The general doctrine of set-off is very clearly set forth by Chancellor WALWORTH in *Holbrook* v. *Receivers of Fire Ins. Co.*, 6 Paige 220.

In view of all the facts in this case, that the officers of the Independent Insurance Company were purchasing these claims, although for other parties; that it was reported to defendants they were purchasing for the company; the fact that they were being purchased in large numbers for 25 per cent., I think the defendants had a right to make the purchases and that by a proper construction of the provisions of the Bankrupt Law they have the right to set them off against the plaintiff's demand.

The defendants having failed to establish their tender, judgment will be rendered for the plaintiffs for the balance of their demand, with interest.

ABSTRACTS OF RECENT AMERICAN DECISIONS.

SUPREME COURT OF MICHIGAN.[1]

SUPREME COURT OF PENNSYLVANIA.[2]

ACTION. See *Check.*

AMENDMENT.

New Rights not to be Acquired by.—Ejectment was brought by two for a whole tract of land; it appearing that one-twentieth was owned by another, an amendment adding his name was proper: *Kaul* v. *Lawrence*, 73 Pa.

Amendments should not be allowed so as to deprive the opposite party of any right: *Id.*

A party will not be allowed by amendment to shift or enlarge his ground by introducing an entirely new cause of action, especially when by reason of the Statute of Limitations, an injury would result to the opposite party: *Id.*

In ejectment a name was added as plaintiff after suit brought; upon request, the court should charge, that if at the time of the amendment the title of the new party was barred by the Statute of Limitations he could not recover: *Id.*

BILLS AND NOTES.

Forged Endorsement—An endorsed note was discounted by a bank for the drawer, at maturity he took it up by a similar note on which the

[1] Abstracts by Henry A. Chaney, Esq.; to be reported in full in 27 or 28 Michigan Rep.

[2] From P. F. Smith, Esq., Reporter; to appear in 73 Pennsylvania State Rep.

endorsements were forged, and destroyed the original note; he took up the second note by another note with forged endorsements. *Held*, that taking the last two notes in renewal did not extinguish the original note: *Ritter* v. *Singmaster*, 73 Pa.

The record of the protesting notary being proved to contain a true copy of the first note, was admissible in evidence: *Id.*

The bank who discounted the first note was entitled to recover, on proof of its destruction and the genuineness of the signatures: *Id.*

Check.

Payment by Bank to Wrong Person.—A check was drawn to Cook, Barnes endorsed Cook's name without his authority and received the money; the bank deducted the check from the drawer's account and settled with him on that basis. *Held*, that Cook could recover the amount of the check from the bank: *Seventh National Bank* v. *Cook*, 73 Pa.

The conduct of the bank was an acceptance and bound it as a certified check would: *Id.*

Constitutional Law.

Taxation.—The court cannot pronounce a tax unconstitutional on the mere ground of injustice and inequality: *Weber* v. *Reinhard*, 73 Pa.

Assessments—Municipal Corporation.—A water company was incorporated in Allentown, and authorized "to lay reasonable assessments in the nature of water-rents on every dwelling in any street, &c., in said city in which and as far as the water-pipes are now laid, or may be laid, and to collect," &c. Under an act for the purpose the city bought the works of the company with their franchises, privileges, &c. *Held*, that although these powers might be unconstitutional when applied to the company, they were not so when transferred to the city, a municipal corporation: *Allentown* v. *Henry*, 73 Pa.

Authorizing the assessment to be made in streets, &c., where pipes were laid, was not imposing a local assessment for a general benefit, but was a local tax for a local benefit: *Id.*

An ordinance by the city laying a tax "upon dwelling-houses *not supplied with hydrants*," was not in accordance with the Act of Assembly, and could not be enforced: *Id.*

Acts of Assembly.—An Act of Assembly must violate some prohibition of the State or Federal Constitution, expressed or clearly implied, before it can be declared unconstitutional: *Butler's Appeal*, 73 Pa.

The legislative power of taxation may be delegated to a municipal corporation, to be exercised within its corporate limits: *Id.*

The legislature may exempt classes of property as well as classes of persons from taxation: *Id.*

An act authorized the councils of Wilkesbarre to impose a tax for police purposes "on bowling-alleys, and billiard-tables, * * * and also auctioneers or other venders of merchandise or articles by outcry, * * * and all other places of business or amusement conducted for profit." This did not authorize a tax on merchants, bankers, brewers, &c.: *Id.*

"Other places of business or amusement," should be of the character of those specifically designated: *Id.*

The ordinance of councils enacted that after notice and failure to pay in ten days, the party should "upon conviction pay a fine not exceeding $100, or imprisonment not exceeding thirty days or both at the discretion of the mayor." This being without authority in the act could not be enforced: *Id.*

Criminal Law.

Notes of Testimony—Dying Declarations.—On the hearing before a justice of the peace of a prisoner charged with murder, the testimony of a witness for the Commonwealth was taken in writing. The witness having died, the notes of his testimony were admissible on the trial: *Brown* v. *Commonwealth*, 73 Pa.

A man was found dead in a road about three hundred yards from his house, with marks of violence. His wife was found in the house the same day, with wounds of which she afterwards died, and there were marks about the house showing that it had been robbed. *Held*, that the dying declarations of the wife were not evidence for the Commonwealth on the trial for the murder of the husband: *Id.*

Damages.

When a vendor fails to comply with his contract, the general rule for the measure of damages is the difference between the contract and market price at the time of the breach: *McHose* v. *Fulmer*, 73 Pa.

When the article cannot be obtained in the market, the measure is the actual loss the vendee sustains: *Id.*

McHose, a manufacturer, contracted for iron from Fulmer, who failed to comply, and McHose could not supply himself in the market. *Held*, that the measure of damage was the loss he sustained by having to use an inferior article in his manufacture, or in not receiving the advance on the contract price upon contracts he was to fill relying on Fulmer's contract: *Id.*

Measure of—Sale.—J. sold stock to T., and agreed that when T. should desire it, he would take it back and repay the price. *Held*, that upon tender of the stock T. might recover the price with interest: *Laubach* v. *Laubach*, 73 Pa.

On a refusal by a vendee to accept goods sold him, the measure of damages is the difference between the contract and the market price at the time of refusal: *Id.*

Where the contract is that the vendee may rescind the contract, the vendor to pay back the price, or the contract is rescinded by the vendee by reason of inherent vice, the measure of damages is the price paid and interest: *Id.*

Ejectment. See *Amendment.*

Husband and Wife. See *Specific Performance.*

Mortgage.

On Foreclosure the Rights of an Adverse Title cannot be adjudicated —Ejectment the proper Remedy.—This was a question as to the ownership of certain mortgaged lands against which foreclosure and sale were decreed, but which seem to have been owned exclusively by other parties

than the mortgagor. Nevertheless the pleadings made no issue upon either the question of the superiority of title, or the forgery of the deed purporting to convey the property from the alleged owner to the mortgagor *Held:*

It is not competent, in a foreclosure suit, whatever the pleadings, to proceed to litigate and settle the right of a party who sets up a legal title, which, if valid, is adverse and paramount to the title of both mortgagor and mortgagee: *Simmons* v. *Emerson et al.*, S. C. Mich.

Section 5154 of the Compiled Laws, declaring that the commissioner's deed in a mortgage sale shall be an entire bar against the mortgagor and mortgagee, does not mean to give the purchaser title by barring the true owner: *Id.*

The purchaser must be left to try the hostile title in ejectment, when a jury may pass upon the question of the forgery of the deed. Neither court, under the above statement, can award a writ of assistance against the holder of the hostile and alleged paramount title: *Id.*

MUNICIPAL CORPORATION. See *Constitutional Law; Street.*

Powers of—Public and Private Character and Rights of—Control of State over.—The Park Commissioners of Detroit were appointed by the State Legislature under Act 277 of 1871, but being officially recognised by the common council of the city, the Supreme Court held them to be city officers: *Attorney-General* v. *Lothrop*, 24 Mich. 235. The authority of the commission extended to the adoption of plans for a park, the selection of a suitable park-site, and the making of conditional contracts for the land, subject to the approval of the common council and a citizens' meeting. Act 224 of 1873 abolished citizens' meetings, and Act 214 added to the powers of the Park Commissioners by authorizing them to "acquire by purchase" lands not exceeding $300,000 in cost, and further declared that the common council should provide money within certain limits to pay for such lands as the commissioners should have purchased, and such as they should deem necessary, but had not been able to purchase, the money to be raised by the issue and sale of city bonds. The only discretion left with the council related to the amount of the bonds, rate of interest thereon, and time of payment. In accordance with this act (No. 214), the commissioners, on August 13th 1873, requested the council to issue bonds not exceeding $300,000 in amount, to pay for lands they had determined on. The council refused, and the park commissioners applied to the Supreme Court for a writ of mandamus to compel them to make the desired issue under the act, which was refused: *Park Commissioners* v. *Common Council*, S. C. Mich.

In all matters of general concern there is no local right to act independent of the state, and the local authorities cannot determine for themselves whether they will contribute through taxation to the support of the state government, or assist when called upon to suppress insurrections, or aid in the enforcement of police laws. On all such subjects, the state may exercise compulsory authority, and may enforce the performance of local duties either by employing local officers for the purpose, or through agents or officers of its own appointment. See *People* v. *Mahaney*, 13 Mich. 487, also, as to the doctrine that in the levy of

taxes for general purposes, municipal bodies cannot demand a right to be consulted, and their consent is immaterial, see *Bay City* v. *State Treasurer*, 23 Mich. 503. Nor have the people a discretionary authority to perform or not the duties which they owe to the commonwealth at large: *Park Commissioners* v. *Common Council*, S. C. Mich.

Although municipal authorities, when used in state government, are under state control, they have objects and purposes peculiarly local, in which the state is legally no more concerned than in the individual and private concerns of its several citizens. The necessity of incorporating cities and villages most distinctly appears from a stand-point of local, rather than of state interest. The two-fold character of municipal organizations, on the one hand for state purposes, and on the other for the benefit of individual corporators, has always been recognised by the Supreme Court of Michigan: *Id.*

In many states it has also been decided that a municipal corporation may justly be held, when receiving its charter, to contract, in consideration of the powers conferred, that its authorities shall perform toward all parties concerned, the several duties imposed upon the corporation, and may be held liable in damages for their failure to perform them: *Id.*

Municipal corporations, considered as communities endowed with peculiar functions for the benefit of their own citizens, have always been recognised as possessing powers and capacities, and as being entitled to exemptions, distinct from those which they possess or can claim as conveniences of state government. These are usually designated as "private" powers, &c., in distinction from the public powers, capacities and interests of the state, and these corporations are thus placed, in this regard, on the footing of private corporations: *Id.*

It is a fundamental principle in Michigan, recognised and perpetuated by express provisions of the Constitution, that the people of every hamlet, town and city in the state are entitled to the benefits of local self-government; the Constitution, however, has not pointed out the precise extent of local powers and capacities, but has left them to be determined in each case by the legislative power of the state, from considerations of general policy, as well as from those which pertain to local benefits and local desires. In conferring these powers, the legislature may give extensive capacity to acquire and hold property, for local purposes, or it may confine the authority within narrow bounds, and what it thus confers, it may enlarge, restrict or take away at pleasure: *Id.*

The authority of the legislature to determine what shall be the extent of a city's capacity to acquire and hold property, is not equivalent to, nor does it contain within itself, the authority to deprive the city of property actually acquired by legislative permission. As to property thus held for its own private purposes, a city is to be regarded as a constituent in state government, and is entitled to the like protection in its property rights as any natural person who is also a constituent. The right of the state as regards such property is one of regulation, not appropriation. The constitutional principle that no person shall be deprived of property without due process of law, applies to artificial as well as to natural persons, and to municipal corporations in their private capacity, as well as to manufacturing and commercial corporations. And when a merely local convenience or need is to be supplied, the state can no more by a process of taxation, take from the individual citizen the money to

purchase it, than it could appropriate it to the state use, if it had already been procured. To this extent the corporate right is an exception to the state's general power of control: *Id.*

NAVIGABLE WATERS.

Extension of Side-Lines into the Water—Rights of Riparian Owners —Dock-Lines.—The side-lines of certain water-lots in Bay City strike the shore at right angles with the middle thread of the river, but at a different angle with the shore, which curves inward somewhat and is nearly parallel with a dock-line established by the city corporation. The question was whether the said side-lines, as they enter the river, should run at right angles with the thread of the stream, or at right angles with the shore at the point of departure. The divergence between the two, within the line permitted for docking, would be about 87 feet.

Held, that side-boundaries of water-lots are to be governed by the course of the stream, and drawn at right angles with the central thread: *Clark* v. *Campau,* 19 Mich. 325. Otherwise, riparian owners might be wholly cut off from the stream and from their docking privileges, by the crossing of boundaries in front of them. There is no distinction in this regard between streams that are subject to easements of passage, and those which are not: *Bay City Gas Light Co.* v. *Industrial Works,* S. C. Mich.

Any use of lands under rivers that is compatible with the full enjoyment of the public easement, belongs with the upland to which it originally appertained, unless sold or granted separately so as to sever it. Under the common law and the law of nations, the rights of riparian owners reached to and were limited by the central thread of the stream, unless, as was usually the case with tide-waters, they terminated at the shore: *Id.*

Even the beds of navigable tide-waters are subject to the disposal of the state laws, saving always any public rights that may exist in them. And even in a stream not susceptible of public use, riparian owners can seldom occupy, by erections, any large portion of its bed, except where it is dammed: *Id.*

The right of docking must not seriously impair the right of navigation, and dock-lines fixed by the city have nothing to do with the determination of boundaries, as the city authorities have no concern with the ownership of property: *Id.*

NEGLIGENCE. See *Street.*

Approach of Railroad Crossing.—The approach by a public road crossing a railroad was particularly dangerous, because the railroad from natural and other obstructions could not be seen nor the whistle heard. The deceased in approaching the railroad did not stop to listen, &c.; in crossing the railroad he was killed by the locomotive. *Held,* that the deceased was guilty of negligence and his family could not recover damages for his death: *Penna. R. R.* v. *Beale,* 73 Pa.

The duty of the traveller to stop is more obligatory when an approaching train cannot be seen, &c., than when it can: *Id.*

If the traveller cannot see the track by *looking* out from his carriage. he should get out and lead his horse: *Id.*

The failure to stop immediately before crossing a railroad track is negligence *per se*, and this is for the court. The rule is unbending: *Id.*

RAILROAD. See *Negligence.*

Powers of Railroad Superintendent.—The main question was whether the General Superintendent of a railroad company has authority by virtue of his office, but without special authority, and in the absence of any showing as to what powers are actually vested in him, to employ a physician to attend an employee who has been injured by the company's locomotive, and to bind the company thereby. CHRISTIANCY, Ch. J., and COOLEY, J., held that he had such authority, and GRAVES and CAMPBELL, JJ., that he had not: *Marquette, Houghton & Ontonagon R. R. Co.* v. *Taft*, S. C. Mich.

RIPARIAN RIGHTS. See *Navigable Waters.*

Right to Drain Lands into Streams.—A riparian owner may drain his own lands through his own lands into an adjoining stream, and may prevent any such interference with the natural flow of the stream, *e. g.* by damming, as will injure his legal privileges: *Treat* v. *Bates*, S. C. Mich.

SLANDER.

Evidence.—It is not competent in slander to prove by the opinion of the witness, the averment that words spoken in the third person, were spoken of the plaintiff: *McCue* v. *Ferguson*, 73 Pa.

When the words are spoken in the second person, to whom they were addressed of a number present, is a question of fact, and if the name of the person is not used it is necessarily dependent upon opinion: *Id.*

In slander the defendant put in a plea of justification and afterwards withdrew it; on a second trial he testified that he had not said that the words were true. The withdrawn plea of justification was not evidence in contradiction of his statement: *Id.*

SPECIFIC PERFORMANCE.

Refusal of Wife to join in Deed.—Specific performance of an agreement to sell real estate will not be decreed against a vendor, a married man, whose wife refuses to join in the conveyance, unless the vendee is willing to pay the full purchase-money and accept the deed without the wife; if not, he must resort to his action at law for damages: *Reisz's Appeal*, 73 Pa.

No abatement which can be made in the price on the ground of the wife's right of dower, will be just to both parties without making a new contract for them: *Id.*

STATUTE. See *Constitutional Law.*

STREET.

A municipal corporation has a right to raise its streets and bridge them in order to improve their usefulness: *Allentown* v. *Kramer*, 73 Pa.

When a municipality exercises its lawful authority derived from the state, it is not liable for collateral injuries from the exercise of its power: *Id.*

For negligence in the construction or repair of public works (when

repair is a duty), the corporation is responsible for special damage caused by its negligence: *Id.*

TAXATION. See *Constitutional Law.*

VENDOR AND PURCHASER. See *Specific Performance.*

Representations—Caveat Emptor—Cloud on Title.—In part payment for a pair of colts, Bristol gave Braidwood a note and mortgage, the latter of which he said was "as good as the wheat," and "as good as the money to any one who did not want to use the money, for it was drawing 10 per cent. interest." And, on being asked, he said there was no mortgage ahead of it that he knew of. About four days afterward, Braidwood, finding a prior mortgage, already foreclosed, and claiming to have been defrauded by Bristol's representations, demanded the colts back and tendered the mortgage and the rest of the payment, all of which Bristol refused. Braidwood brought replevin and obtained judgment. The value of a certain mortgage on land being involved, it was held error to charge that the mere proof of the existence of a prior mortgage describing the same land, and proof of the sheriff's deed of foreclosure, made a *primâ facie* case that there was a prior encumbrance upon the land and threw upon the defendant the burden of proving that it did not affect the title. The burden of proof, on the contrary, was upon the plaintiff throughout, to show that it did affect the title: *Bristol* v. *Braidwood*, S. C. Mich.

Where one who offers a mortgage in payment, remarks on its value, irrespective of the existence of a prior mortgage, his remarks should be taken simply as the expression of his opinion; the vendor, if ordinarily diligent, can judge of the value as well as the vendee, and is therefore not relieved from the application of the principle of *caveat emptor* in regard to it: *Id.*

The maxim *caveat emptor* ought not to be extended, as it has sometimes been, so as to hold that a vendor of real estate, who, for the fraudulent purpose of effecting a sale, makes a positive representation of particular facts respecting the title, which he knows or has good reason to believe false, and which, in fact, turn out false, but which, if true, would make the title good, cannot be held liable in an action for the fraud; and that the vendee cannot have the right to rescind because he might have ascertained from the records the true state of the title, but neglected to do so in reliance on the truth of the vendor's representation of the fact: *Id.*

If one, in order to obtain the property of another, offers him a mortgage on land in payment therefor, and asserts to him as a fact of which he professes to have knowledge, that there is no prior mortgage, when he knows, or has good reason to believe, the contrary, or has no good reason to believe his own assertion, he would be liable as for fraudulent representation, and the other party might rescind the contract and reclaim his property, because he would be entitled to substantially the thing bargained for: *Id.*

Where a mortgage was used in payment, the statement of the vendee that there was no prior mortgage that he knew of, was not a fraudulent representation, but was of a character to fairly put the vendor upon inquiry to ascertain the fact for himself: *Id.*