he is responsible over to a third person, or if the defendant is not entitled to the balance of the value, then the plaintiff is entitled to the whole value. Where an officer levied on property, which at the request of the execution defendant was receipted by a receiptor procured by him for that purpose, in trover by the officer against the receiptor for the goods, *held*, that notwithstanding the receipt required the receiptor to produce the property or pay the execution, yet the officer could recover no more than the amount collectible on the execution, nor could he recover any more than the value of the property, if that value was less than the sum due upon the execution: *Burk v. Webb*, 32 Mich., 173. The damages for the conversion of articles having a regular market value are measured generally by that value. Where they have not such standard market value, then their value to the owner, so far as they are susceptible of pecuniary measurement, which is not fanciful or merely speculative, furnishes the true test; so for the conversion of a promissory note, where the court is satisfied that the note was available at its nominal amount to the plaintiff, he may recover that amount notwithstanding the maker is proved not to have property from which a collection might be enforced by execution: *Rose v. Lewis*, 10 Mich., 483. And in trover for the sale and conversion of a certificate of shares of stock in an incorporated company, the defendant is liable for the value of the shares which he is considered as having converted, and not merely for the paper certificate which represents those shares: *Morton v. Preston*, 18 Mich., 60. Where a defendant wrongfully took logs from plaintiff's premises in one county and transported them to another county, and there manufactured them into lumber, *held*, that the taking in the first county might be treated as the conversion, or that the time of manufacture into lumber might be claimed as the period of conversion, and the damages measured by the value at the

latter time and place: *Final v. Backus*, 18 Mich., 218, and see, *Symes v. Oliver*, 13 Mich., 9. Evidence of what the property sold for at auction shortly after the conversion is admissible, as tending to prove its value at the time of conversion: *Smith v. Mitchell*, 12 Mich., 180; and see, *Davis v. Zimmerman*, 40 Mich., 24; *Dyer v. Rosenthal*, 45 Mich., 588; 8 N. W., 560. But the appraisal of property taken on an attachment is inadmissible as evidence of their value in favor of the officer who levied the writ and appointed the appraisers, in a suit against him for their conversion: *Dyer v. Rosenthal*, 45 Mich., 588; 8 N. W., 560. But it seems that such an appraisal may be received in evidence against the officer: *Worthington v. Hanna*, 23 Mich., 530. Where a defendant sells or disposes of property belonging to another, the measure of the damages is the value of the property at the time and place of conversion: *Greely v. Stillson*, 27 Mich., 152. Where a plaintiff in trover transferred his title to the property after the conversion, *held*, that he could only recover nominal damages unless there was some special damages caused by the taking or detention: *Brady v. Whitney*, 24 Mich., 154. Where one contracts to purchase property, and for the possession of it under the contract, but the title to remain in the vender until the whole of the purchase price is paid, and converts it before completing the payments, if the vender brings trover he will be entitled to damages only to the amount of the unpaid purchase money and interest (if any) thereon: *Johnson v. Whittemore*, 27 Mich., 463. Where a lease contained a clause, that in case of default in the payment of rent the landlord might take possession of the tenant's personal property on the premises and sell it for the rent, the same as on a chattel mortgage, and on the day on which an installment of rent fell due, the landlord seized certain of the tenant's goods, and on a subsequent day sold them at auction as provided in the lease, and the tenant brought trover, *held*, that the landlord's seizure was premature as the tenant had the whole of that day in which to pay the rent, and that the

resulting to the plaintiff, by reason of the conversion, may be recovered if stated in the declaration.¹

§ 647. **Mitigation of damages.**—In mitigation of damages, the defendant may show that he has returned the property.² He may also show that he was tenant in common with the defendant, to reduce the damages to a proportionate share.³ So, that the plaintiff has only a lien on the goods. In such case, if the action be against a *stranger*, the plaintiff may recover the full value, though exceeding his lien, and then stand as trustee for the general owner for the balance; but when the action is against the general owner, or one acting under him, the plaintiff can recover only according to his special interest.⁴ A defendant cannot show title in another,

tenant was entitled to damages to the whole value of the property seized, and that it was no defense nor any mitigation of damages that the landlord would have been legally entitled on the next day after seizure to have taken the property, nor could the installment of rent for which seizure was made be deducted from the tenant's damages. And that the owner of property tortiously taken is entitled in trover to full compensation in damages, and no mere act of the wrong-doer can discharge him from liability, and a subsequent sale on legal process in favor of the wrong-doer and against the owner will not avail to reduce the damages: *Dalton v. Laudahn*, 27 Mich., 529. Damages which are peculiar to the case, and spring from exceptional circumstances, must be specially alleged or they cannot be proved: *Brink v. Freoff*, 44 Mich., 69, 72; 6 N. W., 94. The plaintiff cannot introduce evidence of damage for breaking up his business by the conversion of his goods until he has shown that his business was actually broken up thereby: *Dyer v. Rosenthal*, 45 Mich., 588; 8 N. W., 560.

1—*Brink v. Freoff*, 44 Mich., 69; 6 N. W., 94. See, *Dyer v. Rosenthal*, 45 Mich., 588; 8 N. W., 560. For other cases upon the subject of damages recoverable in trover, see, *Grant v. Smith*, 26 Mich., 201; *Moret v. Mason*, 106 Mich., 340; 64 N. W., 193; *An-*

derson v. Besser, 131 Mich., 481; 91 N. W., 737; *Saltmarsh v. Chicago & G. T. Ry. Co.*, 122 Mich., 103; 80 N. W., 98; *Woods v. Gaar, Scott & Co.*, 93 Mich., 144; 53 N. W., 14; *Schmitt-diel v. Moore*, 120 Mich., 199; 79 N. W., 195; *Isaacs v. McLean*, 106 Mich., 79; 64 N. W., 2.

2—2 Saund. Pl. & Ev., 1168. A defendant in trover cannot show in mitigation of his unlawful taking of the plaintiff's property, his own unauthorized application of the fruits of his tort, upon a naked personal demand of his own against the plaintiff which has not been put in judgment, and is not a lien on the property converted: *Northrup v. McGill*, 27 Mich., 234. Conversion is not excused by the subsequent taking of the property from the defendant on an attachment against the plaintiff in the action of trover; though the appropriation of the property in this manner to the plaintiff's use may be cause for mitigation of damages: *Erle Preserving Co. v. Witherspoon*, 49 Mich., 377; 13 N. W., 781.

3—*Heath v. Hubbard*, 4 East., 110, 121.

4—*Davidson v. Gunsolly*, 1 Mich., 388; *Ingersoll v. Bokkellin*, 7 Cow., 681, n. In trover by an assignee of property levied on by a sheriff on execution against the assignee, held, competent to show that the property was sold on a levy prior to the assignment, and that therefore the plaintiff

without showing some claim of interest in himself derived from such person.⁵

§ 648. Effect of judgment for plaintiff, and its satisfaction.

—By a recovery in trover and payment of the damages, the property vests in the defendant.⁶ But where there is no actual satisfaction of the judgment, but only an imprisonment upon the execution, it would be otherwise.⁷ If judgment has been rendered against one of several liable in trover, a tender of the amount of the judgment to the justice will bar an action against the others.⁸ A judgment in favor of a defendant, upon a trial involving the right of property, will bar an action against all claiming the property under the defendant, or in privity with him. The term *privity* denotes mutual or successive relationship to the same rights of property.⁹

was not injured; also, that it was proper to show that the goods were held and sold for railroad charges which were a prior lien: *Smith v. Michel*, 12 Mich., 180.

5—*Duncan v. Spear*, 11 Wend., 54; see, *Parkhurst v. Jacobs*, 17 Mich., 302.

6—*Hoag v. Bremen*, 3 Mich., 161; *Osterhout v. Roberts*, 9 Cow., 43; *Brady v. Whitney*, 24 Mich., 154.

7—*Osterhout v. Roberts*, 9 Cow., 43; *Livingston v. Bishop*, 1 Johns.,

290; *John A. Tolman Co. v. Walte*, 119 Mich., 341; 78 N. W., 124.

8—*Dexter v. Broat*, 16 Barb., 337. If a judgment in trover is rendered and execution issued thereon against one of several persons by whom the property was converted, this is a bar to any recovery against the others for the same conversion: *Kenyon v. Woodruff*, 33 Mich., 310, 315.

9—*Prentiss v. Holbrook*, 2 Mich., 272, 276.

CHAPTER XXXIX.

OF REPLEVIN.

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| § 649. Nature of the action. | § 655. In case goods are not found. |
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§ 649. Nature of the action—when it may be brought—at common law.—This action has for its object the recovery of the possession of specific personal chattels. The gist of the action is unlawful detention. In certain cases because of the lack of financial responsibility of the defendant, it is the only practical remedy. The plaintiff in replevin must have a general or special property in the goods taken, and a right to the possession of them, at the time of the taking or detention, and of the issuing of the writ, or he cannot maintain the action.¹ But it is not necessary that the plaintiff should ever have had the actual possession before bringing the suit.² At common

1—Sharp v. Whittenhall, 3 Hill., 576; Dodworth v. Jones, 4 Duer, 201; see, ante, § 100, notes; Dunham v. Wyckoff, 3 Wend., 280; and Hatch v. Fowler, 28 Mich., 205; Taylor v. Boardman, 24 Mich., 292; Hunt v. Strew, 33 Mich., 85; Hall v. Kalamazoo, 131 Mich., 404; 91 N. W., 615. It seems that one who has the present right of possession needs no other property right to enable him to maintain the action: Woolston v. Smead, 42 Mich., 54; 3 N. W., 251; Eldridge v. Sherman, 70 Mich., 266; 38 N. W., 255.

Cattle taken damage feasant and impounded, can be replevied only under chapter 295, C. L., 1897: Campau v. Konan, 39 Mich., 362; Marx v. Woodruff, 50 Mich., 361; 15 N. W., 510.

A mortgagee of chattels cannot maintain replevin against an officer who has taken the goods from the possession of

the mortgagor before foreclosure, under an execution against him, notwithstanding the mortgage is past due and unpaid, so long as the officer is proceeding in due course under the statute to a sale of the mortgagor's interest: Macomber v. Saxton, 28 Mich., 516. The mortgagor has a redeemable interest until actual foreclosure which is leviable, and the officer has a right to the possession of the goods for a sufficient length of time to sell them on his process: Carey v. Hewitt, 26 Mich., 228.

2—Dunham v. Wyckoff, 3 Wend., 280; Baker v. Fales, 16 Mass., 147; Gates v. Gates, 15 *Ibid.*, 310; Jackson v. Dean, 1 Doug. Mich., 519, 526. The plaintiff's rights depend upon the condition of the title and the right of possession at the commencement of the action: Crouse v. Derbyshire, 10 Mich., 482; and Carey v. Hewitt, 26 Mich., 228. But a party can-

law, as a general rule, replevin would lie whenever trespass de bonis could be sustained;³ but not always may there be a choice between these actions.⁴ Under the statute, perhaps, the correct rule would be that it can be brought in all cases where trover could be supported.⁵

The action can be maintained for the taking or detaining of personal chattels only.⁶ It does not lie for things fixed to the freehold.⁷ When one enters and ousts the owner of land, and continues in possession, cutting and removing the crops, replevin will not lie for them, although they were sown by the owner.⁸ Several persons cannot join their several rights in this action, but each must have a separate replevin; but joint tenants, or tenants in common may.⁹ If one part owner of a

not bring replevin for property already in his own possession. Thus, where a constable levied upon personal property in the possession of the judgment debtor, but never took it into his own possession nor in any way interfered with the debtor's possession, the debtor could not sue the officer in replevin: *Bacon v. Davis*, 30 Mich., 157; see, *ante*, § 100, n. 3; and *Morrison v. Lombard*, 48 Mich., 548; 12 N. W., 696. The principle which governs in replevin obliges the plaintiff to establish a substantial detention of the property as the very groundwork of the action: *Ibid.* The action rests on a tortious taking or detention of property, and should not be brought against one not in fault: *Cadwell v. Pray*, 41 Mich., 312; 2 N. W., 52. Replevin will lie at the suit of the mortgagee to recover property taken on an execution the value of which did not exceed the amount of the mortgage: *Stack v. Olmsted*, 127 Mich., 359; 86 N. W., 851.

Replevin does not lie against one who is not unlawfully detaining the property at the time the affidavit for the writ is sworn to and when the writ is delivered to the officer: *Burt v. Burt*, 41 Mich., 82; 1 N. W., 936; see, *Adams v. Wood*, 51 Mich., 413; 16 N. W., 788. Goods not in the possession of defendant in replevin on the day the writ issued were presumably not in his possession when it was sued out: *Reid, Murdock & Co. v. Parks*, 122 Mich., 363; 81 N. W., 252.

3—*Stewart v. Wells*, 6 Barb., 79;

Rogers v. Arnold, 12 Wend., 30; *Chapman v. Andrews*, 3 Wend., 240; *Pangburn v. Patridge*, 7 Johns., 140; *Cresson v. Stout*, 17 *Ibid.*, 116; *Clark v. Skinner*, 20 *Ibid.*, 465; see, *ante*, § 100. Where property has been wrongfully taken or wrongfully disposed of by one to whom it was given in charge, the owner may replevy it from any one who has bought it even in good faith and without notice of the title to the real owner, and without any previous demand: *Trudo v. Anderson*, 10 Mich., 357, 358; see, *Ballou v. O'Brien*, 20 Mich., 304, 324; see, *Bristol v. Braidwood*, 28 Mich., 191. Where goods are wrongfully sold or disposed of, the owner may replevy them from the hands of the purchaser, or sue in trover for the conversion: *Eggleston v. Mundy*, 4 Mich., 295.

4—*Gamble v. Cook*, 106 Mich., 561; 64 N. W., 482.

5—*McBrian v. Morrison*, 55 Mich., 351; 21 N. W., 368.

6—*Nibblet v. Smith*, 4 Term. R., 504. Not lie against undertaker for corpse: *Keyes v. Konkell*, 119 Mich., 550; 78 N. W., 649.

7—*Outten v. Whitem*, 3 Ad. & E., N. S., 961; *Darby v. Harris*, 1 *Ibid.*, 899; *ante*, § 100, notes; and *Hatch v. Fowler*, 28 Mich., 205.

8—*Demott v. Hagerman*, 8 Cow., 220.

9—2 Saund. Fl. & Ev., 5 Am. ed., 770. Husband and wife may join in a suit to recover property exempt from execution. The statute which authorizes the wife to sue alone for property of

chattel sue alone, the non-joinder of the other or others may be pleaded in abatement,¹⁰ but not in bar.¹¹ If he sues for a moiety only in his writ, the suit shall be abated.¹² The rule is well established that one tenant in common of personal property cannot maintain replevin against his cotenants.¹³

§ 650. **By statute.**—"Whenever, by any statute, executors or other persons, suing in the right of another, are authorized to maintain actions of trespass or trover, for any personal property, unlawfully taken, or unlawfully detained, such persons may maintain actions of replevin for such property."¹⁴

"No replevin shall lie for any property taken by virtue of any warrant for the collection of any tax, assessment or fine, in pursuance of any statute of this state."¹⁵

her husband exempt from execution, does not prevent him from joining with her in replevin for such property: *Shepard v. Cross*, 32 Mich., 96.

10—*Hart v. Fitzgerald*, 2 Mass., 509. So, if the husband sue alone in replevin to recover property belonging to his wife held in her own right, or that of another person, he will be non-sulted, and the non-joinder of the wife need not be pleaded: *Brown v. Fifield*, 4 Mich., 322, 326. The owner of a part interest in property which cannot be divided, cannot maintain replevin for his undivided share if the execution of the writ would deprive his cotenant whose title is undisputed, of his right of possession: *Kindy v. Green*, 32 Mich., 310. But where a party brought replevin for and recovered an undivided half of a crop of wheat standing in shock, the defendant having no interest in the other undivided half, *held*, that he could not raise the objection that the suit could not be maintained because the wheat was undivided when the writ issued: *Crapo v. Seabold*, 36 Mich., 444. So, where a tenant of farming lands agreed to pay to the landlord one-half of the grain raised thereon, in good order on the farm as his share for the rent, *held*, that they were tenants in common of the grain, and that when it was threshed and ready for delivery, the landlord was entitled to the half thereof, and that upon the tenant's removing the grain from the farm and refusing upon demand to deliver one-half to the land-

lord he might maintain replevin for his undivided half against the tenant: *Sutherland v. Carter*, 52 Mich., 471; 18 N. W., 223.

11—*Wright v. Bennett*, 4 Barb., 451.

12—*D'Wolf v. Harris*, 4 Mason, 515, 538; see, *ante*, § 100, notes.

13—*Wetherel v. Spencer*, 3 Mich., 123, 127. Nor against his cotenant's bailee: *Russell v. Allen*, 3 Kern., 173. See, also, *Bray v. Bray*, 30 Mich., 479; *Kindy v. Green*, 32 Mich., 310; *Kline v. Kline*, 49 Mich., 419; 13 N. W., 800; and *Coan v. Mole*, 39 Mich., 454.

14—C. L., § 10649.

15—C. L., § 10651. See, *ante*, § 100, note 5; *Scott v. Whelan*, 96 Mich., 624; 55 N. W., 1025. The property of a party seized for a tax for which the party was not liable to be assessed, may be replevied; the statute has no application to a case in which no valid tax could be assessed: *Le Roy v. East Saginaw City Ry. Co.*, 18 Mich., 233. The prohibition against bringing replevin for property taken under a tax warrant does not apply where there was no jurisdiction to levy the tax: *McCoy v. Anderson*, 47 Mich., 502; 11 N. W., 290; *Lantis v. Reithmiller*, 95 Mich., 45; 54 N. W., 713; *Whittaker v. Fuller*, 96 Mich., 141; 55 N. W., 612. The statutory prohibition against bringing replevin for property taken in satisfaction of a tax levy while it does not cover cases in which the tax is manifestly unlawful on its face, or is levied against a stranger to it, cannot be defeated by a mere claim

"No replevin shall lie at the suit of the defendant in any execution or attachment, to recover goods or chattels seized by virtue thereof, unless such goods or chattels are exempted by law from such execution or attachment; nor shall a replevin lie at the suit of any person, unless he shall, at the time, have a right to reduce into his possession the goods taken or detained."¹⁶

§ 651. **The declaration.**—"It shall be sufficient for the plaintiff in his declaration, whether the original taking was lawful or otherwise, to allege with requisite certainty of time, place and value, that the defendant received the property to be delivered to the plaintiff when thereunto afterwards requested, and that the defendant, although requested so to do, has not delivered the same to the plaintiff, but hath unlawfully detained the same, to the damage of the plaintiff such sum as he may specify."¹⁷

that the tax is invalid, if it is apparently regular: *Hill v. Wright*, 49 Mich., 229; 13 N. W., 528; *Forster v. Brown*, 119 Mich., 86; 77 N. W., 646; and cases cited in the opinion. Where jurisdiction to levy and assess the tax is established the court can have no further concern with matters affecting the exercise of such jurisdiction, however irregular or invalid they may have been in the action of replevin: *Hood v. Judkins*, 61 Mich., 575; 28 N. W., 689; *West Michigan Lumber Co. v. Dean*, 73 Mich., 459; 41 N. W., 504; *Michigan L. S. P. Co. v. Atwood*, 126 Mich., 651; 86 N. W., 139. Where property is seized by the proper officer under a tax roll and warrant fair on their face replevin will not lie: *Michigan Lumber Co. v. Dean*, *supra*; *Boyce v. Peterson*, 84 Mich., 490; 47 N. W., 1095; *Mogg v. Hall*, 83 Mich., 560; 47 N. W., 553; *North-Western, C. & L. Co. v. Scott*, 123 Mich., 357; 82 N. W., 76; *Curtiss v. Witt*, 110 Mich., 131; 67 N. W., 1106. Where replevin was brought contrary to this statute for property taken under a tax levy, it was held proper on quashing the writ to give judgment for the defendant for the amount of the tax lien: *Hill v. Wright*, 49 Mich., 229; 13 N. W., 528.

In replevin for property duly seized for a village tax regularly assessed, the

validity of the village organization and of the charter under which it has acted for a number of years, cannot be considered: *Coe v. Gregory*, 53 Mich., 19; 18 N. W., 541. And one whose property is seized upon a tax warrant against a third person may replevy it: *Travers v. Inslee*, 19 Mich., 98; *Tousey v. Post*, 91 Mich., 631; 52 N. W., 57; *Pioneer Fuel Co. v. Malloy*, 131 Mich., 466; 91 N. W., 750.

16—C. L., § 10652. See, *ante*, § 100, note 6; *Macomber v. Saxton*, 28 Mich., 516. If a husband abandons his wife, leaving her in possession of household goods exempt from execution, he cannot get possession of them by replevin against her: *Smith v. Smith*, 52 Mich., 538; 18 N. W., 347. Replevin lies for property seized upon an execution issued in void garnishment proceedings: *Iron Cliffs Co. v. Lahais*, 52 Mich., 394; 18 N. W., 121.

17—C. L., § 10670. The declaration in replevin before a Justice may be oral: *Smith v. Dodge*, 37 Mich., 354. In declaring, it is sufficient to follow the form prescribed by the statute: *Elliott v. Whitmore*, 5 Mich., 535. The statute recognizes no distinction between replevin for taking and that for detaining, but the action is in form in all cases for detaining only: *Trudo v. Anderson*, 10 Mich., 370; whether the taking be

"It shall not be necessary for the plaintiff to state in his declaration, a place certain within the township, city or village, as that where the property was detained."¹⁸

§ 652. **Plea and notice.**—"The defendant may plead the general issue to such declaration, which shall be in the same form as in personal actions, and shall put in issue not only the detention of the property, but also the property of the plaintiff therein, and his right to the possession thereof at the time of the commencement of the suit, and under such plea the defendant may give notice of any special matter of defense to the action."¹⁹

§ 653. **Demand.**—In trover, a demand must be proved if the defendant came lawfully into possession of the property; the

wrongful or not: *Le Roy v. East Saginaw City Ry.*, 18 Mich., 234, 240; *McGraw v. Pettibone*, 10 Mich., 537; *Riley v. Littlefield*, 84 Mich., 22; 47 N. W., 576.

Description of the property.—In replevin for grain or other chattels defined by measurement, a description indefinite as to quantity, and *not otherwise* made certain, is defective: *Farwell v. Fox*, 18 Mich., 169. Thus, property described as "a quantity of corn consisting of about two hundred bushels, and a quantity of rye consisting of about one hundred bushels," is insufficient: *Stevens v. Osman*, 1 Mich., 92. But a declaration describing the property as "six oxen" is sufficient: *Farwell v. Fox*, 18 Mich., 166. And in replevin for property taken in execution and claimed as exempt, the declaration need not specifically describe the character of the property so as to show it to be exempt; *Elliott v. Whitmore*, 5 Mich., 532; see, *ante*, § 102, n. 4. In a declaration in trover for various articles, it is not necessary to state the separate value of each, but only the value of the whole: *Root v. Woodruff*, 6 Hill, 418. Where the affidavit, writ and declaration in replevin set forth the value of the property at less than one hundred dollars, and the defendant has pleaded the general issue, the fact that the plaintiff's own testimony shows the value of the property to be more than one hundred dollars, does not oust the justice of jurisdiction: *Henderson v. Desborough*, 28 Mich., 171.

If there is a variance in the description of the property in the declaration from that found in the writ it must be taken advantage of before plea to the merits: *Reeder v. Moore*, 95 Mich., 594; 55 N. W., 436.

18—C. L., § 10671.

19—C. L., § 10672. *Singer Mfg. Co. v. Benjamin*, 55 Mich., 332; 21 N. W., 358; 23 N. W., 25. Any thing going to show that the plaintiff in replevin had no right to the possession, when he commenced the suit, may be proved under the general issue; as, that the sheriff had taken the property on a lawful writ, from the plaintiff, and continued lawfully to hold it under that writ: *Belden v. Laing*, 8 Mich., 503; *Clark v. West*, 23 Mich., 242; 26 Mich., 228; *Macomber v. Saxton*, 28 Mich., 516. So, that the property was taken on execution against a third person who claimed to be the owner thereof: *Snook v. Davis*, 6 Mich., 156. Or, that the property was seized and held under writs of attachment, may be shown under the general issue without notice: *Craig v. Grant*, 6 Mich., 455. In replevin it is competent to disprove the plaintiff's title to the goods, and this may be done by showing that some one else owns them: *Nicholson v. Dyer*, 45 Mich., 610; 8 N. W., 515. In order to recover damages for injuries not the ordinary result of the execution of the writ the defendant must give notice of such claim with his plea: *Bateman v. Blake*, 81 Mich., 227; 45 N. W., 831.

same rule applies to this action.²⁰ It is said, however, that proof of a refusal to deliver the property need not be strong in this action, in the form in which we are required to bring it, as in trover.²¹

Whenever the defendant has given notice of a defense, the

20—*Barrett v. Warren*, 3 Hill, 348. When the taking is lawful, and there has been no wrongful conversion by the defendant, there is nothing to put him in the wrong until the person entitled has made a demand for the property and the defendant has refused to give it up: *Adams v. Wood*, 51 Mich., 413; 16 N. W., 788. In replevin against a wife for property mortgaged by her husband, and kept in use upon a farm belonging to the wife where she and her husband resided, *held*, that the property being lawfully in the possession of the wife, she could not be subjected to the costs and expenses of the suit until after demand upon her; and that the fact that she claimed to own the property was not sufficient to dispense with a demand: *Campbell v. Quackenbush*, 33 Mich., 287. But where property has been taken wrongfully by the defendant, no demand is necessary before suit: *Le Roy v. East Saginaw City Ry. Co.*, 18 Mich., 233. Demand before bringing replevin is unnecessary where the defendant's possession is wrongful: *Bertwhistle v. Goodrich*, 53 Mich., 457; 19 N. W., 143. Nor is any demand necessary where a wrongful taker, or one to whom the property was given in charge, has disposed of it without authority, notwithstanding the defendant may have bought it in good faith, and without any notice of the title of the true owner: *Trudo v. Anderson*, 10 Mich., 357; *Ballou v. O'Brien*, 20 Mich., 304, 324, and see *Whitney v. McConnell*, 29 Mich., 12. And replevin will lie without demand against an officer who has taken plaintiff's property on an execution against a third person in whose hands the officer found the property: *Jackson v. Dean*, 1 Doug. Mich., 519. But where a demand is necessary in order to lay the foundation for replevin, a demand made by the officer after the issuing of the writ, and while he has it in his possession ready for service, is insufficient under the statute. *C. L.*, 1897, § 750, which expressly re-

quires an affidavit for the writ to be made after the cause of action accrued, and before the issuing of the writ: *Darling v. Legler*, 30 Mich., 54. When the original taking was felonious, no matter in whose hands the property may be subsequently found, the owner is entitled to his writ, without demand, because no person can acquire a rightful possession through a felonious taking. And the same is true when the original taking was a trespass, so long as the trespass remains unsatisfied and the owner is not in some way estopped from asserting the wrong. But a different rule prevails when the taking is wrongful, though it arises out of contract relations with the rightful owner, and is claimed to be in pursuance thereof. In all such cases, before any wrong can be imputed to the party in possession in good faith, and before he can be subjected to the expenses of a suit, he must be requested to give up the property and refuse to do so. But unless the plaintiff is entitled to have his demand complied with at the time it was made, it can lay no foundation for this action or change the character of the defendant's possession: *Adams v. Wood*, 51 Mich., 413; 16 N. W., 788. Replevin will not lie upon a demand which when made was in violation of an injunction of a court of competent jurisdiction: *Smith v. Smith*, 52 Mich., 538; 18 N. W., 347. Proof of demand on defendant's agent in possession of the property and who was acting for defendant is sufficient demand on defendant: *Congdon v. Bailey*, 121 Mich., 570; 80 N. W., 369. A demand by the owner, or his agent before his death, will support an action after his death: *Moore v. Machen*, 124 Mich., 216; 82 N. W., 892. It is not necessary, in case of demand of Sheriff for property attached, that the demand specify the nature of the interest of the demandant: *Schoolcraft v. Simpson*, 123 Mich., 215; 81 N. W., 1076; see, *ante*, §§ 100-103.

21—*Holbrook v. Wright*, 24 Wend., 169.

jury must pass upon the matter and incorporate it in their verdict.²² Thus, if the defendant sets up property in a third person, the verdict of the jury should be, that the property of the goods and chattels is in such person. When the trial is by the justice, the same course must be taken to authorize a judgment for the return of the property. The general issue alone would not, probably, authorize judgment for a return.²³

§ 654. **Judgment for plaintiff, etc.**—“If, upon the trial of the cause the verdict be in favor of the plaintiff, the same jury shall assess the damages which he has sustained by the unlawful taking and detention, or by the unlawful detention of the property; but if judgment pass for the plaintiff by default, or upon an issue of law, the damages may be assessed by the court, in the same manner as in personal actions.”²⁴

This provision of the statute contemplates not merely nominal damages, but such actual damages as the plaintiff has in fact sustained, by reason of the taking and detention, or the unlawful detention of the property; and they are not to be inferred, but must be proved.²⁵ The value of the services of an attorney and counsel for the plaintiff, or any fees actually paid by the plaintiff to his attorney and counsel in the prosecution of the suit, constitutes no part of the damages contemplated

22—*Boynton v. Page*, 13 Wend., 425.

23—*Pierce v. Van Dyke*, 6 Hill, 613; *Harris v. O'Gorman*, 118 Mich., 553; 77 N. W.

24—C. L., § 10674. Where the property has been delivered to the plaintiff, and he recovers a verdict on the trial, *the value of the property* is never assessed by the court or jury: *Merrill v. Butler*, 18 Mich., 295. Recovery in replevin of that portion of a fraudulent purchase of goods found in the possession of the defendant does not bar an action of trover for the remainder: *Reid, Murdock & Co. v. Ferris*, 112 Mich., 693; 71 N. W., 484; and cases cited in the opinion. Plaintiff cannot recover for property *known* by him to be out of defendant's possession or out of existence when the writ was sued out: *Reid, Murdock & Co. v. Ferris*, *supra*. The expense of replacing a building wrongfully removed may be recov-

ered as damages: *Byrnes v. Palmer*, 113 Mich., 17; 71 N. W., 331. Depreciation in value of a race horse because not properly cared for is a proper element of damages: *Riley v. Littlefield*, 84 Mich., 22; 47 N. W., 576.

25—*Fhenix, etc., v. Clark*, 2 Mich., 327. But if no evidence of damage was submitted to the court or jury, a judgment for any more than nominal damages would be erroneous. *Ibid*. Damages allowed a defendant in replevin may include the value of the use of the property while it is kept from him by means of the replevin proceedings: *Burt v. Burt*, 41 Mich., 82; 1 N. W., 936. The plaintiff in an unfounded suit in replevin may become liable for damages for withholding the property from the defendant, even though the latter is not the owner of it: *Ibid*.

by the statute, and cannot be legally taken into consideration in the assessment of such damages.²⁶

If the cause is tried by a jury, and they find for the plaintiff, they will assess the damages; if tried by the justice, he will do the same; if the defendant does not appear and plead, or judgment is given against him on demurrer, the justice will assess the damages.

§ 655. In case goods are not found.—"If the goods and chattels specified in any writ of replevin shall not be found, or shall not be delivered to the plaintiff, he may proceed in the action for the recovery of the same, or the value thereof."²⁷

"If the goods and chattels specified in the declaration, shall not have been replevied and delivered to the plaintiff, such plaintiff, in case he shall recover upon the whole record, shall be entitled, in addition to his damages and costs, to a further judgment that such goods and chattels be replevied and delivered to him without delay; or in default thereof, that such plaintiff do recover from the defendant the value of such goods and chattels, as the same shall have been assessed."²⁸

"The execution to be issued upon such judgment shall command the sheriff to levy the plaintiff's damages and costs, of the goods and chattels, lands and tenements of the defendant, as in other executions against property; and also to replevy the goods and chattels described in the declaration, which shall also be specified in the execution, and to deliver them to the

26—Hatch v. Hart, 2 Mich., 289.

27—C. L., § 10660. Maxon v. Perrot, 17 Mich., 334. A replevin suit in which the property is not taken on the writ, and the plaintiff proceeds for damages, determines the title to the property. The same principles apply to such a case as to an action of trover: Parmelee v. Loomis, 24 Mich., 242; see, *ante*, § 647. Where in replevin the defendant was in the wrongful possession of the whole of the property before the issuing of the writ, the plaintiff's right to recover the value thereof is not defeated by the officer's failure to levy on the property. Nor is the plaintiff's recovery confined to the property actually held by the defendant at the date of the writ: McBrien v. Morrison, 55 Mich., 351; 21 N. W., 368. This statute

does not authorize a recovery for property not in the possession of defendant when the writ was sued out: Reid, Murdock & Co. v. Parks, 122 Mich., 363; 81 N. W., 252. See also Hanselman v. Kegel, 60 Mich., 544; 27 N. W., 678.

In replevin for tools of plaintiff's trade taken on execution the estimate of value should be confined to the amount exempted by law, and the damages for their detention should be limited to the period during which the plaintiff was deprived of his exempt property: McGuire v. Galligan, 53 Mich., 453; 19 N. W., 142.

28—C. L., § 10676. Rathburn v. Ranney, 14 Mich., 387. See Reid, Murdock & Co. v. Parks, 122 Mich., 363; 81 N. W., 252; Hanselman v. Kegel, 60 Mich., 549; 27 N. W., 678.

plaintiff, if they can be found within his county, and if the same cannot be found, then that he levy the value of such goods and chattels, specifying the same, together with the aforesaid damages and costs, of the goods and chattels, lands and tenements of the defendant, as above provided."²⁹

"The sheriff shall proceed in the same manner to collect any moneys directed to be collected upon such execution, as upon executions against property in personal actions, and he shall possess the same powers in respect to the replevying of the property described therein, as are herein provided upon the execution of writs of replevin; and if the goods and chattels described in the execution are replevied and delivered to the plaintiff, they shall be irrepleviable."³⁰

§ 656. Judgment for defendant, etc.—"If the property specified in the writ shall have been delivered to the plaintiff, and the defendant recover judgment by the discontinuance or nonsuit, such judgment shall be, that the defendant have return of the goods and chattels replevied, unless he shall elect to waive such return as hereinafter provided; and also that he recover the damages sustained by him by reason of the detention of such goods and chattels, which damages shall be assessed by a jury in the proper court."³¹

29—C. L., § 10677. An execution may issue against the body under C. L., § 860. See, *Tomlin v. Fisher*, 27 Mich., 524.

30—C. L., § 10678.

31—C. L., § 10679. This being a statutory action the judgment must be such and such only, as the statute authorizes: *Bateman v. Blake*, 81 Mich., 232; 45 N. W., 831. No entry of waiver of return need be made beyond such recital in the judgment: *Kline v. Kline*, 49 Mich., 419; 13 N. W., 800. Acceptance of verdict for value and entry of judgment thereon is sufficient evidence of waiver: *Mueller v. Provo*, 80 Mich., 484; 45 N. W., 498. It seems that where plea is the general issue and defendant prevails upon sole ground that his possession was lawful because no demand had been made he is not entitled to a return of the property but only to a judgment for nominal damages: *Farrah v. Bursley*, 100 Mich., 547; 59 N. W., 245. A return need not be awarded in a judgment for the plaintiff in replevin, where the property was delivered under the writ to him: *Smith v. Dodge*, 37 Mich., 354. And a judgment for the return of the property to the defendant would be erroneous, where the plaintiff falls for the reason that the property was in his own possession when the writ issued: *Gidday v. Witherspoon*, 35 Mich., 368. A judgment quashing the proceedings in replevin, is equivalent to a judgment of nonsuit or discontinuance. And in such case, when the property has been given to the plaintiff under the writ, the party disposed has a right to have a return, or to waive a return and have judgment for the value of the chattels replevied: *Humphrey v. Bayn*, 45 Mich., 565; 8 N. W., 556. See, *Hill v. Webber*, 50 Mich., 145; 15 N. W., 52; *Soper v. Hawkins*, 56 Mich., 528; 23 N. W., 206; *Chilson v. Jennison*, 60 Mich., 235; 26 N. W., 859. A verdict that "defendant did not unlawfully detain" does not entitle defendant to a return of the property. If the verdict were general, how-

“Whenever the plaintiff or defendant shall be entitled to a return or surrender of the property replevied, instead of taking judgment for such return or surrender, as above provided, he may take judgment for the value of the property replevied, in which case such value shall be assessed on the trial, or upon the assessment of damages, as the case may be, subject to the provisions of section twenty-nine of this chapter. And in such case he should be entitled to a judgment against the sureties in the bond given by the opposite party, on the delivery of the property to him by the officer, as well as against the principal. When judgment shall be rendered against a party and his sureties, pursuant to the provisions of this section any execution issued thereon shall direct the officer to whom it is directed to make the amount thereof out of the goods, chattels, land and tenements of the principal, naming him, and for want thereof, out of the goods, chattels, lands and tenements of the sureties.”³²

ever, a judgment for return would be proper: *Harris v. O’Gorman*, 118 Mich., 553; 77 N. W., 12. The giving of the bond in replevin does not have the effect to pass title to plaintiff if property be replevied and delivered to him: *Lindsay v. Morse*, 129 Mich., 350; 88 N. W., 881; *Mannausau v. Wallace*, 87 Mich., 543; 49 N. W., 1082. Judgment for return vests title in the defendant in trial on merits and he may have trover for its value. His remedy is not alone on the bond: *Smith v. Demarrais*, 39 Mich., 14. If defendant waives judgment for return or value of the property and in consequence no judgment for either is rendered he cannot have judgment for damages. Under such circumstances a judgment for return with general damages should be given: *Bateman v. Blake*, 81 Mich., 227; 45 N. W., 831. On an assessment of damages, return being waived, all questions concerning the amount recoverable must be settled and the assessment is the conclusive measure of liability on the replevin bond: *Treadwell v. Paddock*, 75 Mich., 286; 42 N. W., 820; *Ryan v. Akeley*, 42 Mich., 516; 4 N. W., 207; *Simmons v. Robinson*, 101 Mich., 240; 59 N. W., 623. The fact that defendant had judgment for return on the trial before the justice, does not prevent his

taking a judgment for value on trial of plaintiff’s appeal: *McCabe v. Loonsfoot*, 119 Mich., 323; 78 N. W., 128. Where plaintiff fails to appear on return day in justice’s court and the officer refuses to return the writ defendant may show delivery of the goods to the plaintiff and take judgment for their value if he so elects: *Frank v. Brown*, 119 Mich., 631; 78 N. W., 670. If plaintiff fail to appear defendant is entitled to a judgment of nonsuit: *Cagney v. Wattles*, 121 Mich., 469; 80 N. W., 245. To entitle defendant to judgment for value it is not essential to show more than possession under claim of title: *Steere v. Vanderberg*, 90 Mich., 187; 51 N. W., 205.

32—C. L., § 10680. The section 29 referred to is Comp. Laws, § 6754; and provides, among other things, that when either party in replevin has at commencement of suit only a lien, special property, or part ownership in the goods, etc., and is not the general owner, the court or jury shall find according to such fact, and judgment shall be rendered only for such interest. And under these C. L., §§ 10675; 10680, as amended, Pub. Acts, 1899, pp. 384, 386, the defendant who sets up only a special property in the chattels replevied, and waives a return and claims only pecuniary damages, can-

“The damages and value of the property mentioned in the thirty-third and thirty-fourth sections of said chapter shall be ascertained by the justice, and no notice thereof shall be necessary, nor shall any exceptions be taken to the sureties of

not have a recovery exceeding the extent of his interest as proved: *Weber v. Henry*, 16 Mich., 399; *Darling v. Legler*, 30 Mich., 54. Thus, where mortgaged property is taken by the mortgagee, and the mortgagor replevies it and has judgment and waives a return, he can have judgment only for the value of the property and over and above the amount remaining secured and unpaid on the mortgage. If he demands a return of the property he is entitled to it regardless of what may be unpaid on the mortgage; but in that case the lien remains, and the property may be taken to enforce it should a breach occur. But when instead of demanding a return, the defendant asks judgment for the value, he must be content to take such judgment as would be equitable under the circumstances. As the lien would be gone, an equitable judgment would be the value less the amount still to be paid on the mortgage: *Fowler v. Hoffman*, 31 Mich., 215-221; see, *Carey v. Hewitt*, 26 Mich., 228. If defendant waive a return of goods upon which plaintiff has a lien he is entitled to an assessment of the value less the lien of plaintiff and judgment for that amount: *Kennedy v. Dawson*, 96 Mich., 82; 55 N. W. 616. A defendant in replevin who fails to take judgment for damages in replevin when he may, cannot have a separate action for them: *Drewyour v. Merrell*, 112 Mich., 681; 71 N. W., 486. A defendant in replevin whose lien under a chattel mortgage on the goods replevied is sustained, cannot in any event recover beyond the value of the goods; and in the absence of any proof of such value, the appraisal made under the writ will govern: *Walrath v. Campbell*, 28 Mich., 111. If the defendant in replevin sets up no right or claim to the property, but denies having been in possession when the writ was issued and served, and defends on that ground, and has a verdict in his favor that he did not unlawfully detain the property, he has no claim to a judgment for the return of the property, or for its value: *Hinchman v. Doak*, 48 Mich., 168, 12

N. W. 39. When a defendant has no real interest in the property, either general or special, but is still entitled to a judgment for want of a demand before suit brought, he can only have nominal damages: *Darling v. Legler*, 30 Mich., 54. Whenever in replevin before a justice, the defendant is entitled to recover for the value of the property taken from him on a writ at the instance of the plaintiff, the judgment for the value and for damages in the aggregate is not limited to one hundred dollars, but may be for the real amount proved by the evidence, not exceeding \$500, the limit fixed by the constitution: *Henderson v. Desborough*, 28 Mich., 170; *Humphrey v. Bayn*, 45 Mich., 565; 8 N. W., 556. In replevin against the sheriff who has taken property on execution against a third person, and not from the possession of the plaintiff, if the judgment is in favor of the sheriff, his damages on waiver of a return may be assessed at the full value of the property, notwithstanding it exceeds the amount due on the execution in his hands; the plaintiff has no right to the property, and as between him and the sheriff the latter had the whole title, and would be bound to account for any surplus to the execution debtor: *First National Bank of Marquette v. Crowley*, 24 Mich., 492. Upon a discontinuance against the plaintiff, the defendant is bound to elect whether to claim or waive a return, and an assessment of damages can only be made when there is on the record some distinct claim in one form or the other to base it upon: *Wheeler v. Wilkins*, 19 Mich., 78, 81. And it is essential to a judgment for the defendant for the value of the property, that the record should affirmatively and distinctly show an election to take the value instead of a return of the property: *Adams v. Champion*, 31 Mich., 233. See note 31, *ante*.

In replevin against an officer for goods taken and sold on execution at public sale after full notice, etc., the price obtained may be shown as competent evidence upon the question of their

the plaintiff, in the bond taken by the justice."¹ "If the property specified in the writ shall not have been replevied and delivered to the plaintiff, and the defendant recover judgment, such judgment shall be for costs only."²

"Whenever judgment shall pass against the plaintiff in replevin, whether by default or otherwise (except when the case shall be dismissed by reason of some default in the writ on the service thereof, or in the affidavit), and a return of the property is awarded, no writ of second deliverance shall be allowed, nor shall any second or other writ of replevin be brought for the same cause, but the plaintiff in replevin shall not thereby be barred from bringing an action of trespass or trover for the same property, unless the judgment in the action of replevin shall have passed against him on the merits."³

value. But it is immaterial as to whether the officer was indemnified or not: *Jennings v. Prentice*, 39 Mich., 421.

A waiver made in open court and entered by the justice at the defendant's request, is sufficient to authorize judgment for the value instead of the return of the property: *Humphrey v. Bayne*, 45 Mich., 565; 8 N. W., 556.

The waiver need not be made before trial nor in writing, and no entry need be made of it beyond the proper recital in the judgment: *Kline v. Kline*, 49 Mich., 419; 13 N. W., 800; see *Just v. Porter*, 64 Mich., 569; 31 N. W., 444.

A joint judgment in replevin is proper when the possession of the defendants was joint and they were connected in all the transactions on which it was based: *West Mich. Sav. Bk. v. Howard*, 52 Mich., 423; 18 N. W., 199. But a judgment against the plaintiff for the value of the property, cannot be given in favor of several defendants jointly, when only a part of them were interested: *Steele v. Matteson*, 50 Mich., 313; 15 N. W., 488.

1—C. L., § 751. The thirty-third and thirty-fourth sections referred to are the above C. L., §§ 10679, 10680. Where a plaintiff in replevin, before a justice of the peace, has judgment of discontinuance rendered against him by the justice, it is the duty of the justice to proceed and assess the damages in favor of the defendant, when he waives a re-

turn of the property, and if the justice refuse to do this, a writ of mandamus will lie to compel him: *People v. Tripp*, 15 Mich., 518. Where goods were taken upon a writ of replevin issued out of the circuit court, but which failed to describe any property, the only description being in the affidavit annexed, and the writ was quashed as being void on that ground, it seems to have been held that the defendant could not have judgment for the value of the property, on the ground that it is only for "property specified in the writ," for which he can have judgment: *Parsell v. Genesee Judge*, 39 Mich., 542. But the fact that the description in the writ is of such property or of such an interest in property as should not be made the subject of replevin, does not deprive the court of jurisdiction to award a judgment of return. It is only where no description of any property at all is set forth in the writ, that the jurisdiction to award a judgment for value, fails: *Humphrey v. Bayn*, 45 Mich., 565; 8 N. W., 556.

2—C. L., § 10682.

3—C. L., § 10683. One whose property has been wrongfully taken from him replevied it, but being nonsuited in the replevin suit, defendant had judgment against him for the value of the property. He then sued in trespass for the taking of the property, and it was held that he was entitled to recover in this suit not only his damages for the

§ 657. **When parties have liens only.**—"When either of the parties to an action of replevin, at the time of the commencement of the suit, shall have only a lien upon, or special property, or part ownership in, the goods and chattels described in the writ, and is not the general owner thereof, that fact may be proved on the trial, or on the assessment of value, or on the assessment of damages, in all cases arising under this chapter; and the finding of the jury or court, as the case may be, shall be according to such fact, and the court shall thereupon render such judgment as shall be just between the parties."⁴

This section is intended to introduce, in actions of replevin, the following rules, which govern in actions of trover. In trover by one having a lien on goods against the general owner, or one who has converted the goods by his direction, the plain-

detention of the property while defendant held it, but also its value as assessed in favor of the defendant in the replevin suit: *Haviland v. Parker*, 11 Mich., 103. A judgment in replevin determining only the right of possession of the property at that time, does not prevent the defeated party from recovering back the possession afterwards under a change of circumstances: *Deyoe v. Jameson*, 33 Mich., 94. See further *Farrah v. Bursley*, 100 Mich., 551; 59 N. W., 245; *Rathbun v. Ranney*, 14 Mich., 382; *Hutchinson v. Hutchinson*, 102 Mich., 636; 61 N. W., 60.

4—C. L., § 10675. See *ante*, § 656. The object of this statute was to permit any special property or part ownership to be proved and determined on the trial of the case, and by the same jury if a jury trial were had, or on the assessment of value where a demurrer has been interposed, or assessment of damages in case of judgment by default and other like cases. It does not authorize an assessment of damages by a second jury after the cause has been tried before another jury on the merits: *Quackenbush v. Henry*, 38 Mich., 369. See, *Alderman v. Manchester*, 49 Mich., 48; 12 N. W., 905. One from whom chattels have been taken by mere trespassers while he was in peaceable possession and holding subject to claims of persons other than the defendants, can maintain replevin: 27 Mich., 104. This

statute, C. L., § 10675: contemplates, that in an action of replevin, the exact extent of the special property of either party may be shown, so that the judgment rendered may correspond to the justice of the case: *Kohl v. Lynn*, 34 Mich., 360. When the verdict is for the defendant who claims only a lien or special interest in the property, the general title being in the plaintiff, it is necessary that the verdict should specify the amount of the defendant's interest: *Farmers' Loan & Trust Co. v. St. Clair*, 34 Mich., 518. The lien must be specially found; and if not so found the court cannot recognize it: *Gidday v. Witherspoon*, 35 Mich., 369. And a finding that defendant did not unlawfully detain the property, that he had a lien on the same to a specified sum, and that the plaintiff was the general owner subject to defendant's lien, will authorize a judgment for the defendant for the amount of the lien as found: *Moore v. Vrooman*, 32 Mich., 526. But where goods held by an officer under an attachment are taken from him on a writ of replevin a judgment in his favor, before the attachment proceedings are decided, must be for a return of the property and not for the special value of his lien. *Frederick v. Mecosta Judge*, 52 Mich., 529; 18 N. W., 343. See further *Upham v. Caldwell*, 100 Mich., 264, 58 N. W., 1001, and note to this case collecting the Michigan cases in 100 Mich., 265.

tiff can recover only according to his special interest; but in a like action against a stranger, the full value of the goods may be recovered, although exceeding the lien; and the plaintiff will then be a trustee for the general owner, as to the balance. If the goods converted are of less value than the amount of the lien, no more can be recovered than their value.⁵ In the first case, instead of taking a judgment for a return, the plaintiff may take judgment for the value of the property; that is, the amount of his lien, which is, in regard to him, its value.

In an action of replevin against a carrier of goods claiming the right to retain them until the freight is paid, it is competent for the owner to prove damages to them in their transit, in order to reduce the amount of freight actually due, or to show that nothing is due; thereby manifesting that the defendant had no right to the possession of the goods.⁶

If the jury or the justice find the property in part of the goods and chattels replevied to be in the defendant, and in the

5—*Ingersoll v. Van Bokkellin*, 7 Cow., 681, note a; see, *Davidson v. Gunsolly*, 1 Mich., 390, 391.

In *Davidson v. Gunsolly*, 1 Mich., 388, it was held under the above section C. L., § 10675, that where either of the parties at the commencement of the suit has only a lien upon or a special interest in the goods replevied, he can only recover according to his special interest, as against a general owner or one who has taken the goods by his direction; but as against a stranger, the full value of the property may be recovered, although exceeding the lien, or special interest, and the plaintiff will be a trustee for the general owner as to the balance. But in a later case,—*Weber v. Henry*, 16 Mich., 399, 404—it was held that, where a defendant sets up only a special interest in the property replevied, and waives a return and claims only pecuniary damages, he can have no recovery in any case beyond the pecuniary extent of his special interest: See, page 404 of the case. It would seem, however, that where it appeared on the trial that the plaintiff had no interest whatever in the property, that the defendant's special interest and possession at the commencement of the suit

ought to entitle him to a return of the goods or their value as against such a plaintiff who had no interest; and probably in this respect, it was not intended by the latter case to overrule the case in 1 Mich., 388, above cited. Where, in replevin against two, the court find that each of the defendants had a separate and independent lien to a specified amount on the property, it is erroneous to render a joint judgment in their favor for the amount of their claims: *Sweetzer v. Mead*, 5 Mich., 107, 111. In replevin for detaining a cable, the defendant under the general issue gave notice of property in himself, and on the trial the jury returned a verdict as follows: "This jury find for the plaintiff;" held, that although the verdict was informal, the justice ought to have entered it according to the substantial finding, in form following the issue, and rendered judgment for the plaintiff: *Lamberton v. Foote*, 1 Doug. Mich., 102. Unless the facts in a replevin suit require a special finding, a verdict that, "this jury finds for the plaintiff," is sufficient, and a judgment must be entered on it: *Smith v. Dodge*, 37 Mich., 254.

6—*Bancroft v. Peters*, 4 Mich., 619.

residue in the plaintiff, each party has judgment according to the findings.⁷

§ 658. **Replevin of goods attached.**—"If any goods or chattels which are replevied had been attached, they shall, in case of judgment for a return, be held liable to the attachment, until final judgment in the suit in which they were attached, and for thirty days thereafter, in order to their being taken in execution; and if such final judgment be rendered before the return of the property, or if the property when replevied was seized and held on execution, it shall be held subject to the same attachment or seizure for thirty days after the return, in order that the execution may be served thereon, or the service thereof completed, in like manner as it might have been if such property had not been replevied."⁸

§ 659. **Replevin bond, action on.**—"If any writ of return, or other execution, issued in favor of either party in the action, shall be returned unsatisfied in whole or in part, the party in whose favor such writ is issued or his representatives may have an action upon the bond executed by or on behalf of the opposite party, to recover against the obligors therein the value of the property replevied, and the moneys, damages and costs awarded to such party, and such bond shall be assigned to such party so entitled to an action thereon, or his representatives, on their request."⁹

7—Wright v. Mathews, 2 Blackford, 187.

8—C. L., § 10684. See, Frederick v. Mecosta Judge, 52 Mich., 529; 18 N. W., 343; Berger v. Clippert, 53 Mich., 469; 19 N. W., 149. Execution cannot issue against the body in replevin in the circuit court: Fuller v. Bowker, 11 Mich., 204. But may on judgment in justice court under C. L., § 860; but if the case were appealed to the circuit, such execution could not issue from the judgment in that court: Tomlin v. Fisher, 27 Mich., 524.

9—C. L., § 10685. No judgment can be rendered against the sureties in a replevin bond exceeding the amount of the penalty of the bond and costs of the suit: Frazer v. Little, 13 Mich., 195. It is a good defense for the sureties in a replevin bond that the plaintiff has released the principal (the defendant in replevin), upon an understanding that

he may still make what he can out of the sureties: Greenlee v. Lowing, 35 Mich., 63. Where the defendant in replevin has judgment and has a return of the property, and plaintiff pays the costs in the suit before the justice, but then appeals to the circuit court, where the defendant again has judgment, the sureties in the replevin bond are liable on the bond for defendant's costs in the circuit; the bond given on appeal is merely cumulative and does not supersede the replevin bond: Brabon v. Pierce, 34 Mich., 39. If plaintiff wrongfully retains his goods taken on the writ defendant is not precluded from resort to other remedies because he has an action on the replevin bond: Scott v. Scott, 50 Mich., 372; 15 N. W., 515. Action on the replevin bond lies only after judgment and execution returned unsatisfied: Scott v. Scott, *supra*. Abatement of the suit does not give an action on

In an action on a replevin bond, the plaintiff cannot recover unless he proves a writ of *retorno habendo*, or other execution in his favor, returned unsatisfied in whole or in part.¹⁰ But this need not be averred in the declaration; it is sufficient if it be proved.¹¹

"In such action the plaintiff shall assign breaches of the condition of such bond as in other cases; and the return of the sheriff to the execution issued in the action of replevin shall be evidence of such breach; the amount recovered in such action of replevin, and remaining uncollected, shall be the measure of the damages, if the value of the property replevied shall have been so recovered, and if not so recovered, and a return

the bond. Remedy, in such event, is replevin for the property or trover for its value: *Kidder v. Merrybrow*, 32 Mich., 470. The defendants in the action on the bond are estopped from setting up any infirmity in the proceedings by which they got the possession of the property: *Jennison v. Haire*, 29 Mich., 207.

10—*Cowden v. Stanton*, 12 Wend., 120, 122; *Williams v. Vall*, 9 Mich., 163; *Scott v. Scott*, 50 Mich., 372; 15 N. W., 515. Where an officer having a writ of execution for the return of the property, demanded a return of the sureties in the bond with which they refused to comply, and the writ was then returned unsatisfied, and suit was thereupon brought against them on the bond, *held*, that when demand was made it was the duty of the sureties to be active in returning the property according to their obligation in the bond; and that they could not object that the officer's return did not show that he had made any attempt to find or seize the property, or that he could not find it. Nor is it any defense to the sureties, that the writ of replevin is issued without the necessary affidavit. They are estopped from setting up any irregularities in the proceedings by which they obtained the property: *Jennison v. Haire*, 29 Mich., 207. It is not necessary to aver in the declaration the issue of an execution for the property, or its return unsatisfied: *Ibid.*

The remedy of a defendant in replevin who has been deprived of his property by a replevin suit which has abated

without any judgment for return or for the value of the property, is an action of replevin to recover it, or possibly trover for its value, and not by an action on the replevin bond: *Kidder v. Merrybrow*, 32 Mich., 470.

11—*Jennison v. Haire*, 29 Mich., 211; *Cowdin v. Pease*, 10 Wend., 333.

After a judgment for the value of the property for the defendant in replevin, an execution was issued in *form* in assumpsit, and purporting to be in favor of the plaintiff, and returned unsatisfied and the replevin bond sued; *held*, that this could not be considered as an execution on the judgment in replevin, consequently no liability upon the replevin bond was created by its return unsatisfied: *Williams v. Vall*, 9 Mich., 162. In an action on the bond the plaintiff must prove an execution in the replevin suit and its return unsatisfied: *Ibid.*: *Phillips v. Waterhouse*, 40 Mich., 273; and should also prove the judgment in replevin: *Ibid.* The fact that the judgment was rendered by consent upon a verdict rendered by a jury, does not defeat an action on the bond: *Estey v. Harmon*, 40 Mich., 645. But if the principal fraudulently consents to a judgment by secret collusion with the defendant, the sureties on the bond will be released: *Wright v. Hake*, 38 Mich., 525.

The defendant must have an assignment of the bond in proper form before he can recover upon it: *Smith v. Demarrais*, 39 Mich., 14.

or surrender thereof shall have been awarded, such value shall be added to the damages and costs recovered in the action of replevin, and the amount of such value, damages and costs, remaining uncollected, shall form the measure of damages.”¹²

“In any action prosecuted on such bond given by either party in action of replevin for the deliverance of any property the defendant may show, in mitigation of damages, that the obligee in such bond had only a lien upon it, or special property, or part ownership in, said property at the time of commencement of suit in replevin, and that the defendants, or either of them, had at the same time a part ownership or other valuable interest in said property; and if such lien, special property, part ownership, or other interest of said obligee, with interest thereon, amount to less than the value of the property replevied, a corresponding reduction shall be made from such value.”¹³

12—C. L., § 10686, as amended Pub. Acts, 1899, p. 386. The measure of the recovery on the bond where defendant prevails in the replevin and waives return, is the amount of his recovery in the replevin suit: *Ryan v. Akeley*, 42 Mich., 516; 4 N. W., 207; *Simmons v. Robinson*, 101 Mich., 243; 59 N. W., 623.

13—C. L., § 10687. As amended Pub. Acts, 1889, p. 387. Before the enactment by amendment of this section (March 15, 1865), it was held that where, on the nonsuit of plaintiff, defendant took judgment in replevin for the value of the property replevied, it was no defense to a suit on the bond to recover the amount of the judgment in the replevin suit, that the defendant in replevin who was plaintiff in the suit on the bond had no interest, in fact, in the property: See, *Williams v. Vail*, 9 Mich., 162. Where the property, taken by virtue of a writ of replevin, is a living animal, and there is judgment for return, it is a good

plea in bar, in an action on the bond, that before the judgment in the replevin suit, the animal died without the default of the plaintiff in the replevin suit: *Carpenter v. Stevens*, 12 Wend., 589. See, as to the rights of sureties when sued upon the bond: *Henry v. Ferguson*, 55 Mich., 401; 21 N. W., 381.

If the defendant in replevin waives return of the property and has his damages assessed, the obligors when sued by him on the bond, cannot introduce evidence under this section in mitigation of damages that the obligee had only a special interest: *Ryan v. Akeley*, 42 Mich., 516; 4 N. W., 207. This section applies only when the obligee has taken a judgment for return of the property: *Ibid.* As to what may be shown by the obligors in mitigation of damages, see, *Henry v. Quackenbush*, 48 Mich., 416; 12 N. W., 634; *Lindner v. Bock*, 40 Mich., 618. In suit on this bond the true interests in the property may be shown: *Treadwell v. Paddock*, 75 Mich., 287; 42 N. W., 820.

CHAPTER XL.

OF COVENANT.

§ 660. In general—When will lie.

§ 662. Actions on implied covenants.

§ 661. Parties to action of.

§ 663. Defenses.

§ 660. In general—when will lie.—The action of covenant is the remedy provided by law for the recovery of damages for the breach of a contract under seal.¹ It cannot be maintained unless the contract is sealed by the defendant; a mere recognition of the contract, though sealed by the other party, will not be sufficient.² No action will lie on a covenant by C to pay a sum of money to A, B and himself C, or the survivors or the survivor of them, on their joint covenant.³

This action may be brought on the condition of a bond,⁴ and in all cases arising upon contracts under seal, or upon judgments, when an action of covenant or of debt may be maintained, an action of assumpsit may be brought and maintained, in the same manner in all respects, as upon contracts without seal.⁵

1—Saund. Pl. & Ev., 5 Am. ed., 853. Since the enactment of the statute permitting assumpsit to be brought whenever covenant may be this action is very uncommon in justice's courts. C. L., § 10417.

2—Gale v. Nixon, 6 Cow., 445.

3—Fawlkner v. Lowe, 4 Exch., R., 598.

4—*Ante*, § 12. The action of covenant lies in justice's court on a money bond, no matter how large the penalty, if given to secure specific sums of money, in one or several installments, provided the aggregate shall not exceed one hundred and fifty dollars: See, C. L., § 709; Gray v. Stafford, 52 Mich., 497; 18 N. W., 235. The statute provides in such cases for an action of covenant for any separate installment, and for several successive installments, if necessary, as independent actions.

But if the bond is not strictly a money bond, it is not taken from the rules governing in other cases, and if the penalty exceeds the jurisdiction of a justice, no suit can be brought before him upon it: *Ibid.*; see, Bishop v. Freeman, 42 Mich., 533; 4 N. W., 290.

5—C. L., § 10417. This section does not compel a party to resort to an action of assumpsit on a sealed instrument: Goodrich v. Leland, 18 Mich., 118; see, Jerome v. Ortman, 66 Mich., 670; 33 N. W., 759; Stewart v. Sprague, 71 Mich., 58; 38 N. W., 673. This statute does not affect the rules of pleading. While the common counts may be joined with special counts, yet whenever the cause of action requires a special count it must still be employed: Gooding v. Hingston, 20 Mich., 440; Stewart v. Sprague, 71 Mich., 58; 38 N. W., 673. Neither does this statute affect the

§ 661. **Parties to actions of.**—It is a general principle, that no action can be brought upon a covenant by a person who was not a party to the deed, though the covenant name him, and be made to him expressly, and for his benefit.⁶

If the covenant be made to two or more jointly, all the covenantors must join in an action upon it, even although the covenant be to do a thing for the benefit of one of them only. And if any of the covenantees be dead, the fact must be averred in the declaration.⁷ If a man covenant with two or more, and with them and each of them, and the interest of the covenantees be several and not joint, each of the covenantees may alone maintain an action on the covenant.⁸ But where the interest is joint, though the covenant is several as “with them and each of them,” yet all must join.⁹ If the covenant be joint and not several, the action must be brought against all the covenantees jointly; but if the covenant be joint and several, the covenantee has his option in bringing the action against all the covenantors, or against any one of them, even although they be jointly interested in the subject matter of of the covenant.¹⁰

§ 662. **Actions on implied covenants.**—This action lies as well on covenants implied from the terms of the deed, as on those which are express. But no covenant shall be implied in any conveyance of real estate, whether such conveyance contain several covenants or not.¹¹ The term conveyance embraces every instrument in writing by which any estate or interest in real estate is created, aliened, mortgaged, or assigned; or by which the title to any real estate may be affected in law or equity, except wills, leases for a term not exceeding three years, and executory contracts for the sale or purchase of lands.¹² An implied covenant, in its proper legal sense, is a covenant not formally stated in a deed, but which is collected

statute of limitations. If assumpsit is brought the six year limitation applies: *Stewart v. Sprague*, *supra*; *Avery v. Miller*, 81 Mich., 85; 45 N. W., 503. Assumpsit will lie upon a penal bond without covenants; as upon an official bond of a bank teller: *Detroit Sav. Bk. v. Ziegler*, 49 Mich., 157; 13 N. W., 496.

6—*Bradford v. Stuckey*, 8 Moo., 88; *Bradford v. Stuckey*, 1 Bing., 225; *Charles v. Brown*, 6 B. & C., 718.

7—*Scott v. Godwin*, 1 B. & P., 73.

8—*Mills v. Ladbroke*, 7 M. & G., 218.

9—*Hopkins v. Lee*, 9 Jur., 616; *Hopkinson v. Lee*, 6 Ad. & Ell. N. S., 964.

10—*Enys v. Domthorne*, 2 Burr, 1190; 1 Saund. Pl. & Ev., 861.

11—C. L., § 8959. *Brayton v. Marthew*, 56 Mich., 168; *Gage v. Jenkinson*, 58 Mich., 172-3.

12—C. L., § 8994, and note.

by constructive inference from the terms used in it. Thus a covenant to supply one with lime at a stipulated price, at all times and seasons of burning lime, is an implied covenant to burn lime at all such seasons.¹³ So, a stipulation in a charter party, that forty days should be allowed for unloading and loading again, implies a covenant on the part of the freighter that the vessel should not be detained longer in unloading and loading again.¹⁴

§ 663. **Defenses.**—The plea of the general issue at the common law only put in issue the giving of the deed, and admitted all the material averments or breaches contained in the declaration.¹⁵ Since the enactment of the statute abolishing special pleas,¹⁶ the general issue requires the plaintiff to prove every fact necessary for him to allege in order to recover.¹⁷ Of all other defenses notice must be specially given.

If the performance of a covenant becomes impossible by the act of God, or the act of the plaintiff, or by the intervention of a statute, the defendant will be excused, and he may plead the matter in bar.

When the law creates a duty, and the party is, by the act of God, disabled to perform it, without any fault in him, and he has no remedy over, the law will excuse him; but when a party, by his own contract, creates a duty or charge upon himself, he is bound to make it good, if he can, notwithstanding any accident by inevitable necessity; because he might have provided against it by his contract. And, therefore, if a lessee covenant to repair a house, though it be destroyed by lightning, yet he must repair it. So, if a party covenant to build and keep in repair a bridge for seven years, he will be held to the observance of his contract, although the bridge be, by the act of God, by an extraordinary and unusual flood of water,

13—*Shrewsbury v. Gould*, 2 B. & A., 487. by proving a lack of power in the agent who executed it in his behalf: *Agent, etc., v. Lathrop*, 1 Mich., 438: unless

14—*Randall v. Lynch*, 12 East., 179.

15—*Legg v. Robinson*, 7 Wend., 194; the writing containing the covenant was filed with the justice at the time of

Cooper v. Watson, 10 Wend., 202.

16—C. L., §§ 10071, 10072.

17—See, *Kinne v. Owens*, 1 Mich., 249; *Young v. Stephens*, 9 Mich., 500. on oath at the time of pleading: C. L., § 826; *Wren v. McLaren*, 48 Mich., 197; Under the general issue in covenant, the defendant may show the deed is not his, 12 N. W., 41; see, *ante*, § 188.

broken down.¹⁸ But in some cases where the act of God renders performance absolutely impossible, the covenantor will be discharged; as, if a lessee covenants to leave a wood in as good a plight as it was at the time of the lease, and the trees are blown down by a tempest; or if one covenant to serve another seven years, and he die before the expiration of the term; or one covenant to deliver a horse to another and the horse die, the covenant in either case is discharged, because the act of God defeats the possibility of performance.¹⁹

When a right of action depends upon the performance of a condition precedent, performance is not excused, although it has become impossible by the act of God.²⁰

When H covenants not to do an act or thing which was lawful to do, and an act of parliament comes after and compels him to do it, the statute repeals the covenant; so if H covenants to do a thing which is lawful, and an act of parliament comes in and hinders him from doing it, the covenant is repealed.²¹ If one covenants not to do a thing, which was then unlawful, and an act comes and makes it lawful, the statute does not repeal the covenant. Nor if he covenants to do a thing which was then unlawful, and a subsequent statute legalizes the act, said statute does not repeal the covenant.²²

18—Platt on Covenants, 274-5.

19—*Ibid.*, 583-4.

20—Carpenter v. Stevens, 12 Wend., 589.

21—Brewster v. Kitchel, 1 Salk.,

198; Presbyterian church v. New York City, 5 Cow., 538; see, People v. Haw-

ley, 3 Mich., 330.

22—Platt on Covenants, 588.

CHAPTER XLI.

OF DEBT.

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| § 664. In general—when will lie. | § 673. Action, where to be brought. |
| § 665. On simple contract. | § 674. Action, how brought, etc. |
| § 666. On bond and deed. | § 675. Form of declaration in. |
| § 667. Profert and oyer. | § 676. Declaration in assumpsit for penalty or forfeiture. |
| § 668. Evidence in debt on bond or deed. | § 677. Declaration in trover for goods forfeited. |
| § 669. Debt on judgment. | § 678. Plea and evidence. |
| § 670. Declaration on judgment. | § 679. Debt on by-laws. |
| § 671. Debt on penal statute. | |
| § 672. Whose duty to prosecute. | |

§ 664. In general—when will lie.—This action is founded upon contract, express or implied, to pay money or render some other specific thing.¹ It is a concurrent remedy with indebitatus assumpsit to recover the price or value of goods sold and delivered, or of work or labor performed, money lent, paid, or had and received, a balance due upon an account stated, or upon any other executed consideration for which money is to be paid.² It is one remedy upon a bond, but not the only one. Covenant may sometimes be brought on a bond,³ or assumpsit, or debt, and assumpsit may be brought upon judgments.⁴ It is the only remedy, by action, for a forfeiture under a by-law. In all cases not otherwise specially provided for by law, where a pecuniary penalty or forfeiture is incurred by any person, and the act or omission for which the same is imposed is not also a misdemeanor, such penalty or forfeiture may be recovered in an action of debt, or in an action of assumpsit.⁵

§ 665. Debt on simple contract.—Debt on simple contract lies in all cases where indebitatus assumpsit lies. It lies on a

1—Saund. Pl. & Ev., 5 Am. ed., 896-7; Doyle v. Powell, 4 B. & A., 268. But does not lie to recover unliquidated damages: Buller's N. P., 167, note a.

2—Archbold's N. P., 200.

3—See, ante, § 660.

4—C. L., § 10417; see, ante, § 660, note 5.

5—C. L., § 9797; see, ante, § 14, note 2. Where a penal statute is repealed without a reservation or saving clause in favor of penalties that had been incurred under it, such penalties cannot afterwards be collected: Engle, etc., v. Shurts, 1 Mich., 150.

promissory note by the payee against the maker, and by any endorsee against the maker or any endorser.⁶ It lies on all contracts for the payment of money.⁷

Debt, as well as assumpsit, may be maintained for rent due, whether claimed in fee or otherwise, and the deed of demise, or other instrument in writing, may be used in evidence by either party to prove the amount due from the defendant.⁸

But when a sum of money is secured by deed, and a balance is struck for the purpose of ascertaining how much remains due thereon, and the obligor admits the correctness of the amount, and promises to pay it, debt on simple contract on an account stated, will not lie, but the action must be brought on the deed.⁹

§ 666. Debt on bond and deed.—An obligation or bond is a deed whereby the obligor obliges himself, his heirs, executors and administrators to pay a certain sum of money to another, at a day appointed. If this be all, the bond is called a single one; but there is generally a condition added, that if the obligor does some particular act, the obligation shall be void, or else remain in full force. In case this condition is not performed, the bond becomes forfeited, or absolute at law, and an action may be brought upon it.¹⁰

If no time of payment be mentioned in the condition of a bond, an action may be brought upon it at any time after the bond is executed; but if a time be mentioned, the action cannot be commenced until after the time shall have expired. "When an action shall be prosecuted in any court of law, upon any bond for the breach of any condition other than for the payment of money, or shall be prosecuted for any penal sum, for the non-performance of any covenant or written agreement, the plaintiff, in his declaration, shall assign the specific breaches

6—*Pierce v. Crafts*, 12 Johns., 90; and occupation, see, *Hogsett v. Ellis*, 17 Willmarth v. Crawford, 10 Wend., 343; Mich., 367.

Onondaga County Bank v. Bates, 3 Hill, 53. 9—*Middleditch v. Ellis*, 2 W. H. & G., 623.

7—*Comyn's Dig.*, Debt, A.

8—C. L., § 9255. See *McIntosh v. Hodges*, 110 Mich., 319; 68 N. W., 158; 70 N. W., 550: For a distinction between rent and compensation for use 10—*Blackstone's Com.*, 340. Justice has jurisdiction in debt on bond only up to \$150; C. L., § 709; *Richland Township v. Cliff*, 131 Mich., 628; 92 N. W., 685, and cases cited in the opinion.

for which the action is brought.”¹¹ The plaintiff is bound to assign his breaches in the declaration, and cannot assign them in the replication or upon the record.¹² To this declaration the defendant will plead the general issue, and give notice with it of any defense which he may have to the breaches assigned.¹³ “Upon the trial of such action if the jury find that any assignment of such breaches is true, and that the plaintiff should recover damages therefor, they shall assess such damages, and shall specify the amount thereof in their verdict, in addition to their finding upon any other question of fact submitted to them.”¹⁴ The verdict of the jury assessing the damages (or as assessed by the justice, if tried by him,) must be entered on the record, or docket, and judgment shall be rendered for the penalty of the bond, or for the penal sum forfeited, as in other actions of debt, together with the costs of suit, and with a further judgment that the plaintiff have execution to collect the amount of the damages so assessed; which damages shall be specified in such judgment.¹⁵ The execution is to be in the usual form in actions of debt, but shall have endorsed thereon in addition a direction, to collect the amount of damages so assessed, which must be stated, with interest thereon from the time of such assessment, and the costs of such suit.¹⁶

11—C. L., § 10378; see, *Young v. Stephens*, 9 Mich., 500; *Spencer v. Perry*, 18 Mich., 399; *Bishop v. Freeman*, 42 Mich., 535; 4 N. W., 290. As to what will be a sufficient assignment of the breach under this section, see, *Delashman v. Berry*, 21 Mich., 516. See, *White Sewing Mach. Co. v. Dakin*, 86 Mich., 581; 49 N. W., 583.

12—*Reed v. Drake*, 7 Wend., 345; *Nelson v. Bostwick*, 5 Hill, 37.

13—See, *ante*, § 188.

14—C. L., § 10379; see, *Delashman v. Berry*, 21 Mich., 516.

15—C. L., § 10380. In an action against the sureties in a replevin bond, no judgment can be recovered for an amount exceeding the penalty of the bond and costs of suit: *Fraser v. Little*, 13 Mich., 195. The object of the penalty or penal sum in a bond, is to fix the limit of the liability of the obligor, and judgment cannot be rendered against him for a sum exceeding that amount. If a surety in a bond other than official

bonds pays without suit the amount for which he is liable on the bond, it will be a satisfaction of, and a defense to an action on the bond. The obligation on such a bond is created by the bond. In official bonds the obligation is created by the statute, and the bond is only a collateral security for the performance of the legal obligation. In such cases the bond applies only to the amount for which the party is in default, and not to sums which may have been paid over in the performance of official or legal obligation, not created by the bond: *Spencer v. Perry*, 18 Mich., 394. There is no provision of law in this state for bringing successive actions on bonds other than money bonds. In the action on such bonds if there is a recovery it is for the penalty of the bond with an assessment of damages for the particular breaches proven. Damages for further breaches are collected through *scire facias* proceedings: *Bishop v. Freeman*, 42 Mich., 533; 4 N. W., 290.

16—C. L., § 10381.

A scroll or device used as a seal upon any deed of conveyance or other instrument whatever, has the same force and effect as a seal.¹⁷ Such was the law previous to the present statutes; now, no bond, deed of conveyance or other contract in writing, signed by any party, his agent or attorney, shall be deemed invalid for want of a seal or scroll affixed thereto by such party.¹⁸

At common law, the declaration must show that the instrument declared on had been sealed by the defendant, that is, the sealing must have been either expressly averred, or the instrument must have been named by some word which would import that it was under seal, such as indenture, deed, or writing obligatory.¹⁹

§ 667. **Profert and oyer.**—It is a general rule in all pleadings, whether by a plaintiff or defendant, if a deed be alleged, and the party claim or justify under it, he must make profert of the deed, that is, must profess that he brings it into court to be shown to the court and his adversary; the import or meaning of which is, that the party has the deed itself ready to give to the opposite party oyer of it.²⁰

Where the deed is stated only as an inducement, or where the plaintiff has no right to the possession of it, or the counterpart, a profert is unnecessary. If there be anything to excuse the profert, as, either that the deed has been lost or destroyed, or is in the possession of the defendant, it must be stated according to the facts, as the opposite party has a right to traverse the excuse. Where a profert, or an excuse for the want of it, is necessary, if the plaintiff profess to produce the deed, when he is not prepared to do so, and the defendant plead the general issue, the plaintiff will be defeated on the trial, as it

17—C. L., § 9005.

18—C. L., § 10417. See, *Fowler v. Hyland*, 48 Mich., 181; 12 N. W., 26; *Lockwood v. Bassett*, 49 Mich., 549; 14 N. W., 492; *McKinney v. Miller*, 19 Mich., 151; *Spicer v. Bonker*, 45 Mich., 635; 8 N. W., 518. This section was intended to give the unsealed instrument all the force and effect that a sealed one of the same tenor would have had; as a legal instrument is not to be affected by the want of that formality: *McKinney v. Miller*, 19 Mich., 151.

Parties to a written contract, not required by law to be in writing, may vary or cancel it by parol: *Barton v. Gray*, 57 Mich., 634; 24 N. W., 638; *Blagborne v. Hunger*, 101 Mich., 375; 59 N. W., 657.

19—*Cabell v. Vaughn*, 1 Saund. Rep., 290; note 1.

20—1 Chitty's Pl., 10 Am. ed., 364-5. Giving oyer of the instrument, is giving a copy of it; *Green's Practice*, 95, § 322. *Vickery v. Belr*, 16 Mich., 53.

will not be sufficient in that case to prove the deed to have been lost or destroyed, or in the defendant's possession. When a profert, or an excuse for the omission, is unnecessary, the statement of it will be considered as surplusage, and will not entitle the other party to oyer. The insertion of an excuse of profert will not preclude the plaintiff from introducing the deed on the trial, if it should afterwards be found.²¹ A profert is required only when oyer can be demanded; it is therefore unnecessary in setting forth the records and proceedings of courts, with the exception of letters testamentary and of administration.²²

If the plaintiff in his declaration, or the defendant in his plea, necessarily make a profert of any deed, letters of administration, etc., the other party may pray oyer, which cannot be refused by the court. But if a profert be unnecessarily made, the other party cannot crave oyer. Nor can it be craved if the deed be lost or destroyed, etc., and that fact be stated in the pleading. If a profert be necessarily made, and oyer be craved and given, the party has a right to make use of it. As oyer cannot be craved except where profert has been made, the party should demur specially to the declaration. Though a party be entitled to crave oyer, yet he is not in general bound to do so.²³ A party who craves oyer of a deed is entitled to a copy of the attestation and the names of the witnesses,²⁴ and not only a true copy of the instrument itself, but of all endorsements and memoranda upon it, and of all papers attached to it; so that he may have the same view of the matter as if the deed had been brought into court.²⁵ Where the deed is not set out on oyer, but is pleaded according to its legal effect, the general issue puts in issue not only the execution of the deed, but the construction of it as alleged in the pleading; it amounts to a denial that the party executed a deed having such effect as stated in the pleading. Had the deed been set out on oyer it would have been otherwise; for then the plea (the general issue containing oyer,) "Would have been inconsistent in itself if

21—1 Chitty's Pl., 10 Am. ed., 364-5.

24—Smith v. Alworth, 18 John., 445.

22—Commercial Bank, etc., v. Sparrow, 2 Denio, 97.

25—Van Rensselaer v. Poucher, 24 Wend., 316.

23—1 Chitty's Pleadings, 10 Am. ed., 430, 431.

the deed it set out did not have the construction put on it by the other part of the plea" (the deed was pleaded in this case,) "and so the objection would be raised on demurrer."²⁶

Oyer having been granted, the party may, sometimes, in his pleading, set forth the deed or not, at his election; and may plead the general issue, or any other plea without stating the oyer.²⁷

Profert may be made in the following language or language of similar import: "All of which will more fully appear by said (deed, mortgage, letters testamentary, etc.) now ready to be produced as the court may direct."

The excuses of the profert are as follows:—If the bond be lost—"and which said writing obligatory having been lost," or, "and which said writing obligatory having been destroyed by accident," or, "by the said defendant, the said plaintiff cannot produce the same to the said court here." If the bond be in the possession of the defendant—"and which said writing obligatory being in the possession of the said defendant, the said plaintiff cannot produce the same to the said court here."

§ 668. **Evidence in debt on bond or deed.**—The only evidence required from the plaintiff, under the general issue, at the common law, was proof of the execution of the bond in the ordinary way.²⁸ This plea at the common law put in issue the execution of the deed only; all other material averments in the declaration were admitted by it.²⁹ Since the enactment of the statute C. L. §§ 10071-10073 abolishing special pleas in bar and providing for notice of certain defenses under the general issue, a plea of the general issue in all cases denies every fact necessary for the plaintiff to allege to recover.³⁰ Notice must be given of matter which shows that the deed was merely voidable, on account of infancy, duress, void by statute, or payment.³¹ So performance or any other matter in excuse of it, as *non damnificatus* to a bond of indemnity; no

26—North v. Wakefield, 13 Ad. & Ell., N. S., 536.

27—If the plaintiff set out the deed in his declaration a formal profert would seem to be unnecessary: Regents, etc., v. Detroit, etc., Society, 12 Mich., 157.

28—See, ante, § 191, and notes.

29—Gardner v. Gardner, 10 Johns., 47; Dale v. Roosevelt, 9 Cow., 307.

30—Kinnle v. Owen, 1 Mich., 249; Young v. Stephens, 9 Mich., 500.

31—That is, notice of the defense must be given under the general issue.

award, to an arbitration bond; and matters in discharge of the action, as tender, set off, accord and satisfaction, former recovery and release, notice must be given of them. So, if the agreement upon which the bond was given be illegal, immoral, or against public policy, it must be pleaded; unless the fact appear upon the face of the condition, and in the pleadings; when the defendant may demur. In any action upon a sealed instrument, and where a set-off is founded on any sealed instrument, the seal is only presumptive evidence of a sufficient consideration, which may be rebutted in the same manner, and to the same extent, as if such instrument were not sealed.³² This defense, however, cannot be made unless notice of it is given with the plea of the general issue.³³

As to when the obligee is discharged by the act of God, etc.³⁴

Under the general issue, the plaintiff must prove the execution of the bond, unless it is filed with the justice at the time of pleading and the defendant fails to deny its execution under oath.³⁵ In order to prove this, the bond must be produced, if profert has been made of it, or the excuse for not having it must be proved; that it has been lost or destroyed, or is in possession of the opposite party, and notice has been given him to produce it and he has failed to do so.

In the cases indicated above proof of execution is unnecessary.³⁶ So where the opposite party pays money into court, on the count in which the deed is set forth,³⁷ or stipulates in writing to admit the execution of the deed on the trial of the cause; in such case the court will allow the deed to be read without further proof, although the party stipulating will not admit the execution.³⁸ And where a party to a suit, pursuant to notice, produces an instrument to which he is a party, or under which he claims a beneficial interest, it is not neces-

32—C. L., § 10185; see, *Dye v. Mann*, 1 Mich., 249; *Young v. Stephens*, 9 Mich., 291.

33—C. L., § 10186; see, *Hobbs v. Brush El. Light Co.*, 75 Mich., 553; 42 N. W., 965; *Boyer v. Sowler*, 109 Mich., 481; 67 N. W., 530; *Robson v. Dayton*, 111 Mich., 440; 69 N. W., 834.

34—See, *ante*, § 663.

35—See, *ante*, § 191; *Kinne v. Owen*,

36—C. L., § 826. *Dunning v. Calkins*, 51 Mich., 556; 17 N. W., 54; *Newton v. Principaal*, 82 Mich., 273; 46 N. W., 234; *ante*, § 191, and notes.

37—*Dyer v. Ashton*, 1 B. & C., 3; 2 Campb., 357.

38—*Burling v. Paterson*, 9 Car. & P., 570.

sary to prove the execution of it.³⁹ Deeds acknowledged or recorded prove themselves.⁴⁰

The recital of a deed, in another deed, is evidence against the party executing the reciting deed,⁴¹ and the obligee and those claiming under him.⁴²

A delivery of the deed is essential, and must be proved; it will be sufficient if a party manifests his intention, in any manner, whether by action or word, to deliver or put the deed into the possession of the other.⁴³ The delivery is usually proved by the fact of the party to whom it is made having the deed in his possession.⁴⁴ If the deed be executed by virtue of a power of attorney for the obligor, the power of attorney must be produced,⁴⁵ or its production excused and its contents proven.

When the general issue is pleaded, and the execution denied under oath,⁴⁶ some evidence must be given to show that the defendant, and the person who executed the deed, are the same.

Debt lies on any contract under seal to pay money, if the demand is for a sum certain or capable of being reduced to a certainty.⁴⁷

§ 669. Debt on judgment.—Debt lies upon the judgment of a court, whether of record or not, and whether rendered in this state or any other state or country.⁴⁸

A judgment rendered in a court of record in this state would be conclusive upon the parties, unless it appear from the record that the court had not jurisdiction.⁴⁹ In this state it has been held; first, that in an action in one state, upon the judgment of a court of general jurisdiction of another state, no plea or proof can be received in contradiction of any material fact appearing by the record, unless such plea or proof would be received in an action upon it in the court in which it was ren-

39—*Jackson v. Kingsley*, 17 Johns., 158.

40—See, *ante*, § 384.

41—*Jackson v. Brooks*, 8 Wend., 426.

42—*Jackson v. Harrington*, 9 Cow., 86. As to manner of proving handwriting and the execution of the instrument, see, *ante*, § 386.

43—*Ver Plank v. Sterry*, 12 Johns., 536.

44—*Jackson v. Perkins*, 2 Wend., 308.

45—*Corbin v. Jackson*, 14 Wend., 619.

46—See, *ante*, § 191.

47—1 Chitty's Pl., 10 Am. ed., 110.

48—1 Saund Pl. & Ev., 5 Am. ed., 898.

49—*Bradshaw v. Heath*, 13 Wend., 408.

dered; second, that if the record shows a want of jurisdiction, the judgment is a nullity; third, that if the record does not show either that the court had or that it had not jurisdiction, the jurisdiction will be presumed; but in such case, facts showing a want of jurisdiction may be alleged by plea, and if established, a recovery may thus be defeated; and, fourth, that when the record shows that where the process was not personally served, and that the defendant did not appear in person in the suit, but that an attorney of the court appeared for him and made defense, the authority of such attorney so to appear will be presumed.⁵⁰

A judgment obtained before a justice in this state, in any suit commenced by attachment, in which the defendant was not personally served, and did not appear, is only presumptive evidence of indebtedness, which may be repelled by the defendant. And, probably, an action cannot be brought on the judgment until the property attached has been sold on the execution.⁵¹ The same reason which would prevent its being set-off,⁵² that is, that it is presumed to be satisfied by the property taken on attachment, would seem to be equally available against an action on the judgment. In all other cases, however, an action may be brought on a justice's judgment immediately after its rendition.⁵³

A judgment rendered in an action against joint debtors is conclusive evidence of the liability of the defendant who was personally served with process in the suit, or who appeared therein, but against every other defendant, it is evidence only of the extent of the plaintiff's demand, after the liability of such defendant shall have been established by other evidence.⁵⁴ In actions upon judgments rendered by justices, the proper plea by which to question the rendition of the judgment, is the general issue. Under this plea, the plaintiff is bound to show the original liability of the defendant, not served, etc., by evidence other than the judgment. The judgment itself is no evidence of that fact.⁵⁵ The defendants may set up the statute

50—Willcox v. Cassick, 2 Mich., 165.

51—Johnson v. Moss, 20 Wend., 148.

52—Miller v. Starks, 13 Johns., 517.

53—Hale v. Angell, 20 Johns., 342;

McDonald v. Butler, 3 Mich., 558.

54—C. L., § 10372. See, ante, § 485.

55—Mervin v. Kumbel, 23 Wend., 293.

of limitations to the original demand if they were not personally served with process, and did not appear in the cause.⁵⁶

In all cases where an action is brought on a justice's judgment, the defendant may show that it is void by reason of irregularity in the proceedings.⁵⁷

The imprisonment of the defendant on a justice's execution is a satisfaction of the judgment, at least while the imprisonment continues,⁵⁸ and an action could not be maintained on the judgment. So, if one of several defendants is imprisoned, the consequence would be the same.⁵⁹ The defendant may also plead payment of the judgment or any other matter which shows that the judgment has been satisfied or discharged. When a judgment is insisted on as a set-off, and submitted to and passed upon by court or jury, or whether the same be allowed or not, the judgment is extinguished.⁶⁰

§ 670. Declaration on judgment.—Formerly, in declaring upon the judgment of a justice, or setting it forth in any other pleading, in strictness, the party should have begun by alleging the issuing and service of the summons or other process by which the suit was commenced, and then have passed to the rendition of the judgment, by stating that such proceedings were thereupon had in said cause, that on such a day judgment was rendered, etc. If jurisdiction was acquired by the party appearing and joining issue, or confessing judgment, it should have been so stated.⁶¹ The declaration must also have shown that the justice had jurisdiction of the subject matter. The particularity in pleading of the common law is not now required in justice's courts. In pleading a judgment or decision of a court or officer of special jurisdiction, it is sufficient to allege generally, that judgment or decision was duly made.⁶²

56—*Bruen v. Bokee*, 4 Denio, 56. And it seems that a defendant in such case may avail himself of any defense which it would have been competent for him to make in the original action if he had been brought into court: *Carmen v. Townsend*, 6 Wend., 206.

57—As to proving judgments, see, ante, § 374.

58—*Sunderland v. Loder*, 5 Wend., 58. But if the defendant escapes, the plain-

tiff is remitted to his former rights, and the bar ceases: *McGuinty v. Herrick*, 5 Wend., 240.

59—*Chapman v. Hatt*, 11 Wend., 41.

60—*McGuinty v. Herrick*, 5 Wend., 240.

61—*Cornell v. Barnes*, 7 Hill, 35, and note c, p. 37.

62—C. L., § 771. *Goodsell v. Leenard*, 23 Mich., 374.

§ 671. **Debt on penal statutes.**—"In all cases not otherwise specially provided for by law where a pecuniary penalty or forfeiture shall be incurred by any person, and the act or omission for which the same is imposed shall not also be a misdemeanor, such penalty or forfeiture may be recovered in an action of debt, or in an action of assumpsit; and if it be a forfeiture of any property, it may be sued for and recovered in an action of trover, or other appropriate action."⁶³

"By statute justices of the peace shall have jurisdiction of all actions for the recovery of penalties or forfeitures, where the amount [of] the penalty or forfeiture shall not exceed one hundred dollars."⁶⁴

If the act or omission for which the penalty or forfeiture is imposed shall also be a misdemeanor, no action can be maintained under this chapter. "When any act or omission is punishable according to law, by a fine, penalty or forfeiture, and imprisonment, or by such fine, penalty, or forfeiture, or imprisonment, in the discretion of the court, such act or omission shall be deemed a misdemeanor,"⁶⁵ and "in all cases where the penalty or forfeiture shall be one hundred dollars, or more, such penalty or forfeiture may be recovered by indictment in the proper court of the county."⁶⁶

§ 672. **Whose duty to prosecute.**—"It shall be the duty of every supervisor whenever he shall know, or have good reason to believe that any penalty or forfeiture has been incurred within his township, which shall be recoverable by action before a justice of the peace, according to the foregoing provisions of this chapter, forthwith to commence and prosecute a suit, in the name of the people of this state, for the recovery thereof."⁶⁷ "It shall be the duty of every other township officer, who shall know, or have good reason to believe that

63—C. L., § 9797; see, *Engle v. Shurts*, 1 Mich., 150. Assumpsit may be brought under this statute: *Canal Street G. R. Co. v. Paas*, 95 Mich., 372; 54 N. W., 907. When a penal statute has been repealed penalties which have accrued previous to the repeal cannot be recovered: *Engle v. Shurts*, 1 Mich., 150; *Breitung v. Lindauer*, 37 Mich., 230, and *ante*, p. 14, note 3.

64—C. L., § 9799; see, *ante*, p. 14, note 3. See, *People v. Brady*, 90 Mich., 459; 51 N. W., 537, distinguishing *People v. Navarre*, 22 Mich., 1.

65—C. L., § 9807.

66—C. L., § 9806. These proceedings can not be taken in justice's court.

67—C. L., § 9808.

any penalty or forfeiture has been incurred within his township, forthwith to give notice thereof to the supervisor.”⁶⁸

§ 673. **Action, where to be brought.**—“Every action for a penalty or forfeiture, shall be brought in the county where the act was done, or where the act omitted was required, in whole or in part, to be done, upon which the penalty or forfeiture attached.”⁶⁹

§ 674. **Action, how brought and conducted.**—“Every such action shall be brought in the name of the people of the state of Michigan, and shall be conducted and prosecuted in the same manner as personal actions, and shall be subject to all the provisions of law concerning personal actions, not repugnant to the provisions of this chapter.”⁷⁰

§ 675. **Form of declaration—in debt.**—“In actions of debt brought to recover any penalty or forfeiture imposed by any statute, it shall be sufficient, without setting forth the special matter, to allege in the declaration, that the defendant is indebted to the plaintiffs in the amount of such penalty or forfeiture; whereby an action hath accrued according to the provisions of the statute by which such penalty or forfeiture is imposed, specifying the section and chapter, as the case may require, or in some other similar terms referring to such statute.”⁷¹

“When a penalty or forfeiture is imposed by law for any act or omission, not exceeding any specified sum, an action may be brought for the highest sum so specified; and the jury, or justice before whom the trial shall be had, shall award the sum so specified to the plaintiff, or such part thereof, within the limitation prescribed by law, as shall be deemed proportionate to the offense.”⁷²

§ 676. **Declaration in assumpsit for penalty or forfeiture.**—“Whenever an action of assumpsit shall be brought for the recovery of any penalty or forfeiture imposed by any statute,

68—C. L., § 9809. 618; 31 N. W., 546, for declaration held
69—C. L., § 9800. See, *People v. fatally defective to support a cause of*
Hart, 1 Mich., 467. action for a penalty brought in justice's
70—C. L., § 9798. court. See, also, *Benalleck v. People,*
71—C. L., § 9801. See *People v. 31 Mich., 200.*
Grand Rapids & W. P. R. Co., 64 Mich., 72—C. L., § 9805.

it shall be sufficient, without setting forth the special matter, to allege in the declaration, that the defendant, being indebted to the plaintiffs in the amount of such penalty or forfeiture, according to the provisions of the statute by which such penalty or forfeiture is imposed, referring to such statute as prescribed in the last section, undertook and promised to pay the same.''⁷³

§ 677. **Declaration, in trover, for goods forfeited.**—"If an action of trover be brought to recover any goods or other things forfeited by the provisions of any statute, the declaration may allege that such goods or other things were forfeited according to the provisions of such statute, referring to the same as prescribed in the foregoing sections, and that the defendant converted the same to his own use, without setting forth the special matter.''⁷⁴

§ 678. **Plea and evidence.**—"To every declaration for a penalty or forfeiture, the defendant may plead the general issue, which shall be in the same form as in personal actions; and may give in evidence under such plea any special matter in bar of the action, or in discharge of the defendant therefrom, in the same manner, and with the like effect as if a special notice thereof had been given.''⁷⁵

§ 679. **Debt on by-laws.**—Where a by-law enacts a penalty to be incurred, when its restrictions are not complied with, debt may be brought for the recovery of it, or *assumpsit*.⁷⁶ But, where it is enacted that the penalty is to be recovered by debt, then debt only can be maintained.⁷⁷

"In an action of debt for the penalty of a by-law, the time when it was made, the parties by whom it was made, their authority to make it, the by-law itself, and the breach of it by the defendant, must be set forth; that the Court may judge

73—C. L., § 9802. *People v. Brady*, 90 Mich., 462; 51 N. W., 537. it to prove title to lands: *Ramsby v. Bigler*, 129 Mich., 570; 89 N. W., 344.

74—C. L., § 9803.

76—*Feltmakers v. Davis*, 1 Bos. & P., 98.

75—C. L., § 9804. This section is not applicable to an action to recover a penalty for obstructing a highway brought before a justice of the peace, so as to enable the defendant by virtue of

77—Com. Dig., "By-Law," 21. Whenever the mode of enforcing obedience to a by-law is prescribed by such by-law, that mode must be strictly pursued: *Dillon on Municipal Corp.*, 345.

both whether the by-law be good and whether the defendant be a proper object of the action.”⁷⁸

78—2 Kyd on Corp., 167; cited and approved in *Coats v. Mayor*, etc., 7 Cow., 585. In the work of Judge Dillon on Municipal Corporations, it is said that the courts, unless it be the courts of the municipality, do not judicially notice the ordinances of a municipal corporation, unless directed by the charter or statute to do so. Therefore, such ordinances, when sought to be enforced by action, or when set up by the defendant as a protection, should be set out in the pleading. It is not sufficient that they be referred to generally by the title or section. It is, however, believed to be sufficient, in the absence of special legislative provisions prescribing the manner of pleading, to set forth the legal substance of that part of the ordinance alleged to have been violated, it being advisable, for purposes of identification, to refer to the title, date and section. In a declaration to recover a penalty for the violation of a by-law or ordinance, the facts which make the liability of the defendant should be distinctly stated, and regularly, as before stated, the by-law should be set forth, or its substance stated, and the breach. But where, as in some of the city charters in this State, it is provided that in prosecutions for violations of ordinances it shall be sufficient to refer to the ordinance violated, by its title, it would not be necessary to set out the ordinance or its substance.

CHAPTER XLII.

OF ASSUMPSIT.

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IN GENERAL.

§ 680. On contracts not under seal.—Assumpsit is the remedy for the recovery of damages for the breach of simple contracts or promises not under seal; and that whether the contract or promise be express or implied, oral or written, as the law always raises an obligation to do that which a party is legally liable to perform.¹

1—1 Saund. Pl. & Ev., 5 Am. ed., 162; Woods v. Ayres, 39 Mich., 345.

Implied contract.—The liability, in case of an implied promise, is founded upon a duty which the law imposes upon the party receiving a benefit to pay for it; and the law enforces this duty under the fiction of an implied contract: Hosmer v. Wilson, 7 Mich., 294, 301. And whenever a benefit accrues to a party, whether for services rendered, money expended, or property used, or from any other cause, upon which a duty to make compensation to another arises, the law will, in the absence of an express promise to make such compensation, imply one from the transaction and the duty. Thus, if A performs labor or renders services for B at the latter's request, or with his knowledge and assent, but without a contract for compensation, the law will imply a promise by B to pay A therefor what such labor or services shall be reasonably worth: Ward v. Warner, 8 Mich., 519. But where there is a merely spontaneous services, such as an act of kindness rendered without request, or where the circumstances account for the transaction on some ground *more probable* than that of a promise of recompense, no promise will be im-

plied: Woods v. Ayres, 39 Mich., 351. See, Fitch v. Newberry, 1 Doug., Mich., 17; St. Jude's Church v. Van Denberg, 31 Mich., 287; Lange v. Kaiser, 34 Mich., 317; In re Young's estate, 39 Mich., 429. Services prompted by kinship or other relationship with no intention to pay or to receive compensation therefor will not raise an implied obligation to make compensation: Estate of Young, 39 Mich., 429; O'Connor v. Beckwith, 41 Mich., 657; 3 N. W., 166; Mason v. Dunbar, 43 Mich., 407; 5 N. W., 432; Martin v. Sheridan, 46 Mich., 93; 8 N. W., 722; Allen v. Allen, 60 Mich., 635; 27 N. W., 702. Where one has performed services from which another has received a benefit, he is entitled to recover pay therefor, if the circumstances and facts were such as would create an implied promise, or, in other words, a clear duty on the part of the other to pay a reasonable compensation; and the fact that defendant had previously paid for like services has a tendency to show such promise: Strong v. Saunders, 15 Mich., 339, 345. So, where a party enters upon land under a contract to purchase it, which he fails to perform, and after such failure is notified that, if he remains in possession, he will be required to pay rent; if he

§ 681. On contracts under seal, etc.—By statute. In all cases arising upon contracts under seal, or upon judgments, when action of covenant or of debt may be maintained, an action of assumpsit may be brought and maintained, in the same manner, in all respects, as upon contracts without seal;² etc.

remain, the law will imply a promise to pay rent from the time of such notice. But in such case there can be no promise implied to pay rent for the occupation while the contract was in force, because no rent could, during that time, have been in contemplation of the parties, and no such duty existed. Where one has the clear right to the use and control of property, and permits its use by others, upon condition of payment therefor, when the condition is specific in terms, the law will imply from the use by one having knowledge of the terms, an assent to them, and a corresponding promise to pay; and when not known, a promise of reasonable compensation. In the first case, the implication is founded upon the knowledge of the terms and conditions of the use, and the latter upon the duty arising from the use; but in neither will the promise or duty be implied, if the party using it asserts adverse rights, and acquiesces and uses the property under an adverse claim of right. Thus, where A asked B to dig a canal across B's lands for the purpose of floating logs, and afterwards used the canal for that purpose under a claim of right to do so, without payment of compensation to B for the use of the canal, and denying B's right to charge for such use; *held*, on a suit by B to recover compensation for the use of the canal, that A's use of the canal under a claim of right and denial of B's right to compensation, precluded every presumption of the recognition of A of a duty upon which a contract to pay could be implied. That the law implied the duty only where the right of dominion over the subject matter was conceded, or not questioned; and never where the use was under an adverse claim of right or denial of that asserted. In such case, if A's claim was unfounded, his entry, being adverse to B, was a naked trespass, upon which no duty to compensate, which

could be converted into a contract, arose; for such duty can only be implied where the conventional or implied relation of promiser and promisee exists, or where the duty springs from some change of relation after the wrongful act, as in the case of the conversion of property wrongfully taken, into money, and the like: *Ward v. Warner*, 8 Mich., 508. When there is an express contract, none can be implied: *Galloway v. Holmes*, 1 Doug., 330; *Peters v. Gallagher*, 37 Mich., 407; *Van Fleet v. Van Fleet*, 50 Mich., 1; 14 N. W., 671. But it seems that where a party seeks to recover upon express contract for services rendered for another, he may still insist that in case the evidence fails to show an express contract, but does show circumstances from which an implied contract to pay may be inferred, that he may recover under the latter: *Ibid.*, *Van Fleet v. Van Fleet*, 50 Mich., 1; 14 N. W., 671. Further as to implied assumpsit, see, *Grand Rapids & B. C. Ry. Co. v. Van Deusen*, 29 Mich., 431; *St. Jude's Church v. Van Denberg*, 31 Mich., 287; *Cicotte v. St. Anne's Church*, 60 Mich., 552; 27 N. W., 682; *Philadelphia W. Co. v. Detroit W. L. Co.*, 58 Mich., 29; 24 N. W., 881.

The law will not raise an implied contract against a municipal corporation in any case where it has no power to make an express one: *Detroit v. Robinson*, 38 Mich., 116.

2—C. L., § 10417. See *ante*, § 660, note 2. The intent of this statute is to permit the action of assumpsit to be brought "in all cases," where before an action of debt might be brought on a contract under seal: *Detroit Savings Bank v. Ziegler*, 49 Mich., 157; 13 N. W., 496; *Christy v. Farlin*, 49 Mich., 319; 13 N. W., 607. But C. L., § 9728, bars the action of assumpsit where covenant might be maintained, in six years. The form of the action and not the character of the obligation determines what

§ 682. **By assignees of demands.**—"The assignee of any bond, note or other chose in action, not negotiable under existing laws, which has been or may be hereafter assigned, may sue and recover the same in his own name, upon such bond, note or other chose in action; and the defendant in all such suits may set up and avail himself of any defense he may have, arising before due notice of such assignment, and which accrued prior to such action, in the same manner and with the like effect as if the assignor had prosecuted the same in his own name."³

statute of limitation applies, whether the six or ten year limitation: *Avery v. Miller*, 81 Mich., 85; 45 N. W., 503. This section does not compel a party to resort to an action of assumpsit on a sealed instrument: *Goodrich v. Leland*, 18 Mich., 118; *Stewart v. Sprague*, 71 Mich., 50; 38 N. W., 673. This section does not make any changes in the rules of pleading applicable to suits on judgments and sealed instruments. Therefore in suing in assumpsit on a judgment, the declaration should set out the judgment specially, and describe it accurately; it could not be proved under a count upon an account stated: *Goodling v. Hingston*, 20 Mich., 440, 441. But it seems that a count upon a judgment may be joined with the common counts in the same declaration: *Hogsett v. Ellis*, 17 Mich., 351, 360; see, remarks at page 360, on the case of *Drew v. Circuit Court*, etc., 1 Doug., Mich., 434.

3—C. L., § 10054. This statute is permissive and the assignee may still sue in name of assignor: *McRoberts v. Lyon*, 79 Mich., 31; 44 N. W., 160. It reaches every right in property which was ever assignable in equity, or capable of survivorship to executors; thus a written contract for the sale of land is such a chose in action as can be sued by the assignee in his own name: *Cook v. Bell*, 18 Mich., 387. So, a guarantee of the collection of a promissory note is assignable, and the assignee may sue thereon in his own name: *Waldron v. Harring*, 28 Mich., 493. And so is the right of action upon a contract for breach of the warranty therein: *Felt v. Reynolds*, R.

F. E. Co., 52 Mich., 602; 18 N. W., 378. And a corporation to whom an insurance policy has been assigned can sue upon it in its own name: *Watertown Ins. Co. v. Grover & Baker Sewing Machine Co.*, 41 Mich., 131, 137; 1 N. W., 961. Accounts existing, and to be, may be assigned: *Fuller v. Rhodes*, 78 Mich., 36; 43 N. W., 1085; *Preston Nat'l B'k v. George T. Smith M. F. Co.*, 102 Mich., 462; 60 N. W., 981; *Dunn v. Michigan Club*, 115 Mich., 409; 73 N. W., 386. A chattel note is assignable and the assignee can sue upon it: *Hicks v. Lyle*, 46 Mich., 488; 9 N. W., 529.

One joint contractor may assign his interest in a right of action under the contract to his co-contractor; but cannot thereby release himself from his obligations under the contract: *Hart v. Summers*, 38 Mich., 399. And even the right of action for torts (excepting only those torts which are merely personal, and which on the death of the person wronged die with him), as for torts for taking and converting personal property, or for injury to one's estate, and generally all such rights of action for tort as would survive to the personal representative, may, it seems, be assigned so as to pass an interest to the assignee which he can enforce by suit at law: *Final v. Backus*, 18 Mich., 231; *Finn v. Corbett*, 36 Mich., 318. Thus a right of action for a tort in cutting and removing timber from the land of another, is assignable, and may be enforced by the assignee in his own name: *Grant v. Smith*, 26 Mich., 201. Actions for fraud are not assignable: *Felt v. Reynolds* R. F. E. Co., 52 Mich., 606; 18 N. W., 378; *Brush v. Sweet*, 38

Mich., 574; *Dayton v. Fargo*, 45 Mich., 153; 7 N. W., 758. Nor is the widow's right to unassigned dower: *Galbraith v. Fleming*, 60 Mich., 408; 27 N. W., 583.

It is no longer necessary for assignees to sue in the name of the assignor, or to bring an action in the name of one person for the use and benefit of another, even in cases of tort where the action is assignable: *Watson v. Watson*, 49 Mich., 540; 14 N. W., 489. One joint wrong-doer who has satisfied the demands of the injured party for the tort, cannot hold the other joint wrong-doers for their proportionate share of the amount paid. Nor can he take an assignment of the claim after such payment and then sue the other wrong-doers for the whole or any part of the damages, either in the name of the assignor or otherwise: *Upham v. Dickens*, 38 Mich., 338.

But the general doctrine is, that nothing is assignable that does not directly or indirectly involve a right of property. Hence, causes of action on the case for deceit, are not assignable: *Dayton v. Fargo*, 45 Mich., 153; 7 N. W., 758.

As to the method of assignment there is no particular requirement of the law. Whenever an assignment would be good in equity it will be good at law: *Draper v. Fletcher*, 26 Mich., 154. Need not generally be in writing: *Donovan v. Halsey Fire Engine Co.*, 58 Mich., 38; 24 N. W., 819. An assignment by way of gift is sufficient: *Briscoe v. Eckley*, 35 Mich., 114. A non-negotiable note may be assigned by indorsing "without recourse, Geo. H. Young, Trustee" (he being the payee), and delivering the same to assignee: *Merchants' Nat'l B'k v. Gregg*, 107 Mich., 146; 64 N. W., 1052; *Steere v. Trebilcock*, 108 Mich., 464; 66 N. W., 342.

The assignee of a non-negotiable chose in action takes it subject to all equities existing between the debtor and creditor. It is not necessary that the equities should have existed at the inception of the debt or contract. It is sufficient if they exist prior to the assignment, as the assignee has it in his power to protect himself against them by inquiry of the debtor, before the assignment: *Warner v. Whitaker*, 6 Mich., 133; and see, *Bloomer v. Henderson*, 8

Mich., 402, 403. Any set off or defense accruing before notice of the assignment, will be available against the assignee: *Finn v. Corbett*, 36 Mich., 318; *Spinning v. Sullivan*, 48 Mich., 5; 11 N. W., 758; *Edison v. Gates*, 44 Mich., 253; 6 N. W., 645. This statute, which allows assignees to sue in their own names, is only permissive; the assignee is still at liberty to sue in the name of the contracting party: *Slason v. Cleveland & Toledo Ry. Co.*, 14 Mich., 496. The statute does not require any particular method of assignment, and was evidently intended to remove the old indirect method of suing in the name of the nominal for the use of the real owner. Assignments of things in action, have never (except under the statute of frauds), been required to be in writing; any purchaser becomes assignee by his purchase. A parol assignment when good in equity is equally good under this statute. And a declaration by an assignee need not aver any formal assignment, but is sufficient if it avers the plaintiff to be the owner and holder: *Draper v. Fletcher*, 26 Mich., 154. It is not necessary that the transfer of a claim should be in writing. If the evidence shows that the plaintiff is the owner at the time of the trial, that is sufficient: *Donovan v. Halsey Fire Engine Co.*, 58 Mich., 38; 24 N. W., 819. Where one person held an account against another and drew upon him in favor of a third person for the amount of it, and attached a statement of the account to the draft, it was held to be a valid assignment of the account: *Moore v. First Nat'l Bank of Madison*, 57 Mich., 251; 23 N. W., 800.

An assignment may be absolute or qualified, as the parties choose, so long as no one is injured or defrauded; so, transfers may be made to agents or attorneys for convenience of suit or release, or in trust, or by way of security: *Herbstreit v. Beckwith*, 35 Mich., 93. Assignments of choses in action may be made by way of gifts as well as for a consideration, and an assignment of several claims to the same person so that they may all be adjusted in one suit is permissible: *Briscoe v. Eckley*, 35 Mich., 112.

In a suit by A in his own name upon a negotiable note payable to the order of "A. & Co.," the possession and pro-

§ 683. **Waiving tort and suing in assumpsit.**—In some cases, where the cause of action is founded in a wrong, the party may waive the tort and bring assumpsit. Thus, if a man by

duction of the note by the plaintiff, is not alone sufficient evidence of his title to entitle him to recover. The language of the statute, permitting an assignee of a chose in action "not negotiable under existing laws," to sue and recover in his own name, does not apply to such a case; the statute expressly excepts all paper negotiable under existing laws: *Redmond v. Stansbury*, 24 Mich., 445; *Brennan v. M. & M. Nat'l B'k*, 62 Mich., 347; 28 N. W., 881; *Redmond v. Stansbury*, 24 Mich., 447; *Matteson v. Morris*, 40 Mich., 55.

The holder by verbal assignment only of a note payable to order and not indorsed, cannot sue thereon in his own name. A note payable to a person or his order, is negotiable, although not indorsed. The term "negotiable," is one of classification, and does not of necessity imply anything more than that the paper possesses the negotiable quality: *Robinson v. Wilkinson*, 38 Mich., 299. The title to negotiable paper may be transferred by mere verbal assignment, or by an assignment written upon the paper itself or upon a separate paper. But in such cases the transferee must sue upon it in the name of the assignor. The statutes authorizing assignees of choses in action to sue in their own names does not apply to such assignments of negotiable paper. In order to enable the transferees of negotiable paper to sue thereon in their own names, the assignment or transfer thereof must be made in the commercial sense and in the manner appropriate to and in accordance with the usual and customary method of transferring commercial paper: *Ibid.*; *Spinning v. Sullivan*, 48 Mich., 5; 11 N. W., 758. And, unless negotiable paper is transferred in this way the assignee will take it subject to all the equities existing between the assignor and the maker. Thus, where the holder of a negotiable note payable to his order, made and signed a transfer written thereon as follows, "I hereby transfer my right, title and interest to the within note to S. A.," it was held that this form of assignment

destroyed the negotiability of the note and transferred it subject to all the equities existing against it while in the hands of the assignor: *Aniba v. Yeomans*, 39 Mich., 171. And so, where the holder of a note payable to his order, transferred it not by indorsement, but by an instrument of assignment written upon a separate paper: *Spinning v. Sullivan*, 48 Mich., 5; 11 N. W., 758; *Matteson v. Morris*, 40 Mich., 55. The assignee of an undivided half interest in a lease may, under this statute, join with the owner of the other undivided interest in a suit for rent: *Bly v. Bliss*, 123 Mich., 195; 81 N. W., 1080.

Where a suit is brought on a contract in the name of the promisee *for the use and benefit* of another person named, the promisee is still the legal plaintiff, and it is not necessary to show on the trial that the contract or claim has been assigned to the person for whose use the suit is brought. But where the interests of the defendant may be affected by the ownership, as, where he claims payment or a set-off, proof of the transfer may become necessary, as the validity of the defense may depend on the time when it was made, and when the knowledge of it came to the defendant: *Farwell v. Dewey*, 12 Mich., 40, 441. The purchaser of a demand due upon contract, whether before suit brought upon it or afterwards, may still pursue his remedy in the name of the original contracting party: *Moon v. Harder*, 38 Mich., 566; see *Peters v. Galligher*, 37 Mich., 407. In a suit upon a claim assigned, by writing executed by the attorney in fact of the assignee the filing of the written assignment with the justice will not dispense with proof of the assignment, nor put the defendants in the position of admitting the execution of the assignment unless denied on oath; the statute, C. L., § 826, applies only to instruments purporting to be executed by one of the parties to the suit: *Hinckley v. Weatherwax*, 35 Mich., 510.

It is not necessary to aver an assignment in actions of replevin or trover by

trespass take my goods and sell them, and receive the money for them, I may bring an action of trespass, or I may maintain an action for money had and received.¹

the assignee: *Warren v. Dwyer*, 91 Mich., 414; 51 N. W., 1062. But it is necessary to make such averment in case where a husband brings action on a due bill running to the wife: *Blackwood v. Brown*, 32 Mich., 104. So in an action by assignee of claim for work and labor; *Cilley v. Van Patten*, 58 Mich., 404; 25 N. W., 326. So, by assignee of an open account: *Feirce v. Closterhouse*, 96 Mich., 124; 55 N. W., 663. So by an assignee for the benefit of creditors: *Powell v. Williams*, 99 Mich., 30; 57 N. W., 1041. An averment that the plaintiff was the holder and owner of a non-negotiable note upon which action is brought is a sufficient averment of an assignment: *Draper v. Fletcher*, 26 Mich., 154. It is sufficient if the assignment appears in the bill of particulars: *Snell v. Gregory*, 37 Mich., 500. See further upon necessity for the averment of assignment: *Conrad Selpp Brewing Co. v. McKittrick*, 86 Mich., 191; 48 N. W., 1086, and cases cited in the opinion.

1—*Putnam v. Wise*, 1 Hill, 234, 240. Thus, where the goods of A have been wrongfully taken or held by B and sold, although the act of B in taking them, or in their conversion, may have been tortious, yet, as he has sold them, and received a benefit from such conversion. A may waive the tort and bring assumpsit for the price for which they were sold. And the court add: "But we are not aware of any principle upon which it can be held, that a mere naked trespass can be made the basis of an implied assumpsit. If a trespass on lands be proved, no presumption of an agreement for compensation can be raised; for the act of entry is in contravention of, and not in subordination to, the rights and claims of the party injured. For such injury the law has given a different remedy; and one founded on the injury, and no promise can be implied to pay, but a liability arises to compensate for the wrong and injury:" *Ward v. Warner*, 8 Mich., 519, 520. And in the same case it was said by Manning, J.: "When plaintiff's goods have been wrongfully taken, it is said he may waive the trespass and bring assumpsit for goods sold and delivered. This may be so where defendant lays no claim to the goods, and the trespass is wholly wanton on his part. But when he claims them as his own, or claims a right to the possession of them, and justifies for the taking on that ground, trespass and not assumpsit is the proper remedy. In case of a pure trespass, by which I mean one committed without color of right to the property taken, the court may well say to the defendant, you shall not be permitted to defeat the action by showing that you took the goods without intending to pay for them, or with an intention to do a wrong with which the plaintiff, by putting a more charitable construction on your conduct, has not thought proper to charge you. This, I think, is all that is meant by waiving the trespass and suing for goods sold and delivered:" *Ibid.*, 525. And where one pastured his cows on the land of another, it was said by Manning, J., Martin, Ch. J., concurring, that, if he used the land for that purpose without plaintiff's consent he was a trespasser, and plaintiff might sue him in trespass, or waive the trespass and bring an assumpsit for pasturing the cattle: *Welch v. Bagg*, 12 Mich., 44. But there seems to be some diversity of opinion as to whether, if a person takes goods and chattels under such circumstances as to make him a trespasser or wrong-doer, the owner can waive the tort and sue in assumpsit, unless he has sold and converted the articles into money or its equivalent: see, the cases cited in 1 Hill, 240, note (a); and *Flquet v. Allison*, 12 Mich., 328, 332. If one has wrongfully taken possession of the property of another and sold or disposed of it, and received money or money's worth, therefor, the owner is not compellable to treat him as a wrong-doer but may affirm the sale as made on his behalf, and demand in this form of action the benefit of the transaction. But it cannot be safely said that the law will go much farther than this

in implying a promise, where the circumstances repel all implication of a promise in fact. Damages for a trespass are not in general recoverable in assumpsit; and in the case of taking personal property, it is generally held essential that a sale by the defendant should be shown. Thus, where one took logs belonging to another and claimed to own them, and still had them in his possession, *held*, that assumpsit for their value would not lie: *Watson v. Stever*, 25 Mich., 386. See a discussion of this case in *Nelson v. Kilbride*, 113 Mich., 637; 71 N. W., 1089. It is here held that it is not necessary to aver the tort out of which the assumpsit is implied. And upon like principle, where A had possession of bonds purchased with the money of B, and delivered them over to C, who claimed that they were purchased for him, and were in fact his property. A neither undertaking to transfer any title to the bonds, nor receiving or contracting to receive any benefit from the transaction, but merely yielding the possession to C, on his claim of ownership: *held*, that B could not maintain assumpsit against A for the value of the bonds: *Barnum v. Stone*, 27 Mich., 332. But where one wrongfully obtained a school district order and used it as money for his benefit, the tort may be waived, and he may be sued in assumpsit for the amount: *Bowen v. School District, etc.*, 36 Mich., 149. One tenant in common may waive the tort of the other in converting the share of the first, and sue in assumpsit for the value: *Loomis v. O'Neal*, 73 Mich., 582; 41 N. W., 701. In *Tuttle v. Campbell*, 74 Mich., 652; 42 N. W., 384; 16 Am. St., 652, the general rule is stated as follows: "Before a party can waive a tort for the conversion of personal property and bring assumpsit, the property in the hands of the tort-feasor must have been sold and converted into money upon the theory that the money has been received for the plaintiff's use. There is, however, another class of cases where the property has been converted but not sold, where the tort may be waived and assumpsit brought for the value of the goods converted. This class belongs to those relations where a contract may exist and at the same time a duty is superimposed

or arises out of the circumstances surrounding or attending the transaction, the violation of which duty would constitute a tort. In such cases the tort may be waived and assumpsit be maintained, for the reason that the relation of the parties, out of which the duty violated grew, had its inception in contract." These relations are usually those of trust and confidence, such as those of agent and principal, attorney and client, or bailee and bailor. In *McCormick, H.-M. Co. v. Waldo*, 128 Mich., 135; 87 N. W., 55, it is stated in this language: "The right to waive the tort and sue in assumpsit exists in at least two classes of cases—one where the defendant has come into possession of the plaintiff's property without his consent and has received money upon a subsequent sale of the same; the other where he has come into possession through contract relations with the plaintiff, and the contract has been rescinded or failed, and he persists in keeping the property, refusing to deliver it upon demand." In *Grinnell v. Anderson*, 122 Mich., 533; 81 N. W., 329, it is stated again in the following words: "The rule is that, before a party can waive the tort and sue in assumpsit for the conversion of personal property, the tort-feasor must have converted the property into money, or the relation existing between the parties must have had its inception in contract." For other cases on the general subject, see, *Coe v. Wager*, 42 Mich., 49; 3 N. W., 248; *Aldine Manf. Co. v. Barnard*, 84 Mich., 632; 48 N. W., 280; *Ginsburg v. Cutler & Savage L. Co.*, 85 Mich., 439; 48 N. W., 952; *Bryant v. Kenyon*, 123 Mich., 151; 81 N. W., 1093; *Castner v. Darby*, 128 Mich., 241; 87 N. W., 199; *St. John v. Antrim Iron Co.*, 122 Mich., 68; 80 N. W., 998; *Brown v. Foster*, — Mich., —; 100 N. W., 167 (June, 1904).

Waiving the tort of a conversion of property, and suing in assumpsit for the value of the property converted, amounts to an election to regard the defendant as the owner of the property, and estops the plaintiff from bringing trover therefor against one to whom the defendant had sold it: *Nield v. Burton*, 49 Mich., 53.

So, the master of an apprentice may bring assumpsit for the value of the work and labor of an apprentice who has been seduced from him.²

§ 684. **The consideration.**—Every promise, to be binding, must be founded upon a sufficient consideration. It must be of some value.³ If the promise be founded on or arise from

2—*Foster v. Stewart*, 1 Maule & S., 191; *Lightly v. Clouston*, 1 Taunt., 112.

3—*Jones v. Ashburnham*, 4 East., 455. A promise is a sufficient consideration for a promise if there is an absolute mutuality of engagement between the parties, so that each has the right at once to hold the other to a positive engagement; 1 *Parsons on Contracts*, 4 ed., 373, 374. As illustrating doctrine that there must be mutuality of promises to support an executory contract see, *Wilkinson v. Heavenrich*, 58 Mich., 574; 26 N. W., 139; *Kopplitz-Melchers B. Co. v. Behm*, 130 Mich., 649; 90 N. W., 676. It is a sufficient consideration for giving a note, that the payee has assumed an obligation in consequence of having received it, which he can be compelled either at law or equity to perform. If the entire consideration for a promise be void, the promise is not binding. If one or more of several considerations for a promise are frivolous and insufficient, but not illegal, and others are good, the insufficient considerations will be disregarded, while those which are valid will sustain the promise: *Wesleyan Seminary v. Fisher*, 4 Mich., 515. Where several subscribe to a fund to be used to effect a laudable or worthy purpose, each agreeing to pay the sum set opposite his name, the several promises are mutually considerations for each other, and any one appointed by the subscribers to collect and disburse the funds, and accepting the appointment, may in his own name, enforce payment by the subscribers, whether he was named as payee in the subscription paper or not: *Comstock v. Howd*, 15 Mich., 237. Nor is it necessary to the validity of the consideration that the subscribers should be pecuniarily benefited by the accomplishment of the purpose intended: *Underwood v. Waldron*, 12 Mich., 89, 90. An agreement with defendant to forbear suit against a third person who was

debtor to plaintiff, is a good consideration for defendant's promise to pay the debt: *Rood v. Jones*, 1 Doug. Mich., 188; *Calkins v. Chandler*, 36 Mich., 320. So, an extension of credit is a sufficient consideration to uphold a contract of suretyship: *Lee v. Wisner*, 38 Mich., 86. The compromise and settlement of an asserted claim, involved in legal controversy, be it never so doubtful, is a sufficient consideration for its settlement, and for any obligation given by one party to the other in consideration of such settlement: *Van Dyke v. Davis*, 2 Mich., 144, 149; see, *Weed v. Terry*, 2 Doug., 344. A claim made in good faith, with color of right, although there be in fact no right, so long as the party asserting it does not know he has no right, is sufficient to sustain a compromise; for a party may buy his peace in a case in which he knows there is no right against him: *Gates v. Shutts*, 7 Mich., 133; see, *Hale v. Holmes*, 8 Mich., 37; *Converse v. Blumrich*, 14 Mich., 109. Nor can a person knowing the facts of his case, and having means of reflection and consultation with his friends, be relieved against the consequences of his own want of firmness in yielding to the arrogant claims and threats of civil litigation from an adverse party, and submitting to an unjust compromise: *Mayhew v. Phoenix Ins. Co.*, 23 Mich., 105; *Hull v. Swarthout*, 29 Mich., 250. But unaccepted offers of compromise cannot affect the rights of the parties. An assignment of a mortgage obtained from a timid and ignorant man, by threats of prosecution for slander, was held to have been procured without consideration: *Tate v. Whitney*, Har. Ch., 145; see, *Lyon v. Waldo*, 36 Mich., 345. The delivery of property manufactured under a contract, is a sufficient consideration for an agreement by the party accepting delivery to waive any claim for damages for the non-fulfillment of the contract with-

any illegal transaction,⁴ or an immoral or fraudulent one, or contrary to public policy, an action cannot be sustained upon it.⁵

A seal to an agreement in writing purports a consideration, and it is not necessary to aver or prove one where the agreement is under seal.⁶ And even in those cases where the statute requires agreements to be in writing, it is not necessary that

in the stipulated time: *Moon v. Detroit, etc.*, 14 Mich., 266. And it seems that a moral obligation to pay a debt is a sufficient consideration for a promise to pay, although the remedy for its collection at law may be suspended: *Edwards v. Nelson*, 51 Mich., 121; 16 N. W., 261. The sufficiency of the consideration for an honest bargain cannot be inquired into if there was any consideration of value: *Kennedy v. Shaw*, 43 Mich., 359; 5 N. W., 396. A seal imports a consideration: *Lee v. Wisner*, 38 Mich., 82. The seal, however, is but prima facie evidence of consideration: *Green v. Langdon*, 28 Mich., 221. A promissory note of the wife imports a proper consideration, prima facie: *National L. Bank v. Miller*, 131 Mich., 564; 91 N. W., 1024. A benefit to his principal will support a consent of the surety to an extension of time: *Borden v. Fletcher's Estate*, 131 Mich., 220; 91 N. W., 145. The moral obligation to pay a debt barred by the statute of limitations is a sufficient consideration for a new promise to pay it: *Koons v. Vauconsant*, 129 Mich., 260; 88 N. W., 630. So if made by a surety: *Perkins v. Cheney*, 114 Mich., 567; 72 N. W., 595. The subscription of one to a common object finds its consideration in the subscriptions of the others: *Waters v. Union Trust Co.*, 129 Mich., 640; 89 N. W., 687; *First U. Church v. Pungs*, 126 Mich., 670; 86 N. W., 235. The consideration of an assignment is no concern of the debtor: *Hicks v. Steel*, 126 Mich., 408; 85 N. W., 1121. A release of claim for damages in consideration of reemployment for such time as might be satisfactory to the employer, the claimant being then in his employ, is without consideration: *Potter v. Detroit, etc., Ry. Co.*, 122 Mich., 179; 81 N. W., 80; 82 N. W., 245. Not so if at the time the claimant is not in employ of the de-

fendant: *Sax v. Detroit, etc., Ry. Co.*, 125 Mich., 252; 84 N. W., 314. An agreement not to attack a transfer to the wife of all the husband's property is sufficient consideration for wife's note where a claim of fraud in the transfer is made in good faith: *Harris v. Gates*, 121 Mich., 163; 79 N. W., 1098; *Whelpley v. Stoughton*, 112 Mich., 594; 70 N. W., 1098; *Acme E. I. & A. Co. v. Van Derbeck*, 127 Mich., 341; 86 N. W., 786.

4—*Van Dyke v. Davis*, 2 Mich., 145.

5—1 Archb N. P., 26, 36; 1 Pars. on Contracts, 4 ed., 380. A mortgage executed for the purpose of preventing a prosecution of the mortgagor's son for a felony is invalid for illegality of consideration: *Koons v. Vauconsant*, 129 Mich., 260; 88 N. W., 630. So a contract cannot be supported by an undertaking to procure an appointment to office. It contravenes public policy: *Harris v. Chamberlain*, 126 Mich., 280; 85 N. W., 728. A note given in settlement of a charge of embezzlement is valid to the extent of the money embezzled: *Beath v. Chapaton*, 115 Mich., 506; 73 N. W., 806. An agreement to conceal from the public the guilt of the maker, of the crime of adultery will vitiate a note of which it is a part consideration: *Case v. Smith*, 107 Mich., 416; 65 N. W., 279. For other cases on the subject of consideration see, *Johnson v. Bratton*, 112 Mich., 319; 70 N. W., 1021, holding that an agreement to release a debtor from personal responsibility and look to the mortgage security for the remainder in consideration that the debtor will pay a portion of his debt is invalid for want of consideration in law: *Perkins v. Brown*, 115 Mich., 41; 72 N. W., 1095, holding that total failure of consideration will defeat a once valid obligation.

6—*Dye v. Mann*, 10 Mich., 291. A seal is presumptive evidence of consid-

the consideration should be set forth in the agreement or in any writing, but it may be proved by any other legal evidence.⁷

§ 685. **Contracts made on Sunday.**—The statute provides that no person shall do any manner of labor, business, or work, except only works of necessity and charity, on the first day of the week.⁸ The evident intent of this statute 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 privately.⁹ Nor, can

eration, and in the absence of any statute to the contrary is conclusive: *Lee v. Wisner*, 38 Mich., 85; see, C. L., § 10185.

7—C. L. § 9512.

8—C. L., § 5912 and note.

9—*Adams v. Hamell*, 2 Doug. Mich., 73, 76. Therefore, where two persons traded horses on Sunday, and one of them on the same day gave the other his promissory note for the difference in value of the horses as agreed, *held*, that the transaction was in violation of the statute, and that the note was void: *Ibid.* A horse trade made and possession given on Sunday, is void, and cannot be ratified; and either party can reclaim his property at any time unless a new contract is afterwards made by the mutual assent of both parties: *Winfield v. Dodge*, 45 Mich., 355; 7 N. W., 906. In order to make such a trade good a new contract must be made between the parties at a time when it is legally competent for them to make one. An action to recover money paid on Sunday for a horse purchased on that day, is not subject to the defense that the plaintiff has unreasonably delayed to rescind for there is nothing to rescind where the contract is void. Nor, upon such a trade could the plaintiff rely upon any warranty and the breach thereof, as no legal warranty could be made on Sunday. Nor could the defendant in such an action for money had and received avail himself of the defense that plaintiff had misused or injured the horse while it was in his possession. Such damages could not, from their unliquidated nature, be applied by way of set-off; nor could he recoup, because the damages do not arise out of any con-

tract which the plaintiff is seeking to recover upon: *Braze v. Bryant*, 50 Mich., 136; 15 N. W., 49.

"It is settled law in Michigan that a Sunday contract is a prohibited transaction, the illegality of which forbids it being made a sale by a mere delivery later. The delivery must be accompanied by circumstances which in themselves supply the necessary elements of a contract without depending upon the Sunday transaction for any essential": *Aspell v. Hosbein*, 98 Mich., 117; 57 N. W., 27; *Pillen v. Erickson*, 125 Mich., 68; 83 N. W., 1023. If one of the parties performs on a week day and the other accepts he must pay for what is done: *Bollin v. Hooper*, 127 Mich., 287; 86 N. W., 795.

The statute takes away the legal capacity of the parties to make a contract on Sunday. Therefore the vendor of property sold on Sunday may on a subsequent day tender back the purchase price, and recover the property by replevin if it is not restored on demand; and the vendee, on tendering back the property, may recover the money or property given in payment or exchange as if no pretence of such contract existed: *Tucker v. Mowrey*, 12 Mich., 378. Still the statute does not declare that notes made contrary to the Sunday law shall be void under all circumstances. Thus, where a note was made on Sunday, but dated Monday; *held*, that in the hands of a *bona fide* purchaser before due, and without knowledge that it was made on Sunday, it was valid, and that the maker could not set up his own fraud to defeat the note in the hands of such a holder: *Vinton v. Peck*, 14 Mich., 287, 291. A contract made

an action be maintained for a deceit practiced in the exchange of property on Sunday. The law will not lend its aid to a party who founds his action on an illegal transaction. When the parties are in *pari delicto*, the court will not interfere to assist either of them by giving effect to that which the law forbids.¹⁰ An action will lie to recover the money paid or property delivered under such contracts.¹¹

§ 686. **Rescinding contracts for fraud.**—Where one has been induced to enter into contract relations with another through fraud practiced upon him by that other the law affords him two remedies, either of which he may elect, but having elected, the other is no longer open to him. He may affirm the contract and sue to recover the damages incurred by reason of the fraud, in an action on the case, or he may disaffirm or rescind the contract for the fraud and bring the appropriate action to recover the money paid or property delivered pursuant to the fraudulent contract.¹² Assumpsit will lie to

from necessity on Sunday is not void. Thus, taking a prisoner to jail on Sunday, under legal process, is a work of necessity; and hiring a horse for that purpose is not an illegal contract under the statute: *Fisher v. Kyle*, 27 Mich., 454.

A note made on Sunday is not void at the common law. Hence, a note made in another State on Sunday, will not be held void unless proof is made of some statute of that State invalidating it: *O'Rourke v. O'Rourke*, 43 Mich., 58; 4 N. W., 531. Making the note payable out of the state would not change the rule: *Arbuckle v. Reaume*, 96 Mich., 243; 55 N. W., 808. A note may be signed on Sunday if delivered on a week day: *Berger v. Farnham*, 130 Mich., 487; 90 N. W., 281. The mere fact that the note is handed over on Sunday will not vitiate a transfer of it: *Steere v. Frebilcock*, 108 Mich., 464; 66 N. W., 342. The fact that delivery of goods sold was made on Sunday will not defeat action for contract price: *Holmes v. Sheehan*, 118 Mich., 539; 77 N. W., 88.

As to what is a work of necessity or charity, is a question of law and not of fact, and cannot be left to depend upon the opinion of jurors. Mere convenience

of time and opportunity cannot be the test as to whether a work done on Sunday is one of necessity. All the necessary and usual work connected with religious worship is a work of charity. The support of public worship is a work of charity that may properly be done on Sunday. And subscriptions for that purpose, or to pay off a church debt, or to purchase a house of worship, taken from a congregation assembled for religious exercises on Sunday, is a work of charity, and will be sustained: *Allen v. Duffie*, 43 Mich., 1; 4 N. W., 427.

The rescission of a contract requiring certain steps to be taken by the party seeking to rescind, is as much a matter of business as that of making the contract itself, and therefore if done on Sunday, is illegal and void. Thus a party who has been defrauded in a horse trade made on a week day, cannot on Sunday take the necessary steps to rescind the bargain, so as to enable him to recover the property of which he was defrauded by the bargain: *Benedict v. Batchelder*, 24 Mich., 425.

10—*Robeson v. French*, 12 Metc., 24.

11—*Tucker v. Mowry*, 12 Mich., 378; *Brazee v. Bryant*, 50 Mich., 136, 15 N. W., 49.

12—*Jewett v. Pettit*, 4 Mich., 508. A

recover money paid, in case of rescission; or, if property has been parted with under the influence of the fraud practiced, replevin or trover will lie, and in case defendant has disposed of the property so received, assumpsit will lie for its value.¹³

sale procured by fraud may be rescinded by the vendors: *White v. Mitchell*, 38 Mich., 390. Where one party to a contract has been defrauded by the other, he may rescind the contract on discovering the fraud; but if he would do this it must be done promptly after the discovery: *Martin v. Ash*, 20 Mich., 166; *Craig v. Bradley*, 26 Mich., 353-4. A rescission must be within a reasonable time; if a party knowing all the facts which would warrant a rescission of his contract, asks of the adverse party further time to perform his part of the contract, he thereby waives his right to rescind: *Hubbardston Lumber Co. v. Bates*, 31 Mich., 158. But where the adverse party upon rescission was only entitled to the refunding of his money, and no action or right was otherwise involved, a delay of three days before rescinding, even with full knowledge of all the facts warranting a rescission, was held immaterial; nor, in refunding was it necessary to return the identical pieces of money received, as in law one dollar is equivalent to any other dollar: *Michigan Central Ry. Co. v. Dunham*, 30 Mich., 128. One who has his election whether he will affirm a contract, must elect either to affirm or disaffirm it altogether. He cannot adopt the part which is for his own benefit, and reject the rest. If he elects to disaffirm on the ground of fraud, he must do so as soon as the fraud is discovered, and must restore the other party, so far as it then can be done, to the same condition he would have been in if the contract had never been made: *Jewett v. Petit*, 4 Mich., 508; and see, *Warren v. Cole*, 15 Mich., 265; *Hubbardston Lumber Co. v. Bates*, 31 Mich., 158. A mere offer to trade back is no rescission of the contract; the party aggrieved must do what he can to place the other in the condition in which he was before the contract; and where the transaction was a sale or exchange of property, he must if possible return, or tender a return of what he has received in exchange for

what he has given, and any unnecessary delay in rescinding the contract will cut off the right: *Wilber v. Flood*, 16 Mich., 45.

A party seeking to avoid a settlement on the ground of fraud must return or offer to return whatever he has received under it. And his failure to do so on discovering the fraud will be deemed a ratification of the settlement: *Crippen v. Hope*, 38 Mich., 344.

If he sues upon the contract, he thereby affirms it: *Barker v. Cleveland*, 19 Mich., 235; *Hunt v. Lockett*, 31 Mich., 18. If a vendor having a right to rescind the contract of sale for fraud, brings *indebitatus assumpsit* for the price of the goods, he thereby affirms the contract; and if he elects to affirm it, he is bound by it in all respects: *Galloway v. Holmes*, 1 Doug., 330; *Jewett v. Petit*, 4 Mich., 508. Where, after discovering that they had been defrauded, the plaintiffs made a compromise with the defendants and received from them securities to the amount agreed on, although compelled to consent by a strong pressure of pecuniary difficulty, they thereby waived their right to complain of the original fraud. Fraud may be waived and condoned, and a defrauded party must act consistently in refusing acquiescence in order to keep his claim in force: *Craig v. Bradley*, 26 Mich., 353. Where there is an express contract, none can be implied. If therefore, a party defrauded by an express contract rescinds it, he cannot set up an implied contract and sue upon that; as, where goods were purchased on credit by fraud, the vendor cannot, before credit has expired, bring suit in assumpsit on an implied contract for the value of the goods sold: *Galloway v. Holmes*, 1 Doug. Mich., 330; but see, *Hunt v. Sackett*, 31 Mich., 18.

13—*Aldine Mfg. Co. v. Barnard*, 84 Mich., 632; 48 N. W., 280; and see, *ante*, § 683 and notes, "Waiving tort and suing in assumpsit."

By statute.—By the act of 1897,¹⁴ it is provided, “That in all cases where, by the fraudulent representations or conduct of any person, an injury has been or shall be produced, either to the person, property or rights of another, for which an action on the case for fraud or deceit may by law be brought, an action of assumpsit may be brought to recover damages for such injury, and in all such cases a promise shall be implied by law to pay all just damages arising from such fraud or deceit, and may be so declared upon.” The following section provides for the survival of such actions.¹⁵ This statute authorizes assumpsit to be brought to recover damages growing out of fraud and deceit in all cases.¹⁶

AS AFFECTED BY STATUTE OF FRAUDS.

§ 687. The statute of frauds.—Agreements required to be in writing.—“In the following cases specified in this section, every agreement, contract, and promise shall be void, unless such agreement, contract or promise, or some note or memorandum thereof be in writing, and signed by the party to be charged therewith, or by some person by him thereunto lawfully authorized,¹⁷ that is to say:

1. Every agreement that, by its terms, is not to be performed in one year from the making thereof;”¹⁸

Agreements which may by possibility be completed within one year are not within the statute; it extends to such only as by their express terms are not to be, and cannot be carried into full and complete execution until after the expiration

14—C. L., §§ 10421, 10422.

15—While it would be better practice in declaring under this statute to make reference to it, it is not essential that such reference be made: *Hallett v. Gordon*, 128 Mich., 364; 87 N. W., 261.

16—*Hallett v. Gordon*, 128 Mich., 364; 87 N. W., 261.

17—The writing which will relieve from the operation of the statute must contain all the terms of the contract: *Baumann v. Manistee S. & L. Co.*, 94 Mich., 365; 53 N. W., 1113; *Ayres v. Gallup*, 44 Mich., 13; 5 N. W., 1072; *McElroy v. Buck*, 35 Mich., 434. While the contract controlled by the statute is void, yet if the parties choose to treat

it as valid, it will be so as to them: *Spalding v. Archibald*, 52 Mich., 365; 17 N. W., 940; *Fuller v. Rice*, 52 Mich., 435; 18 N. W., 204; see, also *Miner v. O'Harrow*, 60 Mich., 91; 26 N. W., 843; *Waldron v. Laird*, 65 Mich., 237; 32 N. W., 29; *Dickinson v. Wright*, 56 Mich., 46; 22 N. W., 312.

18—C. L., § 9515 and notes. It is not essential to aver that the contract, required by the law to be in writing, actually was in writing. The general allegation of the making of the contract is sufficient: *Harris Photographic Co. v. Fisher*, 81 Mich., 136; 45 N. W., 661; *Stearns v. Lake Shore & M. S. Ry. Co.*, 112 Mich., 651; 71 N. W., 148.

of that period of time.¹⁹ Although the agreement requires a part performance within a year, and is so far executed, still it is void, unless reduced to writing, if other stipulations remain to be executed after the close of the year. When one party has fully performed on his part within the year, he may maintain a general indebitatus assumpsit against the party who refuses to proceed further under the contract, and thus recover a com-

19—As to the agreements under this clause, Mr. Parsons says: It must be certain, however, from the terms of the contract, or be necessarily implied therefrom, that the contract cannot be performed within a year, or it will not be void because not in writing: 1 Parsons on Cont., 4 ed., 529. Where, by the express agreement of the parties, the performance of a verbal agreement is not to be completed within one year, it is clearly within the statute, and void. Thus, a verbal contract, made on the 27th of May, for a year's service, to commence on the 30th of June following, is void: *Bracegirdle v. Heald*, 1 B. & Ald., 722; *Davis v. Mich. Mut. Life Ins. Co.*, 127 Mich., 559; 86 N. W., 1021; *Bristol v. Sutton*, 115 Mich., 365; 73 N. W., 424; *Nones v. Homer*, 2 Hilt., 116; *Amburger v. Marvin*, 4 E. D. Smith, 393, 422. And such a contract, it seems, will not be valid because one of the parties may annul it within a year; thus, where one contracted verbally to carry the mail for four years on a certain route, it was claimed not to be within the statute, because the postmaster general might annul the contract at any time; but the court said this was a contract which by its terms could not be performed in one year; it was to extend through four years, and was void: *Harris v. Porter*, 2 Har. Del., 27; and see, *Birch v. Earl*, etc., 9 B. & C., 392; *Dobson v. Colles*, 1 Hurlst. & Norm., 81. But if it is merely optional with one of the parties, whether he shall perform the contract within a year or take a longer time, the contract is said not to be within the statute; thus, an agreement that one party may cut certain trees on the land of another at any time within ten years has been held good, because he might cut them immediately: *Kent v. Kent*, 18 Pick., 569. So where a verbal contract was made in

October, by which a party agreed to furnish timber and build a house before the close of the following year; held valid, since the house might be completed within a year, the contract not providing that more than a year *should* be occupied for that purpose: *Pilington v. Curtis*, 15 Wend., 336; see, also *Archer v. Zeh*, 5 Hill, 200; *Moore v. Fox*, 10 Johns., 244; *Rogers v. Kneeland*, 10 Wend., 246; *Linacott v. McIntire*, 15 Maine, 201; *Roberts v. Rockbottom Co.*, 7 Metc., 47. So where defendant verbally agreed to clear off a piece of land, and complete the work in a year from the following spring, and then plant a crop thereon, which he was to have as payment for the clearing, held void: *Broadwell v. Getman*, 2 Denio, 87; see, also, *Lower v. Winters*, 7 Cow., 263; *Hinckley v. Southgate*, 11 Vt., 428; *Shute v. Dorr*, 5 Wend., 204; *Drummond v. Burrell*, 13 *Ibid.*, 307; *Wilson v. Martin*, 1 Denio, 602; *Spencer v. Halstead*, *ibid.*, 606; *Lockwood v. Barnes*, 3 Hill, 128; *Lapham v. Whipple*, 8 Metc., 59; *Hill v. Hooper*, 1 Gray, 131.

Where it is evident, from the subject matter of the contract, that the parties had in contemplation a longer period than one year at the time of its performance, it will be invalid. Therefore, a verbal subscription or agreement to take and pay for the numbers of a work as they should be issued, the publication of which upon the plan then proposed requiring more than a year for its completion, was held void: *Boydell v. Drummond*, 11 East., 142. Here there was no express stipulation that the publication and contract should *not* be completed within a year; but the court say, the whole scope of the undertaking shows that it was not to be performed within that time: *Ibid.* It was well understood that more than a year's time should be employed in the

pensation for what has been advanced and received upon it.¹ In England, it was held that a performance on one side within the year was sufficient.²

performance, and it was void: *Herrin v. Butters*, 20 Maine, 119; *Peters v. Westborough*, 19 Pick., 364.

But verbal contracts, the performance of which are made to depend upon some contingency, which may or may not happen within a year, are held not to be void under the statute. Thus, an agreement to support a child five or six years or so long as the child shall remain chargeable to the town; held good, because the child might not continue to be chargeable, etc., longer than a year: *McLees v. Hale*, 10 Wend., 426. So, where defendant promised verbally that he would not thereafter run stages on a certain route; held good, because it was a personal promise which would be fully performed at defendant's death, which might happen within a year: *Lyon v. King*, 11 Metc., 411. So a verbal agreement to support another during his life; held good, as not being an agreement which by its terms was not to be performed in a year, for, the party's death might occur within that time, and then the contract would be performed: *Dresser v. Dresser*, 35 Barb., 573; and see *Quackenbush v. Ehle*, 5 Barb., 469-473; *Wells v. Horton*, 4 Bing., 40; *Blake v. Cole*, 22 Pick., 97; and see, *Sword v. Keith*, 31 Mich., 249; *Carr v. McCarthy*, 70 Mich., 258; 38 N. W., 241; *Durgin v. Smith*, 115 Mich., 239; 73 N. W., 361; *Smalley v. Mitchell*, 110 Mich., 650; 68 N. W., 978; *Donovan v. Richmond*, 61 Mich., 467; 28 N. W., 516; *Barton v. Gray*, 57 Mich., 634; 24 N. W., 638; *De Land v. Hall*, — Mich., —, 96 N. W., 449, (Sept. 1903); *Baldwin v. King*, 132 Mich., 65; 92 N. W., 774; *Drew v. Billings*, 132 Mich., 65; 92 N. W., 774.

In New York, under a statute the same as ours, it is held that if the contract is void for not being in writing, a part performance of it within the year will not render it valid, so as to give a right of action for damages for a refusal to perform the residue of the agreement: *Broadwill v. Getman*, 2

Denio, 87, 90; *Wilson v. Martin*, 1 *Denio*, 603; *Ibid.* *Spencer v. Halstead*, 606; *Drummond v. Burrell*, 13 Wend., 307; *Shute v. Dorr*, 5 Wend., 204. And if one party has fully performed the agreement on his part within the year, that will not render the contract binding on the other party: *Lockwood v. Barnes*, 3 Hill, 128; *Broadwell v. Getman*, 2 *Denio*, 87; *Lower v. Winters*, 7 Cow., 263; *Bartlett v. Wheeler*, 44 Barb., 162; *Whipple v. Parker*, 29 Mich., 374; but see, *Donelan v. Read*, 3 B. & Ad., 899. Although the contract be void, yet, if one party has performed it on his part, or, has partially performed it and is prevented from fulfilling it by the other party, he may recover for the value of what he has done: *Nones v. Homer*, 2 Hilt., 116; *Little v. Willson*, 4 E. D. Smith, 422; *Broadwill v. Getman*, 2 *Denio*, 87; *Lockwood v. Barnes*, 3 Hill, 128. But in such case it seems that the declaration should not be on the void agreement, but on an implied agreement to pay what the services or performance was worth: 2 *Parsons on Cont.*, 4 ed., 316, 320; *Whipple v. Parker*, 29 Mich., 374-5. And the void agreement may be shown, not for the purpose of recovering upon it, but to assist in arriving at a just amount which the plaintiff should recover upon the implied agreement: *Ibid.*, 376.

Where a plaintiff sues upon a contract not to be performed within a year from the time it was made, it is incumbent on him to show that the contract, or memorandum thereof, was reduced to writing and signed by or on behalf of the defendant. And such memorandum, when the contract is not written out, must embrace all of its substantial terms (except the consideration—C. L., § 9519), and cannot be aided by parol evidence when essentially defective: *Palmer v. Marquette & Pacific Rolling Mills Co.*, 32 Mich., 274.

1—*Broadwell v. Getman*, 2 *Denio*, 87.

2—*Donelan v. Read*, 3 B. & Ad., 899; see, *Cherry v. Heming*, 4 Exch. R., 631.

2. "Every special promise to answer for the debt, default, or misdoings of another person;³

In order to ascertain whether a case is within this clause of the statute, the principal question will be, whether the promise be an original one or collateral merely, or in other words whether the credit was not in fact given to the defendant, and not to the person for whom it is supposed he became surety; if the former, the case of course is not within the statute; if the latter, it is, and the promise must be in writing.⁴ The general

3—C. L., § 9515. Under this statute, any agreement to pay the debt of another is absolutely void, unless a note or memorandum of it is made in writing, signed, etc. And the whole agreement must be in writing. No resort can be had to parol evidence to add to the writing, or to show any part of the agreement not included therein; the writing need not show the consideration for the agreement, that may be proved orally; *Hall v. Soule*, 11 Mich., 496, 497; *Fuller Rice L. & M. Co., v. Houseman*, 114 Mich., 275; 72 N. W., 187; *Wenzel v. Johnston*, 112 Mich., 243; 70 N. W., 549; *Dean v. Ellis*, 108 Mich., 240; 65 N. W., 971; *Goodman v. Felcher*, 116 Mich., 348; 74 N. W., 511. Nor can parol evidence be received to show a subsequent verbal agreement to change any of the terms of the written agreement, as no part of it can rest in parol: *Abell v. Munson*, 18 Mich., 306; *Ibid.*, *Cook v. Bell*, 393; see, *Green v. Brookins*, 23 Mich., 48; see, *Coon v. Spaulding*, 47 Mich., 162; 10 N. W., 183; *Brewster v. Potruff*, 55 Mich., 129; 20 N. W., 823.

4—*Rogers v. Kneeland*, 13 Wend., 114. The plain, ordinary meaning of this clause of the statute indicates, that the class of special promises required to be in writing includes only such as are secondary or collateral to, or in aid of the undertaking or liability of some other party whose obligation or debt, as between the promisor or surety and promisee or creditor, is the original or primary debt or obligation. In other words, the statute applies only to promises which are in the nature of guarantees for some other original or primary obligation to be performed by another: *Gibbs v. Blanchard*, 15 Mich., 302, 303. The words "original" and

"collateral" are used, the former to mark the obligation of the principal debtor, the latter that of the surety or person who undertakes to answer for such debt: *Ibid.*, 303. "In many cases the test whether a promise is or is not within the statute of frauds is to be found in the fact that the original debtor does or does not remain liable on his undertaking. If he is discharged by a new arrangement, made on a sufficient consideration with a third party, this third party may be held on his promise, though not in writing; but if the original debtor remains liable, and the promise of the third party is only collateral to his, it will, in strictness, be nothing more than a promise to answer for another's debt. But where the third party is himself to receive the benefit for which his promise is exchanged, it is not usually material whether the original debtor remains liable or not": *Calkins v. Chandler*, 36 Mich., 320; *Perkins v. Hershey*, 77 Mich., 504; 43 N. W., 1021.

A verbal promise to pay for such goods as may be furnished to a third person, is an original and not a collateral promise, and is based upon a sufficient consideration and is not within the statute as a promise to pay the debt of another, and an action will lie upon it for goods furnished in pursuance thereof to such third person, if credit therefor is given to the person promising and not all to the person receiving the goods: *Larson v. Jensen*, 53 Mich., 427; 19 N. W., 130. A verbal promise of a mortgagee to indemnify a third party from loss if he will become security with the mortgagee in a bond given by the mortgagor in replevin of the goods mortgaged from attacking creditors is an original undertaking: *Boyer v. Soules*, 105 Mich., 31; 62 N.

rule established is, that if the person for whose use the goods are furnished be liable at all, any promise by a third person to pay that debt is within the statute, and must be in writing,

W., 1000. A verbal promise of a widow to pay a debt due from her husband's estate, "If the creditors would thereafter furnish her goods on credit," which debt was not discharged, is void: *Ruppe v. Peterson*, 67 Mich., 437; 35 N. W., 822; *Gower v. Stuart*, 40 Mich., 747.

But if the merchant sell the stove to A and on his credit for the price, upon B's promise to pay the debt if A does not, the obligation of A is the original, and the promise of B is collateral and void unless in writing: *McKinnon v. Bliss*, 21 N. Y., 215; *Hall v. Soule*, 11 Mich., 496, 497; *Huntington v. Wellington*, 12 Mich., 12, 15; *Welch v. Marvin*, 36 Mich., 59. So, where a sub-contractor, having abandoned the building he was erecting, resumed work and did extra labor on the verbal promise of a third person to pay him, but still looking to the contractor—his original debtor and employer—for payment, and to the third person only as guarantor, it was held that the promise of the third person was within the statute, and void: *Bressler v. Pendell*, 12 Mich., 224; see, *Farwell v. Dewey*, *Ibid.*, 436. And where A, claiming an interest in certain property held by his debtor, agreed not to attach it in consideration of the verbal promise of another creditor who desired to attach, that he would pay the debt owing to A, *held*, that this promise was within the statute, and void: *Waldo v. Simonson*, 18 Mich., 345.

But it seems that a verbal promise to pay the debt of another in consideration of the release and discharge of the debt as against the original debtor, is not within the statute, and is valid. In such case the new promise is regarded as an original promise by way of substitution for the former promise, which it discharges, and not as collateral to the former promise, which no longer exists; 2 *Parsons on Contracts*, 4 ed., 304; see, *Mulcrone v. American Lumber Co.*, 55 Mich., 622; 22 N. W., 67. When by the new promise the old debt is extinguished, the promise is not within the statute. It is not then the promise to pay the debt of another which has accrued, but it is an original contract

on good consideration. But where the original debt still exists, and where the creditor has relinquished no interest or advantage which has enured to the benefit of the new promisor, it is not an original contract, but still a promise to pay the debt of another, and must be in writing: *Curtis v. Brown*, 5 Cush., 492; see, *Cook v. Bell*, 18 Mich., 393; *Brown v. Hazen*, 11 Mich., 221; *Hogsett v. Ellis*, 17 Mich., 351; *Halsted v. Francis*, 31 Mich., 113; *Calkins v. Chandler*, 36 Mich., 320; *Welch v. Marvin*, 36 Mich., 60; *Baker v. Ingersoll*, 39 Mich., 158. Thus, where A released to his debtor B certain of B's property which A held as security for the debt, upon the verbal promise of C to pay the debt in consideration of such release; *held*, that the release would have been a sufficient consideration for C's promise if it had been in writing. But as the debt against B was not extinguished, but still remained an obligation against him, C's promise was merely an agreement to pay the debt of another, and was void for not being in writing. A verbal promise of a third person based upon a consideration passing only between the debtor and creditor, but from which the third person receives no pecuniary benefit, is within the statute. Such a consideration will not take the promise of that person to pay the debt, out of the statute: *Corkins v. Collins*, 16 Mich., 478; *Mallory v. Gillett*, 21 N. Y., 412; *Curtis v. Brown*, 5 Cush., 491.

A verbal promise to a merchant to pay or guarantee the account of a third person, who is working for the promisor, is within the statute: *Studley v. Barth*, 54 Mich., 6; 19 N. W., 568; *Buttars Salt & Lumber Co. v. Vogel*, 130 Mich., 33; 89 N. W., 560. An agreement of A with another that if he will continue to furnish goods to a third person, he, A, will see that they are paid for is within the statute: *Ramsdell v. Citizens E. L. & P. Co.*, 103 Mich., 89; 61 N. W., 275. See also *Baker v. Ingersoll*, 39 Mich., 158; *Ingersoll v. Baker*, 41 Mich., 48; 1 N. W., 907; *Preston v. Young*, 46 Mich., 103; 8 N.

otherwise not. The object of the statute was to reach every case of mere suretyship, whether the agreement of the surety was collateral to a previous promise or liability on the part of the original debtor, or only collateral to a promise or agreement made at the same time with the promise of the surety to

W., 706; Studley v. Barth, 54 Mich., 6; 19 N. W., 568; Pfaff v. Cummings, 67 Mich., 143; 34 N. W., 281; Preston v. Lekind, 84 Mich., 641; 48 N. W., 180; Chappell v. Barkley, 90 Mich., 35; 51 N. W., 351.

But wherever the main purpose and object of the promisor is not to answer for another, but to subserve some purpose of his own, or is made in consideration of some benefit to accrue to himself, his promise is not within the statute, although it may be in form a promise to pay the debt of another, and though the performance of it may incidentally have the effect of extinguishing the liability of another: 2 Parsons on Cont., 4 ed., 305, 306; Calkins v. Chandler, 36 Mich., 325. Thus, a verbal promise to pay the debt of another, if made upon a new and good consideration passing to the promisor from either the debtor or the creditor, is valid. So, also, is a verbal promise to pay the debt of another in consideration of the release by the creditor of a lien on the property of the debtor, in which the promisor has an interest, whereby the promisor is enabled to apply the property to his own benefit, so that the release enures to his own advantage. In such cases the performance of the promise, it is true, will have the effect to release or discharge the debt of another; but that is so incidentally and indirectly, it is not the object or end for which the new promise was made; the agreement of the promisor here, is a new and original contract made for his own benefit, and upon a consideration passing to himself for his own advantage. It is the contract of the promisor made in his own behalf, and not in behalf of the original debtor, and any advantage accruing to the latter is merely incidental, and is not the thing bargained for. Such a promise is, therefore, in no sense a promise to answer for anything but the promisor's own responsibility, and need not be in writing: Corkins v. Collins, 16 Mich., 478, 482; Nelson v. Boynton,

3 Metc., 396; Curtis v. Brown, 5 Cush., 488; Mallory v. Gillet, 21 N. Y., 418, 419; Leonard v. Vredenburg, 8 John., 29; Farley v. Cleveland, 4 Cow., 432, 439; see, Calkins v. Chandler, 36 Mich., 324-5. And upon this principle, if a party selling a note or other demand, verbally guarantees its collection or payment, or that the maker is responsible, it is good without writing. Here the guaranty is collateral to the seller's own contract of sale; it is a part of the consideration he gives for the price he receives for the note, and is not intended for the debtor's advantage; it is merely incidental to the principal contract made by the guarantor himself on his own account, and is regarded as in effect a promise to pay his own debt, and therefore need not be in writing: Huntington v. Wellington, 12 Mich., 10, 15; Corkins v. Collins, 16 Mich., 482; Thomas v. Dodge, 8 Mich., 51; Jones v. Palmer; 1 Doug., 379. So, a verbal agreement by which a partner purchases the interest of his co-partner, and agrees to indemnify him against the outstanding debts of the firm is good: Bonebright v. Pease, 3 Mich., 318. And generally a promise to pay one's own debt to a third person, as, where A owes B, and promises at B's request to pay the amount to C in satisfaction of a like amount owing by B to C, is not within the statute, and need not be in writing; Blunt v. Boyd, 3 Barb., 209; Barker v. Bucklin, 2 Denio., 45; Wyman v. Smith, land, 4 Cow., 432; and see, Huntington v. Wellington, 12 Mich., 15; Calkins v. Chandler, 36 Mich., 324. And it has been frequently decided that where a debtor sells property or delivers money to a third person upon his verbal promise to pay an agreed sum to the creditor of such debtor, the promise is good, and the creditor may collect upon it: Lawrence v. Fox, 20 N. Y., 268; Barker v. Bucklin, 2 Denio., 45; Wyman v. Smith, 2 Sandf., 331; Cleveland v. Farley, 9 Cow., 639; Ellwood v. Monk, 5 Wend., 235; Stilwell v. Otis, 2 Hilt., 148; Sea-

indemnify against a future default or liability of such principal debtor.¹

3. Every agreement, promise or undertaking made upon consideration of marriage, except mutual promises to marry;

4. Every special promise made by an executor or administrator, to answer damages out of his own estate."²

§ 688. **Sales of goods for price of fifty dollars or more.**—"No contract for the sale of any goods, wares, or merchandise, for the price of fifty dollars or more, shall be valid, unless the purchaser shall accept and receive part of the goods sold, or shall give something in earnest, to bind the bargain or in part payment, or unless some note or memorandum in writing of the bargain be made, and signed by the party to be charged thereby, or by some person thereunto by him lawfully authorized."³

The object of this statute was to guard against the fabrication of evidence as to the existence or non-existence of contracts, by requiring it to appear, before evidence of the oral contract will be received, that something more than mere spoken words furnish evidence of contract relation. This something more, may be either (a) acceptance and receipt of part of the goods sold; (b) something delivered in earnest of the bargain or in part payment for the goods; or (c) some note

man v. Hasbrouck, 35 Barb., 151. But such promise it seems must be made to the creditor, in order to enable him to collect upon it: Pipp v. Reynolds, 20 Mich., 88. But even a written promise to pay the debt of another will be invalid unless founded upon a good consideration: Nelson v. Boynton, 3 Metc., 399. Therefore, a verbal promise to pay such debt being invalid, is not a sufficient consideration for a subsequent promise in writing to pay such debt: Hall v. Soule, 11 Mich., 497. It seems that this statute applies only to promises made to the person to whom another is answerable, and not to promises made to a person who is answerable to another. Thus, if A, for a valuable consideration promise B, a debtor, to pay the amount of the debt to B's creditor, the promise need not be in writing, but if the promise were made to the creditor to pay him the debt owing to him by B, it would be invalid unless in writ-

ing: Green v. Brookins, 23 Mich., 48, 52-3; see further, Barden v. Briscoe, 36 Mich., 254; Comstock v. Norton, *Ibid.*, 277.

While a verbal promise to pay the debt of another is void when such promise is made to the creditor, yet, if made to the debtor for a consideration passing from him, it is not within the statute, and therefore is not void: Pratt v. Bates, 40 Mich., 37.

1—Rogers v. Kneeland, 13 Wend., 114.

2—C. L., § 9515. Mead v. Bowles, 123 Mich., 696; 82 N. W., 658, holding that an administrator's agreement to be personally responsible for legal services rendered in proceeding instituted by him on behalf of the estate, made before the services were rendered and as a condition of their being rendered, is not within the statute.

3—C. L., § 9516.

or memorandum of the bargain signed by the party in default, or his authorized agent. Proof of none of these things necessarily establishes the contract, though some evidence of the existence of contract relations. Such evidence does, however, open the door for the introduction of the evidence of the spoken words out of which the contract arises, which otherwise would be inadmissible.

§ 689. **The sale.**—In case the price of goods sold does not amount to fifty dollars, the contract of sale becomes absolute as between the parties, without actual payment or delivery, whenever the terms of sale are agreed on, and the bargain is struck, and everything that the other has to do with the goods is complete. The vendee is entitled to the goods on payment or tender of the price, and not otherwise, unless the goods are sold upon credit, in which case the vendee is entitled to immediate possession.⁴

The sale of a chattel, where the consideration is actually paid, is valid, although there is at the time no actual delivery of the chattel, or even if it is lost or withheld from the vendor by a wrong-doer. "The property passes by a sale without delivery, as between the parties; payment of consideration being made, third parties only can question the want of delivery." "I know of no principle of law that establishes that a sale of personal goods is invalid because they are not in the possession of the rightful owner, but are withheld by a wrong-doer. The sale is not, under such circumstances, the sale of a right of action, but the sale of the thing itself, and is good to pass the title against every person, not holding the same under a bona fide title, for a valuable consideration without notice; and *a fortiori*, against a wrong-doer."⁵

4—2 Kent's Com. 492, 493.

5—Davis v. Ransom, 4 Mich., 238. A sale is a parting with one's interest in a thing for a valuable consideration; and in every sale there is a transfer or change of title from the vendor to the vendee: Western Mass. Ins. Co. v. Riker, 10 Mich., 281. The words "goods, wares and merchandise" in this section include animate as well as inanimate personal property: Weston v. McDowell, 20 Mich., 353. Contracts of barter are within the statute: Gorman v. Brossard, 120 Mich.,

611; 79 N. W., 903. See for cases within the statute: Foster v. Lumberman's Mining Co., 68 Mich., 188; 36 N. W., 171; Kuppenheimer v. Werthelmer, 107 Mich., 77; 64 N. W., 952; Gorman v. Brossard, 120 Mich., 611; 79 N. W., 903; Hudson v. Emmons, 107 Mich., 549; 65 N. W., 542. For cases not within the statute see Turner v. Mason, 65 Mich., 662; 32 N. W., 846; Slesinger v. Bresler, 110 Mich., 198; 68 N. W., 128; Rasch v. Bissell, 52 Mich., 455; 18 N. W., 216.

§ 690. **Delivery and acceptance.**—In order to satisfy the statute as to delivery and acceptance, there must be a delivery of goods by the vendor with an intention of vesting the right of possession of the whole in the vendee; and there must be an actual acceptance by the latter with an intention of taking possession as owner. The acceptance must be unequivocal.⁶ The right of the vendor to retain possession, as a lien for the price, and the absence of any fact showing the abandonment of such lien, will, in general, lead to the conclusion that there has been no sufficient acceptance to satisfy the statute.⁷

§ 691. **Of earnest and part-payment.**—After earnest given upon the sale of goods, the vendor cannot sell them to another without a default in the vendee. Earnest given upon a sale of goods does not absolutely alter or bind the property of the goods contracted for, but only binds the bargain, and entitles the vendee to the goods, if not guilty of an express default in subsequently refusing to pay for them.

To constitute a payment of earnest or a part payment, with-

An order for goods to the amount of fifty dollars or more, does not amount to a contract and is not binding until accepted in writing or until some act is done on the faith of it by the person to whom it is given: *Goodspeed v. Wlard Plow Co.*, 45 Mich., 322; 7 N. W., 902.

6—*Chitty on Cont.*, 6 Am. ed., 390.

7—*Russell v. Minor*, 22 Wend., 659. On a verbal sale with delivery of a chattel at an agreed price, to be paid on a certain day, but until paid the title to remain in the seller the title does not vest in the purchaser until payment: *Chitty on Cont.*, 6 Am. ed., 391, note (2), and cases there cited. The delivery required by this section, where no payment is made or earnest given, is not dispensed with by an agreement at the time that the purchaser should take the property where it then was, and that the vendor need not be troubled to make a delivery; unless the purchaser afterwards exercised acts of ownership over it. But his inquiry afterwards about the property would not amount to acts of ownership: *Alderton v. Buchoz*, 3 Mich., 322. It seems not necessary that the acceptance should be at the time of the purchase; therefore a subsequent delivery and acceptance of a

part of the property, in pursuance of a verbal agreement of sale, will take the case out of the statute, although not occurring until some months after the purchase: *McKnight v. Dunlop*, 5 N. Y., 537, and cases there cited. Where the case is not within the statute of frauds, manual delivery of the article sold is not essential to the passing of the title, unless made so by the understanding of the parties: *Whitcomb v. Whitney*, 24 Mich., 486, 490; see, *Lingham v. Eggleston*, 27 Mich., 324, 327.

Where a carrier has been employed and authorized as his agent to receive the goods purchased by verbal bargain, the carrier's acceptance may be sufficient to bind the principal; but where the delivery to the carrier is merely in pursuance of the same verbal contract under which the goods were purchased, and the carrier has no separate and independent authority to act for the purchaser; as, where upon the purchase it was understood that the goods were to be forwarded to the purchaser by a certain railroad, there being no other authority to the railroad company: *held*, that a delivery of the goods to the company, and an acceptance by them to carry to the purchaser, was not such a de-

in the statute, there must be an actual transfer or delivery of the thing or money agreed to be given as earnest or part payment.⁸

§ 692. The memorandum.—A memorandum would be insufficient which did not mention the name of both the contracting parties, or their agents, and the price agreed to be given if a price was agreed on with a description of the thing sold. But it is not necessary that the whole of the terms of the contract should be comprised in one writing.⁹

The agent contemplated by the statute who is to bind a defendant by his signature, must be a third person, and not the contracting party.¹⁰

The signing of the note or memorandum by one party only is sufficient, provided it be the party sought to be charged.¹¹

§ 693. Sales at auction.—“Whenever any goods shall be sold at auction, and the auctioneer shall, at the time of sale, enter in a sale book, a memorandum specifying the nature and price of the property sold, the terms of the sale, the name of the purchaser, and the name of the person on whose account the sale is made, such memorandum shall be deemed a memorandum of the contract of sale, within the meaning of the last section.”¹²

livery to and acceptance by the purchaser as would take the case out of the statute: *Grimes v. Van Vechten*, 20 Mich., 410; *Smith v. Brennan*, 62 Mich., 349; 28 N. W., 892; *Gatiss v. Cyr*, — Mich., —; 96 N. W., 26 (July, 1903).

8—The part payment need not to be contemporaneous with the making of the contract: *Dallavo v. Richardson*, — Mich., —; 96 N. W., 20 (July, 1903).

9—*Chit. on Cont.*, 395, 396, 398. Where a contract of sale is executory the memorandum must contain all the terms of a complete contract. And, unless the price is fixed distinctly according to some standard, either of amount, or of market, or of reasonableness, or some other method of ascertainment, the contract is incomplete and the purchaser is not bound. Where the contract is silent as to price, and there is evidence of a parol agreement as to price, then there can be no recovery on a *quantum valebat*, a contract is as necessary for a reasonable price as any other, and

proof that there was a parol agreement as to price disproves the completeness of the memorandum. When goods have been accepted, and nothing has been said about the price, a reasonable price will be intended: *James v. Muir*, 33 Mich., 223; and see, *McElroy v. Buch*, 35 Mich., 434. See, also *Sherwood v. Walker*, 66 Mich., 568; 33 N. W., 919.

10—*Chitty on Cont.*, 403.

11—*Russell v. Nichol*, 3 Wend., 112, 113.

12—C. L., § 9517. This section applies only to the sales of personal property: *Champlin v. Parish*, 11 Paige, 405; *Coles v. Bowne*, 10 *Ibid.*, 526. The memorandum of the auctioneer must be made in the sale book at the time and place of the sale; and it seems that a pencil memorandum then made, but entered at another time and place, is not sufficient: *Hicks v. Whitmore*, 12 Wend., 548. The term goods includes both animate and inanimate property: *Weston v. McDowell*, 20 Mich., 358.

A contract for goods to be manufactured is not within the statute.¹³

§ 694. Representations as to the credit of another.—"No action shall be brought to charge any person, upon or by reason of any favorable representation or assurance, made concerning the character, conduct, credit, ability, trade or dealings of any other person, unless such representation or assurance be made in writing, and signed by the party to be charged thereby, or by some person thereunto by him lawfully authorized."¹⁴

§ 695. Writing need not express the consideration.—"The consideration of any contract, agreement or promise required by this chapter to be in writing, need not be expressed in the written contract, agreement or promise, or in any note or memorandum thereof, but may be proved by any other legal evidence."¹⁵

§ 696. Leases for longer term than one year.—"Every contract for the leasing for a longer period than one year, or for the sale of any lands, or any interest in lands, shall be void, unless the contract, or some note or memorandum thereof, be in writing, and signed by the party by whom the lease or sale

13—*Crookshank v. Burrell*, 18 Johns., 58. This is more in the nature of a contract for work and labor to be performed: *Sewell v. Fitch*, 8 Cow., 215; see, *Downs v. Ross*, 23 Wend., 270.

14—C. L., § 9518 and note. The object of this statute is to reach cases where the plaintiff has given credit to the person commended and done so on the faith of the commendation. It does not apply to conspiracies to defraud where the fraudulent representations are made to enable the maker to profit by them: *Hess v. Culver*, 77 Mich., 602; 43 N. W., 994. See also *French v. Fitch*, 67 Mich., 492; 35 N. W., 258; *Daniel v. Robinson*, 66 Mich., 296; 33 N. W., 497; *Clark v. Hurd*, 79 Mich., 130; 44 N. W., 343. A verbal guaranty made upon the sale of a note, that the maker is responsible, is not within the statute, and is good: *Huntington v. Wellington*, 12 Mich., 10. Where A was

induced to indorse B's note, by the false and fraudulent representations made by C (not in writing) that B was responsible, and C afterwards purchased the note and sued A upon his indorsement, B proving insolvent; *held*, that C's false statements in inducing the indorsement were a good defence, and that the case was not within the statute of frauds requiring representations as to the credit of another to be in writing: *Lenheim v. Fay*, 27 Mich., 70; see, *Tozer's estate*, 46 Mich., 299; 9 N. W., 424.

Representations concerning the credit of a corporation are within the statute of frauds: *Bush v. Sprague*, 51 Mich., 41; 16 Mich., 222.

15—C. L., § 9519. See *Whipple v. Parker*, 29 Mich., 372-3. The memorandum of the statute of frauds need not it seems state the consideration: *Palmer v. Marquette & P. R. M. Co.*, 32 Mich., 274.

is to be made, or by some person thereunto by him lawfully authorized by writing.'¹⁶

UPON PROMISSORY NOTES.

§ 697. **Essentials of a promissory note.**—A promissory note, says Judge Story, may be defined to be a written engagement by one person to pay another person, therein named, absolutely

16—C. L., § 9511 and notes. This section relates to *contracts for leasing*.

An agreement for a lease is a different thing from the lease itself: *Tillman v. Fuller*, 13 Mich., 113. A lease may be made to take effect in the future; and in such a case the estate does not begin with the contract but at the future period. Hence, a verbal agreement for a future term not exceeding one year, is valid, and not within the statute. Thus a verbal agreement made in April for a year's tenancy from the beginning of May following, is valid: *Ibid.*; *Whitting v. Ohlert*, 52 Mich., 462; 18 N. W., 219.

The tender of a deed of lands pursuant to a written offer to pay a specified price therefor, does not make a written memorandum which satisfies the statute: *Kroll v. Diamond Match Co.*, 113 Mich., 196; 71 N. W., 630. An oral agreement by the owner of lands with one in possession that if the latter would take care of the former's father she might continue to occupy the land till she received therefrom sufficient to pay for such care is invalid: *Smalley v. Mitchell*, 110 Mich., 650; 68 N. W., 978.

A vendee in a *parol* contract for the purchase of land, who has made a partial payment and taken possession of the land, cannot sue the vendor to recover back what he has paid without first demanding its repayment nor even then unless the defendant refuses to perform the agreement, or has parted with his title: *Abbot v. Draper*, 4 Denio, 51; *Battle v. Rochester City Bank*, 3 Comst., 88; *Collier v. Coates*, 17 Barb., 471; *Goelth v. White*, 35 *Ibid.*, 76. An agreement for the sale of growing trees, with a right to enter on the land at a future time and cut and take them away, is a contract for the sale of an interest in the lands, and must be in writing:

Green v. Armstrong, 1 Denio, 550; *McGregor v. Brown*, 6 Selden, 114. But the decisions of the courts upon these questions are far from being uniform. See, *Chitty on Contracts*, 6 Am. ed., 299, 302, and notes. A *parol* license to cut trees for a fixed price for stumpage is not invalid, and is not covered by the statute of frauds, either as a sale of an interest in lands, or as a sale of chattels, and the licensee is protected by it in regard to all trees cut before revocation: *Greeley v. Stilson*, 27 Mich., 153. An agreement giving the owner of a mill site the right for a stipulated annual compensation to flow the adjoining lands of another for an indefinite period, creates a tenancy in such lands; the agreement, however, is within the statute of frauds, but that statute permitting *parol* leases for a year, and a *parol* lease for more than a year under which the lessee has been put in possession, being good as a lease from year to year until terminated by notice, an action cannot be maintained against one in possession under such an agreement, created by *parol*, except for the agreed compensation, without notice to quit: *Morrill v. Mackman*, 24 Mich., 279. A *parol* agreement to lease lands for one year with the privilege of three is within this statute: *Hand v. Osgood*, 107 Mich., 55; 64 N. W., 867. A written contract for the sale of lands executed by an agent whose authority rests in *parol* is controlled by this section: *Baldwin v. Schiappacasse*, 109 Mich., 170; 66 N. W., 1091. See further under this section: *Ducett v. Wolf*, 81 Mich., 311; 45 N. W., 829; *McDonald v. Maltz*, 78 Mich., 685; 44 N. W., 337; *Carr v. Leavitt*, 54 Mich., 542; 20 N. W., 576. 2 Cow. Treat., 2 ed., 613. In a declaration in *assumpsit*, care should be taken to set forth correctly the promise or agreement, the consideration for the

and unconditionally, a certain sum of money at the time specified therein.¹

promise (unless the agreement be such as to import a consideration on its face, as a promissory note, or an agreement under seal), and the breach of it, and to allege that plaintiff sustained damage thereby. The declaration may be special, setting forth specifically the agreement alleged to have been broken; or, in some cases it may be upon the common counts only; or, both classes of counts may be joined in the same declaration. Whenever the terms of a special agreement have been performed, so as to leave a mere simple debt or duty between the parties, the plaintiff may proceed upon the common counts: *Saund., Pl. & Ev., 5 Am. ed., 180.*

1—Story on Promissory Notes, § 1. An absolute unconditional promise in writing to pay a certain specified sum at a certain time, to the payee or bearer, is a promissory note; and the statement in the instrument of the consideration upon which it was given, does not change its nature: *Beardslee v. Horton, 3 Mich., 560, 565; see, Preston v. Whitney, 23 Mich., 260.* And if the specified sum is made payable at a certain place, "with current exchange on New York, the instrument is still a promissory note: *Smith v. Kendall, 9 Mich., 241; Johnson v. Frisbie, 15 Mich., 286.* And an instrument promising to pay M, "or heirs, the sum making \$450, on the 1st day of January, 1868," is sufficiently certain as to the sum and payee to be a promissory note: *Knight v. Jones, 21 Mich., 161.* An instrument in which the maker promised to pay E or bearer \$60 in two years, but recited that E agreed to receive \$50 in full satisfaction if paid in one year, is not a promissory note; it lacks certainty as to the amount to be paid: *Fralick v. Norton, 2 Mich., 130.* A stipulation in the note for the payment of attorney's fees destroys negotiability: *Strawberry Point Bank v. Lee, 117 Mich., 122; 75 N. W., 444,* and cases cited in the opinion. Recitals in a promissory note of the fact that title to the property which is the consideration for it, is not to pass till the note is paid and that the payee, in case payment is not made at maturity, may take possession does not de-

stroy negotiability: *Choate v. Stevens, 116 Mich., 28; 74 N. W., 289.* The indorsement on the back of a promissory note of a statement by the maker as to his financial responsibility does not destroy its negotiability: *Hudson v. Emmons, 107 Mich., 549; 65 N. W., 542.*

A clause attached to a promissory note providing that the payee may indefinitely extend the time of payment, destroys its negotiability and makes it a simple contract: *Smith v. Van Blarcom, 45 Mich., 371; 8 N. W., 90,* or a stipulation that the maker shall pay all taxes assessed against the lands mortgaged to secure its payment: *Carmody v. Crane, 110 Mich., 508; 68 N. W., 288.* Provisions which if found in the note would destroy its negotiability, will not necessarily have that effect when found in the mortgage securing its payment: *Wilson v. Campbell, 110 Mich., 580; 68 N. W., 278.* See, *Cox v. Cayan, 117 Mich., 599; 76 N. W., 96.*

An instrument promising to pay a certain sum on or before two years from date with interest, with a memorandum attached thereto, providing that if paid within one year there shall be no interest, is not a negotiable promissory note: *Lamb v. Story, 45 Mich., 488; 8 N. W., 87.* Such an instrument is not a promissory note, either negotiable or non-negotiable, but merely a simple contract, and can only be transferred by assignment; and although the payee may assign it by indorsing it, he does not thereby assume the character of an indorser of commercial paper, nor thereby make himself liable for the amount to be paid: *Story v. Lamb, 52 Mich., 525; 18 N. W., 248.* The question of whether negotiable, where a note is made in one state payable in another, is to be determined by the law of the state where payable: *Barger v. Farnham, 130 Mich., 487; 90 N. W., 281.*

A certificate of deposit, dated and signed in the following form, viz.: "H C has deposited in this bank \$500, payable to the order of R. C., with interest if left three months on the return of this certificate," is a promissory note; and the indorser of such a certificate assumes the same liability as the indorser

of a promissory note of like tenor: *Cate v. Patterson*, 25 Mich., 191; *Tripp v. Curtenius*, 36 Mich., 494; *Beardsley v. Webber*, 104 Mich., 88; 62 N. W., 173; see, *Birch v. Fisher*, 51 Mich., 36; 16 N. W., 220. A note signed by a person, who, if intoxicated, was yet aware of what he was doing and was not deceived as to the identity of the paper he signed, is not void, and any defense to it must rest on fraud and not on absolute incapacity. Such a note would be valid in the hands of an innocent holder for value: *Miller v. Finley*, 26 Mich., 249.

A third person signing his name on the back of a note before delivery is a joint maker rather than an indorser: *Weatherwax v. Paine*, 2 Mich., 555; *Rothschild v. Grix*, 31 Mich., 150; 18 Am. Rep., 171; *Dow Law Bank, v. Godfrey*, 126 Mich., 521; *Allison v. Judge of Washtenaw Circuit*, 104 Mich., 141; 62 N. W., 152. A promissory note signed by several but worded in the singular is several as well as joint: *Dow Law Bank, supra*, 126 Mich., 521; 85 N. W., 1075, and cases cited in the opinion.

Delivery.—The delivery of a promissory note by the maker is necessary to its validity. The possession of a promissory note by the payee or indorser is *prima facie* evidence of a delivery. But if it be shown that the note has never been actually delivered; and that, without any confidence, or negligence, or fault on the part of the maker, but by force or fraud, it was put in circulation, there can be no recovery on it, even when in the hands of an innocent holder. A note takes effect only from delivery, and if this be subsequent to the date, it takes effect from the delivery, and not from the date. When a note payable to bearer, which has once become operative by delivery, has been lost or stolen from the owner, and has subsequently come to the hands of a *bona fide* holder for value, the latter may recover against the maker and all indorsers on the paper when in the hands of the loser, and he must sustain the loss: *Burson v. Huntington*, 21 Mich., 415. It is well settled as a general rule, that the possession of a promissory note payable to the bearer, by the plaintiff producing it on the trial, is *prima facie* evidence of his title, or his right to sue upon it, and that the plain-

tiff need not to be the real or beneficial owner to entitle him to recover. The owner may bring suit or allow it to be brought in the name of any other person with his assent. If the plaintiff's right of action, whether as owner or otherwise, existed at the commencement of the suit, the ownership or title can be inquired into, only for the purpose of letting in any defense or set-off the maker would have had against a former holder (when transferred after maturity or with notice), or for the purpose of showing that the plaintiff's possession of the note is not in good faith. But a plaintiff cannot maintain an action on a note, brought before his right of action accrued. The state of facts authorizing the suit to be brought in the name of a particular person must exist at the time the suit is commenced in his name. And this would in ordinary cases be presumed from the production of the note by the plaintiff on the trial. But the defendant may rebut this presumption and defeat the action by showing that the state of facts existing at the time of the commencement of the suit, did not authorize the plaintiff to sue: *Hovey v. Sebring*, 24 Mich., 232; *Battersbee v. Calkins*, 128 Mich., 569; 87 N. W., 760; *Hogan v. Dreflus*, 121 Mich., 453; 80 N. W., 254. Non-ownership of a promissory note at the time when sued upon or action brought is fatal: and may be shown under the general issue: *Reynolds v. Kent*, 38 Mich., 246; *Hovey v. Sebring*, 24 Mich., 232. But in a case of a mere due bill, not payable to bearer and not negotiable, a presumption of ownership and right to recover upon it does not arise from the mere fact of possession, and a judgment upon such an instrument in favor of one not the owner would not bar a subsequent recovery by the true owner: *Blackwood v. Brown*, 32 Mich., 104; see, *Howry v. Eppinger*, 34 Mich., 35. In a suit by A on a negotiable promissory note payable to the order of A & Co., the possession and production of the note by the plaintiff is not alone sufficient evidence of his title to entitle him to recover. The statute, C. L., § 10054, permitting an assignee of a chose in action, "not negotiable under existing laws," to sue and recover in his own name, does not apply to such a case. The statute expressly excepts all paper

not negotiable under existing laws: *Redmond v. Stansbury*, 24 Mich., 445. A declaration by an assignee upon a conditional note not negotiable, need not aver any formal assignment; it is sufficient if it avers the plaintiff to be the owner and holder: *Draper v. Fletcher*, 26 Mich., 154.

When note taken subject to defenses—A party who acquires a negotiable promissory note without consideration, or for consideration after it is due, or who has notice when he receives it of any defense that could be made to it while in the hands of the person from whom he obtains it, takes it subject to all the defenses that could be made to it in a suit by the person from whom he obtains it, against the maker. On the other hand, any want or failure of consideration, whether partial or total, or any fraud even, or other equities, between antecedent parties, will constitute no defense to a note or bill in the hands of one who obtained it in good faith, for a valuable consideration, before maturity and without notice of any circumstances impairing its validity: *Bostwick v. Dodge*, 1 Doug. Mich., 413; *Gibson v. Miller*, 29 Mich., 355; *Wright v. Irwin*, 33 Mich., 32. If the evidence shows the bond void in the hands of the original holder the plaintiff has the burden of showing that he or some former holder of the bond was a *bona fide* holder: *Thompson v. Mecosta*, 127 Mich., 522; 86 N. W., 1044. One who takes a promissory note as collateral security is entitled to the protection extended to a *bona fide* holder: *First National Bank v. Shue*, 119 Mich., 560; 78 N. W., 647.

The purchaser of a past due note is bound by any equities which bind the original holder; and as between such purchaser and an indorser, the latter can show the consideration and the circumstances of the indorsement, as, that he indorsed only for accommodation, and therefore was only a surety: *Simons v. Morris*, 53 Mich., 155; 18 N. W., 625.

A person to whom a promissory note has been indorsed in payment of a pre-existing debt, is a holder for value, and is not affected by any equities between antecedent parties, where he has received it before due and without notice of such equities: *Outhwalte v. Porter*, 13 Mich., 533; *Thompson v. Me-*

costa, 127 Mich., 523; 86 N. W., 1044; *First National Bank v. Houseknecht*, 121 Mich., 313; 80 N. W., 13.

A person who pays value for a promissory note is to be regarded as the rightful holder, unless he is shown to have purchased with such knowledge as would make him guilty of bad faith, and the facts brought home to him must be such as to show defects in title as fraud cannot be presumed without proof: *Miller v. Finley*, 26 Mich., 249; *Howry v. Eppinger*, 34 Mich., 30. Notice to a proposed purchaser of a promissory note that it was given for a patent right, is not enough to put him on inquiry so as to preclude him from becoming a *bona fide* purchaser; nor will the fact that a vendor of a note indorses it "without recourse," have any tendency to show that the vendee is not a *bona fide* purchaser: *Borden v. Clark*, 26 Mich., 410. And a defense that the note was obtained by duress will not avail against a *bona fide* purchaser for value before the maturity of the note: *Farmers' Bank v. Butler*, 48 Mich., 192; 12 N. W., 36.

When the plaintiff has purchased a note before due and is a *bona fide* holder, any inquiry into the consideration of the note is immaterial. The defendant cannot prevail against such a holder, for a defect of consideration: *Polhemus v. Ann Arbor Savings Bank*, 27 Mich., 44. And where a plaintiff becomes a *bona fide* holder before maturity, evidence of the amount paid for the note by the person of whom plaintiff purchased, is inadmissible: See, *Hunter v. Parsons*, 22 Mich., 96. But where the defendant unwittingly signed an instrument in the form of a negotiable promissory note, relying upon false representations made to him at the time, that the instrument he was signing was a mere duplicate of a contract just previously signed by him, making him an agent for the sale of a certain article, the signing being under circumstances devoid of any negligence on his part, and where fraudulent means were taken to prevent him from noticing the body of such pretended duplicate, and he delivered the same in ignorance of its true character, believing it to be a mere duplicate contract, *held*, that such instrument was to be regarded as a forgery and could not be enforced even in the

hands of a *bona fide* purchaser. *Gibbs v. Linabury*, 22 Mich., 479; *Beard v. Hill*, 131 Mich., 246; 90 N. W., 1065; see, *Burson v. Huntington*, 21 Mich., 415. And if a note is fraudulently altered without the knowledge or consent of the maker, it is void, even in the hands of a *bona fide* purchaser: *Holmes v. Trumper*, 22 Mich., 427. The general rule that a purchaser from a *bona fide* holder of negotiable paper, takes it with all the rights of such holder, whether he has notice of any infirmity, as between the original parties, or not, is subject to the exception, that when the payee becomes such purchaser from a *bona fide* holder, he takes it subject to all equities and defenses originally existing against it between the maker and himself: *Kost v. Bender*, 25 Mich., 515. One who has been privy to, and a participant in, the fraudulent procurement of an indorsement of a note, has notice of the fraud, and cannot become a *bona fide* purchaser of the indorsed paper so as to entitle him to recover on the contract of indorsement: *Lenheim v. Fay*, 27 Mich., 70. Where there is testimony showing fraud in the inception of the note the burden is on the plaintiff to show that he purchased in good faith: *Little v. Mills*, 98 Mich., 423; 57 N. W., 266; *Rice v. Rankans*, 101 Mich., 385; 59 N. W., 660; *Drovers' Nat'l Bank v. Blue*, 110 Mich., 31; 67 N. W., 1105; 64 Am. St., 327. But where plaintiff assumes to show his *bona fides* it is incumbent upon defendant to show *mala fides* before he can give evidence of fraud: *Drovers' Nat'l Bank v. Blue*, *supra*; *Shaw, Kendall & Co. v. Brown*, 128 Mich., 573; 87 N. W., 757.

A firm note given by one of the partners for his private debt, without the authority of the copartners, cannot be enforced by the original holder against the firm: *Hotchin v. Kent*, 8 Mich., 528. Where a member of a firm gives a note in the partnership name, the presumption is that it was given for partnership purposes, and the burden of proof is upon the copartnership to show the contrary if they claim that to be the fact. And a firm may defend against a note given in the firm name, by showing it was given by one of the partners for his own private purposes and without the knowledge or consent of the firm. In declaring on a firm

note, it is not necessary to allege the capacity of the firm to make notes, or to set forth such facts as imply such capacity: *Carrier v. Cameron*, 31 Mich., 373. When it is made to appear that paper signed in partnership name was so signed by one partner and used for his personal ends the burden is on the plaintiff to show that he holds without notice of the fact and for value: *Stevens v. McLachlan*, 120 Mich., 285; 79 N. W., 627.

After dissolution of a partnership by the death of one of the members, a survivor cannot without express authority, bind a co-survivor, by a time note given by him in the firm name for a debt owing by the firm before dissolution: *Matterson v. Nathanson*, 38 Mich., 377; see, *Smith v. Sheldon*, 35 Mich., 42.

If a partner purchases property for his own use of the maker of a note then held by the firm, agreeing that in consideration of the property he will take up and discharge the note held by the firm, this will not release the maker from his liability on the note without the consent of the firm to receive the partner as their debtor in place of the maker of the note: *Lewis v. Westover*, 29 Mich., 14. And as to the power of a partner to bind the firm, see, *Smith v. Sheldon*, 35 Mich., 42, and *Mills v. Bunce*, 29 Mich., 364.

Alteration of note.—The alteration of a note, without the consent of the maker, having the effect to increase his liability, renders the note void as against the maker, even in the hands of a *bona fide* holder for value. Thus the alteration by the payee or subsequent holder of a promissory note, by adding thereto the words "at ten per cent.," after the words, "with interest," if made without the knowledge or consent of the maker, constitutes a valid defense in favor of the maker, even against a *bona fide* purchaser. And in an action upon such an altered note, the maker cannot be held liable to pay the amount of the note as originally drawn: *Holmes v. Trumper*, 22 Mich., 427. See, *Weidman v. Symes*, 120 Mich., 657; 79 N. W., 894, holding that an alteration by filling in blanks in a note made with printed form, left vacant when delivered, does not vitiate the paper in the hands of a *bona fide* holder; this case is

To render it negotiable, it must be payable to bearer or order.¹

A promissory note must be in writing. It is not necessary, however, that the writing should be in ink; it is sufficient if in pencil.² "In writing," and "written," includes printing, engraving and lithographing.³

It must be payable to another person. As a general rule, it is necessary that the person to whom the note is payable should be clearly expressed, and made known upon the face of the note; for parol evidence is not admissible to show to whom it is payable. But this rule must be understood with proper limitations and qualifications. It is not necessary that the name of the payee should be stated on the face of the note; but it will be sufficient if, from the language used, the person

distinguished from *Holmes v. Trumper*, *supra*, where there was no blank space; from *Miller v. Finley*, 26 Mich., 249, where the alteration was by adding another signer and from *Bradley v. Mann*, 37 Mich., 1, where the rate of interest was added at the end of the note. See also, *Union Banking Co. v. Martin's Estate*, 113 Mich., 521; 71 N. W., 867. An alteration made in a material part of a negotiable paper, by the holder thereof, in the absence and without the knowledge of the party liable thereon, ought not to be maintained as a lawful alteration except on very clear proof that when actually made it had the assent of the party to be charged: *Swift v. Barber*, 23 Mich., 503; and see, *Hunter v. Parsons*, 22 Mich., 96; *Gibbs v. Linabury*, *Ibid.*, 479; *Jourdan v. Boyce*, 33 Mich., 302; *Ibid.*; *Goodenow v. Curtis*, 506; *Willett v. Shepard*, 34 Mich., 106; *Anderson v. Walter*, *Ibid.*, 113; *Farmers' Bank of Grand Rapids v. Butler*, 48 Mich., 192.

Notes given by married women.—A married woman is not liable upon her promissory note given for the purpose of securing a debt of her husband: *Emery v. Lord*, 26 Mich., 431. Nor is she liable when joining her husband in giving a promissory note to secure a debt owing by him alone, the engagement not being made with reference to her own property, and she receiving no consideration for signing: *DeVries v. Conkling*, 22 Mich., 255; see, *ante*, § 178 and

notes. Whatever contracts a married woman may make, may be made with the like effect as if she were unmarried. But she has no general capacity to contract. She can only make such contracts as relate to her own property. She may purchase property and bind herself for the purchase money. But she cannot become personally liable except upon her own matters, and cannot enter into an undertaking jointly with her husband merely as his surety. And she can never be held without affirmative proof that the contract is her own and within her powers. A married woman who joins in a promissory note with her husband for the absolute payment of money does not, by that act merely, create a charge upon her separate property: *West v. Laramy*, 28 Mich., 464.

1—C. L., § 4867. The addition of a seal to the signature of the maker of a promissory note destroys its negotiability by converting it into an instrument suable in covenant at any time within ten years after the accruing of the cause of action upon it, and withdraws it from that class of paper declared by this section of the statutes to be "negotiable in like manner as inland bills of exchange": *Rawson v. Davidson*, 49 Mich., 607; 14 N. W., 565.

2—Story on Prom. Notes, § 9; *Brown v. Butchers' & Drovers' Bank*, 6 Hill, 443; see notes to § 178, *ante*.

3—C. L., § 50, clause 17.

can be certainly ascertained. Thus, a note payable to the order of A; or to A or bearer; or to bearer, is a promissory note. So, a note in these words: "Received of B \$50, which I promise to pay on demand," is a good promissory note; for the promise will be interpreted to be a promise to pay B.⁴ A note issued with a blank left for the name of the payee may be filled up by a bona fide holder with his own name.⁵ When payable to a fictitious person or order, it is in effect payable to bearer, and may be declared on as such, in favor of a bona fide holder ignorant of the fact, against all parties knowing that the payee was a fictitious person.⁶

Notes made payable to the order of the maker thereof, or to the order of a fictitious person, shall, if negotiated by the maker, have the same effect, and be of the same validity as against the maker, and all persons having knowledge of the facts, as if payable to bearer.⁷ A note payable "to A or B" is not a promissory note. A due bill, payable at a specific time, is a promissory note.⁸

A promissory note must be payable absolutely, and not upon any contingency, as to time or event.⁹ It must be a fixed period of time, or some event which must inevitably happen. Therefore, a written promise to pay a certain sum of money at the death of the party to the instrument, or at a limited time after the death of such party, or of a third person, is a valid promissory note; because it must inevitably come due at some future time. But a written promise to pay money, when the maker or the payee shall come of age, will not be; for he may not live to that period.¹⁰ A promise to pay "when certain

4—Story on Prom. Notes, §§ 35, 36.

5—*Ibid.*, § 37; Chitty on Bills, 160, 177, 178.

6—Plets v. Johnson, 3 Hill, 112; Story on P. Notes, § 39.

7—C. L., § 4870. Shaw, Kendall & Co. v. Brown, 128 Mich., 573; 87 N. W., 757.

8—Edwards on Bills and Notes, 132; Kimball v. Huntington, 10 Wend., 675; Lequeer v. Prosser, 1 Hill, 256. If no time of payment is mentioned in it, it is due immediately: Socket v. Spencer, 29 Barb., 180.

9—Worden v. Dodge, 4 Denio, 159; see, Preston v. Whitney, 23 Mich., 260.

In an action upon a promissory note, it is not competent to show an oral contemporaneous agreement to reduce the note from an absolute and specific undertaking, according to its terms and legal import, to a defeasible engagement: Hyde v. Tenwinkle, 26 Mich., 93.

A provision in a promissory note for the payment of an attorney's fee in case of the non-payment of the note at maturity, or in case of proceedings taken to collect the same, is nugatory and invalid: Bullock v. Taylor, 39 Mich., 137.

10—Story on Prom. Notes, §§ 27, 28. A promise to pay "on or before" a

carriages are sold,"¹¹ or "provided the ship Mary arrives free from capture or condemnation,"¹² or "out of the net proceeds, after paying costs and expenses of ore to be raised and sold from the bed," etc., is not a promissory note;¹³ it is not a promise to pay absolutely and at all events. In the latter case, as well as the first, the objection is, that the fund from which the payment is to be made might never be realized. Therefore, where the fund is only referred to as an absolute existing fund, as the consideration of the promise, and on account of which the money is to be paid, the instrument will be a valid promissory note. Thus, a note promising to pay A B, or order, a sum of money, "being money which I have received on his account," or "which I owe him for the freight," will be a valid promissory note, as importing the consideration only, for which it is given.¹⁴

It must be for the amount of money in specie, and that only.¹⁵ Therefore, if payable "in foreign bills," or in "Pennsylvania or New York paper currency, to be current in the State of New York," or "in bills of country banks," or "bank bills or notes," or "in current bank notes," it is not a good promissory note.¹⁶

certain day named states the time with sufficient certainty for the purpose of a promissory note: *Mattison v. Owen*, 31 Mich., 421. But will not be due until the day named: *Helmer v. Kralick*, 36 Mich., 371.

A note payable on demand is payable at once, and without demand, so that the statute of limitations runs from its delivery. And this is the rule even where from the form of the contract it is manifest that immediate payment is not expected. And a note payable thirty days after demand is within the same principle: *Palmer v. Palmer*, 36 Mich., 487.

11—*DeForest v. Tracy*, 6 Cow., 151.

12—*Coolidge v. Ruggles*, 15 Mass., 387.

13—*Worden v. Dodge*, 4 Denio, 159. A necessary requisite of a promissory note is, that it must be payable at a time which must certainly arrive in the future, upon the happening of some event or the completion of some period not depending on the future volition of any-

one; and if the time of payment cannot be made certain by any attainable means, the instrument cannot be regarded as a promissory note: *Brooks v. Hargreaves*, 21 Mich., 254, 260; see, *Smith v. Van Blarcom*, 45 Mich., 371; 8 N. W., 90; *Lamb v. Story*, 45 Mich., 488; 8 N. W., 87; *Story v. Lamb*, 52 Mich., 525; 18 N. W., 248.

14—*Story on Prom. Notes*, § 26; *Kelley v. Mayor, etc.*, 4 Hill, 263.

15—*Atkinson v. Manks*, 1 Cow., 691.

16—*Young v. Adams*, 6 Mass., 182; *Leiber v. Goodrich*, 5 Cow., 186; *Story on Prom. Notes*, § 18; *Edwards' Bills and Notes*, 134, 135; but see, *Keith v. Jones*, 9 Johns., 120; *Buchanan v. Curry*, 19 *Ibid.*, 144; *Swetland v. Creigh*, 15 Ohio, 118. Where a draft was drawn in Cincinnati on bankers in Chicago, to "pay to the order of R. \$600, 'current funds,'" *held*, that in the absence of evidence that anything else than cash was treated as current funds in Chicago, the "current funds" in which it was made payable should

A promissory note imports a consideration; none, therefore, need be expressed.¹⁷

The sum to be paid, written in the body of the note, will control, if there is a variance between it and the sum expressed in figures, on any other part of the paper.¹⁸ But a promissory note expressed in the body of it to be for "three hundred dollars," and in figures in the margin "\$300," is a good note for three hundred dollars, if the maker, when he signed it,

be considered such funds only as were current by law; and that the draft should be treated as a negotiable bill of exchange payable in money: *Phoenix Ins. Co. v. Allen*, 11 Mich., 501, 508; and see, *Phelps v. Town*, 14 Mich., 374. A note made and indorsed in Michigan and payable in Canada, "in Canada currency," is payable in money, and is therefore negotiable; such a phrase in a note made here means no more than that it is payable in Canada money at the Canadian standard, as it would have been without such phrase if made payable there: *Black v. Ward*, 27 Mich., 191; see, *Preston v. Whitney*, 23 Mich., 260.

¹⁷—*Bank of Troy v. Topping*, 13 Wend., 557. Nor alleged in the declaration, nor proved on the trial, unless the defendant shows a want of consideration, which he may do: *Ibid.* A note void for illegality of consideration is not a sufficient consideration for a new note given instead thereof: *Comstock v. Draper*, 1 Mich., 481. Whenever the consideration of a note between the original parties is illegal, especially if in violation of a positive prohibition of statute (as, where the consideration was the price of spirituous liquors sold contrary to law), proof of such illegality throws upon the holder the burden of proving that he got it *bona fide*, and gave value for it. The rule is the same as to the burden of proof where it is shown that the paper was obtained by fraud, or duress, and when stolen, or put in circulation by fraud: *Paton v. Coit*, 5 Mich., 505, 510. In assumpsit, illegality of consideration between the original parties may be shown under the general issue: *Myers v. Carr*, 5 Mich., 63. Where a note is made to

be discounted for the accommodation of the payee, and is discounted accordingly, the fact that the maker received no consideration therefor is no defense to a suit brought thereon by the indorsee against the maker: *Thatcher v. West River Nat'l Bank*, 19 Mich., 196. A note given for an interest in a patent issued by the United States patent office, cannot be regarded as without consideration. But evidence of the pecuniary worthlessness of the patent is not admissible under the general issue, without notice; a defense based on fraud must be specially set forth: *Miller v. Finley*, 26 Mich., 249. A note given to a bank in consideration of assurances on the part of its officers that they would sign a petition to the judge for clemency towards a relative of the maker's who is under arrest for robbing the bank, or that they would be more likely to do so, or that in any manner they would exercise, or be more likely to exercise, influence with the court to secure a lighter sentence, is based on considerations opposed to public policy, and is void: *Buck v. First N. Bank*, etc., 27 Mich., 293; *Snyder v. Willey*, 33 Mich., 483. A note given wholly or partly in consideration of the discontinuance of a criminal prosecution is void: *Wisner v. Bardwell*, 38 Mich., 278. So a promissory note given in consideration of a contract to clear a citizen from draft is without consideration, and cannot be enforced by the payee named therein: *O'Hara v. Carpenter*, 23 Mich., 410. As to consideration, see *Campbell v. Skinner*, 30 Mich., 32.

¹⁸—*Saunders v. Piper*, 5 Bing. N. C., 425.

intended “thee” for “three;” and whether such was his intention, is a question for the jury.¹⁹

§ 698. **Action by payee against maker.**—In the action by the payee against the maker of a note, the plaintiff must produce the note, and in case the execution of it is denied by defendant’s plea, and on oath²⁰ the handwriting of the defendant must be proved.

If the note be attested by a witness, the execution, if denied on oath, must be proved by him.²¹

If there be no subscribing witness, proof that the defendant admitted the signature to be his, will be sufficient. But where the witness stated that he called on the defendant with the alleged note in his pocket, but which he did not exhibit, and told him he had a note for that amount against him, given to the plaintiff, which he wanted the payment of, for the plaintiff, to which the defendant replied that he had given such a note, it was held that the proof was insufficient. “The identity of

19—Burnham v. Allen, 1 Gray, 496. A promissory note payable to bearer, or, if payable to order and indorsed in blank, may be sued in the name of an agent or person who holds it for collection, even though he has no actual interest in it: Brigham v. Gurney, 1 Mich., 349, 351. And it seems that a wife may sue her husband upon his promissory note given by him to her for money borrowed of her: Markham v. Markham, 4 Mich., 305, 307.

20—See, *ante*, § 191. In a suit against one of several makers of a joint and several promissory notes, it is not necessary to prove its execution by the makers not sued: Chandler v. Lawrence, 3 Mich., 261. An affidavit filed with the plea to a declaration on a promissory note, which denies only the delivery of the note, admits the genuineness of the signature, and the production of the note, together with proof of the indorsement by the payee, establishes a *prima facie* case for the plaintiff: Burson v. Huntington, 21 Mich., 415. The payee of a note cannot sue, as a joint maker, one who has put his name on the back of it if he himself has afterwards indorsed the note and put his name before the other: Greusel v. Hubbard, 51 Mich., 95; 16 N. W., 248.

A stranger signing his name to a promissory note before delivery is held as a joint maker: Wetherwax v. Paine, 2 Mich., 555; Rothschild v. Grix, 31 Mich., 150; Sibley v. Muskegon Nat’l Bank, 41 Mich., 196; 1 N. W., 930. See, Barger v. Farnham, 130 Mich., 487; 90 N. W., 281. It makes no difference that his indorsement follows that of the payee: Peninsular Savings Bank v. Hosie, 112 Mich., 351; 70 N. W., 890. Successive indorsements, as between the several indorsers, import a several and successive and not a joint obligation, and this whether the indorsements be made for accommodation or for value received. It may be shown, however, that the undertaking of the several indorsers is in fact joint: Harrod v. Doherty, 111 Mich., 175; 69 N. W., 242. Parol evidence is competent to show that one signing on the back is a joint maker: Barger v. Farnham, *supra*. So it is to show that one who indorsed the note before delivery was as between himself and the maker a surety: Hitchcock v. Frackelton, 116 Mich., 708; 74 N. W., 720.

21—See, *ante*, § 386. But it seems now, that by C. L., § 10199, proof by the subscribing witness may be dispensed with.

the note to which the confession of the defendant related is not proved; the evidence does not tend to show that the defendant admitted that he executed the note produced on the trial. Evidence that the defendant had executed a note answering the description of the note produced, without other proof of identity, is not sufficient to submit to a jury to pass upon the question whether the defendant executed the note produced.²²

If the note was executed by a firm, their existence and signature need not be proved, unless the execution is denied under oath.²³ When the note is payable to a firm, proof is required that the firm consists of the plaintiffs on the record.²⁴

The note must correspond with the description of it in the declaration; but the declaration may be amended.²⁵

When the note is in the possession of the defendant, the plaintiff must give notice to him to produce it on the trial; upon proof of notice, the plaintiff, after proof of execution, may give parol evidence of its contents.²⁶

§ 699. **In case of note, lost or destroyed.**—If the note has been destroyed, parol evidence of its contents may be given, after proof of its actual destruction,²⁷ unless the plaintiff deliberately and voluntarily destroyed it.²⁸

If the note has been lost, and was not negotiable, or, if negotiable, was not endorsed at the time it was lost, the plaintiff is entitled to recover upon proof of the note and its loss.²⁹ But when a note payable to bearer, or to order, and endorsed, is

22—Shaver v. Ehle, 16 Johns., 201.

23—See, *ante*, § 191. But an affidavit by a part of the defendants who are sued as joint makers of a promissory note purporting to be executed in the name of the firm, denying, "each for himself that he ever signed, executed or delivered said note," etc., is not sufficient to put the plaintiff to proof of the execution of the note. Such an affidavit might be made in every case of a partnership note by each of the partners, except the one who actually signed the partnership name and delivered the instrument: Mills v. Bunce, 29 Mich., 364.

24—*Ibid.*; McGregor v. Cleveland, 5 Wend., 475.

25—See, *ante*, § 355.

26—See, *ante*, § 399.

27—See, *ante*, § 398.

28—Blade v. Noland, 12 Wend., 173; see, *ante*, § 398, note 25.

29—Rowley v. Ball, 3 Cow., 303, 312; Pintard v. Tackington, 10 John., 104; C. L., § 10183. As to what is sufficient proof of loss, see, Higgins v. Watson, 1 Mich., 431, 432. The fact that the note is in the hands of the defendant who declines to produce it does not justify an action upon it as a lost note: Page W. W. F. Co. v. Pool, 129 Mich., 57; 87 N. W., 1043; distinguishing McKinney v. Hamilton, 53 Mich., 497; 19 N. W., 263, where the note was in the possession of a third person.

lost, no recovery can be had in an action upon it, or in respect of it, except a bond of indemnity is executed to the adverse party.³⁰ Proof of the destruction of the instrument does not, however, always authorize the admission of secondary evidence. If the destruction was accidental, and occurred without his agency or assent, or even if it was voluntary, and his own act, but yet done under a mistake, so as to rebut all idea of contemplated fraud, inferior evidence will usually be allowed. But a party who, under no pretense of mistake or accident, voluntarily destroys primary evidence, to prevent its being used against him, or to create an excuse for its non-production, to injure the opposite party, or for other fraudulent purposes, thereby excludes himself from the benefit of inferior evidence.³¹

“In any suit founded on any negotiable promissory note or bill of exchange, or in which such note, if produced, might be allowed as a set-off in the defense of any suit, if it appear on the trial that such note or bill was lost while it belonged to the party claiming the amount due thereon, parol or other evidence of the contents thereof may be given on such trial, and notwithstanding such bill or note was negotiable, such party shall be entitled to recover the amount due thereon, as if such note or bill had been produced.”³²

§ 700. Bond in case of lost note.—“But to entitle a party to such recovery, he shall execute a bond to the adverse party, in a penalty at least double the amount of such note or bill, with two sureties to be approved by the court in which the trial shall be had, conditioned to indemnify the adverse party, his heirs, and personal representatives, against all claims by any other person on account of such note or bill, and against all costs and expenses by reason of such claim: Provided, That such party shall not recover costs in such case, unless (before the commencement of such suit) he shall have executed and tendered to such adverse party, or, in case of several defendants, to one of such defendants, a bond conditioned as aforesaid, with sureties as aforesaid, approved by the judge or clerk

30—C. L., § 10184; see post § 700.

32—C. L., § 10183; McKinney v.

31—Blade v. Noland, 12 Wend., 173; Hamilton's Estate, 53 Mich., 497; 19 N. Clute v. Small, 17 Wend., 243; ante, W., 263.

§ 398, note 25.

of such court, or the circuit court commissioner of the county where such suit is brought, or, in actions brought before justices of the peace, by such justice: And provided further, That upon filing such last mentioned bond with the clerk of said court, or with such justice, at the time of the commencement of such suit, no other or further bond shall be necessary to entitle such party to such recovery upon such note or bill, with costs as aforesaid.³³

In order to charge the endorser of a negotiable promissory note, lost before due, the holder must tender an indemnity both to him and the maker, at the time of demand and notice.³⁴

In declaring on a note, it is usual to add the common counts to the count on the note, to avoid a failure in supporting by proof the count on the note.

A note, in an action by the payee against the maker, is evidence of money paid, money lent, money had and received, and account stated.³⁵ This, however, applies only to the principals; a person who becomes a party to a note, as a mere surety, is not liable under the common counts, if it appear on the face of the note that he is surtey only.³⁶ Where a note is properly given in evidence under the money counts, the defendant cannot defeat the action by showing that it was not in fact given for money as the consideration.³⁷

§ 701. **Interest.**—The plaintiff may, in most cases, recover the principal sum due, and the interest thereon. The interest will be calculated from the time specified in the note. A note payable on demand not expressing on interest, carries no interest until a demand is made by suit or otherwise.³⁸

33—C. L., § 10184. If there are several makers, the bond must run to all the defendants, whether all are served with process or not: *Higgins v. Watson*, 1 Mich., 428.

34—*Smith v. Rockwell*, 2 Hill, 482.

35—1 Cow. Treat., 2 ed., 231, 232. In general, where a party has a right to sue upon a bill or note, he may also declare for the consideration for which he received it; as, if he had sold goods for it, done work and labor, or lent money, he may join a claim or count in his declaration for such goods, work or money; and recover what is due to

him, either on proving such consideration, or upon proving the bill or note, under that part of his declaration which sets it forth. And the bill or note will, of itself, as between the immediate parties to it, be evidence not only of money lent, but of money paid, or money had and received: *Ibid*.

36—*Butter v. Rawson*, 1 Denio, 105; *Wells v. Girling*, 8 Taunt, 737.

37—*Hughes v. Wheeler*, 8 Cow., 77; *Smith v. Van Loan*, 16 Wend., 659.

38—*Rensselaer, etc., v. Reid*, 5 Cow., 587. Interest upon an obligation may run from the beginning of suit, if the

The interest of money is now at the rate of five per cent., unless otherwise stipulated in writing, when it may not exceed seven per cent.³⁹ In actions against banks, on their bills, the plaintiff may, in some cases, recover at the rate of ten per cent., from the time of refusal to pay.⁴⁰

Interest is allowed upon all judgments for the recovery of any sum of money, and upon all decrees in chancery for the payment of money, and may be collected on execution at the rate of six per cent.; but when judgment is rendered on any written instrument, having a different rate, the interest shall be computed at the rate specified in such instrument, not exceeding eight per cent.⁴¹ Interest is to be computed and collected from the time of entry of the judgment.⁴² So on all contracts from the time when the principal ought to be paid.⁴³ And it seems that interest is allowed—first, upon a special agreement; second, upon an implied promise to pay it, and this may arise from usage between the parties or usage of a particular trade; third, where money is withheld against the will of

date of a previous demand for payment is not shown: *Brion v. Kennedy*, 47 Mich., 499; 11 N. W., 288.

39—C. L., § 4856, as amended by Pub. Acts, 1899, p. 324. A provision in a promissory note drawing no interest, if paid at maturity, for the payment of interest from its date, if not paid at maturity, may be enforced where the note was given for property sold on these specific terms: *Flanders v. Chamberlain*, 24 Mich., 306. The rate of interest in a note can be changed only by agreement in writing: *Swift v. Barber*, 28 Mich., 503.

When a promissory note is payable with annual interest, the expression means with interest payable at the end of each year. But the words "annual interest," or "with interest payable annually," in a note made to fall due in less than two years, does not require an installment of interest to be paid at the end of the first year, but merely requires the whole interest to be paid with the principal at the maturity of the note. Hence it has been held that an unauthorized addition of the word "annually" to a note payable with interest

at ten per cent. at a period more than one and less than two years from date, was not a material alteration, as it did not make the interest payable before the maturity of the note, and therefore did not invalidate the note: *Leonard v. Phillips*, 39 Mich., 182.

40—C. L., § 10470.

41—C. L., § 4865. In all cases on contracts, when any sum shall be found for a party by verdict, report of referees or award of arbitrators, or other assessment according to law, unless such verdict, report, award, etc., shall be set aside, interest shall be allowed upon the amount so ascertained until payment, or until judgment shall be rendered thereon, and if judgment is entered thereon, the interest shall be included in the judgment: C. L., § 4866. For provisions as to the rate of interest on contracts between citizens of this state and other states, payable out of this state, see, *ante*, § 252; and as to interest, usury, etc., see, *ante*, §§ 250, 251 and notes.

42—C. L., § 10308.

43—*Williams v. Sherman*, 7 Wend., 109; *Still v. Hall*, 20 Wend., 51.

the owner; fourth, by way of punishment for any illegal conversion or use of another's property; fifth, upon advances of cash.⁴⁴

A merchant whose uniform custom it is, after a certain period, to charge interest upon articles sold, may charge interest accordingly, to those who are in the habit of dealing with him, as they are presumed to have a knowledge of such custom.⁴⁵ So, after an account rendered and not objected to within a reasonable time, or after demand of payment.⁴⁶

When a credit is given for a specified or for an indefinite time, without express agreement as to interest, interest is not allowable in the first case until time of credit has expired, and in the other, until a demand for payment.⁴⁷

§ 702. Compound interest.—"When any installment of interest upon any note, bond, mortgage, or other written contract, shall have become due, and the same shall remain unpaid, interest may be computed and collected on any such installment so due and unpaid, from the time at which it became due, at the same rate as specified in any such note, bond, mortgage,

44—*Reid v. Rensselaer*, 3 Cow., 436, *per Savage*, Ch. J.

45—*McAllister v. Reab*, 4 Wend., 483.

46—*Rensselaer, etc., v. Reid*, 5 Cow., 587. But it seems that interest is not chargeable upon an open mutual account; therefore, where parties accounted together as to a part of their dealings, showing a balance due to one of them, but other items of their accounts were left unadjusted, *held*, that the account still remained open, and that interest was not chargeable on the balance shown by the partial accounting: *Davis v. Walker*, 18 Mich., 25. Interest can never be allowed on an unsettled or an unliquidated account, without an agreement, express or clearly implied: *Sweeney v. Neely*, 53 Mich., 421, 424; 19 N. W., 127.

But in a suit for a balance due on a running account for goods sold, partial payments having been made in cash from time to time by the defendant, but no settlement or accounting had been had, nor balance agreed on by the parties, the supreme court say: It is very common and is certainly just and equitable, to allow interest on balances which

have been suffered to stand for more than six months; and that if the justice had included such interest in the judgment, such allowance would have been in accordance with what is commonly expected by creditors and conceded by debtors, and should be supported: *Hill v. Robbins*, 22 Mich., 478.

47—*Beardslee v. Horton*, 3 Mich., 560. Interest upon money withheld is allowed either because there is an express or implied promise to pay it, or as damages; but no promise can be implied until the principal falls due, and it is not allowable as damages if there has been no final understanding as to how much is to be paid: *Lake Shore & Michigan Southern Ry. Co. v. The People*, 46 Mich., 193, 211; 9 N. W., 249.

When partial payments amounting to less than the accrued interest are made, interest is still to be computed upon the whole principal until such times as all the payments shall equal the accrued interest, and if the payments do not amount to so much, then to the time of final payment of principal and interest: *Payne v. Avery*, 21 Mich., 524.

or other written contract, not exceeding ten per cent.; and if no rate of interest be specified in such instrument, then at the rate of seven per centum per annum."⁴⁸

§ 703. **Actions by indorsee against maker.**—In an action by an indorsee against the maker, the execution of the note by the maker, if denied under oath, and the indorsement by the indorser, must be proved.⁴⁹ The only additional proof in this action to what is required when the suit is brought by the payee against the maker, is the indorsement.

§ 704. **Actions by indorsee against indorser.**—The plaintiff must prove the endorsement of the defendant, if denied under oath.⁵⁰ The handwriting of the maker, and of all endorsements prior to the defendant's, is admitted by his endorse-

48—C. L., § 4859. This section took effect July 4, 1869. As to whether this act authorizes the compounding of interest upon instruments made before that date, *quere*: see, *Glens Falls Ins. Co. v. Jackson* Circuit Judge, 21 Mich., 579. As to compounding interest all obligations made before this statute (C. L., § 4859) took effect—and as to when and how interest may be compounded, see, *ante*, § 251 note 24.

Interest cannot be compounded without statutory authority. This statute § 4859, does not contemplate the compounding of interest in the ordinary sense, but only the payment of interest on what, being sums certain expressly provided for by the written contract, are allowed to be treated as separate debts for the purpose of interest; And new interest accruing merely by lapse of time, will not be converted into principal: *Voigt v. Beller*, 56 Mich., 140; 22 N. W., 270.

49—See, *ante*, § 191; see, *Howry v. Eppinger*, 34 Mich., 30. An indorsee suing on a note must plead and prove his title thereto: *St. Johns T. Co., v. Brown*, 126 Mich., 592; 85 N. W., 1124; *Hinkley v. Weatherwax*, 35 Mich., 510; *Hamilton v. Powers*, 80 Mich., 313; 45 N. W., 580; *Newton v. Principaal*, 82 Mich., 271; 46 N. W., 234. Indorsement of a note for collection for the holder, passes no title to the indorsee on his own account. Thus, where the maker of a note deposited money with

his banker to pay it and they credited the maker with the money and the holder of the note indorsed it to the bank for collection and then forwarded it to the bank, but the bank made no application of the deposit to the payment of the note and failed with the note in its possession and the deposit still standing to the credit of the maker, *held*, that the transaction did not amount to a payment of the note: *Sutherland v. First National Bank of Ypsilanti*, 31 Mich., 230; *Page W. W. F. Co., v. Pool*, 133 Mich., 323; 94 N. W., 1053 (May, 1903).

An agent to whom negotiable paper is indorsed for collection may sue thereon in his own name. And as the indorsement for such purposes passes the legal title in trust, the authority to collect is not revoked by the death of the owner of the paper: *Moore v. Hall*, 48 Mich., 143; 11 N. W., 844. The plaintiff who sues as indorsee is presumed to be the owner, and the defendant's indorsement sufficiently establishes plaintiff's right to sue, and the character in which he sues: *Wilson Sewing Machine Co. v. Spears*, 50 Mich., 534; 15 N. W., 894.

50—See, *ante*, § 191. But need not be proved if defendant makes no objection to its admission in evidence without proof, and plaintiff's title to the note is not questioned: *Hyde v. Tenwinkle*, 26 Mich., 93.

ment.⁵¹ But, if a subsequent endorsement be stated, it must be proved.

§ 705. **Presentment for payment.**—If no particular time is fixed for the payment of a note, as, if payable on demand, it should be presented for payment in a reasonable time. What is a reasonable time, is a question of law, and depends on the facts of each particular case, and may vary according to the

51—By indorsing a promissory note, the indorser agrees to and with the indorsee and all subsequent holders—That the note and the antecedent signatures thereon are genuine; that the maker will on due presentment of the note, pay it at maturity, or when it is due; and that, if, when duly presented, it is not paid by the maker, he, the indorser, will, upon due and reasonable notice of the dishonor, pay the same to the indorsee or other holder: Story on Prom. Notes, § 135, 380; see, *Atwood v. Cornwall*, 28 Mich., 336. The obligation incurred by indorsing a note payable to order, or bearer, is the same: *Ibid.*, § 132; *Sutherland v. First Nat. Bank of Ypsilanti*, 31 Mich., 230. So the indorsee of a certificate of deposit assumes the same liability as the indorsee of a promissory note of the like tenor: *Cate v. Patterson*, 25 Mich., 191. Where a note is made payable to the order of A, and the maker procures B to indorse it upon the promise that it shall be indorsed by A, the payee, before it is used, but in violation of his agreement negotiates the note with B's indorsement only—the legal character of indorser does not thereby attach to B, and this defect being apparent from an inspection of the instrument, the purchaser takes it subject to B's defense that he never became liable as indorser: *Gibson v. Miller*, 29 Mich., 355; but see, *Rothschild v. Grix*, 31 Mich., 150. An indorsement on a promissory note which purports merely to transfer the right and title of the indorser (thus, "I hereby transfer my right, title and interest of the within note to S. A.") destroys the negotiable character of the paper. Such an indorsement gives the indorsee no greater rights than the indorser had, and subjects the paper in the hands of the indorsee to the same defenses that could have been made to it in the hands

of the indorser: *Aniba v. Yeomans*, 39 Mich., 171.

Where the plaintiff has acquired the equitable title to the note he sues upon prior to the bringing of suit, the endorsement of the same over to him by his vendor is mere matter of form, and may be made at the time of the trial: *Brown v. McHugh*, 35 Mich., 50.

An indorsement is "in blank," when made by writing simply the indorser's name on the back of the note; in such case the note and indorsement are transferable by delivery merely, the same as a note payable to bearer. An indorsement is "full," where the indorser writes over his name an order to pay to the person in whose favor the indorsement is made; thus, "Pay to A . . . B . . . , or order." In order to transfer a note so indorsed, the indorsee must add his own indorsement, which may be in full: Story, § 138, 139. A promissory note made payable to C . . . T . . . , Cashier, or order, indicates that it was made to him not as an individual but as a bank officer, and that it was a contract with the bank, and in a suit on it by the bank, no indorsement by such cashier is necessary to the admission of the note in evidence: *Garton v. Union City Nat'l Bank*, 34 Mich., 279.

An indorser will be discharged from liability by the payment of the note by the maker or any prior indorser: Story, § 372. Or by the holder's neglect to present the note to the maker for payment when due: *Ibid.*, § 198. Or to give due notice of non-payment to the indorser: *Ibid.*, § 299. Or by giving further time for payment to the maker or any prior indorser, if done by a valid agreement founded on a good consideration, whereby the holder will be prevented from taking legal proceedings to collect until the expiration of the further credit. But a mere delay or indulgence to the maker, or a promise

circumstances and situation of the parties.¹ But when a note is payable at a particular time, payment is demandable only

without consideration to extend, or an extension with the consent of the indorser, will not so operate: Story, § 413, *et seq.* So, an indorser will be discharged by the release of the maker or any prior indorser: *Ibid.*, § 422. But where one of two joint makers of a note obtains of the payee an extension of time of payment and procures an additional signer to the note, this will not release the other maker who was in fact only a surety, the payee having no notice of such relation: *Gano v. Heath*, 36 Mich., 441. Where one person, by false and fraudulent representations to another as to the solvency of a third party, induced him to indorse the note of such third person, and afterwards purchased the indorsed paper, *held*, that he could not hold the indorser: *Lenheim v. Fay*, 27 Mich., 70.

In order to hold an indorser upon the obligation incurred by his indorsement, it is necessary to present the note to the maker for payment on the day when it becomes due, and at the place (if any) named for payment: Story, §§ 201, 227. And if payment is not made, to give due notice to the indorser or indorsers sought to be held for payment: *Ibid.*, § 299. One who receives from his debtor, as collateral, the negotiable note of a third person, indorsed by the debtor, releases his debtor from this indorsement if he neglects to protest the note for non-payment. And this rule applies equally to drafts as well as promissory notes. And evidence in such case that the maker was insolvent when the note was given, and was still so, and that the indorser suffered no injury from the failure to protest, is incompetent: *Whitten v. Wright*, 34 Mich., 92.

But the rule requiring immediate notice of the non-payment of commercial paper does not apply to a non-negotiable order drawn upon a debtor and taken by a creditor of the maker, merely as conditional payment to be applied in case it is collectable. Still one who receives such an order on a third person as conditional payment, must exercise reasonable diligence to collect it: *Briggs v. Parsons*, 39 Mich., 400. A promissory note payable on demand with in-

terest is not a continuing security, on which the indorsers will remain liable until actual demand, however long delayed, but on the contrary such a note must be presented within a reasonable time in order to hold indorsers, and a delay of two and a half years where all parties reside in same city is too long: *Home Savings Bank v. Hosie*, 119 Mich., 116; 77 N. W., 625.

To charge an indorser, several distinct things are necessary, no one of which can be disregarded. These things to be proved are not only the making of the contract of indorsement, but presentment of the note at maturity for payment, a neglect or refusal to pay when presented, a notice giving a sufficient description of the note and distinctly showing its dishonor, and service of such notice within the proper time personally, or at the residence or place of business of the indorser, or by mail when it is properly mailable. These are all legal conditions, which, unless waived, must be strictly complied with, in order to charge the indorser at all. And proof of the performance of any one or more of these conditions has no tendency to prove a compliance with the rest: *Cicotte v. Morse*, 8 Mich., 428. An indorser of a promissory note, not notified of its dishonor, so as to become liable upon it, may so act, however, as to waive his defense on that ground. And when such indorser, with full knowledge that he has been discharged from liability, for want of such notice states to the holder of the note that he expects to have to pay it, but requests such holder to try and collect it of the maker, he thereby recognizes his liability to pay the same: *Parsons v. Dickinson*, 23 Mich., 56.

An indorsement implies that it was done for a valuable consideration. The indorser of a note for whose benefit it was discounted, does not in consequence of that fact, incur any other liability than that of his indorsement; and proof that it was discounted for his benefit is therefore irrelevant in a suit against him: *Newberry v. Trowbridge*, 13 Mich., 263.

¹—*Sice v. Cunningham*, 1 Cow., 397; *Mohawk Bank v. Broderick*, 10 Wend.,

when that time has expired, and not before.² In the computation of time upon notes, a month is a calendar month.³ A note dated on the first day of January, payable ten days after date, would, without days of grace, become due on the eleventh day of the month;⁴ if dated on the tenth day, payable in one month, without days of grace, it would be payable on the tenth of February.⁵

To this time is to be added, except where the note is payable on demand, and also when there is not an express stipulation to the contrary, in the note, three days, called days of grace.

On all bills of exchange, payable at sight, or at a future day certain, within this state, and on all negotiable promissory notes, orders and drafts payable at a future day certain, within this state, in which there is not an express stipulation to the contrary, grace shall be allowed, except as provided in the following section, in like manner as it is allowed by the custom of merchants, on foreign bills of exchange, payable at the expiration of a certain period after date or sight."⁶ The provisions of the last preceding section shall not extend to any bill of exchange, note or draft payable on demand.⁷

Since the enactment of the foregoing sections, it has been provided that "All checks, bills of exchange, or drafts, appearing on their face to have been drawn upon any bank, or upon any banking association or individual banker carrying on a banking business under the act to authorize the business of

304; *Rice v. Wesson*, 11 Metc., 400; *Phoenix Ins. Co. v. Allen*, 11 Mich., 501, 508; see, *Phoenix Insur. Co. v. Gray*, 13 Mich., 191. As against the maker of a note payable at a particular time and place, no presentment and demand of payment at the place is necessary; still, it seems that the maker may show in his defense that he was ready to pay at the place, and thus avoid all special damages, and the costs of the suit. And if any special loss has accrued to the maker by the neglect of presentment and demand, his rights will be protected: *Reeve v. Park*, 6 Mich., 240. A note payable on demand will, after a reasonable time, be considered as overdue, so that an indorsee or purchaser from the payee will be considered as taking it subject to any defenses

that the maker had against it at the time of the transfer. As to what that reasonable time is, is a question for the determination of the court upon the facts of each particular case; two and a half months seems to be about as short a time as such a note will be considered overdue, while, on the other hand, five months have been held not an unreasonable time. *Carll v. Brown*, 2 Mich., 401.

2—Story on Prom. Notes, § 200.

3—*Ibid.*, § 211; C. L., § 50, clause 10.

4—Story on Prom. Notes, § 211. The day of the date is not counted in computing the time.

5—*Ibid.*, § 211.

6—C. L., § 4871.

7—C. L., § 4872.

banking, which are on their face payable on any specified day, or in any number of days after the date or sight thereof, shall be deemed due and payable on the day mentioned for the payment of the same without any days of grace being allowed, and it shall not be necessary to protest the same for non-acceptance.”⁸

With the addition of the three days of grace, a note drawn on the first day of January, payable one month after date, would be due on the fourth day of February, the days of grace commencing on the second of February; so a note drawn payable thirty days after date, would be due on the thirty-third day after date.⁹ In the computation of these days, Sunday, unless it should be the last day, is included; but when the third day comes on Sunday, the note becomes due on the preceding day, that is, on Saturday. The same rule would apply in case the last day of grace occurs on the fourth of July.¹⁰ If two holidays should succeed each other, as Sunday on the second day of grace, and the fourth of July on the third, the note would be payable on the preceding Saturday.¹¹

And it is now provided by statute that the first day of January, the twenty-second day of February, the thirtieth day of May, commonly called decoration day, the fourth day of July, the twenty-fifth day of December, the first Monday in September; Saturdays from twelve o'clock noon and any day appointed or recommended by the Governor of this State or the President of the United States as a day of fasting and prayer, or thanksgiving, shall for all purposes whatsoever, as regards the presenting for payment or acceptance, and of the protesting or giving notice of the dishonor of bills of exchange, bank checks and promissory notes, made after this act shall take effect, be treated as the first day of the week, commonly called Sunday and as public holidays or half holidays, and bills, checks and notes otherwise presentable for acceptance or payment on any of the said days shall be deemed to be payable and presentable on the secular or business day next succeeding: Provided, That if any of said holidays shall fall

8—C. L., § 4877. This applies only to a paper made since May 1st, 1867; holiday: Ransom v. Mack, 2 Hill, 587. C. L., § 4878.

10—*Ibid.*, § 220. Or on any other

11—Story on Prom. Notes, § 220:

9—Story on Prom. Notes, § 217.

See, C. L., § 4880.

upon Sunday, then the Monday following shall be considered as the said holiday.¹²

The maker has the whole of the last day of grace in which to make payment; and an action cannot be brought against him on that day.¹³

As to the time of day when demand of payment shall be made, it must be a reasonable time before the expiration of the day when the note falls due. If the note is payable at a bank, it should be presented at the bank during the hours to which its business transactions are limited by the usage of the bank. If a note is payable generally, and without any designation of place, it may be presented at the usual place of business, or counting house, or dwelling house, of the maker. If presented at his place of business or counting house, it must be within the hours during which such place of business or counting house is usually kept open according to the custom or usage of the town or city; or if there be no such custom or usage, then, within the reasonable hours for transacting business there, by the maker. If presented at the dwelling house or domicile of the maker, then it must be within such reasonable hours as that the family are up, and the maker may be presumed to be ready to transact business there.¹⁴ The general rule is, that the presentment for payment may be made to the maker personally, or at his dwelling house, or other place of abode, or at his counting house, or place of business. A presentment in either of these modes will be sufficient.¹⁵

§ 706. By whom.—The presentment should, in general, be made by the holder of the note, or some agent competent to give a legal receipt for the money.¹⁶ A demand of payment, by an agent having any parol authority as a notary, or the mere possession of the paper, is sufficient; and such agent is

12—C. L., § 4880, as amended by Pub. Acts, 1903, p. 420. Notes falling due on Saturday are payable on the next secular or business day succeeding said Saturday, which is Monday unless that be a legal holiday in which case they are payable on Tuesday following; and notes maturing on Sunday are payable on Monday also: *Hitchcock v. Hogan*, 99 Mich., 124; 57 N. W., 1095.

13—*Osborne v. Moncure*, 3 Wend., 170.

14—Story on Prom. Notes, § 226; *Wiesinger v. First Nat'l Bank*, 106 Mich., 291; 64 N. W., 59.

15—Story, Prom. Notes, § 235; see, C. L., § 4876; see, *Pease v. Warner*, 29 Mich., 9.

16—*Coose v. Callaway*, 1 Esp., 115; *Bank of Utica v. Smith*, 18 Johns., 230.

competent to give notice of non-payment.¹⁷ Any person who, by accident or otherwise, happens to be the holder at the time a bill or note becomes due, may and ought to demand payment and give notice of the non-payment, although not beneficially interested, and though liable to pay over the proceeds on demand to the person legally entitled.¹⁸ The notice given by any party to the note, subsequent to the party on whom it is served, is deemed the notice, and inures to the benefit of every party to the note, subsequent to the party served, whether prior or subsequent to the party giving notice.¹⁹

§ 707. **At what place.**—In case the note is not payable at any particular place, payment must be demanded of the maker personally, or at his dwelling house, or other place of abode, or at his counting house, or place of business.²⁰ To this rule there are several exceptions: 1. Where the maker absconds before the maturity of the note, and cannot be found.²¹ 2. Where the maker is a seaman on a voyage, and not having a domicile in the state.²² 3. Where the maker has no known residence or place within the state at which the note can be presented for payment.²³ 4. Where the maker, before the note is payable, removes from the state, and takes up his residence in some other state or country.²⁴ But if the maker, at the time the note was given, has a known residence in another state, payment must be demanded there, the same as if his residence was in this state.²⁵

When a note is payable at a particular place, it must be presented for payment at such place, or the endorser will be discharged from all liability.²⁶

§ 708. **In case of two or more persons liable.**—If a note is made by two or more persons, not partners, a demand of payment must be made of each, or the endorser will not be

17—*Shed v. Bret.*, 1 Pick., 401; *Bank of Utica v. Smith*, 18 Johns., 230; *Pease v. Warner*, 29 Mich., 9.

18—*Jones v. Foot*, 9 B. & C., 764; see, *Story on Prom. Notes*, § 247.

19—*Wilson v. Swabey*, 1 Starkle R., 34.

20—*Story on Prom. Notes*, § 235; see, *Taylor v. Snyder*, 3 Denio, 145.

21—*Putnam v. Sullivan*, 4 Mass., 45;

Widgery v. Munroe, 6 Mass., 449; *Blanchard v. Hilliard*, 12 *Ibid.*, 86, 88.

22—*Chitty on Bills*, 354, note 1.

23—*Story on Prom. Notes*, § 237; *Anderson v. Drake*, 14 Johns., 114.

24—*Anderson v. Drake*, 14 John., 114; *Wheeler v. Field*, 6 Metc., 290.

25—*Taylor v. Snyder*, 3 Denio, 145; *Gilmore v. Spies*, 1 Barb., 153.

26—*Story, Prom. Notes*, § 227.

holden.²⁷ If the maker be dead, it must be made upon the executor or administrator, if any has been appointed, and his place of residence is known, or can, upon reasonable inquiry, be ascertained; but if there be no executor or administrator, then at the house of the deceased. On a note by partners, the demand must be at their place of business, or at the dwelling house of either. If one be dead, demand must be made of the survivors.²⁸

§ 709. **Waiver of demand and notice.**—If, before the note becomes due, the endorser, by an agreement to that effect, waives a presentment of the note for payment and notice of non-payment, neither are necessary.²⁹

§ 710. **The notice to the indorser.**—A notice in the following words: "Take notice, that a note drawn by Cornelius Roosevelt, to the order of Daniel S. Mercier, for \$466.62, dated Sept. 7, 1837, at six months after date, this day due, endorsed by said Daniel S. Mercier, and afterwards by you, has been protested for non-payment, at the request of the bank of Pontiac, and the holders look to you for payment of the same;" was adjudged insufficient, because it did not "assert the fact that the note was presented at the proper time and place for payment, and payment not obtained."³⁰

27—Willis v. Green, 5 Hill, 232. But otherwise if they were partners: *Ibid.*

28—Story on Prom. Notes, § 241.

29—Coddington v. Davis, 3 Denio, 16; see, Backus v. Shipherd, 11 Wend., 629.

30—Platt v. Drake, 1 Doug. Mich., 296; affirmed in Newberry v. Trowbridge, 4 Mich., 391. The ground of decisions in those cases was that the word "protested" used in the notice was without meaning as applied to promissory notes, and therefore the use of that word was not equivalent to saying that the note was presented at the proper time and place for payment, and that payment was refused; but in Burkham v. Trowbridge, 9 Mich., 209, the court say that promissory notes may be protested, and that the statement in the notice that the note was "protested" was inferentially saying that the note was duly presented at the proper time and place for payment, and payment refused; therefore the case in 1 Doug.

and 4th Mich., above cited, are at least doubted, if not overruled, by the case in 9th Mich., 209. In the latter case a notice to the indorser, dated on the day of the maturity of a note, and stating that it was on that day, by the notary who signed the notice, protested for non-payment after due demand and refusal, and that the holder looked to the party notified for payment, was held sufficient. But see Union National Bank v. Williams Milling Co., 117 Mich., 535; 76 N. W., 1, holding that it must appear when, where, how, by whom and to whom presentment was made and that a general statement that the note was "duly protested for non-payment" at a particular time is insufficient. A formal protest of a promissory note, it seems, is not necessary: Platt v. Drake, 1 Doug., 296; Newberry v. Trowbridge, 4 Mich., 391; Burkham v. Trowbridge, 9 Mich., 209. But it may be done, and is proper: Burkham v. Trowbridge, 9 Mich., 209.

When the notice, which was without date, stated that the note had been "this day presented for payment," it was held insufficient.³¹ So where the notice stated that the demand was made on the fourth of July, though in fact made on the third day.³² It must describe the note correctly, and must be directed on its face to the indorser; it is not sufficient to have it directed correctly on the outside.³³ Upon some, if not all, the preceding questions, directly contrary decisions have been made.

§ 711. When notice may be served by mail.—"Whenever the indorser or indorsers of any promissory note, or the drawer or indorser of any check, draft, or bill of exchange, shall reside or have a place of business, * * * * in the same city, village or township where such promissory note, draft, check, or bill of exchange is made payable, or may be legally presented for payment or acceptance, all notices of the non-payment or non-acceptance thereof may be served by depositing such notices, with the postage prepaid, in the post-office in the city, township or village where such promissory note, draft, check, or bill of exchange is made payable, or may be legally presented for payment or acceptance, properly directed to such drawer or indorser at such city, village or township; and whenever any promissory note, check, or draft shall not be made payable at any place, notices of non-payment or non-acceptance may be served by depositing the same in the post-office, prepaid, directed to the drawer or indorser at his reputed place of post-office delivery, such reputed place of business, residence, or post-office delivery to be ascertained by

31—Wynn v. Alden, 4 Denio, 163. So held because the notice did not show that the demand was made at the proper time: *Ibid.*

32—Ransom v. Mack, 2 Hill, 587. The 4th being a holiday, a notice of a demand on that day was notice of a demand that could not legally be made: *Ibid.*

33—Remer v. Downer, 23 Wend., 620. The object of the notice is merely to inform the indorser of the non-payment by the maker, and that he is held liable for the payment of the note, and if the notice accomplishes this object it is sufficient, even though it misdescribe the

note in some particulars. The question in such cases is, has the indorser been misled by the notice: Snow v. Perkins, 2 Mich., 238, 243; see, Parsons v. Dickinson, 23 Mich., 56. In such notice, no technical phrases are necessary; but it is only required that the terms used be such as fairly and naturally lead the mind of a person of ordinary intelligence to the idea that the paper has been presented at maturity and dishonored, and that the person notified is looked to for payment: Burkham v. Trowbridge, 9 Mich., 210; see, Platt v. Drake, 1 Doug., 296.

the best information that can be obtained by diligent inquiry therefor.”³⁴

§ 712. **Guaranty of payment of note.**—Questions frequently arise as to what is, and the effect of, a guaranty of payment of a note. The supreme court of this state, in 1 Mich., 428, held that a guarantee of a note, in the words, “I guaranty John Watson,” indorsed on the back of a note, at the time of making it, made the guarantor a joint promissor with the maker of the note, and liable as such to the bearer of the note.³⁵ This case was subsequently overruled, the court holding that the negotiability of this description of guaranty could not be sustained, either on the ground of the guarantor being a joint maker or otherwise.³⁶ But it is now enacted by statute:

34—C. L., § 4876. But this act does not apply to notes drawn previous to May 1, 1867: See, C. L., § 4878. A witness called to prove the dishonor of a note, who only testifies that he went to find the maker's last place of residence, and that the note was not paid, and that he then protested it; but does not testify whether he found the indorser or not, or whether he made any demand, nor concerning his knowledge of the residence, nor whether, if no personal demand was made, there was any valid reason for the omission, does not sufficiently show such facts as amount to a dishonor: Nevins v. Bank, etc., 10 Mich., 547. Where there is no direct evidence of notice to an indorser, a subsequent recognition of liability by his presumptive evidence, in the nature of an implied admission, that the notice has been given. But where a plaintiff attempts to prove due notice, and only succeeds in proving one defective in form and mode of service, this excludes the presumption of a proper and sufficient notice; and a part payment by the indorser afterwards will not operate as an unqualified acknowledgment of liability unless it be shown that he knew at the time that the notice was defective.

Compiled Laws § 2635, making the certificate of a notary public presumptive evidence of official acts done by him excludes the certificate of a notary of notice of non-payment where there is an affidavit that such notice has not

been received and filed with the plea; and this though the notary be dead at the time of the trial; Sexton v. Perrigo, 126 Mich., 542; 85 N. W., 1096.

As to the essentials of such certificate of protest of promissory note see, Union National Bank v. Williams Milling Co., 117 Mich., 535, 76 N. W., 1.

An offer by the indorser to pay the note in depreciated bank bills, without explanation, can be regarded only as an offer to compromise, and cannot operate as a waiver of notice: Newberry v. Trowbridge, 13 Mich., 263.

35—Higgins v. Watson, 1 Mich., 428.

36—Tinker v. McCauley, 3 Mich., 188.

This case held, that a negotiable promissory note and a guarantee of its payment at the same time indorsed thereon, are separate and distinct undertakings, creating distinct undertakings as it respects the maker and guarantor. And that such guaranty is not negotiable. In Weatherwax v. Paine, 2 Mich., 555, it was held that where two indorse a note at its making and before delivery to the payee, to enable the maker to purchase with it certain property of the payee, they are to be considered as joint and several promisors with the maker: see the ruling in this case approved and re-affirmed in Rothchild v. Grix, 31 Mich., 150. It is not necessary that the guaranty should name the promisee, or person in whose favor it is made. The promisee becomes definite and fixed whenever any one takes

“That the guaranty of the payment or of the collection of any promissory note shall hereafter be negotiable, and shall pass to the holder of the note, whether indorsed thereon or written or printed on a separate paper; and the assignment, indorsement, or transfer of any promissory note, the payment or collection of which shall have been guaranteed, shall operate as, and be an assignment of, all guaranties of any such note, and the holder of such note may maintain an action upon any and all such guaranties, in his own name, subject to all equities existing between the guarantor and the person to whom such guaranty was made.”³⁷

the note and guaranty on the guarantor's credit, and that party may sue on it: *Nevins v. Bank, etc.*, 10 Mich., 547; *Thomas v. Dodge*, 8 Mich., 51; *Comstock v. Howd*, 15 Mich., 243. But such guaranties are now made negotiable by statute: See, next note. Nor is it necessary when a party selling a note guarantees it, that the guaranty should be in writing: *Huntington v. Wellington*, 12 Mich., 10. Where an agent of another for the sale of property, who has agreed not to sell for credit, except to those who are good and responsible, and to take no paper except good, first-class collectable paper, and such as he is willing to guarantee, takes paper he knows to be worthless and turns it over to his employer who is ignorant of its character, he makes himself liable as a guarantor of the paper, and is not entitled to have the paper returned to him as a condition precedent to judgment against him on such guaranty: *Clark v. Roberts*, 26 Mich., 506.

37—C. L., § 4879; and see *Waldron v. Harring*, 28 Mich., 493. A guaranty of collection indorsed by the payee of a note passes the title thereto; *Russell & Co. v. Klink*, 53 Mich., 161; 18 N. W., 627. A guaranty of payment indorsed by the payee on a note payable to his order is negotiable under this statute; C. L., § 4879. Such a guaranty of payment indorsed upon a note by one to whose order it is payable, is both a guaranty and an indorsement, and the note will thereafter pass by mere delivery. And the indorser may be joined as a defendant in a suit against the maker: See, C. L., § 10055.

Guaranty of collection.—When a

party guarantees the collection of a note, or that it is collectible, the meaning of his undertaking is, that if proceedings at law for its collection are diligently prosecuted, they shall result in its collection. It does not mean that the maker of the note is responsible, or shall remain so, but that the debt shall be collected, if the proper steps are promptly taken for that purpose. Hence an action will not lie upon the guaranty, until after a failure to obtain payment by a suit at law duly taken and prosecuted for its collection. Proof that the maker is insolvent or pecuniarily irresponsible will not excuse the neglect to proceed at law for its collection: *Bosman v. Akeley*, 39 Mich., 710.

The liability of a party who guarantees the collection of a note is established when the creditor sues the maker in Justice's court and an execution is returned unsatisfied; a suit in a court of record is not necessary: *Thomas v. Dodge*, 8 Mich., 51, 54. In an action upon the guaranty of collection of the note of a third person, it is incumbent on the plaintiff to show, before he can recover, his inability, after reasonable diligence, to collect the note of the maker, and if there are several makers of the note, this condition must be made out as to each and all of them. Proof of a prosecution seasonably commenced against all of the principal debtors, and diligently and in good faith carried on against all to final judgments and execution without avail, is sufficient to authorize the creditor to demand payment of the guarantor of collection: *Aldrich v. Chubb*, 35 Mich., 350.

But where one guarantees the collection

In New York, it has been decided that a guaranty of the payment of a note, indorsed on it, though given at the time the note was made, was not of itself a promissory note, but "a special promise to answer for the debt, default, or miscarriage of another person."³⁸

Where the guaranty was in the words, "I guarantee the payment of the within," the court said: "The undertaking of the defendant was not conditioned, like that of an indorser, nor was it upon any condition whatever. It was an absolute agreement that the note should be paid by the maker at maturity. When the maker failed to pay, the defendant's contract was broken, and the plaintiff had a complete right of action. It was no part of the agreement that the plaintiff should give notice of the non-payment, nor that he should sue the maker, or use any diligence to get the money. With us, proceedings against the maker are only necessary when there is a guaranty of collection. The point was decided long ago—that a guaranty of payment, like the one in question, is not conditional, but an absolute undertaking that the maker will pay the note when due." "It is a general rule that where one guarantees the note of another, though on condition, his liability is commensurate with that of his principal, and he is no more entitled to notice of the default than the holder."³⁹

§ 713. Suretyship.—Questions as to the liability of sureties of notes and when they are discharged frequently occur, and these subjects will now be noticed.

Mere delay of a holder of a note to call on the principal debtor for payment will not discharge the surety.⁴⁰ But if the holder of a note, who is requested by the surety to proceed without delay and collect the money of the principal, who is then solvent, neglects to proceed against the principal, who afterwards becomes insolvent, the surety will be discharged.⁴¹

of a note which is secured by a collateral mortgage referred to in it, and at the same time assigns the mortgage with the note, he is not liable on his guaranty until resort has been had to the mortgage as well as to the note, for the collection of the moneys secured: *Barman v. Carhart*, 10 Mich., 338.
 228; *Allen v. Rightmere*, 20 John., 365; *Peck v. Barney*, 13 Vermont, 93; *Farmer's, etc., Bank v. Kercheval*, 2 Mich., 504; *Roberts v. Hawkins*, 70 Mich., 566, 38 N. W., 575.
 38—*Hall v. Farmer*, 5 Denio, 484.
 39—*Brown v. Curtiss*, 2 N. Y., 227.
 40—*King v. Baldwin*, 2 Johns. Ch. R., 554; same case, 15 John., 384.
 41—*Paine v. Packard*, 13 John., 174; *King v. Baldwin*, 17 *Ibid.*, 384; *Remsen v. Beekman*, 25 N. Y., 552. The

If the creditor, by express agreement with the principal, waives the terms of the contract, by enlarging the time of performance, without the assent of the surety, the latter is discharged.⁴² "If the creditor, by agreement with the principal debtor, without the surety's consent, has disabled himself from suing, when he would otherwise have been entitled to sue, under the original contract, or has deprived the surety on his paying the debt from having immediate recourse to his principal, the contract is varied to his prejudice, and he is consequently discharged."⁴³ But a promise to indulge the principal, unsupported by a sufficient consideration, would not be a defense to the surety, although actually carried into

doctrine of the case of *Paine v. Packard*, is overruled in this State. It is held here that a joint maker of a promissory note who writes after his signature to the note, the word "surety," does not thereby limit or change the nature of his liability to the holder, nor make it any more the duty of the latter to proceed against the other maker at his request, than as if he had signed as a principal maker without adding the word surety. And it is no defense to such a note by such a signer that the holder had neglected at his request to proceed against the other maker for payment when he was solvent, and that since such request he had become insolvent. The proper course for such a signer is to pay the note according to the terms of the note, and then proceed himself against the principal as it is his right to do. *Inkster v. First N. Bank of Marshall*, 30 Mich., 143. See, *Rothschild v. Griz*, 31 Mich., 150. A creditor's neglect to enforce his demand against his debtor at the request of the surety of the latter, does not release the surety in this state. The discharge of a surety by an extension of time on his principal's debt results from the contract for extension and not merely from delay to collect the debt or from a promise to forbear collection: *Michigan State Ins. Co. v. Soule*, 51 Mich., 312; 16 N. W., 662.

When one has purchased a note overdue, the collection of which has been guaranteed by a prior owner thereof, refuses to receive the money when offered to him by the maker, and delays the collection of the note, until the

makers have failed, such guarantor will be discharged. *Sears v. Van Dusen*, 25 Mich., 351.

42—*King v. Baldwin*, 2 John. Ch., 554; *F. & M. Bank v. Kercheval*, 2 Mich., 504; *Porter v. Hodenpuy*, 9 Mich., 11. But not when the holder of the note extends the time to the principal debtor without notice that the other signer is only a surety: *Gano v. Heath*, 36 Mich., 441. See, *Smith v. Shelden*, 35 Mich., 43.

43—*King v. Baldwin*, 2 John. Ch. 554. But a surety who, after time given to the principal, promises to pay the debt with full knowledge of the facts, is liable without any new consideration for the promise. The action in such case is upon the original contract, and not upon the new promise: *Porter v. Hodenpuy*, 9 Mich., 11. See *People v. Grant*, — Mich., —; 100 N. W., 1006; (Oct., 1904), holding that accepting a note payable beyond the time when an account is due releases a surety for the payment of such account.

A surety only engages to make good a deficiency; an arrangement between his principal and the creditor, without his privity, whereby the principal is not to be sued by the creditor, is a substantial alteration of the contract of suretyship to the surety's prejudice; *Farnsworth v. Coots*, 46 Mich., 117; 8 N. W., 705. A creditor who knows that his debtor is only a surety is bound to take no steps which will change the principal's liability without the surety's consent: *Canadian Bk. v. Coumbe*, 47 Mich., 358; 11 N. W., 196.

execution by the creditor.⁴⁴ The promise in such a case would not preclude the holder of the note from suing the principal debtor, if he should be required so to do by the surety.

A surety will be discharged if the holder of the note surrender a collateral security for the debt. "It is a well settled principle of equity, that a creditor who has the personal contract of his debtor, with a surety, and has also, or takes afterwards, property from the principal as a pledge or security for his debt, is to hold the property fairly and impartially for the benefit of the surety, as well as himself; and if he parts with it without the knowledge or against the will of the surety, he shall lose his claim against the surety to the amount of the property so surrendered."⁴⁵

The neglect of the creditor to record a bill of sale of a vessel given him as security by the principal, in consequence of which she was taken possession of by a subsequent purchaser, was held to have discharged the surety to the full extent of her value.⁴⁶ A withdrawal by the creditor of an execution levied on the goods of the principal, under a judgment obtained on a warrant of attorney given by the latter, would discharge the surety, whether he knew of the existence of the warrant and judgment or not.⁴⁷ But it seems that a direction to the sheriff not to proceed with an execution before actual levy, will not operate as a discharge of the surety, even when it has resulted in the loss of all means of collecting the debt from the principal.⁴⁸ The mere delay of a creditor in enforcing the collection of a bond and judgment, which had been transferred to him as collateral security for a debt, was held to discharge the estate of the debtor, for all that the creditor might have received, but for his wilful default.⁴⁹

44—President, etc., v. French, 21 Pick., 486. And it is said that a creditor may extend the time for his debtor to pay in, without discharging the surety. If he, by the same agreement, expressly reserves his remedy against them, and the right to sue for the debt at any time, notwithstanding the extension: Bailey v. Gould, Walker's Mich., Ch. 478, 482.

45—Baker v. Briggs, 8 Pick., 122;

and see, Ives v. Bank of Lansingburg, 12 Mich., 361.

46—Walton v. Johnson, 2 Simmons, 457.

47—Mayhew v. Crickett, 2 Swanston, 193; Farmers' Bank of Canton v. Reynolds, 13 Ohio, 84.

48—*Ibid.*, Lenox v. Prout, 3 Wheaton, 520.

49—Williams v. Price, 1 Sim. & Stu., 581; Nexsen v. Lyell, 5 Hill, 466.

A declaration, by the holder of a promissory note, that he will look solely to the principal for payment, in consequence of which the surety omits to obtain security for his indemnification, is a defense to an action on the note against him.⁵⁰

It is a good defense to an action of debt on a judgment against the survivor of two judgment debtors, to show that the defendant was surety for the other debtor, in the original obligation on which the judgment was obtained; and that he gave up a security which he held for the debt on being told by the plaintiff that the judgment was paid. Such a defense is good even where there was no actual fraud or intention to deceive on the part of the creditor.⁵¹

USE OF THE COMMON COUNTS IN ASSUMPSIT—IN GENERAL.

§ 714. **Though there is no special count.**—The common counts in assumpsit are frequently sufficient without any special count; and even where the declaration contains a special count, it is often advisable to insert one or more of the common counts. The plaintiff is at liberty to insert in his declaration as many counts as he shall think advisable, so as to be prepared for any complexion which the case may assume on the trial. Though, as a general rule, when there is an express contract, the plaintiff cannot resort to an implied one, yet he may, in many cases, recover on the common count, though there was a special agreement.⁵² Thus where a contract has been fully performed by plaintiff and all that remains to be done is the payment of money by defendant it may be recovered under the appropriate common count.⁵³ The breach

50—Harris v. Brooks, 21 Pick., 195.

51—Carpenter v. King, 9 Metc., 511.

52—But so long as an express contract remains in force, none can be implied covering the same subject matter: Hunt v. Sackett, 31 Mich., 19. An action on the common counts will not lie where proof of a contract and the breach of it is necessary to a recovery; Phippen v. Morehouse, 50 Mich., 537; 15 N. W., 895; Tate v. Torcott, 100 Mich., 308; 58 N. W., 993.

But where a special contract has been modified by agreement of the parties, a recovery may be had under the common counts for whatever has been done under

the contract as modified: Moon v. Harder, 33 Mich., 566.

53—(Work and labor). Bush v. Brooks, 70 Mich., 446; 38 N. W., 562; Thomas v. Caulkett, 57 Mich., 392; 24 N. W., 154; Strome v. Lyon, 110 Mich., 680; 68 N. W., 893; Nicol v. Fitch, 115 Mich., 15; 72 N. W., 988: (Money had and received), Phippen v. Moorehouse, 50 Mich., 537; 15 N. W., 895; White v. Taylor, 113 Mich., 543; 71 N. W., 871: (Goods sold), McGraw v. Sturgeon, 29 Mich., 426; Richards v. Burroughs, 62 Mich., 117; 28 N. W., 755; Flint & P. M. Ry. Co. v. Donovan, 108 Mich., 80; 65 N. W., 583; Burt v.

of an express contract cannot be shown as a basis of recovery under the common counts.⁵⁴ The common counts will not sustain an action to recover damages for the breach of an executory contract.⁵⁵ Again, where plaintiff has failed to perform his contract fully, or in the manner provided, yet has furnished something, or done something, of value to the defendant, which the defendant has accepted, an implied assumpsit arises to make reasonable compensation therefor, which may be enforced under the appropriate common count.⁵⁶

In framing a declaration, the plaintiff will insert one or more of these counts, as the nature of his demand may require.⁵⁷

USE OF THE COMMON COUNTS IN CASE OF GOODS BARGAINED AND SOLD.

§ 715. **What circumstances justify their use.**—This count can be adopted only in cases where the property in the goods wholly vests in the defendant, so that he may maintain trover for them against any person but the plaintiff, and against the plaintiff were it not for his lien upon them for the price.⁵⁸

It can only be maintained where the property in the goods

Greene, 125 Mich., 328; 84 N. W., 317; (An adjusted insurance loss), Granger v. Manchester Fire A. Assn., 119 Mich., 177; 77 N. W., 693.

54—Flint & P. M. Ry. Co. v. Donovan, 108 Mich., 80; 65 N. W., 583; Loranger v. Davidson, 110 Mich., 605; 68 N. W., 426; Bullock v. Neberroth, 121 Mich., 293; 80 N. W., 39.

55—Wigent v. Marrs, 130 Mich., 609; 90 N. W., 423.

56—Allen v. McKibben, 5 Mich., 449; Wildey v. Paw Paw S. D., 25 Mich., 419; Wilson v. Wagar, 26 Mich., 452; Howell v. Medler, 41 Mich., 641; 2 N. W., 911; Gage v. Meyers, 59 Mich., 300; 26 N. W., 522.

57—A declaration in assumpsit, on the common counts, which after stating the several causes of action, omits to allege an express promise to pay, is bad on special demurrer; but is cured by judgment: Hoard v. Little, 7 Mich., 468. A demurrer to an entire declaration containing the common counts properly pleaded, because of defects in

special counts, will not be sustained: Weston v. County of Luce, 102 Mich., 528; 61 N. W., 15. The common counts are as applicable in case of written as of oral contracts: Record Pub. Co. v. Merwin, 115 Mich., 10; 72 N. W., 998.

Stipulated damages for the breach of an express contract, cannot be recovered under the common counts: Butterfield v. Seligman, 17 Mich., 95.

58—1 Archibold's N. P., 159; 1 Chitty's Pl., 10 Am. ed., 347. This is a proper action to recover the price of goods and chattels sold by plaintiff to defendant by a valid bargain which vests the title of the goods in the defendant, and which goods, etc., the defendant refuses to take; or which the plaintiff has a right to retain until paid for. It does not lie where the goods, etc., have been delivered to the purchaser; in that case the action should be for goods *sold and delivered*: *Ibid.*; Chitty's Pl., 347; 1 Cow. Treat., 2 ed., 98. See, *ante*, § 688 *et seq.*

has passed from the plaintiff to the defendant.⁵⁹ Unless the property has passed, the plaintiff must bring an action upon the agreement to purchase, for not accepting the goods and paying for them. The contract must be for a specific article or articles, a specific price must be agreed upon, and everything must be done, such as weighing and measuring, or the like, which is necessary to the specific appropriation of the goods to the defendant.⁶⁰ It must also appear that the defendant assented to take the articles. The property must be changed to make the action maintainable. "There cannot be any sale unless there is an assent by the defendant to take the articles."⁶¹ "The articles must be complete, ready for delivery, when the assent is given."⁶²

By the common law, when the terms of sale are agreed on, and the bargain is struck, and everything that the seller has to do with the goods is complete, the contract of sale becomes absolute as between the parties, without actual payment or delivery, and the property and the risk of accident to the goods rests in the buyer. He is entitled to the goods on payment or tender of the price.⁶³ When the price is fifty dollars or upwards, the statute governs and the contract is not binding, unless the purchaser shall accept and receive part of the goods sold, or shall give something in earnest to bind the bargain, or in part payment, or unless some note or memorandum in writing of the bargain be made signed by the party to be charged or some one by him lawfully authorized.⁶⁴ The pro-

59—*Elliott v. Pybus*, 10 Bing., 512; *Scotten v. Sutter*, 37 Mich., 526.

60—*Simmons v. Swift*, 5 B. & C., 857; *Downer v. Thompson*, 2 Hill, 137; *Lingham v. Eggleston*, 27 Mich., 324; *Foster v. Lumberman's Ins. Co.*, 68 Mich., 188; 36 N. W., 171; *Wagar v. Farrin*, 71 Mich., 370; 38 N. W., 865. Though something still remains to be done in order to ascertain the price to be paid, still this is but presumptive evidence that title has not passed; the parties may have agreed that notwithstanding the price has not actually been fixed, yet nevertheless the title shall pass, and such agreement is valid. It is a question of interest to be determined from all the surrounding circumstances: *Byles v. Collier*, 54 Mich., 1; 19 N. W.,

565. See, on the proposition that the question of whether title has passed is one of whether the parties intended it should, to be ascertained from their contract, the situation of the thing sold and the circumstances surrounding the sales: *Lingham v. Eggleston*, 27 Mich., 324; *Bonn v. Haire*, 40 Mich., 404; *Brewer v. Michigan Salt Assn.*, 47 Mich., 526; 11 N. W., 370; *Whitcomb v. Whitney*, 24 Mich., 486.

61—*Atkinson v. Bell*, 8 B. & C., 277.

62—*Hague v. Porter*, 3 Hill, 141.

63—1 Cow. Treat., 2 ed., 101; *Davis v. Ransom*, 4 Mich., 241; *Conway v. Bush*, 4 Barb., 564; *Kling v. Fries*, 33 Mich., 275; *Bonn v. Haire*, 40 Mich., 404.

64—C. L., § 9516.

visions of this statute require, when fifty dollars or more are involved, that before the oral contract can be shown, there shall be given some evidence of contract relations which is not found in spoken words. This preliminary evidence is the key which unlocks the door of the court to evidence of the parol contract. It may consist of an acceptance and receipt of goods, of a part payment for goods, of something given in earnest, or of a note or memorandum signed as stated above. Neither this note or memorandum nor any of the other things is the contract; they are but evidences of contract relations. The contract is in the spoken words. Delivery and acceptance of part of the goods takes the contract out of the operation of the statute.⁶⁵ Under the rule in England the earnest is something outside the contract while part payment was, as the term indicates, a payment of a part of the consideration. This distinction seems not to be uniformly regarded in this country. As a practical question it is of little importance as to what may be the correct view for the earnest of the old law is practically obsolete with us. The language of the statute however retains the term and it seems to be regarded as having a different meaning from the term part-payment.⁶⁶ The part-payment may consist in money, property or the discharge in whole or in part of an existing debt, if the parties have so agreed. An agreement to discharge without actually discharging the indebtedness is not sufficient.⁶⁷ The memorandum must contain all the terms of the contract.⁶⁸

65—*Garfield v. Paris*, 96 U. S., 557; *Vechten*, 20 Mich., 410; *Webber v. Alderton v. Buchoz*, 3 Mich., 322; *Richards v. Burroughs*, 62 Mich., 117; 28 N. W., 755. Constructive delivery will be sufficient, as where the property is ponderous and the purchaser exercises acts of ownership over it: *Alderton v. Buchoz*, 3 Mich., 322. Reception by a carrier to transport to the vendee will not in the absence of an understanding that he may accept for the vendee, amount to acceptance within the requirement of the statute: *Rindskopp v. DeRuyter*, 39 Mich., 1; *Grimes v. Van*

Vechten, 20 Mich., 410; *Webber v. Howe*, 36 Mich., 150; *Smith v. Brennan*, 62 Mich., 349; 28 N. W., 892.

66—See, *Burhans v. Carey*, 17 Mich., 282.

67—*Brabin v. Hyde*, 32 N. Y., 519.

68—*Gault v. Stormont*, 51 Mich., 636; 17 N. W., 214; *Banman v. Manistee S. & L. Co.*, 94 Mich., 365; 53 N. W., 1113; *Hall v. Soule*, 11 Mich., 494; *Webster v. Brown*, 67 Mich., 331; 34 N. W., 676; *Messmore v. Cunningham*, 78 Mich., 623; 44 N. W., 145.

USE OF THE COMMON COUNTS IN CASE OF GOODS SOLD AND DELIVERED.⁶⁹

§ 716. **When appropriate.**—The price of goods sold may be recovered under this count, if they have been actually delivered, and the contract were to pay in money, and the time of credit has expired. This action may, in some cases, be maintained, even although there was a special agreement between the parties. Thus, where there was a special agreement for goods to be delivered by the plaintiff, and for work to be done by the plaintiff in relation to the goods, and after delivery the defendant refused to suffer the plaintiff to do the work, it was held that the plaintiff might abandon the agreement, and bring his action for goods sold and delivered.⁷⁰ But if such goods are sold on a credit, the vendor cannot, before the credit has expired, maintain this action, even though he can prove that the vendee induced him to sell the goods by fraud. The vendor, in such a case, may disaffirm the contract and sue in trover, unless the goods have passed into

69—For form of common count for goods sold and delivered, see, *Weston v. McDowell*, 20 Mich., 353. Upon the general question of the sale of goods, wares and merchandise, see, *ante*, § 688 *et seq.*

70—*Linningdale v. Livingstone*, 10 Johns., 38.

Where a contract for the sale and delivery of goods has been fully carried out by the seller, and the property in the goods has passed and nothing remains but the duty of the buyer to make payment of the price in money, the amount may be recovered under the common count, or on a special count on the contract. The general count may also be used where the contract has not been so performed, if the vendee has actually received and appropriated the goods or any part of them: *Beagle v. McKenzie*, 26 Mich., 470; *McGraw v. Sturgeon*, 29 Mich., 426. As to plaintiff's damages where the vendee has received a part of the goods sold and refuses to receive the balance, see, *Wilson v. Wagar*, 26 Mich., 452. On a contract to sell and deliver goods where the delivery is to be on notice from the purchaser, such

notice is essential to a recovery: *Chadwick v. Butter*, 28 Mich., 349—as to measure of damages, see same case.

The vendor of goods delivered upon a contract which he has failed to complete in full is still entitled to recover under the common count for such part of the goods as have been actually accepted by the purchaser; but his recovery in such case is not based upon the contract, but upon the benefit which the purchaser has received from the goods delivered and accepted; still he cannot recover any more than the contract price, nor more than the actual value of the goods at the time and place of delivery: *Chapman v. Dease*, 34 Mich., 375.

In an action on the common counts by the assignee of a demand for goods sold and delivered, the assignment of the account is admissible in evidence, as the defendant might obtain all needful information of the nature of the demand sued on by calling for a bill of particulars—and if an allegation of an assignment were needed it might be added by amendment: *Kelley v. Waters*, 31 Mich., 404.

the hands of a bona fide purchaser.¹ But if the vendor bring assumpsit, he affirms the contract.² So, where goods were sold upon these terms: seven and one-half per cent. discount, bill at three months; ten per cent. discount, cash in fourteen days; held, that the vendor could not sue for goods sold and delivered within the fourteen days, even if the sale had been effected by fraud on the part of the vendee.³ One who has been induced, by the fraudulent representations of another, to enter into a contract, may affirm or disaffirm it, on discovery of the fraud, but he cannot do both, and he must affirm or disaffirm altogether; and, if the latter, must do so as soon as the fraud is discovered. He cannot adopt that part which is for his own interest, and reject the residue.⁴

A contract which, in the first instance, was not a sale, but might become so upon the happening of a particular event, may upon the happening of that event be declared upon as such, and the price be recovered in this action. Thus, plaintiff agreed to let (or lend) the defendant a musical snuff-box, on an understanding that if it was damaged the defendant was to have it, and £3 10s. was to be taken as its value. The box was received by defendant, and damaged while in his possession. Held, that the plaintiff was entitled to maintain this action, and that it was not necessary to declare specially.⁵

If the goods are to be paid for, partly in money and partly in goods, to be delivered, the vendor must declare specially.⁶ But if the goods have been delivered, and the breach complained of be the non-payment of the money only, this action is proper.⁷

When the whole credit has not expired, it is necessary to declare specially; as where goods are to be paid for by a bill or note at three months, or other time, the credit will not expire (although the bill or note is not given) until the expiration of three months, or other time, and until then the plaintiff cannot declare in this form, but may at the expiration of the time.⁸

1—Ferguson v. Carrington, 9 B. & C., 59.

2—Galloway v. Holmes, 1 Doug. Mich., 330.

3—Strutt v. Smith, 1 C. M. & R., 312; Ferguson v. Carrington, 9 B. & C., 59.

4—Jewett v. Petit, 4 Mich., 508.

5—Blanchi v. Nash, 1 M. & W., 545.

6—Talvert v. West, Holt, N. P., 179; Barbe v. Parker, 1 H. Bl., 287.

7—Sheldon v. Cox, 3 B. & C., 420.

8—Webb v. Fairmainer, 3 M. & W.,

§ 717. **What plaintiff must prove.**—Under the general issue, the plaintiff must prove the sale of the goods, the delivery, and the value of them, or the price agreed to be paid for them.

A sale may be implied, in all cases, from evidence of the delivery of the goods to, and reception of them by, the vendee. If there was a written contract, it must be produced, if the plaintiff wishes to recover according to its terms; and must be, in case it appears from the witness' testimony that the contract was in writing.

A delivery to the defendant, or to some person authorized by him to receive, must be proved.⁹ A delivery to a carrier, by order of the vendee, though he do not name him, will be a constructive delivery to the vendee, and be sufficient. But a delivery to a carrier, without the consent of the vendee, either express or implied, will not enure as a delivery to the latter.¹⁰ Where the goods are in the hands of a wharfinger or warehouseman, and a delivery order is given by the seller to the buyer, and the goods are accordingly transferred to the buyer's name in the books of the wharfinger or warehouseman, yet if anything still remains to be done towards the completion of the contract, such as weighing, measuring, or the like, the delivery is not complete, so as to vest the property in the buyer; but after the goods have been weighed, etc., or if the quantity be sold in bulk so as not to require weighing, etc., then the property in the goods will be vested in the buyer by the delivery order and transfer.¹¹

If a person send an order to a merchant to send him a certain quantity of goods on a certain credit, and the merchant sends a smaller quantity, at a shorter credit, no agreement exists between the parties, until the former assent to receive them; and if the goods be lost on the way, there is no implied

473; *Swancott v. Westgarth*, 4 East., 75. Where there is a sale of goods on credit, to be paid for by bill or note, which is not given, it is well settled that, while the credit or period for which the bill or note was to run is yet unexpired, the declaration must be special for refusing to give the paper; yet after the period for which the note was to run, the plaintiff may recover on the common counts for the goods sold and delivered: *Gibbs v. Blanchard*, 15 Mich., 305.

9—2 Saund. Pl. & Ev., 5 Am. ed., 94.

10—*Hague v. Porter*, 3 Hill, 141; see, *Meredith v. Meigh*, 2 Ell. & B., 364.

11—*Swanwick v. Sothorn*, 9 Ad. & Ell., 895; see, 2 Saund. Pl. & Ev., 97; *Downer v. Thompson*, 2 Hill, 137.

assumpsit to pay for them.¹² So, if a merchant send a larger quantity than was ordered.¹³

The delivery must be shown to have been at usual and convenient hours; therefore, an offer to deliver several tons of oil at an unreasonable hour of the night, was held not to satisfy a contract to deliver generally within a certain number of days.¹⁴

Where there is an express contract, and the price of the goods is stated in it, proof of the contract proves the price. If the price, however, is not mentioned in the contract, but merely implied from the delivery of the goods to and acceptance by the defendant, then the law implied that the parties intended that a reasonable price should be paid for them; and the plaintiff must call a witness, or witnesses, who know the nature of such goods, and their value, and can swear that they believe them reasonably to be worth a certain price or sum.¹⁵

§ 718. **Defenses.**—Under the general issue, the defendant may prove any matter which shows that the plaintiff never had a cause of action, and also most matters in discharge of the action.¹⁶ He may show that the action was commenced too soon, that the goods were sold at a certain credit, and that the credit had not expired at the time the action was commenced.¹⁷

§ 719. **The damages.**—In diminution of the damages, however, the defendant, even in an action on an express contract for a certain price, may prove that the goods are inferior in quality to what he had contracted for, and the plaintiff can then only recover on a quantum meruit.¹⁸ And where the defendant proved that a machine, for the price of which the action was brought, was made by the plaintiff under a con-

12—Bruce v. Pearson, 3 Johns., 534.

13—Downer v. Thompson, 2 Hill, 137.

14—Startup v. McDonald, 2 Man. & G., 395.

15—1 Archbold's Nisi Prius, 157.

16—See, *ante*, § 192.

17—Galloway v. Holmes, 1 Doug. Mich., 330. But it is no defense to an action for the price of goods sold and

delivered to show that plaintiff made the sale with intent to cheat and defraud some third person: Cool v. Snover, 38 Mich., 562.

18—Cousins v. Padden, 2 C. M. & R., 547. But it has been held that if there was a specific price agreed on, the defendant should give notice of his intended defense: Basten v. Butter, 7 East., 479.

tract that if it did not work, nothing should be paid for it; and that in fact it could not be made to work, and was wholly useless to him; this was holden to be a good defense to the action, altogether, although the engine had not been returned; and it was holden that the plaintiff was not entitled to damages upon a quantum meruit, without showing some implied contract resulting from the defendant's conduct or dealing with the goods.¹⁹ So, where cinq foin seed was sold, warranted to be new growing seed, and in an action for the price the defendant proved that he had sown part, and sold the remainder; and that the whole proved unproductive, and not worth anything, and that those to whom he sold it refused to pay for it; the court held this to be a good defense to the action altogether, although it appeared that the defendant, before he sowed or sold the seed, was told by a third person that it was not good new growing seed, and did not answer the warranty, and the defendant did not inform the plaintiff of it, or offer to return the said seed.²⁰

So, in all actions for goods sold and delivered with a warranty, as well as for goods agreed to be supplied according to a contract, it is competent for the defendant to show how much less the subject of the contract was worth by reason of a breach of the contract by the plaintiff.

The question whether a party, who has contracted to deliver a certain quantity of any article, can, where the whole has not been delivered, maintain an action for the part delivered, has been decided both for and against maintaining the action, in the state courts. In England, the cases are in favor of maintaining the action, although the contract has not been performed by a delivery of all the property which was contracted to be delivered. The courts have held that the plaintiff cannot bring an action until the whole quantity has been delivered, or until the time for the delivery of the whole has arrived.²¹ When there is an entire contract to deliver a large quantity of goods, within a specified time, and the seller delivers part, he cannot, before the expiration of that time, bring

19—Grundsels v. Lamb, 1 M. & W., 352. 21—Waddington v. Oliver, 2 Bos. & P. N. R., 61.

20—Poulton v. Lattimore, 9 B. & C., 259.

an action to recover the price of that part delivered, because the purchaser may, if the vendor fail to complete his contract, return the part delivered. But if he retain the part delivered, after the seller has failed in performing his contract, the latter may recover the value of the goods which he has so delivered.²² The supreme court of this state, in accordance with these cases, held that although a contract for the sale of goods be entire, and the seller deliver only a part of the goods bargained for, yet if the vendee retain such part, the vendor may recover the value of the part retained in an action for goods sold and delivered.²³ In all such cases, the declaration must be on the common counts, and not on the special contract. The defendant may reduce the plaintiff's claim by showing any damages he may have sustained by the plaintiff's failure to fulfill his contract, and thus substantial justice may be done without subjecting the defendant to the necessity of bringing a cross action.²⁴

§ 720. Husband's liability for goods furnished to wife.—

Under this count, a recovery is sometimes sought against a husband or father, for goods furnished to a wife or child. The liability of a husband for the contracts or acts of his wife, and of a father for those of his child, except as governed by statute, are determined upon the principles of agency. If the circumstances are such as to fairly indicate that the husband has authorized the wife to purchase goods on his account the husband will be liable to pay therefor.²⁵

The husband, by common law, was liable for the debts of the wife contracted by her before marriage, and therefore for goods sold and delivered to her before marriage; but this is changed by statute.²⁶ The liability of a husband for goods supplied to his wife depends upon whether she is his agent for the purpose of binding by contracts for goods supplied to her, which is a question for the jury to determine upon the facts of the case; and in determining that question, the extravagant nature of her orders is a matter to be taken into

22—Oxendale v. Wetherel, 9 B. & C., 386; Keegan v. Smith, 5 *Ibid.*, 378.

23—Clark v. Moore, 3 Mich., 55; Wilson v. Wagar, 26 Mich., 452.

24—Bowker v. Hoyt., 18 Pick., 555.

25—C. L., § 4487 makes parent and child, being of sufficient ability, each liable for support of the other when that other is unable to maintain himself.

26—C. L., §§ 8690-8693.

consideration, as showing that she had no such authority.²⁷ In an action for goods supplied to a married woman, the proper question to leave to the jury is, not simply whether the goods were necessaries suitable to the station in life of the party but whether upon the facts proved the wife had authority, express or implied, to bind the husband by her contracts.²⁸

The general rule is, that the wife cannot bind her husband by her contract except as his agent. There are, however, cases in which a jury may infer such agency. In the cases of orders given by the wife in those departments of her husband's household which she has under her control, the jury may infer that the wife was the agent of her husband, till the contrary appear. So, for such articles as are necessary for the wife such as clothes, if the order is given by the wife, and she is living with her husband and nothing appears to the contrary, the jury do right by inferring the agency; but if the order is excessive in point of extent, or if, when the husband has a small income, the wife give extravagant orders, these are circumstances from which the jury would infer that there was no agency.²⁹

27—Lane v. Ironmonger, 13 M. & W., 368.

28—Seaton v. Benedict, 5 Bing., 28, 30. The wife is *prima facie* the agent of the husband in managing the affairs of his household, and in doing those things necessary to the comfort of married and domestic life, as to hire servants and to purchase those articles necessary for the use and convenience of the family in accordance with the husband's means and station in life: Snyder v. People, 26 Mich., 106, 109; 1 Parsons on Cont., 288; Pickering v. Pickering, 6 N. H., 124; Felker v. Emerson, 16 Vt., 653.

29—Freestone v. Butcher, 9 C. & P., 643, 647. A wife is not permitted to purchase, nor is a tradesman authorized to furnish articles to the wife, on the credit of the husband, which are above the means of the husband, or his situation in life. If such articles are furnished to her without his consent or knowledge, he will not be liable to pay for them: Montague v. Benedict, 5 B. & C., 631; Seaton v. Benedict, 5 Bing., 28.

A tradesman supplies goods to the wife at his peril when the husband is guilty of no neglect of duty in the premises, and when there can be no necessity for her purchasing on his credit at all. And a husband who suitably supplies his wife with necessaries or with money to purchase them, will not be held liable under a presumption of authority or of an implied agency, for goods purchased by her on his credit, without his knowledge or consent, of one with whom he had previous dealings, although the goods be of the character of necessaries. In proving what is a reasonable expenditure for one's family, the income and capacity of the husband to earn and produce is as important a subject of inquiry as the amount of property possessed. In determining what are necessaries for the wife, evidence of the style of living and expenditure of the circle in which he introduces her and where he expects her to find her associates, is pertinent: Clark v. Cox, 32 Mich., 204. Necessaries, besides board and lodging, are such articles as com-

The objection that credit was given to the wife alone means that it was given to her to the exclusion of her husband's liability, and the circumstance that the goods were booked to her alone, but in her marriage name as the defendant's wife, is not sufficient to show this; on the contrary, the fact that she was known by the plaintiff to be a married woman and supposed to be the defendant's wife, is rather *prima facie* evidence that credit was given to her husband.³⁰

It is clear that a husband is obliged to maintain his wife, and may by law be compelled to find her necessities, as meat, drink, clothes, physic, etc., suitable to the husband's degree, estate or circumstances.³¹

port with the wife's situation in life and her husband's fortune, and are usually worn or possessed by persons in similar conditions of life: 2 Bright on Husband and Wife, 7. The law is, that the husband is bound to provide his wife with necessities suitable to her situation and condition in life; and if she contracts debts due for them during cohabitation, he is obliged to pay those debts, but for anything beyond necessities he is not chargeable. He is bound by her contracts for ordinary purchases from a presumed assent on his part. But if his dissent be previously made known, the presumption of his assent is rebutted. He may still be liable, though the seller would be obliged to show, at least, the necessity of the purchases for her comfort: 2 Kent's Com., 9 ed., 146; Ogden v. Prentice, 33 Barb., 164. And that the husband neglected or refused to furnish them: Keller v. Phillips, 40 Barb., 390; Therlott v. Baglioli, 9 Bosw., 578.

30—Jewsbury v. Newbold, 40 Eng. Law & Eq., 518. If the wife has a separate estate or income, and the tradesman furnished goods to her on her separate credit, he cannot subsequently charge the husband with the articles and recover the price of him, even though they may be necessities, and the wife be living with her husband: Bently v. Griffin, 5 Taunt., 356; Stammers v. Macomb, 2 Wend., 454; Leggat v. Reed, 2 C. & P., 16; Tillman v. Shackleton, 15 Mich., 453. A creditor for necessities furnished to the wife can only sue the

husband in her right, and can be in no better condition to complain of him than she is: Crittenden v. Schermerhorn, 39 Mich., 661. A party who without authority from the husband loans money to the wife, knowing it to be for her private use, and concealing the fact at her request from her husband, cannot recover the money of him. A wife can not borrow money on her husband's credit or secretly on his account with an understanding that the transaction shall be concealed from him: Franklin v. Foster, 2 Mich., 75. And where a wife carries on a boarding house of which she has the sole management, and exclusively on her own account, although with the knowledge and assent of her husband, it seems that she alone and not her husband is liable for supplies purchased by her on credit for the use of her house, the purchases being on her credit: Tillman v. Schackleton, 15 Mich., 447. But where a woman purchasing in a store of one who knows that she is a married woman and living with her husband, goods suitable for the ordinary family use, does not affirmatively claim to be buying upon her own account, the natural inference would be that she was buying on her husband's account, and for the use of the family, and in the absence of any express agreement she would not thereby render herself individually liable for them: Powers v. Russell, 26 Mich., 179.

31—Howe v. North, 69 Mich., 272; 37 N. W., 213.

§ 721. Effect of separation between husband and wife.—Adultery of the wife during cohabitation will not destroy the presumption of the law of his assent to all contracts made by the wife for necessities,³² But if the husband turn away his wife on account of her having committed adultery, he will not be liable for necessities furnished her.³³

In all actions for necessities furnished the wife in cases of separation, the plaintiff must show affirmatively that the separation took place in consequence of his misconduct. It is not enough that it appear that there were quarrels and personal conflicts between them, unless it be shown that the husband was the offending party.³⁴

§ 722. Effect of divorce.—After a sentence of divorce ab initio, the liability of a husband for the debts of his wife does not continue.³⁵ But a husband separated from his wife by a divorce a mensa et thoro, for adultery on his part, with a decree for alimony, is liable for necessities supplied to his wife, if he omit to pay the alimony, or maintenance under a separation deed, etc.³⁶

And when a wife dies, although living separate from her husband, he is bound to provide her with a funeral at a reasonable expense; and if he does not do so, any person who voluntarily employs an undertaker and pays him for performing such a funeral, is entitled to recover the sum so expended from her husband, in an action for money paid.³⁷

In this connection it may be noticed that in relation to the liability of the husband for the torts of the wife, it is now provided by statute that "Executions issued upon judgments rendered against husband and wife in any suit brought against them to recover damages for any tort or wrong committed by

32—1 Selw. N. P., 230. That is, if he continues to cohabit with her.

33—*Ibid.*, 278; Hardie v. Grant, 8 C. & P., 512; Manwairing v. Sands, 1 Strange, 706; Harris v. Morris, 4 Esp. 41. A husband's obligation to support a wife apart from him can only arise from his turning her out of his home, or being guilty of such misconduct as would justify her in leaving: Randall v. Randall, 37 Mich., 563; Crittenden v. Schermerhorn, 39 Mich., 661; Page v. Page, 51 Mich., 89; 16 N. W., 245; McCutcheon

v. McGahay, 11 Johns., 281; Blowers v. Sturtevant, 4 Denio, 46; Hancock v. Merrick, 10 Cush., 41.

34—Blowers v. Sturtevant, 4 Denio, 46.

35—Anstey v. Manners, Gow., 10.

36—Hunt v. DeBlaquiere, 5 Bing., 550; Nurse v. Craig, 2 B. & P., N. R., 148.

37—Sears v. Giddey, 41 Mich., 590; 2 N. W., 917; Gallaway v. McPherson's Estate, 67 Mich., 546; 35 N. W., 114; Ambrose v. Kerrison, 1 J. Scott, 776.

the wife, shall be levied on and satisfied from the property of the wife only, nor shall the property of the husband be taken in satisfaction of any such judgment or execution; nor shall he be liable for the payment of any such judgment.”³⁸ And another section provides that “No husband who shall be joined as defendant with his wife in any suit or action to recover damages for any tort or wrong committed by the wife, shall be arrested or imprisoned upon any process issued in such cause, or upon any execution or final process issued upon any judgment in any such cause, or on any process or proceeding founded upon any such judgment.”³⁹

§ 723. Cohabitation, though without marriage—effect of.—

If a man allows a woman to use his name, and pass for his wife, he will be bound to pay for goods furnished to her, even by a man who knew that the parties were not married.⁴⁰ But although a man is conclusively liable for necessities supplied to a woman while he is living with her as his wife, yet where they have separated, he is not liable for necessities supplied to her on the ground that he has lived with her, and represented her as his wife, if he can show that in point of fact they were not married.⁴¹

Where a man who had for some years cohabited with a woman who passed for his wife, went abroad, leaving her and her family at his residence in the country, and died abroad, it was held that the woman might have the same authority to bind him by her contracts for necessities as if she had been his wife; but that his executor was not bound to pay for any goods supplied to her after his death, but before notice of it had been received.⁴²

§ 724. Liability of parent for goods furnished to infant child.—A husband is not bound to maintain his wife's chil-

38—C. L., § 10352. A husband is not responsible for his wife's carelessness or negligence, unless she was acting under his direction, or with his knowledge and assent; Ricci v. Mueller, 41 Mich., 214; 2 N. W., 23. And there is no occasion for joining him in an action for her tort. Still such joinder can do no harm and is not error. Weber v. Weber, 47 Mich., 571; 11 N. W., 389; Burt v. McBain, 29 Mich., 262-3.

39—C. L., § 10552. Burt v. McBain, 29 Mich., 260.

40—Watson v. Trekeld, 2 Esp., 637; Ryan v. Sams, 12 Q. B., 460.

41—Munro v. DeChemant, 4 Camp., 215; but see, Ryan v. Sams, 12 Ad. & E., N. S., 460.

42—Blades v. Free, 9 Barn. & C., 167; Blades v. Free, 4 M. & R., 282.

dren by a former husband.⁴³ Nor would the child be liable on an express or implied promise, made during minority, to pay for necessities furnished by his stepfather.⁴⁴ No promise will be implied against the stepfather to pay for the services of the stepchild.⁴⁵ While it is true that there are many authorities to the effect that this infant child cannot, without his authority, bind the father even for necessities,⁴⁶ still the rule as generally enforced in this country does hold the father responsible for "necessaries" furnished the child and which the father has not, and does not stand ready to furnish.⁴⁷

The moral obligation which a father is under to provide for his child imposes on him no liability to pay the general debts incurred by the child; and he is not so liable unless he has given the child authority to incur them, or has contracted to pay them.

Where a minor leaves his father's house voluntarily, for the purpose of making his fortune in the world, or to avoid domestic discipline and restraint, the father is under no obligation to pay for his support.⁴⁸

USE OF COMMON COUNTS IN ACTIONS FOR WORK, LABOR AND MATERIALS.

§ 725. In general.—If a plaintiff, declaring on the common count for work and labor, has also a demand for materials furnished for the same for the defendant, a claim for such materials should be made in the count.¹

43—*Tubb v. Harrison*, 4 Term. R., 118; 47—*Tyler v. Arnold*, 47 Mich., 564; *Cooper v. Martin*, 4 East., 76. See, *Staal v. Grand Rapids & I. Ry. Co.*, 57 Mich., 240; 23 N. W., 795. The statute, C. L. § 4487 extends only to relatives by blood: *Gay v. Ballou*, 4 Wend., 403. See, *Clinton v. Lanning*, 61 Mich., 359; 28 N. W., 125.

44—*Sharp v. Cropsy*, 11 Barb., 224.

45—*Sword v. Keith*, 31 Mich., 247. See also, *Thorpe v. Bateman*, 37 Mich., 68.

46—*Mortimer v. Wright*, 6 M. & W. 482; *Shelton v. Springelt*, 20 Eng. L. & E., 281; *Gordon v. Potter*, 17 Vt., 350; *Hunt v. Thompson*, 3 Scam., 180; *Finch v. Finch*, 22 Conn., 411. See, also, 1 *Raymond v. Loyl*, 10 Barb., 483; *Chilcott v. Trimble*, 13 Barb., 502.

47—*Angell v. McLellan*, 16 Mass., 28. 1—*Andre v. Harden*, 32 Mich., 324.

Where a party performs labor and services for another without his knowledge or request, there is, of course, no express promise to pay therefor, and none can be implied, and he cannot recover therefor, even though the other may be benefited by such services: *Fitch v.*

If a claim for materials found, be not mentioned in the declaration, the plaintiff cannot recover for them.² "If you employ a man to build a house on your lands, or to make a chattel with your materials, the party who does the work has no power to appropriate the product of his labor and your materials to any other person; he bestowed his labor, at your request, on your materials; he may maintain an action against you for work and labor; but if you employ another to work up his own materials in making a chattel, then he may appropriate the product of that labor and materials to any other person. The right to maintain an action rests in him during the progress of his work; but when the chattel has assumed the character bargained for, and he has completed it, the party employed may maintain an action for goods sold and delivered, or (if the employee refuse it) a special action on the case for such refusal; but he cannot maintain an action for work and labor, because the labor was bestowed on his own material and for himself, and not for the person who employed him."³ But if the work has been performed upon materials still in the possession of the workman, it is not necessary that he should first deliver them to his employer, before he commences an action for the work and materials; but after he has given his employer a full opportunity to inspect and examine the work, he may sue for the amount of it, and still retain the thing on which the work has been performed, until payment,⁴ even although it be in fact the property of his employer.⁵ The obligation to deliver and to make payment in such cases are, as to performance, cotemporaneous.

When the claim is for fees, wages, or work and labor in a particular profession or business, etc., it is usual to state the nature of the work done, and the materials used, yet this is not

Newberry, 1 Doug. Mich., 17; and see, *St. Jude's Church v. Van Denberg*, 31 Mich., 287. And where plaintiff agreed to manufacture certain articles for defendant out of materials belonging to defendant, and without any request from plaintiff or understanding that he was to be paid for his labor, assisted plaintiff in the manufacture, *held*, that defendant could not claim payment for his assist-

ance, and that the law would not imply any agreement to pay him: *Lange v. Kaiser*, 34 Mich., 317.

2—*Heath v. Freeland*, 1 M. & W., 543.

3—*Atkinson v. Bell*, 8 B. & C., 283; see, *Hosmer v. Wilson*, 7 Mich., 294.

4—*Planche v. Colburn*, 8 Bing., 14.

5—*Hughes v. Tenny*, 5 M. & W., 183.

necessary, and the common count for work and labor, and materials for the same is sufficient.⁶

§ 726. **In case contract not fully performed.**—When a person is hired to labor for a fixed time, and leaves the service before the end of it, without reasonable excuse, and without the agreement of the other party, he loses his right to sue upon the contract for the time he may have worked. “Where a party fails to comply substantially with an agreement, unless it is apportionable, the rule is well settled that he cannot sue upon the agreement, or recover upon it at all. And under strict common law rules he was remediless. But the doctrine has now grown up, based upon equitable principles, that where anything has been done from which the other party has received substantial benefit, and which he has appropriated, a recovery may be had, upon a quantum meruit, based upon that benefit. And the basis of this recovery is not the original contract, but a new implied agreement, deducible from the delivery and acceptance of some valuable service or thing.”⁷ The employer cannot, by his misconduct, compel a laborer to quit him before the expiration of the term of service, or dismiss him without sufficient cause, and then refuse to pay him. A person prevented from performing a labor contract by the wrongful act of the employer may recover on the quantum meruit what his services were reasonably worth so far as rendered, although in excess of the contract price.⁸ If the contract is terminated by the employer wrongfully, and the contractor desires to recover for profits he might have earned on his contract he must declare specially on the contract. But if he elect to bring his action for work and labor generally, he cannot recover for profits upon the executed part of the work.

6—Clark v. Mumford, 3 Camp., 37. A plaintiff who has annexed the common counts to a special count upon a contract of employment, may at the trial abandon his special count and seek to recover on his common count: Wyman v. Crowley, 34 Mich., 84. Suit on the quantum meruit lies where the mode of performing an unapportionable contract is so changed that the contract price for what has been done cannot be determined: Boyce v. Martin, 46 Mich., 239; 9 N. W., 265.

7—Allen v. McKibben, 5 Mich., 449; Eaton v. Gladwell, 121 Mich., 444; 80 N. W., 292.

8—Hemmlinger v. Western Assurance Co., 95 Mich., 355; 54 N. W., 949; Wildey v. School District, 25 Mich., 419; Howell v. Medler, 41 Mich., 641; 2 N. W., 911. See, also, Mooney v. York Iron Co., 82 Mich., 263; 46 N. W., 376; Cadman v. Markle, 76 Mich., 448; 43 N. W., 315.

In such cases, the rule of damages is the actual value of what has been done under the contract.⁹

Where the plaintiffs declared on a contract by which they had engaged to transport a number of horses for the defend-

9—Clark v. The Mayor, etc., 4 Comst., 238, 343; see Kearney v. Doyle, 22 Mich., 294; McQueen v. Gamble, 33 Mich., 344; Burrell v. New York & S. S. S. Co., 14 Mich., 34. In the case of a contract for a certain amount of labor, or for work for a specified period, when the labor is to be performed on the material or property, or in carrying on the business of the defendant, or when the defendant has otherwise accepted or appropriated the labor performed, if the defendant prevent the plaintiff from performing the whole, or wrongfully discharge him from his employment, or order him to stop the work, or refuse to pay as he had agreed as payments become due in the progress of the work, or disable himself from performing, or unqualifiedly refuse to perform his part of the contract, the plaintiff may, without further performance, elect to sue upon the contract and recover damages for the breach, or treat the contract as at an end, and sue in general assumpsit for the work and labor actually performed. And in such cases he may, it would seem, under the common *indebitatus* count, recover the contract price, where the case is such that the labor done can be measured or apportioned by the contract rate; or whether it can be so apportioned or not he may under the *quantum meruit* recover what it is reasonably worth. But in all such cases, the defendant having appropriated and received the benefit of the labor (or, what is equivalent, having induced the plaintiff to expend his labor for him, and, if properly performed according to his desire, the defendant being estopped to deny the benefit), a duty is imposed upon the defendant to pay for the labor thus performed. This duty the law enforces under the fiction of an implied contract, growing out of the reception or appropriation of the plaintiff's labor. But where in such cases the value of the work could not be apportioned or measured by the contract price, the fair value of the work would necessarily constitute the true measure of

damages: See, Boyce v. Martin, 46 Mich., 239; 9 N. W., 265.

Similar rules would apply to contracts for furnishing materials, and for the sale and delivery of personal property, when, after part of the materials or property has been received and appropriated by and vested in the defendant, he has prevented the plaintiff from performing, or authorized him to treat the contract as at an end, on any of the grounds above mentioned.

But where the defendant has employed the plaintiff to perform labor upon materials to be furnished by the plaintiff; as, to construct and deliver an engine to defendant at a stipulated price for the engine when completed; and before the completion and delivery of the article the defendant refuses to proceed with the contract, and notifies the plaintiff that he will not accept the article, the plaintiff cannot recover for his labor on the common count; in such case the plaintiff's labor and material are all his own, and in no sense belong to the defendant before delivery. Here, the plaintiff's remedy is to declare on the special agreement, and claim damages for the breach of it, or for being wrongfully prevented from performing it. And he will be entitled to recover the actual damages which he has suffered by defendant's refusal to accept; or, in consequence of being prevented from proceeding with the contract; and these damages may be more or less than the value of the labor. In such cases defendant's refusal authorizes an immediate action by plaintiff on the contract; he is not required to complete the work and tender the article to defendant before suing. So, a refusal to make any payment, which by the contract is to be made during the progress of the work, has the same effect: Hosmer v. Wilson, 7 Mich., 294. But one who by his contract is to receive payments in something else than money, cannot, where he has broken his contract, sue upon the *quantum meruit* and recover the value of the labor performed

ants in a canal boat to Albany for fifty-five dollars; the horses were so restive after being put on the boat that it was impossible to keep them on board, and they were taken off. The justice charged that the plaintiffs having shown a readiness and offer to perform the contract, were entitled to recover the contract price. The court held the rule of damages to be the loss or injury sustained by the party ready and willing to perform, and not the price engaged to be paid on actual performance. "Here we have a contract to sell labor and services. On the vendee declining them, the vendor sells them to another, or converts them to his own use; in other words, he goes about his business in another direction, which fetches him the same or more, perhaps, than the agreed price, which has failed. This is necessarily so, unless the vendor of the labor choose to be idle for the supposed length of time which performance would have demanded. But that he had no right to do. A mason is engaged to work for a month, and tenders himself and offers to perform, but his hirer declines the service. The next day the mason is employed at equal wages elsewhere for a month. Clearly his loss is but one day; and it is his duty to seek other employment. Idleness is in itself a breach of moral obligation. But if he continue idle for the purpose of charging another, he superadds a fraud, which the law would rather punish than countenance."¹⁰

USE OF THE COMMON COUNTS IN ACTIONS FOR MONEY LENT.

§ 727. **In general.**—Where a person lends money to the defendant, or to another on his account, and at his request, the law presumes an undertaking on his part to repay it, and assumpsit or debt will lie against him for the amount.¹¹ Money lent to the defendant himself may be recovered under this count, though delivered to a third person at the defendant's request.¹² But when the plaintiff declared for money lent

under the contract, and thereby convert into cash payment what, according to his own agreement, is payable in something else; the express contract is not to be disregarded in such a case: *Roberts v. Wilkinson*, 34 Mich., 129.

¹⁰—*Shannon v. Comstock*, 21 Wend., 457.

¹¹—*Lamine v. Dorrell*, 2 Lord Raym., 1216. One who lends money to be used to make a "corner" in wheat cannot recover it by any legal measures: *Raymond v. Leavitt*, 46 Mich., 447; 9 N. W., 525.

¹²—*Bull v. Sibbs*, 8 Term. R., 328.

by him to a third person at the defendant's request, the declaration was held bad, and the judgment was arrested; for the word "lent" was a technical term, and implied a loan to the third person, and he alone was the debtor.¹³ A declaration against the husband for money lent to his wife, at his request, is good.¹⁴

In general, there must have been a loan of money to support this count.¹⁵

A lender who has received goods as a security for the repayment of a loan, may recover in this action, without proving that he has returned or tendered the goods.¹⁶

If a creditor borrow money of his debtor, he will not be prevented from setting off the debt due to himself, even though he expressly promise to pay the sum lent to him by his debtor.¹⁷

USE OF COMMON COUNTS IN ACTION FOR MONEY PAID.

§ 728. **In general.**—This action is maintainable in any case in which the plaintiff has paid money to a third person at the request, express or implied, of the defendant, with an understanding, express or implied, to repay it, and it is not necessary that the defendant should have been relieved from a liability by the payment.¹⁸ Money advanced by one man for another, without an express or implied authority from the latter, or his sanction after it is advanced, will not render the latter liable.¹⁹ In general, there must be an actual payment of money.²⁰ If the plaintiff has given a bond for the debt of the defendant, it is not sufficient,²¹ unless money has been paid on it before the commencement of the suit.²² But giving a negotiable note may be equivalent to a payment of money,²³ as when it is received in payment;²⁴ so payment of a money

13—Marriot v. Lister, 2 Wills, 141.

14—Stevenson v. Hardie, 2 W. Bl. R., 827; Stephenson v. Hardy, 3 Wills., 388.

15—Harrington v. McMorris, 5 Taunt., 228.

16—Lawton v. Newland, 2 Stak., 73.

17—Lechmere v. Hawkins, 2 Esp., 625.

18—Brittain v. Lloyd, 14 M. & W., 762. And the omission of the words, "to the use of," in the common count for money paid to the use of the defendant, is a mere clerical error which may be

corrected on trial: Brown v. McHugh, 35 Mich., 50.

19—Rensselaer v. Reid, 5 Cow., 587.

20—Power v. Butcher, 10 B. & C., 329; Cuning v. Hackley, 8 Johns., 202.

21—Cumming v. Hackley, 8 Johns., 202.

22—Maxwell v. Jameson, 2 B. & A., 51.

23—Cumming v. Hackley, 8 Johns., 202.

24—Barclay v. Gooch, 2 Esp., 571.

debt as surety or endorser, by conveying land, which is received at the time of payment, will support the count for money paid.²⁵ When A, being in want of some goods, went to B, accompanied by C, and ordered them, C saying in A's presence that he would pay the money if A did not, it was held that C thereby acquired no authority to pay the money on the default of A, although the agreement was void by the statute of frauds; and that having paid it, he was entitled to recover it back from A, the authority to pay not being shown to have been countermanded. It was precisely the same as if A had requested C to pay the money.²⁶ So when a husband goes abroad and leaves his wife who dies in his absence, a third person who voluntarily pays the expenses of her funeral may recover from the husband the money so paid, as the law will imply a request.²⁷ So the common money counts are sufficient in an action by the county to recover for money paid out for maintenance of poor or insane persons, as provided in Comp. Laws 1897, §§ 1921 and 4494.²⁸ Whenever one person pays money to protect his own interests, yet which it was the duty of another to pay instead, a request to make such payment will be implied.²⁹

§ 729. Payment by sureties.—A surety who pays the whole sum for which he was jointly liable, may recover the whole against the principal, or a proportionate part against his joint surety.³⁰ A surety may recover contributions from his co-sureties, according to the number of them, without reference to the number of the principals.³¹ But he cannot sue his co-surety until he has paid, on account of the principal debt, a sum greater than he would be obliged to when the entire liability should be fairly apportioned among them. The calculation is made upon the aliquot share in reference to the number of sureties, although one be insolvent; so if there be three

25—Ainslee v. Wilson, 7 Cow., 622. Mich., 291; Crane v. Grossman, 27

26—Alexander v. Vane, 1 M. & W., Mich., 443; Brown v. McHugh, 35 Mich., 511.

27—Jenkins v. Tucker, 1 H. Bla., 30.

28—Superintendent of the Poor v. Rabbitt, 99 Mich., 60; 57 N. W., 1084. 30—Toussaint v. Martinant, 2 Term R., 105. Payment of money by a surety

29—Bates v. Lane, 62 Mich., 132; 28 for his principal, raises an implied promise to refund it on demand: Lee v. N. W., 753. See Bay City Bank v. Wisner, 38 Mich., 86; Mitchell v. Lindsay, 94 Mich., 176; 54 N. W., 42; Chambers, 43 Mich., 150; 5 N. W., 57. Curtis v. Flint & P. M. Ry. Co., 32 31—Kemp v. Finden, 12 M. & W., 421.

sureties for a debt of three hundred dollars, and one pay the whole, he can recover only one hundred dollars from his co-surety, although the third be unable to contribute.³² When there are several co-sureties, one of them who has taken from the principal a collateral security, will still be entitled to sue his co-sureties on paying more than his proportion.³³

§ 730. **Contribution in case of torts.**—This action will not lie for contribution or indemnity against a person jointly engaged with the plaintiff in doing an illegal act by which the plaintiff is put to expense.³⁴ But this rule does not apply to a case where the party seeking contribution or indemnity was a tortfeasor only by inference of law, but is confined to cases where it must be presumed that the party knew that he was committing an unlawful act; or the act is obviously of an illegal character. A promise to indemnify against a trespass is valid, unless the promisor show that the promisee knew the act to be a trespass, or illegal.³⁵

USE OF COMMON COUNTS IN ACTIONS FOR MONEY HAD AND RECEIVED.

§ 731. **In general.**—When a defendant receives money which belongs to the plaintiff, or which, in equity or justice, he should not retain, and which ought to be paid to the plaintiff, this action may be brought against him for the amount of it.³⁶

32—*Ibid.*, and *Brown v. Levy*, 6 B. & C., 697.

33—*Done v. Walley*, 2 Exch. R., 198.

34—*Merryweather v. Nixan*, 8 Term R., 186.

35—*Stone v. Hooker*, 9 Cow., 154; see, *Avery v. Halsey*, 14 Pick., 174.

36—*Stranton v. Rastall*, 2 Term R., 370; *Blackwood v. Brown*, 34 Mich., 4. When one man has in his hands money which, according to the rules of equity and good conscience, belongs to and ought to be paid to another, an action for money had and received is the proper remedy for its recovery. It is not necessary that there should be any privity between the parties or any express promise to pay, for the law implies a promise where justice imposes a duty; *Beardslee v. Horton*, 3 Mich., 563, 564. This action does not depend on any pre-

liminary agreement, but upon the receipt of money by one, which he is bound to pay to another: *Spencer v. Towles*, 18 Mich., 11. It is essentially an equitable action, founded upon all the equitable circumstances of the case between the parties; and if it appear, from the whole case, that the defendant has in his hands money which, according to the rules of equity and good conscience, belongs or ought to be paid to the plaintiff, he is entitled to recover: *Moore v. Mandelbaum*, 8 Mich., 448. Thus, where an agent to sell property purchased it of his principal, concealing important facts, so that the transaction amounted to a fraud upon the principal, and afterwards sold the property at a higher price, it was held that the principal might recover from him in this action the difference between the price paid by

In general, to sustain this action, it must appear that money was received, and, therefore, evidence of a transfer of stock merely will not maintain this count. A bill of exchange or negotiable note of a third person, given and received in satisfaction of a draft, will support this count.³⁷ But, as between the maker and payee, the giving of a note is not a payment authorizing a recovery in this action on failure of consideration,³⁸ unless given by a surety and received as payment.³⁹ It must appear that it was received by the defendant on his own account, and not as the agent or servant of another, by whom he was employed to receive it; and that it was received for the use of the plaintiff, or such facts must be proved as show that the receipt by the defendant was in law a receipt to the use of the plaintiff.⁴⁰

There need be no privity of contract.⁴¹ Money paid by mistake is recoverable under this count.⁴² A creditor receiving from his debtor money known by him to be the property of a third person is liable to such third person under this count,⁴³

§ 732. Money received from the plaintiff.—If a person give money to another, to apply to a particular purpose for him,

the agent and the price at which he sold it: *Ibid.* So, where an agent receives money which he conceals from the principal: *Heimbach v. Weinberg*, 18 Mich., 48. So where a party receives the plaintiff's money on a void contract, as on an oral agreement to sell land to plaintiff, the plaintiff may recover back the money: *Scott v. Bush*, 29 Mich., 523. "This action is peculiarly equitable in its nature and lies whenever an express or implied trust to pay over money has been violated": *Catlin v. Birchard*, 13 Mich., 110; *Collar v. Collar*, 75 Mich., 414; 42 N. W., 847; *Tanner v. Page*, 106 Mich., 156; 63 N. W., 993.

The count for money had and received clearly includes any dealings whereby money due to the plaintiff came into the hands of the defendant: *Freehling v. Ketchum*, 39 Mich., 299.

An action for money had and received will lie against an employer for moneys retained by him out of the wages of his workmen under an agreement by

which he was to so retain and pay the same to plaintiff in satisfaction of debts owing by the workmen to plaintiff: *Donkersly v. Levy*, 38 Mich., 54.

37—*Rew v. Barber*, 3 Cow., 272.

38—*Van Ostrand v. Reed*, 1 Wend., 424.

39—*Cumming v. Hackley*, 8 Johns., 202.

40—*Archbold's N. P.*, 2d ed., 175; *Coles v. Wright*, 4 Taunt., 198; see the cases, *Nickodemus v. East Saginaw*, 25 Mich., 456; *Scott v. Bush*, 26 Mich., 418; *Barnum v. Stone*, 27 Mich., 335-6.

41—*Walker v. Conant*, 65 Mich., 198; 31 N. W., 786.

42—*Lane v. Boom Co.*, 62 Mich., 63; 28 N. W., 786; *McKay v. Coleman*, 85 Mich., 60; 48 N. W., 203; *Kennedy v. Murphy Iron Works*, 91 Mich., 500; 51 N. W., 1120. See further, *Wheeler v. Hatheway*, 58 Mich., 77; 24 N. W., 780; *Walker v. Conant*, 65 Mich., 198; 31 N. W., 786.

43—*Bearce v. Fahrnow*, 109 Mich., 315; 67 N. W., 318.

and the other neither apply it nor return it, the owner may recover the amount from him in this action:

§ 733. **Money received on plaintiff's account.**—If an agent receives money for his principal, the latter may recover the amount in this action. As if an officer levy money under an execution, and do not pay it over to a plaintiff or person entitled to it.⁴⁴

An action for money had and received will not lie by a creditor against a third person, in whose hands funds have been deposited by a debtor, with directions to pay them over to the creditor in extinguishment of a debt, unless there be an agreement, either express or to be implied from the circumstances of the case, by which the funds become the property of the creditor, so that the debtor loses all control over them, and is disabled from giving them another direction; unless the money be deposited with the concurrence of the creditor, expressed previous to its receipt by the agent.⁴⁵

§ 734. **Money received for property of the plaintiff.**—If a person take the property of another, in any manner not amounting to felony, and sell it, receive the money for it, and do not pay it over to the owner, the latter may waive the trespass or tort, and bring this action, to recover the money derived from the sale.⁴⁶ Where T, the owner of a certificate of deposit in the bank of L, payable to order, caused it to be endorsed payable to W, and then transmitted it to W, by mail without his knowledge or request, and it was stolen on the way, and the name of W forged upon it, after which it came to the defendant's hands, who collected the money, it was held he was liable to T, in this action for the amount.⁴⁷

44—Peabody v. Tarbell, 2 Cush., 226; Blackwood v. Brown, 34 Mich., 4. Where defendant has possession of the note of a third person belonging to plaintiff, with authority to collect interest which he does collect, an action on the common count for money had and received will lie to recover the amount so collected: Llesemer v. Burg, 106 Mich., 124; 63 N. W., 999. Again where defendant has money in his hands as the result of the execution of a trust which trust has been fully executed except the paying over of the money, it may be

recovered under the count for money had and received: Tanner v. Page, 106 Mich., 155; 63 N. W., 993.

45—Seaman v. Whitney, 24 Wend., 260.

46—Osborn v. Bell, 5 Denio, 370; Jones v. Hoar, 5 Flick., 285. One whose timber has been taken and sold by a trespasser may recover the proceeds in an action on the common count for money had and received: Nelson v. Kilbride, 113 Mich., 637; 71 N. W., 1089; see, *ante*, § 683.

47—Talbot v. Bank of Rochester, 1

§ 735. Money received by a stakeholder—lost at gaming.—

If the loser of money deposited with a stakeholder on an unlawful wager claim his deposit before it has been actually paid over to the winner, though it be after the wager has been decided, the stakeholder is bound to return it to him; and if he refuse to do so, the loser may maintain an action for money had and received, against him, to recover it.⁴⁸

And by statute it is provided that: "Any person that shall lose any sum of money, or any goods or articles of value, by playing or betting on cards, or by any other device in the nature of such playing and betting, and shall pay or deliver the same or any part thereof to the winner, the person so paying or delivering the same may sue for and recover such money in an action for money had and received, to the use of the plaintiff; and such goods or other articles of value in an action of replevin, or the value thereof in an action of trover, or in a special action on the case."⁴⁹

§ 736. Money received under a void authority.—If a person receives money under an authority which afterwards turns out to be void, the party really entitled to the money may recover it from him in this action. If an administrator or executor receive money due to his intestate or testator, and it appears

Hill, 295; Canal Bank v. Bank of Albany, *Ibid.*, 287. For other cases illustrating the use of this count see, *Martin v. Sheridan*, 46 Mich., 93; 8 N. W., 722; *Mulcrone v. American Lumber Co.*, 55 Mich., 622; 22 N. W., 67; *Blackwood v. Brown*, 34 Mich., 4; *Davis v. Gerber*, 69 Mich., 246; 37 N. W., 281; *Wood v. Kaufman*, — Mich., —; 97 N. W., 47 (Nov., 1903); *Morin v. Robarge*, 132 Mich., 337; 93 N. W., 886 (Mar., 1903).

48—*Whitewell v. Carter*, 4 Mich., 329, 331; see, *Lewis v. Miner*, 3 Denio, 103.

49—C. L., § 5929, see note to this section. Plaintiff deposited his negotiable promissory note for the amount of his bet with a stakeholder, who afterwards delivered it to the winner, the defendant, and he transferred it before due for value to another party, and the loser sued the winner for the amount of the note in an action for money had and received, and produced the note on the trial as evidence that he had paid the

note; *held*, that the plaintiff's possession of the note was not sufficient evidence alone that he had paid the note, and that he could not recover on that evidence alone: *Buckley v. Saxe*, 10 Mich., 328. The furnishing of money to another to use in betting on an election is a gaming transaction and an action for the winnings cannot be maintained: *Helber v. Schantz*, 109 Mich., 669; 67 N. W., 913. This statute has no application to money lost in betting upon elections and such money cannot be recovered: *Lassen v. Karrer*, 117 Mich., 512; 76 N. W., 73. But it seems that money lost in betting on any game of chance may be so recovered. *Lassen v. Karrer*, *supra*. For a definition of "betting" see, *Shaw v. Clark*, 49 Mich., 388; 13 N. W., 786. For a definition of "gaming" see, *People v. Weithoff*, 51 Mich., 203; 16 N. W., 442; *People v. Weithoff*, 93 Mich., 634; 53 N. W., 784.

that the supposed testator or intestate is still alive, the money may be recovered back; because the executor or administrator can have no authority whatever during the lifetime of the party.⁵⁰ So if a judgment be reversed, after payment of it or of the execution upon it, it may be recovered back in this action.⁵¹ And the action lies against the real parties plaintiffs, where the suit was prosecuted in the name of a nominal plaintiff.⁵²

§ 737. Money paid by plaintiff upon a forged instrument.—If a person discount a bill or note, and it turns out to be a forgery, he may recover the amount of the money he paid upon it, in this action, against the person to whom he paid it.⁵³ But if the man whose name is forged take up the bill or note, he cannot recover the money back from the party to whom he paid it, that party being an innocent holder for valuable consideration. So, if the drawee of a forged bill accept it, and pay it, he cannot recover back the sum from the person to whom he paid it.⁵⁴ So, if a bill be made payable at a banker's, and he, imagining the acceptance to be the genuine signature of the customer, pay it, he cannot recover back the money from the person to whom he paid it.⁵⁵

Where a banking company paid notes, on which the name of the president had been forged, and neglected for fifteen days to return them, it was held that they had lost their remedy against the person from whom the notes had been received.⁵⁶ The supreme court of the United States went beyond this, and held that if a bank receive, as genuine, forged notes, purporting to be its own, and pass them to the credit of a depositor who acts in good faith, it is bound by the credit thus given, and the notes are to be treated as cash.⁵⁷

§ 738. Money paid by plaintiff through mistake.—If a man, under a mistake, pay money which there was no ground to

50—See, *Allen v. Dundas*, 3 Term R., 125; *Scott v. Bush*, 29 Mich., 523.

51—*Sturgis v. Allis*, 10 Wend., 354; *Clark v. Pinney*, 6 Cow., 297.

52—*Magee v. Kellogg*, 24 Wend., 32.

53—*Jones v. Ryde*, 5 Taunt., 488; see, *Fuller v. Smith, Ry. & M.*, 49; *Wilkinson v. Johnson*, 3 B. & C., 428; see, *Canal Bank v. Bank of Albans*, 1 Hill, 287, 292; *Little v. Derby*, 7 Mich., 325.

54—*Price v. Neal*, 3 Burr, 1354; *Bank of Commerce v. Union Bank*, 3 Comst., 234; *Goddard v. Merchants' Bank*, 4 *Ibid.*, 147.

55—*Smith v. Mercer*, 6 Taunt., 76.

56—*President, etc., v. Salem Bank*, 17 Mass., 33.

57—*United States Bank v. Bank of Georgia*, 10 Wheat, 340.

claim in conscience, and it be a mistake in fact, and not merely of law; he may recover it in this form of action, from the person to whom he paid it.⁵⁸ So, money paid, with full means of knowledge, but under a forgetfulness of facts at the time of payment which implies absence of knowledge at that time, may be recovered in this action.⁵⁹ But if a person, with a knowledge of all the facts, pay over money to another, he cannot recover it back, because he paid it in ignorance of the law, or a misconception of it.⁶⁰

§ 739. **Money paid by plaintiff and failure of consideration.**—When money is paid for a certain consideration, if the consideration afterwards fail, the party who paid the money may recover it back, in this action.⁶¹ Thus, if money be paid for a thing, and the thing contracted for be not afterwards delivered, the money may be recovered back in this action;⁶² or if the title fail.⁶³ So, money paid on account of services to be performed, may be recovered back in this action, in case of non-performance.⁶⁴ So, this action lies to recover back money paid on a contract which has been rescinded.⁶⁵ So, to recover back part of the consideration money paid on a contract for the purchase, after the purchase money has been tendered, and a deed demanded, so as to put the vendor in default.⁶⁶ Where one agrees to convey land on the payment of money, the vendee must not only tender or pay the money, but he must demand a

58—*Burr v. Veeder*, 3 Wend., 412; *Walker v. Conant*, 65 Mich., 194; 31 N. W., 786; *Byrnes v. Martin*, 67 Mich., 399; 34 N. W., 688; *Lane v. Pere Marquette Boom Co.*, 62 Mich., 63; 28 N. W., 786; *McKay v. Coleman*, 85 Mich., 60; 48 N. W., 203; *Kennedy v. Murphy Iron Works*, 91 Mich., 500; 51 N. W., 1120. But where one pays money after investigation on a claim made in good faith cannot recover it back: *McArthur v. Luce*, 43 Mich., 435; 5 N. W., 451; *Wheeler v. Hatheway*, 58 Mich., 77; 24 N. W., 780.

59—*Kelly v. Solari*, 9 M. & W., 54; *Franklin Bank v. Raymond*, 3 Wend., 69, 74.

60—*Mewat v. Wright*, 1 Wend., 360; *Champlin v. Laytin*, 18 Wend., 407, 423; see, *Cooke v. Nathan*, 16 Barb., 342. The true ground of recovery, in

case of money paid by mistake, is that the money was paid without consideration: *Little v. Derby*, 7 Mich., 325.

61—*Child v. Pierce*, 37 Mich., 155; *Wright v. Dickinson*, 67 Mich., 580; 35 N. W., 164; *Campau v. Shaw*, 15 Mich., 226.

62—2 Saund. Pl. & Ev., 5 Am. ed., 380; *Nockels v. Crosby*, 3 B. & C., 814; *Kempson v. Saunders*, 4 Bing., 5; *Murray v. Richards*, 1 Wend., 58.

63—*Fitzpatrick v. Hoffman*, 104 Mich., 228; 62 N. W., 349.

64—*Wheeler v. Board*, 12 Johns., 363; *Briggs v. Vanderbilt*, 19 Barb., 222; *Garrison v. Akin*, 2 *Ibid.*, 26.

65—*Raymond v. Bearnard*, 12 Johns., 274; *Davis v. Strobridge*, 44 Mich., 157; 6 N. W., 205.

66—*Hudson v. Swift*, 20 Johns., 24.

conveyance, and after waiting a reasonable time for it to be made out, must present himself to receive it.⁶⁷

But this action will not lie, if the plaintiff have received any benefit from the contract under which it was paid.⁶⁸ The only remedy is by an action upon the contract.

§ 740. **Money obtained by misrepresentation or fraud.**—If money be obtained from a man by misrepresentation or fraud, he may recover it back in this action.⁶⁹ Where property was sold at auction under a description which was untrue, and calculated to entrap persons coming into the auction room, the sale was held void, and that the purchaser might recover back his deposit.⁷⁰ But the representation must be fraudulent as well as incorrect to enable the plaintiff to recover.⁷¹ So, money obtained by a fraudulent trick or artifice may be recovered back.⁷²

§ 741. **Money paid by plaintiff under compulsion.**—If a man be obliged to pay money wrongfully by compulsion, he may in general recover it back in this action.¹ Where a railway company, bound by their act to charge for carriage along their line to all persons alike, made an allowance to carriers of ten per cent., for loading and unloading, except to J. L., whom they charged and obliged to pay the full amount, it was holden that J. L. might maintain this action against the company, to recover from them the ten per cent. he was compelled to pay more than carriers.² But, if a man pay an illegal or unfounded demand, under a threat of being sued for it, he cannot recover it back in this form of action; for it is a voluntary, not a compulsory payment, inasmuch as if he had defended the action, he would not have been compelled to pay the money. The rule

67—Fuller v. Hubbard, 6 Cow., 13.

68—1 Chitty's Pl., 10 Am. ed., 355.

69—Moore v. Mandlebaum, 8 Mich., 433; Cornell v. Crane, 113 Mich., 460; 71 N. W., 878; Hicks v. Steel, 126 Mich., 408; 85 N. W., 1121; Ripley v. Case, 78 Mich., 129; 43 N. W., 1097; Schmemmann v. Rothfus, 46 Mich., 453; 9 N. W., 489.

70—Robinson v. Musgrove, 8 C. & P., 469.

71—Early v. Garrett, 9 B. & C., 928.

72—Billing v. Ries, 1 C. & M., 26;

Abbotts v. Barry, 2 Brod. & B., 369; Archer v. Champneys, 1 *Ibid.*, 289.

1—A Payment of money to a public officer in compliance with a demand accompanied by a threat of immediate enforcement is compulsory, and in no sense a voluntary payment; and when the claim is unlawful and made under color of office, an action lies for its recovery: First National Bank of Sturgis v. Watkins, 21 Mich., 483; McKee v. Campbell, 27 Mich., 497.

2—Parker v. G. W. R. Co., 7 Man. & G., 253.

of law, in such cases, is said to be, that if a party, with a full knowledge of the facts, voluntarily pays a demand urgently made on him, and attempted to be enforced by legal proceedings, he cannot recover back the money, as paid by compulsion, unless there be fraud in the party enforcing the claim, and a knowledge that the claim is unjust, and the case is not altered by the fact that the party so paying protests that he is not answerable, and gives notice that he shall bring an action to recover the money back.³

§ 742. **Money due on a contract fully performed by plaintiff.**—Where the plaintiff has fully performed a contract on his part so that all that remains to be done is the payment of money by the defendant it may be recovered under this count.⁴

§ 743. **Money paid under a moral obligation.**—If a man pays what the law would not have compelled him to pay, but what in equity and good conscience he ought to pay, he cannot recover it back. So, where a man has paid a debt which would otherwise have been barred by the statute of limitations; or a debt contracted during his infancy which in justice he ought to discharge, though the law would not have compelled the payment, yet the money being paid, it will not oblige the payee to refund it.⁵

USE OF THE COMMON COUNTS IN ACTIONS UPON ACCOUNTS STATED.

§ 744. **In general.**—An admission of a balance or acknowledgment made by one party to another, that a sum of money is due to the latter, is sufficient prima facie evidence to entitle the plaintiff to recover that sum on an account stated.⁶ But

3—Benson v. Munro, 7 Cush., 125, 131. For illustrative cases upon what constitutes an involuntary payment such as that it may be recovered see: Congdon v. Preston, 49 Mich., 204; 13 N. W., 516; McCabe v. Shaver, 69 Mich., 25; 36 N. W., 800.

4—Thomas v. Caulkett, 57 Mich., 392; 24 N. W., 154.

5—Rize v. Dickinson, 1 Term R., 286; Munt v. Stokes, 4 *Ibid.*, 561.

6—Truman v. Hurst, 1 Term. R., 42. The conversion of an open account into an account stated is an operation by which the parties assent to

a sum as the correct balance due from one to the other: White v. Campbell, 25 Mich., 468. Evidence tending to show that the parties met and settled up, and that a balance was struck and agreed upon, is admissible to prove an account stated. In an action upon an account stated only, the nature of the original transaction out of which the acknowledgment of indebtedness grew, is immaterial: Albrecht v. Gies, 33 Mich., 389. An account stated need not cover all the dealings between the parties, or dealing on both sides: Graham v. Chubb, 39 Mich., 417. The

an acknowledgment by the defendant after action brought of money being due the plaintiff, where there is no evidence of a debt or account between them having existed before the bringing of the action, is not evidence in support of this count.⁷ To support this count, there must be an acknowledgment of a subsisting debt; therefore an admission by the defendant that he had received a sum of money on account of the bankrupt, after an act of bankruptcy, but not that it was a subsisting debt, is not evidence to support this count.⁸ If the admission be merely that the defendant is indebted to the plaintiff, or indebted in some amount, without stating the sum particularly, it will not be sufficient even to recover nominal damages.⁹ The admission must be clear and unqualified.¹⁰

"It is not necessary in support of an account stated to show the nature of an original transaction or indebtedness or to give the items constituting the account. It is sufficient to prove some existing antecedent debt or demand between the parties, respecting which a balance was struck. Any admission of a balance or acknowledgment made by one party to another that a sum of money is due to the latter is sufficient prima facie evidence to entitle the plaintiff to recover under this count."¹¹

failure of a debtor to object within a reasonable time to monthly statements rendered to him amounts to an admission by him that the account is correctly stated: *Pabst Brewing Co. v. Lueders*, 107 Mich., 41; 64 N. W., 872. See *Raub v. Nisbett*, 118 Mich., 248; 76 N. W., 393. An account stated need not be in writing: *Watkins v. Ford*, 69 Mich., 357; 37 N. W., 300. A statement is not, in law, an account stated, if neither party agrees to it: *Raymond v. Leavitt*, 48 Mich., 447; 9 N. W., 525. There must be a lawful consideration to support an agreement which will support an action as upon an account stated: *Miner v. O'Harrow*, 60 Mich., 91; 26 N. W., 843. Matters entering into an account stated may be impeached for fraud or mistake: *Stevens v. Saginaw Supervisors*, 62 Mich., 579; 29 N. W., 492.

7—*Allen v. Cook*, 2 Dowl. P. C., 544, 546.

8—*Tucker v. Barron*, 7 B. & C., 623. A declaration upon an account stated may be supported whenever, as the result of an accounting between the parties, in respect to debts on accounts, a balance has been struck; and any admission by one of a balance, or an acknowledgment that a sum of money is due to the other, is sufficient to support such a count. And so an amount found due by the award of arbiters may be regarded as evidence of an account stated; but a foreign judgment is not admissible in evidence under such a count. When there is no acknowledgment of a debt, nor any promise to pay proven, the count is not sustained: *Gooding v. Hingston*, 20 Mich., 439.

9—*Evans v. Verity*, 1 R. & M., 239; *Kirton v. Wood*, 1 M. & Rob., 253.

10—*Green v. Davis*, 4 B. & C., 235; *Calvert v. Baker*, 4 M. & W., 417.

11—*Stevens v. Tuller*, 4 Mich., 387.

As Lord Mansfield says: "It is an agreement by both parties that all the articles are true." It is not necessary, however, that there should have existed mutual accounts between the parties; it may relate to a single debt or transaction. Neither does the nature of the original transaction, out of which the acknowledgement of indebtedness grew, appear to be material. It may have been for the sale of land as in this case, as well as for the sale of other property, or for personal services. But the admission of indebtedness must be clear and unqualified.¹²

A promissory note, in an action by the payee against the maker, is evidence on this count.¹³ But an admission by the defendant in a conversation with a third person, not an agent, that he was indebted to the plaintiff in a named sum, is not evidence of an account stated.¹⁴ The subject matter of the account must have been for money, and a debt.¹⁵ Proof of one item is sufficient.¹⁶

§ 745. **Defenses.**—The defendant may show that there was a great error or mistake in the accounts, or that the admission was made under a misapprehension of the facts, for the account stated is not conclusive evidence against him.¹⁷ He may deny that any action was stated, or may deny the facts from which the plaintiff wishes it implied; or he may prove additional facts to show that the case is one in which an action on account stated will not lie.¹⁸ A settlement of accounts is *prima facie* settlement of all accounts; whether so or not, is a question for the jury.¹⁹

USE OF COMMON COUNTS IN ACTIONS FOR USE AND OCCUPATION.

§ 746. **Form of remedy.**—"Every person in possession of land, out of which any rent is due, whether it was originally demised in fee, or for any other estate of freehold, or for any term of years, shall be liable for the amount or proportion of rent due from the land in his possession, although it be only a

12—*Stevens v. Tuller*, 4 Mich., 387.

13—*Clayton v. Gosling*, 5 B. & C., 8., 65.

360.

14—*Breckon v. Smith*, 1 Ad. & E.,

488; *Calvert v. Baker*, 4 M. & W., 417.

15—*See, Whitehead v. Howard*, 5

Moore, 105, 116.

16—*Highmore v. Primrose*, 5 M. &

S., 65.

17—*Thomas v. Hawks*, 8 M. & W.,

140; *Stevens v. Saginaw Supervisors*, 62

Mich., 579; 29 N. W., 492.

18—1 *Archbold's Nisi Prius*, 195.

19—*Bourke v. James*, 4 Mich., 336.

part of what was originally demised.”²⁰ Covenant or debt was, at common law, the only remedy for rent due on a lease under seal, but by statute “Such rent may be recovered in an action of debt or assumpsit, and the deed or demise or other instrument in writing, if there be any showing the provisions of the lease, may be used in evidence by either party to prove the amount due from the defendant.”²¹ “Nothing contained in the preceding sections shall deprive landlords of any legal remedy for the recovery of their rents, whether secured to them by their leases, or provided by law.”²²

§ 747. **Must be founded in contract.**—The action must be founded on contract, and cannot be supported unless there be a contract, express or implied, between the parties.²³ And in cases where the possession is adverse, assumpsit cannot be supported,²⁴ but the plaintiff must declare in trespass or eject-

20—C. L., § 9254; see notes thereto.

21—C. L., § 9255; see notes thereto.

22—C. L., § 9256; *Hogsett v. Ellis*, 17 Mich., 367, and notes. See *Heyerman v. Kanter*, 38 Mich., 316. Use and occupation may be sued for generally or specially without reference to the form of the lease under which they are enjoyed. In an action upon the common counts for use and occupation the tenant can, under the general issue, set up a new agreement; and by way of recoupment can, on giving notice, show damages to goods on the premises: *Conkling v. Tuttle*, 52 Mich., 630; 18 N. W., 391.

23—*Birch v. Wright*, 1 Term R., 378. The action must be founded upon a contract, express or implied, creating the relation of landlord and tenant, and imposing upon the defendant the obligation to pay for the use of the premises: *Dwight v. Cutler*, 3 Mich., 571, 572. Therefore, a tenant in common of lands, cannot recover of his cotenant for the use and occupation of the latter of the lands claimed in common, in the absence of any express promises to pay rent. The right of each to occupy is one of the legal incidents of such a tenancy, and it pervades the whole land, and one is not excluded by the failure of the other to occupy, but whatever he occupies in such case he occupies in his own right and not as tenant of the

other cotenant: *Evert v. Beach*, 31 Mich., 136. And the claim that the cotenant occupying was holding adversely to the other would not avail—since if he held adversely there could be no relation of landlord and tenant, and that would equally preclude the recovery of rent: *Wilmarth v. Palmer*, 34 Mich., 347. The substantial distinction between an action on the lease and one for use and occupation is, that in one the declaration is special and in the other it is general: *Dalton v. Landahn*, 30 Mich., 349. A specified yearly rental cannot be recovered under a declaration containing the common money counts but none for use and occupation: *Heyerman v. Kanter*, 36 Mich., 316. Use and occupation may be sued for generally or specially without reference to the form or the lease: *Conkling v. Tuttle*, 52 Mich., 630; 18 N. W., 391.

24—*Tew v. Jones*, 13 M. & W., 12; *Croswell v. Crane*, 7 Barb., 192; *Hurd v. Miller*, 2 Hilt, 540. The action cannot be maintained where the relation of landlord and tenant did not exist during the occupancy, or where the holding has been adverse to the owner: *Hogsett v. Ellis*, 17 Mich., 367; *Dalton v. Landahn*, 30 Mich., 349; *Marquette, H. & O. Ry. Co. v. Harlow*, 37 Mich., 554; *Lockwood v. Thunder Bay R. B. Co.*, 42 Mich., 536; 4 N. W., 292; *Bates v.*

ment, as the court will not, in such case, imply a contract.²⁵

A tenant at sufferance is chargeable for use and occupation after notice to quit and demand of possession.²⁶ A tenant at will is bound to pay for use and occupation until his tenancy is terminated by notice.²⁷

The notice to determine an estate at will or by sufferance, must be a three months' notice. If a lease provides for the payment of rent at periods of less than three months a notice will be sufficient which is equal to the interval between the times of payment.²⁸

§ 748. **Defendant's occupation.**—Proof of an actual occupation by the defendant is not essential; proof of the contract or tenancy is sufficient, and the plaintiff need not prove that the defendant, in fact, entered and occupied the premises; it is

Phinney, 45 Mich., 388; 8 N. W., 88; see, Ward v. Warner, 8 Mich., 508. But where the relation exists, and the occupancy has been beneficial to the defendant, the law implies a promise to pay a reasonable compensation, unless there be an express contract or other circumstances inconsistent with the notion of such promise, or with the duty or obligation to pay: *Ibid.*, Hogsett v. Ellis, 17 Mich., 351.

A tenant is not permitted to deny his landlord's title: Lee v. Payne, 4 Mich., 106. But where the lessee is evicted by one having a title paramount to that of the landlord, so that his beneficial enjoyment of the premises is interfered with, he will not thereafter be liable to the landlord for rent: Marsh v. Butterworth, 4 Mich., 575. And where a landlord, during the continuance of the lease, without the consent of the tenant, enters upon the demised premises, although they may have been vacated by the tenant and the entry is followed by continuous possession inconsistent with the rights given to the tenant by the lease, such possession amounts to an eviction, and precludes the recovery of rent while it continues; and this is so whether the entry be for condition broken or not. If for condition broken, it signifies an intention to terminate the lease entirely; while if the landlord regard the lease as still continuing, the right to rent is suspended during his

occupancy: Day v. Watson, 8 Mich., 555.

It is said that at common law a tenant at sufferance is not liable for rent. This is so as to rent, *strictly so called*, which always grows out of an express contract, and is fixed and definite in amount. The contract being terminated before the tenancy at sufferance commences, there is nothing from which rent, *as such*, can arise, but if the tenant at sufferance remains in possession after notice to quit and a demand of possession by the landlord, the law will imply a promise to pay a reasonable compensation for the use and occupation after such demand and notice: Hogsett v. Ellis, 17 Mich., 368, 371.

25—Birch v. Wright, 1 Term R., 386; Dwight v. Cutter, 3 Mich., 566; Ward v. Warner, 8 Mich., 508; Wilmarth v. Palmer, 34 Mich., 347; Marquette, H. & O. Ry. Co. v. Harlow, 37 Mich., 554; Lockwood v. Thunder Bay R. B. Co., 42 Mich., 536; 4 N. W., 292; Henderson v. Detroit, 61 Mich., 378; 28 N. W., 133.

26—Hogsett v. Ellis, 17 Mich., 371.

27—Huntington v. Parkhurst, 87 Mich., 38; 49 N. W., 597; McIntosh v. Hodges, 110 Mich., 319; 70 N. W., 550.

28—C L., § 9257; Huyser v. Chase, 13 Mich., 98; Woodrow v. Michael, 13 Mich., 187.

sufficient if the defendant might have done so if he pleased, and was not prevented by the plaintiff.²⁹

If A agrees to let premises to B, who permits C to occupy them, B may be sued for the rent,³⁰ and when a house is demised by a written agreement, rent may be recovered, after the house has been burnt down,³¹ unless there be an express agreement to the contrary,³² and it is recoverable, also, although the defendant has deserted the premises.³³ A tenant who has left the premises, in pursuance of a parol license from his landlord, without having given a regular notice to quit, remains liable for the rent.³⁴

§ 749. Evidence for defendant.—The defendant may prove a payment of the rent to his lessor before notice of the assignment of the whole to the plaintiff, who is an assignee of the reversion.³⁵ He may show that he entered under a contract for the purchase of the premises,³⁶ or as a trespasser. Where a party is let into possession of land under a contract to purchase, which afterwards goes off, he is liable to an action for use and occupation, at the suit of the vendor, for the period during which he continues in possession after the contract went off.³⁷

§ 750. Damages.—If there has been a stipulated rent, the plaintiff will be entitled to recover to that amount, though the lease be void.³⁸ In other cases he must prove the value of the premises.³⁹ Where the plaintiff is not the person who originally let the premises to the defendant, he can only recover rent from the time he had the legal title in him.⁴⁰

29—*Harland v. Bromley*, 1 Stark., 453; *Finero v. Judson*, 6 Bing., 206; *Woolley v. Watling*, 7 C. & P., 610. But it has been held that where a tenant hired the premises for a year, but did not at any time go into possession, either in person or by agent, or under-tenant, that this action could not be maintained, but that the remedy was on the lease: *Wood v. Wilcox*, 1 Denio, 37.

30—*Bull v. Sibbs*, 8 Term R., 327; *Conolly v. Baxter*, 2 Stark, 527.

31—*Baker v. Holtzoffel*, 4 Taunt., 45; *Izon v. Gorton*, 5 Bing. N. C., 501; *ibbs v. Richardson*, 9 Ad. & E., 849.

32—*Packer v. Gibbons*, 1 Q. B., 421.

33—*Mollet v. Brayne*, 2 Camp., 103.

34—*Matthews v. Sawell*, 8 Taunt., 270; *Johnstone v. Haddlestone*, 4 B. & C., 922.

35—*Birch v. Wright*, 1 Term R., 378; *Bridges v. Smyth*, 5 Bing., 410.

36—2 Saund. Pl. & Ev., 5 Am. ed., 1173, 1178; *Sylvester v. Ralston*, 31 Barb., 286.

37—*Howard v. Shaw*, 8 M. & W., 118.

38—*De Medina v. Polson*, Holt, 47; *free, Williams v. Sherman*, 7 Wend., 109. Sec. *McIntosh v. Hodges*, 110 Mich., 319; 70 N. W., 550.

39—*Tomlinson v. Day*, 2 Brod. & B., 680.

40—*Gregory v. Doldge*, 3 Bing., 474.

§ 751. **Determination of tenancy by assignment or surrender.**—By statute,⁴¹ “no estate or interest in lands, other than cases for a term not exceeding one year, * * * shall hereafter be created, granted, assigned, surrendered or declared, unless by act or operation of law, or by a deed or conveyance in writing, etc.” By this statute, a parol assignment or license to quit will be sufficient,⁴² even although the defendant has left the premises,⁴³ or, though the agreement between the parties be canceled.⁴⁴

The assignment or surrender may, however, by the words of the statute, be effectual by “act or operation of law,” though not made in writing. If a landlord in the middle of a quarter accept from his tenant the key of the house demised, under a parol agreement that upon her then giving up the possession the rent shall cease, and she never afterwards occupies the premises, he cannot recover in an action for the use and occupation of the house for the time subsequent to his accepting the key.⁴⁵ It must, however, be clearly established that it was the landlord’s intention to determine the tenancy by accepting the key of the house, as it would be insufficient to show merely that the key was left at plaintiff’s house, or delivered to his servant.⁴⁶ Upon a tenancy from year to year, determinable at a quarter’s notice, if the lessor licenses the tenant to quit in the middle of a quarter, and the tenant quits, and the lessor accepts possession, it is a surrender by operation of law, destroying the right to rent for the whole or any part of the current quarter.⁴⁷ In all these cases the consent of all the parties to the change of the tenancy is necessary.⁴⁸

ASSUMPSIT ON WARRANTY.

§ 752. **What constitutes a warranty.**—The undertaking by way of warranty being a contract obligation, the remedy for

41—C. L., § 9509; see notes to same.

42—*Botting v. Marten*, 1 Camp., 318.

43—*Mollet v. Brayne*, 2 Camp., 103; *Matthews v. Sawell*, 8 Taunt., 270.

44—*Roe d. Berkeley v. York*, 6 East., 86; *Johnstone v. Huddleston*, 4 B. & C., 922; *Johnstone v. Huddleston*, 7 D. & R., 411.

45—*Whitehead v. Clifford*, 5 Taunt., 518.

46—*Horland v. Bromley*, 1 Stark., 455.

47—*Gimmam v. Legge*, 8 B. & C., 324.

48—*Thomas v. Cook*, 2 B. & A., 119; *Morrison v. Chadwick*, 7 C. B., 284.

its breach is in assumpsit.⁴⁹ No particular words are prescribed by law to constitute a warranty; but it is essential that the affirmation should be made at the time of sale and be intended by the parties as a warranty.⁵⁰ It is not necessary that the word "warrant" should be used;⁵¹ if the words used are intended as a representation of the soundness, etc., of a horse, and the plaintiff relied upon them as such, they will be considered as amounting to a warranty. It would be otherwise if what was said was a mere expression of an opinion of the defendant.⁵² An affirmation that a horse was not lame, made

49—And this is true though the damages resulting from such breach are consequential in their nature: *Tatro v. Brower*, 118 Mich., 615; 77 N. W., 274.

50—*Sweet v. Colgate*, 20 Johns., 203. It must be an absolute and positive assertion, and one on which the purchaser relies as a warranty, and not merely the expression of an opinion: *Oneida Mfg. Soc. v. Lawrence*, 4 Cow., 440; *Switzer v. Pinconning Mfg. Co.*, 59 Mich., 488; 26 N. W., 762. As to what is essential to a warranty see *Linn v. Gunn*, 56 Mich., 447; 23 N. W., 84.

Representations do not amount to warranties unless so intended, and so understood by both parties. A warranty must be accepted by the purchaser as well as offered by the seller; and in determining the mutual understanding, the situation and conduct of the parties at the time and afterwards, is open to consideration: *Kimball & Austin Mfg. Co. v. Vroman*, 35 Mich., 331. What a vendor says in mere praise of the property he is selling is not a warranty. Therefore, held, that when the vendor of a threshing machine said at the time of the sale, "that it was a very good machine and would do very nice work," falls far short of amounting to a warranty: *Worth v. McConnell*, 42 Mich., 473-6; 4 N. W., 198.

51—*Chapman v. Murch*, 19 Johns., 290; *Roberts v. Morgan*, 2 Cow., 438.

52—*Whitney v. Sutton*, 10 Wend., 411, 413. A mere assertion of value made by the seller, where no warranty is intended, is no ground of relief to the purchaser, because the assertion is matter of opinion, which does not imply knowledge, and in which men differ. A purchaser must expect that a vendor

will seek to enhance his wares, and must disregard his statements of their value. Every person reposes at his peril on the opinions of others, when he has an equal opportunity to form and exercise his own judgment. But this rule applies only when the vendor and vendee rely upon their own judgment. When the vendee expressly relies upon the knowledge of the vendor, as to quality or value of the article of sale, the vendor is bound to act honorably and deal fairly with the vendee. When confidence is reposed in the vendor he is bound not to abuse it, and the rule that *the purchaser must beware*, does not apply: *Picard v. McCormick*, 11 Mich., 68; see, *Wilbur v. Cartright*, 44 Barb., 536; *Clark v. Rankin*, 46 Barb., 570. But to constitute a warranty on the part of the vendor, he must make an assertion which he intends the vendee shall rely upon as true, in relation to the property of which he speaks: *Carley v. Wilkins*, 6 Barb., 557; *Blakeman v. Mackay*, 1 Hilt., 266; *Hotchkiss v. Gage*, 26 Barb., 141; *Rogers v. Ackerman*, 22 *Ibid.*, 134. A representation that a machine is a very good machine and will do nice work is not a warranty: *Worth v. McConnell*, 42 Mich., 473; 4 N. W., 198. But a representation, made to plaintiff to induce him to order a machine that it is well made and of good material, is a warranty: *Aultman, M. & Co. v. Knapp*, 105 Mich., 205; 63 N. W., 66. The rule that a vendor has a right to praise his goods in order to make a sale does not apply to statements of fact which the vendor knows to be false and upon which the vendee, who is ignorant on the subject, relies: *Peck v. Jennison*, 99 Mich., 326; 58 N. W., 312. Where

at the time of sale, or previous, by the defendant, and that he would not be afraid to warrant that the same was sound every way as far as he knew, was held to amount to a warranty.¹ Whether what was said was intended as a warranty or not, is a question of fact to be decided by the jury.² When the seller, in the course of the conversation at the time of the sale, said to the person who was about to purchase the horse, "You may depend upon it, the horse is perfectly quiet and free from vice," it was holden to be a warranty.³

The term "sound," in a warranty of a horse or other animal, implies the absence of any disease or seeds of disease in the animal at any time, which actually diminishes, or in its progress will diminish, his natural usefulness in the work to which he would properly and ordinarily be applied.⁴

§ 753. **Implied warranties.**—A warranty of title is implied on the sale of a chattel.⁵ But where there is an express war-

a vendor knows that the vendee is ignorant of the value of property and is relying on his representation as to value which is in the nature of a statement of fact rather than opinion, the rule of *caveat emptor* is inapplicable: *Maxted v. Fowler*, 94 Mich., 106; 33 N. W., 921.

1—Cook v. Mosely, 13 Wend., 277.

2—Whitney v. Sutton, 10 Wend., 411, 413; Chapman v. Murch, 19 Johns., 290, 484.

3—Scholefield v. Robb, 2 Moody & Robinson, 210.

4—Kiddell v. Burnard, 9 M. & W., 668. A warranty of soundness in the sale of a horse, extends to every kind of unsoundness known and unknown to the seller; and if at the time of sale the animal has any infirmity upon it which renders it less fit for present service, the warranty is broken: *VanHoesen v. Cameron*, 54 Mich., 609; 20 N. W., 609. In a suit upon a warranty of soundness of a horse, it can be shown by a former owner that the horse was diseased while he owned it, if the disease was one which might have resulted in the unsoundness complained of: *Ibid.* But a temporary and curable injury, although existing at the time of sale, if it does not injure the animal for present service, is not an unsoundness; but it seems that, whether the injury be permanent

or temporary, curable or incurable, if it render the animal less fit for present usefulness and convenience, it is an unsoundness: *Roberts v. Jenkins*, 1 Foster N. H., 116. Parol proof of a warranty cannot be received to modify an unambiguous written contract for sale; *Hallett v. Gordon*, 122 Mich., 567; 81 N. W., 556; 82 N. W., 827; *Hallwood Cash Reg. Co. v. Millard*, 127 Mich., 816; 86 N. W., 833; *McCray R. Co. v. Woods & Zent*, 99 Mich., 269; 58 N. W., 320.

5—*Defreeze v. Trumper*, 1 Johns., 274; *Hunt v. Sackett*, 31 Mich., 18. The possession of chattels by the vendor at the time of sale is said to be equivalent to an affirmation that he has title, and in such case the vendor is to be held to an implied warranty of title, though nothing be said on the subject between the parties: *McCoy v. Artcher*, 3 Barb., 323; *Coolidge v. Brigham*, 1 Met., 551. And if there is an affirmation of title where the vendor is not in possession, the same warranty of title will be implied as if he were in possession: *McCoy v. Artcher*, 3 Barb., 323. So, on a sale of personal property in the possession of the vendor, there will be an implied warranty that the property is free from prior liens and incumbrances: *Dresser v. Ainsworth*, 9 Barb., 619. And one who sells a chose in action impliedly warrants that there is no

ranty covering the same matter none will be implied.⁶ In general there is no implied warranty of quality, but if the circumstances are such as naturally to give rise to such an undertaking one may be implied; as where one buys a machine of a dealer there is an implied warranty that it is not second hand;⁷ or under certain circumstances, that goods shall be merchantable;⁸ or under others that they shall be fit for a particular use;⁹ and again, that they shall correspond to sample.¹⁰

legal defense to its collection arising out of his connection with the origin of the claim: *Delaware Bk. v. Jarvis*, 6 E. P. Smith, 226. And it is held that where one sells a judgment, he impliedly warrants that the whole is due and unpaid: *Furniss v. Ferguson*, 7 Tiff., N. Y., 485. But, if the property sold be at the time in the hands of a third person, and there be no affirmation or assertion of ownership, no warranty of title will be implied: *McCoy v. Archer*, 3 Barb., 323. On sale of property without distinct warranty that it should be of the kind and quality ordered, there is no implied warranty to that effect which may be enforced after acceptance with opportunity for inspection: *Williams v. Robb*, 104 Mich., 242, 62 N. W., 352. See, *Talbot P. Co. v. Gorman*, 103 Mich., 403; 61 N. W., 655.

The following principles relating to implied warranties may be noticed:

Every vendor of securities for money impliedly warrants that he has a title enabling him to sell: *Ritchie v. Summers*, 3 Yeates, 531; *Richards v. Killam*, 10 Mass., 245.

Every one negotiating a promissory note, or bill of value, impliedly warrants that it is genuine: *Herrick v. Whitney*, 15 Johns., 240; *Young v. Adams*, 6 Mass., 182.

6—*McGraw v. Fletcher*, 35 Mich., 104.

7—*Grieb v. Cole*, 60 Mich., 397; 27 N. W., 579

8—In every contract to furnish manufactured goods, there is an implied warranty that the goods shall be merchantable: *Lairg v. Fidgeon*, 6 Taunt., 108; *Laing v. Fidgeon*, 4 Camp., 169. And, if a thing be ordered of the manufacturer for a special purpose, and it is to be supplied and sold for that purpose, there is an implied warranty that it is

fit for that purpose: *Beals v. Olmstead*, 24 Vt., 114; *Brenton v. Davis*, 8 Blackf., 317; see, *McGraw v. Fletcher*, 35 Mich., 104; *Kimball Mfg. Co. v. Vroman*, *Ibid.*, 310; *West Michigan F. Co. v. Diamond Glue Co.*, 127 Mich., 651; 87 N. W., 92. So a dealer who sells a piano by a written contract which speaks nothing as to a warranty, is bound by an implied warranty that the instrument is properly constructed: *Little v. G. E. Van Syckle & Co.*, 115 Mich., 480; 73 N. W., 554.

Upon a written contract of sale of goods of a particular description, which the purchaser has no opportunity of inspecting, the law implies a warranty of saleable articles answering the description in the contract: *Hastings v. Lovering*, 2 Pick., 220; *Gardiner v. Gray*, 4 Camp., 144. But no warranty can be implied from the fact that the goods were sold for a sound price: *Wright v. Hart*, 18 Wend., 455; *Holden v. Dakin*, 4 Johns., 421.

Where goods are sold without any opportunity for the purchaser to examine them, there is an implied warranty that they are saleable: *Gardiner v. Gray*, 4 Camp., 144; *Laing v. Fidgeon*, *ibid* 169; *Laing v. Fidgeon*, 6 Taunt., 108.

9—On a sale of a commodity for a particular purpose, there is an implied warranty that it is fit for that purpose: *Gray v. Cox*, 4 B. & C., 114; *Gray v. Cox*, 6 D. & R., 200. Thus, if one sells a horse for a carriage horse, he impliedly undertakes that it is suitable for that purpose; or if he undertakes to furnish a rope to raise certain heavy articles, he impliedly warrants that it is sufficient for that purpose: *Hilliard on Sales*, 257; *Brown v. Edington*, 2 M. & G., 279; *Getty v. Roundtree*, 2 Chand., 28; *Beers v. Williams*, 16 Ill., 69.

A declaration on the sale of an article that it is good, and such as the

Where one farmer bought of another the carcass of a dead pig for food, which turned out to be unsound and unfit for human consumption, it was held that no warranty of soundness was implied by law.¹¹

A general warranty will not extend to protect against plain and obvious defects, as where a horse is warranted perfect, and wants an ear or a tail, etc. It is said that defects apparent at the time of the bargain are not included in a general warranty.¹² If the buyer examined the property at the time of

seller can warrant, raises a sufficient warranty: *Prosser v. Hooper*, 1 Moore, 109.

But where a purchaser inspects the articles which he purchases, and there is not a clear and express warranty or fraud on the part of the vendor, no action will lie for a defect in the quality of the article sold: *Hotchkiss v. Gage*, 26 Barb., 141; *Deifendorf v. Gage*, 7 Barb., 18.

If a purchaser takes a written warranty, all representations made in the negotiations for the sale are merged in the writing, and the purchaser must rely on the writing alone unless there was fraud in the sale: *Horner v. Fellows*, 1 Doug. Mich., 54. Where there is an express warranty none can be implied: *McGraw v. Fletcher*, 35 Mich., 104.

10—In a sale by sample, there is an implied warranty that the commodity shall correspond with the sample: *Parker v. Palmer*, 4 B. & Ald., 387; *Hibbert v. Shee*, 1 Camp., 113; *Bradford v. Manly*, 13 Mass., 139; *Lorymer v. Smith*, 1 B. & C., 1; *Beirne v. Dord*, 1 Selden, 98, 99.

11—*Burnby v. Bollet*, 16 M. & W., 644; *Emerson v. Brigham*, 10 Mass., 197. But in this state it is held that when articles of food are sold for domestic consumption, the law implies a warranty that they are fit for that purpose. The supreme court says that when articles of food are bought for consumption, and the vendor sells them for that express purpose, the consequences of unsoundness are so dangerous to health and life, and the failure of consideration is so complete, that we think the rule which has often been recognized, that such sales are warranted,

is not only reasonable, but essential to public safety: *Hoover v. Peters*, 18 Mich., 51, 55; see also, *Van Bracklin v. Fonda*, 12 Johns., 468; *Moses v. Mead*, 1 Denio, 378. But, it is held that where provisions are sold, not for immediate consumption, or domestic use, but as merchandise to be sold again, and are in a situation to be examined, and are examined as fully as the buyer deems necessary, there is no implied warranty of soundness: *Moses v. Mead*, 5 Denio, 617; *Moses v. Mead*, 1 *Ibid.*, 378; 1 *Parsons on Cont.*, 4 ed., 470, note *w*, and *Hurlst. & Norm.*, 586. There is an implied warranty in the sale of bread to one who purchases it for sale and delivery to others for consumption: *Sinclair v. Hathaway*, 57 Mich., 60; 23 N. W., 459.

12—*Schuyler v. Russ*, 2 Caines, 202. But to prevent a recovery for a breach of warranty upon the sale of a horse, on the ground that the defects existed and were visible at the time of sale, it must be shown that the defects were such as could be discerned by an ordinary observer examining the property with a view of trading for it, or of purchasing it, and were not such as to require skill to detect them: *Birdseye v. Frost*, 34 Barb., 367. It is said that a vendor may warrant against an obvious defect, as well as against any other. A general warranty that a horse was sound, would, in our judgment, be broken, if one eye was so badly injured, or so malformed, as to be entirely useless, and although this defect might have been noticed by the purchaser at the time of the sale. He may choose to rely on the warranty of the vendor, rather than upon his own judgment, and we see no reason why he should

the sale, and it is perfectly apparent that it has some particular defect, which can be discerned without requiring any particular skill in the qualities of the property, as the loss of the ears or tail, it will be presumed that the parties did not include such defect in the warranty. But if the property, has a defect which is not plain and obvious, except to those who are skilled in the quality of the particular article, the defendant cannot say that the defect was too obvious to come within the warranty. If the attention of the purchaser is called to the defect at the time of sale, it will not be included within the warranty,¹³ unless the warranty take the form of an undertaking that the defect will not diminish the ordinary usefulness of the property for the purposes for which it would ordinarily be used: as that a splint will not make a horse lame.¹⁴

It is not necessary for the plaintiff to prove that the defendant knew that the property was defective, or in anywise did not answer the warranty; even if the declaration contain such an allegation.¹⁵ In other words, one may warrant against unknown, as well as known, defects and a general warranty is against unknown as well as known defects.¹⁶ A breach of warranty may be shown in defense without returning the property.¹⁷

§ 754. Measure of damages.—If the property has been returned, the measure of damages will be the full price paid for it; if it has not been returned the damages will be the difference between the value of the property, at the time of sale, if it had been as warranted, and its actual value at that time. If, after notice to the seller, the property is sold by the plaintiff, he will recover the difference between the net sum produced by the sale, and the price he paid the defendant for it.¹⁸

not be permitted to do so. A warranty that a horse is sound is broken if he cannot see with one eye: *House v. Fort*, 4 Blackf., 294.

13—*Margetson v. Wright*, 7 Bing., 603.

14—*Ibid.*, *Margetson v. Wright*, 8 Bing., 454.

15—See, *Carley v. Wilkins*, 6 Barb., 557.

16—*Van Hoesen v. Cameron*, 54 Mich., 609; 20 N. W., 609; *Connell v. McNett*, 109 Mich., 329; 67 N. W., 344.

17—*Hull v. Belknap*, 37 Mich., 179; *Boltwood v. Miller*, 112 Mich., 657; 71 N. W., 506.

18—*Caswell v. Core*, 1 Taunt., 566. The rule as to the measure of damages for a breach of warranty, as now established, seems to be the difference between the value which the article would have possessed had it conformed to the warranty, and its actual value with the faults or defects complained of, and which were warranted against: *Sedgwick on Dam.*, 3 ed., 287; *Hilliard*

Where the plaintiff was induced by the defendant's warranty to warrant the horse as sound to a person to whom he sold it, and the horse proving unsound; the second purchaser brought an action against the plaintiff upon his warranty, of which the plaintiff gave the defendant, his vendor, notice, and

on Sales, 2 ed., 291; *Barker v. Cleveland*, 19 Mich., 230, 237; *Reggio v. Braggiotti*, 7 Cush., 166; *Jackson Sleigh Co. v. Holmes*, 129 Mich., 370; 88 N. W., 895; *Tuttle v. Brown*, 4 Gray, 457; *Sharon v. Mosher*, 17 Barb., 518. And this, without regard to the price given the warrantor, or obtained on a re-sale: *Hilliard on Sales*, 291. Where fruit trees are sold represented to be of certain varieties, and they are found to be of inferior varieties the measure of damages is the value that would have been added to the premises if, they had been of the varieties contracted for: *Hellman v. Pruyn*, 122 Mich., 301; 81 N. W., 97. This measure cannot be reduced by a showing that many of the trees winter killed: *Hellman v. Pruyn*, *supra*; *Angell v. Pruyn*, 126 Mich., 16; 85 N. W., 258.

And it is said that if the article does not comply with the warranty, the purchaser may return it forthwith, and if he does so without unreasonable delay, this will be a rescission of the sale, and he may sue for the price if he has paid it, or defend against an action for the price, if one be brought by the seller. But if he has sold a part before his discovery of the breach, and therefore cannot return the whole, he may still rescind the sale, and will be liable for the market value of what he does not return: 1 *Parsons on Cont.*, 4 ed., 174; *Shields v. Pettie*, 4 Comst., 122. In case of a rescission the title in the goods reverts in the vendor, and the plaintiff would be entitled to recover as damages the amount paid the vendor, and a reasonable sum for the costs and expenses of keeping the article: *McKenzie v. Hancock*, R. & M., 436; *Chesterman v. Lamb*, 2 Ad. & E., 129; *Ellis v. Chinnock*, 7 C. & P., 169. But in such case, it would seem that unless there was an agreement that the article might be returned, the action or defense should not be on the warranty but for deceit. And the better opinion

seems to be that unless there was fraud or deceit in the sale, or an agreement that the article might be returned if found not to be as warranted, the purchaser cannot rescind the sale and return the article for a mere breach of warranty, but must rely on an action on the warranty: *Sedgwick on Dam.*, 286, 287; 1 *Parsons on Cont.*, 475; *Voorhees v. Earl*, 2 Hill, 288; *Cary v. Gruman*, 4 *Ibid.*, 625; *West v. Cutting*, 19 Vt. 536; *Freeman v. Clute*, 3 Barb., 424; *Rowley v. Bigelow*, 12 Pick., 307. But where the contract of purchase is executory, as where an article is ordered from a manufacturer for a special purpose, and upon its arrival to the vendee, it is found not to comply with the warranty, the vendee may without doubt rescind and return the article, though there be no fraud: See *Hilliard on Sales*, 2 ed., 316, 317; *Street v. Blay*, 2 B. & Ad., 460; *Mallow v. Hinde*, 12 Wheat, 193; *Toulmin v. Hedley*, 2 C. & K., 157; see, *Shields v. Pettie*, 2 Sandf., 262; *People v. Bancker*, 5 N. Y., 122. Breach of warranty may be set up as a defense without returning the goods unless the contract of sale requires their return; the omission to return them only affects the amount of damages recoverable: *Hull v. Belknap*, 37 Mich., 179; see, *Kimball, etc., Mfg. Co. v. Vroman*, 35 Mich., 310. The person injured by a breach of warranty of such a nature as would justify a return of the property, cannot be compelled to elect between a return and damages, but may be entitled to both; a recovery of the purchase price paid, may not compensate him for all his loss, and the retention of the property which may be unfit for use may be ruinous: *The K. & A. Mfg. Co. v. Vroman*, 35 Mich., 310. If a party sue for or defend on account of a breach of warranty, he thereby affirms the contract of sale: *Barker v. Cleveland*, 19 Mich., 230.

the option of defending the action, and his vendor not interfering, the plaintiff defended it and failed, it was held the plaintiff was entitled to recover the costs he had to pay in the action against him.¹

The buyer may maintain an action on the warranty against the seller, even though the horse or other warranted article has not been returned, or although the buyer has allowed several months to elapse before he complained of the unsoundness. It is not necessary to return the article previous to bringing a suit, nor to give notice of the defect to the seller,² unless the contract of sale contain a stipulation to that effect.³

In an action upon a warranty of title, there must, in general, be a recovery by the person claiming title, against the vendee, before the action can be maintained.⁴ The vendee cannot dispute the title of vendor, unless he has been charged at the suit of another person, who has, after contestation, shown a better title.⁵

If the vendee has fully notified his vendor of the pendency of the suit, a recovery against the vendee will be conclusive evidence against the vendor.⁶ One notice is sufficient; the vendor is bound to know all the subsequent proceedings in the cause without further notice.⁷

The measure of damages in an action for a breach of an implied warranty of title in the sale of chattels, in case of a suit by the owner and notice to the vendor is the price paid, the interest thereon, and the cost recovered against the purchaser or his vendee; the costs of the defense are not recoverable.⁸ The declaration must count specially on the warranty and set up the breach.⁹

1—*Lewis v. Peake*, 7 Taunt., 153.

2—*Felder v. Starkim*, 1 H. Bl., 17; *Pateshall v. Tranter*, 3 Ad. & E., 103; *Kellogg v. Denslow*, 14 Conn., 411; *Hills v. Bannister*, 8 Cow., 31; *Hunt v. Sackett*, 31 Mich., 18.

3—*Adam v. Richards*, 2 H. Bl., 573; *Hills v. Bannister*, 8 Cow., 31; see, *Horner v. Fellows*, 1 Doug. Mich., 51.

4—*Case v. Hall*, 24 Wend., 102; *Delaware Bank v. Jarvis*, 6 E. P. Smith, 230. But it has been held that the vendee may voluntarily yield up the

property to the rightful owner, and recover against the vendor, on his implied warranty of title, provided he can show that such claimant had a paramount authority: *Sweetman v. Prince*, 26 N. Y., 224.

5—*Vibbard v. Johnson*, 59 Johns., 77. But see previous note.

6—*Barney v. Dewey*, 13 Johns., 224.

7—*Blasdale v. Babcock*, 1 Johns., 517, 519.

8—*Armstrong v. Percy*, 5 Wend., 535.

9—*Hunt v. Sackett*, 31 Mich., 18.

A count for money had and received may be added to the special count. If the property has been actually returned, the plaintiff may recover on this count the price he paid for it; but merely making a tender of the property would not be sufficient.¹⁰

10—Payne v. Whale, 7 East., 274; Gompertz v. Denton, 1 Cr. & M., 207; see Kimball, etc., Mfg. Co. v. Vroman, 35 Mich., 310.

A declaration upon a warranty, in justice's court must state the nature and terms of the warranty, and the breach. Thus, a declaration in the following terms: "The plaintiff declares in assumpsit specially for damages for breach of warranty on a pair of horses purchased of the defendant, and claims damages of \$200," was held insufficient as not stating any cause of action: Smith v. Hobart, 43 Mich., 465; 5 N. W., 666.

And it seems that a plaintiff may at his option, declare in assumpsit for a breach of warranty, or sue in case for the damages caused by the deceit of a false warranty: Carter v. Glass, 44 Mich., 154; see, Beebe v. Knapp, 28 Mich., 53; and Hopkins v. O'Neil, 46 Mich., 403; 9 N. W., 448.

In an action to recover damages for a breach of warranty the court has not power to order defendant to permit an inspection of the property on his premises: Martin v. Elliott, 106 Mich., 130; 63 N. W., 998.

CHAPTER XLIII.

OF ACTIONS ON THE CASE.

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| § 755. In general. | § 762. For keeping dangerous instruments. |
| § 756. For negligence — contributory negligence. | § 763. For keeping dangerous animals at common law. |
| § 757. As between employer and employee. | § 764. For keeping dangerous animals by statute. |
| § 758. The declaration for negligence. | § 765. Against common carriers—who are. |
| § 759. Growing out of bailments. | § 766. Liability of common carriers. |
| § 760. For fraud or deceit. | § 767. For negligent driving. |
| § 761. The declaration for fraud or deceit. | § 768. Statutory duty of persons driving on the highway. |

§ 755. *In general.*—The action on the case, at the present time, may be understood to comprise all actions for torts or injuries effected without force, and for torts and injuries arising from the forcible or violent act of another, when the tort or injury is not the immediate effect of the force, but merely a consequence of it, and being for torts only, it is technically called an action of trespass on the case.¹ Notwithstanding the act be immediate, if it be not wilful, but occasioned by the carelessness and negligence of the defendant, the plaintiff is at liberty to bring an action on the case.² And although by

1—Archbold's *Nisi Prius*, 402.

2—*Williams v. Holland*, 10 Bing., 112. An owner of land made an excavation therein, within a foot or two of a public street, and used no precaution against the danger of falling into it; a person passing in the night-time fell into the excavation, and was injured. *Held*, that the owner of the land was not liable to an action for the injury thus caused. *Howland v. Vincent*, 10 Metc., 37. In this case, the court say that the defendant was lawfully entitled to excavate and use his own land up to the line of the street, nor did the law require him to erect any barrier or fence between his excavation and the street, consequently defendant was not guilty of negligence in the manner in which

he used his premises; on the other hand, plaintiff in passing along the street had no right to go outside of it on to defendant's premises, and had she not done so no accident would have occurred, and, although she were guilty of no negligence in passing beyond the line of the street, yet she cannot recover. Owners of private property are not liable for injuries caused by leaving a dangerous place unguarded, when the person injured was upon the premises without permission and not on business or other lawful occasion, and had no right to be there: *Hargreaves v. Deacon*, 25 Mich., 1; see, 33 Mich., 232. This rule that the owner of lands is not liable to trespassers for injuries sustained by them on the lands has no ex-

the common law trespass and not case must be brought, where the act was willful, this rule is very much changed by statute, and it is now in general immaterial, so far as regards the form of action, whether the action was willful or not. "Where, by the wrongful act of any person, an injury is produced, either to the person, personal property, or rights of another, or to his servant, child, or wife, for which an action of trespass may by law be brought, an action of trespass on the case may be brought to recover damages for such injury, whether it was willful or accompanied by force or not; and whether such injury was a direct and immediate consequence from such wrongful act, or whether it was consequential and indirect."³

§ 756. **Actions for negligence.**—Where the injury of which the plaintiff complains has resulted from the negligence of both parties, without any intentional wrong on the part of the defendant, the action cannot be maintained.⁴ No man can, in

ception in favor of children: *Ryan v. Towar*, 128 Mich., 463; 87 N. W., 644; *Formall v. Standard Oil Co.*, 127 Mich., 496; 86 N. W., 946; *Peninsular Trust Co. v. Grand Rapids*, 131 Mich., 571; 92 N. W., 38; *Frost v. Eastern Ry.*, 64 N. H., 220, 9 Atl. 790, 10 Am. St., 396. What is known as the doctrine of the "Turntable cases," the first of which was *Railroad Co. v. Stout*, 17 Wall., 657, is disapproved in *Ryan v. Towar*, *supra*. There is a liability, however, even to trespassers, for injuries resulting from wanton or willful conduct of the owner: *Bird v. Holbrook*, 4 Bing., 628; *McCa-hill v. Railway Co.*, 96 Mich., 156; 55 N. W., 668. W, who prepared drugs for the market, by his servant, labeled a jar of belladonna, a poisonous extract, as dandelion, a harmless medicine, and sold it; and, after it had passed through several hands, a portion of the contents of the jar was sold and administered as dandelion, and seriously injured the patient; it was held that W was liable to an action for the damages. *Thomas v. Winchester*, 6 N. Y., 397.

3—C. L., § 10400. This statute has no reference to trespass on lands: *Wood v. Michigan A. L. Ry. Co.*, 81 Mich., 358; 45 N. W., 980; *Haines v. Beach*, 90 Mich., 563; 51 N. W., 644. This statute authorizes the joinder of counts in trespass and case: *Bellant v. Brown*,

78 Mich., 294; 44 N. W., 326. The object of this statute was to "obviate the technical rules of pleading which had grown up under the decision of the courts and to enable parties to bring as many claims as possible into one suit" and "with this object in view the statute should be liberally construed": *Bellant v. Brown*, *supra*. One who, being allowed to remain on land under a mere license, keeps animals on it that have an infectious disease, in consequence of which the animals of the owner, afterwards brought upon the land in ignorance of the danger, become infected and damaged, will be liable to an action for such consequential injury: *Eaton v. Winne*, 20 Mich., 156. Injury alone will not support an action on the case. There must be a concurrence of injury and wrong; and if the act be not unlawful in itself, then unless done in a manner, and at a time, or under circumstances which render it wrongful, or lacking in due regard to the rights of others, there can be no liability for any injury that may result: *Macomber v. Nichols*, 34 Mich., 213.

4—*Browell v. Flagler*, 5 Hill, 282; and cases there cited, and *Underwood v. Waldron*, 33 Mich., 232. Negligence cannot be presumed without proof of actual negligence: *Grand Rapids & Indiana Ry. Co. v. Huntley*, 38 Mich., 541.

any case, be allowed to recover damages resulting from his own misconduct or negligence. A plaintiff suing for negligence, must himself be without fault.⁵

5—*Brown v. Maxwell*, 6 Hill, 592; *Kelly v. Hendrie*, 26 Mich., 255. Thus in case of a collision, the burden of proof is on the plaintiff not only to show negligence on the part of the defendant, but ordinary care on his own part: *Drew v. Steamboat Chesapeake*, 2 Doug. Mich., 36; see, *McWilliams v. Detroit Central Mills Co.*, 31 Mich., 274. One who is guilty of contributory negligence cannot recover for a negligent injury: *Joslin v. LeBarron*, 44 Mich., 160; 6 N. W., 214; *Lake Shore & Michigan Southern Ry. v. Bangs*, 47 Mich., 470; 11 N. W., 276. For cases illustrating the doctrine that negligence of the plaintiff contributing to the injury complained of defeats a recovery, see, *Goodale v. Portage L. B. Co.*, 55 Mich., 413; 21 N. W., 866; *Van Auken v. Chicago & W. M. Ry. Co.*, 96 Mich., 307; 55 N. W., 971; *Smith v. Jackson*, 106 Mich., 136; 63 N. W., 982; *Bannister v. Lake Shore & M. S. Ry. Co.*, 113 Mich., 530; 71 N. W., 861; *Smith v. Township of Walker*, 117 Mich., 14; 75 N. W., 141; *Howey v. Fisher*, 122 Mich., 43; 80 N. W., 1004; *Benedict v. Port Huron*, 124 Mich., 600; 83 N. W., 614; *Merritt v. Foote*, 128 Mich., 367; 87 N. W., 262; *Freeman v. Pere Marquette Ry. Co.*, 131 Mich., 544; 91 N. W., 1021; *Oesterreich v. Detroit*, — Mich., —; 100 N. W., 466; (July, 1904); *Kupkowski v. John S. Spiegel Co.*, — Mich., —; 97 N. W., 48; (Nov., 1903); *Smith v. Detroit & M. Ry. Co.*, — Mich., —; 99 N. W., 15; (April, 1904); *Proper v. Lake Shore & M. S. Ry. Co.*, — Mich., —; 99 N. W., 283; (April, 1904). Contributory negligence in order to constitute a defense must have been negligence contributing to the injury itself for which the action is brought. If it was subsequent negligence and only contributed to increase the injurious consequences, it goes to the amount of the recovery only: *Brown v. Marshall*, 47 Mich., 576; 11 N. W., 392. A plaintiff may recover notwithstanding he was negligent if the conduct of defendant was wanton or wilful and except for it

the injury would not have been received: *Tyler v. Nelson*, 109 Mich., 37; 66 N. W., 671.

Where an injury of which the plaintiff complains has resulted from the fault or negligence of himself, or where it has resulted from the fault or negligence of both parties, without any intentional wrong on the part of the defendant, an action cannot be maintained: *Williams v. Michigan Central Ry. Co.*, 2 Mich., 259, 265. Thus, where a person permitted his horse to run at large in the highway, and it went upon defendant's railroad track and was killed by a passing train in a dark night, the engineer not appearing to have been in fault, *held*, he could not recover: *Ibid.*, see, *Michigan Central R. R. Co. v. Leahy*, 10 Mich., 193; *Detroit & Milwaukee R. R. Co. v. Van Steinburg*, 17 Mich., 99. So in an action against a railroad company, for injuries received by the plaintiff, in a collision between a locomotive and the wagon on which plaintiff was riding, negligence on the part of the driver of the team affects the plaintiff's right to recover equally with her own negligence. The plaintiff cannot recover in such an action if her own negligence, directly or proximately, contributed to produce the injury, although the defendant's negligence may also have contributed to produce the result. In such an action the plaintiff must show that she acted with due care, or that her own negligence did not contribute to the injury, as well as that the defendant was guilty of such negligence. The reasonable care which the plaintiff and the driver of the vehicle in which she is riding are required to exercise in such a case, is not limited or affected by their situation or condition in life; neither their station in life nor any personal peculiarity of either of them has anything to do with the question. And it is no excuse to plaintiff seeking to recover for injuries received under such circumstances, that she was absent-minded, and did not look to see or stop to hear the cars. And the degree of the defendant's negligence seems

to be entirely immaterial so long as it appears that the plaintiff's negligence contributed to the injury of which she complains: *Lake Shore & Michigan Southern Ry. Co. v. Miller*, 25 Mich., 274. For cases illustrating the rule of imputed negligence, as where the negligence of the driver of a vehicle is imputed to one riding with him: see, *Hilts v. Foote*, 125 Mich., 241; 84 N. W., 139; *Mullen v. Owosso*, 100 Mich., 103; 58 N. W., 663; 23 L. R. A. 693; 43 Am. St., 436. The principle involved is that of agency and therefore negligence cannot be imputed to an infant, he not having capacity to employ an agent: *Hampel v. Detroit G. R. & W. Ry. Co.*, — Mich., —; 100 N. W., 1002; (Oct., 1904); overruling, *Apsey v. Detroit L. & N. Ry. Co.*, 83 Mich., 432; 47 N. W., 319. To the same effect see *Shippy v. Au Sable*, 85 Mich., 280; 48 N. W., 584; *Mullen v. Owosso*, 100 Mich., 103; 58 N. W., 663; 23 L. R. A., 693; 43 Am. St., 436. In order that a plaintiff may recover for injuries resulting from the wrong or negligence of another he must show in all cases that the defendant is entirely responsible for the grievance complained of. It must appear from this showing that all the material negligence that led to the injury was on the part of the defendant or his agents, and that the plaintiff did not contribute towards it. Plaintiff must establish completely whose fault it was, and explain the whole transaction: *Michigan Central Ry. Co. v. Colman*, 28 Mich., 441, 447; and see, *Daniels v. Clegg*, 28 Mich., 32.

Negligence consists in the failure to observe that degree of care which the law requires for the protection of the interest likely to be injuriously affected by the want of it. In making out negligence, the first requisite is to show the existence of the duty, which has been neglected. That duty must be set out in the declaration, and the neglect averred, and a failure to prove it is a failure to make out the plaintiff's case: *Flint & Pere Marquette Ry. Co. v. Stark*, 38 Mich., 714, 717; *Thurston v. Detroit U. Ry. Co.*, — Mich., —; 100 N. W., 395; (July, 1904).

The degree of care required of a party in any business must, however, be proportionate to its nature and risk. But the law does not require business

to be conducted upon any unusual basis, although it be one of great risk and requiring great caution; all rules applied in such matters must be reasonable, and must be applied with reference to the ordinary conduct of affairs: *Ibid.* And it seems that in considering whether plaintiff's negligence has contributed to an injury of which he complains, regard will sometimes be had to his age, condition, capacity and degree of understanding. Thus, where plaintiff's carriage, while driven by his daughter, was injured by collision in a highway, while it was held that an injury to plaintiff's horses and vehicle resulting from defendant's negligence in driving on a highway, will not entitle plaintiff to recover, if by ordinary care he might have avoided the collision notwithstanding the defendant's failure to turn out to the right, yet the court say, on the question of whether the plaintiff's daughter, (who alone was driving his horse when the collision occurred,) was guilty of negligence, it is proper that her age, and the fact that she was a woman, should be considered by the jury; and the degree of care and skill to which she should be held is that only of a person of her age and sex, and not necessarily the same that would be required of plaintiff himself if he had been driving at the time: *Daniels v. Clegg*, 28 Mich., 32; *East Saginaw C. R. Co. v. Bohn*, 27 Mich., 503; *Swoboda v. Ward*, 40 Mich., 420; *Young v. Detroit G. H. & M. R. Co.*, 56 Mich., 430; 23 N. W., 67; *Powers v. Harlow*, 53 Mich., 507; 19 N. W., 257; *Cooper v. Lake Shore & M. S. Ry. Co.*, 66 Mich., 261; 33 N. W., 306; *Baker v. Flint & P. M. Ry. Co.*, 68 Mich., 90; 35 N. W., 836.

In judging of negligence all the attendant circumstances are to be taken into consideration, and among others the age and sex of the person injured, so far as these are important; but it cannot be laid down as a rule of law that a less degree of care is required of a woman than of a man. Sex is no excuse for negligence: *Hassenyer v. Michigan Central Ry.*, 48 Mich., 205; 12 N. W., 155.

Where the driver of a street car permitted a child under the age of discretion to sit upon the front platform of

§ 757. **As between the employer and his employee.**—It is the duty of the employer to select such persons for his service as possess in a reasonable degree the skill, knowledge and habit of carefulness essential to the discharge of the duties incident to the service. And while his employees are engaged in his service and doing those things within the general scope of their employment they are acting for the employer, and he is answerable for any failure to exercise a reasonable degree of care and skill, resulting in injury to third persons.⁶

the car from which he fell and was injured, *held*, that it was the duty of the Street Railway Co. to provide vehicles which give security to their passengers, and not to suffer them to occupy unsafe places upon such vehicles. But if this duty is neglected and a passenger is injured he cannot recover damages if his own neglect of the duty of self-preservation contributed to the injury; but duty can only be predicated of one who has capacity to understand and ability to perform it; and therefore a child not of an age or discretion to understand the danger of riding on the front platform of a street car, cannot be charged with negligence in so doing: *East Saginaw City R. Co. v. Bohn*, 27 Mich., 503. But where a statute creates a duty and gives damages for injuries resulting from a neglect of that duty, as in case of sec. 36 of the general railroad act (see C. L., § 6294), requiring every railroad company to fence their track, etc., and in default thereof making them liable for all damages done to cattle, etc., thereon, it is no defense to a company failing to fence, etc., and thereby injuring plaintiff's cattle, that plaintiff's own negligence contributed to the injury: *Flint & Pere Marquette Ry. Co. v. Lull*, 28 Mich., 510; *Neversorry v. Duluth S. S. & A. Ry. Co.*, 115 Mich., 146; 73 N. W., 125; *Grand Rapids & I. Ry. Co. v. Cameron*, 45 Mich., 452; 8 N. W., 99. A similar doctrine obtains under the statute, C. L., § 6295, making railway companies liable for injuries from fires set along their right of way under certain circumstances: *Peter v. Chicago & W. M. Ry. Co.*, 121 Mich., 324; 80 N. W., 295, and cases cited in the opinion. But where one assumes to have a knowledge upon a sub-

ject of which another may well be ignorant, and knowingly makes false statements in regard to it, upon which the other relies, to his injury, it does not lie with him to say that the party who took his word and relied upon it as that of an honest and truthful man, was guilty of negligence in so doing, so as to be precluded from recovering compensation for the injury which was inflicted upon him under cover of the falsehood. If a party's own wrongful act has brought another into peril, he is not at liberty to impute the consequences of his act to a want of vigilance in the injured party, when his own conduct and untruthful assertions have thrown the other off his guard, and produced a false sense of security: *Eaton v. Winne*, 20 Mich., 156, 166; see, *Picard v. McCormick*, 11 Mich., 68. *Hassenyer v. Michigan Central Ry. Co.*, 48 Mich., 209; 12 N. W. 155.

6—*Liability of employer for negligence of employe.*—As a general rule of law, the party who receives an injury must seek his damages of the party by whom it was occasioned. The exception to this rule is in the case of master and servant, for the reason that the master, in selecting his servant, should see to it that he does not make choice of an unskillful, careless, or vicious person. His obligation is to use "such care [in the selection of his servants] as, in view of the consequence that may result from negligence on the part of employees, is fairly commensurate with the perils or dangers likely to be encountered." *Walkowski v. Penokey & G. C. M.*, 115 Mich., 629; 73 N. W., 895; and when he has exercised such care he may rely upon the presumption of competency until he has

notice or knowledge to the contrary: *Walkowski v. Penokee & G. C. M.*, *supra*.

If he neglects his duty in this respect, it is not unreasonable that he should be held responsible for any injury resulting from the want of skill or from want of care of his servant. Thus, if a drover who is engaged in the business of driving cattle employs a servant to assist him, through whose carelessness and negligence injury is done, the drover is liable. But where the employee is in the exercise of an independent and distinct employment, and not under the immediate control, direction, or supervision of the employer, the latter is not responsible for the negligence or misdoings of the employee. Thus, where a merchant employed a licensed drayman to cart goods from a warehouse to his store at a given price, and the drayman, while performing the duty, negligently permitted a barrel of the goods to roll against and injure another person in the street, *held*, that the employer was not responsible: *DeForest v. Wright*, 2 Mich., 368; and see, *Moore v. Sanborn*, 2 Mich., 519; *Davis v. Detroit & Milwaukee R. R. Co.*, 20 Mich., 105. Where one hires a contractor to do certain work and has no immediate control, direction or supervision of the servants of such contractor, he is not answerable for their negligence or carelessness: *Riedel v. Moran F. & Co.*, 103 Mich., 262; 61 N. W., 509; *Reier v. Detroit S. & S. W.*, 109 Mich., 244; 67 N. W., 120. Men employed by owner's agent and on owner's credit are the servants of the owner: *Smaltz v. Boyce*, 109 Mich., 383; 69, N. W., 21. Where plaintiff is informed by defendant's foreman under whom he was working that the place or machine was a safe one and he relies upon such information not knowing to the contrary he is relieved from the general rule that he assumes the risk; *Burnside v. Novelty Mfg. Co.*, 121 Mich. 115; 79 N. W., 1108; *Shadford v. Ann Arbor S. R. Co.*, 121 Mich., 224; 80 N. W., 30.

In any case, to render an employer liable for the fault or negligence of his employee, the injury complained of must arise in the course of the execution of some service lawful in itself, but negligently or unskillfully performed; for

a wanton violation of law by a servant, although occupied about the business of his employer, the servant alone is liable: *Moors v. Sanborn*, 2 Mich., 519, 529.

A master is liable for an injury done by his servant when acting within the scope of the master's employment, when the servant acted carelessly and recklessly and in negligent disregard of his master's instructions, but not if the injury was by the wanton, wilful and intentional act of the servant. And to escape responsibility for such an injury the burden would be upon the master to show that the servant was not at the time engaged in the course of his employment. Recklessness is only a high degree of negligence, and the master's responsibility does not depend upon the degree: *Cleveland v. Newsom*, 45 Mich., 62; 7 N. W. 222. But see, *Randall v. Chicago & G. T. Ry. Co.*, 113 Mich., 115; 71 N. W., 450; holding that the plaintiff has the burden of showing that the act complained of was within the scope of the servant's employment and this would seem to be the general rule. A rule promulgated for the control of the employment cannot be invoked by the master where it is customarily violated under circumstances from which knowledge by the master was to be presumed. Such conditions amount to a virtual abrogation of the rule: *Fuhrer v. Lake Shore & M. S. Ry. Co.*, 121 Mich., 212; 80 N. W., 23; *Nichols v. Chicago & W. M. Ry. Co.*, 125 Mich., 394; 84 N. W., 470. And so a master is responsible for the negligent driving of his servant even while the latter is acting temporarily for a third person who has hired the team and driver from the master; *Joslin v. Grand Rapids Ice Co.*, 50 Mich., 516; 15 N. W., 887; see, *Broderick v. Detroit Union R. R. Sta. & Depot Co.*, 56 Mich., 261; 22 N. W. Reporter, 802. Conduct outside the employment does not render the master liable: *Schulwitz v. Delta Lumber Co.*, 126 Mich., 559; 85 N. W., 1075. (Child permitted to ride on wagon used by servant): *Formall v. Standard Oil Co.*, 127 Mich., 496; 86 N. W., 946; *Mahler v. Stott*, 129 Mich., 614; 89 N. W., 340. By statute, C. L., § 4297, it is provided that the owners of carriages carrying passengers on the public highway for hire shall be liable to persons in-

Because one is held to assume the risks naturally incident to his employment, among which is the negligence of other servants engaged in the same employment, there is no liability of the master to servants injured by the carelessness or negligence of their fellow servants.⁷

It is the duty of the employer to furnish a reasonably safe place in which the employee may do his work. This does not require the employer to eliminate all danger. Many occupations are necessarily dangerous. The place, the machinery, the tools, in which, or with which, the employee is required to render his service, must be reasonably safe having in view the general character of the employment.⁸

injured by such carriage though occasioned by the willful conduct of the driver.

In trespass against an employer for an injury caused by the act of his servant, it is for the jury to decide whether the act was willful or careless; if it was willful the employer would not be answerable: *Wood v. Detroit City R. Co.*, 52 Mich., 402; 18 N. W., 124.

7—*Employer not liable to his servant, for the negligence of a fellow-servant.*—Where one man enters into the service of another to perform a particular kind of work, he is very properly held, as between himself and his employer, to assume the natural and ordinary risks incident to such service, arising from the negligence and misconduct of his fellow servants, as well as other risks not arising from the fault of the employer. And if the employer has acted in good faith and with ordinary care and prudence in the selection and employment of fit and competent servants, he should not be liable to one of them for an injury arising from the negligence of his fellow-servant; because it is fair to presume that the compensation was fixed with reference to such risk: per Christlancy, J., in *Michigan Central Ry. Co. v. Leahy*, 10 Mich., 203; *Davis v. Detroit & Milwaukee R. R. Co.*, 20 Mich., 105; and see, *Michigan Central R. R. Co. v. Dolan*, 32 Mich., 510.

But where a master retains an incompetent servant in his employment after knowledge comes to him of the unfitness of the servant for the service in which he is engaged, or of whose unfitness

he might have known by the exercise of due diligence or ordinary care, is liable to another servant for injuries caused by the negligence of the incompetent servant: *Hilts v. Chicago, etc., Ry. Co.*, 55 Mich., 437; 21 N. W., 878.

A railroad employee having knowledge of the unfitness of another employee of the same company, and who does not give information to the company of such unfitness, takes upon himself all the risks of injury from such unfitness while engaged in the ordinary performance of his duties, as much as if he had expressly contracted with reference to possible injuries from that cause: *Davis v. Detroit & Milwaukee Ry. Co.*, 20 Mich., 105. Employees engaged in the operation of freight trains are fellow servants: *Stanley v. Chicago & N. W. Ry. Co.*, 101 Mich., 202; 59 N. W., 393; (conductor, engineer, brakeman); so are a locomotive fireman and section track repairers and train brakeman: *Loranger v. Lake Shore & M. S. Ry. Co.*, 104 Mich., 80; 62 N. W., 137.

8—*Duty of employer to furnish a safe place to work.*—As to liability of employer, for injuries resulting to employee in the prosecution of the employment: See, *Fort Wayne, J. & S. R. R. Co. v. Gildersleeve*, 33 Mich., 133.

A master is only bound to use ordinary care in protecting his servants from dangers that are not within their knowledge or observation. The servant is supposed to understand and assume the ordinary risks of his service. Hence,

§ 758. **The declaration in actions for negligence.**—The declaration should allege that he, the plaintiff, at the time of the injury complained of was in the exercise of ordinary care and was not guilty of any negligent conduct contribu-

employers may use such machinery as they choose, provided it is sound, well made and kept in repair, and in an action by the servant for injuries caused by its use, the question as to whether a different kind of machinery would not have been safer, cannot be considered. Masters do not impliedly warrant the machinery and appliances used by their servants, to be safe beyond contingency, or even to be safe as those of other employers. And a servant who continues to use machinery which has proved to be unsafe, assumes the risk and cannot recover for injuries which he receives in doing so.

Accidental injuries to servants will not sustain an action against the master where they arise from the servant's voluntary use of machinery which they understand, and to which no objection has been made as being particularly unsafe: *Richards v. Rough*, 53 Mich., 213; 18 N. W. 785. But see *Broderick v. Detroit Union S. & D. Co.*, 56 Mich., 261; 22 N. W., 802. The obligation of the employer is not to make his premises and machinery perfectly safe or to have the most approved appliances but to have his premises reasonably safe and his machinery reasonably well suited for the purpose for which it is used: *Lamotte v. Boyce*, 105 Mich., 545; 63 N. W., 517. It is sufficient if the master furnishes appliances which are in common use in the same or similar lines of work: *Shadford v. Ann Arbor S. Ry. Co.*, 111 Mich., 390; 69 N. W., 661. Where the danger is apparent to one of ordinary comprehension the master is not liable though the place is not safe: *Berlin v. Mershon*, 132 Mich., 183; 93 N. W., 248; *Murshinsky v. Vincent*, — Mich., —; 97 N. W., 43; (Nov., 1903). The master cannot delegate the duty to furnish a safe place so as to relieve himself from responsibility and persons engaged in work of making the place safe are held, in *Balhoff v. Michigan C. Ry. Co.*, 106 Mich., 606; 65 N. W., 592, not within the fellow servant rule; See cases cited in the opinion in last named case and

Anderson v. Michigan C. Ry. Co., 107 Mich., 591; 65 N. W., 585. This duty is a continuing one and is not satisfied by once furnishing such conditions, but requires the master to provide reasonably for inspection and repair: *Anderson v. Michigan C. Ry. Co.*, *supra*; *McDonald v. Michigan C. Ry. Co.*, 108 Mich., 7; 65 N. W., 597. Duty of inspection is not discharged by delegating to a fellow servant: *McDonald v. Michigan C. Ry. Co.*, *supra*. This duty of inspection does not extend to the small and common tools in everyday use, of the fitness for use of which the employees using them may reasonably be supposed to be competent judges: *Wachsmith v. Shaw Electric C. Co.*, 118 Mich., 275; 76 N. W., 497.

Nor will an employer be held liable as for negligence in omitting to guard against accidents that are not likely to happen, or such as no one would be likely to foresee: *Sjogren v. Hall*, 53 Mich., 274; 18 N. W. 812.

Whoever hires out for any service, takes the risk ordinarily incident to it. And a railroad company is not negligent in omitting to clear snow and ice from the ground alongside of its track in the neighborhood of its depot platforms; and a brakeman who is injured by slipping on it has no remedy against the company: *Piquegno v. Chicago & Grand Trunk Ry. Co.*, 52 Mich., 40; 17 N. W. 232. Where a danger incident to a particular employment is apparent to the ordinary person the employee assumes the risk: *Manning v. Chicago & W. M. Ry. Co.*, 105 Mich., 260; 63 N. W., 312; *Gavigan v. Lake Shore & M. S. Ry. Co.*, 110 Mich., 71; 67 N. W., 1097; *Journeaux v. E. H. Stafford Co.*, 122 Mich., 396; 81 N. W., 259; *Shanke v. United States H. Co.*, 125 Mich., 346; 84 N. W., 283; *Ertz v. Pierson*, 130 Mich., 160; 89 N. W., 680. The employer is not bound to warn against dangers of every possible kind; not against one not to be expected: *Nowakowski v. Detroit S. W.*, 130 Mich., 308;

ting to the injury;¹ that defendant owed to him, the plaintiff, a particular duty the failure to perform which is the occasion of this action;² that the defendant was guilty of such conduct, specifically alleging the same in detail, as shows a failure to discharge the duty he owed to plaintiff by reason of which failure the plaintiff was injured;³ there should also be an allegation as to the nature and extent of the injury received.⁴

§ 759. Actions on the case growing out of bailment relations.—A bailment consists in the delivery of personal chattels from one person, entitled to control their possession, to another for the accomplishment of some particular purpose, and under an obligation to return, or deliver over to a particular custody agreed upon, when the bailment purpose is accomplished.

Bailments are of three general classes; those for the sole benefit of the bailor; those for the sole benefit of the bailee; and those for the mutual benefit of bailor and bailee. These three classes, naturally as well as by requirement of law, call for different rules for measuring the care and responsibility of the bailee for the property which is the subject of the bailment. If the bailor alone is benefited by the bailment, while the bailee should not be excused from an obligation to exercise some degree of care in connection with the bailment, still he should not be required to exercise such a high degree of care as if the bailment were for his sole benefit or even for

89 N. W., 956. If the work is in the line of his employment and the danger known by the employee, the fact that the place is one of especial danger will not render master liable for injury received: *Middaugh v. Mitchell*, 120 Mich., 581; 79 N. W., 806.

1—*Thompson v. Flint & F. M. Ry. Co.*, 57 Mich., 307; 23 N. W., 820; *Denman v. Johnston*, 85 Mich., 387; 48 N. W., 565; *Pratt v. Montcalm Circuit Judge*, 105 Mich., 501; 63 N. W., 506; *McKormick v. West Bay City*, 110 Mich., 265; 68 N. W., 148.

2—*Buckley v. Great Western Ry. Co.*, 18 Mich., 121; *Thompson v. Flint & P. M. Ry. Co.*, 57 Mich., 307; 23 N. W., 820; *Thorsen v. Babcock*, 68 Mich., 526; 36 N. W., 723; *Schindler v. Milwaukee L. S. & W. Ry. Co.*, 77 Mich., 136; 43 N. W., 911.

3—*Thompson v. Flint & P. M. Ry. Co.*, 57 Mich., 307; 23 N. W., 820; *Lucas v. Wattles*, 49 Mich., 382; 13 N. W., 782; *O'Neill v. Duluth S. S. & A. Ry. Co.*, 101 Mich., 437; 59 N. W., 836; *Ella v. Boyce*, 112 Mich., 552; 70 N. W., 1106.

4—For cases illustrating necessity for, and sufficiency of allegations of special damages: *Shaddock v. Alpine P. L. Co.*, 79 Mich., 11; 44 N. W., 158; *Fuller v. Jackson*, 92 Mich., 199; 52 N. W., 1075; *McKormick v. West Bay City*, 110 Mich., 265; 68 N. W., 148; *Snyder v. Albion*, 113 Mich., 279; 71 N. W., 475; *Fye v. Chapin*, 121 Mich., 675; 80 N. W., 797.

the mutual benefit of both. On the other hand if the bailee alone is benefitted by the bailment he should be held to a much higher degree of care than as if he had no benefit from the bailment or than as if he profited equally with the bailor. Again if bailor and bailee are both benefitted by the bailment relation a different measure of care is exacted than in either of the others; a measure of care lying between that required in the other two. The law designates this measure of care, required in the case of the mutual benefit bailment as "ordinary" care, and, without more definiteness, designates that required in the bailment for the sole benefit of the bailor as something less than ordinary care, and that required in the bailment for the sole benefit of the bailee as something more than ordinary care. An illustration of the mutual benefit bailment is the hiring of a horse from a livery stable keeper to make a desired drive. The stable keeper is benefitted through receiving his hire and the other, the bailee through being able to make his desired drive. An illustration of the bailment for the sole benefit of the bailor is the taking by his neighbor and friend of his silver to care for while he is absent from home with no thought of compensation but as a neighborly act. An illustration of the bailment for the sole benefit of the bailee is where the bailor as a neighborly kindness and with no thought of receiving compensation allows the bailee to take his horse to drive to a neighboring town.

To state the rules of law applicable, from the point of view of responsibility for failure to exercise the required degree of care, the bailee in the mutual benefit bailment is answerable for failure to exercise ordinary care,⁵ the bailee in the bailment for the sole benefit of the bailor is answerable for gross negligence only,⁶ and the bailee in the bailment for the sole

5—Hofer v. Hodge, 52 Mich., 372; 18 N. W., 112; Ruggles v. Fay, 31 Mich., 141; Eastman v. Sanborn, 3 Allen, 594; Cross v. Brown, 41 N. H., 283; Harrington v. Snyder, 3 Barb., 380; Ray v. Tubbs, 50 Vt., 688; Knights v. Piella, 111 Mich., 9; 69 N. W., 92. See, State Savings Bank v. Buhl, 129 Mich., 193; 88 N. W., 471; Taylor v. Downey, 104 Mich., 532; 62 N. W., 716. The burden is upon the bailor to show want of the care required: Knights v. Piella, *supra*; Dennis v. Huyck, 48 Mich., 620; 12 N. W., 878. One who uses the property in a way not within the bailment purpose, is answerable absolutely for loss or injury occurring while so being used: Fisher v. Kyles, 27 Mich., 454.

6—Coggs v. Bernard, 2 Ld. Raym., 909; Foster v. Essex Bank, 17 Mass., 479; 9 Am. Dec. 168; Edson v. Weston, 7 Cow., 278.

benefit of the bailee is answerable for even slight negligence.⁷

§ 760. **Action for fraud or deceit.**—When a false representation of a fact is made, to induce another to do a particular thing, who does it accordingly, and thereby sustains damage, it may be recovered in an action on the case.⁸ If A fraudulently makes a representation which is false to B, meaning that B shall act upon it, and B, believing it to be true, does act upon it, and thereby suffers damage, he may sustain an action on the case against A for the deceit; there being here the conjunction of wrong and loss, entitling the injured and suffering party to a compensation in damages.⁹ Where the plaintiff employed the defendant to obtain a lease of some premises for him, and the defendant falsely pretended that he paid £150 premium for it, and obtained that amount from the plaintiff, whereas in fact he had only paid £100, it was holden that an action on the case would lie for this deceit.¹⁰

In an action for deceit in the sale of a horse where proof is given that the defendant knowingly made false representations to the plaintiff concerning the horse, at the time of the sale, and that the plaintiff was induced by those representations to buy the horse, and confiding in them, did buy him, the jury are authorized and required to find that the defendant made the representations with the intent thereby to induce the plaintiff to buy the horse, and the plaintiff cannot legally be required to give further proof of such intent of the defendant.¹¹

If a man do anything in the name of another, by which he is deceived and injured, as, if a man bring an action in the name of another, and then suffers a nonsuit, whereby the plaintiff be-

7—Carpenter v. Branch, 13 Vt., 129; 37 Am. Dec. 586; Beardslee v. Richardson, 11 Wend., 25; 25 Am. Dec. 596; see, Beller v. Schultz, 44 Mich., 529; 7 N. W., 225.

8—Pasley v. Freeman, 3 Term. R., 51; Picard v. McCormick, 11 Mich., 68; and Beebe v. Knapp, 28 Mich., 53; Carter v. Glass, 44 Mich., 156; 6 N. W., 200.

9—Gerhard v. Bates, 2 El. & Bl., 476, 488; White v. Merritt, 3 Selden, 352. If one obtains property of another by means of untrue statements, though in

ignorance of their falsity, he must be held responsible for a legal fraud: Converse v. Blumrich, 14 Mich., 109; Carter v. Glass, 44 Mich., 156; 6 N. W., 200; Hopkins v. O'Neill, 46 Mich., 403; 9 N. W., 448; see, Beebe v. Young, 14 Mich., 136; Comstock v. Smith, 20 Mich., 338; see, Stone v. Covell, 29 Mich., 360.

10—Pewtress v. Austin, 6 Taunt., 522.

11—Collins v. Dennison, 12 Metc., 549.

comes liable to costs, the latter may maintain an action on the case against him.¹²

If a man, in selling a house, allege the cost of it to be more than it really is, whereby the vendee is induced to give a higher price for it; or if, in selling a public house, the vendor allege the business done in it to be more than it really is, by which the vendee is induced to give a higher price for it, this action lies.¹³

If, upon a reference to a man, with respect to the solvency of another, he represent him as fit to be trusted, when he knows he is not so, this action lies, if any injury arise to the party from having given credit upon his representation.¹⁴ But by statute, "No action shall be brought to charge any person, upon or by reason of any favorable representation or assurance, made concerning the character, conduct, credit, ability, trade or dealings of any other person, unless such representation or assurance be made in writing, and signed by the party to be charged thereby, or by some person thereunto by him lawfully authorized."¹⁵

The doctrine of fraud includes not only the expression of that which is false, but also the suppression of that which is true. Where it is made to appear that a vendor has been guilty of a fraudulent concealment of material facts, to the injury of the vendee, an action at law can be maintained to recover the damages.¹⁶ Where a father by letter recommended his minor son as worthy of credit, but did not state that he was a minor, and the plaintiff on the strength of it trusted the son for goods to a large amount, the court held that the direction to the jury, that if the father concealed the fact of the minority of the son, with the view of giving him credit, knowing or believing that if that fact had been stated, he would not have obtained the

12—Buller's N. P., 30.

13—Pillmore v. Hood, 5 Bing., N. C., 97; Taylor v. Green, 8 C. & P., 316.

14—Corbet v. Brown, 8 Bing., 35; 7 Ad. & El., 86.

15—C. L., § 9518 and notes. This statute is not applicable where the representations form part of a contract: Huntington v. Wellington, 12 Mich., 10; nor where the representation

is made to enable the party making it to profit by it: Hess v. Culver, 77 Mich., 602; 43 N. W., 994; Clark v. Hurd, 79 Mich., 130; 44 N. W., 343. This statute applies though the representation is made in another state where there is no such statute: Third National Bank v. Steel, 129 Mich., 434; 88 N. W., 1050.

16—Fleming v. Slocum, 18 Johns., 403.

credit, he was liable in law for the damage the plaintiff sustained, was correct.¹⁷

But the vendor of merchandise is not bound to communicate to the vendee intelligence of extrinsic circumstances, exclusively within the knowledge of the vendor, which may affect the price of the merchandise. But at the same time each party must take care not to say anything tending to impose upon the other.¹⁸

§ 761. The declaration in actions for fraud or deceit.—It should, by a general allegation of the circumstances show that the plaintiff was justified in relying on the representations of defendant, and specifically what the representations were;¹⁹ facts showing that they were material; that they were relied upon and induced plaintiff to do the thing, the doing of which resulted in his injury; that the representations were false;²⁰ that plaintiff was injured and the character of the injury and an allegation of damages.

§ 762. For keeping dangerous instruments.—If a man have dangerous instruments, which are in a state to do mischief, he must take the utmost care that they are kept in such a way that they may not occasion an injury to another. Where the defendant, having a gun at the house of J L, which he knew to be loaded with powder and shot, sent a very young girl for it, with a message to J L, to take out the priming, before he sent it; J L accordingly took out the priming, and gave it to the girl, who, in play, presented it at the child of the plaintiff, and it unfortunately went off and wounded him; the court held that the plaintiff might maintain an action against the defendant for the injury; the latter, no doubt, intended to have taken sufficient precaution by directing the priming to be taken out, but unfortunately it was not sufficient; it was incumbent upon him who, by charging the gun, had made it capable of doing mischief, to render it safe and innocuous before it was entrusted to such a messenger.²¹ Where the defendant, for the

17—*Kidney v. Stoddart*, 7 Metc., 252.

18—*Laidlaw v. Organ*, 2 Wheaton, 178.

19—*Parker v. Armstrong*, 55 Mich., 179; 20 N. W., 892; *Pforzheimer v.*

Selkirk, 71 Mich., 607; 40 N. W., 12.

20—*Stoflet v. Marker*, 34 Mich., 315; and see cases cited in last note.

21—*Dixon v. Bell*, 5 M. & S., 198; *Dixon v. Bell*, 1 Stark., 287.

protection of his property, some of which had been stolen, set a spring gun, without notice, in a garden completely walled around, and at a distance from his house, and the plaintiff, who had climbed over the wall in pursuit of a strayed fowl, was shot, the judges held that an action was maintainable and the defendant liable in damages.²² In that case, it was evident from notice not being put up, and also from the declarations of the defendant, that he intended to inflict an injury on any person who should trespass on the land.²³ So, if a man place dangerous traps, baited with flesh, in his own ground, so near a highway or the premises of another that dogs passing along the highway, or kept in his neighbor's premises, must probably be attracted by their instinct into a trap, and in consequence of such act his neighbor's dogs be so attracted.

§ 763. For keeping dangerous animals—at common law.—At the common law, and in the absence of statute, the owner of domestic or other animals, not naturally inclined to commit mischief, as dogs, horses and cattle, is not liable for any injury committed by them to the person or personal property, unless it can be shown that he previously had notice of the animal's malicious propensity; it being, in general, necessary in an action for any injury committed by such animals, to allege and prove that the owner knew that the animal was wont to do mischief.²⁴ If a man keeps a vicious animal, knowing it to be so, and do not take sufficient measures to prevent its doing mischief, he will be answerable for any injury it may commit to the property or person of another; as, if a man knowingly keep a vicious bull,²⁵ or a dog accustomed to bite cattle or sheep,²⁶ or a dog accustomed to bite mankind,²⁷ whether the animal be his own property or not.²⁸ In relation to animals naturally wild, such as bears, etc., the keeper of them is accountable for

22—*Bird v. Holbrook*, 4 Bing., 628, 644.

23—The statute, C. L., § 11515, makes the setting of a spring gun, or other like device, a misdemeanor, except it be left in the immediate presence of some competent person.

24—1 Chitty's Pl., 10 Am. ed., 82.

25—*Blackman v. Simmons*, 3 C. & P., 138.

26—*Hartley v. Harriman*, 1 B. & A., 620.

27—*Judge v. Cox*, 1 Cox, 285; *Curtis v. Mills*, 5 C. & P., 489; *Hogan v. Sharpe*, 7 *Ibid.*, 755.

28—*McKone v. Wood*, 5 C. & P., 1.

the mischief they do, whether he have notice or not of their vicious disposition.²⁹

If a man keep a dog, accustomed to bite, upon his premises for their protection, and another person incautiously come upon the premises in the night, and be bitten by the dog, he is in that case injured by his own fault, and the owner of the dog is not responsible.³⁰ A person has a right to keep a fierce dog to protect his property; but not to place it in or on the approaches to his house, so as to injure persons exercising a lawful purpose, in going along those paths to the house.³¹

To establish the scienter of the owner of the animal, it will be sufficient to prove that the owner had notice of a similar mischief having been committed (as, if a dog had bitten sheep, and afterwards bite a horse), for the owner ought to have killed him when he had notice of the first mischief.³²

§ 764. By statute.—"Any person may kill any dog that he may see chasing, worrying, wounding, or killing any sheep, lambs, swine, cattle, or other domestic animal, out of the enclosure or immediate care of the owner or keeper, unless the same be done by the direction or permission of such owner or keeper; or any dog that may suddenly assault him while he is peaceably walking or riding anywhere out of the enclosure of the owner or keeper of such dog."³³

"If any dog shall have killed, or assisted in killing, wounding or worrying any sheep, lamb, swine, cattle, or other domestic animal, or that shall assault or bite, or otherwise injure any person while traveling the highway or out of the enclosure of the owner or keeper of such dog, such owner or keeper shall be liable to the owner of such property or person injured in double the amount of damages sustained, to be recovered in an action of trespass, or on the case, and it shall not be necessary, in order to sustain an action, to prove that the owner or keeper knew that such dog was accustomed to do such dam-

29—*Rex v. Higgins*, Lord Raymond, 1583; 1 Chitty's Pl., 82.

30—*Sarch v. Blackburn*, Moody & Mall., 505.

31—*Tennant v. Strachan*, 19 Eng. Com. Law R. 394.

32—*Coux v. Lowther*, Lord Raym., 600, 607; see, 1 Chitty's Pl., 82, notes.

33—C. L., § 5592. For a construction of this statute see: *Hubbard v. Preston*, 90 Mich., 221; 51 N. W., 209; *Bowers v. Horen*, 93 Mich., 420; 53 N. W., 535; *Ten Hopen v. Walker*, 96 Mich., 236; 55 N. W., 657; *Throne v. Mead*, 122 Mich., 273; 80 N. W., 1080.

age or mischief; and upon the trial of any cause mentioned in this section, the plaintiff and defendant may be examined under oath touching the matter at issue, and evidence may be given as in other cases; and if it shall appear to the satisfaction of the court by the evidence, that the defendant is justly liable for the damages complained of under the provisions of this act, the court shall render judgment against such defendant for double the amount of damages proved, and costs of suit; but in no case shall the plaintiff recover more than five dollars costs.'³⁴

§ 765. Against common carriers, who are.—Common carriers undertake, generally, and not as a casual operation, and for all people, indifferently, to carry goods, and deliver them at a place appointed, for hire, as a business, and with or without a special agreement as to time. They include the owners of stage wagons and coaches, and railroad cars, who carry goods as well as passengers for hire, wagoners, teamsters, cartmen, porters, the masters and owners of ships, vessels, and all water craft, including steam vessels and steam tow-boats, belonging to internal as well as coasting and foreign navigation, lightermen, barge owners, canal boatmen, and ferrymen.³⁵ To bring a person within the description of a common carrier, he must exercise it as a public employment; he must undertake to carry goods for persons generally, and he must hold himself

34—C. L., § 5593, and see notes thereto. This statute does not supersede common law actions. It was intended to give a liberal remedy in a few special cases, and to authorize a recovery in its nature penal. It does not require proof of knowledge in the defendant of the dog's habit to "do such damage or mischief," and the right of action cannot be extended by construction: *Monroe v. Rose*, 38 Mich., 347; *Newton v. Gordon*, 72 Mich., 642; 40 N. W., 921.

Although the plaintiff's right to recover under this statute does not depend on the fact as to whether defendant knew that his dog was vicious and inclined to bite, yet the fact of knowledge in the owner of the vicious disposition of his dog is a proper sub-

ject to be taken into account and weighed by the jury in estimating the damages, and evidence of such knowledge is therefore competent. Recklessness of conduct, or the want of due and reasonable care, is an important element in estimating the damages in such a case as in most cases of tort: *Swift v. Applebone*, 23 Mich. 252. As to the pleadings, see, *Monroe v. Rose*, 38 Mich. 347; *Snow v. McCracken*, 107 Mich. 49; 64 N. W. 866. See *ante* § 474.

35—2 Kent's Com., 598. Telegraph companies, in the absence of statute, are not common carriers under the rule as declared in this state: *Birkett v. Western Union T. Co.*, 103 Mich., 361; 61 N. W., 645.

out as ready to engage in the transportation of goods for hire, as a business, and not as a casual occupation.³⁶

§ 766. **Liability of common carriers.**—A common carrier is, by the common law, in the nature of an insurer. This makes him liable for everything except the act of God, and the public enemy, that is, even for inevitable accidents, with these exceptions. By the act of God is to be understood, natural accidents, such as lightning, storms, tempests, and the like, which could not happen by any human intervention; unusual force, though ever so great and irresistible, does not excuse.³⁷

Questions frequently have arisen in respect to the validity of notices by common carriers restricting their common law liability. In England, the cases recognized the validity of these notices until little responsibility attached to carriers, when parliament interposed, and by statutory provisions rendered carriers liable, in a great measure, to the same extent as by the common law.

The courts in this country have, however, generally held that the carriers could not, by a notice to that effect, absolve themselves from the responsibility which attached to them

36—Story on Bailments, § 495. Mandamus will lie by the attorney general on the relation of a private individual, to compel an express company to perform the duties imposed upon it by law with reference to the receiving and forwarding of goods: Attorney Gen'l, *ex rel*, Moore v. American Express Co., 118 Mich., 682; 77 N. W., 317. While common carriers under the rule of the common law must carry for all persons indiscriminately this duty is emphasized by the statute, C. L., § 6235, providing a penalty for failing to do so. This penalty cannot, however, be recovered by another common carrier to whom goods were consigned to be carried to their destination: Crosby v. Pere Marquette Ry. Co., 131 Mich., 288; 91 N. W., 124.

37—Hollister v. Nowlen, 19 Wend., 247, 251; Michigan Central R. R. Co. v. Hale, 6 Mich., 257; 2 Kent's Com., 652. Contrary to the rule obtaining generally in this country, a common carrier does not, in Michigan, carry live stock under the general rule of the common law as to liability, but is

held answerable only for failure to exercise ordinary care: Michigan, S. & N. I. Ry. Co. v. McDonough, 21 Mich., 165; Heller v. Chicago & G. T. Ry. Co., 109 Mich., 53; 66 N. W., 687; see, Smith v. Michigan Central Ry. Co., 100 Mich., 148; 58 N. W., 651.

Where goods are expressed C. O. D. the liability of the express company as a common carrier terminates on the safe carriage of the goods to their destination, the giving of reasonable notice to the consignee of their arrival and offer to deliver on payment of amount charged against them. If they are not taken within a reasonable time after such notice the liability of the express company is that of a warehouseman: Hasse v. American Express Co., 94 Mich., 133; 53 N. W., 918. An express company in general is under obligation to make free delivery, but it may establish distance limitations from its office in the city or town beyond which it will charge for making personal delivery: Bullard v. American Express Co., 107 Mich., 695; 65 N. W., 551.

by the common law.³⁸ A common carrier may limit its common law liability by such express agreement with the shipper as is reasonable and not inconsistent with sound public policy. A receipt or bill of lading limiting the liability by its terms, to an amount not exceeding \$50, received by the shipper without objection, and without insisting on the common law liability for the carrier, operates as a limitation upon the common law liability. So of the provision therein limiting liability to losses or injuries occurring on its own line of transportation; so of a provision therein exempting from loss by fire, all of which provisions were held reasonable.³⁹ The terms of a bill of lading handed to a shipper's clerk, and never brought to the shipper's attention, will not prevail as against an oral contract of shipment previously made by the shipper with the carrier's authorized agent.⁴⁰ But such circumstances in the

38—*Bein v. Heath*, 6 Howard, 244. In this case Nelson J., in relation to notices said: "That admitting the right thus to restrict his (the carrier's) obligation, it by no means follows that he can do so, by any act of his own. He is in the exercise of a sort of public office, and has public duties to perform, from which he shall not be permitted to exonerate himself without the assent of the parties concerned. And this is not to be implied or inferred from a general notice to the public, limiting his obligation, which may or may not be assented to. He is bound to receive and carry all the goods offered for transportation, subject to all responsibilities incident to his employment, and is liable to an action in the case of refusal. And we agree with the court in the case of *Hollister v. Nowlen*, that if any implication is to be indulged from the delivery of the goods under the general notice, it is as strong that the owner intended to insist upon his rights, and the duties of the carrier, as it is that he assented to their qualification." *Hollister v. Nowlen*, 19 Wend., 234; *Jones v. Voorhees*, 10 Ohio, 145.

Common carriers cannot themselves restrict in any manner their common law liability as such carriers. They cannot limit their liability by a mere notice published or posted, or otherwise brought to the knowledge of the

consignor. But a carrier may by special agreement with an individual contract for a limited liability, that is the consignor may release the carrier by express contract from any portion of his common law liability. The carrier is bound to transport property entrusted to him under his common law liability, if it be not waived or changed by contract; and he cannot refuse to receive property for transportation unless the consignor will agree to enter into a special contract therefor, or release him from any of his common law obligations as a carrier: *Michigan Central Ry. Co. v. Hale*, 6 Mich., 243; *McMillan v. Michigan Southern & Northern Indiana Ry. Co.*, 16 Mich., 79; see, *American Trans. Co. v. Moore*, 5 Mich., 368; *Sisson v. Cleveland & Toledo R. R. Co.*, 14 Mich., 489; *Hawkins v. Great Western Ry.*, 17 Mich., 57; *Great Western Ry. v. Hawkins*, 18 Mich., 427. A common carrier is bound to receive and carry goods only when offered for carriage by the owner or his authorized agent; and then only upon payment of freight in advance if required: *Fitch v. Newberry*, 1 Doug. Mich., 1.

39—*Smith v. American Express Co.*, 108 Mich., 572; 66 N. W., 479; *Hope v. Delaware & H. C. Co.*, 111 Mich., 209; 69 N. W., 487.

40—*Rudell v. Ogdensburg Transit Co.*, 117 Mich., 568; 76 N. W., 380.

absence of any special oral agreement will operate as a contract limiting liability and the shipper cannot avoid it by showing that he received it in haste and without reading.⁴¹ The burden of showing that the carriage was under a contract for a limited liability is upon the carrier.⁴²

A common carrier is responsible for the loss of a box or parcel of goods, though he be ignorant of the contents, or though those contents be ever so valuable, unless he made a special acceptance. But the rule is subject to a reasonable qualification, and if the owner be guilty of fraud or imposition in respect to the carrier, as by concealing the value or nature of the article, or deludes him by his own carelessness in treating the parcel as a thing of no value, he cannot hold him liable for the loss of the goods.⁴³ If any means are used to conceal the nature of the article, and thereby the owner avoids paying a reasonable compensation for the risk, this unfairness, and its consequence to the carrier, upon the principle of common justice will exempt him from responsibility, for such a result is alike due to the carrier, who has received no reward for the risk, and to the party who has been the cause of it.⁴⁴ These cases seem not to be obnoxious to the objection that the carrier cannot limit his liability by a printed notice. So long, says Cowen, J., as the printed notice of a common carrier is confined to the purposes which I have enumerated, and others calculated to save himself, without mischief to his customers, or for the benefit of the latter, I see no objection in principle to give it full effect.⁴⁵ When there is no notice, if there are no improper means or artifice adopted by the person who sends the goods to conceal the nature and value of the contents of the box, parcel, or package, to mislead or deceive the carrier, the person sending the goods is not bound to make the disclosure, unless inquiry is made of him on the subject, although the carrier has the right to make the inquiry, and to have a true answer, and if a false answer is given, he will not be responsible.⁴⁶

41—Hengstler v. Flint & P. M. Ry. Wend., 459; Bradley v. Waterhouse, 3 Co., 125 Mich., 530; 84 N. W., 1067. C. & P., 318.

42—Bonfiglio v. Lake Shore & M. S. Ry. Co., 125 Mich., 476; 84 N. W., 722. 45—Cole v. Goodwin, 19 Wend., 251.

43—Kent's Com., 603. 46—Sewal v. Allen, 6 Wend., 335,

44—Orange Co. Bank v. Brown, 9 Walker v. Jackson, 10 M. & W., 168; Cow., 85, 116; Pardee v. Drew, 25 Batson v. Donovan, 4 B. & Ald., 21.

To render the defendant liable, the property must be delivered to him or to some one authorized by him to receive it. When the plaintiff, intending to take passage in a steamboat of the defendants, deposited his trunk on board, in the usual place for baggage, but without putting it in charge of any person, or notifying any person employed on the boat of such deposit, or of his intention to take passage, and while temporarily absent from the boat she started on her trip and he was left; the supreme court of this state held that there was not a constructive delivery and acceptance of the trunk as the baggage of a passenger, by which the defendants could be held liable for its loss.⁴⁷ In order that the carrier shall be held to answer under the rule of the common law for loss of baggage checked it must be accompanied by a bona fide passenger. It is not enough that a ticket is purchased.⁴⁸

§ 767. Actions for negligently driving on the highway.—If by reason of the carelessness or negligence or want of skill of one driving on the public highway another is injured in his person or property, an action on the case will lie to recover damages for such injury.⁴⁹ This action will lie against the driver, and, in case he is a servant or agent engaged in the business of the master or principal, against the master also.⁵⁰ The master is not liable for the willful act of the

47—Wright v. Caldwell, 3 Mich., 51. Where a plaintiff counts upon the common law liability of common carriers to carry safely, he must prove all the circumstances necessary to create the liability, and if he fail to show that the property was delivered to or accepted by the company under circumstances which made it their duty to assume the care and custody of the property, in its reception, transportation and delivery, he fails to prove the liability alleged: Michigan Southern & Northern Indiana Ry. Co. v. McDonough, 21 Mich., 165. A common carrier becomes immediately responsible as such, where goods are properly marked and placed inside its freight depot for shipment at once, and the agent said they would be shipped the next morning, and this though no shipping bill is taken: Meloche v. Chicago, M. & St. P. Ry. Co., 116 Mich., 69; 74 N. W., 301.

48—Marshall v. Pontiac, O. & N. Ry. Co., 126 Mich., 45; 85 N. W., 242.

49—Moreton v. Harden, 4 B. & C., 223. All the surrounding circumstances, including age and sex of the person injured, are to be taken into consideration upon the question of negligence; but it cannot be laid down as a rule of law that a less degree of care is required of a woman than of a man: Hassenyer v. Michigan Central Ry. Co., 48 Mich., 205; 12 N. W., 155.

50—Moore v. Sanborn, 2 Mich., 519; Sutherland v. Ingalls, 63 Mich., 620; 30 N. W., 342; Wood v. Detroit City S. Ry. Co., 52 Mich., 402; 18 N. W., 124. If, however, such driver is not at the time engaged in the business of the master, or if as to the particular misconduct the servant acts wilfully, maliciously or in wanton violation of law, he alone is liable: Moore v. Sanborn, 2 Mich., 519; Chicago & N. W.

servant except the driver be engaged by the master in driving of the vehicles for hire, in which case both master and servant are liable.⁵¹

§ 768. Statutory duty of persons driving on the highway.—

“Whenever any person shall meet each other on any bridge or road traveling with carriages, wagons, carts, sleds, sleighs or other vehicles, each person shall seasonably drive his carriage or other vehicle to the right of the middle of the traveled part of such bridge or road, so that the respective carriages, or other vehicles aforesaid may pass each other without interference.”⁵² The following section provides: “Every person offending against the provisions of the preceding section, shall, for each offense forfeit a sum not exceeding twenty dollars, and shall also be liable to the party injured for all damages sustained by reason of such offense; Provided, That proceedings shall be commenced for the recovery of such forfeiture within three months after the offense shall have been committed, and any action for such damages shall be commenced within one year after the cause of action shall have accrued.”⁵³

Ry. Co. v. Bayfield, 37 Mich., 205; Sutherland v. Ingalls, 63 Mich., 620; 30 N. W., 342; Great Western Ry. Co. v. Miller, 19 Mich., 305. See, Smith v. Webster, 23 Mich., 298, and Scripps v. Reilly, 38 Mich., 10; Mahler v. Stott, 129 Mich., 614; 89 N. W., 340; Formall v. Standard Oil Co., 127 Mich., 496; 86 N. W., 946; Schulwitz v. Delta Lumber Co., 126 Mich., 559; 85 N. W., 1075.

51—C. L., § 4297.

52—C. L., § 4291. The *traveled* part of the highway means that part worked

and prepared for travel and is not limited to the most traveled wheel track: Daniels v. Clegg, 28 Mich., 42. One may recover for an injury received in a collision on the highway though he was negligent himself, and failed to observe the “law of the road,” if notwithstanding such negligence the injury would not have been received but for the wanton and wilful conduct of the defendant: Tyler v. Nelson, 109 Mich., 37; 66 N. W., 671.

53—C. L., § 4292; Daniels v. Clegg, 28 Mich., 42.

APPENDIX A.

FORMS.

IN PROCEEDINGS BY SUMMONS.

No. 1—Form of Summons.

Ante, §§ 19, 21. C. L., §§ 712, 715, 718, 719.

STATE OF MICHIGAN, }
COUNTY OF..... } ss.

To any Constable of said County:

In the name of the People of the State of Michigan, you are hereby commanded to summon C.... D..., if he shall be found in your county, to appear before me at my office in the township (*city or village*) of M.... in said county on the day of 19.., at o'clock in thenoon to answer unto A. B. in a plea of to the damage of the said A.... B.... of one (*or three*) hundred dollars or under. Hereof fail not, and have you then and there this precept.

Given under my hand at M.... in said county the day of 19..

L.... M...., *Justice of the Peace.*

No. 2—Return of Summons Personally Served.

Ante, §§ 40, 47. C. L., §§ 716, 743.

I hereby certify, that I have personally served the within summons on the within named defendant, by delivering ~~to~~ him a copy thereof on the day of A. D. 19.., at, in the county of....

Amount of my fees, \$..... O.... S...., *Constable.*

Dated, 19..

No. 3—Return of Summons not Personally Served.

Ante, §§ 40, 47. C. L., §§ 716, 743.

I hereby certify, and return, that after diligent inquiry I have been unable to find the within named defendant within the county of....., and that I have served the within summons on him by leaving a copy thereof at his last place of abode in said county, on the day of, 19.., in the presence of G.... H...., a member of his family of reasonable discretion and of the age of years or more, who was informed of its contents by me.

Amount of my fees, \$....

O.... S...., *Constable.*

Dated, 19..

No. 4—Return of Summons Against Several Persons.*Ante*, §§ 47, 48.

I hereby certify, that on the day of, 19.., I served the within summons personally on C.... D...., one of the within named defendants, by delivering to him a copy thereof at, in this county of; and that after diligent inquiry I am unable to find the within named defendant E.... F.... in said county; and that I served the within summons on him by leaving a copy thereof at his last place of abode in said county, on the day of 19.., in the presence of G.... H...., a member of his family of reasonable discretion, and of the age of years or more, who was informed of its contents by me.

Amount of my fees, \$....

O.... S...., *Constable*.

Dated, 19..

No. 5—Return of Service of Summons on a Corporation.*Ante*, §§ 43, 47. C. L. §§ 743, 754 as amended by Pub. Acts 1901, p. 101. 10022.

I hereby certify, that on the day of, 19.., I served the within summons on the L.... Company, the defendant within named, by delivering a copy thereof to G.... H...., who is the secretary of said company (*or to any other of the officers named in the statute. Act 68 of Public Acts 1901*), at, in this county of

Amount of my fees, \$....

O.... S...., *Constable*.

Dated, 19..

IN PROCEEDINGS BY WARRANT.**No. 6—Affidavit for Warrant Against a Public Officer for Money Collected.***Ante*, §§ 50, 51. C. L., § 722.STATE OF MICHIGAN, } ss.
COUNTY OF

A.... B...., of the of, in said county, being duly sworn, says that he has, as he has good reason to believe, a demand not exceeding dollars, founded upon contract, against C.... D...., against whom deponent applies for process by warrant. And the said demand is for money collected by the said C.... D...., as a constable, for him, the said A.... B.... And that the facts and circumstances constituting the grounds of said application are (*state the facts and circumstances in detail and in full.*)

A.... B....

Subscribed and sworn to before me, }
this day of A. D. 19.. }

L.... M...., *Justice of the Peace*.

No. 7—Affidavit for Warrant in Case of Fraud, Etc.*Ante*, §§ 50, 51. C. L., § 722.STATE OF MICHIGAN, }
COUNTY OF } *ss.*

A.... B...., of the of, in said county, being duly sworn, says that he has, as he has good reason to believe, a cause of action for damages not exceeding dollars, arising out of contract, against C.... D...., against whom deponent applies for process by warrant, for a fraud committed by the said C.... D.... against this deponent; and that the facts and circumstances within the knowledge of this deponent constituting the grounds of said application, are, that
(*state the facts and circumstances constituting the fraud in detail.*)

A.... B....

Subscribed and sworn to before me, }
this day of A. D. 19.. }

L.... M...., *Justice of the Peace.***No. 8—Affidavit in Case of Tort.***Ante*, § 52. C. L., § 723.STATE OF MICHIGAN, }
COUNTY OF } *ss.*

A.... B...., of the of, in said county, being duly sworn, says that he has, as he has good reason to believe, a just cause of action against C.... D...., of the of, in said county, against whom he applies for process by warrant, for wrongfully converting and disposing of one ox, of the value of one hundred dollars or under, of the goods and chattels of this deponent. And deponent further says, that the facts and circumstances constituting the ground of this application for said warrant, are (*state the facts and circumstances constituting the wrong complained of, in detail.*)

A.... B....

Subscribed and sworn to before me, }
this day of A. D. 19.. }

L.... M...., *Justice of the Peace.***No. 9—Form of Warrant.***Ante* § 55. C. L., § 725.STATE OF MICHIGAN, }
COUNTY OF } *ss.*

To any Constable of said County:

In the name of the People of the State of Michigan, you are hereby commanded to take C.... D...., of the of, in said county, and have him forthwith before me, one of the Justices of the Peace in and for said county, at my office in, then and there to answer to A.... B...., in a plea of to his damage dollars. And

after such arrest you are to notify the plaintiff thereof. Hereof fail not, but of this writ, with your doings, make due return according to law.

Given under my hand at, this day of, 19

L M, *Justice of the Peace.*

No. 10—Return to Warrant.

Ante, §§ 64-66. C. L., § 743.

I have this day, in the county of, arrested the within named defendant, and have him before the court in custody; plaintiff notified on the day of 19

Amount of my fees, \$

O S, *Constable.*

Dated, 19

No. 11—Return to Warrant Where Justice Issuing the Warrant Is Absent.

Ante, § 66. C. L., § 726.

By virtue of the within warrant I have this day, in the county of arrested the within named defendant; and further return that L M, the Justice of the Peace of the township of M within named, by whom said warrant was issued, is absent from said township, therefore, I have the said defendant in custody before J N, another Justice of the Peace of said township, as required by law; plaintiff notified on the day of, 19

Amount of my fees, \$

O S, *Constable.*

Dated, 19

No. 12—Form of Affidavit on the Return of a Warrant, that the Justice Is a Material Witness.

Ante, § 68. C. L., § 835.

IN JUSTICE'S COURT:

A B }
v.
C D }

Before L M, a Justice of the
Peace in and for the County of

COUNTY OF, ss.—C D, the defendant in this cause, being duly sworn, says that L M, Esquire, the Justice of the Peace by whom the warrant in the said cause was issued, is a material witness in behalf of this deponent on the trial of said cause, and that he cannot safely proceed to the trial of said cause without the testimony of said L M

C D

Subscribed and sworn to before me, }
this day of 19 }

L M, *Justice of the Peace.*

IN PROCEEDINGS BY ATTACHMENT.**No. 13—Form of Affidavit to Obtain an Attachment.***Ante*, §§ 69-75. C. L., §§ 721, 11207, 11208.STATE OF MICHIGAN, }
COUNTY OF..... } ss.

A.... B...., of the township of, in said county, being duly sworn, says that there is justly due to this deponent, from C.... D...., of said county, upon express contract, the sum of dollars, as near as this deponent can estimate the same, over and above all legal set offs; and this deponent further says, that he has good reason to believe, and does believe, that the said C.... D.... is about to remove his property from the said county of in which he resides, with intent to defraud his creditors.

This deponent therefore applies for an attachment against the goods and chattels of the said C.... D...., and further this deponent saith not.

A.... B....

Subscribed and sworn to before me, }
this day of A. D. 19.. }

A.... B...., *Justice of the Peace.***No. 14—Form of Bond in Attachment.***Ante*, §§ 76-78. C. L., §§ 728, 10409, 10410, 10417.

Know all men by these presents, that we, A.... B...., as principal, and E.... F.... and G.... H...., as sureties, of, are held and firmly bound unto C.... D...., in the sum of two hundred dollars (or, if plaintiff's demand exceed \$100 then in double the amount of the demand), to be paid to the said C.... D...., or to his certain attorney, executors, administrators, or assigns; to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals. Dated the day of, 19..

WHEREAS, application has been made by the above bounden A.... B...., to L.... M...., Esq., a Justice of the Peace of the of in the county of, for an attachment against the goods and chattels of the said C.... D...., in favor of the said A.... B....;

NOW THEREFORE the condition of this obligation is such, that if the said A.... B.... shall pay to the said C.... D.... all damages and costs, he, the said C.... D...., may sustain by reason of the issuing of said attachment, if the said A.... B.... shall fail to recover judgment in said suit, then this obligation to be void, otherwise of force.

A.... B.... [L. S.]

E.... F.... [L. S.]

G.... H.... [L. S.]

I approve of E.... F.... and G.... H.... as sureties in the foregoing bond.

L.... M...., *Justice of the Peace.*

Dated....., 19..

No. 15—Form of Writ of Attachment.

Ante § 79. C. L., § 729.

STATE OF MICHIGAN, }
COUNTY OF..... } ss.

To any Constable of said County, greeting:

Whereas, application has been made to me, I.... M...., a Justice of the Peace of the of, in said county, for an attachment in favor of A.... B.... against the goods and chattels of C.... D...., for the sum of dollars, due to the said A.... B.... upon express contract from the said C.... D...., being the amount claimed by the said A.... B...., and the requisite affidavit having been made and filed with me, and a bond with sufficient sureties having been made and executed, and filed with me:

Therefore in the name of the People of the State of Michigan, you are commanded to attach so much of the goods and chattels of the said C.... D.... (excepting such as are exempt by law from execution) as will be sufficient to satisfy said demand; and safely keep the same to satisfy any judgment that may be recovered by the said A.... B.... And do you return this attachment to me, the said justice, at my office in the of, in said county, on the day of, at o'clock in the noon.

Given under my hand at the of aforesaid, the day of, 19..

L.... M...., *Justice of the Peace.*

No. 16—Form of Docket Entry—Successive Attachments.

Ante § 85. C. L., §§ 737, 738.

Attachments having been issued and served on the goods and chattels of the defendant, at the times, in favor of the parties, and in the order following:

PARTIES.	AMOUNT OF JUDGMENT AND COSTS.	WHEN ATTACHMENT SERVED.
A. B. v. C. D.	\$46 00	November 1st, 1905.
E. F. v. C. D.	36 00	November 4th, 1905.

I, L.... M...., the Justice of the Peace who issued the attachment having the priority of lien, do find that the priorities exist, and said judgments are entitled to be satisfied out of the property attached by said attachments, in the order above set forth.

No. 17—Form of Copy of Inventory to Return with Attachment.*Ante* § 92. C. L., § 744.

Copy of an inventory of goods and chattels this day seized by me
by virtue of the annexed attachment,

One black horse.

One red cow.

Two Berkshire hogs.

One axe.

Dated....., 19..

O.... S...., *Constable*.**No. 18—Bond to Prevent the Removal of Property Attached.***Ante*, § 88. C. L., § 732.

Know all men by these presents, that we, C.... D...., as principal,
and E.... F...., as surety, are held and firmly bound unto O....
S.... (*the officer's name*), in the sum of (*at least double the sum
stated in the attachment to have been sworn to*) dollars, to be paid
to said O.... S.... (*the officer*), or to his certain attorney, executors,
administrators or assigns; to which payment well and truly to be
made, we bind ourselves, our heirs, executors and administrators,
jointly and severally, firmly by these presents.

Sealed with our seals. Dated the day of, 19..

The condition of this obligation is such, that if certain goods and
chattels, to-wit: (*enumerate all the articles attached*) which have
been seized by the above named O.... S...., a constable of the town-
ship of, in the county of, by virtue of an attachment issued
by L.... M...., Esq., Justice of the Peace of the township of,
in the county of, in favor of A.... B...., against, the
above bounden C.... D...., shall be produced to satisfy any execu-
tion that may be issued upon any judgment that shall be recovered
by the plaintiff upon the said attachment, then this obligation to be
void, otherwise of force.

C.... D.... [L. S.]

E.... F.... [L. S.]

I approve of E.... F.... as surety in the within bond.

Dated....., 19..

O.... S...., *Constable*.**No. 19—Bond by Claimant of Property Attached.***Ante* § 90. C. L., § 733.

Know all men by these presents, that we, N.... O...., as principal,
E.... F.... and G.... H...., as sureties, are held and firmly bound
unto A.... B.... (*the plaintiff*), in the sum of (*double the value of
the property attached*) dollars, to be paid to the said A.... B...., or
to his certain attorney, executors, administrators or assigns; to which
payment well and truly to be made, we bind ourselves, our heirs,

executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals. Dated the day of, 19..

WHEREAS certain goods, to-wit: (*enumerate all the articles attached*), were, on the day of, 19.., seized by O.... S...., constable, by virtue of an attachment issued by L.... M...., Esq., a Justice of the Peace of the township of, in the county of, in favor of the above named A.... B.... against C.... D.... And whereas, the above bounden N.... O.... claims the said goods as his property:

Now, THEREFORE, the condition of this obligation is such, that if, in a suit to be brought on this obligation within three months from the date hereof, the said N.... O.... shall establish that he was the owner of the said goods at the time of the said seizure; and in case of his failure to do so, if the said N.... O.... shall pay the value of the said goods and chattels, with interest, to the said plaintiff, then this obligation to be void, otherwise of force.

N.... O.... [L. S.]

E.... F.... [L. S.]

G.... H.... [L. S.]

I approve of E.... F.... and G.... H.... as sureties in the above (or, *within*) bond.

Dated, 19.. O.... S...., *Constable, above named.*

No. 20—Form of Return of an Attachment—Personal Service.

Ante § 92. C. L., §§ 743, 744.

By virtue of the within attachment, I, at on the day of, 19.., seized the goods and chattels of the defendant mentioned in the inventory, of which the annexed is a copy, and on the same day I served upon the defendant personally, a copy of the within attachment, and of the said inventory, duly certified by me, all in said county of....

Amount of my fees, \$....

O.... S...., *Constable.*

No. 21—Form of Return Where Bond is Given.

Ante § 92. C. L., §§ 743, 744.

By virtue of the within attachment, I, on the day of, 19.., at, in the county of, seized the goods and chattels of the defendant mentioned in the inventory, of which the annexed is a copy, and on the same day I served upon the defendant, personally, a copy of the within attachment, and of the said inventory, duly certified by me; but the said goods and chattels were delivered up to C.... D...., the defendant, (or, to E.... F...., the claimant of said property), upon receiving the bond herewith returned.

Amount of my fees, \$....

O.... S...., *Constable.*

No. 22—Form of Return—Defendant not Found.*Ante*, §§ 86, 92. C. L., § 731, 743, 744.

By virtue of the within writ of attachment, I, on the day of, 19.., at, in the county of, seized the goods and chattels of the defendant C.... D...., within named, which are mentioned in an inventory of which the annexed is a copy, and I hereby certify that I have made diligent search and inquiry, and am unable to find the said C.... D.... within said county; and, therefore, on the day of, 19.., because the said defendant could not be found, I left a copy of the within attachment and of the said inventory, duly certified by me, at the last place of residence of said defendant in said county of, with E.... F...., a person of suitable age and discretion (or, with G.... M...., in whose possession I found the said goods and chattels, and I certify that said defendant has no last place of residence within said county. If the property is released because a bond is given that fact should be stated and the bond returned.)

Amount of my fees, \$....

O.... S...., Constable.

No. 23—Form of Order of Sale.*Ante*, § 94. C. L., §§ 10360, 10361, as amended by Pub. Acts, 1901, p. 90.

IN JUSTICE COURT:

A.... B....	}	In attachment: Before L.... M.... a Justice of the Peace in and for the county of
v.		
C.... D....		

To A.... B...., one of the Constables of said County: It appearing from your return to the writ herein that you have levied upon perishable property, to-wit: one hundred pounds of dressed beef; and it further appearing that notice has been given the defendant that this court would, at this time and place, consider the advisability of making an order for the sale of said property; now, therefore, you are commanded to make sale of said property at on the day of at o'clock in thenoon, in the manner required for sales upon execution. And do you make return of your action under this order on the day of, 19..

Witness my hand this day of, 19..

L.... M...., Justice of the Peace.

No. 24—Bond to Pay Judgment.*Ante*, § 95. C. L., § 742.

Know all men by these presents, that we, C.... D...., as principal, and G.... H...., as surety, are held and firmly bound unto A.... B.... in the sum of dollars (*double the amount claimed by the plaintiff*), to be paid to the said A.... B...., or to his certain attor-

ney, executors, administrators or assigns; to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals. Dated the day of, 19..

WHEREAS, a certain suit was commenced by attachment on the day of last, before L.... M...., Esq., a Justice of the Peace in the township of, in the county of, against the above bounden C.... D...., in favor of the above named A.... B...., in a plea of; and, whereas, the above bounden C.... D.... has appeared and answered to said action;

Now, THEREFORE, the condition of this obligation is such, that if the above bounden C.... D.... shall pay to the above named A.... B.... any judgment the said A.... B.... may recover against him, the said C.... D...., in the said action, within thirty days after the rendition thereof, then this obligation to be void, otherwise of force.

C.... D.... [L. S.]

G.... H.... [L. S.]

I approve of G.... H.... as surety in the within bond.

Dated....., 19..

L.... M...., *Justice of the Peace.*

No. 25—Form of Order of Discharge.

Ante, § 95. C. L. § 742.

IN JUSTICE COURT:

A.... B.... } In attachment: Before L.... M...., a Justice of the
v. }
C.... D.... } Peace in and for the County of....

To A.... B...., a Constable of the Township of County of....

The defendant in this cause having appeared and answered to said action, and given bond as required by law, conditioned for the payment of any judgment the plaintiff may recover against him in the action, within thirty days after the rendition thereof, I do hereby discharge the property, attached by you, from the attachment in said cause, and you are hereby ordered to restore the same to the said defendant.

Dated....., 19..

L.... M...., *Justice of the Peace.*

IN PROCEEDINGS IN REPLEVIN.

No. 26—Form of Affidavit in Replevin.

Ante §§ 101, 102. C. L. § 748.

STATE OF MICHIGAN, } ss
COUNTY OF.... }

A.... B...., of, in said county, being duly sworn, doth depose and say, that (*one bay mare*), of the value of ninety dollars, and not exceeding in value one hundred dollars, of the proper goods and chattels of this deponent, is unlawfully detained from the possession of said deponent, the said A.... B...., at the township of,

in said county of . . . , by C. . . . D. . . . , and that said deponent is now lawfully entitled to the possession of said goods and chattels.

And this deponent further deposing, says that the said above mentioned goods and chattels have not been taken for any tax, assessment or fine levied by any law of this state, nor seized under any execution or attachment against the goods and chattels of the said deponent liable to execution; and that said deponent, the said A. . . . B. . . . , claims one hundred dollars damages for the said taking and detaining said goods and chattels. And further this deponent says not.

A. . . . B. . . . ,

Subscribed and sworn to before me, }
this day of , A. D. 19. . . }

L. . . . M. . . . , *Justice of the Peace.*

No. 27—Form of Bond in Replevin.

Ante, §§ 101, 103. C. L. § 748.

Know all men by these presents, that we, A. . . . B. . . . , as principal, and E. . . . F. . . . and G. . . . H. . . . , as sureties, of the township of , county of and state of Michigan, are held and firmly bound unto C. . . . D. . . . , of the township of , in said county of , in the sum of (*not less than one hundred dollars, and twice the amount of the value of the property as sworn to in the affidavit*) dollars, lawful money of the United States, to be paid to the said C. . . . D. . . . , aforesaid, or to his assigns; to which payment well and truly to be made, we bind ourselves, our and each of our heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals, and dated this day of , 19. . .

The condition of the foregoing obligation is such, that if the above bounden A. . . . B. . . . shall prosecute the suit to effect which he has commenced before L. . . . M. . . . , Esq., one of the Justices of the Peace of the of in said county, against C. . . . D. . . . , the defendant, for the unlawful detention of the following goods and chattels, to wit: (*here specify the property described in the affidavit and writ*) which writ is returnable before said justice, on the day of A. D. 19. . . , at his office, in the of , in said county, at o'clock in the noon, and that if the defendant recover judgment in the said action, he will return the said property, if return thereof be adjudged, and will pay to the said defendant all such sums of money as may be recovered by the said defendant against him in the said action, then the above obligation to be void, otherwise to remain in full force and virtue.

A. . . . B. . . . [L. S.]

E. . . . F. . . . [L. S.]

G. . . . H. . . . [L. S.]

STATE OF MICHIGAN, } ss.
COUNTY OF }

E. . . . F. . . . and G. . . . H. . . . , the sureties who executed the fore-

going (*or within*) bond, being severally duly sworn, each for himself, deposes and says that he owns property situated in the state of Michigan, and subject to execution, of the value, above exemptions allowed by law, of the penalty in said bond.

Subscribed and sworn to before me, }
 this day of, 19.. }
 L.... M...., *Justice of the Peace.*

E.... F....

G.... H....

I approve of E.... F.... and G.... H.... as sureties in the foregoing bond.

Dated, 19..

L.... M...., *Justice of the Peace.*

No. 28—Form of Writ of Replevin.

Ante, §§ 101, 104. C. L. § 748, 749.

STATE OF MICHIGAN, } ss.
 COUNTY OF..... }

To any Constable of said County:

In the name of the People of the State of Michigan you are hereby commanded that you take into your custody the following goods and chattels, to wit: (*here describe the goods and chattels to be replevied*), and deliver the same to A.... B...., plaintiff herein, he having given security as required by law, to prosecute to effect this writ against C.... D...., defendant herein, and to return the aforesaid goods and chattels, if return thereof shall be adjudged, and to pay all such sums of money as may be recovered against him hereupon; and also that you summon the said C.... D.... to appear before* the undersigned, a Justice of the Peace of in said county, at on the day of, 19.., at o'clock in the noon, then and there to answer the said A.... B.... concerning the unlawful detention of the said goods and chattels. And have you then there this writ with your doings hereon.

Given under my hand at the of in the county aforesaid, the day of, 19..

L.... M...., *Justice of the Peace.*

No. 29—Return to Writ of Replevin, Goods Found, and Defendant Summoned.

Ante, § 106. C. L. § 10661.

By virtue of the within writ, I have this day replevied and delivered to the plaintiff within named, the goods and chattels specified, as I am within commanded, and I have also this day summoned the within defendant to appear according to the exigency of said writ, by delivering to said defendant personally a certified copy of said writ.

Dated, 19..

O.... S...., *Constable.*

Amount of my fees, \$....

No. 30—Return, Goods not Found—Defendant Summoned.*Ante*, §§ 105, 107. C. L. § 10655, 10659, 10661.

I do certify and return to the within writ, that no part (*or if part were and part were not found, so state, specifically describing those found*) of the goods and chattels therein mentioned could be found by me so as to make replevin and delivery thereof as I am within commanded. And further return that I have this day summoned the within named defendant to appear according to the exigency of said writ, by delivering to said defendant personally a copy of said writ.

Dated, 19.

O.... S...., *Constable*.

Amount of my fees, \$....

No. 31—Return, Goods Found—Defendant not Found.*Ante*, §§ 105, 107. C. L. § 10655, 10659, 10661.

By virtue of the within writ, I did, on the day of, 19... at...., in the county of, replevy and deliver to the plaintiff within named, the goods and chattels specified in the within writ as I am therein commanded: and I further return, that I have made diligent search and inquiry to find said defendant, and that I am unable to find him in said county whereon to make personal service of said writ, and because I am unable to find him, I did, on the day of, 19.., leave a certified copy of said writ of replevin at the defendant's usual place of abode in said county, with his wife, who is a person of the age of years or more and of reasonable discretion.

Dated, 19..

O.... S...., *Constable*.

Amount of my fees, \$....

No. 32—Form of Summons in Replevin After Return of "Not Found."*Ante*, § 107.

STATE OF MICHIGAN, } ss.
COUNTY OF..... }

To any Constable of said County:

In the name of the People of the State of Michigan. Whereas, by a writ of replevin to you lately directed and delivered, we commanded you that you forthwith take into your custody (*Describe the property as in the writ of replevin*). And, whereas, O.... S...., one of the constables of said county, at that day made return to said writ that (*same as in No. 31*). Now, therefore, you are commanded as you were before commanded, that you summon the said C.... D.... to appear before (*following the writ No. 28 after the **).

L.... M...., *Justice of the Peace*.

IN PROCEEDINGS IN GARNISHMENT.**No. 33—Form of Affidavit in Garnishment.**

Ante, §§ 109, 110. C. L. § 990, Pub. Acts, 1901, p. 253.

STATE OF MICHIGAN, } ss.
COUNTY OF..... }

A.... B...., of, in said county, being duly sworn, deposes and says that C.... D...., of, is justly indebted to this deponent in the sum of dollars, or thereabouts, upon express contract (or, *upon a judgment rendered by L.... M...., a Justice of the Peace in said county, for dollars damages and costs*), and that for the recovery of said demand this deponent has commenced a suit before L.... M...., one of the Justices of the Peace in and for said county.

And this deponent further says, that he has good reason to believe, and does believe, that N.... O...., of the township of, in said county, has property, money and effects in his hands, or under his control, belonging to said C.... D...., and that the said N.... O.... is indebted to the said C.... D...., and further says not.

A.... B....

Subscribed and sworn to before me, }
this day of, 19.. }
L.... M...., *Justice of the Peace*

No. 34—Form of Summons in Garnishment.

Ante, §§ 109, 111. C. L. §§ 990, 1015.

STATE OF MICHIGAN, } ss.
COUNTY OF..... }

To any Constable of said County:

In the name of the People of the State of Michigan, you are hereby commanded to summon N.... O.... to appear before me at my office, in the (*city, village or township*) of M...., in said county, on the day of, 19.., at o'clock in the noon, to answer under oath, all questions put to him touching his indebtedness to C.... D...., principal defendant at the suit of A.... B...., plaintiff herein, and the property, money and effects of the said C.... D.... in his possession, within his knowledge, or under his control, according to the allegations contained in the affidavit of said A.... B.... (or, *E.... F...., agent of said A.... B....*), duly made and filed in this suit.

Hereof fail not, and have you then there this precept.

Given under my hand at M...., in said county of this day of, 19...

L.... M...., *Justice of the Peace.*

No. 35—Form of Return of Summons in Garnishment.*Ante*, § 112. C. L. § 990, Pub. Acts, 1901, p. 253.

I hereby certify, that I personally served the within summons on N.... O...., the garnishee within named, on the day of 19..., at...., in the county of...., by delivering a copy thereof to him, and at the same time I paid to him the sum of....for his fees for traveling to the place named in the within summons and for his attendance thereat.

Dated, 19....

O.... S...., *Constable*.

Amount of my fees, \$....

No. 36—Warrant Against Garnishee.*Ante*, § 114. C. L. §§ 992, 993.

STATE OF MICHIGAN, }
COUNTY OF..... } *ss.*

To any Constable of said County, greeting:

Whereas, a summons was issued on the day of, by me, L.... M...., one of the Justices of the Peace of said county, against N.... O...., in favor of A.... B.... returnable on the day of at o'clock in the afternoon, at my office, in the township ofin said county, upon the affidavit of the said A.... B.... made and filed with me, who made oath that C.... D.... was justly indebted (*set forth the facts as stated in the affidavit*); and, whereas, O.... S...., one of the constables of said county, on said day of made return to me of said summons, that he served the same personally on the said N.... O...., on the day of, and at the same time paid (or, *tendered*) to him the sum of, for his fees for traveling to the place named in said summons, and for his attendance thereat; and, whereas, the said N.... O.... neglected (or, *refused*) to appear before me at the time and place mentioned in said summons and answer as aforesaid; therefore,

In the name of the People of the State of Michigan, you are hereby commanded forthwith to take the body of the said N.... O.... and bring him before me, at my office, in the township of, in the said county, on the day of, at o'clock in the noon, to answer, under oath, all questions (*as in summons No. 34*); and after you shall have arrested the said N.... O...., do you notify the said A.... B.... thereof. And have you then there this precept.

Given under my hand and seal, the day of, 19..

..

L.... M...., *Justice of the Peace*.

No. 37—Return to the Warrant.*Ante*, § 114. C. L. §§ 992, 993.

I have this day arrested N.... O...., the garnishee within named, and have him before the court in custody; and I have this day notified A.... B...., the plaintiff, of such arrest.

Dated...., 19..

O.... S...., *Constable*.

Amount of my fees, \$....

MISCELLANEOUS FORMS RELATING TO PROCESS.**No. 38—Form of Deputation of Process.***Ante*, § 137. C. L. §§ 978, 979.

On the request of the within named plaintiff, and deeming it expedient so to do, I hereby empower J.... K...., who is a person of lawful age, and not a party or interested in the suit, to be commenced by the service of the within process, to execute the same.

June, 19..

L.... M...., *Justice of the Peace*.**No. 39—Security for Costs by Non-residents—Before Suit, to Be Entered on the Docket.***Ante*, §§ 140, 141. C. L. §§ 713, 11283.

COUNTY OF, ss. A.... B...., a non-resident of said county, having applied to L.... M...., Esq., a Justice of the Peace of said county, for a summons in his favor against C.... D...., therefore I, E.... F...., do hereby become security that said A.... B.... shall pay the said C.... D...., any costs which may be adjudged against him, the said A.... B...., in the suit to be commenced against C.... D.... by said summons.

Dated, 19..

E.... F....

No. 40—Form of Security After Suit Commenced, to Be Entered on the Docket.*Ante*, §§ 140, 141. C. L. §§ 713, 11283.

Whereas, A.... B...., the plaintiff in the above entitled cause, has been required by L.... M...., the Justice of the Peace before whom said cause is pending, for good reasons shown, to give security for costs, therefore, I, E.... F...., do hereby become security that the said A.... B.... shall pay the defendant, C.... D...., any costs that may be adjudged against the said A.... B.... in said cause.

Dated, 19..

E.... F....

**No. 41—Security—Plaintiff Having Removed From the County
After Suit Commenced.**

Ante, §§ 140, 141. C. L. §§ 713, 11283.

A.... B...., the plaintiff in the above entitled cause, having removed from this county of, after the commencement of this suit, and he having been required by L.... M...., the justice of the peace before whom the said cause is pending, to give security for costs, therefore, I, E.... F...., do hereby become security that the said A.... B.... shall pay the defendant, C.... D...., any costs that may be adjudged against the said A.... B.... in said cause.

Dated, 19..

E.... F....

**No. 42—Form of Consent and Appointment of Next Friend for
an Infant Plaintiff.**

Ante, § 147. C. L. §§ 756, 757, 760.

I consent to be the next friend to A.... B...., an infant, as plaintiff, in a suit against C.... D....

Dated, 19..

R.... R....

The said R.... R.... is accordingly appointed.

Dated, 19..

L.... M...., *Justice of the Peace*.

**No. 43—Consent and Appointment of Next Friend—Issue
Joined Without Process.**

Ante, § 147. C. L. §§ 756, 757, 760.

IN JUSTICE'S COURT:

A.... B....,	}	Before L.... M...., Esq., a Justice of the Peace, in and for the County of
C.... D....		

I hereby consent to be the next friend of A.... B...., the above named plaintiff, an infant, in the above cause.

Dated, 19..

R.... R....

The said R.... R.... is accordingly appointed.

Dated, 19..

L.... M...., *Justice of the Peace*.

**No. 44—Form of Consent and Appointment of Guardian for
Infant Defendant.**

Ante, § 148. C. L. §§ 758, 759, 760.

IN JUSTICE COURT:

A.... B....,	}	Before L.... M...., a Justice of the Peace, in and for the County of
C.... D....		

I consent to be the guardian of A.... B...., an infant, defendant in the above entitled cause.

Dated, 19..

R.... R....

The said R.... R.... is accordingly appointed.

Dated, 19..

L.... M...., *Justice of the Peace*.

FOR TRANSFER OF CAUSE.**No. 45—Form of Affidavit to Transfer a Cause Because the Justice is a Material Witness.***Ante*, §§ 151. C. L. § 835.

IN JUSTICE'S COURT:

A.... B....	} Before L. M., Justice of the Peace in and for the County of
v.	
C.... D....	

COUNTY OF, ss. C.... D...., the defendant in this cause, being duly sworn, says L.... M...., the Justice before whom this cause is pending, is a material witness for him, this defendant in this cause, and without whose testimony he cannot safely proceed to the trial thereof; and deponent further says, that he expects to prove by said Justice, on such trial, the following facts, to-wit: (*set forth facts expected to be proved*); and deponent further says, that the said facts which he expects to prove by said Justice, as aforesaid, will be material to the issue upon such trial, as he verily believes.

C.... D....

Subscribed and sworn to before }
me, this day of, 19... }

L.... M...., *Justice of the Peace.*

IN PLEADINGS.**No. 46—General Form of Declaration.***Ante*, §§ 155, 159, 160. C. L. §§ 766, 767.

IN JUSTICE'S COURT:

A.... B....	} Before L. M. Justice of the Peace in and for the county of
v.	
C.... D....	

COUNTY OF, ss. A.... B...., plaintiff in this suit, by N.... O...., his attorney (*or, in his own proper person*), complains of C.... D...., the defendant herein, who has been summoned to answer the said plaintiff in a plea of trespass on the case upon promises (*or as the case may be*).

For that whereas (*state the cause of action and conclude thus*), to the damage of the plaintiff of three hundred dollars (*or if the action is in tort, one hundred dollars*) and therefore he brings suit.

A.... B...., *Plaintiff.*

No. 47—Plea in Abatement for Nonjoinder of a Co-contractor.*Ante*, §§ 172, 180.

IN JUSTICE'S COURT:

A.... B....,	}	Before L.... M...., a Justice of the Peace, in and for the County of
v.		
C.... D....		

And the defendant in person prays judgment of the said *summons* and declaration; because he says that the said promise (*several promises, if more than one is alleged*) in the said declaration mentioned, if any such was made (*were and each of them were if more than one alleged*) was made by E.... F.... jointly with the defendant, and which said E.... F.... is still alive, wherefore, because the said E.... F.... is not named in the said *summons* and declaration, he prays judgment of the *summons* and declaration, and that the same may be quashed.

C.... D...., *Defendant*.

COUNTY OF, ss. C.... D...., the defendant in this cause, being duly sworn, says that the above plea (*or, the plea hereto annexed*) is true in substance and matter of fact.

C.... D....

Sworn to and subscribed before me, }
this day of, 19...

L.... M...., *Justice of the Peace*.**No. 48—Replication Denying the Plea.***Ante*, §§ 180, 181.

IN JUSTICE'S COURT:

A.... B....,	}	Before L.... M...., a Justice of the Peace, in and for the County of
v.		
C.... D....		

And the plaintiff says that the said *summons* and declaration, by reason of any thing above by the said defendant in his said plea alleged, ought not to be quashed, because he says that the said promise (*several promises, if more than one is alleged*) was not made by the defendant jointly and together with the said E.... F...., in manner and form as the defendant hath above in his said plea in that behalf alleged; and this the plaintiff prays may be inquired of by the country.

A.... B...., *Plaintiff*.**No. 49—Plea in Abatement—Pendency of Another Action.***Ante*, § 184.

IN JUSTICE'S COURT:

A.... B....,	}	Before L.... M...., a Justice of the Peace, in and for the County of
v.		
C.... D....		

And the defendant in person prays judgment of the said *summons* and declaration, because he says that before the issuing of the said *summons*, or the plaintiff declaring thereupon, to-wit: on the

day of, the said plaintiff issued a summons, out of the court of N. . . . O. . . ., Esq., one of the Justices of the Peace of said county of and declared therein against him in a certain plea of promises upon the same identical promises and undertakings in the said declaration in this present suit mentioned, as by the record and proceedings thereof remaining in the said court, before the said justice, more fully appears; and the defendant further saith, that the parties in this and the said former suit are the same, and not other or different persons, and that the supposed causes of action in this and the said former suit are, and each and every one of them is and are the same, and not other or different causes of action, and that the said former suit, so brought and prosecuted against him, the defendant, by the plaintiff as aforesaid, is still depending in the court of the said Justice of the Peace as aforesaid, and this the defendant is ready to verify. Wherefore he prays judgment of the said summons and declaration in the suit, and that the same may be quashed.

C. . . . D. . . ., Defendant.

Note.—Add verification as in No. 47.

No. 50—Replication Denying Plea.

IN JUSTICE'S COURT:

A. . . . B. . . .,	}	Before L. . . . M. . . ., a Justice of the Peace, in and for the County of
v.		
C. . . . D. . . .		

And the said plaintiff says that his said summons and declaration ought not to be quashed; because he says that said former suit, in the said plea mentioned, was not pending at the time of the commencement of this suit in manner and form as the said defendant hath above, in his said plea in that behalf alleged; and this the said plaintiff prays may be inquired of by the country.

A. . . . B. . . ., Plaintiff.

No. 51—General Form of Plea of General Issue and Notice of Defense.

Ante, § 188. C. L., §§ 767, 10071-10073.

IN JUSTICE'S COURT:

A. . . . B. . . .,	}	Before L. . . . M. . . ., a Justice of the Peace, in and for the County of
v.		
C. . . . D. . . .		

And the said defendant demands a trial of the matters set forth in plaintiff's declaration.

C. . . . D. . . ., Defendant.

To the above named plaintiff: Please take notice that on the trial of the above cause the defendant will give in evidence in his defense that (*here set forth the matters of defense intended to be proved*).

Dated, 19..

Yours, etc.,

C. . . . D. . . ., Defendant.

No. 52—Notice that Cause of Action did not Accrue Within Six Years, to be Attached to the Plea of the General Issue.

Ante, § 223. C. L., § 9728.

To the above named plaintiff:

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

C.... D...., *Defendant*.

No. 53—Form of Notice of Set-off, to Be Attached to the Plea of the General Issue.

Ante, §§ 255-266. C. L., §§ 776, 777.

To the above named Plaintiff:

Take notice that the said defendant will, on the trial of this cause, give in evidence, and insist, that before and at the time of the commencement of this suit, to-wit, on the day of, he, the said plaintiff was, and still is, indebted to the said defendant in the sum of one hundred dollars, for the work, labor and services of the said defendant before then done for the said plaintiff, and for divers materials and other necessary things used and employed in and about the same; and for divers goods, wares and merchandise before then bargained and sold, and sold and delivered by the said defendant to the said plaintiff; and for money before then lent by the said defendant to the said plaintiff, and for other money before then paid, laid out and expended by the said defendant, to and for the use of the said plaintiff, all at his request. Which several claims the said defendant will set off and allow to the said plaintiff against any claim or claims to be proved by him on said trial.

Yours, etc.,

C.... D...., *Defendant*.

Dated 19..

No. 54—Form of Notice of Recoupment, to Be Attached to the Plea of the General Issue.

Ante, §§ 276, 278.

(On breach of warranty in sale of goods.)

To the Plaintiff:

Take notice, that the defendant will show on the trial of this cause in his defense under the general issue above pleaded, that the said goods mentioned in plaintiff's declaration (or, *mentioned in the plain-*

tiff's bill of particulars filed in this cause) were sold and delivered by plaintiff to this defendant, in the package, and without any opportunity for the defendant to examine the same; and that at the time of such sale, the plaintiff, in consideration that defendant would purchase the same, represented and agreed that said goods were free from defect or injury, whereas in fact a portion of said goods were then defective and injured, and moth-eaten, and worthless, which was unknown to the defendant at the time of said sale and delivery, and that by reason thereof the defendant has sustained damages to a large amount, to-wit, one hundred dollars, which said damages the defendant will recoup against any claim that may be proved against him by the plaintiff on said trial, and will apply the same, or so much thereof as may be necessary, to the satisfaction of such claim, if any, as the plaintiff may prove as aforesaid, and will have the balance certified in his favor.

Yours, etc.,

Dated, 19..

C.... D...., *Defendant*.

No. 55—Form of General Demurrer.

Ante, § 280. C. L., 767.

IN JUSTICE'S COURT:

A.... B....	}	Before L.... M...., Justice of the Peace in and for the County of....
v.		
C.... D....		

And the said C.... D.... comes and says that the plaintiff's said declaration (or, *the said count of the said declaration*) is not sufficient in law.

C.... D...., *Defendant*.

No. 56—Form of Joinder in Demurrer.

Ante, § 280.

IN JUSTICE'S COURT:

A.... B....	}	Before L.... M...., a Justice of the Peace in and for the county of....
v.		
C.... D....		

And the said A.... B...., the said plaintiff, says that the said declaration herein is sufficient in law.

A.... B...., *Plaintiff*.

No. 57—Notice of Defense in Bar, puis darrein continuance.

Ante, §§ 282, 283.

IN JUSTICE'S COURT:

A.... B....	}	Before L.... M...., a Justice of the Peace in and for the county of....
v.		
C.... D....		

To the Plaintiff:

And now, on this day of, until which day the plea aforesaid was last continued, comes the said defendant, and now here gives notice to the said plaintiff, that after the last continuance of this

cause, and before this day, to-wit: on the day of, at
(here state the matter of defense as in ordinary cases); all of which
 the defendant will give in evidence in his defense on the trial of this
 cause, under the general issue by him heretofore pleaded, and insist
 upon the same as a bar to the further maintaining of the aforesaid
 action by the said plaintiff against said defendant.

C.... D...., *Defendant.*

County of, ss. C.... D...., the above named defendant, being
 duly sworn, says that the above notice is true in substance and mat-
 ter of fact.

C.... D....

Subscribed and sworn to before me, }
 this day of 19...

L.... M...., *Justice of the Peace.*

No. 58—Form of Bill of Particulars.

Ante, §§ 284-288. C. L., §§ 772-774.

IN JUSTICE'S COURT:

A.... B....	} Before L.... M...., a Justice of the Peace in and for the county of....
v.	
C.... D....	

To the defendant:

SIR—Please take notice that the following is a bill of the particulars
 of the plaintiff's demand in this cause, and for the recovery of which
 this action is brought, to-wit:

19.., May 1—Money lent to defendant,.....	\$30 00
“ “ 5—Money paid to J.... D...., for defendant.	30 00
“ “ 8—One ton of hay sold defendant.....	10 00

*(And so throughout, giving the dates, items and sums, with as much
 particularity as possible.)*

Dated.... 19..

Yours, etc.,

A.... B...., *Plaintiff.*

ON APPLICATION FOR ADJOURNMENT.

No. 59—Form of Oath to be Administered by the Justice on Oral Showing for Adjournment.

Ante, §§ 289-298. C. L., §§ 791-795.

You do solemnly swear, that you will true answers make to such
 questions as may be put to you, in relation to the necessity for an
 adjournment, in the case of A.... B...., plaintiff, against C.... D....,
 defendant, now pending before me.

No. 60—Form of Bond on Adjournment in Suit Commenced by Warrant.*Ante*, § 293. C. L., § 793.

Know all men by these presents, that we, C.... D...., as principal, and E.... F...., as surety, of, in the county of, are held and firmly bound unto A.... B.... in the sum of two hundred dollars, to be paid to the said A.... B.... or to his certain attorney, executors, or administrators, or assigns; to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals. Dated the day of, 19..

WHEREAS, a suit has been commenced by warrant, before L.... M...., Esq., one of the Justices of the Peace of the township of, in said county of, by the said A.... B...., plaintiff, against the above bounden C.... D...., defendant, in a plea of *trespass on the case*, and now, upon the application of the above named defendant, the trial of said cause is adjourned until the day of, 19.., at o'clock in the afternoon, at the of the said Justice, in the said township.

Now, THEREFORE, the condition of this obligation is such, that if the above bounden C.... D.... shall render himself in execution, in case judgment shall be rendered against him in said suit, and if no part of the property of the said C.... D.... liable to execution shall be removed, secreted, assigned or disposed of, except for the necessary support of himself and family, until any judgment the said plaintiff may obtain against him shall be satisfied, or until the expiration of ten days after the said plaintiff shall be entitled to execution thereon, then this obligation to be void, otherwise of force.

Signed, sealed and delivered	}	C.... D.... [L. S.]
in presence of.....		E.... F.... [L. S.]

I approve of E.... F.... as surety in the foregoing bond.

Dated this day of, 19..

L.... M...., *Justice of the Peace.*

No. 61—Form of the Oath to Surety.

You do [*solemnly swear—or affirm*] that you will true answers make to such questions as shall be put to you, touching your competency as surety for C.... D.... on his application to adjourn this cause.

RELATING TO WITNESSES.**No. 62—Form of Subpoena.***Ante*, § 299. C. L., § 801.STATE OF MICHIGAN, }
COUNTY OF..... } ss.

To J.... K.... and N.... O...., greeting:

In the name of the People of the State of Michigan, you are commanded to appear personally before me, the undersigned, a Justice of the Peace of, in said county, at my office, in, on the day of, 19.., at o'clock in the noon of that day, to testify the truth according to your knowledge, in an action now pending before me, the said Justice, and then and there to be tried between A.... B...., plaintiff, and C.... D...., defendant, on the part of the, in a plea of Hereof fail not at your peril.

Given under my hand, at the of aforesaid, the day of, 19..
L.... M...., *Justice of the Peace.*

No. 63—Form of Subpoena, duces tecum.*Ante*, § 300.STATE OF MICHIGAN, }
COUNTY OF..... } ss.

To J.... K.... and N.... O...., greeting:

In the name of the People of the State of Michigan, you are commanded to appear personally before me, the undersigned, a Justice of the Peace of, in said county, at my office, in, on the day of, A. D. 19.., at o'clock in the noon of that day, to testify the truth according to your knowledge, in an action now pending before me, the said Justice, and then and there to be tried between A.... B...., plaintiff, and C.... D...., defendant, on the part of the, in a plea of And you, the said J.... K...., are further commanded to bring with you, and then and there produce in evidence, a certain letter dated the day of, and written and sent by the said C.... D.... from D.... to one R.... S.... (*give such a description of the paper wanted that the witness may clearly know what one is intended*). Hereof fail not at your peril.

Given under my hand, at the of aforesaid, this day of, 19..
L.... M...., *Justice of the Peace.*

No. 64—Subpœna Before Arbitrators.*Ante*, § 301. C. L., § 10929.STATE OF MICHIGAN, } ss.
COUNTY OF..... }

To J.... K.... and N.... O...., greeting:

In the name of the People of the State of Michigan, you and each of you are commanded personally to appear and attend, at the, in the township of, in the county of, on the day of next, at o'clock in the noon of that day, before E.... F.... and G.... H...., arbitrators chosen to determine a controversy between A.... B.... and C.... D...., then and there to testify as a witness in relation thereto, before said arbitrators, on the part of the said C.... D.... Hereof fail not at your peril.

Given under my hand, at the township aforesaid, this day of, 19.. L.... M...., *Justice of the Peace*.

No. 65—Form of Return of Service of Subpœna.*Ante*, § 303. C. L., § 802.

I hereby certify that on the day of, 19.., I served the within subpœna personally upon the within named J.... K.... and N.... O...., in the township of, in the county of, by reading the same to each of them (or *by stating the contents thereof to each of them*), and at the same time I paid to them each, as fees for miles travel, and for attendance before the within named Justice.

Dated, 19..

O.... S...., *Constable*.**No. 66—Oath to Party Proving Cause for an Attachment for a Defaulting Witness.***Ante*, § 304. C. L., § 803.

You do solemnly swear that you will true answers make to all such questions as may be put to you, in relation to the service of a subpœna upon N.... O...., as a witness in the cause now pending before me, wherein A.... B.... is plaintiff and C.... D.... is defendant, and as to the materiality of his testimony for the plaintiff, and as to the cause of his neglect or refusal to attend as such witness.

No. 67—Affidavit for Attachment for Defaulting Witness to Be Annexed to Subpœna.*Ante*, § 304. C. L., § 803.STATE OF MICHIGAN } ss.
COUNTY OF..... }

A.... B...., the plaintiff named in the annexed subpœna, being duly sworn, says that he did, on the day of instant, at the

township of, in said county, serve the annexed subpoena on N.... O...., a witness therein named, by reading the same (or, *by stating the contents thereof*) to him and at the same time paying (or *tendering*) to him the sum of as his fees. And this deponent further says, that the testimony of the said N.... O...., as this deponent verily believes, is material and necessary to this deponent upon the trial of the cause mentioned in the said subpoena; and further, that the said N.... O.... refuses (or, *has neglected*) to attend the trial of the said cause as he was commanded to do in and by the said subpoena.

A.... B...., *Plaintiff*.

Subscribed and sworn to before me, }
this day of, 19.. }

L.... M...., *Justice of the Peace*

No. 68—Form of Attachment for Defaulting Witness.

Ante, § 304. C. L., § 803.

STATE OF MICHIGAN: } *ss.*
COUNTY OF..... }

To any Constable of said County, Greeting:

In the name of the People of the State of Michigan, you are hereby commanded to attach N.... O.... and bring him before me, the undersigned, a Justice of the Peace in and for said county, at my office, in the township of in said county, forthwith (or, *on the day of instant, at o'clock in the noon,*) to testify those things which he knows, in an action now pending before me, the said justice, between A.... B...., plaintiff, and C.... D...., defendant, on the part of the, and also to answer all such matters as shall be objected against him, for that the said N.... O...., having been duly subpoenaed to appear at the trial of said action, has refused (or *neglected*) to attend in conformity with such subpoena; and have you then there this precept.

Given under my hand, at the township aforesaid, the day of , 19...

L.... M...., *Justice of the Peace*.

No. 69—Return to the Attachment for Defaulting Witness.

Ante, § 305. C. L., § 804.

By virtue of the within attachment, I have attached N.... O...., as within commanded, and I have his body, together with the within writ, before the within named Justice, as by said writ directed.

Dated.....

O.... S...., *Constable*.

Amount of my fees, \$....

No. 70—Minute of Conviction for Defaulting Witness.*Ante*, § 306. C. L., §§ 805-808.

County of . . . , ss.—Be it remembered, that on this . . . day of . . . 19. . . , N. . . . O. . . . is convicted before me, and fined the sum of . . . dollars, besides . . . dollars costs, for non-attendance as a witness to give evidence before me, at my office in the township of . . . , on the . . . day of . . . , in a certain cause then and there depending before me, in which A. . . . B. . . . was plaintiff, and C. . . . D. . . . defendant, in disobedience of the command of the subpoena duly served upon him.

L. . . . M. . . . , *Justice of the Peace.*

No. 71—Form of Execution Against Defaulting Witness for Fine and Costs.*Ante*, § 306. C. L., §§ 807-808.

STATE OF MICHIGAN, }
COUNTY OF } ss.

To any Constable of said County, Greeting:

WHEREAS, N. . . . O. . . . was, on the . . . day of . . . , 19. . . . , convicted and fined by me, the undersigned, a Justice of the Peace of the township of . . . in said county, the sum of . . . dollars, besides . . . dollars costs, for non-attendance as a witness to give evidence before me, at . . . , in the township of . . . , in said county, on the . . . day of . . . instant, in a certain cause then and there depending before me, in which A. . . . B. . . . was plaintiff and C. . . . D. . . . defendant; a record of which conviction, and of the cause thereof, has been duly made up and entered in my docket; and, whereas, the said N. . . . O. . . . has neglected to pay the said fine and costs, therefore,

In the name of the People of the State of Michigan, you are hereby commanded to levy the said fine and costs of the goods and chattels of the said N. . . . O. . . . , and for the want thereof to take and convey the said N. . . . O. . . . to the jail of said county, there to remain until he shall pay the said fine and costs; and the keeper thereof is required to keep the said N. . . . O. . . . in close custody, in said jail, until the fine and costs aforesaid be paid, or until thirty days after the commencement of his imprisonment.

Given under my hand, at the township aforesaid, the . . . day of . . . 19. . .

L. . . . M. . . . , *Justice of the Peace.*

No. 72—Form of Oath—Materiality of Witness.*Ante*, § 304. C. L., § 803.

You do solemnly swear (*or affirm*) that you will true answers make to such questions as shall be put to you touching the materiality of the testimony of . . . a witness in the cause here on trial before me, between A. . . . B. . . . , plaintiff, and C. . . . D. . . . , defendant.

No. 73—Form of Commitment of a Witness.*Ante*, § 306. C. L., §§ 805-807.STATE OF MICHIGAN, } ss.
COUNTY OF..... }

To any constable of said county, and to the keeper of the common jail of said county, greeting:

WHEREAS, on the trial of a cause before L.... M...., one of the justices of the peace in the township of, in said county, this day, between A.... B...., plaintiff, and C.... D...., defendant, N.... O...., being called as a witness on the part of the said plaintiff, and being present, refused to be sworn as such witness, in the form prescribed by law (or N.... O.... was called and sworn as a witness on the part of the said plaintiff, and on his examination as such witness the said N.... O.... was asked, by the said plaintiff, the pertinent and proper question, "whether he was acquainted with the handwriting of the defendant," to which question the said N.... O.... refused to answer), (*if the witness refuse to be sworn add*) and, it being proved to me by the oath of said plaintiff (or, by the return of O.... S.... one of the constables of said county), that the said N.... O.... was duly subpoenaed to attend the said trial, as a witness on the part of said plaintiff, therefore,

In the name of the People of the State of Michigan, you, the said constable, are commanded forthwith to convey and deliver the said N.... O.... into the custody of the said keeper of the said jail, and you, the said keeper, are hereby required to receive the said N.... O.... into your custody in the said jail, and him there safely to keep until he shall submit to answer the said question so put to him by the said plaintiff (or, until he shall submit to be sworn and to testify as such witness), and shall be discharged by due course of law. And hereof fail not.

Given under my hand, the day of, 19..

L.... M...., *Justice of the Peace.***No. 74—Form of Oath, or Affirmation to Witness.***Ante*, § 311. C. L., §§ 830, 10204, 10206.

OATH.—You do solemnly swear, that the evidence you shall give relating to the issue in this case now on trial between A.... B...., plaintiff, and C.... D...., defendant, shall be the truth, the whole truth, and nothing but the truth.

AFFIRMATION.—You do solemnly and sincerely affirm, that the evidence you shall give relating to the issues in this case now on trial between A.... B...., plaintiff, and C.... D...., defendant, shall be the truth, the whole truth, and nothing but the truth, and this you do under the pains and penalties of perjury.

RELATING TO THE TRIAL.**No. 75—Form of Oath to Constable Before Selecting Jury.***Ante*, §§ 315, 319. C. L., §§ 815, 816.

You do solemnly swear, that in the suit now pending before me, wherein A.... B.... is plaintiff and C.... D.... is defendant, you will select, according to your best judgment, and without favor or partiality to either party, the names of eighteen inhabitants of this county who are qualified to serve as jurors in the courts of record, and in nowise of kin to the plaintiff or defendant, nor interested in said suit, from whom to form a jury for the trial of said cause.

No. 76—Form of Venire.*Ante*, § 319. C. L., § 817.

STATE OF MICHIGAN, } ss.
COUNTY OF..... }

To any Constable of said County, Greeting:

In the name of the People of the State of Michigan, you are hereby required to summon (*insert the names of the jurors*), to appear before the undersigned, one of the Justices of the Peace of the township of, in said county, at, in said township of, on the day of instant, at o'clock in thenoon, to make a jury for the trial of an action of (*trespass or, assumpsit, or, as the case may be*) between A.... B...., plaintiff, and C.... D...., defendant. And have you then and there this precept.

Given under my hand, at the township aforesaid, the day of, 19..

L.... M...., *Justice of the Peace.*

No. 77—Form of Return to a Venire.*Ante*, §§ 319, 321. C. L., § 817.

I certify, that by virtue of the within precept I have personally summoned each of the several persons therein named (*if unable to find one or more of the persons named, let the return show who was not served*), to appear at the time and place within mentioned.

Dated....., 19..

O.... S...., *Constable.*

No. 78—Oath to Juror on Challenge.*Ante*, §§ 327, 329, 332. C. L., §§ 348, 10238.

You do solemnly swear that you will true answers make to all such questions as may be put to you touching your competency to sit as a juror, in the trial of this action between A.... B...., plaintiff, and C.... D...., defendant.

No. 79—Oath to Witness on Trial of Challenge.

Ante, § 332.

You do solemnly swear that you will true answers make to all such questions as shall be put to you in relation to the challenge of M.... N...., now depending and on trial.

No. 80—Form of Oath to Jurors for the Trial.

Ante, § 334. C. L., §§ 821, 10204.

You do solemnly swear (or, *sincerely declare and affirm*), that you will well and truly try the matter in difference between A.... B...., plaintiff, and C.... D...., defendant, and, unless discharged by me, a true verdict give, according to law and evidence (*and, if the juror affirms, add, and this you do under the pains and penalties of perjury*).

No. 81—Form of Oath to Constable in Charge of Jury.

Ante, § 345. C. L., § 831.

You do solemnly swear that you will, to the utmost of your ability, keep the persons sworn as jurors on this trial, in some private and convenient place, without meat or drink, except such as shall be ordered by me; that you will not suffer any communication, orally or otherwise, to be made to them; that you will not communicate with them yourself, orally or otherwise, unless by my order, or to ask them if they have agreed on their verdict, until they shall be discharged; and that you will not, before they render their verdict, communicate to any person the state of their deliberations, or the verdict they have agreed on.

No. 82—Form of Oath to Interpreter.

Ante, § 450.

You do solemnly swear that you will accurately and truly interpret between the court, the jury, the attorneys and the witness, N.... O...., in this action, between A.... B...., plaintiff, and C.... D...., defendant.

DEPOSITION FORMS.

No. 83—Stipulation to Take Testimony de bene esse on Oral Interrogatories.*Ante*, § 432. C. L., § 10141.

A.... B....	}	In Justice's court. Before L.... M...., one of the justices of the peace in and for the county of
v.		
C.... D....		

It is hereby stipulated and agreed by and between the parties to the above entitled cause that the deposition of E.... F...., a witness material to the plaintiff on the trial thereof, may be taken on oral interrogatories at in the of in the state of, at o'clock in the noon of the day of, 19.., before R.... S...., and that the deposition so taken, when properly returned, may be read upon the trial of said cause in the same manner and subject to the same conditions as if taken upon notice, as provided in chapter 282 of the compiled laws of 1897.

Dated....., 19..

A.... B...., *Plaintiff*.C.... D...., *Defendant*.*Note.*—**No. 84—Stipulation to Take Testimony de bene esse on Written Interrogatories.***Ante*, § 432. C. L., § 10141.

A.... B....	}	In Justice's court. Before L.... M...., one of the justices of the peace in and for the county of
v.		
C.... D....		

It is hereby stipulated and agreed by and between the parties to the above entitled cause that the deposition of E.... F...., a witness material to the plaintiff on the trial thereof, may be taken on the annexed interrogatories, and upon them only. Such deposition shall be taken before R.... S...., who is duly authorized to administer oaths, at in of in the state of, at o'clock in thenoon of the day of 19.., and shall be returned as the law requires. When so taken and returned it may be read upon the trial of said cause in all respects as if taken upon notice as provided by chapter 282 of the compiled laws of 1897.

Dated....., 19..

A.... B...., *Plaintiff*.C.... D...., *Defendant*.

No. 85—Notice of Taking Deposition de bene esse Without a Commission.*Ante*, § 426. C. L., § 10136.

A.... B....	}	In Justice's court. Before L.... M...., one of the Justices of the Peace in and for the County of
v.		
C.... D....		

To the above named defendant:

Take notice that the deposition, de bene esse, of N.... O...., a witness for the above named plaintiff, in this cause, will be taken before R.... S...., a notary public (*or other officer named in the statute*) at his office at No. street, in the city of, in the state of Michigan, at ... o'clock ... m. on the ... day of, 19... The reason for the taking of such deposition is that such witness resides more than fifty miles from the place of trial of said cause (*or other cause mentioned in the statute*).

Dated....., 19..

A.... B...., *Plaintiff*.**No. 86—Certificate of Officer Taking the Deposition, of the Time, Place and Manner of Taking.***Ante*, § 430. C. L., § 10139.

I, R.... S...., a notary public for the county of, in the state of, qualified under the laws thereof to administer oaths, do hereby certify that on the day of, 19.., at o'clock in the noon, at my office in the of in state of, I did take the deposition of E.... F...., the witness named in the annexed notice (*or stipulation*). Upon the taking of such deposition I was attended by A.... B.... in person and by G.... H.... as attorney for C.... D.... The witness was by me first sworn to tell the truth, the whole truth and nothing but the truth in said cause, and was then examined by A.... B.... and cross-examined by G.... H.... for C.... D....

The questions as put and the answers as given were correctly written down by me (*or under my direction or were taken stenographically and transcribed under my direction*), were then read over to the witness and pronounced correct and were then signed by the witness. I do further certify that the annexed writings, marked respectively Exhibits A, B and C, were the writings used by the witness and referred to in his deposition. And further that I am not interested in the event of said cause nor attorney or of counsel for either party.

Witness my hand and seal this day of, 19..

[Seal.]

R.... S...., *Notary Public*.

The amount of my fees is:

For taking, sealing, certifying and returning deposition, \$....

For writing words contained in said deposition,

Total fees,

R.... S...., *Notary Public*.

Note.—If the deposition is taken upon written interrogatories the above form should be modified accordingly.

**No. 87—Clerk's Certificate to Be Attached to the Certificate
of the Officer Taking the Deposition Where He
Has no Official Seal.**

Ante, § 426. C. L., § 10136.

I, J.... S...., as clerk of the court for the county of in the state of, the same being a court of record, do hereby certify that R.... S...., the officer before whom the annexed deposition was taken, was at the time of the taking thereof a notary public in and for said county, and qualified under the laws of this state to administer oaths.

I do further certify that I am acquainted with the signature of the said R.... S.... and believe the signature to the certificate of the taking of said deposition is his genuine signature.

Witness my hand and the official seal of said court this day of, 19..

[Seal.]

J.... S....

Clerk of said Court.

No. 88—Affidavit for a Commission to Take Testimony de bene esse.

Ante, §§ 426, 427. C. L., §§ 10136, 10137.

A.... B.... } In Justice's court. Before L.... M...., one of the
v. } justices of the peace in and for the county of
C.... D.... }

County of, ss: A.... B...., being first duly sworn, deposes and says that N.... O.... is a material witness for this plaintiff on the trial of this cause. That said witness resides at in the state of Michigan and more than fifty miles from, the place of the trial of this cause.

And further deponent says that R.... S...., of, in this state, is a person without interest in this cause, and is not attorney or counsel for either party hereto, and is a suitable person to take the testimony of said witness by commission.

Subscribed and sworn
to before me this the
.... day of, 19..

A.... B....

L.... M...., *Justice of the Peace.*

No. 89—Commission to Take Testimony de bene esse.

Ante, §§ 426, 427. C. L., §§ 10136, 10137, 10140.

A.... B.... } In Justice's court. Before L.... M...., one of
v. } the justices of the peace in and for the county
C.... D.... } of

To R.... S....: Pursuant to the provisions of chapter 282 of the Compiled Laws of 1897, and for the reasons set forth in the annexed affidavit, you are hereby commissioned and empowered to take the

deposition de bene esse of N.... O...., a witness for the plaintiff herein, at in the of in this state, beginning at ... o'clock in thenoon of the day of 19.. In taking such deposition and making return thereof you will follow the procedure as pointed out in section four of said chapter, a copy of which is printed on this commission. You will put such written interrogatories to said witness as are attached hereto and as may be furnished by the parties hereto.

Dated....., 19.. L.... M...., *Justice of the Peace.*

No. 90—Notice of Taking Deposition by Commission.

Ante, § 427. C. L., § 10137.

A.... B....	}	In Justice's court. Before L.... M...., one of the Justices of the Peace in and for the County of
v.		
C.... D....		

To the above named defendant:

Take notice that the deposition, de bene esse, of N.... O...., a material witness for this plaintiff, will be taken by commission before R.... S...., a commissioner duly appointed by L.... M...., the above named Justice, for that purpose, at the office of the said R.... S...., at No. street, in the city of, in the state of, on the day of at o'clock in thenoon.

Attached hereto are true copies of the commission issued to the said R.... S...., of the affidavit upon which such commission issued, and of the written interrogatories of this plaintiff attached to said commission.

You will promptly furnish such cross-interrogatories, if any, as you desire to have put to such witness.

A.... B...., *Plaintiff.*

No. 91—Certificate of Commissioner of the Taking of the Deposition.

Ante, §§ 426, 427. C. L., §§ 10137, 10139.

State of..... }
County of..... } ss.

I, R.... S...., the commissioner in the annexed commission named, do hereby certify that the annexed deposition of the witness, N.... O...., was taken at in the of in the state of, beginning on the day of, 19.., at o'clock in thenoon.

The said witness was by me first duly sworn to testify the truth, the whole truth and nothing but the truth in said cause, and then the several direct and cross and redirect interrogatories annexed to the commission herein were by me read to the said witness, and his answers thereto respectively, were by me (or, under my direction) cor-

rectly written down, were then read over to the said witness and pronounced by said witness to be correct. The said witness then signed, in my presence, such deposition so taken.

I do further certify that the annexed writings marked, respectively, exhibits A, B and C, are the writings referred to by said witness in his deposition.

And further I do certify that I am not interested in the event of the suit in which such deposition is taken, nor am I attorney or of counsel for either party.

Witness my hand this day of, 19..

R.... S...., *Commissioner*.

The amount of my fees is:

For taking, certifying, sealing and forwarding deposition.... \$.....

For writing words.....

Total fees

R.... S...., *Commissioner*.

No. 92—Indorsement and Address for Return of Depositions.

Ante, § 430. C. L., § 10139.

A.... B.... } In Justice's court. Before L.... M...., one of the
v. } Justices of the Peace in and for the County of
C.... D.... }, State of

Depositions of N.... O...., taken in said cause, and sealed up by me to be sent, as hereon addressed, by mail.

R.... S...., *Notary Public*.

(or as the case may be)

To L.... M...., Justice of the Peace in and for the of
Michigan. Postoffice.....

County of.....

State of

No. 93—Notice of Filing of Depositions.

Ante, § 430. C. L., § 10139.

A.... B.... } In Justice's court. Before L.... M...., one of the
v. } Justices of the Peace in and for the County of
C.... D.... }, State of

To A.... B...., the above named plaintiff:

You are hereby notified that the deposition of N.... O.... taken in said cause has been filed therein.

L.... M...., *Justice of the Peace*.

Note. A like notice should be sent to the defendant.

No. 94—Objections to the Notice for Taking, the Manner of Taking or of Certifying and Returning Deposition.

Ante, § 430. C. L., § 10139.

A.... B.... } In Justice's court. Before L.... M...., one of the
v. Justices of the Peace in and for the County of
C.... D.... }, State of Michigan.

This defendant comes and objects to the deposition of N.... O.... filed in said cause and moves the suppression of the same for the following reasons: (*Set out reasons in full.*)

This motion is based upon the affidavits of E.... F.... and G.... H.... filed herewith and upon the files and records in said cause.

C.... D...., *Defendant.*

To A.... B....:

You will take notice that an objection and motion, of which the foregoing are true copies, have been entered and made in said cause. Copies of the affidavits referred to therein are hereto attached.

You will further take notice that said objections and motion will be heard on the next adjourned day of said cause or as said court may direct.

Dated....., 19..

C.... D...., *Defendant.*

No. 95—Form of Confession of Judgment.

Ante, § 482. C. L., § 705.

To L.... M...., Esquire, one of the Justices of the Peace of the County of

I hereby confess that I am indebted to A.... B.... upon contract in the sum of dollars, damages, besides costs, and I hereby authorize you to enter judgment against me in his favor, for that sum, with costs.

Dated....., 19..

C.... D....

Signed in my presence, in open court.

L.... M...., *Justice of the Peace.*

No. 96—Entry of Judgment by Confession.

A.... B.... }
v.
C.... D.... }

On this day of, 19.., the above named parties personally appeared before me in open court. The defendant, C.... D...., confesses in writing signed by him, in my presence, that he is indebted to A.... B...., the plaintiff, upon contract, in the sum of fifty dollars damages, besides costs, and thereupon, by the consent of the plaintiff, judgment is rendered against said defendant for fifty dollars damages and sixty-three cents costs of suit.

L.... M...., *Justice of the Peace.*

RELATING TO TRANSCRIPTS.**No. 97—Form of Affidavit for a Transcript.***Ante*, §§ 496-499. C. L., §§ 845-851.

IN JUSTICE'S COURT:

A.... B....	}	Before L.... M...., one of the Justices of the Peace in and for the County of
v.		
C.... D....		

County of, ss. A.... B...., the above named plaintiff, being duly sworn, says that there is now due and remaining unpaid upon the judgment heretofore, on the day of, 19.., rendered in the above entitled cause by the above named Justice, in favor of this deponent against the above named defendant, the sum of (*state the sum, which must not be less than twenty dollars*), exclusive of costs, and that there is now due to this deponent for the costs taxed in said cause by said Justice upon the rendition of said judgment, the further sum of, and that execution may be now issued upon said judgment for the collection thereof. And deponent further says that he has good reason to believe, and does believe, that there is not sufficient goods and chattels liable to execution to satisfy said judgment within the county of, where said judgment was rendered, belonging to the said C.... D.... (*or to any person or persons against whom such execution may issue*). And further says not.

Subscribed and sworn to before me,	}	A.... B....
this day of, 19..		

L.... M...., *Justice of the Peace.***No. 98—Form of Certificate to Be Attached to Transcript.***Ante*, § 496. C. L., § 845.

IN JUSTICE'S COURT:

A.... B....	}	Before L.... M...., one of the Justices of the Peace in and for the County of
v.		
C.... D....		

County of, ss. I, L.... M...., one of the Justices of the Peace of the township of, in said county, do hereby certify that the foregoing (or *annexed*) is a correct transcript from my docket, of the judgment rendered by me in the above entitled cause and remaining in my control, and of my docket, and of the whole thereof, and of all entries made therein of the proceedings had by and before me in said cause, so far as they appear upon said docket, together with (*if there was security for stay of execution, filed with the justice, add, "the original security for stay of execution upon said judgment, and"*) the original affidavit delivered to me upon the application for said transcript.

Dated....., 19.. L.... M...., *Justice of the Peace.*

No. 99—Certificate to Transcript Where Judgment Was Rendered by Another Justice.*Ante*, § 499. C. L., §§ 848-851.

IN JUSTICE'S COURT:

A.... B....	}	Before L.... M...., one of the Justices of the Peace in and for the County of
v.		
C.... D....		

County of, ss. I, L.... M...., one of the Justices of the Peace of the township of, in said county, do hereby certify that the foregoing (or, *annexed*) is a correct transcript from the docket of M.... N...., late a Justice of the Peace of the township of, in said county, of the judgment rendered by him in the above entitled cause, and of his docket, and the whole thereof, and of all entries made therein of the proceedings had by and before him in said cause, so far as they appear upon said docket, which is in my possession, and of which said docket and said judgment I have control, together with (if there was a stay of execution filed with the justice, add, "*the original security for stay of execution upon said judgment, and*") the original affidavit delivered to me upon the application for said transcript.

Dated....., 19.. L.... M...., *Justice of the Peace.*

RELATING TO EXECUTIONS.**No. 100—Form of Execution.***Ante*, §§ 500, 504. C. L., §§ 852, 853.

STATE OF MICHIGAN, } ss.
COUNTY OF..... }

To any Constable of said County:

Whereas, judgment against C.... D...., defendant, for the sum of dollars, damages, and dollars and cents, costs, in favor of A.... B...., plaintiff, was rendered by and before me, the undersigned, a justice of the peace of the township of, in said county, on the day of, 19.., at the township aforesaid. You are therefore commanded, in the name of the People of the state of Michigan, to levy the said damages, with interest from said day of, 19.., and costs, of the goods and chattels of the said C.... D.... (excepting such goods and chattels as are by law exempted from execution), and to bring the money before me, at my office, in said township, in sixty days from the date hereof, to render to the said A.... B...., the said plaintiff. And have you then and there this writ.

Given under my hand, at the said township of, this day of, 19..

L.... M...., *Justice of the Peace.*

No. 101—Form of Endorsement on the Execution, Where a Surety is Defendant.

It appeared on the trial of the within named cause, that the within named E.... F.... was surety for his co-defendant, C.... D...., within named, who was the principal debtor.

L.... M...., *Justice of the Peace.*

No. 102—Form of Execution Against the Body.

Ante, §§ 505, 506. C. L., §§ 854, 860, 10342.

STATE OF MICHIGAN, }
COUNTY OF..... } ss.

To any Constable of said County:

Whereas, judgment against C.... D...., defendant, for the sum of dollars damages, and dollars and cents, costs, in favor of A.... B...., plaintiff, was rendered by and before me, the undersigned, a Justice of the Peace of the township of, in said county, on the day of, A. D. 19.., at the township aforesaid. You are therefore commanded, in the name of the People of the State of Michigan, to levy the said damages, with interest from said day of, 19.., and costs, of the goods and chattels of the said C.... D.... (excepting such goods and chattels as are by law exempted from execution), and to bring the money before me, at my office, in said township, in sixty days from the date hereof, to render to the said A.... B...., the said plaintiff. And if no such goods or chattels can be found, or not sufficient to satisfy this execution, you are further commanded, in the name of said people, to take the body of the said C.... D.... and convey him to the common jail of the said county, there to remain until this execution shall be paid and satisfied, or the said C.... D.... shall be discharged by due course of law. Hereof fail not, and have you then and there this writ.

Given under my hand, at said township, this day of, 19..

L.... M...., *Justice of the Peace.*

No. 103—Form of Execution Against Principal and Surety for a Stay of Execution.

Ante, § 508. C. L., § 855.

STATE OF MICHIGAN, }
COUNTY OF..... } ss.

To any Constable of said County:

Whereas, judgment against C.... D...., defendant, for the sum of dollars damages, and dollars and cents, costs, in favor of A.... B...., plaintiff, was rendered by and before me, the undersigned, a Justice of the Peace of the township of, in said county,

on the day of, 19..., at the township aforesaid; and whereas, E.... F...., on the day of, 19..., became surety for the payment of said damages, with interest and the costs aforesaid, at or before the expiration of months from the commencement of suit, agreeably to law; and whereas, the said damages, with interest and costs, have not been paid. You are therefore commanded, in the name of the People of the State of Michigan, to levy the said damages, with interest, from said day of, at the rate of per cent., and said costs, of the goods and chattels of the said C.... D.... and E.... F.... (excepting such goods and chattels as are by law exempted from execution), and to bring the money before me, at my office, in said township, in sixty days from the date hereof, to render to the said A.... B.... Hereof fail not.

Given under my hand, at said township, this day of, 19..

L.... M...., *Justice of the Peace.*

No. 104—Notice of Intention to Apply for Execution.

Ante, § 511. C. L., § 864.

IN JUSTICE COURT:

A.... B....	}	Before L.... M...., one of the Justices of the Peace in and for the County of
v.		
C.... D....		

To the above named defendant:

Take notice that I intend to apply to L.... M...., Esq., the above named Justice of the Peace, at his office, in the township of, on the day of instant, at o'clock in the noon, for an immediate execution on the judgment in this cause.

Dated....., 19..

A.... B...., *Plaintiff.*

No. 105—Form of Affidavit of Service of Notice of Application for Execution.

Ante, § 511. C. L., § 864.

IN JUSTICE COURT:

A.... B....	}	Before L.... M...., one of the Justices of the Peace in and for the County of
v.		
C.... D....		

County of, ss. A.... B...., of the township of, in said county, being duly sworn, deposes and says that on the day of, instant, he served upon C.... D...., the above named defendant, a notice, of which the annexed is a copy, by delivering the same to him personally (or, in case he cannot be found, by delivering the same to the wife of the defendant or to some member of his family of suitable age and discretion, at the dwelling house of the said defendant, at in, he being absent therefrom).

Subscribed and sworn to before me, } A.... B...., *Plaintiff*
this day of, 19.. }

L.... M...., *Justice of the Peace.*

No. 106—Form of Oath on Application for Immediate Issuing of Execution.

You do solemnly swear (*or affirm*) that you will true answers make to such questions as shall be put to you, touching the necessity of an immediate execution upon the judgment rendered in this cause, between A.... B...., plaintiff, and C.... D...., defendant.

No. 107—Security for Stay of Execution to be filed with the Justice.

Ante, §§ 512, 514. C. L., §§ 865-867.

IN JUSTICE COURT:

A.... B....	}	Before L.... M...., one of the Justices of the Peace in and for the County of
v.		
C.... D....		

County of, ss. Whereas, judgment was rendered, in the above entitled cause, on the day of, 19.., by the above named L.... M...., one of the justices of the peace, in and for said county, in favor of A.... B...., the above named plaintiff, against C.... D...., the above named defendant, for the sum of, damages, and costs of suit. Therefore, I do acknowledge myself surety for the stay of execution on said judgment, and for payment by said defendant to the plaintiff of said damages, with interest, and said costs at or before the expiration of months from the commencement of said suit, and do agree to pay the same to said plaintiff, at or before the expiration of the time aforesaid.

Witness my hand this day of, 19..

Signed, acknowledged and delivered	}	E.... F....
in presence of		

L.... M...., *Justice of the Peace*.

I approve of E.... F.... as surety for the stay of execution aforesaid.

L.... M...., *Justice of the Peace*.

No. 108—Form of Stay of Execution When Entered on the Docket.

Ante, § 514. C. L., § 867.

County of, ss. I, E.... F...., hereby acknowledge myself surety for the payment to the plaintiff by the defendant of the above judgment, with interest and costs thereon, at or before the expiration of months from the commencement of said suit.

Dated the day of, 19..

E.... F....

I approve of E.... F.... as surety as aforesaid.

Dated....., 19..

L.... M...., *Justice of the Peace*.

No. 109—Form of Order Recalling Execution When Security for Stay is Given.*Ante*, § 515. C. L., § 869.

IN JUSTICE'S COURT:

A.... B.... }
 v. } Before L.... M...., one of the Justices of the
 C.... D.... } Peace in and for the County of

To O.... S...., a Constable of the township of, in said county of

You are hereby required to return to me the execution in your hands issued by me in the above entitled cause, the defendant therein having given to the plaintiff and filed with me, security in writing for staying execution on the judgment therein.

Dated....., 19.. L.... M...., *Justice of the Peace*.

No. 110—Form of Affidavit by Surety for Stay, on Application for Execution.*Ante*, § 516. C. L., § 871.

IN JUSTICE'S COURT:

A.... B.... }
 v. } Before L.... M...., one of the Justices of the
 C.... D.... } Peace in and for the County of

County of, ss. E.... F...., the surety for the stay of execution on the judgment in the above entitled cause, being duly sworn, says that he has become, and is apprehensive that by delaying execution until the full time of said stay, he may and will be compelled to pay said judgment.

Subscribed and sworn to before me, } E.... F....
 this day of, 19.. }

L.... M...., *Justice of the Peace*.

No. 111—Endorsement on Execution Against Joint Debtor Where One Not Served.*Ante*, § 520. C. L., § 875.

The within named defendant, G.... H...., was not served with process, and did not appear in the suit.

L.... M...., *Justice of the Peace*.

No. 112—Form of Inventory in Case Where Levy Is Made Upon a Class of Property Exempt to a Specified Amount.*Ante*, § 528. C. L., §§ 10325, 10326.

An inventory of property exempt by law from execution to a specified amount or value, levied upon by the undersigned, a constable of the township of, in the county of, by virtue of an execu-

tion issued by L.... M...., esquire, a Justice of the Peace of the township of in said county, in favor of A.... B...., plaintiff, against C.... D...., defendant, made by said constable, this day of, 19.., to-wit:

One pair of bay horses.

One two-horse lumber wagon.

O.... S...., *Constable*.

No. 113—Oath by Constable to Appraisers, to Be Endorsed on Inventory.

Ante, § 528. C. L., § 10325.

COUNTY OF, ss. G.... L.... and P.... T...., disinterested freeholders of the township of, in said county, being sworn, do, and each for himself doth say, that he will well and truly appraise the property mentioned in the within inventory, at its cash value, according to the best of his understanding.

Subscribed and sworn to the day }
of, 19.., before me.

G.... L....
P.... T....

O.... S...., *Constable*.

No. 114—Appraisal to Be Endorsed on the Inventory.

Ante, § 528. C. L., § 10325.

We, the above named G.... L.... and P.... T...., disinterested freeholders of the township of, in the county of, being duly sworn by O.... S...., the constable above named, well and truly to appraise the property mentioned in the within inventory (said property now being in the said township of) at its cash value, according to the best of our understanding, and having viewed said property, do appraise the same as follows:

One pair of bay horses, valued at \$150 each.....\$300 00

One two-horse lumber wagon, appraised at..... 60 00

Witness our hands this day of, 19..

G.... L.... } Appraisers.
P.... T.... }

No. 115—Form of Bond of Indemnity to the Officer Levying an Execution.

Ante, § 539. C. L., § 10349.

Know all men by these presents, that we, A.... B...., as principal, and E.... F...., as surety, are held and firmly bounden unto O.... S...., a constable of the township of, county of, in the sum of dollars, to be paid to the said O.... S...., his executors, administrators, or assigns, to which payment well and truly to be made we jointly and severally bind ourselves, our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals. Dated the day of, 19..

Whereas, the said O.... S...., as constable as aforesaid, by virtue of a certain execution issued against C.... D.... by L.... M...., esquire, one of the Justices of the Peace of the township of, in said county of, is about to seize and levy on (*specify the property*) alleged by the said A.... B.... to belong to the said C.... D.... with intent to sell the same upon said execution:

Now, therefore, the condition of this obligation is such, that if the said A.... B.... shall at all times, and forever hereafter, keep the said O.... S.... harmless and indemnified of, from, and against all damages, costs, charges, trouble, and expense, of what nature soever, which he may be put to, sustain, or suffer by reason of such levy and seizure, or of the subsequent proceeding thereon, then this obligation to be void, or otherwise of force.

A.... B....
E.... F....

No. 116—Form of Receipt for Goods Levied Upon.

Ante, § 540.

IN JUSTICE'S COURT:

A.... B.... }
v.
C.... D.... }

Execution issued by L.... M...., Esquire, one of the Justices of the Peace in the County of, for

Damages	\$28.00
Costs	1.50
Constable's fees for collecting.....	1.50
	<hr/>
	\$31.00

Interest on damages, from 19..,\$.....

By virtue of the execution above described, O.... S...., one of the constables of the township of, in said county, has levied upon the following goods and chattels, the property of the said C.... D...., to-wit: (*Name the property.*)

Received June 6, 19.. of the said O.... S...., the goods and chattels above mentioned, which I promise to deliver to him at, in the township of, in said county, on the day of next, or in default thereof, I do hereby agree with the said O.... S...., to pay him the said damages and interest, and costs and fees for collection, above mentioned.

E.... F....

No. 117—Form of Endorsement of Levy.

Ante, § 541. C. L., § 881.

By virtue of the within execution I have this day levied on (*name the property*), the property of C.... D...., the defendant within named.

Dated the day of, 19..

O.... S...., *Constable.*

No. 118—Form of Notice of Constable's Sale.*Ante*, § 542. C. L., § 882.

By virtue of an execution issued out of a Justice's court, against C.... D..., upon a judgment in a cause wherein A.... B.... was plaintiff, and the said C.... D.... was defendant, I have seized and taken (*describe the property*), the property of said C.... D..., which I shall sell at public vendue, to the highest bidder, at, in the township of, in the county of, Michigan, on the day of, A. D. 19.., at o'clock in the noon.

Dated the day of, 19..

O.... S..., *Constable*.**No. 119—Form of Return to an Execution, Where Property Found.***Ante*, §§ 545, 546. C. L., §§ 884, 888.

I hereby return that I have levied and collected the within damages, with interest and costs, of the within named C.... D..., as I am within commanded.

Dated, 19..

O.... S..., *Constable*.**No. 120—Form of Return to an Execution Against the Body.**

I hereby return that I have levied dollars, a portion of the damages and costs within mentioned; of the goods and chattels of the within named C.... D..., and, after diligent search, no goods or chattels being found, whereof I could levy the residue thereof, I have committed his body to the common jail, as I am within commanded.

Dated, 19..

O.... S..., *Constable*.**No. 121—Form of Return to an Execution Where no Property Found.***Ante*, § 545. C. L., § 884.

I hereby return that after diligent search no goods or chattels of the within named C.... D.... could be found, whereon to levy the within specified damages or costs.

Dated, 19..

G.... H..., *Constable*.**No. 122—Form of Renewal of an Execution.***Ante*, § 549. C. L., § 877.

The within execution is this day renewed for sixty days.

Dated, 19..

L.... M..., *Justice of the Peace*.

No 123.—Renewal Where a Part Has Been Paid or Collected.*Ante*, § 549. C. L., § 877.

The sum of ten dollars remains due on the within execution, and the said execution is renewed for the collection of that sum with interest from this date, for sixty days.

Dated . . . , 19..

L. . . . M. . . . , *Justice of the Peace.***No. 124—Form of Return of Execution—Goods not Sold, etc.***Ante*, § 549. C. L., § 885.

By virtue of this execution I levied upon the goods and chattels of the defendant therein, described in the schedule hereunto annexed on the . . . day of . . . , inst., and I do further return that there was not sufficient time, after said levy, and before the return day of said execution, to advertise and sell such property according to law.

Dated . . . , 19..

O. . . . S. . . . , *Constable.***No. 125—Form of Schedule of Property Levied Upon.***Ante*, § 549. C. L., § 885.

Schedule of property levied upon, on the . . . day of . . . by O. . . . S. . . . , one of the constables of said county, by virtue of the annexed execution.

One brown horse,
One red cow.

Dated . . . , 19..

O. . . . S. . . . , *Constable.***No. 126—Endorsement on Execution for Benefit of Stay.***Ante*, § 552. C. L., § 873.

The within execution is issued for the use of E. . . . F. . . . , the security for the stay of execution on the within mentioned judgment.

L. . . . M. . . . , *Justice of the Peace.***IN PROCEEDINGS BY CERTIORARI.****No. 127—Notice of Intention to Remove a Case by Certiorari.***Ante*, § 553. C. L., §§ 935, 936.

IN JUSTICE'S COURT:

A. . . . B. . . . }

v.

C. . . . D. . . . }

Before L. . . . M. . . . , one of the Justices of the Peace in and for the County of

SIR—Take notice, that I intend to remove this cause by *certiorari*, to the Circuit Court for the County of

Dated . . . , 19..

C. . . . D. . . . , *Defendant.*To L. . . . M. . . . , *Justice of the Peace.*

No. 128—Affidavit to Obtain Allowance of Writ of Certiorari.*Ante*, § 553. C. L., § 936.STATE OF MICHIGAN, }
COUNTY OF..... } ss.

C.... D.... of the township of, in said county, being duly sworn, deposes and says that A.... B.... lately prosecuted this deponent by summons, returnable on the day of last, at o'clock in the noon, before L.... M...., one of the Justices of the Peace of said township, at the office of the said Justice, in said township, in a plea of And this deponent appeared to the said summons, and the said A.... B...., the plaintiff, declared against this deponent as follows: (*set forth the declaration*) to which this deponent pleaded (*set forth the plea*). And thereupon the said parties proceeded to trial before the said Justice, without a jury. And upon the trial the following evidence was given, to-wit: N.... O...., on the part of the plaintiff, testified (*set forth the testimony on either side, and the objections made, and the decisions of the Justice thereon*).

And this deponent further saith, that the preceding is a substantial statement of the testimony and proceedings before the said Justice; and after the said testimony was given, the cause was submitted to said justice, who upon said day of, rendered judgment against this deponent in favor of the plaintiff for dollars damages, and dollars costs of suit.

And this deponent further saith, that he is advised and alleges that the said judgment is erroneous, upon the following grounds, to-wit:

1. That the said Justice erroneously rejected the testimony of the witness offered by this deponent.
2. That the Justice, etc. (*state all the errors complained of*).

And further this deponent saith not.

C....D....

Subscribed and sworn to before me, }
this day of, 19.. }

O.... G...., Notary Public in and for said County.

No. 129—Bond on Certiorari Where Judgment Was Against the Party Bringing It.*Ante*, § 556. C. L., § 938-940.

Know all men by these presents, that we, C.... D...., as principal, and E.... F...., as surety, both of the township of, in the county of, are held and firmly bound unto A.... B...., in the sum of fifty dollars (or, *if the judgment and costs exceed twenty-five dollars, then in double the amount of the judgment*), to be paid to the said A.... B...., his certain attorney, executors, administrators, or assigns; for which payment well and truly to be made, we bind our-

selves, our heirs, executors and administrators, jointly and severally, firmly by these presents. Sealed with our seals.

Dated this day of, 19..

Whereas, judgment was rendered on the day of, 19.., by L.... M...., one of the Justices of the Peace of the county of in favor of the said A.... B...., plaintiff, for the sum of dollars damages, and dollars costs, against the said C.... D...., defendant; and whereas, the said C.... D.... has obtained the allowance of a *certiorari* to remove the said judgment into the Circuit Court of the said county.

Now, therefore, the condition of this obligation is such, that if the said C.... D.... shall prosecute such *certiorari* to effect, and shall abide the judgment of the said Circuit Court therein, and shall pay the debt (or, *damages*) and costs that shall be awarded against him, the said C.... D...., then this obligation to be void, otherwise to remain in force.

C.... D.... [L. S.]

E.... F.... [L. S.]

No. 130—Condition of Bond When Judgment Was for the Party Procuring the Writ.

Ante, § 556. C. L., § 940.

Now, therefore, the condition of this obligation is such, that in case the said judgment shall be affirmed, if the said A.... B.... shall pay such costs as shall be awarded against him on the affirmance of such judgment, then this obligation to be void, otherwise to remain in force.

No. 131—Justification of Surety to Be Endorsed on Bond.

Ante, § 556. C. L., § 939.

County of ss.—E.... F...., the surety in the foregoing bond, being first duly sworn deposes and says that he owns property in this state of the value of at least dollars over and above all debts and demands, and legal exemptions.

E.... F....

Subscribed and sworn to before me }
this day of, 19.. }

No. 132—Form of Approval of Surety.

Ante, § 556. C. L., § 938.

I approve of E.... F.... as surety in this bond.

Dated, 19..

L.... M...., *Justice of the Peace*.

**No. 133—Certificate to Suspend Execution After Certiorari
Has Been Issued.**

Ante, § 559. C. L., § 943.

IN JUSTICE'S COURT:

A.... B.... }
v. } Before L.... M...., one of the Justices of the
C.... D.... } Peace of the County of

I certify that a writ of *certiorari* has been duly issued on the judgment in this cause.

Dated, 19..

L.... M...., *Justice of the Peace*.

No. 134—Form of Justice's Return to a Certiorari.

Ante, § 560. C. L., §§ 944, 945.

COUNTY OF ss.—I, L.... M...., the Justice of the Peace named in the writ hereto annexed, do certify to the Circuit Court of said county that before coming to me of the said writ, to-wit: on the day of at the request of A.... B.... in the said writ named, I issued a summons directed to any constable of the said county, commanding him to summon C.... D.... in the said writ also named, to appear before me at my office, in the township of, on the day of, then instant, at o'clock in the noon, to answer the said A.... B.... in a plea of trespass on the case, to his damage one hundred dollars; which summons, on or before the return day thereof, was delivered to me by O.... S...., a constable of the said county, with a return thereon signed by him, that the same was personally served on the said C.... D.... on the day of, aforesaid. And I do also certify, that at the time and place above specified for the return of the said summons, the said parties appeared before me, and the said plaintiff declared against the defendant as follows: (*Insert the declaration.*) To which declaration the defendant pleaded (*set forth the plea and notice, if any.*) And thereupon, I, the said Justice proceeded to try the said cause. On the trial of said cause, M.... A...., a witness sworn on the part of the plaintiff, testified that (*set forth the testimony*). And thereupon plaintiff rested his cause. And S.... R...., a witness sworn on the part of the defendant, testified that (*set forth the testimony*). And I also certify that the foregoing is all the testimony given on the said trial, and that after hearing the proofs and allegations of the parties, I, the said Justice, did forthwith render judgment in favor of the plaintiff, against the defendant, for dollars damages, and also dollars costs.

And in further answer to the facts set forth in the copy of the affidavit on which the said writ of *certiorari* was allowed, I do further certify and return (*set forth the facts as to the alleged grounds of error specified in the affidavit*).

All of which I send with the process, pleadings and other things

touching the annexed proceedings and judgment, as by the said writ I am commanded.

Given under my hand, the day of, 19..

L.... M...., *Justice of the Peace.*

(Form of indorsement of writ.)

The execution of this writ appears by the return hereto annexed.

L.... M...., *Justice of the Peace.*

No. 135—Form of Amended Return to Writ of Certiorari.

Ante, § 561. C. L., § 946.

STATE OF MICHIGAN,

A.... B...., *Plaintiff,*

v.

C.... D...., *Defendant.*

} In the Circuit Court for the County
of

In obedience to a rule of the Circuit Court for the County of made on the day of, I, L.... M...., the justice referred to in the said rule, do further certify and return to the writ of *certiorari* in this cause, and in compliance with the said rule, that (*here set forth the facts relating to the particular matter as to which further return is ordered*).

Given under my hand, the day of, 19..

L.... M...., *Justice of the Peace.*

IN PROCEEDINGS ON APPEAL.

No. 136—Form of Affidavit for Appeal.

Ante, §§ 563, 564. C. L., §§ 902, 903.

STATE OF MICHIGAN, }
COUNTY OF..... } ss.

C.... D...., of said county, being duly sworn, says that a final judgment was rendered by L.... M...., esquire, a Justice of the Peace in and for said county, on the day of, 19.., upon an issue of fact (*or as the case may be*) joined between the parties, in favor of A.... B...., plaintiff, and against this deponent as defendant, for dollars damages, and dollars costs of suit. Deponent further says that such judgment is not in accordance with the just rights of this deponent, as deponent verily believes, and that said deponent conceives himself aggrieved thereby, and appeals therefrom to the Circuit Court for the County of and further deponent saith not.

C.... D....

Subscribed and sworn to before me, }
this day of, 19.. }

L.... M...., *Justice of the Peace.*

No. 137—Affidavit for Special Appeal.*Ante*, § 564. C. L., § 903.STATE OF MICHIGAN, }
COUNTY OF..... } ss.

C.... D...., of said county, being duly sworn, says that a final judgment was rendered by L.... M...., Esquire, a Justice of the Peace in and for said county, on the day of, A. D. 19.., upon an issue of fact (*or as the case may be*) joined between the parties, in favor of A.... B...., plaintiff, and against this deponent as defendant, for dollars damages, and dollars costs of suit. Deponent further says that such judgment is not in accordance with the just rights of this deponent, as deponent verily believes, and that said deponent conceives himself aggrieved thereby, and appeals therefrom to the Circuit Court for the County of

And this deponent further saith, that he alleges that the said judgment is erroneous for the following causes, to-wit:

1. That the said Justice erred in deciding that the return of the constable was sufficient, although the time of service was not stated.
2. The said Justice erred, etc. (*set forth all the errors complained of*), and further deponent saith not.

C.... D....

Subscribed and sworn to before me, }
this day of, 19.. }

L.... M...., *Justice of the Peace.***No. 138—Form of Bond on Appeal.***Ante*, § 566. C. L., §§ 904-906.

Know all men by these presents, that we, C.... D...., as principal, and E.... F.... and G.... H...., as sureties, all of the of in the county of, and state of Michigan, are held and firmly bound unto A.... B...., of the of in the county of and state of Michigan, in the sum of (*not less than fifty dollars and double the amount of the judgment*), to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals, and dated the day of, 19..

Whereas, judgment was rendered on the day of, 19.., by L.... M...., Esq., one of the Justices of the Peace of the County of and state of aforesaid, in favor of the said A.... B...., for the sum of dollars damages, and costs of suit against the said C.... D....; and whereas, the said C.... D...., conceiving himself aggrieved by the said judgment, has appealed therefrom to the Circuit Court for said County of

Now, the condition of the above obligation is such, that if the said C.... D.... shall prosecute his said appeal with all due diligence to a decision in the said Circuit Court, and if a judgment be rendered

against him in the said court, shall pay the amount of such judgment including all costs with interest thereon, and in case the said appeal shall be discontinued or dismissed, if he, the said C.... D...., shall pay the amount of the judgment rendered against him in the Justice's court, including all costs with interest thereon, then this obligation to be void, otherwise in force.

C.... D....
E.... F....
G.... H....

I hereby certify that the sureties in the foregoing bond, justified their pecuniary responsibility as such in writing and on oath.

Dated, 19.. L.... M...., *Justice of the Peace.*

(*For form of justification of sureties see, ante, No. 131.*)

No. 139—Justice's Certificate That an Appeal Has Been Made.

Ante, § 569. C. L., § 911.

IN JUSTICE'S COURT:

A.... B.... }
v. } Before L.... M...., one of the Justices
C.... D.... } of the Peace of the County of

I certify that an appeal to the Circuit Court for the county of has been duly made in this cause by the defendant.

Dated, 19.. L.... M...., *Justice of the Peace.*

No. 140—Return to an Appeal.

Ante, § 570-572. C. L., §§ 912-914.

IN JUSTICE'S COURT:

A.... B.... }
v. } Before L.... M...., one of the Justices of the
C.... D.... } Peace in and for the County of

An appeal having been made in the above cause, I, L.... M...., the Justice before before whom the above cause was tried, do hereby return to the Circuit Court for the County of, the proceedings had before me therein, as follows:

The parties prosecuted and defended in their individual character.

The cause was commenced by summons issued on the day of, 19.., returnable at my office in the township of, in said county, on the day of aforesaid, at o'clock in the afternoon.

The plaintiff's declaration was in writing, of which the following is a copy; (*or, the plaintiff declared verbally as follows: insert the substance of the declaration*).

The defendant's plea was in writing, and the following is a copy thereof: (*insert copy of plea; or, if verbal, the substance of it*).

The said cause was tried by jury, and the names of the jurors were (*insert names of jurors*), and the jury found a verdict in favor of the plaintiff for dollars damages.

That on the day of, 19.., I rendered judgment against the defendant for dollars damages and dollars costs.

And as to the matters and alleged errors stated and set forth in the affidavit to appeal said cause, hereunto annexed, I do further return: *(set forth the facts relating to the points alleged in the affidavit to be erroneous, including copies of all process, returns, affidavits, etc., and decisions, if any, relating to those points).*

And I do further return, that the affidavit and bond herewith returned, were delivered to me on the day of instant, and the costs of suit and my fees were at the same time paid.

Given under my hand, the day of, 19..

L.... M...., Justice of the Peace.

RELATING TO PROCEEDINGS AGAINST FRAUDULENT DEBTORS.

No. 141—Form of Affidavit for Warrant Against Fraudulent Debtor.

Ante, §§ 590, 591. C. L., §§ 9555, 9556.

STATE OF MICHIGAN, } ss.
COUNTY OF..... }

A.... B...., being duly sworn, deposes and says, that C.... D...., of the township of, in said county, is justly indebted to this deponent in the sum of dollars, upon express contract for goods, wares and merchandise, sold and delivered by this deponent to said C.... D.... (or upon an account for work and labor performed by deponent for said C.... D....; or, upon a judgment rendered by L.... M...., a Justice of the Peace in and for said county of, on the day of, 19.., upon a contract for work and labor performed by deponent for said C.... D...., etc.; stating the demand), for which the said C.... D.... cannot be arrested or imprisoned according to the provisions of section one of chapter 261 of the Compiled Laws of 1897, entitled "Of the punishment of fraudulent debtors;" and that for the recovery of said demand, this deponent has commenced a suit which is now pending before L... M..., one of the Justices of the Peace of said county, against the said C.... D.... (or, if judgment has already been obtained, "That he has recovered a judgment before L.... M...., one of the Justices of the Peace of said county, against the said C.... D...., upon said demand").

And deponent further says, that he has reason to believe and does believe, that the said C.... D.... is about to remove his property (or, a part of his property) out of the jurisdiction of the court in which said suit is brought (or, judgment was obtained), with intent to defraud his creditor (or, creditors).

And deponent further says, that the facts and circumstances con-

stituting the grounds of his belief are, that the said C.... D.... has been busily employed during the past week in packing up goods and merchandise belonging to him in his store in, and that said goods were so packed secretly in the night-time, in boxes and trunks convenient for transportation, and that some of them have already been conveyed away secretly in the night-time, and that (*state all the grounds of belief fully and particularly*). And further deponent says not.

A.... B....

Subscribed and sworn to before me, }
this day of, 19.. }

L.... M...., *Justice of the Peace.*

No. 142—Form of a Warrant Against Fraudulent Debtor.

Ante, §§ 590-592. C. L., §§ 9555-9557.

STATE OF MICHIGAN, } ss. To the Sheriff of the County of or
COUNTY OF..... } to any Constable of said County:

Whereas, it satisfactorily appears to me, the subscriber, a justice of the peace in and for said county of, and residing in said county, by the affidavit of A.... B...., a copy of which accompanies this warrant, that the said A.... B.... has commenced a suit which is pending before me, the said justice, against C.... D...., for the recovery of the sum of dollars, which is due to said A.... B.... from the said C.... D.... upon an express contract, for goods, wares and merchandise sold and delivered to him by the said A.... B...., for which demand the said C.... D.... cannot be arrested or imprisoned, according to the provisions of section one of chapter 261 of the Compiled Laws of 1897, entitled "Of the punishment of fraudulent debtors;" and that the said C.... D.... is about to remove part of his property out of the jurisdiction of the court in which said suit is brought and is pending, with intent to defraud his creditors; you are, therefore, in the name of the People of the State of Michigan, commanded to arrest the said C.... D.... and bring him before me, at my office, in the township of without delay, to answer to said complaint, that such further proceedings may be had thereon as are authorized by law.

Given under my hand, at, this day of, 19..

L.... M...., *Justice of the Peace.*

No. 143—Form of Certificate to Affidavits for Warrant.

Ante, § 592. C. L., § 9557.

I certify the preceding to be true copies of all the affidavits presented to me, on which my warrant this day issued against J.... D.... is founded.

Dated, 19..

L.... M...., *Justice of the Peace.*

No. 144—Form of Affidavit in Denial.*Ante*, § 594 C. L., § 9559.**IN JUSTICE'S COURT:**

A.... B.... } Before L.... M...., a Justice of the
 v. } Peace in and for the County of
 C.... D.... } In the matter of the complaint against C.... D....
 COUNTY OF, ss. C.... D...., being duly sworn, deposes and
 says, that, etc. (*setting forth the denial of the facts and circumstances*
contained in the affidavit or affidavits).

C.... D....

Subscribed and sworn to before me, }
 this day of, 19.. }
 L.... M...., *Justice of the Peace*.

No. 145—Form of Oath to Defendant.*Ante*, § 594. C. L., § 9559.

You do solemnly swear (*or affirm*) that you will true answers make to such questions as shall be put to you, touching the matter of the complaint of A.... B.... against you, now pending before me, and that therein you will speak the truth, the whole truth and nothing but the truth.

Note.—This form can be readily adapted to the case of the witness.

No. 146—Form of Examination of Defendant.*Ante*, § 594. C. L., § 9559.**IN JUSTICE'S COURT:**

A.... B.... } Before L.... M...., one of the Justices of the
 v. } Peace in and for the County of
 C.... D.... }
 In the matter of the complaint of A.... B.... against C.... D....
 C.... D.... having been arrested on a warrant issued by L....
 M...., Esq., a Justice of the Peace of the township of county of
 on a complaint made against him by A.... B...., who had commenced a suit against him before the said L.... M...., and having been brought before the said L.... M...., with a view to the proceedings authorized by the seventh, eighth, ninth, tenth and eleventh sections of chapter 261, Compiled Laws of 1897 of this state, entitled "Of the punishment of fraudulent debtors," and the said C.... D.... having made his affidavit in exculpation of himself from the said complainant, he was examined by the said A.... B.... on oath administered by the said L.... M.... on this day of, 19.., and answered and deposed as follows: (*State the testimony, which should be signed by C.... D....*)

C.... D....

The foregoing examination of C.... D.... reduced to writing and subscribed by him this day of, 19..

L.... M...., *Justice of the Peace*.

No. 147—Form of Recognizance.*Ante*, § 954. C. L., § 9559.STATE OF MICHIGAN, } ss.
COUNTY OF..... }

Be it remembered, that on the day of, in the year 19.. C.... D.... and E.... F.... personally came before me, L.... M...., Esquire, one of the Justices of the Peace of the township of in said county, and acknowledged themselves to owe to the people of the state of Michigan the sum of dollars, of good and lawful money of the said state, to be levied of their goods and chattels, lands and tenements, to the use of the said people, if the said C.... D.... shall fail in performing the condition underwritten.

The condition of the above recognizance is such that if the said C.... D.... shall personally appear before L.... M...., Esquire, a Justice of the Peace of the township of, in said county, at his office, in the township of, on the day of instant, at o'clock in the noon, then and there to answer a complaint preferred against him before the said Justice, by A.... B...., under the third and fourth sections of chapter 261 of the Compiled Laws of 1897, entitled "Of the punishment of fraudulent debtors," and submit himself to the said Justice in respect to the said complaint, and shall not, in the meanwhile, secrete, destroy, dispose of, or in any manner make away with or put out of his possession any of his property not exempt from sale or execution, then this recognizance to be void, otherwise to remain in full force.

Taken and acknowledged before me, the } C.... D....
day and year first above written. } E.... F....
L.... M...., *Justice of the Peace.*

No. 148—Form of Subpoena.*Ante*, § 594. C. L., § 9560.STATE OF MICHIGAN, } ss. To David Jones.
COUNTY OF..... }

In the name of the people of the state of Michigan, you are hereby commanded personally to appear before me, L.... M...., Esquire, a Justice of the Peace of the township of, in said county, at my office, in said township, on the day of, instant, at ten o'clock in the forenoon, to testify in respect to the matter of a complaint by A.... B.... against C.... D...., pending before the said Justice, under and by virtue of chapter 261 of the Compiled Laws of 1897, entitled "Of the punishment of fraudulent debtors." And this you are not to omit under the penalties imposed by law for such omission.

Given under my hand, at, this day of, 19..
L.... M...., *Justice of the Peace.*

No. 149—Form of Commitment.

Ante, § 595. C. L., § 9561.

STATE OF MICHIGAN, }
COUNTY OF..... } ss. To the Sheriff of the County of, or
to any Constable of said County, and to the Keeper of the jail of said
County:

Whereas, A.... B.... heretofore made complaint before me, the subscriber, a Justice of the Peace of the township of, in said county, against C.... D...., representing that the said A.... B.... had commenced a suit before me for a demand amounting to dollars, due to him on express contract, for goods, wares and merchandise sold and delivered by him to the said C.... D...., for which demand the said C.... D...., could not be arrested or imprisoned, according to the provisions of chapter 261 of the Compiled Laws of 1897, entitled "Of the punishment of fraudulent debtors," and that the said C.... D.... was about to remove a part of his property out of the jurisdiction of the said court in which the said suit was brought, with intent to defraud the said A.... B.... and the other creditors of the said C.... D...., and produced before me his affidavit in support of the said allegations, which was to me satisfactory proof of said allegations; whereupon, in pursuance of the said chapter, I issued my warrant for the apprehension of the said C.... D.... and he was apprehended and brought before me, at my office in the township of, on the day of instant, when and where I proceeded to hear the said complaint, and the proofs and allegations of the parties in relation thereto. *(If there was an adjournment, add: and adjourned the said hearing for further examination to the day of instant, at the same place, when and where I heard the further allegations and proofs of the parties.)* And upon the said hearing, having duly considered the said allegations and proofs, I was satisfied and did determine and decide that the allegations of the said complainant were substantiated, and that the said C.... D.... is about to remove part of his property out of the jurisdiction of the court in which the said suit was commenced, and the said C.... D.... not having done any of the acts prescribed in the said chapter to prevent the issuing of the warrant of commitment therein provided: you are therefore commanded, in the name of the People of the State of Michigan, to commit the said C.... D.... to the jail of the county of, and you the keeper of said jail are hereby commanded to receive the said C.... D.... into your custody in said jail, to be there detained until he shall be discharged according to law. And for so doing, this shall be your sufficient warrant.

Given under my hand and seal, at, in said county, this day of, 19..

L.... M...., Justice of the Peace.

No. 150—Form of Bond to Assign, etc., to Avoid Commitment.*Ante*, § 595. C. L., § 9562.

Know all men by these presents, that we, C.... D...., of, as principal, and E.... F.... and G.... H...., as sureties, are held and firmly bound unto A.... B...., of, in the sum of dollars, to be paid to the said A.... B...., or to his certain attorney, executors, administrators or assigns, for which payment well and truly to be made, we bind ourselves, our and each of our heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals, and dated the day of, 19..

Whereas, complaint has been made by the said A.... B.... to L.... M...., Esquire, a Justice of the Peace of the township of, in the county of, against C.... D...., under the third and fourth sections of chapter 261 of the Compiled Laws of 1897, entitled "Of the punishment of fraudulent debtors," and such proceedings have been had thereon that the said officer has decided to grant a warrant of commitment against the said C.... D.... pursuant to the ninth section of said chapter. Now, therefore, to prevent the granting of such commitment, the condition of this obligation is such that if the said C.... D.... shall, within thirty days hereafter, apply for an assignment of all of his property, and for a discharge, as provided in chapter 261 of the Compiled Laws of 1897, and diligently prosecute the same until he obtains such discharge, then this obligation to be void and of no effect, otherwise to be and remain in full force and virtue.

C.... D....

E.... F....

G.... H....

No. 151—Form of Approval to Be Endorsed on Bond.

I approve of E.... F.... and G.... H...., as sureties, in the within bond.

L.... M...., *Justice of the Peace.*

Dated the day of, 19..

No. 152—Form of Supersedeas.*Ante*, §§ 595, 596. C. L., §§ 9561, 9562.

STATE OF MICHIGAN, } To the Sheriff of said County and to the
COUNTY OF..... } *ss.* Keeper of the jail of the said County:

Whereas, C.... D.... was, by a warrant issued by me, the subscriber, a Justice of the Peace of the township of, in said county, and dated on the day of, 19.., committed to your custody on a certain complaint made before me by A.... B...., under the third and fourth sections of chapter 261 of the Compiled Laws of 1897, entitled "Of the punishment of fraudulent debtors," which complaint was founded upon a certain demand upon express contract of the said

A.... B.... against the said C.... D.... for the recovery of which a suit had been commenced before me, and which warrant was issued under the ninth section of the said chapter; and whereas, the said C.... D.... has paid the said demand, together with the costs of the said suit, and of the said proceedings against him; (or, *has given security for the payment of the said demand and costs, as provided in the tenth section of said chapter; or, has entered into a bond that he will, within thirty days thereafter, apply for an assignment of all his property and for a discharge, according to the provisions of said chapter*); therefore,

In the name of the People of the State of Michigan, you are hereby commanded that you forbear and cease to arrest, imprison, detain, or otherwise molest the said C.... D.... for the said cause specified in the said warrant of commitment; and if the said C.... D.... do remain in the jail of the said county, for the said cause, and for none other, that you deliver him thence and suffer him to go at large and be at liberty, without further delay.

Given under my hand, this day of, 19..

L.... M...., *Justice of the Peace.*

RELATING TO THE DOCKET.

No. 153—Form of Entries in Justice's Docket.

Ante, § 600. C. L., §§ 957, 958.

A.... B.... }
v.
C.... D.... }

1905. September 4th. Summons issued, returnable September 12th, at 2 o'clock p. m., at my office, in the township of

1905. September 12th. Summons returned personally served September 5th, 1905, upon the defendant C.... D.... by G.... H...., constable; his fees, \$0.50.

Parties appeared, defendant in person, and the plaintiff by N.... O.... who proves his authority as attorney for the plaintiff.

Plaintiff declared orally in assumpsit for goods sold and delivered by him to defendant on the first day of June, 1905, and claims \$100 damages. Defendant pleads orally the general issue, and gives notice of set-off for work and labor, and for money lent to the plaintiff. On motion of plaintiff and on cause shown on oath, case is adjourned to September 18, 1905, at 2 o'clock p. m., at my office, in the township of Venire issued at the request of the defendant, returnable at the same time and place, and delivered to O.... S...., constable, for service.

1905. September 18. Parties appear and proceed to the trial of the cause. Venire returned. All the jurors named in the venire, to-wit: H.... I...., J.... K...., etc., were returned summoned by O....

S...., constable and all appeared and were sworn as jurors to try the cause. Witnesses on the part of the plaintiff, sworn and testified, were S.... N.... and S.... T.... and on the part of the defendant, R.... S.... and R.... T....

After hearing the testimony and arguments of the parties, the jury retired to consider of their verdict, under the charge of O.... S...., constable, duly sworn for that purpose, and after being absent for a time, returned into court and gave their verdict in favor of the plaintiff for twenty dollars damages, which was received on the said eighteenth day of September, 1905.

Judgment rendered upon said verdict forthwith by me against said defendant, and in favor of the plaintiff for twenty dollars damages and five dollars costs of suit.

Damages	\$20 00
Costs	5 00
	<hr/>
	\$25 00

L.... M...., *Justice of the Peace.*

RELATING TO PROCEEDINGS FOR CONTEMPT.

No. 154—Form of Warrant for Contempt.

Ante, §§ 597-599. C. L., §§ 980-983.

STATE OF MICHIGAN, }
COUNTY OF..... } *ss.* To any Constable of said County:
Whereas, on this day, during the trial of a cause, between A.... B...., plaintiff, and C.... D...., defendant, before me, L.... M...., a Justice of the Peace of the township of, in said county, at my office in the said township of, I.... J.... did contemptuously, insolently and in a disorderly manner, so behave and conduct himself towards the undersigned, as to interrupt the said proceedings on said trial, and to impair the respect due to the authority of the undersigned, by declaring in a loud voice, that the said defendant, C.... D...., could not have justice done him in a court held by the undersigned, (*state the contemptuous conduct, whatever it may be, fully*); therefore, in the name of the People of the State of Michigan, you are hereby commanded forthwith to apprehend the said I.... J...., and bring him before me to answer for the said contempt, and to be further dealt with according to law.

Given under my hand the day of, 19..

L.... M...., *Justice of the Peace.*

No. 155—Record of Conviction for a Contempt.*Ante*, §§ 597-599. C. L., §§ 980-983.STATE OF MICHIGAN, } ss.
COUNTY OF..... }

Be it remembered, that on this day of, 19.., during the trial of a cause between A.... B...., plaintiff, and C.... D...., defendant, before me, L.... M...., a Justice of the Peace of the township of, in said county, at my office in the said township of, I.... J.... did contemptuously, insolently, and in a disorderly manner, so behave and conduct himself towards the undersigned as to interrupt the said proceedings on the said trial, and to impair the respect due to the authority of the undersigned by (*state the particular circumstances of the contempt fully and particularly as in the warrant*). And whereas, the said I.... J.... was thereupon required, by the undersigned, to answer for the said contempt, and to show cause why he should not be convicted thereof (or, *having been brought before me and required to answer for the said contempt, and show cause why he should not be convicted thereof*); and not having purged himself therefrom, I do hereby convict the said I.... J.... of the contempt aforesaid, and do adjudge and determine that for the said contempt the said I.... J.... pay a fine of five dollars, and be imprisoned in the county jail of said county five days, and until he pay the fine aforesaid or be duly discharged according to law: *Provided*, that he shall not remain imprisoned for the non-payment of said fine more than ten days.

In witness whereof, I have hereunto set my hand this day of, 19..

L.... M...., *Justice of the Peace.*

No. 156—Form of Commitment for a Contempt.*Ante*, §§ 597-599. C. L., §§ 980-983.STATE OF MICHIGAN } ss. To any Constable of said County, and
COUNTY OF..... } to the Keeper of the jail of said
County:

Whereas, on this day of, 19.., during the trial of a cause between A.... B...., plaintiff, and C.... D...., defendant, before me, L.... M...., a Justice of the Peace of the township of, in said county, at my office in the said township of, I.... J.... did contemptuously, insolently, and in a disorderly manner, so behave and conduct himself towards the undersigned, as to interrupt the said proceedings on the said trial, and to impair the respect due to the authority of the undersigned, by (*state the particular circumstances of the contempt fully and particularly as in the conviction*). And whereas, the said I.... J.... was thereupon required, by the undersigned, to answer for the said contempt, and to show cause why he should not be convicted thereof (or, *having been brought before me and required to answer for the said contempt, and show cause why he*

should not be convicted thereof); and not having purged himself therefrom.

And whereas, upon such conviction, I did adjudge and determine that for the said contempt, the said I.... J.... pay a fine of twenty-five dollars, and be imprisoned in the county jail of said county five days, and until he pay the fine aforesaid, or be duly discharged according to law. *Provided*, That he should not remain imprisoned for the non-payment of such fine more than ten days.

Therefore, in the name of the People of the State of Michigan, you, the said constable, are hereby commanded to take, convey and deliver the said I.... J.... into the custody of the said keeper of the said jail; and you, the said keeper, are hereby required to receive the said I.... J.... into your custody in the said jail, and him there safely keep, during the said term of five days, and until he pay the said fine, or be duly discharged according to law: *Provided*, That he shall not be detained in prison for the non-payment of such fine more than ten days; and hereof fail not.

Given under my hand, this day of, 19..

L.... M...., *Justice of the Peace*.

DECLARATION BY ONE ACTING IN REPRESENTATIVE CHARACTER.

No. 157—Form of Declaration by Executor.

Ante, §§ 584-588. C. L., §§ 704, 780.

IN JUSTICE'S COURT:

A.... B....
as Executor of, etc.,
v.
C.... D....

Before L.... M...., one of the Justices of the
Peace of the County of

County of, ss. A.... B...., as executor of the last will and testament of E.... F...., deceased, plaintiff, complains of C.... D...., defendant, in a plea of trespass on the case upon promises: for that whereas, the defendant heretofore and in the life-time of the said E.... F...., to-wit: on the day of, 19.., at, in said county, was indebted to the said E.... F.... in the sum of for the work and labor of the said E.... F...., by him before that time done for the defendant at his request; and being so indebted, he, the defendant, in consideration thereof, afterwards and in the life-time of the said E.... F...., to-wit: on the day and year last aforesaid, at aforesaid, promised the said E.... F.... to pay him the said sum of money when he, the defendant, should be requested so to do; yet the defendant hath not paid the said sum of money or any part thereof to the said E.... F...., in his life-time, or to the plaintiff as executor of the said E.... F.... since his death, although often

requested so to do; but to pay the same or any part thereof, the defendant has hitherto refused and still refuses, to the damage of the plaintiff as executor as aforesaid of dollars, and therefore he brings suit. And the said plaintiff brings into court here his letters testamentary of the said E.... F...., deceased, whereby it appears that the said plaintiff is executor of the last will and testament of the said E.... F...., deceased.

E.... F...., as executor of

No. 158—Declaration by an Administrator.

Ante, §§ 584-588. C. L., §§ 704, 780.

IN JUSTICE'S COURT:

<p>A.... B.... Administrator of v. C.... D....</p>	}	<p>Before L.... M...., one of the Justices of the Peace in and for the County of</p>
---	---	--

County of ss. A.... B...., as administrator of all and singular the goods, chattels, and credits which were of E.... F...., deceased, at the time of his death, who died intestate, complains of C.... D.... in a plea of, etc., for that whereas, etc. (*The remainder of the declaration will be substantially the same as in No. 157.*)

RELATING TO PLEADINGS AND PROCEEDINGS IN SPECIFIC ACTIONS.

No. 159—Form of Declaration for Assault and Battery.

Ante, §§ 602-607.

IN JUSTICE'S COURT:

<p>A.... B.... v. C.... D....</p>	}	<p>Before L.... M...., one of the Justices of the Peace in and for the County of</p>
---	---	--

County of ss. A.... B...., plaintiff in this suit, complains of C.... D...., the defendant herein, of a plea of trespass: For that the said defendant, on, to-wit: the day of, 19.., at, in said county, with force and arms, assaulted the plaintiff, and then and there with great force and violence, beat, bruised, wounded and ill-treated him, the said plaintiff, insomuch that by means thereof the said plaintiff then became and was sick, sore, lame, and disordered, and so remained and continued for a long space of time, to-wit, from thence hitherto, during all of which time the plaintiff thereby suffered great pain, and was hindered and prevented from performing and transacting his necessary affairs and business, by him during that time to be transacted and performed; and other wrongs to the plaintiff then and there did; against the peace and dignity of the people of this state; and to plaintiff's damage of dollars.

A.... B...., *Plaintiff*.

No. 160—Form of Declaration in Trover.*Ante*, §§ 632-648.

IN JUSTICE'S COURT:

A.... B....	}	Before L.... M...., one of the Justices of the Peace in and for the County of
v. C.... D....		

County of, ss. A.... B...., plaintiff in this cause, complains of C.... D...., defendant herein, in a plea of trespass on the case: For that the said plaintiff on, to-wit: the day of, 19.., at, in said county, was lawfully possessed as of his own property of one bay colt, two years old, of the value of eighty dollars; and being so possessed thereof the said plaintiff, afterwards, to-wit: on the day and at the place last aforesaid, casually lost the same out of his possession; and the said colt afterwards, to-wit, on the ... day of, 19.., at ... in said county, came to the hands and possession of the said defendant by finding. Yet the said defendant, well knowing the premises, has not (although often requested so to do) delivered the said colt to said plaintiff, but afterwards, to-wit, on the day of, 19.., at in said county, wrongfully converted and disposed of the same to his own use, to the damage of plaintiff of eighty dollars.

A.... B...., *Plaintiff*.**No. 161—Form of Declaration in Trespass to Personal Property.***Ante*, §§ 610-613.

IN JUSTICE'S COURT:

A.... B....	}	Before L.... M...., one of the Justices of the Peace in and for the County of
v. C.... D....		

County of, ss. A.... B...., plaintiff in this suit, complains of C.... D...., the defendant herein, in a plea of trespass.

For that the defendant on, to-wit, the day of, 19.., at, in said county, with force and arms drove a certain carriage in which he was then riding along the highway, with great force and violence against a certain other carriage of the plaintiff of great value, to-wit, of the value of dollars, in which the plaintiff was then riding in said highway, and thereby then and there broke and damaged the plaintiff's carriage, by means whereof the plaintiff was compelled to expend and did expend a large sum, to-wit, dollars, in repairing his said carriage. And other wrongs to the plaintiff then and there did, against the peace of the people of this state, whereof the plaintiff says that he is injured and has sustained damage to the amount of dollars.

A.... B...., *Plaintiff*.

No. 162—Declaration Under the Statute for Cutting Timber, etc.

Ante, § 618. C. L., §§ 11204, 11205, 11207.

IN JUSTICE'S COURT:

A.... B.... }
v. } Before L.... M...., one of the Justices of the
C.... D.... } Peace of the County of
County of, *ss.* A.... B...., plaintiff in this cause, complains of
C.... D...., the defendant herein, in a plea of trespass.

For that the defendant on, to-wit, the day of, 19..., at, in said county, with force and arms, and contrary to the provisions of section 11204 of the Compiled Laws of 1897 of this state, did cut down and carry off, without and against the leave of said plaintiff, the owner thereof, divers trees, to-wit: twenty oak trees, of great value, to-wit: of the value of dollars, then and there being and standing upon the land of said plaintiff, known and described as being the west half of the northwest quarter of section number ten, in the township of, in said county, by means whereof the plaintiff has lost and been deprived of said trees, and said lands and premises of the plaintiff have been greatly injured and depreciated in value: whereby the said defendant has, by force of said statute, forfeited three times the amount of damages sustained by said plaintiff by reason of the said premises: To plaintiff's damage one hundred dollars, and therefore he brings suit.

A.... B...., *Plaintiff*.

No. 163—Usual Form of Declaration for Trespass on Lands.

Ante, §§ 614-617, 619.

IN JUSTICE'S COURT:

A.... B.... }
v. } Before L.... M...., one of the Justices of the
C.... D.... } Peace in and for the County of
County of, *ss.* A.... B...., plaintiff in this cause, complains
of C.... D...., the defendant herein, in plea of trespass:

For that the defendant on, to-wit, the day of, 19..., with force and arms, the close of the said plaintiff, situate in the township of, in said county, and known and described as being (*describe the land*) broke and entered and with his feet in walking, and with cattle, to-wit, horses, hogs, and oxen, trod down, trampled upon and destroyed the grass and corn of the said plaintiff there growing, and other injuries to him then and there did against the peace of the People of the State of Michigan, and to the plaintiff's damages of one hundred dollars.

A.... B...., *Plaintiff*.

No. 164—Plea and Notice of Title.*Ante*, §§ 621-624. C. L., §§ 782-788, 790.

IN JUSTICE'S COURT:

A.... B....	}	Before L.... M...., one of the Justices of the Peace in and for the County of
v.		
C.... D....		

And the said defendant comes and demands a trial of the matters set forth in the plaintiff's declaration. C.... D....

To the above named plaintiff: Take notice, that on the trial of the above cause, the defendant will give in evidence that the said close in (or in the first count of) the plaintiff's declaration mentioned, and in which the injuries complained of are supposed to have been committed, with the appurtenances, is, and at the time when the said injuries were supposed to have been committed, was, the close, soil, and freehold of the said defendant; and that the said defendant, in his own right, at the said time when, etc., as the close, soil and freehold of the said defendant, broke and entered, and did all and singular the acts whereof the said plaintiff in his declaration complains as he lawfully might.

Dated...., 19.. C.... D...., *Defendant*.

The above plea and notice were delivered to me at the time of joining issue in the above cause, on the day of, 19..

L.... M...., *Justice of the Peace*.

No. 165—Form of Notice of Title to Land to Follow the Plea of the General Issue.*Ante*, §§ 622-624. C. L., §§ 782-788, 790.

To the above named plaintiff: Take notice, that the defendant on the trial of the above cause will give in evidence that the saw-logs and timber mentioned in the first count in plaintiff's declaration in this cause, and therein alleged to have been taken away by the said defendant, and converted and disposed of to his own use, were cut and carried away by the said defendant from the east half of the south-east quarter of section number 10, in the township of and county of, and that the said east half of the south-east quarter of section number ten, at the time the said saw-logs and timber were so cut and carried away by the said defendant, was, and still is, the close, soil, and freehold of the said defendant.

Dated...., 19.. C.... D...., *Defendant*.

No. 166—Form of Bond With Plea and Notice of Title.*Ante*, § 624. C. L., §§ 784-788.

Know all men by these presents, that we, C.... D...., of, as principal, and E.... F...., of the same place, as surety, are held and firmly bound unto A.... B...., of, in the sum of (*not less than two hundred*) dollars, to be paid to the said A.... B...., or to his

certain attorney, executors, administrators or assigns; for which payment well and truly to be made we bind ourselves, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals, and dated the day of, 19..

Whereas, in a suit before L.... M...., Esquire, one of the Justices of the Peace of the township of in the county of, wherein the above named A.... B.... is plaintiff, and the above bounden C.... D.... is defendant, the above bounden C.... D...., under a plea of the general issue, has given notice showing that the title to lands will come in question in the said suit.

Now, therefore, the condition of this obligation is such, that if the said C.... D.... shall pay any judgment that may be rendered against him in such action in the Circuit Court of said County of, then this obligation to be void, otherwise of force.

C.... D....
E.... F....

I approve of E.... F.... as surety in the foregoing bond.

Dated...., 19..

L.... M...., *Justice of the Peace.*

No. 167—Justice's Certificate to Circuit Court on Plea of Title.

Ante, § 624. C. L., § 785.

IN JUSTICE'S COURT:

A.... B....	} Before L.... M...., a Justice of the Peace in and for the County of
v.	
C.... D....	

County of, ss. I, L.... M...., a Justice of the Peace of said county, do certify to the Circuit Court of said County, that on the day of, 19.., at the request of A.... B...., I issued a summons, directed to any constable of the said county, commanding him to summon C.... D.... to appear before me at my office, in the township of, on the day of then instant, at two o'clock in the afternoon, to answer to the said A.... B.... in a plea of trespass, to his damage one hundred dollars; which summons, on or before the return day thereof, was delivered to me by O.... S...., a constable of the said county, with a return thereon, signed by him, that the same was personally served by him on the said C.... D...., on the day of aforesaid. And I do also certify, that at the time and place above specified for the return of the said summons, the said parties appeared before me, and the said plaintiff declared against the defendant in writing, which declaration is hereto annexed. The defendant at the time he was required to join issue in said cause, pleaded the general issue, and gave notice under said plea, showing that the title to the land described in said declaration would come in question, which said plea and notice are also hereunto annexed, and at the time of tendering to me said plea and notice, the said defendant entered into a bond to said plaintiff, with one sufficient surety, approved by me, in the pen-

alty of two hundred dollars, conditioned that said defendant would pay any judgment that might be rendered against him in said action in the Circuit Court in said County of . . . , which said bond is also hereunto annexed, and the said defendant at the same time paid to me the plaintiff's costs in said suit, amounting to \$. . . , and one dollar for this my certificate, together with the sum of two dollars as an entry fee for the use of the county.

Dated. . . , 19. .

L. . . M. . . , *Justice of the Peace.*

No. 168—Form of Declaration in Replevin.

Ante, §§ 649-651. C. L., §§ 10649-10652, 10670, 10671.

IN JUSTICE'S COURT:

A. . . B. . . }
v. } Before L. . . M. . . , one of the Justices of the
C. . . D. . . } Peace in and for the County of

County of . . . , ss. C. . . D. . . was summoned to answer A. . . B. . . , the plaintiff herein, in a plea wherefore he detains certain goods and chattels of said plaintiff, described in the writ of replevin in this cause, and hereinafter set forth: And thereupon the said plaintiff complains of said C. . . D. . . , the defendant herein; for that the said defendant on, to-wit: the . . . day of . . . 19. . , at the township of . . . in said county, received one gelding of great value, to wit: of the value of . . . dollars, of the goods and chattels of the said plaintiff, to be delivered to the said plaintiff when he should afterwards request the same; but the said defendant, although often requested so to do, has not delivered the goods and chattels above mentioned to the plaintiff, but hath unlawfully detained the same, to the damage of the said plaintiff one hundred dollars; and therefore he brings his suit, etc.

A. . . B. . . , *Plaintiff.*

No. 169—Form of General Issue and Notice of Defense in Replevin.

Ante, § 652. C. L., § 10672.

IN JUSTICE'S COURT:

A. . . B. . . }
v. } Before L. . . M. . . , one of the Justices of the
C. . . D. . . } Peace in and for the County of

And the said defendant comes and demands a trial of the matters set forth in the plaintiff's declaration.

C. . . D. . . , *Defendant.*

To the above named plaintiff—SIR: Take notice, that on the trial of this cause, the defendant will prove that the said goods and chattels in the said declaration mentioned, at the time of the detention of the same by the said defendant, were the property of the said defendant (or, of one E. . . R. . .) and not of the said plaintiff.

Dated. . . 19. .

C. . . D. . . , *Defendant.*

No. 170—Verdict for Plaintiff and Judgment Thereon, in Replevin.

Ante, §§ 654, 655. C. L., §§ 10674-10678.

The jury say that the defendant did unlawfully detain said goods and chattels, and they assess the damages sustained by the plaintiff by the unlawful detention of said goods and chattels at dollars, besides his costs.

Therefore, it is considered that the said plaintiff recover against the said defendant his damages aforesaid, and also dollars for his costs by him about his suit in this behalf expended.

No. 171—Verdict and Judgment for Defendant in Replevin on General Issue, with Notice of Property in Defendant.

Ante, §§ 656-658. C. L., §§ 751, 10679-10684.

The jury say that the defendant did not unlawfully detain said goods and chattels, and that they find the property in said goods and chattels is in the defendant, and they assess the value of said goods and chattels at dollars, and the damages sustained by the defendant by the detention of said goods and chattels at dollars, besides the costs.

Therefore, it is considered that the said defendant have a return of the goods and chattels aforesaid; and that the said defendant do recover against the said plaintiff his damages aforesaid, and also dollars for his costs.

No. 172—Verdict for Defendant—Return Waived—Judgment for Value, etc.

Ante, § 656. C. L., § 10680.

The jury say that the defendant did not unlawfully detain said goods and chattels, and that they find the property in said goods and chattels is in the defendant, and they assess the value of said goods and chattels at dollars, and the damages sustained by the defendant by the detention of said goods and chattels, at dollars, besides his costs.

And the said plaintiff waiving any judgment for a return of said goods and chattels, and praying judgment for the value thereof, etc. Therefore, it is considered that the said defendant recover against the said plaintiff dollars, the value aforesaid found, and also dollars, the damages aforesaid, together with dollars for his costs.

No. 173—Execution for Plaintiff in Replevin.*Ante*, §§ 654, 655. C. L., §§ 10677, 10678.STATE OF MICHIGAN, }
COUNTY OF } *ss.*

To any Constable of said County:

In the name of the People of the State of Michigan, you are commanded to levy of the goods and chattels of C.... D.... (*excepting such goods and chattels as are by law exempted from execution*), dollars and cents, with interest from the day of, 19.., which A.... B...., lately before me, the undersigned, a Justice of the Peace in the township of, in said county, recovered against him for his damages, which he had sustained by the unlawful detention of certain of the goods and chattels of the said A.... B...., and also dollars for his costs, and bring the money before me, at my office in the township of, in sixty days from the date hereof, to render to the said A.... B....

Given under my hand, at the township aforesaid, the day of, 19..

L.... M...., *Justice of the Peace.***No. 174—Execution for Defendant for Return and for Damages and Costs.***Ante*, § 656. C. L., § 10679.STATE OF MICHIGAN, }
COUNTY OF } *ss.*

To any Constable of said County:

Whereas, C.... D.... was lately summoned to appear before the undersigned, one of the Justices of the Peace of said county, to answer unto A.... B.... concerning the unlawful detention of certain goods and chattels; and whereas, on the day of, it was considered and adjudged by me, that he recover against the said A.... B.... his damages, by reason of the detention of said goods and chattels, assessed at dollars, and dollars for his costs, therefore,

In the name of the People of the State of Michigan, you are commanded that you forthwith cause to be returned to the said defendant the said goods and chattels, to-wit: (*specify the property*) and in what manner you shall have executed this writ, do you make return to me, at, in said township, in sixty days from the date hereof.

And you are further commanded to levy the damages aforesaid, with interest, and said costs, of the goods and chattels of the said A.... B.... (*excepting such goods and chattels as are by law exempt from execution*), and bring the money before me, at my office, in said township, in sixty days from the date hereof, to render to the said C.... D....

Given under my hand, this day of, 19..

L.... M...., *Justice of the Peace.*

No. 175—Execution for Defendant for Value, Damages and Costs.

Ante, § 656. C. L., 10679, 10680.

STATE OF MICHIGAN, }
COUNTY OF..... } ss.

To any Constable of said County:

In the name of the People of the State of Michigan, you are commanded to levy of the goods and chattels of C.... D.... (*excepting such goods and chattels as are by law exempted from execution*), dollars and cents, for the value of certain goods and chattels of the said C.... D.... unjustly detained by the said A.... B.... from the said C.... D....; and also dollars for his damages which he had sustained on occasion of the detention of said goods and chattels, and interest from the day of, 19.., and also dollars for his costs in a certain action of replevin lately commenced before me, at the suit of the said A.... B.... against the said C.... D...., and bring the money before me, at my office, in the township of, in sixty days from the date hereof, to render to the said C.... D....

Given under my hand at, this day of, 19..

L.... M...., *Justice of the Peace.*

No. 176—Declaration—Covenant on a Sealed Note.

Ante, § 660. C. L., § 10417.

IN JUSTICE'S COURT:

A.... B.... }
v. } Before L.... M...., one of the Justices of the
C.... D.... } Peace in and for the County of

County of, ss. A.... B...., plaintiff, complains of C.... D...., defendant herein, in an action of covenant.

For that the said C.... D.... on, to-wit, the day of, 19.., at, by a certain instrument in writing sealed with his seal (and to the court now here shown, the date whereof is the day and year aforesaid) for value received, promised to pay to the said A.... B.... one hundred dollars, ten days after the date thereof. Yet the said C.... D...., although often requested so to do, has not paid the said sum of money or any part thereof, but the same to pay has always refused and still doth refuse. And so the said plaintiff says that the said defendant has not kept his covenant in the form aforesaid made, to the damage of the plaintiff of dollars and therefore he brings suit.

A.... B...., *Plaintiff.*

No. 177—Declaration in Debt—on Bond.*Ante*, §§ 666, 667. C. L. § 9255.

IN JUSTICE'S COURT:

A.... B....	}	Before L.... M...., one of the Justices of the Peace of the County of
v.		
C.... D....		

County of, ss. A.... B...., plaintiff, complains of C.... D...., the defendant herein, in an action of debt, for that whereas, the said defendant heretofore, to-wit, on the day of, 19.., at the township of in said county, by his certain bond, sealed with his seal, and now shown to the court here, the date whereof is the day and year aforesaid, acknowledged himself to be held and firmly bound to the said plaintiff, in the sum of dollars, to be paid to the plaintiff when he, the said defendant, should be thereunto afterwards requested. Yet the said defendant, although often requested so to do, hath not as yet paid the sum of dollars or any part thereof, to the said plaintiff; but so to do hath hitherto wholly refused and still doth refuse, to the damage of the plaintiff of dollars, and therefore he brings suit, etc.

A.... B...., *Plaintiff*.**No. 178—Declaration in Debt—Assigning Breach of Condition.***Ante*, §§ 666. C. L., § 10379.

IN JUSTICE'S COURT:

A.... B....	}	Before L.... M...., one of the Justices of the Peace in and for the County of
v.		
C.... D....		

County of, ss. A.... B...., plaintiff, complains of C.... D...., the defendant herein, in an action of debt, for that whereas, the said defendant heretofore, to-wit, on the day of, 19.., at the township of, in said county, by his certain bond, sealed with his seal, and now shown to the court here, the date whereof is the day and year aforesaid, acknowledged himself to be held and firmly bound to the said plaintiff, in the sum of dollars, to be paid to the plaintiff, when he, the said defendant, should be thereunto afterwards requested. Which said bond was and is subject to a condition thereunder written, that if (*set out the condition verbatim*), as by the said bond and the condition thereof will more fully appear. Yet the said plaintiff in fact saith the (*stating the breach*). By reason of which said breach the said bond became forfeited, and thereby an action hath accrued to the said plaintiff to demand and have of and from the said defendant, the said sum of (*the penalty*) above demanded. Yet the said defendant, although often requested so to do, has not yet paid to the said plaintiff, the said sum of dollars, or any part thereof; but so to do has hitherto wholly refused and still does refuse, to the damage of the plaintiff of dollars, and therefore he brings suit.

A.... B...., *Plaintiff*.

No. 179—Declaration in Debt, for a Penalty.*Ante*, §§ 671-675. C. L., §§ 9797, 9798, 9801.

IN JUSTICE'S COURT:

The People of the State of Michigan v. C.... D....	}	Before L.... M...., one of the Justices of the Peace in and for the County of
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County of ss. The People of the State of Michigan, plaintiffs in this suit, complain of C.... D...., defendant herein, of a plea that he render to the said plaintiffs the sum of dollars, which he owes to and unjustly detains from them. For that whereas, the said defendant heretofore, to-wit: on the day of, in the year, at the township of, in the county aforesaid, was indebted to the said plaintiffs in the sum of dollars, according to the provisions of section of chapter of the Compiled Laws of 1897, of this state (or, *name the section of the act, giving the title of the act in full, and the date of its approval*), whereby an action hath accrued to the said plaintiffs to demand and have of and from the said defendant the said sum of money, above demanded, according to the provisions of the said statute. Nevertheless the said defendant, although often requested so to do, has not yet paid the said sum of money, above demanded, or any part thereof, to the said plaintiffs, but to pay the same, or any part thereof to the said plaintiffs, he, the said defendant, has hitherto wholly refused, and still doth refuse: to the damage of said plaintiffs of dollars, and therefore they bring their suit, etc.

The People of the State of Michigan.

By A.... B....

No. 180—Declaration in Assumpsit for a Penalty.*Ante*, §§ 671-676. C. L., §§ 9797, 9802.

IN JUSTICE'S COURT:

The People of the State of Michigan v. J.... D....	}	Before L.... M...., one of the Justices of the Peace in and for the County of
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County of ss. The People of the state of Michigan, plaintiffs in this suit, complain of C.... D...., defendant in this suit, in a plea of trespass on the case, upon promises. For that, whereas, the said defendant heretofore, to-wit, on the day of, 19.., at the township of in the county aforesaid, was indebted to the said plaintiffs in the sum of dollars, according to the provisions of section of chapter of the Compiled Laws of 1897 of this state, and being so indebted, he, the said defendant, in consideration thereof, afterwards, to-wit, on the day and year, and at the place aforesaid, undertook and then and there faithfully promised the said plaintiffs to pay them the said sum of dollars, when he, the said defendant,

should be thereto afterwards requested. Yet the said defendant, not regarding his said promise and undertaking, hath not yet paid the said sum of money, or any part thereof, to the said plaintiffs, although often requested so to do, to the plaintiff's damage dollars, and therefore they bring suit, etc.

The People of the State of Michigan.

By A.... B....

No. 181—Declaration in Trover for Goods Forfeited.

Ante, § 677. C. L., § 9803.

IN JUSTICE'S COURT:

The People of the State of Michigan <i>v.</i> C.... D....	}	Before L.... M...., one of the Justices of the Peace in and for the County of
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County of ss. The People of the State of Michigan, plaintiffs in this suit, complain of C.... D.... the defendant in this suit, in a plea of trespass on the case. For that, whereas, heretofore, to wit, on, etc., at, etc., certain goods and chattels, to-wit (*specify the goods*), of great value, to wit, of the value of dollars, were forfeited by the said defendant according to the provisions of section of chapter (*state the chapter or act*), of the Compiled Laws of 1897, and that the said defendant afterwards, to-wit, on the day and year aforesaid, at the place aforesaid, converted and disposed of the said goods and chattels to his own use, to the damage of the said plaintiffs of one hundred dollars, and therefore they bring their suit, etc.

The People of the State of Michigan.

By A.... B....

No. 182—Declaration in Assumpsit—General Form for Breach of Contract to Deliver Property Sold.

Ante, §§ 680-682. C. L., § 10417, 10054.

IN JUSTICE'S COURT:

A.... B.... <i>v.</i> C.... D....	}	Before L.... M...., one of the Justices of the Peace of the County of
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County of ss. A.... B...., plaintiff, complains of C.... D.... the defendant, in a plea of trespass on the case upon promises. For that, whereas, heretofore, to wit, on the day of 19.., at the said plaintiff, at the defendant's request, bargained with him to buy of him twenty bushels of wheat, and the said defendant then and there sold the same to said plaintiff, at the price of two dollars per bushel, to be delivered by the defendant to the plaintiff within one week then next following, at to be paid for on the delivery thereof; and in consideration that the plaintiff had then and there promised, at the request of defendant, to accept the same wheat of him, and to

pay him for the same the price aforesaid, he, the defendant, promised to deliver the same to the plaintiff as aforesaid. And although the time for said delivery has long since passed, and said plaintiff was always, within and at the expiration of the said week, ready to receive and pay for said wheat, and offered the defendant to pay for the same as aforesaid, to wit: at etc., yet the the said defendant neglected to deliver the said wheat as aforesaid, whereby the said plaintiff has lost the said wheat, and has lost and been deprived of divers great gains and profits, which might and otherwise would have arisen and accrued to him from the delivery of said wheat to the said plaintiff as aforesaid; to plaintiff's damage dollars, and therefore he brings suit.

A.... B...., *Plaintiff*.

No. 183—Declaration on Note—Payee Against Maker.

Ante, §§ 697, 698.

IN JUSTICE'S COURT:

A.... B.... }
v. } Before L.... M...., one of the Justices of the
C.... D.... } Peace in and for the County of

County of ss. A.... B...., plaintiff, complains of C.... D...., the defendant herein, in a plea of trespass on the case on promises. For that whereas, the said defendant on, to-wit, the day of, 19.., at, made his promissory note in writing, and delivered the same to* the plaintiff, and thereby promised to pay the plaintiff dollars months after the date thereof, with interest, which period has now elapsed.† Yet the said defendant, although often requested so to do, has not yet paid said sum, or any part thereof, to plaintiff, but has hitherto neglected and still does neglect and refuse to pay the same; to plaintiff's damage dollars, and therefore he brings suit.

A.... B...., *Plaintiff*.

No. 184—Bond of Indemnity Against a Lost Note.

Ante, §§ 699, 700. C. L., §§ 10183, 10184.

Know all men by these presents, that we, A.... B...., as principal, and E.... F.... and G.... H...., as sureties, are held and firmly bound unto C.... D.... in the sum of (*double the amount of the note at least*) dollars, to be paid to the said C.... D.... or to his certain attorney, heirs, executors, or administrators, to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals, dated the day of 19..

The condition of this obligation is such, that if the said A.... B.... shall indemnify and save harmless the said C.... D.... his heirs and personal representatives, against all claims, by any other person, on account of a certain promissory negotiable note, executed by said C.... D.... to said A.... B.... for (*state the sum as near as may be*),

dated on or about the (*give the date as near as possible*), and payable (*state as near as may be, how, when and to whom payable*), which said promissory note has been lost, and against all costs and expenses by reason of any such claim, then this obligation to be void, otherwise of force.

A.... B.... [L. S.]

E.... F.... [L. S.]

G.... H.... [L. S.]

I approve of E.... F.... and G.... H.... as sureties in the foregoing bond.

Dated 19..

L.... M.... *Justice of the Peace.*

No. 185—Declaration—Indorsee Against Maker.

Ante § 703.

(*As in No. 183 to the*, and then*) G.... H...., and thereby promised to pay the said G.... H...., or order, dollars months after the date thereof, which period has now elapsed, and the said G.... H.... then and there indorsed the same to the plaintiff, whereof the defendant then and there had notice, and then and there, in consideration of the premises, promised to pay the amount of the said note to the plaintiff according to the tenor and effect thereof; (*closing as in No. 183 after the†*).

No. 186—Declaration—Indorsee Against Indorser.

Ante, § 704.

(*As in No. 183 to the*, and then*) G.... H...., and thereby promised to pay to the said G.... H...., or order, dollars, with interest, months after the date thereof, which period has now elapsed, and the said G.... H.... then and there indorsed the same to the defendant, who then and there indorsed the same to the plaintiff; and the said C.... D.... did not pay the amount thereof, although the same was presented to him on the day when it became due; of all of which the defendant then and there had notice. By means whereof the defendant then became liable to pay the amount of said note to said plaintiff, and being so liable, the defendant, in consideration thereof, then and there promised to pay the same to the plaintiff on request. Yet, etc., (*closing as in No. 183 after the†*).

No. 187—Declaration Embracing all the Common Counts.

Ante, §§ 714 *et seq.*

IN JUSTICE'S COURT:

A.... B....	}	Before L.... M...., one of the Justices of the Peace of the County of
C.... D....		

COUNTY OF...., ss. A.... B.... plaintiff, complains of C.... D.... the defendant herein, in a plea of trespass on the case upon promises.

For that whereas, the said defendant, on, to-wit, the.... day of....,

19.... at...., in said county, was indebted to the plaintiff in the sum of....dollars for goods, wares and merchandise before then bargained and sold by the plaintiff to the defendant at his request.

And in the sum of....dollars for goods, wares, and merchandise before then sold and delivered by the plaintiff to the defendant, and at his request.

And in the sum of....dollars for work and labor before then done, and materials for the same, provided by the plaintiff for the defendant at his request.

And in the sum of....dollars for money before then lent by the plaintiff to the defendant at his request.

And in the sum of....dollars for money before then paid by the plaintiff to and for the defendant at his request.

And in the sum of....dollars for money before then had and received by the defendant to and for the use of the plaintiff.

And in the sum of....dollars for money then and there found to be due from the defendant to the plaintiff on account stated between them.

And in the sum of....dollars for the use and occupation of a certain piece of land, by and at the request of the said defendant, and by the permission of the said plaintiff.

And thereupon the said defendant afterwards, and on the day and year aforesaid, in consideration of the premises respectively, then and there promised the plaintiff to pay the said several sums of money respectively, on request: Yet the said defendant has disregarded his said promises, and has not (although often requested so to do) paid any of the said sums of money, or any part thereof, to the plaintiff's damage of three hundred dollars, and therefore he brings suit, etc.

A.... B...., *Plaintiff*.

No. 188—Form of Declaration—Action on the Case.

Ante, § 755 et seq.

IN JUSTICE'S COURT:

A.... B....	}	Before L.... M...., one of the Justices of the Peace in and for the County of
v.		
C.... D....		

COUNTY OF.... ss. A.... B...., plaintiff, complains of C.... D.... the defendant herein, in a plea of trespass on the case.

For that whereas, the plaintiff, on, to-wit, the.... day of...., 19... delivered to the defendant a certain horse of the plaintiff to ride from.... to...., a distance of.... miles; and the said defendant on the same day, at the county of.... aforesaid, wrongfully rode said horse immoderately, and with such great and unreasonable speed, that the said horse, thereafter, on the same day, by reason of such immoderate and unreasonable riding, died; to the damage of the plaintiff one hundred dollars, and therefore he brings suit.

A.... B.... *Plaintiff*.

APPENDIX B.

CONTAINING THE JUSTICE COURT ACTS OF THE SEVERAL CITIES IN MICHIGAN HAVING SPECIAL PROVISIONS DIFFERING MATERIALLY FROM THE GENERAL PROVISIONS RELATING TO SUCH COURTS. THEY GENERALLY PROVIDE FOR MAKING THE JUSTICES SALARIED OFFICERS, THEIR JURISDICTION IS USUALLY SOMEWHAT ENLARGED, PROVISION IS MADE FOR A CLERK, AND IN SOME CASES ONLY ATTORNEYS AT LAW ARE ELIGIBLE TO THE OFFICE OF JUSTICE.

THE ACT PROVIDING FOR JUSTICES' COURTS IN THE CITY OF DETROIT.

Act No. 475, Local Acts, 1903.

An act to establish and provide justices' courts in the City of Detroit, and to repeal act number four hundred and twenty-six of the local acts of nineteen hundred and one, approved May thirteenth, nineteen hundred and one.

The people of the State of Michigan enact:

Section 1. That there shall be four justices of the peace in and for the City of Detroit, who shall be elected at the regular charter election of said city, or at any general election held therein, in the same manner, possess the same jurisdiction, powers, duties and liabilities as justices of the peace for townships, excepting as otherwise provided by law. Each of said justices of the peace shall hold his office for the term of four years, commencing on and after the fourth day of July succeeding his election. The four justices of the peace heretofore elected, and now holding office in said City of Detroit, shall be and continue to act as justices of the peace under the provisions of this act until the expira-

Four justices
to be elected.

Jurisdiction.

Term of office.

Files and records shall be safely kept. tion of their respective terms of office for which they have been elected, and until their successors are elected and have qualified. The files, records and dockets belonging or appertaining to the offices of justice of the peace now in office, and all files, records and dockets hereafter appertaining to such offices, shall be filed and safely kept in the office of the clerk of said justices' courts hereinafter mentioned.

Two justices shall be elected every two years. Sec. 2. At the general election held in November, in the year nineteen hundred and four, and every two years hereafter, there shall be elected two justices of the peace, whose terms of office shall commence on the fourth day of July next succeeding their election, and who shall hold their office for a term of four years.

Auditors shall provide suitable rooms. Sec. 3. The auditors of the County of Wayne shall provide suitable rooms for the accommodation of said justices of the peace, and also an office for the clerks hereinafter mentioned, also such jury rooms as may be necessary, which offices and rooms shall be as nearly contiguous to each other as in the discretion of said auditors, and the convenient dispatch of the business of said courts requires. Said auditors shall also provide necessary dockets and books, including the Michigan Reports, blanks, stationery, furniture and fuel, for the use of said justices and clerks.

Dockets, books, etc. Sec. 4. Each of the said justices of the peace elected in the City of Detroit, and duly qualified according to law, shall have original jurisdiction of all civil actions wherein the debt or damages do not exceed the sum of one hundred dollars; and concurrent jurisdiction in all civil actions ex contractu and ex delicto, wherein the debt or damages or the property involved does not exceed the sum of five hundred dollars, except as provided in section seven hundred and four of the Compiled Laws of Michigan, A. D. eighteen hundred ninety-seven.

Limit of jurisdiction. Sec. 5. The said justices of the peace of the City of Detroit, as against all other justices of the peace, shall have exclusive jurisdiction of all actions and proceedings within their jurisdiction, where both of the parties thereto shall, at the time of the commencement of such

Exclusive jurisdiction.

action or proceeding, be residents of said city. They shall also have a like exclusive jurisdiction where the original cause of action existed in favor of a resident of said city, but has been by him assigned: Provided, however, Such assignee resides in Wayne County. They shall also have jurisdiction in all cases where either or any of the parties reside in said city.

Sec. 6. Each of said justices of the peace shall Salary. receive from the treasurer of the County of Wayne an annual salary of two thousand five hundred dollars, payable in semi-monthly installments on the certificate of the board of auditors of the County of Wayne.

Sec. 7. This act shall in no way affect the fees to Fees for marriage ceremonies, etc. which said justices of the peace shall be entitled on the performance of marriage ceremonies, taking acknowledgments, and in administering oaths in matters not connected in any litigation in the said justices' courts.

Sec. 8. Each of the said justices shall have his court Hours court room shall be open. room open, and he shall be in attendance at the duties of his office therein, from nine o'clock in the forenoon, city time, until twelve o'clock noon, and from two o'clock until four o'clock in the afternoon: Proviso. Provided, That where either one of said justices is actually engaged in the trial of a suit, he shall so continue at least until five o'clock in the afternoon, when it shall be necessary so to do in order to finish the trial of said suit.

Sec. 9. There shall be one clerk for said justices, Clerk. who shall be known as the clerk of the justices' courts for Detroit. The office of said clerk shall be open continuously from eight-thirty a. m. until four o'clock p. m., city time, each day, excepting legal holidays. He shall How and by whom appointed. be appointed by the board of auditors for the County of Wayne forthwith upon the making and filing with them of the written recommendation of the majority of said justices holding office, on or before December thirty-first of each year. If for any reason such recommendation be not made and filed by the said date then the said auditors shall make such appointment on their own motion. The term of office of said clerk shall be one Term of office. year, to commence on the first day of January. He

Salary.	shall receive from the treasurer of Wayne County an annual salary of fifteen hundred dollars, payable in semi-monthly installments on the certificate of said auditors of Wayne County.
Bond of clerk.	Sec. 10. Before entering upon the duties of his office, the said clerk shall file in the office of the clerk of Wayne County, a surety company bond in the penal sum of five thousand dollars, to be approved by the said auditors of Wayne County, conditioned that the said clerk shall faithfully and properly perform the duties of his said office, and that he shall well and truly pay to the treasurer of Wayne County all moneys received by him or by his deputies under him, as clerk of said justices' courts, for the use of said county, and that he shall well and truly pay to the persons entitled thereto all moneys paid under judgments rendered by said justices, and all moneys paid under garnishments in said justices' courts, and all moneys otherwise received by virtue of his office, and otherwise conditioned as the said auditors shall prescribe.
Condition of bond.	
Duties of clerk.	Sec. 11. It shall be the duty of said clerk to keep a true and complete record of all proceedings before each of said justices, and to enter all judgments in the docket of the justice rendering the same in the time and manner prescribed by law, which judgment shall be signed by the justice by whom it was rendered, and such records shall be hereafter indexed in the proper book to be kept for that purpose, which said index shall be kept both as to plaintiffs and defendants. He shall keep true and correct accounts of all moneys received by him or his deputies, as court fees for the use of Wayne County, or for any other purpose, and shall properly account for and pay over the same to the party entitled thereto. He shall also file and safely keep all papers and books belonging and appertaining to the said justices' courts, none of which shall be removed from said office without the authority in writing of the justice before whom the cause is pending, or the clerk of said court, nor unless proper receipts be given therefor.
Moneys received by clerk.	
Clerk to keep books and papers.	
Shall enter list of jurors.	The said clerk shall also enter in a book provided for

the purpose a list of all jurors that sit in trial of cases in said justices' courts, together with the date or dates and the time during which said jurors served, with a reference to the page of the docket containing the record of the cause in which said juror served. Said clerk shall receive all costs, fines and dues of every description, which are provided by law in all proceedings in said justices' courts, and shall pay the same weekly to the treasurer of Wayne County, and shall take his receipt therefor. All moneys paid under judgments rendered by said justices, and all moneys paid under garnishments in said justices' courts shall be paid to said clerk, or his deputy or deputies by him authorized to receive the same. Said clerk shall have power generally to administer oaths and to take affidavits.

Shall receive all fines, costs etc.

Sec. 12. Said clerk shall keep an assignment book or list upon which the names of the justices shall appear, and as cases are commenced, he shall assign them and make all writs and process therein returnable to the said justices in rotation, and as each case is assigned he shall number the same, and the said number shall be designated and known as the file number. All original writs or process issues by said justices shall be returnable at nine o'clock in the morning, city time. If upon the return day or the adjourned day of any case, the justice issuing the writ or process therein shall be absent at the time to which the case has been adjourned or the writ of process therein made returnable, or be engaged in the trial of another case, then any of the other justices present shall have the same jurisdiction to proceed therein as though the case had been originally commenced before him, and the record thereof shall be entered in the docket of the justice issuing the original writ or process: Provided, That it shall not be necessary for the said justices to wait any length of time after the time fixed by any writ or adjournment to dispose of the cases pending before them.

Shall keep assignment book.

Writes and process returnable in rotation.

Writes: when returnable.

Practice when justice is absent.

Proviso.

Sec. 13. Said clerk shall have and is hereby given the power and authority to appoint such number of deputies as shall be approved by the board of county

Deputy clerks.

Term of office.	auditors, whose terms of office shall commence on the first day of January of each year, to properly execute the work of said office, and said appointment shall not be for a longer time than his term of office, and shall be subject to revocation at any time, for cause, by said clerk. Appointments and revocation of appointments of such deputies shall be made by the certificate of said clerk filed with the auditors of Wayne County, and such certificates shall be notices of the appointment or revocation, as the case may be, and the appointment or revocation shall be operative from the time of the filing of such certificate, and the said board of auditors shall cause payment of salary to such deputies accordingly.
Appointment and revocation, how made.	
Duties of deputy clerks.	The said deputy clerks shall be under the control and direction of the said clerk, and shall perform such duties as he shall direct, and shall have authority to administer oaths, take affidavits, and perform generally the duties of said clerk. Each of said deputies shall, if required by said clerk, furnish a good and sufficient bond for the faithful discharge of his duties, with surety or sureties in such amount and with such conditions as said clerk may prescribe. One of said deputy clerks shall be designated by said clerk as chief deputy, and shall receive a salary of one thousand and two hundred dollars per annum. The other deputies shall each receive a salary of one thousand dollars per annum. Said salaries shall be paid in semi-monthly installments by the treasurer of Wayne County, upon the certificate of the auditors of said county.
Bond.	
Chief deputy.	
Salary of chief deputy.	
Salaries of other deputies.	
Costs and fees in commencing suit.	Sec. 14. Before any civil action or proceeding except proceedings in garnishment, shall be commenced in said justices' courts, there shall be paid to the clerk of said court by the party bringing the action, the sum of fifty cents and the fees of the officer for service of the writ or process by which such action is commenced, and before the trial of such action or proceeding shall be commenced, the further sum of fifty cents; but in cases of non-suit, no judgment fee shall be required, and proceedings in garnishment shall be treated as part of the principal case, except garnishment proceedings com-
Trial fee.	
Costs in garnishment upon judgment.	

menced upon judgment rendered prior thereto, in which cases an entry fee and trial fee shall be paid as in other actions herein provided, and no additional fee shall be charged therefor up to and including the entry of judgments therein. The fees paid to the clerk for service of such writ or process by which the action is commenced, shall be retained by said clerk until the writ or process has been returned duly served, or said cause is brought to issue, when the said fee or fees shall be paid by said clerk to the officer making the service, taking his receipt therefor and placing the same in the files of said cause: Provided, That if it appear by the files in said case that no service has been had for three months after the date of the writ, then the officer's fees which have been paid into the court shall be returned by the clerk to the plaintiff in the suit.

Service fees to be retained by clerk until writ of process served.

Proviso.

Sec. 15. If any person shall satisfy one of said justices by affidavit that he has a good, meritorious cause of action for personal service against another within the jurisdiction of said courts, and that he has made personal demand for payment thereof of the debtor, and that such payment has been refused, and that he is financially unable to pay the court costs, and shall also state the name and residence of the debtor, and the amount due over and above all legal set-offs, the justice to whom such affidavit is presented may in his discretion endorse on such affidavit directions to the said clerk to cause to be issued the proper writ in the case returnable before one of the other justices, without charge for court fees for the commencement or trial of said cause. If the plaintiff in such case recover judgment, he shall be entitled to recover his costs therein. The usual court fees, however, shall also be taxed against the defendant, but in favor of Wayne County. If the defendant obtain judgment in such cause, the said court fees shall in like manner and for the like purpose be taxed against the plaintiff. Nothing herein contained shall be so construed as to prevent the circuit court for the County of Wayne, on an appeal of any such cause, to

Writ may issue without payment of court fees in certain cases.

Taxation of costs in certain cases.

require the appellant therein to give security in said court for costs as in other cases.

Manner of
service of
summons.

Sec. 16. The service of a summons under this act may be made in the manner prescribed in section fourteen of act number one hundred and ninety-one of the public acts of eighteen hundred and seventy-nine, being section seven hundred and sixteen of the Compiled Laws of eighteen hundred and ninety-seven.

Fees for serv-
ice of costs
and process.

Sec. 17. Constables and other officers serving writs or process issued out of said justices' court, shall be entitled to receive for the service of such writs or process within the corporate limits of the City of Detroit, the following fees: For the service of a summons by

Summons.

Writ of at-
tachment or
replevin.

which suit is commenced, seventy-five cents for each defendant served; for the service of a writ of attachment or writ of replevin, two dollars; for the service of such process, outside said city limits, the officer shall be entitled to receive in addition to the above compensation, mileage fees according to the statute regulating such fees, to be computed from the place of service to the corporate limits of the City of Detroit. The above fees shall be in full for all services rendered by the officer or his assistants, and it shall be unlawful in any case for the officer or his assistants to demand or receive any compensation whatsoever in addition to the fees above set forth. For the service of other process or the performance of other duties, the fees therefor shall be regulated according to the general statutes providing therefor. Except as herein otherwise provided, this act shall in no way affect the fees to which constables are entitled, or the present method of paying them.

Mileage fees
outside city
limits.

No additional
compensation.

General stat-
utes govern
in certain
cases.

Jury commis-
sioners to
select jurors.

Sec. 18. The board of jury commissioners, as created by act number two hundred and four of the public acts of eighteen hundred ninety-three, shall annually or whenever required by the clerk of said court, in accordance with the method required by that act, select persons to serve as jurors for the trial of cases, matters and proceedings in said justices' courts, and shall file a list of the persons so selected with the clerk of said justices' courts. The number to be selected on the third

Number to
be selected.

Monday of May of each year as provided by said act, shall be three hundred. After the filing of such list, the proceedings for selection, summoning and compelling the attendance of jurors and talesmen shall be, as far as practicable, the same as provided by law for like purposes, as in the circuit court for Wayne County, except that the attendance of the sheriff shall not be required. Jurors shall be drawn and summoned for a term of two months, which shall be the calendar month next succeeding such drawing. Not less than eighteen or more than thirty-six jurors shall be drawn and summoned for a term, unless for a special reason the clerk of said court shall in writing direct that a greater number shall be drawn and summoned. The persons so drawn shall be notified in writing of their liability to jury duty in the justices' courts for the calendar months to be specified, which notice shall be served personally, if practicable, upon each person so drawn, by the sheriff in the manner now provided by law, and a return in writing, of the time and manner of such service shall be made and filed with the clerk of said justices' courts. Said jurors shall report for service to the clerk of said court. The actual attendance of the persons duly notified for jury service may be required and enforced according to law. The persons so serving as jurors shall be entitled to receive from the County of Wayne the sum of two dollars and fifty cents each for each day's actual attendance, which sum shall be paid by the county auditors on certificate of the clerk of said justices' courts. Whenever by law, a judge of the circuit court for Wayne County is required or directed to be present at or to participate in any part of the proceedings to select jurors for that court, the clerk of said justices' court shall perform like duty in like proceedings to select jurors for said justices' courts.

Proceedings to compel attendance of jurors.

Term of jurors.

Number of jurors for each term.

How persons drawn shall be notified.

Jury fees.

Proceedings when court judge is required to be present.

Sec. 19. Juries in said justices' courts shall be composed of six persons, who shall be residents of said City of Detroit, and shall severally possess the lawful qualifications of jurors in the circuit court for the County of Wayne, and any challenge, which would be valid in said

Qualifications of jurors.

Challenge.

Limitation of peremptory challenges. circuit court, shall be valid and sufficient if made in the said justices' courts: Provided, however, That but two peremptory challenges shall be allowed to the plaintiff, and the like number to the defendant in all trials in said justices' courts. If any party demands a jury in any action in said justices' courts, he shall advance to the clerk the sum of five dollars as jury fee, and the same shall belong to the County of Wayne, and shall be turned over by said clerk in the same manner as is required in the case of other moneys received by him: Provided, That in all cases where the amount involved does not exceed fifty dollars, the jury fee shall be only three dollars.

Party demanding jury must advance fee.
Amount of jury fees.

Jury to decide questions of fact. Sec. 20. The jury empaneled in any case as herein provided, shall determine any and all questions of fact in such cases, but it shall be the duty of the justice hearing such case to decide all questions of law arising therein, and it shall also be the duty of the said justice to instruct the jury as to the questions of law applicable to the case.

Justice to decide questions of law.

Justice may set aside verdict and grant new trial. Sec. 21. The justice before whom any cause has been tried and verdict or judgment rendered, shall have the same power and authority to set aside the verdict or judgment, and grant a new trial therein upon legal cause shown therefor, as the circuit courts of the State possess: Provided, That a motion in writing be made and filed with the clerk of said justices' courts within five days after the rendition of the verdict or judgment in said case. Said motion shall briefly and plainly set forth the reasons and grounds upon which it is made.

Motion to set aside must be in writing.

What motion shall show. Affidavits upon which the motion is founded shall also be filed at the time of filing of said motion, and notice of the hearing of such motion, with copy of the motion and affidavits filed as aforesaid, shall be served upon the adverse party or his attorney at least two days before the hearing thereof. Such motion shall be determined within two days after the same shall have been heard and submitted, and such motion shall be submitted within one week after the same shall have been filed. The time for taking an appeal from judgment, in case such motion be not granted, shall begin to run from

Affidavits to accompany motion.

Service of copy of motion.
When motion shall be determined.

Time for taking appeal.

the time when such motion shall be overruled. In no case shall the pendency of such motion stay the issuing and levy of an execution in such case; but in case of a levy under execution pending such motion, no sale of the property so levied on shall be advertised or made until the final determination of such motion.

Pendency of motion shall not stay execution.

Sec. 22. No appeal shall be taken from any judgment of any justice of the peace in said City of Detroit, except in the following cases:

Cases in which appeal may be taken.

First, When said justice shall disallow any claim in favor of any plaintiff or defendant in any cause in said justices' courts, in whole or in part, to the amount of fifty dollars;

When justice shall disallow claim to amount of fifty dollars.

Second, When said justice shall render a judgment to the amount of fifty dollars exclusive of costs; in either of which cases, the party aggrieved may appeal;

When judgment shall amount to fifty dollars.

Third, Appeals may be authorized by the circuit court of the County of Wayne, when the party making the appeal has been prevented from making a defense upon the merits of the case in which such appeal is taken by circumstances not under his control; and such appeal may also be authorized when justice requires that such appeal should be authorized, and in all cases where the parties against whom such appeal is sought has appeared in said justices' courts by an attorney or agent, it will be sufficient to serve such attorney or agent with the notices of all subsequent proceedings in such case and all orders made therein by said circuit court may be served on said attorney or agent, and such service shall have the same effect as though made on the party against whom such appeal is taken;

When appeal may be authorized by circuit court.

Fourth, Under absolutely no circumstances shall any appeal be allowed or authorized after five days from the rendition of judgment, except as herein otherwise provided.

No appeal allowed after five days.

Sec. 23. Before any affidavit for appeal, or writ of certiorari, shall be served on any one of said justices, in addition to the fees allowed by law for making returns to an appeal or certiorari, the entry fee for filing the same in the circuit court shall be paid to the said clerk by the

Entry fee upon appeal or writ of certiorari.

appellant, or plaintiff in error, and the said clerk shall as early as possible file a return to such appeal or writ of certiorari, in the office of the clerk of the circuit court for Wayne County, and shall pay over to him the fees so advanced as aforesaid, and if said return is not filed with the clerk of the circuit court within ten days after the appeal or costs on certiorari shall have been paid, a writ of mandamus may issue to the clerk of the justices' courts, compelling him to make such return forthwith, and he shall be personally liable for the costs if any shall be awarded in such proceeding.

Clerk shall file returns.
Clerk may be compelled to make returns.
Fees shall be for use of county.
Taxation of costs.
Costs in in criminal cases.

Sec. 24. The money paid to the said clerk of the justices' courts upon commencement of suit, for trial fees, jury fees, and fees for making returns to appeal or writ of certiorari and entry fee for filing same, shall be for the use of the county, and shall be held to be in full for all fees in civil actions from the commencement thereof to and including the issuing of execution therein. The sum or sums so paid, including the jury fees, shall be taxed as costs of suit in favor of the party paying the same, if he be the prevailing party in the suit, in addition to any other costs to which he may be entitled by law. In criminal cases the same costs shall be paid, and in the same manner as in proceedings before justices of the peace in townships, except that the same shall be paid to the said clerk as in civil cases is provided.

Party may deposit legal tender funds in lieu of bond.
Money or effects in garnishment may be released by filing bond.
Amount of such bond.

Sec. 25. In all cases when a party is required or allowed by law to give a bond, as a condition of commencing or prosecuting any suit, action or proceeding in said justices' courts, such party may execute and file such bond, or he may in the discretion of the court deposit with the clerk thereof the amount of the bond required in legal tender funds of the United States. And in garnishment proceedings, the principal defendant may have any money or effects released which have been garnished, by filing with the justice before whom the case is pending a surety company bond, approved by said justice, in double the amount of the plaintiff's claim stated in his affidavit, and not less than fifty dollars, or deposit with the clerk of the court an amount

equal to such a bond, which money shall remain with said clerk until disposed of by the court according to law. A certificate of such deposit, setting forth the case in which, the amount thereof, the person by whom, the purpose for which, and the time when deposited, shall be given to the party depositing the same by the clerk of said court. Upon the final disposition of the case, action or proceeding in which such deposit was made, in case the party making such deposit shall be adjudged liable to pay the costs of such suit or proceedings, or to pay any other sum to secure the payment of which said deposit was made, then such fund so deposited shall under the direction of the court be applied in payment and satisfaction of the same. Should any surplus remain after satisfying such order of the court, the same shall be returned to the party depositing the same.

Certificate of deposit.

Application of fund upon final disposition of case.

Surplus.

Sec. 26. The justices of the peace mentioned herein shall have the power to make and adopt such rules of practice in said justices' courts as to them may be deemed advisable for the purpose of facilitating the business of said courts.

Rules of practice.

Sec. 27. In case a vacancy shall at any time occur in the office of the justice of the peace of the City of Detroit, by death, resignation, removal or other cause, it shall be the duty of the common council of the City of Detroit to fill such vacancy by appointment of some suitable person, who shall upon duly qualifying therefor fill such vacancy until the next general election, when a justice of the peace shall be elected to fill the unexpired term of said office.

Common Council shall fill vacancy.

Sec. 28. None but attorneys at law of four years' standing shall be eligible to be elected or appointed to the office of the justice of the peace under the provisions of this act. And no justice of the peace for said city shall during his term of office act as attorney or solicitor in any court in the County of Wayne.

Qualification of justices.

Sec. 29. Act number four hundred and twenty-six of the local acts of nineteen hundred and one, being an act entitled "An act to establish and provide justices' courts

Repeal of prior acts.

in the City of Detroit, and to repeal act number four hundred and sixty of the local acts of eighteen hundred and ninety-five, entitled 'An act to establish and provide justices' courts in the City of Detroit,' and to repeal act number two hundred and eighty of the local acts of eighteen hundred and eighty-three, entitled 'An act relative to justices' courts in the City of Detroit,' approved April twenty-fifth, eighteen hundred and eighty-three, and all acts amendatory thereof," approved June first, eighteen hundred and ninety-five, and all acts amendatory thereof, approved May thirteenth, nineteen hundred and one, and all other acts or parts of acts contravening the provisions of this act, shall be and the same are hereby repealed.

This act is ordered to take immediate effect.

Approved May 20, 1903.

THE ACT PROVIDING FOR JUSTICES' COURTS IN THE CITY OF GRAND RAPIDS.

Act No. 306, Local Acts, 1893, as amended by Act No. 327. Local Acts. 1897, and Act No. 498, Local Acts, 1903.

Two justices.

Qualifications
of, and how
elected.

Term of office
of present
justices.

Files, records
and dockets,
how disposed
of.

Executions,
by whom
issued.

Section 1. There shall be two justices of the peace in and for the city of Grand Rapids, who shall be electors of the city and actual residents therein; they shall be attorneys at law, duly admitted to practice their profession in the several courts of this State, and they shall be elected in the manner justices of the peace are now elected in the city. The justices of the peace now holding office in the city, shall continue to hold the same until the expiration of their respective terms, and until their successors are elected and qualified. The files, records and dockets appertaining to the offices of former justices of the peace in said city, shall be kept in the office of the clerk herein provided for. Either of the present or future justices is empowered to issue an execution, ac-

according to law, upon judgments, appearing upon such dockets, as if such judgments had been rendered by him.

Sec. 2. Justices of the peace in said city, except to fill vacancies, shall be elected at the annual municipal election held in the city, and shall hold their offices for a term of four years from and after the fourth day of July succeeding their election, and until their successors are elected and qualified.

Election and term of office of.

Sec. 3. The Common Council of the City of Grand Rapids shall provide such rooms as shall be suitable for use for holding justice courts, and for jury purposes, and an office for the clerk of said courts hereinafter mentioned. Such rooms shall be contiguous to each other. The said Common Council shall also provide the necessary furniture, fixtures, dockets, books, blanks and stationery for use in the business of said courts, and for the heating and lighting of said rooms.

Council to provide suitable rooms.

Furniture, fixtures, etc.

Sec. 4. Each of the justices of the peace of the city of Grand Rapids shall receive from the treasury of the city an annual salary of thirteen hundred dollars, which salary shall be in lieu of all fees, costs and charges to which said justices would be entitled but for the provisions of this act, except fees for the performance of marriage ceremonies, for taking acknowledgments, and for administering oaths in matters not connected with suits or proceedings in justices' courts in said city; such salary shall be paid to said justices in monthly installments, as other officers of said city are paid. Each of said justices shall be in attendance at his office on all days, except Sundays and legal holidays, from the hour of nine o'clock in the forenoon until noon, and from the hour of two o'clock until five o'clock in the afternoon.

Salaries of justices.

No fees.

Proviso.

Office hours.

Sec. 5. At the first annual municipal election held after the passage of this act, and every two years thereafter at such election, there shall be elected a clerk for such justices of the peace, to be known as "The Clerk of the Justice Courts of Grand Rapids," who shall hold his office for the term of two years from the first Mon-

Election and term of office of clerk of justice courts.

Salary of clerk.	day in May next succeeding his election and until his successor is elected and qualified. Said clerk shall receive from the treasury of said city an annual salary of ten hundred dollars, to be paid to him in monthly installments, as other officers of said city are paid; he shall
Deputies.	have power to appoint one or more deputies and to revoke any such appointment at pleasure: Provided, however, That the compensation of such deputy or deputies shall be paid by said clerk and shall not constitute an additional charge or expense to said city. Any deputy so
Clerk responsible for acts of deputies.	appointed shall have power to perform all of the duties of said clerk, and said clerk shall be responsible for the acts of any such deputy in respect to the affairs and duties and administration of the office to the same extent as for his own acts. Such clerk may require such bonds or other securities from such deputies as he may deem proper. Before entering upon the duties of his office said
Bond of deputies.	clerk shall file in the office of the city clerk of said city a bond approved by the Common Council of said city in the penal sum of three thousand dollars, with two or more sureties, conditioned that he shall well and truly perform his duties as such clerk, and account for and pay over all moneys, which shall be received by him, to the persons lawfully entitled to receive the same. The
Bond of clerk.	Common Council shall have power to remove such clerk at any time for causes provided for in the charter of the City of Grand Rapids.
Council may remove clerk, when.	Sec. 6. The office of said clerk shall be open and said clerk or his deputy shall be in attendance therein, from eight o'clock in the forenoon until noon, and from one o'clock until five o'clock in the afternoon. It shall be the duty of said clerk to assist said justices in the preparation of process and in keeping full and complete dockets of the proceedings by and before each of said
Duties of clerk.	justices in the manner provided by law. Said clerk shall also file and safely keep all books and papers belonging to said courts. Said clerk shall also enter in a book the names of all persons who shall sit as jurors in said courts, in the trials of causes; such names to be arranged alphabetically, together with the dates that each
Jurors.	

juror so sat, and a reference to the page of the docket where the proceedings of the trial were entered. The said clerk shall receive all fees, costs, fines and dues of every description that shall become due and payable on account of proceedings in said courts, or by or before said justices, except fees for the performance of marriage ceremonies, for taking acknowledgments, and for administering oaths in matters not connected with suits or proceedings in said justices' courts, and shall keep an account of the same, and pay over all such fees, costs, fines, penalties, forfeitures and dues (except such as are by law required to be paid to the clerk of the circuit court for the County of Kent upon the removal of causes from said justices' court to said circuit; and such as are by law required to be paid to the county treasurer of said county) to the treasurer of the City of Grand Rapids, for the benefit of said city; such payments to be made weekly. Said clerk shall also receive all other moneys paid into such courts, for or on account of proceedings therein, and shall pay over all such moneys to the person lawfully entitled to the same.

Fees to be
paid to clerk.

Fees to be
paid by clerk
to city and
county treas-
urers.

Other moneys.

Sec. 7. Before any civil action or proceeding, except proceedings against a garnishee defendant, shall be commenced in any of said justices' courts, there shall be paid to the clerk of said courts, by the party commencing the same, an entry fee of one dollar, and before the trial of any such action or proceedings shall be commenced, such party shall pay a judgment fee of one dollar; but in case of non-suit before the commencement of trial, no judgment fee shall be required. Proceedings in garnishment shall be treated as part of the principal cause, and no additional fees shall be required therein, except when an issue of fact shall be joined in respect to the liability of a garnishee or garnishees; in such cases a judgment fee of one dollar shall be paid before such trial shall commence. The fees provided for in this section shall be in full for all services and proceedings by and before said justices, to and including the issuing of execution upon judgment therein, and shall be taxed in favor of the party paying the same

Entry fees.

Judgment
fees.

Garnishee.

Fees to be
in full for all
services.

if he be the prevailing party in the suit. For all services and proceedings subsequent to the issuing of the execution, or for the purpose of staying proceedings; or removing causes to an appellate court, there shall be paid to the said clerk the fees provided by law: Provided, That in all causes where the cause of action is for personal work and labor of the plaintiff or any member of his or her family, upon filing with the clerk of said justice court an affidavit showing that such claim or cause of action is brought for such personal work and labor as aforesaid, such action shall, within the discretion of the court, be commenced and prosecuted to judgment without the payment of any entry fee or judgment fee, as herein required in other causes, but that the costs [which] shall accrue in such cause of action, including the entry and judgment fee, as in other causes shall be taxed in favor of the prevailing party.

Additional fees provided by law.

Proviso in favor of labor claims.

Process issued from court to be signed by whom.

If justice is absent on return day, how to proceed.

New assignment of justice, when and how.

Sec. 8. Process issued from said justices' courts shall be signed by the justice before whom the cause in which such process is issued, has been commenced, or is pending; and said clerk shall assign causes to be begun before said justices respectively in regular rotation as nearly as practicable. If upon the return day or adjourned day of any cause, the justice by whom the process therein was issued, shall be absent at the time to which the same is adjourned, or the process therein is made returnable, the other justice in the regular order of issuing writs, if present, shall proceed therein as though it had been originally commenced before him. On the return day of any process, before a justice of the peace to whom the cause has been assigned by said clerk, any party to said cause may have a new assignment of the same by presenting to such justice an affidavit therein, made by such party, his agent or attorney, stating that the person making such affidavit has good reason to believe, and does believe, that the said justice to whom said cause has been assigned is interested in the same or is biased or prejudiced against the party in whose behalf said affidavit is made; and said justice shall thereupon transfer said cause to the other justice in the reg-

ular order of issuing writs, if present, who shall proceed therein as if the same had originally been commenced before him. In all cases where causes are transferred from one justice to the other, the docket entries therein shall be made in the docket of the justice by whom the original process shall have been issued. Docket entries of the proceedings had by and before each of said justices shall be made and signed by the justice by or before whom such proceedings were had on the day such proceedings were had.

Sec. 9. If any party to a cause before either of said justices shall demand a trial by jury, he shall pay the fees therefor in advance, and the sum shall be disposed of by the clerk in the manner now provided by law; and the moneys paid for jurors shall be taxed as costs in favor of the party paying the same, if he be the prevailing party in the suit, in addition to such other costs as he may be entitled to recover. And in addition to all other costs there may be, in the discretion of the justice trying the cause, with or without a jury, taxed as an attorney fee in favor of the prevailing party, not exceeding the sum of five dollars.

Trial by jury.

Costs taxed.

Attorney fee.

Sec. 10. In criminal cases the same justice's fees shall be collected and in the same manner as in such proceedings before justices of the peace in townships, except that the same shall be received by the said clerk and paid to the treasurer of said city, as provided in civil suits.

Costs in criminal cases.

Sec. 11. It shall be unlawful for said justices of the peace or said clerk or his deputy or deputies, to act as counsel, agent or attorney for any party in any matter, suit, or proceeding, within the jurisdiction of, said courts. A violation of this provision shall be deemed misconduct and shall be sufficient cause for removal from office of the party so violating.

Justices, clerk or deputy cannot act as counsel.

Sec. 12. It shall be a part of the judicial duties of said justices of the peace to act in the place of the judge of the police court of Grand Rapids, whenever from any cause, said judge shall be unable to perform the duties of his office, but in so doing said justices of the peace

To act as police judge, when.

Compensation.	shall receive no compensation in addition to their regular salaries as such justices of the peace. At the first regular meeting of the Common Council in each municipal year, it shall designate which one of the justices of the peace shall act in the place of said police judge, whenever from any cause said judge shall be unable to perform the duties of his office; in such case said justice of the peace shall exercise the power, authority and jurisdiction herein conferred upon said police judge. Such designation shall be made in writing in open session of the Common Council and shall be entered upon its minutes. The present justices of the peace in the city are hereby invested, for the time being, with the power to act in the place of said judge as aforesaid, until their successors are elected and qualified; and immediately upon the passage and taking effect of this act, it shall be the duty of the Common Council to designate which of said justices of the peace shall so act until the beginning of the municipal year of 1897, at which time a designation shall be made by the Common Council for the ensuing municipal year, as aforesaid. The justice thus designated shall exercise the power, authority and jurisdiction of said police judge as aforesaid, while acting in his place.
Council to designate who to act.	
Designation, how made.	
Present justices to act until, when.	
When council to designate.	
Powers of, while so acting.	
Jurisdiction of.	Sec. 13. The said justices of the peace of the City of Grand Rapids shall, as against all other justices of the peace of the County of Kent and State of Michigan, have exclusive jurisdiction of all acts and proceedings within their jurisdiction where both the parties thereto shall, at the time of the commencement of such action or proceeding, be residents of said city. They shall also have a like exclusive jurisdiction, as against all other justices of the peace of the said County of Kent, where the original cause of action existed in favor of a resident of said city, but has by him been assigned.
Justices of the peace, jurisdiction of.	Sec. 14. The justices of the peace of said city shall file their oaths of office in the office of the clerk of the County of Kent, and shall have in addition to the duties conferred by this act on them, the same jurisdiction, powers, and duties conferred on justices of the peace

in townships, and that in all civil causes the said justices of the peace shall have concurrent jurisdiction to the amount of five hundred dollars.

Sec. 15. It shall be the duty of the justices of the peace of said city to keep their offices in said city, and to attend all complaints of a criminal nature which may properly come before them.

Justices to keep offices in city.

Sec. 16. Any justice of the peace of the city may be suspended or removed from his said office by the circuit court for the County of Kent; for the unfaithful or insufficient performance of his duties in relation to the internal police of the State, or for any misconduct, or on charges specially preferred by said Common Council of said city, or of any member or officer thereof, or by three electors of said city, founded on affidavit filed in said circuit court, specifically stating the charges complained of, a copy whereof shall be served upon him in such manner as said circuit court shall direct, and opportunity shall be given him to be heard in his defense.

Justices may be removed from office, how and for what cause.

Sec. 17. In addition to the security now required by law to be given by justices of the peace, each of the justices of the peace shall, before entering upon the duties of his office, execute a bond to the City of Grand Rapids, with one or more sufficient sureties, to be approved by the mayor of said city, which approval shall be endorsed on said bond, in the penalty of one thousand dollars, conditioned for the faithful performance of his duties as a police justice of said city, and to pay over the money so collected as such police justice to the treasurer of said city within ten days after receipt of the same; and on the last Saturday in each month the said justices of the peace shall file with the clerk of said city a report of all the moneys so collected and paid over to the city treasurer.

Justices to execute bond to city.

Penalty of. Conditions of

Sec. 18. All dockets and office books kept by the justices of the peace shall at all times be subject to inspection and examination by the Common Council, or any member or officer thereof, and it shall be the duty of said justices of the peace to produce such dockets and books at all times, whenever and wherever the said Common

Docket, etc., is subject to inspection.

How produc-
tion of books
compelled
when refused.

Council shall require or direct, and if they shall neglect or refuse to produce such dockets or office books as directed and required, the circuit judge of the circuit court for the County of Kent may, on a proper application to him for the purpose, make an order requiring the same to be produced, and enforce obedience thereto in the same manner in which other orders made by him are enforced.

Justices to re-
port relative
to goods
seized as
stolen prop-
erty.

Sec. 19. It shall be the duty of each justice of the peace, at the first regular meeting of the Common Council in each of the months of August, November, February and May in every year, to account on oath, before the Common Council, for all such moneys, goods, wares, and merchandise, seized as stolen property, as shall then remain unclaimed in the offices of either of said justices of the peace, and immediately thereafter to give notice once in each week, for four weeks, in one of the official newspapers printed in said city of Grand Rapids, to all persons interested or claiming such property: Provided, always, That if any goods, wares, merchandise, or chattels of a perishable nature, or which shall be expensive to keep, shall at any time remain unclaimed in the offices of either of said justices, it shall be lawful for such justice to sell the same at public auction at such time and after such notice as to him and the Common Council shall seem proper.

Proviso.

May sell per-
ishable prop-
erty or prop-
erty expensive
to keep.

Justice to de-
liver stolen
property to
owner, when.

Sec. 20. It shall be the duty of each of the justices of the peace aforesaid, who may recover or obtain possession of any stolen property, on his receiving satisfactory proof of property from the owner, to deliver such property to the owner thereof, on his paying all necessary and reasonable expenses which may have been incurred in the recovering, preservation, or sustenance of such property, and the expense of advertising the same.

Justices to
sell all un-
claimed prop-
erty at auc-
tion, when,
and pay pro-
ceeds to city
treasurer.

Sec. 21. It shall be the duty of each of the justices of the peace aforesaid to cause all property unclaimed after the expiration of the notice specified in section nineteen of this act, money excepted, to be sold at public auction to the highest bidder, unless the prosecuting attorney of the County of Kent shall direct that it shall

remain unsold for a longer period, to be used as evidence in the administration of justice, and the proceeds thereof forthwith to pay to the treasurer of the City of Grand Rapids, together with all money, if any, which shall remain in his hands after such notice as aforesaid, first deducting the charges of said notice of sale.

Sec. 22. The justices of the peace in said city exercising civil jurisdiction, shall be deemed justices of the peace of the County of Kent, and shall be subject to the general laws of the State in relation to civil causes before justices of the peace, and appeals from their judgment may be made to the circuit court for the County of Kent, in the same manner as appeals from justices' judgment in towns are made.

Justices of the peace deemed justices of the peace of Kent County.

Sec. 23. The justices of the peace of said city shall have all the authority of justices of the peace in towns in criminal matters as well as civil, and shall have all the authority and perform all the duties hereinbefore provided and required of them.

Jurisdiction of.

Approved March 10, 1897.

Ordered to take immediate effect.

JUSTICE'S COURT FOR THE CITY OF ISHPEMING.

That portion of the charter of the City of Ishpeming providing for a court of a justice of the peace, and being a portion of Act No. 251 of the Local Acts of 1891, as amended by Act No. 317 of the Local Acts of 1893; Act No. 417 of the Local Acts of 1897; Act No. 356 of the Local Acts of 1901, and by Act No. 346 of the Local Acts of 1903.

Sections one, three, four and five of Chapter II. provide for the election and qualification of a justice of the peace.

Chapter IV. prescribes the "Qualifications, compensation, powers and duties of officers," and Sections 8a to 8h inclusive are as follows:

Justice of the
peace, pow-
ers, duties,
etc.

Section 8a. The justice of the peace of the city, except as herein provided, shall have and exercise herein and within the County of Marquette the same jurisdiction and power in all civil and criminal matters, causes, suits and proceedings and shall perform the same duties in all respects as far as occasions may require as are or may be conferred upon or required of justices of the peace by the general laws of the State and the proceedings in all suits and actions before said justice shall, except as otherwise provided in this act, be according to and governed by the general laws applicable to justice courts and justices of the peace, and said justice shall, except as otherwise provided in this act, in the exercise of the powers and duties conferred upon or required of him, be governed by the general laws of the State relative to justice of the peace, and said justice shall have jurisdiction of civil cases where either of the parties thereto reside in the County of Marquette. Said justice may, from time to time, make and adopt rules of practice for the conduct of the business of said court, not inconsistent with the general laws of the State or the charter and ordinances of said city, which rules shall be entered upon the civil docket of said justice and signed by him. Before any civil suit shall be commenced in said court, the party bringing the same shall pay to said justice the sum of one dollar as an entry fee, and before the trial of any cause, the further sum of one dollar as a trial fee, which shall be in lieu of all justice fees except appeal fees and which shall be deposited to the credit of the city treasurer at the end of each week.

May adopt
rules.

Fees to be
paid to.

Parties in
suits entitled
to jury.

Jurisdiction
of justice.

Sec. 8b. Either party may demand a jury under like terms, conditions and fees as are now or may hereafter be required under the general laws of the State relative to jurors and justice courts.

Sec. 8c. The said justice in addition to his general powers as justice of the peace shall have exclusive jurisdiction except as herein provided, to hear, try and determine all actions and prosecutions for the recovery or enforcing of fines, penalties and forfeitures for vio-

lations of this act, and for encroachments upon and injuries to any of the streets, alleys and public grounds within the city, excepting cases where jurisdiction is given some other court, and to hear, try and determine all suits and prosecutions for the recovery or enforcing of fines, penalties and forfeitures imposed by the ordinances of the city and to punish offenders for violations of such ordinances as in the ordinances prescribed and directed, subject only to the limitations prescribed in this act.

Sec. 8d. The said justice shall enter in the docket kept by him the title of all suits and prosecutions commenced or prosecuted before him for violations of the city charter or ordinances of the city, all the proceedings and the judgment rendered in every such cause, and the items of all costs taxed or allowed therein, and also the amounts and dates of payment of all fines, penalties and forfeitures, moneys and costs received by him on account of any such suit or proceeding. Such docket shall be submitted by him at all times for the examination of any person desiring to examine the same, and shall be produced by him to the Common Council whenever required. He shall also keep a docket for civil cases and criminal cases which shall be kept and submitted the same as the docket for city cases.

Justice to
keep docket.

To be open to
public.

Sec. 8e. The council of the city shall provide for a suitable court room and office for the accommodation of said justice and all necessary furniture, fuel, light, record books, blanks and stationery for the use of the said justice in connection with his office.

Council to
provide room,
etc., for
justice.

Sec. 8f. All moneys paid to said justice except jury, officer and witness' fees and except all fines recovered for the violation of penal laws of this State shall be for the use of the city and shall be paid weekly to the city treasurer: Provided, That all moneys collected in any case for or on account of services rendered by constables or other officers therein shall be for the use of such officers, and shall be immediately paid over to them, except fees in criminal cases on account of services of the marshal, deputy marshal and night watch-

To pay mon-
eys to treas-
urer.

Proviso.

man, which shall belong to the city and paid by said justice to the city treasurer each week. The expenses of prosecutions for the violations of penal laws of the State shall be paid by the County of Marquette. It shall be the duty of said justice to present in proper form to the board of supervisors of Marquette County at each of its meetings, correct statements of costs for all violations of the penal laws of this State, which costs shall include officers' fees to which this city is entitled, and upon receipt of the same he shall deposit said fees in the city treasury. He shall, subject to the confirmation of the Common Council have authority to employ a clerk of said court which clerk shall be under his supervision and subject to his orders and directions.

County to pay certain expenses.

May employ a clerk.

To be successor to present justices.

Salary of justice.

Of clerk.

Sec. 8g. The said justice shall be considered the successor in office of all the justices of the peace now in said city, as their respective terms of office shall expire by resignation or otherwise, and as such successor in office he shall take possession of their dockets and papers and possess and exercise the same powers and authority concerning the same as are now given by the general laws of this State to successors in office to a justice of the peace.

Sec. 8h. The justice shall receive an annual salary of not to exceed twelve hundred dollars per year, the same to be fixed annually by the Common Council in the same manner as other salaries are fixed and the same to be paid out of the treasury of said city in monthly installments. The said clerk shall receive an annual salary of not to exceed six hundred dollars per year to be fixed and paid in the same manner as the justice of the peace. These salaries shall be in full compensation for all services performed by said officers in the discharge of the duties of their respective offices, and they shall make no charge to any person for any service required of them or either of them by this act.

JUSTICE'S COURT FOR THE CITY OF JACKSON.

That portion of the charter of the City of Jackson providing for a court of a justice of the peace and being a portion of Act No. 523 of the Local Acts of 1903.

Sections one, seven, twelve and thirteen of Title IV. provide for the election and qualification of a justice of the peace.

Title V. prescribes the "Duties and compensation of officers" and Sections 23 to 29 inclusive are as follows:

JUSTICES OF THE PEACE.

Section 23. The justices of the peace to be elected in said city, shall be elected in the manner that justices of the peace are now elected in said city: Provided, That no election for justices of the peace, except to fill any vacancy that may occur, shall be held in said city in the year nineteen hundred four, and the office of the justice of the peace whose term expires on the fourth of July, nineteen hundred four, is hereby abolished from and after the last named date. The files, records and dockets appertaining to the office of justice of the peace in said city abolished by this act, shall be transferred to and kept by the other justice whose election is herein by this act provided for, and such justice is empowered to issue execution according to law upon judgments appearing upon such dockets so transferred to him with the same effect as if such judgment had been rendered by him. The justice of the peace elected in said city under the provisions of this act shall have and exercise therein and within the county the same jurisdiction and powers in all civil cases, suits and proceedings as are or may be conferred upon, or required of justices of the peace by the general laws of the State: Provided, That all actions within the jurisdiction of the justices of the peace may be commenced and prosecuted in said justice's court, whenever the plaintiffs or defendants or one of the plaintiffs or de-

How elected.

Proviso as to abolishing one office.

Powers, etc., of remaining justice.

Proviso.

fendants reside in either the said city or the townships of Summit, Blackman, Leoni, Spring Arbor or Sandstone in said county. The proceedings in all suits, actions and prosecutions before the said justice and in the exercise of the powers and duties conferred upon and required of him shall, except as otherwise provided in this act, be according to and be governed by the general laws applicable to courts of justices of the peace and to the proceedings before such officers.

Salary.

Sec. 24. Said justice of the peace shall receive from the treasurer of the city an annual salary to be fixed by the council of not less than six hundred dollars nor more than one thousand dollars, which salary shall be in lieu of all fees, costs and charges to which said justice would be entitled, but for the provisions of this act; except fees for the performance of marriage ceremonies, for taking acknowledgments and for administering oaths in matters not connected with suits or proceedings in courts in said city; such salary shall be paid to said justice in monthly installments as other officers of said city are paid; said justice shall be in attendance at his office on all days except Sundays and legal holidays from the hour of nine o'clock in the forenoon until noon and from the hour of two o'clock until five o'clock in the afternoon. Every justice of the peace shall enter in the docket kept by him the title of all suits and prosecutions commenced before him and all the proceedings and the judgment rendered in every cause and the items of all costs taxed or allowed therein and also the amounts and date of payment of all fines, penalties and forfeitures, moneys and costs received by him on account of any suit or proceeding. Such docket shall be submitted by the justice at all times to the examination of any person desiring to examine the same and shall be produced by the justice of the peace to the council whenever required.

Office hours.

Duty as to docket.

Civil actions when commenced, etc.

Sec. 25. Before any civil action or proceeding, except proceedings in garnishment, shall be commenced in said justice court, there shall be paid to said justice by the party commencing the same, an entry fee of one

dollar, and before the trial of any such action or proceeding shall be commenced, such party shall pay a judgment fee of two dollars, except in default cases, when such judgment fee shall be one dollar. But in case of non-suit before the commencement of trial, no judgment fee shall be required. Proceedings in garnishment shall be treated as part of the principal cause, and no additional fee shall be required therein, except when an issue of fact shall be joined in respect to the liability of a garnishee or garnishees; in such cases a judgment fee of two dollars shall be paid before such trial shall commence. The fees provided for in this section shall be in full for all services and proceedings by and before said justice, and include the issuing of execution upon judgment therein, and shall be taxed in favor of the party paying the same if he be the prevailing party in the suit. For all services and proceedings subsequent to the issuing of the execution, or for the purpose of staying proceedings, or removing causes to an appellate court, there shall be paid to the said justice the fees provided by law. All costs, fees and moneys for services collected or received by said justice of the peace for or on account of the business of his office except as herein otherwise provided, shall be paid over by said justice to the city treasurer on or before the first Monday of the month next after the collection or receipt thereof. And the justice shall take the receipt of the city treasurer therefor and file the same with the recorder. The fees of witnesses, jurors, sheriffs and constables shall be paid to the persons respectively entitled thereto under the general laws of the State.

Garnishment
proceedings,
how treated.

Costs, etc.,
to whom paid.

Sec. 26. If a party to a cause before any of said justices shall demand a trial by jury, he shall pay the fees therefor in advance, and the sum shall be disposed of by the justice in the manner now provided by law and the moneys paid for jurors shall be taxed as costs in favor of the party paying the same if he be the prevailing party in the suit, in addition to such other costs as he may be entitled to recover. In criminal cases the same costs shall be collected and in the same manner as in

Trial by jury,
etc.

such proceedings before justices of the peace in townships.

Not to act as
counsel.

Sec. 27. It shall be unlawful for said justice of the peace to act as counsel, agent or attorney for any party in any matter, suit or proceedings, within the jurisdiction of said courts. A violation of this provision shall be deemed misconduct in office and shall be deemed sufficient cause for removal from office of the parties so violating.

Penalty for
misconduct.

Sec. 28. Any justice of the peace who shall be guilty of misconduct in office, and who shall wilfully neglect or refuse to perform or discharge any of the duties of his office required by this act or by any of the ordinances of the city, shall be deemed guilty of a misdemeanor and punishable accordingly, and upon conviction thereof, by a court of competent jurisdiction may be suspended from office by the council during its pleasure.

Report to
council.

Sec. 29. Every justice of the peace shall account on oath to the council at its first meeting in each month, for all such moneys, goods, wares and property seized as stolen property as shall then remain unclaimed at his office, and shall make such disposition thereof as shall be prescribed by the council.

JUSTICE'S COURT FOR THE CITY OF LANSING.

That portion of the charter of the City of Lansing providing for a court of a justice of the peace, and being a portion of Act No. 405 of the Local Acts of 1893, as amended by Act No. 416 of the Local Acts of 1897, and by Act No. 378 of the Local Acts of 1903.

Section six of Title III. provides for the election of a single justice of the peace for the whole city.

Sections twenty to thirty inclusive prescribe the powers, duties and compensation of such justice of the peace and are as follows:

Justice en-
titled to
dockets, rec-
ords, etc.

Sec. 20. The justice of the peace of said city provided for in this act, shall be entitled to receive from

the justices of the peace, whose terms shall expire on the first Monday of May, nineteen hundred three, all files, records and dockets by them kept appertaining to their said offices; and said justice shall be and is empowered to issue executions according to law upon any judgments appearing upon said dockets with the same effect as if said judgments had been rendered by him; and any action or proceeding pending before any of said justices at the time their said terms of office shall expire shall be transferred to the justice elected under this act, and he shall have full jurisdiction to proceed with the same in the same manner as said justices themselves might have done. The said justice of the peace shall have and exercise within the County of Ingham the same jurisdiction in criminal cases, suits and proceedings as are or may be conferred upon or required of justices of the peace by the charter of the City of Lansing or by the general laws of this State. He shall have original jurisdiction of all civil actions not otherwise prohibited by law, wherein the debt or damages do not exceed one hundred dollars and concurrent jurisdiction in all civil actions upon contract, express or implied, wherein the debt or damages do not exceed five hundred dollars. He shall have such jurisdiction to hear, try and determine all actions arising within said city for the recovery of the possession of lands under the provisions of chapter two hundred eleven of the Compiled Laws of eighteen hundred seventy-one and the acts amendatory thereto as is conferred upon justices of the peace of townships to hear, try and determine cases arising within townships under said chapter and the amendatory acts: Provided, That in case of the absence, disability or disqualification of the said justice and [a] justice of the peace of the Township of Lansing in said county shall be qualified to act in the place of and for said justice in the performance of any of the duties devolved upon him under this act, and shall, when called upon by said justice or by the circuit judge so act; and while so acting shall be entitled to receive pro rata for the time he shall so serve,

Proceedings
transferred.

Powers, etc.,
of.

Proviso as
to absence.

the salary which would otherwise have been payable to the justice elected under this act.

To file oath,
give bonds,
etc.

Sec. 21. The justice of the peace of the city shall file his oath of office in the office of the county clerk of the county of Ingham, and in addition to the surety required by general law to be given by justices of the peace, he shall, before entering upon the duties of his office execute a bond to the city of Lansing with one or more sufficient sureties to be approved by the mayor of said city, which approval shall be endorsed on said bond in a penalty of one thousand dollars conditioned for the faithful performance of the duties of his office as a police justice of said city, and to pay over the moneys collected and to make his reports and verified statements of his accounts as in this act required.

Council to
provide
rooms, dock-
ets, etc.

Sec. 22. The common council of the city of Lansing shall provide and maintain, heat, light and properly furnish suitable rooms for the said justice of the peace, and shall furnish all dockets and legal blanks necessary to properly conduct his office; and shall pay to the said justice of the peace a salary of twelve hundred dollars per annum, payable monthly; he shall receive no fees or perquisites of any kind whatever for the performance of any duties connected with his office, except marriage fees; but all such fees as are hereinafter provided to be by him taxed and collected in civil cases and all such fees as are by the general laws of this State properly taxable by a justice of the peace in criminal cases, shall be taxed and collected in like case by the justice of the peace of the city of Lansing, and paid into the city treasury within five days after they shall have been so collected.

Fees, to
whom paid.

Fines, etc., to
whom paid.

Justice to
report to
council.

Sec. 23. All fines, penalties or forfeitures recovered before said justice for violation of any city ordinance shall, when collected, be paid into the city treasury, and said justice shall report on oath to the common council, at the first regular meeting thereof in each month, during the term for which he shall perform the duties of such justice, the number and name of every person against whom judgment shall have been rendered for such fine,

penalty or forfeiture, and all moneys by him received for and on account thereof, which moneys so received or which may be in his hands, collected on such fine, penalty or forfeiture, shall be paid into said city treasury on the first Monday of each and every month during the time such justice shall exercise the duties of said office, and for any neglect in this particular he may be suspended or removed as hereinafter provided.

Sec. 24. It shall be the duty of said justice of the peace, at the first regular meeting of the common council, in each of the months of August, November, February and May in each year, to account on oath, before the common council for all such moneys, goods, wares and merchandise, seized as stolen property, as shall then remain unclaimed in the office of said justice of the peace, and immediately thereafter to give notice for four weeks in one of the public newspapers printed in said city, to all persons interested or claiming such property: **To account to council for unclaimed property.** Provided always, That if any goods, wares, merchandise **Proviso.** or chattels of a perishable nature, or which shall be expensive to keep shall at any time remain unclaimed in the office of said justice, it shall be lawful for such justice to sell the same at public auction, at such time, and after such notice as to him and the said common council seem proper.

Sec. 25. It shall be the duty of the justice of the peace aforesaid, who may recover or obtain possession of any stolen property, on receiving satisfactory proof of property from the owner, to deliver such property to the owner thereof, on his paying all necessary and reasonable expenses which may have been incurred in the recovering, preservation, or sustenance of such property, and the expenses of advertising the same, unless the attorney of the city or the prosecuting attorney of the county of Ingham shall otherwise direct. **When may restore stolen property.**

Sec. 26. It shall be the duty of the justice of the peace as aforesaid, to cause all property unclaimed after the expiration of the notice specified in the last preceding section but one of this act, money excepted, to be sold at public auction to the highest bidder, unless the prose- **When may sell unclaimed property at auction.**

cuting attorney of the county of Ingham shall direct that it shall remain unsold for a longer period, to be used as evidence in the administration of justice and the proceeds thereof forthwith to pay to the treasurer of the said city; together with all the money, if any, which shall remain in his hands, after such notice, as aforesaid, first deducting the charges of said notices of sale.

To try cases
of violation of
ordinances.

Sec. 27. The justice of the peace of said city shall have full power and authority, and it is hereby made the duty of such justice, upon complaint to him in writing, on oath, to inquire into, and try and determine all offenses which shall be committed within said city against any of the by-laws or ordinances which shall be made by the common council, in pursuance of the powers granted by this act, and to punish the offenders, as by said by-laws or ordinances shall be prescribed or directed; to award all process, take recognizances for the appearance of the person charged, and upon appeal, and to commit to prison, as occasion may require: Provided, That any person making said complaint (except city officers) shall give security for costs in the same manner as is required in criminal cases under the general laws of this State, which security shall have the same force and effect, and judgment shall be rendered against said complainant and surety, and execution issued thereon, when the justice shall be satisfied there was not reasonable cause for making said complaint.

Proviso as to
costs.

When to issue
warrants.

Sec. 28. Whenever any person shall be charged with having violated any ordinance of the common council, by which the offender is liable in imprisonment, the justice of the peace of said city, to whom complaint shall be made in writing, and on oath, shall issue a warrant directed to the marshal of the city of Lansing or to the sheriff or any constable of the county of Ingham, commanding him forthwith to bring the body of such before him, to be dealt with according to law; and the marshal or other officer to whom said warrant shall be delivered for service, is hereby required to execute the same in any part of this State, where such offender may be found, under the penalties which are by law incurred

by sheriffs and other officers for neglecting or refusing to execute other criminal process.

Sec. 29. In every civil action or proceeding, except garnishment proceedings commenced in said justice court, there shall be paid to said justice by the plaintiff, an entry fee of one dollar and before the trial of any action or proceeding shall be commenced, such party shall pay a judgment fee of one dollar in cases where the defendant shall not appear and join issue, and two dollars in cases where issue is joined between the parties; but in case of non-suit before commencement of trial no judgment fee shall be required; proceedings in garnishment shall be treated as part of the principal cause and no additional fee shall be required therefor, except when an issue of fact shall be joined in respect to the liability of any garnishee; in such case, a judgment fee of two dollars shall be paid before such trial shall commence. The fees provided in this section shall be in full for all services and proceedings in said cause to and including the issue of an execution upon the judgment therein, and shall be taxed in favor of the party paying the same if he be the prevailing party in the suit. The jury and officers' fees provided by general law shall be paid in addition to the foregoing fees. For all services and proceedings subsequent to the issuing of an execution or for the purpose of staying proceedings or removing causes to an appellate court, there shall be paid to the said justice the fees provided by law. In all criminal cases where a fine may be imposed it shall and may be lawful to include in the sentence such an amount for costs as would be taxable under the general laws of the State, in justices' courts and all such costs and fees and moneys collected by such justice for or on account of the business of his office, except as herein otherwise provided, shall be paid over by said justice to the city treasurer as hereinbefore provided. The fees of witnesses and jurors in criminal cases shall be paid in the same manner as is now provided by law for the payment of such fees by justices in townships, and all fines imposed by the said justice for the violation of any of the crimi-

Fees to be paid to, on commencement of suits.

Jury, etc., fees, how paid.

Witness fees.

Application
of general
law.

Justice may
appoint clerk.

To present
accounts to
council.

Council to
examine and
present to
supervisors.

nal laws of this State, except such as are imposed as costs as aforesaid, shall be, by the said justice of the peace, paid to the treasurer of the county of Ingham as required by law. Except as herein otherwise provided, the general laws of the State with reference to justice courts and justices of the peace shall be applicable to the said justice of the peace and the court held by him. The said justice of the peace shall have power to and shall appoint some suitable person to act as clerk of said court who shall receive such salary to be paid monthly, as the common council shall from time to time determine; said clerk shall hold his office during the pleasure of said justice and shall perform such duties in connection with said justice court as the said justice of the peace shall require, and shall be in daily attendance upon said court and shall in criminal cases make such report of the proceedings thereof to the prosecuting attorney of the county of Ingham as is or may be required by law of justices of the peace in cases brought before them.

Sec. 30. The justice of the peace shall keep a just and true account of all fees which by law, he would be entitled to receive for performing services in criminal cases if such services were not compensated by salary as herein provided, and at least fifteen days before the regular meeting of the board of supervisors in January and October in each year, he shall present to the common council a verified statement of such account together with the statement of the constable's account, certified by him as provided in section nineteen, for examination and approval; and the common council shall examine said accounts and may suggest corrections or amendments thereto, and said accounts, when approved by the common council, shall be presented to the board of supervisors at its then next meeting and the same shall be audited and the amount justly due thereon, allowed as other bills of justices of the peace and constables are allowed for similar services. For the amount so allowed, a warrant shall be drawn by the county clerk upon the county treasurer in favor of the

city of Lansing, and delivered to the treasurer thereof. In case of examination of offenders by said justice for offenses committed against the criminal laws of this State where such justice has jurisdiction to examine and to hold to bail only, it shall be lawful for said justice, on motion of the prosecuting attorney, to cause an order to be entered in the records of such court before or during the pendency of said examination, appointing some suitable stenographer to take down in shorthand the testimony of such examination; and such stenographer so appointed shall receive such per diem compensation for the time so expended in taking such testimony and such price per folio for writing out the same in longhand, as shall be fixed by the board of supervisors, the same to be allowed and paid out of the treasury of said county.

When justice
may appoint
stenographer.

JUSTICES' COURTS FOR THE CITY OF PORT HURON.

That portion of the charter of the city of Port Huron providing for justices' courts in that city, and being chapter XIV of act No. 390 of the Local Acts of 1885 as amended by Act No. 392 of the Local Acts of 1893; Act No. 445 of the Local Acts of 1897; Act No. 372 of the Local Acts of 1899; and Act No. 317 of the Local Acts of 1901.

Sec. 1. At the general charter election held in the year one thousand eight hundred and ninety-eight and every fourth year thereafter, there shall be elected in said city one justice of the peace, who shall be known as police justice, whose term of office shall commence on the first day of January next following his election and continue for four years, and until his successor shall be elected and qualified. He shall be elected on the general ticket in the manner herein provided for the election of other city officers and none but attorneys at law duly admitted to practice in the Supreme Court of this

When elected.

Must be an
attorney.

Assistant
police justice.

state, and of at least two years' good standing shall be eligible to the said office of justice of the peace in said city. And there shall be elected at the annual election in the year nineteen hundred, and every fourth year thereafter, one justice of the peace for the term of four years, to be known as assistant police justice, who shall be an attorney and counsellor at law, and who shall exercise, in case of the absence from his office or in case of the death or disability of the police justice, all duties of police justice.

Exclusive
jurisdiction.

Sec. 2. Said police justice and said assistant police justice shall have the exclusive jurisdiction to hear, try and determine all charges for offenses and misdemeanors alleged to have been committed within the city, and which by the general laws of the State are within the jurisdiction of justices of the peace. They shall also have exclusive jurisdiction to hear and examine all charges for crimes alleged to have been committed within the city of Port Huron, and which by the general laws of the State are examinable by and before a justice of the peace, and to hold to bail, or commit for trial in the circuit court for the county of St. Clair. They shall also have concurrent jurisdiction with other justices of the peace of the county of St. Clair, as to all crimes, offenses and misdemeanors, when alleged to have been committed without the city, but within the county of St. Clair.

Concurrent
jurisdiction.

General laws
applicable.

Sec. 3. The general laws of the state relating to justices of the peace shall, in all things, apply to and govern said justices of the peace except as otherwise provided in this act.

To try viola-
tions of ordi-
nances.

Sec. 4. Said justices of the peace shall have sole and exclusive jurisdiction to hear, try and determine in a summary manner, and without the aid of a jury, all charges for violation of city ordinances; and all persons convicted by or before either of them of a violation of a city ordinance may be fined or imprisoned, or both, according to the terms of the ordinance, and if a fine shall be imposed, it shall be with the costs of prosecution if the ordinance so provide; and an appeal may be taken

in the circuit court, as in civil cases and such imprisonment may be in St. Clair county jail, or in the city jail.

Sec. 5. Said justices of the peace shall receive no fees to their own use, but in lieu thereof shall be paid by the city an annual salary to be paid monthly. Compensation.

Sec. 6. There may be a "clerk of the justice court," to be appointed by the common council, upon the nomination and recommendation of said police justice, and who may be suspended or removed by said justice at any time, and who shall receive an annual salary, fixed by the common council, which may be increased from time to time as the common council by a two-thirds vote of the aldermen elect therefor may determine. Council to appoint clerk.

Salary of clerk.

Sec. 7. The common council shall provide and furnish for said justices of the peace, suitable and convenient court rooms with a jury room adjacent, and provide and furnish the same with desks, tables, furniture, fuel, blanks, and stationery and such other things as may be required to properly carry on and hold such justice court. Council to provide office.

Sec. 8. The chief of police shall detail one or more policemen, as the said justice of the peace may direct to attend upon and keep order in said justice court under the direction of said justice. Court officer.

Sec. 9. Prosecutions under the ordinances of the city shall be commenced and carried on in the name of "The People of the State of Michigan," and the practice in such cases shall (except as herein otherwise provided) be the same as near as may be as in criminal cases cognizable by justices of the peace in townships. Style of prosecutions.

Sec. 10. Said justices shall qualify in the same manner provided by the general laws of the state, but their bonds or instruments in writing shall be approved by the common council. Justice to qualify.

Sec. 11. Said clerk shall qualify by taking the constitutional oath and giving a bond in such amount and with such sureties as may be required by the common council and conditioned, as provided in section five of chapter four of this act, and otherwise conditional as the council may direct. Clerk to qualify.

Duties of clerk.

Sec. 12. Said clerk shall, under the direction of the justice, keep three dockets, which dockets shall contain all that is required to be kept under the general laws of the state relating to justices. He shall also file and safely keep and care for all books, papers, and other things coming to his hands as such clerk, being subject at all times to the control and direction of said justice, and said dockets shall be signed by said justice. In one of said dockets shall be kept the record of all civil business, in another all criminal business, and in third all cases under city ordinances, rules and by-laws.

Warrants, how directed.

Sec. 13. Warrants issued by said justice upon complaints made for violation of any city ordinance shall be directed to the chief of police and may be served by any (said) chief or any policeman, or the sheriff or any deputy, or any constable, and if served by the chief or any policeman, the fees for such service shall, when collected, be paid to the city treasurer.

Exclusive jurisdiction.

Sec. 14. Said justices of the peace shall have exclusive jurisdiction of all such civil actions and proceedings, as by the general laws of the state are within the jurisdiction of justices of the peace. The police justice and assistant police justice elected in the city of Port Huron and duly qualified according to law shall have original jurisdiction of all civil actions wherein the debt or damages do not exceed the sum of one hundred dollars, and concurrent jurisdiction in all civil actions wherein the debt or damages do not exceed the sum of five hundred dollars, except as provided in section seven hundred and four of the compiled laws of the state of Michigan of eighteen hundred and ninety-seven. The justices of the peace known as police justice and assistant police justice now in office shall continue to hold their offices until the expiration of their respective terms, and until their successors are elected and qualified as herein provided.

Jurisdiction of police justice.**Justice's office not affected.****Issue of civil process.**

Sec. 15. All original civil process shall be tested by the justice of the peace known as police justice, and shall be returned in the same manner as process issued by justices of the peace under the general laws of the

State. After the return of such process, the said justice of the peace known as police justice, may, whenever he deems it necessary in order to facilitate the business of the court, assign civil cases brought in said court and upon which process has been returned to the justice of the peace known as assistant police justice for trial. Such assignment may be made by an order entered in said cause upon the book in which the minutes of said cause are kept. When said cause has been so assigned to said assistant police justice, all further proceedings in said cause shall be carried on by and before the said assistant police justice; and for such purpose he shall have all the powers possessed by a justice of the peace under the general laws of this State to proceed and determine said cause, to issue process therein and enforce the collection of such judgment as may be therein rendered.

Assignment
of cases for
trial.

Sec. 16. Before any civil action or proceeding, except proceedings in garnishment, shall be commenced in said justice's court there shall be filed with such justice by the party commencing such action, a precipe for the writ desired to be issued and the party commencing such proceeding shall at the same time pay or cause to be paid to the clerk, the sum of fifty cents, and before the trial of any such action or proceeding shall be commenced the further sum of fifty cents shall be paid to said clerk by the party bringing such action, but in cases of non-suit no judgment fee shall be required. In all cases actually contested by the defendant there shall be paid to said clerk by the party bringing such action the sum of one dollar additional. If more than one day is occupied in the trial of any case, there shall be paid to the clerk the sum of one dollar additional, by the party bringing such action, for each and every day or part of a day so occupied. Whenever after disclosure filed in garnishment a summons to show cause shall be desired, the party desiring such summons shall pay or cause to be paid to the clerk of said court the sum of twenty-five cents and before the trial of the issue under such summons to show cause shall be

Justice's fees.

Security for costs.	commenced, the further sum of twenty-five cents shall be paid by the party prosecuting such action. The amounts herein provided to be paid shall be in lieu of all other justice's fees, and there shall be no charge for issuing executions. No process shall be issued out of said court until the provisions of this section shall have been complied with. Security for costs may be required as under the general laws of the State.
Appeal.	Sec. 17. Any cause tried or determined in said court, by either of said justices, may be appealed or removed by certiorari to the circuit court for the County of St. Clair, and the general laws of the State relating to appeals and certiorari from justices' court shall apply to and govern such appeals and certiorari, except that the fees for making a return thereto shall be paid by the clerk to the city treasurer: Provided, That the return to all such appeals shall be made by the justice before whom said cause was tried and determined. It is further provided that no appeal shall be taken from any judgment of said justices in the City of Port Huron except in the following cases:
Proviso.	First, When said justices shall disallow any claim in favor of any plaintiff or defendant in any cause in the said justice court, in whole or in part, to the amount of fifty dollars.
Further proviso.	Second, When said justice shall render a judgment to the amount of fifty dollars, exclusive of costs, in either of which cases the party aggrieved may appeal.
Disallowance of claim.	Third, Appeals may be authorized by the circuit court for the County of St. Clair when the party making the appeal has been prevented from making a defense upon the merits of the case in which said appeal was taken, by circumstances not under his control; and such appeal may also be authorized when justice requires that such appeal shall be authorized; and in all cases where the parties against whom such appeal is sought had appeared in said justice court by an attorney or agent, it will be sufficient to serve such attorney or agent with notice of all subsequent proceedings in said cause, and all orders made therein by said circuit court may be
Judgment amount of.	
When appeal authorized.	

served upon said attorney or agent, and such service shall have the same effect as though made on the party against whom said appeal is taken.

Sec. 18. All fees and costs, except justice's fees and costs, shall be disposed of and paid out as is now or may be provided by the general laws of the State relating to justices, but this act shall in no way affect the fees to which said justice may be entitled on the performance of marriage ceremonies, taking acknowledgments, and administering oaths in matters not connected with any litigation in said justice's court.

Fees and costs and disposition of.

Sec. 19. Said police justice shall receive an annual salary of not less than one thousand dollars and not more than fifteen hundred dollars, and the said assistant police justice shall receive an annual salary of not less than four hundred dollars. Said salary shall be paid monthly by warrants drawn by the controller on the city treasurer: Provided, That the total amount paid for salaries to both said justices shall not exceed the sum of two thousand dollars per annum.

Salary.

Sec. 20. A session of said court shall be held every day, Sundays and legal holidays excepted.

Court to be held, when.

Sec. 21. All fees and costs shall be collected by said clerk, and weekly, or oftener if required by the Common Council of said city, he shall pay over to the city treasurer all moneys received by him belonging to the city, taking duplicate receipts therefor, and filing one of such receipts with his sworn statement of the amounts received with the controller, and he shall not be entitled to receive his monthly wages or salary until his accounts for the preceding month are fully settled and all moneys received by him paid over as aforesaid.

Account of fees and costs collected to be rendered to common council.

Sec. 22. Process may be signed in blank in civil cases and left with said clerk and may be issued by him on proper application or showing, and said clerk is authorized to administer oaths in all cases whenever an oath is required. Said clerk shall also have authority, in the absence of said justice of the peace, to approve such bonds as require approval in said court. Process signed in blank, as aforesaid, shall have the same force

Clerk may issue process, when.

and effect as if filled by said justice: Provided, That no process shall be issued by said clerk until the fees therefor shall have been first paid and the precipe filed as required in section sixteen.

Clerk may
certify appeal
or certiorari.

Sec. 23. In case of appeal or certiorari the said clerk may make and certify a return thereto which shall have the same force and effect as if made and certified to by said justice.

Liability for
justice's fees.

Sec. 24. In all prosecutions before said justice for a violation of any of the general laws of the State, the County of St. Clair shall be liable for justice fees, and other fees and costs, to the same extent that it is liable under the general laws of the State for justice fees, and the clerk shall make out and certify such bill in the name of the justice and present the same to said board, and said board shall allow the same as in other cases of bills from justices, and the amount or the order therefor when received shall be paid over and delivered to the city treasurer.

Duty of clerk.

Court to be
open, when.

Sec. 25. Said police justice shall have his court room open and he shall be in attendance at such court room for the performance of such duties as may be required of him at least from eight-thirty o'clock in the morning until eleven-thirty o'clock and from one-thirty to four-thirty in the afternoon of each day except Sundays and legal holidays; and the said clerk's office shall be open continuously from eight-thirty o'clock a. m. until four-thirty o'clock p. m. of each and every day except Sundays and legal holidays and except during the hours between eleven-thirty a. m. and one p. m.

JUSTICE'S COURT FOR THE CITY OF SAGINAW.

That portion of the charter of the City of Saginaw providing for a justice's court in that city and being a portion of Act No. 465 of the Local Acts of 1897, and Title XV. thereof, as amended by Act No. 419 of the Local Acts of 1901.

The several sections of this title are as follows:

Section 1. There shall be but one justice of the peace in and for the City of Saginaw. The said justice shall have and exercise the same jurisdiction and powers in civil and criminal cases and proceedings, and shall perform the same duties as may be conferred upon or required of justices of the peace by the laws of this State, except as otherwise provided in this act. He shall have such further jurisdiction or powers as are conferred by this act, and in the absence or inability of the recorder acting as police judge, said justice of the peace shall hear and determine all cases pending before said police judge, and shall have the same power to issue process and hear and determine cases as said police judge. If, for any cause, a vacancy shall occur in the office of said justice, the Common Council of said city may order a special election to be held for the election of a justice of said court for the remainder of the term of said justice, which said election, if ordered, shall be conducted in the same manner as the biennial city elections, and the same notice thereof shall be given as for the biennial city elections.

Justice of the peace, term of office, jurisdiction.

Council to order a special election to fill vacancy.

Sec. 2. Said justice of the peace and recorder as police judge shall each have jurisdiction in all civil cases cognizable by a justice of the peace where the plaintiffs, or any of them, or the defendants, or any of them, reside in the County of Saginaw, and in such cases shall have exclusive jurisdiction over any cause or proceedings where both parties to the same, reside in the City of Saginaw at the time of the commencement of the proceedings or cause. No justice of the peace of any township in the County of Saginaw shall have jurisdic-

Jurisdiction.

tion over any civil cause or proceedings where both parties to the proceedings reside in the City of Saginaw at the time of the commencement of said proceedings or cause.

Plaintiff to
begin suit,
where.

Records to be
kept by clerk
of police
court.

Sec. 3. A plaintiff or plaintiffs, non-residents of the County of Saginaw, shall bring action before the justice of the peace or police judge of the City of Saginaw, when the defendant or defendants, or either of them, reside in the City of Saginaw. The files, records and dockets of the justice shall be filed with and kept by the clerk of the police court, and all dockets now in possession of the clerk of the justice court, and all executions to be issued, shall be issued by the justice or police judge whose term of office first expires and who shall be and remain in office, and such justice or police judge shall have power and authority to issue executions upon judgments rendered by the police judge of said city.

Examination
before justice
of the peace.

Sec. 4. In cases of examination of offenders by the justice for offenses committed against the criminal laws of this State, which are not triable before said justice, but before the circuit court, it shall be lawful for such justice to cause an order to be entered in the record of such examination appointing, at the request of the prosecuting attorney or his assistant, if in the judgment of said justice it is in the interest of the public so to do, some competent stenographer to take in shorthand the testimony given upon such examination, which shall be written out in long hand upon the written request of the prosecuting attorney, filed in the cause, and the stenographer so employed shall receive such per diem compensation for the time expended by him in taking such testimony, and such price per folio for writing it out in long hand, when requested by the prosecuting attorney as aforesaid, as shall be fixed by the board of supervisors of Saginaw County, the same to be allowed and paid out of the treasury of said county.

Justice to
have office in
city hall.

Sec. 5. Said justice of the peace shall have his office in the city hall, and the Common Council of the City of Saginaw shall provide the necessary dockets,

books, blanks, stationery, furniture, fuel and lighting for the use of said justice. And the Michigan Reports now in the police judge's office shall be used in common by the police judge and the justice of the peace.

Sec. 6. Said justice of the peace shall be entitled ^{Salary.} to receive from the treasurer of the City of Saginaw an annual salary of twelve hundred dollars, payable monthly, on the certificate of the controller, but no such certificate shall be granted by said controller until the justice asking for the same has made and filed with him his affidavit, setting forth the number of days he has been in actual attendance at his court room ready for business, during the period for which the certificate is intended to cover, and for such time thus spent in attendance to business only, shall he be allowed in said certificate. The recorder acting as police judge and the justice shall each have his court room open and he shall be in attendance to the duties of his office therein from nine o'clock in the morning until twelve o'clock noon, and from half past one o'clock until five o'clock in the afternoon, except on Sundays and legal holidays.

<sup>When court
to be open.</sup>

Sec. 7. It shall be the duty of the clerk of police court to keep a true record of said justice court and police court, with the assistance of the justice of the peace and police judge, and enter all judgments on the dockets under the direction of the justice and police judge rendering the same, in the time and manner provided by law, but after such entry, each judgment shall be signed by the justice or police judge by whom it was rendered. The said clerk shall also file and safely keep all books and papers belonging or appertaining to said court, and enter in a book provided for that purpose a list of names of all jurors that sit on the trial of cases before the said justice or police judge, with names arranged in alphabetical order, together with the date or dates that each juror so sat, with a reference to the page of the docket where the proceedings of the trial are entered. He shall have power generally to administer oaths and take affidavits; he shall also fill up processes and blank forms on request, and make all writs returnable to

<sup>Duty of clerk
in regard to
records, and
powers of.</sup>

the said justice or police judge in regular rotation; and if upon the adjourned or return day of any cause the justice or police judge issuing the process therein should be absent at the time to which the same was adjourned or made returnable, the justice, and police judge, shall have the same jurisdiction to proceed therein as though it had been originally commenced before him, but the record thereof shall be entered in the docket of the justice or police judge issuing the original process. The said clerk shall also receive all costs, fines and dues of every description which are provided by law, in all proceedings in said justice court and police court, and shall pay the said county treasurer of Saginaw County weekly, all such fines collected in the State criminal cases, and shall pay to the treasurer of the City of Saginaw weekly, all such fines, costs and dues by him so received, except fines in State criminal cases, and shall take the receipts of the said treasurer therefor. He shall file said receipts with the city controller of said city, and shall render to said controller weekly, a report of all business transacted by the justice of the peace, including a statement of the receipts and disbursements of his office.

Fees to be
paid to clerk
on commence-
ment of suit.

Proviso.

Sec. 8. Before any action or proceeding, except proceedings in garnishment, replevin, attachment or by civil warrant, shall be commenced in any of said courts, there shall be paid to said clerk by the said party bringing the same, the sum of fifty cents as entry fee, and in actions of replevin, attachment, or those begun by civil warrant, there shall be paid, as aforesaid, the sum of one dollar as entry fee, and at or before the trial of any such action or proceeding shall be commenced, the further sum of one and one-half dollars, but in case of non-suit or discontinuance before the commencement of the trial, only the entry fee shall be payable: Provided, That if there be more than two adjournments after the return day of the principal suits or after joining issue in a garnishee case, there shall be an adjournment fee paid by the party procuring said adjournment, of twenty-five cents for each adjournment, before

he shall be entitled to such adjournment. Proceedings in garnishment shall be treated as a part of the principal cause, and no additional fee shall be required therein, except when an issue of fact shall be joined in respect to the liability of a garnishee or garnishees; in such case a judgment fee of one dollar and one-half shall be paid before such trial shall commence. If any party demand a jury in any civil action in said court, he shall advance the same fees therefor that are or may be provided by the general statutes of the State governing justice courts. The money so paid to said clerk, as herein provided, shall be for the use of said city, and shall be held to be in full of all fees in civil actions, including the issuing of executions and satisfaction of judgment. The sum or sums so paid, including the jury fees, shall be taxed as costs of suit in favor of the party paying the same, if he be the prevailing party in the suit. For all services and proceedings subsequent to the issuing of the execution, or for the purpose of staying proceedings, or removing causes to the appellate court, there shall be paid to the said clerk the fees now or hereafter provided by the general statutes of the State governing the justice courts and returns in appeal cases, and to writs of certiorari shall be made in the manner therein provided. In criminal cases the same costs shall be paid, and in the same manner as in proceedings before justices of the peace in townships, except that the same shall be paid to the said clerk.

In case party demands a jury.

Sec. 9. The fees of said justice of the peace for services hereafter performed in State criminal cases shall belong to the said City of Saginaw, and after being audited by the board of supervisors of Saginaw County, shall be paid to the controller and by him to the treasurer of said City of Saginaw.

Fees of justice to belong to city.

Sec. 10. Said clerk shall on the first Monday of each and every month report in writing to the Common Council of said city the amount of all costs collected in civil cases and State criminal cases during the preceding month in said courts, and shall at the same time report in writing to the board of supervisors of Saginaw County

Clerk to make monthly report to the council.

the amount of fines collected by him in State criminal cases during the preceding month in said courts.

What fees
not to be
affected.

Sec. 11. This act shall in no way affect the fees to which justice of the peace or police judge may be entitled, on the performance of marriage ceremonies, taking acknowledgments and administering oaths in matters not connected with litigation in said courts, nor shall it affect the fees to which sheriffs or constables are entitled, or the present method of paying them.

Service of
writs.

Proviso.

Sec. 12. The services of all writs under this act shall be made in the manner prescribed by the general laws of this State: Provided, That for the service of original writs within said city, no constable or deputy sheriff shall be allowed to charge or demand more than fifty cents as fees for such service.

Circuit court
may prescribe
rules to gov-
ern justice's
court.

How justice
may be
removed.

Sec. 13. The circuit court for the County of Saginaw may prescribe the (rules) rule to govern the practice in the said justices' courts, not inconsistent with the laws of this State. Any justice of the peace of said city may be removed from his said office by the circuit court for the County of Saginaw, for the refusal or neglect to pay over, as required by law, any moneys by him collected for or on account of any fine, penalty, forfeiture or costs, for the unfaithful or inefficient performance of his duties, or for any official misconduct, upon charges specifically preferred against him by the mayor or Common Council, or by any three electors of said city. Said charges, upon being duly verified by oath, shall be filed in said circuit court, and a copy thereof served personally upon said justice of the peace against whom the same are preferred, at least ten days before he is required to be tried thereon and opportunity shall be given him to be heard in his defense; and said court shall have power to make all necessary orders to insure a fair but summary trial thereof, and upon conviction, to enter the proper judgment for suspension or removal from his said office of the said justice so convicted.

Charges to be
filed in the
circuit court.

Defendant
may have
cause trans-
ferred.

Sec. 14. The defendant in any cause begun before either said justice or police judge may have the trial of the case, whether the same be civil or criminal, trans-

ferred from the justice or police judge who issued the process by which said suit was begun to the other justice or police judge by filing with the clerk of said court an affidavit that the defendant has good cause to believe and does believe that the said justice or police judge who issued such process entertains such a prejudice against said defendant that defendant verily believes that he cannot obtain a fair and impartial trial before the justice or police judge that issued such process, at any time before the trial of the case has actually begun; and upon the filing of such affidavit, the justice or police judge who issued such process shall have no further jurisdiction in said cause, but all further proceedings in said cause shall be conducted by such other justice or police judge, in the same form and manner as if such other justice or police judge had issued the original process in said cause.

Sec. 15. The clerks of the justice and police courts now holding office under the charter of the City of Saginaw of eighteen hundred and eighty-nine, shall be and remain in and hold their respective offices, and perform the same duties as required under the charter of the City of Saginaw of eighteen hundred and ninety-five, until the third regular meeting of the Common Council after the annual city election in the year eighteen hundred and ninety-eight, at which time there shall be elected by the Common Council of the City of Saginaw, upon the nomination of the police judge and justice of the peace, a clerk to act for both justice and police courts; said clerk to be known as police clerk.

Clerks to perform same duties as required by charter of 1895.

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