CHAPTER XXX.

Of Amendments.

§ 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; Babcock v. Lipe, 1 Denio, 139.

6—Near v. Van Alstine, 14 Wend., 230; see, Farrand v. Bentley, 6 Mich., 282-4.

7—C. L., § 10268. Attachment affidavits cannot be amended: Freer v. White, 91 Mich., 74; 51 N. W., 807.

8—Schindler v. Milwaukee L. S. & W. Ry. Co., 77 Mich., 136, 154; 43 N. W., 911.

9—Beecher v. Wayne Circuit Judges, 70 Mich., 363; 38 N. W., 322; Portsmouth Sav. Bk. v. Hart, Circuit Judge, 83 Mich., 646; 47 N. W., 595; Smith v. Pinney, 86 Mich., 492; 49 N. W., 305; Smith S. & Co. v. Grosslight, 123 Mich., 87; 81 N. W., 975.

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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.

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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

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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., § 929, 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., 567. 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.

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§ 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.

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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. Prentis, 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. Widdicomb, 114 Mich., 639; 72 N. W., 615.

Subdiv. 13. Bogue v. Prentis, 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,

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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.

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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.

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