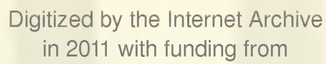

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REPORTS

OF

CASES ARGUED AND DETERMINED

IN

THE SUPREME COURT

OF THE

STATE OF ILLINOIS.

VOL. III.

BY CHARLES GILMAN,

COUNSELOR AT LAW,

VOLUME VIII.

WITH NOTES BY

HON. W. H. UNDERWOOD.

ST. LOUIS:
PUBLISHED BY W. J. GILBERT.
E. B. MYERS, CHICAGO.

Entered according to Act of Congress in the year 1870, by
J. W. GILBERT,
In the Clerk's Office of the District Court of the United States for the Eastern District of Missouri.

Entered according to Act of Congress in the year 1847, by
CHARLES GILMAN,
In the Clerk's Office of the District Court of the District of Illinois.

ECONOMICAL PRINTING CO.,
3rd. & Walnut Sts.
St. Louis,
Mo.

JUSTICES

OF THE

SUPREME COURT OF THE STATE OF ILLINOIS,

DURING THE PERIOD OF THESE REPORTS.

			Date of Resignation.
WILLIAM WILSON, CHIEF JUSTICE.			
SAMUEL D. LOCKWOOD, ASSOCIATE JUSTICE.			
THOMAS C. BROWNE,	"	"	
WALTER B. SCATES,	"	"	January 11, 1847.
SAMUEL H. TREAT,	"	"	
JOHN D. CATON,	"	"	
RICHARD M. YOUNG,	"	"	January 25, 1847.
GUSTAVUS P. KOERNER, (1)	"	"	
NORMAN H. PURPLE, (2)	"	"	
WILLIAM A. DENNING, (3)	"	"	
JESSE B. THOMAS, (4)	"	"	

ATTORNEY GENERAL,
DAVIB B. CAMPBELL. (5)

REPORTER,
CHARLES GILMAN.

CLERK,
EBENEZER PECK.

(1) Appointed by the Governor, April 2, 1845; elected by the General Assembly, December 19, 1846, and commissioned December 21, 1846.
(2) Appointed by the Governor, August 8, 1845; elected by the General Assembly, December 19, 1846. and commissioned December 21, 1846.
(3) Elected by the General Assembly in place of Walter B. Scates, resigned, January 18, 1847, and commissioned January 19, 1847.
(4) Elected by the General Assembly in place of Richard M. Young, resigned, January 26, 1847, and commissioned January 27, 1847.
(5) Elected by the General Assembly, December 19, 1846, in place of James A. McDougall, whose term of office had expired, and commissioned December 21, 1846.

SUPREME COURT, March 1, 1847.

The present clerk of this Court having tendered his resignation to take effect on the 15th day of June next, *It is ordered by the Court* that RIGDON B. SLOCUMB be appointed the clerk of this Court from and after the 15th day of June next.

A true copy from the Records.

Attest; EBENEZER PECK, C. S. C.

CIRCUITS OF THE JUSTICES.

1st Circuit,		-	-	JUSTICE LOCKWOOD.
2d	do.	-	-	" KOERNER.
3d	do.	-	-	" SCATES.
"	"	-	-	" DENNING.
4th	do.	-		CHIEF JUSTICE WILSON.
5th	do.	-	-	JUSTICE PURPLE.
6th	do.	-	-	" BROWNE.
7th	do.	-	-	" YOUNG.
"	"	-	-	" THOMAS.
8th	do	-	-	" TREAT.
9th	do.	-	-	" CATON.

TABLE OF CASES.

Allen v. Belcher....................594
Anderson v. Ryan.................583

Baker, Snow v.....................258
Ballance v. Fortier.................291
———v. Curtenius.................449
Barrett, Howell v.................433
Baxter v. The People.............368
Beames, Buckmaster v............197
Beebe v, Swartwout..............162
Belcher, Allen v...................594
Bellingall v. Duncan 477
Bennett, Scott v..................243
Berry, Turner v...................541
Birch, ex parte....................135
Boone v. Stone.....................537
Bowles v. Rouse...................408
Branigan v. Rose...................123
———v. Gurnee...................130
Browne, People v................. 87
Brown v. Pease.....................191
———, Finch v.....................488
Brunton, Williams v..............600
Brush, Jenkins v.................. 18
Bryant v. Dana......................343
Buckmaster v. Beames............ 1
——— v. ———..................... 97
——— v. Grundy...................626
———, Hailman v..................498
Bulkley, Hoard v..................154
Butler, Longwith v.............32, 74
Campbell, Trumbull v............ 502
———, People v 466
Cantrill v. The People 356
Carpenter v. The People..........147
Chapman v. Shattuck............. 49
Cheever, Lombard v..............469
Chenot v. Lefevre..................637
Clark, Gear v...................... 64
Cooper v. Crosby..................506
Corbin v. Shearer..................482
Corey v. Russell...................366
Cowls v. Cowls 435
Crisman v. The People............351
Crosby, Cooper v. 506
Curry v. Hinman................... 90
Curtenius, Ballance v..............449

Dana, Bryant v.....................343
Davidson, Miller v.................518
Duncan, Bellingall v..............477
Dunlap v. Ennis....................286

Edgar Co. v. Mayo................. 82
Ennis, Dunlap v. 286
Ex parte Birch.....................134

Fell v. Price 186
Ferguson v. Miles..................358
——— v. Sutphen...................547
Finch v. Brown....................488
Fortier, Ballance v................291

Garrett v. Stephenson............261
Gautier, Whitaker v.............443
Gear, Griggs v.................... 2
—— v. Clark..................... 64
——, Harback v................... 18
Granger v. Warrington............299
Greenup v. Stoker................202
Greene, McConnell v..............590
Gregory, Stow v..................575
Griggs v. Gear................... 2
Grundy, Buckmaster v............626
Gurnee, Branigan v...............130

Hadduck, Russell v...............233
Hailman, Semple v................131
—— v. Buckmaster.................498
Harback v. Gear.................. 18
Harber, Lusk v...................158
Hawks v. Lands...................227
Henderson v. Welch...............340
Hinman, Curry v.................. 90
Hoard v. Bulkley.................154
Holt, Purviance v................394
Howell v. Barrett................433

Jenkins v. Brush................. 18
Judy, Williams v.................282

Kenyon v. Sutherland............. 99

Lalor v. Wattles.................225
Lands, Hawks v...................227
Lefevre, Chenot v................639
Lombard v. Cheever...............469
Longwith v. Butler............... 32
—— v. ——........................ 74
Lusk v. Harber...................158

Mason v. Richards................ 25
——, Young v...................... 55
Mayo, Edgar co. v................ 82
McConnell v. Greene..............590
McCluskey v. McNeely.............578
McNeely, McCluskey v.............578
McQuoid v. The People............ 76
Miles, Ferguson v................358
Miller v. Davidson...............518
Monaghan, Roney v................ 85
Moore v. Purple..................149
Munsell v. Temple................ 93

Passfield v. The People..........406
Pate v. ——.......................644
Pearl v. Wellman.................311
Pease, Brown v...................191
People, Sawyer v................. 53
——, v. Percells.................. 59
——, Rainey v..................... 71
——, McQuoid v.................... 76
——, v. Browne.................... 87
——, Carpenter v..................147
——, Sans v..................327, 383
——. Crisman v....................351
——, Cantrill v...................356
——, Baxter v.....................368
——, Passfield v..................406
—— v. Campbell...................466
——, Pate v.......................644
Percells, The People v........... 59
Phelps, Rhines v.................455
Price, Fell v....................186
Purple, Moore v..................149
Purviance v. Holt................394

Rainey v. The People............. 71
Rector v. Rector.................105
Rhines v. Phelps.................455
Richards, Mason v................ 25
Roby, Wilcoxon v.................475
Robinson, Shelburne v............697
Roney v. Monaghan................ 85
Rose, Branigan v.................123
Rouse, Bowles v..................408
Russell v. Hadduck...............233
——, Corey v......................366
Ryan, Anderson v.................583

Sans v. The People..........326, 338
Saunders, Turney v...............239
Sawyer v. The People............. 53
Scott v. Bennett.................243
—— v. Shepherd...................483
Sears v. Sears................... 47
Semple v. Hailman................131

Shaeffer v Weed....................511
Shattuck, Chapman v............. 49
Shearer, Corbin v..................482
Shelburne v. Robinson............597
Shepherd, Scott v..................483
Skiles, Switzer v...................529
Snow v. Baker.......................258
State Bank v. Wilson............... 89
Stevanson, Garrett v...............261
Stoker, Greenup v..................202
Stone, Boone v......................537
Stow v. Gregory 575
Sutherland, Kenyon v............. 99
Sutphen, Ferguson x...............647
Swartwout, Beebe v...............162
Switzer v. Skiles...................529
Sykes, Welch v......................197

Taylor, Wright v.....................193
Temple, Munsell v................. 93
Thompson, Wadsworth v.........423
Thrall, Watson v.....................69
Trumbull v. Campbell.............205
Turney v. Saunders 239
Turner v. Berry 541

Wadsworth v. Thompson.........423
Wallace, Welch v...................490
Warrington, Granger v...........299
Watson v. Thrall 69
Wattles, Lalor v....................225
Weed, Shaeffer v...................511
Welch v. Sykes......................197
——, Henderson v..................340
Welch v. Wallace 490
Wellman, Pearl v...................311
Whitaker v. Gautier...............443
Wilcoxon v. Roby..................475
Williams v. Judy...................282
—— v. Brunton.....................600
Wilson, State Bank v.............. 98
Wright v. Taylor...................163

Young v. Mason 55

DECISIONS

OF

THE SUPREME COURT

OF THE

STATE OF ILLINOIS,

DECEMBER TERM, 1845, AT SPRINGFIELD.

NATHANIEL BUCKMASTER, who sues for the use of George W. Denham, plaintiff in error, *v.* MANNING BEAMES *et al.*, defendants in error.

Error to Madison.

In a suit brought by one for the use of another, the defendant filed his affidavit showing the insolvency of the person for whose use the suit was brought, and moved that he be required to give security for costs. *Held*, that as the nominal plaintiff was a citizen of the State, and liaole for the costs, the motion should be denied.

In this case the defendants in error filed an affidavit in the usual form, alleging the insolvency of Denham, the plaintiff in interest, and moved the Court that he be required to give security for costs.

L. Trumbull, for the plaintiff in error.

J. Gillespie, for the defendants in error.

The opinion of the court was delivered by

TREAT, J. An action was instituted in the circuit court in the name of Buckmaster, to the use of Denham, against Beames. Judgment was rendered for the defendant, and the plaintiff prosecuted a writ of error to this court.

The defendant in error now presents an affidavit, showing the insolvency of Denham, and moves that he be required to give security for costs.

We refuse the application. The nominal plaintiff is a citizen of the State, liable for the costs of the case, and, for aught that it shown, fully able to pay them. If so, the defendant is sufficiently indemnified, and further security is unnecessary.

Motion denied.

DAVID R. GRIGGS *et al.*, appellants, *v.* HEZEKIAH H. GEAR, appellee.

Appeal from Jo Daviess.

Bills of review are in the nature of writs of error, filed in the same Court where the decree in the original cause was entered, calling upon the Court to review and reverse the former decree. They are of two kinds, first, for error of law, and secondly, upon newly discovered evidence. (*a*) A bill of review may be brought for error of law, which is apparent upon the face of the decree itself, and no question is raised as to the propriety of the determination of the matters of fact, or the evidence upon which the decree is founded, but it is only upon matters of law arising upon the facts. So it may be brought, by reason of newly discovered evidence, and this evidence must be set forth, and it must be stated, also, that it has arisen since the final decree, or has since come to the knowledge of the party, and that he was guilty of no neglect in not discovering and producing it before. Furthermore, the evidence must not be cumulative, and must be of an important and decisive character, if not conclusive.

A party may bring a bill of review for error apparent, as a matter of right without the leave of the Court; but allowing a bill of review for newly discovered evidence rests in the sound discretion of the Court.

(*a*) Grubb vs. Crane, 4 Scam. R. 153--Post 2 541 ; Evans vs. Clement, 14 Ill. 206; Garrett vs. Moss, 22 Ill. R. 363 ; Gautner, vs. Emerson, 40 Ill. R. 296.

An original bill in the nature of a bill of review may be brought for the purpose of impeaching a decree or fraud. It is a matter of right, and may be filed at any time without the leave of Court, and may be brought for fraud in fact or fraud in law. So, a bill partaking of the two-fold character of a bill of review for errors apparent and of an original bill in the nature of a bill of review to reverse a decree for fraud, may be filed withou the leave of Court.

Before filing a bill for a review, the party who seeks to reverse the former decree, must have performed it; as, if it be for the delivery of possession of land, he must have done so; or, for the payment of money, he must have paid it. If, however, by complying with the decree, he would extinguish a right, as the execution of an acquittance or the like; or if the party show himself absolutely unable to comply with the decree, as, for instance, where he is required to pay a sum of money, and he is insolvent, he may show the facts to the Court and get released from the performance before he files the bill.

In chancery, a party will be afforded relief where his appearance in the suit has been entered without authority, and where the solicitor is unable to indemnify the party for the damages which he must sustain by the unauthorized act; and that, too, whether the solicitor acts under a misapprehension of his duty, or misunderstanding of his authority, or from a fraudulent intent.

After a defendant has demurred to a bill of review, he cannot raise an objection to the right of the complainant to file the bill. To avail himself of such an objection, he should move the Court, on his first appearance, to strike the bill from the files, or to dismiss the suit. (*a*)

Bill in Chancery to review and reverse a former decree, &c., in the Jo Daviess circuit court, filed by the appellants against the appellee. There was a demurrer to the bill, and at the March term 1845, the Hon. Thomas C. Browne presiding, the demurrer was sustained and the bill dismissed at the costs of the complainants, who appealed to this court.

The material portions of the bill appear in the opinion of the court.

J. W. Chickering, for the appellants.

Errors on the face of the record may always be taken advantage of by a bill of review. Story's Eq. Pl. § 403, and cases cited in the notes.

Though a bill of review could not originally be brought until decree performed and costs paid, there are, still, exceptions, and we bring ourselves within those exceptions. Story's Eq. Pl. § 406; 1 Vern, 264, side paging; 2 Johns. ch. R. 491; 3 Barb. & Har. dig. 54, § 104.

The court had no jurisdiction of the person or subject

(*a*) Limitations to Bills of Review, 10 Wheat. U. S. R. 146.

matter of the suit. The solicitors were not authorized to enter the appearance of the party, who had not been brought into court by proper service.

A motion interposed to dissolve an injunction is not an appearance in the suit for any other purposes. 1 Barbour's ch. Pr. 78; 1 Hoffman's ch. Pr. 170.

That an attorney or solicitor has appeared without authority, is good ground to set aside a judgment at law or decree in chancery. Cox v. Nichols, 2 Yeates, 546; Crichfield v. Porter, 3 Hamm. 518; Smith v. Bossard, 2 McCord's ch. R. 409; 3 Barb. & Har. dig. 47, § 17; particularly if the attorney or solicitor is responsible. Denton v. Noyes, 6 Johns. 296; Meacham v. Dudley, 6 Wend. 514; Rust v. Frothingham, Bre. 258. So also, in the case of the negligence, or ill advice of the solicitor. Millspaugh v. McBride, 7 Paige, 509; Tripp v. Vincent, 8 do. 179.

Where there is an adequate remedy at law, courts of equity will grant no relief. 1 Story's Eq. Jur. 620, § 670; 1 Fonblanque's Eq., Book 1 ch. 3, § 3.

Assumpsit lies for the non-performance of an agreement to furnish funds to carry on a copartnership, Collyer on Partnership, B. 2, ch. 2, § 2, (1, 3.); Ib. 2, ch. 3, §1; Venning v. Leckie, 13 East, 7; 8 Mass. 462; Story on Partn.§ 218; Gow on Partn. 70.

After a bill is taken as confessed, the defendant has a right to have notice of all subsequent proceedings. King v. Bryant, 3 Mylne & Craig, 191; Hart v. Small, 4 Paige, 551; 1 Barbour's ch. Pr. 479; Bennett's ch. Pr.

After a defendant has suffered a bill to be taken as confessed, he may be relieved at the discretion of the court. Wooster v. Woodhall, 1 Johns. ch. R. 539; Parker v. Grant, Ib. 630; Beckman v. Peck, 3 do 415.

J. J. Hardin & D. A. Smith, for the appellee.

I. Bills of review are of two kinds:

1. Bills which seek to review or reverse a case for matter apparent on the record. In such cases it is in the nature of a writ of error; and the bill will not be sustained, unless the

error is so apparent that the case would be reversed if a writ of error had been prosecuted. Story's Eq. Pl. 322, 324; 2 Maddock's Ch. 536–8; 2 Smith's Ch. Pr. 48, 50, 53; Story's Eq. Pl. § § 403, 404, 405, 407; and,

2. Bills which ask for review on account of newly discovered testimony, applicable to the issue in the case when tried. Nor will it avail, or be permitted to allege new testimony not applicable to the issue tried. 2 Mad. Ch. 536; 2 Johns. Ch. R. 488; 3 do. 124; 2 Smith's Ch. Pr. 59; Story's Eq. Pl. § 412; 3 Barb. &. Har. Dig. § 27; 2 Har. & Johns. 230.

II. This bill must be treated as a bill filed for error apparent on the record.

1. It so states in the body of the bill;

2. It was filed without any leave first asked or had. This is a right in bills of review for error apparent. 2 Smith's Ch. Pr. 53, and cases cited; and,

3. It assigns various alleged errors in the case sought to be reviewed.

Reasons why this is not a bill of review, alleging new facts:

1. No leave to file bill was asked. A bill alleging new facts can only be filed after leave is first asked and obtained. Story's Eq. Pl. § § 412, 413; 2 Mad. Ch. 538; 1 Peters, Dig. 367, § § 17, 18, 19; 2 Smith's Ch. Pr. 56–7–8; 2 Vesey, 571;

2. No affidavit was made by complainants to the truth of he bill. If complainants rely on newly discovered testimony, it is certainly requisite that they should state these facts under oath, and not be permitted to open a decree by the irresponsible allegations of counsel. Story's Eq. Pl. § 412; 3 Paige, 206; and,

3. The facts alleged to be new, are: 1. That Cowles & Krum had no right to enter their appearance in the case; and 2, That they were not partners with Gear, and have a good defence to the suit, if they get another hearing with new proofs.

Whether Cowles & Krum were their authorized attorneys was not in issue in the trial of the case, therefore it is

not pertinent to the case, nor examinable by bill of review. May v. Armstrong, 3 Marsh. 263; Talbot v. McGee, 4 Monroe, 377; Osborn v. United States Bank, 5 Peters' Cond. R. 741.

As to their allegation that they were not partners with Gear; this was in issue. But no new fact is alleged which was not known to appellants at the time of the trial.

III. There are various reasons why the demurrer should have been sustained, owing to imperfections in complainants' bill of review:

1. The decree was for the payment of $36,208.02 by complainants to Gear. This has not been paid. Now the authorities are explicit that "the decree must be complied with before a bill of review can be sustained." Story's Eq. Pl. § 406; 2 Smith's Ch. Pr. 54–5–6; 2 Johns. Ch. R. 488; 3 do. 124;

2 "If the party is unable to perform the decree, he must move for an order to stay what is proper to be stayed, and should swear to his inability." 2 Smith's Ch. Pr. 54–5; Mellish v. Williams, 1 Vernon, 117;

3. Decree was that appellants should pay the costs, which has not been done. "If costs have been decreed in the original cause, they should be paid before the bill of review is filed." 2 Smith's Ch. Pr. 54–5;

4. If appellants seek for review on allegation of newly discovered facts, still their bill is defective, and cannot be sustained. If this bill was an application to the court for leave, it was addressed to the discretion of the court Story's Eq. Pl. § 412;

5. Neither a bill of review nor a writ error will lie for any exercise of discretion in the court. Story's Eq. Pl. § 417; 2 Madd. Ch. 538; 2 Duer's Pr. 474; Graham's Pr. 958: Whiting v. U. S. Bank, 13 Peters, 15; and,

6. The bill should have stated all the facts constituting the defence of appellants. This is not done, but it is alleged that they have prepared answers which they wish to file in the case sought to be reviewed. These answer are not copied, nor is there any evidence that they were ever per-

sented to the court. The new facts should also have been sworn to. 1 Peters' Dig. 366, §§ 7, 13.

IV. The first paragraph of appellants' abstracts states, this is in part a bill of review for errors apparent on the record, and in part an original bill to review, vacate and reverse a former decree upon matters dehors the record, and for fraud in procuring the said decree.

1. Now there cannot be any such amalgamation of bills; and "a plaintiff cannot put his bill in the alternative as a bill of review, or if the court shall think it not so, then as a bill of revivor and supplement." 2 Smith's ch. Pr. 53; 17 Vesey, 177; and,

2. "A supplemental bill in the nature of a bill of review can only be filed on leave first granted by the court. 2 Smith's ch. Pr. 63, 64;; Story's Eq. Pl. § 422.

The allegation of fraud is not sustained by any thing in the bill, record, or affidavits.

V. "The usual defence to a bill of review is a demurrer." 2 Smith's ch. Pr. 55–6; Cooper's Pl. 215; 3 Paige, 206.

If demurrer is sustained, it has all the effect of confirming the decree, and terminates the suit. 2 Smith's ch. Pr. 56.

The demurrer was properly sustained.

1. The question for consideration is not, whether the court below properly decided the case on the proofs and merits; but whether there is error apparent in point of law, for which a writ of error would be sustained. Story's Eq. Pl. § 407; 2 Smith's ch. Pr. 51; Mellish v. Williams, 1 Vernon, 166; Filton v. Macclesfield, Ib. 292; 3 Paige, 371; Dougherty v. Morgan's Executors, 6 Monroe, 153; 2 Maddock, 538;

2. If objection exists to the report of the Master, it should have been taken below, and if a report of Master is deficient, the defect cannot be cured upon a bill of review. 2 Maddock, 541; 17 Vesey, 183; 3 Barb. & Har. Dig. § 98;

3. The questions referred to the Master were all proper. Quantum Damnificatus. It is pecurliarly proper for a Master to decide the compensation and damages to be allowed for violating a contract. 2 Story's Eq. Jur. 105–7;

4. All questions of litigation between partners are pe-

culiarly cognisable in Equity. 1 Story's Eq. Jur., 612, 614, 617 ; Story on Partnership, § 222 ;

5. As to laches of appellants. The report was made and decree entered on the 23d day of March, 1844. Appellants admit notice of both in their bill soon after the decree, in April, 1844. They might have applied to the court at its next term to open the decree. R. S. chap. 21, § 18 ; Grubb v. Crane, 4 Scam. 155. Having neglected to do so, it is too late to ask for redress by bill of review.

Chapter 21, § 15, Rev. Stat. gives appellants full remedy if they were not served with process, or properly in court on the rendering of the decree. Two terms of the court intervened before filing bill of review after they ackowledge notice. See Story's Eq. Pl. § 414.

VI. It is not competent or proper for appellants to allege that they had no notice of the suit.

1. An appearance is a waiver of want of service on defendant. 4 Paige, 439 ; 1 Barb. ch. Pr. 81, 82.

2. In bill of review, appellants admit that Cowles & Krum were their attorneys to bring common law suit against Gear. This is a branch of the same suit. Also admitted by Krum in his affidavit.

3. The appearance of an attorney without authority is binding. Breese, 258 ; 6 Johns. 34, 296 ; 1 Pick. 461–2 ; Graham's Pr. 44 ; 7 Pick. 137–8 ; 4 Monroe, 377 ; 3 Yerger, 408 ; 1 U. S. Dig. 328, § § 70 72, 73, 81, 84, 90.

4. A defendant cannot plead [after an appearance entered by an attorney] that he was not served with process. 1 Peters' C. C. R., cited in 1 Peters' Dig., 290.

5. Defendant's appearance may be entered by his solicitor. 1 Smith's ch. Pr. 158.

6. An attorney may bring a second suit on a note after being non-suited on his general retainer. 12 Johns. 315 ; Graham's Pr. 46.

7. An attorney may bring a writ of error without consulting his client. 16 Mass. 74.

8. Courts will not grant trials on account of the negligence or inattention of their attorneys. 1 J. J. Marsh. 471.

9. If their was no warrant of attorney, the Statute of

Amendments and Jeofails, section 7, page 49, cures the defect in the decree. 5 Peters' Cond. R. 741.

VII. But the question of the authority of Cowles & Krum to enter appearance of appellants does not and cannot properly come up in this case:

1. If it is a newly discovered fact, yet it is not one pertinent to the issue then tried.

This bill of review being for error apparent, is like a writ of error; consequently, no question can be examined except what appears in the record. On the record Cowles & Krum appear to be solicitors of appellants.

2. The right of an attorney to appear cannot be questioned in the Supreme Court, when it is not questioned in the court below. 3 A. K. Marsh. 263; 5 Peters' Cond. R. 741; 4 Monroe, 377.

3. The proper remedy is, (in case Cowles & Krum were not authorized to appear,) to ask leave of the court to open the decree at the next term. Chancery Act, §18; Grubb v. Crane, 4 Scam. 155.

4. Or to ask leave within three years, under §15, Chancery chapter, by filing affidavits, &c., in support of the prayer of the petition and bill.

The allegation of fraud made in the bill of review, is not sworn to, nor does it appear in any way on the record.

Cowles & Krum had authority to collect the claim of Gear. This is not denied in the affidavits of appellants accompanying the bill of review, but they enter a special plea of not having authorized them to appear in that particular suit. Now, the claim having been entrusted to Cowles & Krum for collection, they were authorized, as attorneys, to bring and defend as many suits as were necessary to prosecute the claim to collection. It was a matter, not a single suit, which was entrusted to them.

J. Butterfield, on the same side.

The court will not extend the practice of filing bills of review. They must be filed by leave of court, unless founded

on errors of law, when they may be pleaded as a matter of right. Story's Eq. Pl. §420.

For cases of petitions for leave to file a bill of review, &c., see 2 Johns. ch. R. 488, and 3 do. 125.

In this case, the bill was filed without the leave of court, and it is a good ground of demurrer.

The court will infer notice of the suit to the party. If the party was aggrieved by an unauthorized appearance of solicitors in his behalf, application should have been made in the court below to review the cause on that ground.

This bill cannot be sustained for the causes set forth therein. The errors must be those of law, not because the decree was contrary to proof, &c. 2 Madd. ch. 537.

A. Lincoln, for the appellants, replied at length to the arguments of the counsel for the appellee.

The opinion of the court was delivered by

Caton, J. In the first place, it is necessary to ascertain the nature and character of this bill, in order to understand by what principles we shall be governed in the determination of the several questions which have been raised by the defendant in support of his demurrer. It is insisted by him that it is purely a bill of review, and must be governed by the rules which are applicable to such bills, while it is insisted by the complainant that although they have in some parts of the proceedings called it a bill of review, yet it is not so, strictly, but partakes partly of the character of a bill of review, and partly of an original bill. Bills of review are in the nature of writs of error, filed in the same court where the decree in the original cause was entered, calling upon the court to review, and reverse the former decree. They are of two characters, first, for error of law and secondly, upon newly discovered evidence.

Firstly, a bill of review may be brought for error of law, which is apparent upon the face of the decree itself. In such a case no question is raised as to the propriety of the determi-

nation of the matters of fact, or the evidence upon which the decree is founded, but it is only upon matters of law as arising upon the facts, which are to be taken as absolutely true, as stated in the decree, that any question can be raised. By decree here, must be understood, not only the final judgment of the court, but the pleadings also, the substance of which, according to the English practice, is recited in the decree. So that in passing upon the errors assigned, in the bill of review, the court will look through the bill, answer, the facts as found, and determined in the original cause, and into the adjudication made thereon.

Secondly, a party may file a bill of review for newly discovered evidence. In such a case the bill must set forth the newly discovered matter, and that it has arisen since the final decree, or has since come to the knowledge of the party, and that he was guilty of no neglect, in not discovering and producing it before. The evidence must not be cumulative, and must be of an important and decisive character, if not conclusive, and most usually consists of documentary evidence. A party may bring a bill of review for error apparent as a matter of right without the leave of the court; but allowing a bill of review for newly discovered evidence, rests in the sound discretion of the court. It is, therefore, necessary to apply to the court for leave to file this bill, which may be refused, although the new facts might change the decree, if the court is of opinion, looking at the whole case, that innocent parties might be injured, or for any other satisfactory reason. Before filing a bill of review, it is necessary that the party should pay the costs of the first cause, and perform the decree, unless the party by performing the decree, would extinguish some right; such as executing a release or the like, or the party is unable, from some cause, to perform the decree, when upon special application, the court may allow him to file a bill of review without complying with the decree. (*a*)

There is another sort of bills for opening and reversing a decree in the same court, very nearly allied to a bill of review, the object of which is to impeach the former decree

(*a*) Horner vs. Zimmerman, 45 Ill. R. 14.

for fraud. This is an original bill in the nature of a bill of review, and is a matter of right, and may be filed at any time without the leave of the court. This bill may be brought for fraud in fact, or fraud in law. [Cooper's Eq. Pl. 96). There are other bills similar in their nature and object; but it is unnecessary to mention them here. It is not unfrequently the case, that one bill partakes of the character of several of these and other bills. Such was the case of Perry v. Phillip,s 17 Ves. 176, where Lord Eldon says: "There is no objection to this bill, as being, on the face of it, a bill of review and supplement, as in some cases, the bill must of necessity be both a bill of review and a bill of revivor, and in some, a bill of supplement also, in addition to these two descriptions." So also of necessity may a bill be filed seeking the reviewal and reversal of a former decree, partaking both of the character of a bill of review for errors apparent, and of an original bill in the nature of a bill of review seeking to reverse a former decree for fraud, both of which may be filed without the leave of the court; as for instance, suppose a bill is filed against several defendants in which a decree is entered, which, as against one of the defendants, there is manifest error on its face, but as against the other defendants, there is no apparent error, but was in truth obtained by fraud. Such, we apprehend, is the true character of this bill, and it remains to be seen whether, as such, it can be sustained.

This original bill on which the decree which is sought to be reversed was entered, avers, that in 1835, the parties entered in to an agreement of copartnership in the lead business at Galena, by the terms of which, Griggs & Weld were to furnish Gear with all the money which he should want, and Gear was to superintend the business at Galena, and ship the lead to Boston, to be sold by Griggs & Weld. From the terms of the agreement, so far as we can learn from the bill, Harback was to do nothing, either by advancing capital or bestowing his personal attention upon the business. He undertook to do nothing, unless what the law would imply from his being named as one of the partners,

that he should share in the profits and loss of the business. The bill avers that Griggs & Weld refused to furnish capital according to the agreement, whereby Gear had suffered damage to more than one hundred thousand dollars. It no where avers that Harback had done anything improper, or refused to do anything that he had agreed to do. It stated that Griggs & Weld had sued Gear for over $13,000 for goods furnished to him by them on account of said copartnership, which suit was sought to be enjoined by that bill. In 1839, without any authority from the defendants in the chancery suit, the attorneys of Griggs & Weld in the suit at law which was enjoined, entered a motion in the chancery cause to dissolve the injunction, which motion was overruled it 1841, and in 1842 a decretal order was entered directing a special Master to take proof of the allegations of the bill, and to ascertain and report the amount of damages to which the complainant was entitled, if any, by reason of the premises, against the defendants or either of them. In 1844, the special Master reported, that by reason of the failure of the defendants to fulfil their part of the agreement, Gear had suffered a loss of $50,000, from which the Master had deducted $13,791.98, the amount of goods furnished by Griggs & Weld to Gear, leaving a balance due him from the defendants of $36,208.02, which report was approved by the court, and the balance thus found decreed to be paid to Gear by all the defendants jointly.

The bill in this cause states the substance of the proceedings in the original cause, and makes an entire copy thereof, an exhibit, and assigns a variety of errors in the former decree, and prays that the same may be reviewed and reversed. To this bill a demurrer was filed, which was sustained by the court, and the bill dismissed, which decision we are now called upon to reverse.

It has been before stated, as a bill of review, we cannot question the truth of the facts upon which the court acted in making up the decree, nor of the mode in which the court below came to the determination of the existence of those facts; but we are only to examine and see if the

questions of law arising on those facts have been properly determined. In doing this, however, we must look at the whole record, and if we find that the court below found any facts to exist and acted upon them, which are not founded upon, or are inconsistent with the statements in the bill, those facts must be rejected, because if the averments in the bill do not warrant the judgment of the court, there is an error on the face of the proceedings, for no proof could legitimately be given to entitle the party to more relief against any of the defendants than the averments in the bill show that he ought to have. The proofs must necessarily be confined within the statements of the bill. Taking, then, all the statements of the bill to have been proved, and still they could not possibly have sustained the decree against Harback. By the complainant's own showing, he never violated the agreement of co-partnership in any way whatever. He was to furnish no money and was to do no act; nor is the least complaint made against him; and yet because Griggs & Weld failed to furnish Gear with the necessary funds as they had agreed, Harback is decreed jointly with Griggs & Weld to pay to Gear $36,208.02 damages. If, in truth, the business of the firm was broken up, and great damages sustained by reason of this default of Griggs & Weld, then was Harback entitled to a share of those damages, instead of being compelled to contribute to their payment. There is no intimation that Harback became obligated to Gear, any more than Gear did to him, for the faithful performance by Griggs & Weld of their part of the agreement. In this respect, then, there is manifest error in the original decree and sufficient to sustain this bill as to Harback, at least, as a bill of review.

This bill shows that no process was ever served upon any of the defendants in the original bill filed by Gear; nor was publication made of the pendency of the suit under the statute; nor were they, in any other manner, brought into court, nor did they ever authorize any solicitor to enter their appearance in that cause; nor was their appearance ever entered in any way in that cause, except that the attorneys of Griggs & Weld, in their suit at law, which

was enjoined by that bill, moved to dissolve that injunction, without ever paying any farther attention to the suit. We are not prepared to say, even if they had been specially retained to make that motion, that that was such an appearance of the defendants, as authorized the court to take jurisdiction and proceed with the cause, without service or notice. Let that be as it may, however, it is certain that the attorneys who made that motion, were not retained by the defendants to appear in that suit at all; but so far from it, the defendants never knew of its existence till after the final decree was entered. It further appears, that those attorneys are irresponsible. Can it be tolerated for a moment, that parties are to be bound by a decree to pay more than $36,000 which is entered up behind their backs, and without even an implied knowledge of the existence of the suit, and without their having any adequate remedy over against any one? Can it be said, that the arm of equity is too short to reach such a flagrant case of injustice as this? Neither the law nor good conscience can tolerate such a conclusion. We cannot consent to attach such a sanctity to the character and conduct of a solicitor, that he may bind strangers without their privity or consent in proceedings which may be utterly ruinous to them, and without their being able to respond for the damages which they may occasion, no matter how honest may be their motives. If the fortunes of all our citizens are held by so frail a tenure as this,—if they may be utterly ruined without redress, either by the carelessness, the ignorance, or the dishonesty of every one who may get a license to practice law in a country where there are so many facilities for obtaining a license as in this, it is quite time that every one should know it. Here, we have not been in the practice of requiring a written authority to allow a solicitor to enter the appearance of defendants in chancery, and we are bound to afford the party relief where his appearance has been entered without authority, and where the solicitor is unable to indemnify the party for the damages which he must sustain by the unauthorised act, and that too whether the solicitor act under a misapprehension of his duty, a misunderstanding

of his authority, or from a fraudulent intent. To the defendant it is the same thing. To him it is no difference, whether he is ruined by the mistaken notion of one whom he has never authorized to appear for him, or by the appearance of one who desires to injure him, and does it for that purpose alone. In the former case, there is not that moral turpitude, which is manifest in the later, yet the mischief in the particular case is precisely the same. In the former case, it is a fraud in law, while in the latter it is fraud in fact; and in either case, especially if the solicitors be irresponsibile as in this case, it is sufficient ground to open the decree and let the parties into a defence; and we should be inclined to adopt the same rule, even if the solicitors were not insolvent, and turn the complainant in the original suit over to the solicitor, if he had sustained damage by his unauthorized interference. (*a*)In this case, there is no pretence of any improper motive on the part of the attorneys who entered the motion to dissolve the injunction; nor will we now say that they transcended their duty as attorneys in the suit at law, in making the effort to get it reviewed from the injunction, that they might proceed with its prosecution; but if they did not, then they acted as attorneys in the suit at law, and not as solicitors in the suit in chaucery. They were employed by Griggs & Weld alone to collect a debt from Gear of over $13,000, and not to subject Griggs, Wend and Harback to a decree of over $36,000 against them. If the entry of that motion was not an appearence for the defendants, then the decree was manifestly wrong for want of jurisdiction of the persons of the defendants. If it was an appearance, then it was without authority, and, as to them was a fraud in law, and entitles them to relief.

We have already shown that this bill is of a character which does not require the consent of the court to bring the suit before the bill is filed. It has been already stated that before filing a bill of review, the party who seeks to reverse the former decree must have performed it. As, if it be for the delivery of the possession of land, he must have done so; or for the payment of money, he must have paid it. If, however by complying with the decree he would extinguish a right,

(*a*) Dana vs. Adams, 13 Ill. R. 694; Frazier vs. Rosor, 23 Ill. R. 89.

as the execution of an acquittance, or the like; or if the party shows himself absolutely unable to comply with the decree, as for instance, where he is required to pay a sum of money and he is insolvent, he may show the facts to the court, and get relieved from the performance before he files the bill. In this case it does not appear that the parties have performed the decree, nor was previous leave given to file this bill without performance, although the complainants aver in this bill their inability to perform; yet, if the defendant wished to raise that objection to the right of the complainants to file this bill, he should have moved the court below, upon his first appearance, to have stricken the bill from the files, or to have dismissed the suit, and not went on and treated it as if it were regularly filed. By demurring to it he admits that it is properly in court, and only objects that the statements in the bill show no ground for relief. The performance of the decree is not necessary to the jurisdiction of the court, but was merely a personal right, which the defendant might have insisted upon, and which he should have urged at a proper time. He has chosen, however, to rely upon the insufficiency of the case as presented by the bill, and having consented to enter upon the merits of the controversy, he must abide the result.

A question was made, upon the argument, of the propriety of the proceedings before the Master; and such is one of the errors assigned in this bill, but the propriety of his practice is not the subject of review in this mode. Upon the report of the Master, the court below found the existence of certain facts upon which it pronounced its decree, and we cannot now inquire whether it decided properly in the ascertainment of these facts; but we can only see if it pronounced the law properly upon the facts which were presented in the complainant's bill, and thus found.

The decree of the court below, sustaining the demurrer and dismissing the bill, must be reversed, and the cause remanded for further proceedings, each party to pay one half of the costs of the appeal.

Decree reversed.

NATHANIEL R. HARBACK, impleaded with David R. Griggs and Aaron D. Weld, plaintiff in error, v. HEZEKIAH H. GEAR, defendant in error.

Error to Jo Daviess.

PER CURIAM. This is the same case as the one just decided, of Griggs, Weld and Harback v. Gear, and the same judgment will be entered as in that. That case was brought up by appeal, and this is a similar case brought up by Harback on writ of error, he not having been a party to the appeal.

Decree reversed.

ALEXANDER M. JENKINS, appellant, v. DANIEL H. BRUSH, appellee.

Appeal from Jackson.

Upon a plea of payment in an action of assumpsit, the jury rendered a verdic for the defendant, there being mutual accounts between the parties. The plaintiff moved for a new trial, which motion was overruled, and was assigned for error: Held, on a review of the whole evidence, that the same was competent, and in itself sufficient to establish the fact of payment, and being uncontradicted, the motion for a new trial was properly overruled.

It is the privilege of a jury to take into consideration all the circumstances disclosed in the trial of a cause, many of which rarely find their way into the record as presented in an appellate Court. (*a*)

ASSUMPSIT in the Jackson circuit, court brought by the appellant against the appellee, and heard before the Hon. Walter B. Scates and a jury, at the April term, 1845. Verdict for the defendant for $325.60. The plaintiff moved for a new trial, whereupon the defendant entered a remittitur of the sum of $246.35. The court overruled the motion for a

(*a*) Sullivan vs. Dollins, 13 Ill. R. 87 ; Dufield vs. Cross 13 Ill. R. 699, and notes.

new trial, and rendered a judgment in favor of the defendant for $79,25.

L. Trumbull, and J. Lamborn, for the appellant.

D. J. Baker for the appellee.

The opinion of the court was delivered by

KOERNER, J.* Alexander M. Jenkins declared against Daniel H. Brush, in the Jackson Circuit Court, at the May term 1844, in assumpsit, the declaration containing the common money counts and two special counts, the first of which alleges that, on the 3d day of May, 1839, the parties made an agreement in writing, by which the defendant undertook to collect for the plaintiff a considerable amount of notes, accounts, and judgments, in consideration of retaining one half of the amount collected, as a compensation, and to use all due and proper diligence to collect the same. It further alleges that the said defendant had not used such diligence, whereby the plaintiff had lost the benefit of said notes, &c. &c., and that they had become, and were entirely lost to him. The second special count avers that defendant, in consideration of receiving one half of the sums of money to be collected by him, and promised to collect the amount of $2,052.97, and that he had actually collected $2,000.00 thereof, and had refused to pay the one half of said last mentioned sum to said plaintiff.

The defendant pleaded the general issue, payment statute of limitations, set off, and a special plea that he, defendant, had used due diligence, filing an account with his plea of set-off. Issues of fact were joined, and at the April term 1845, the case was submitted to a jury, who found a verdict for defendant for $335.60. A new trial was moved for by plaintiff, for the reason that the verdict was against the evidennce, whereupon the defendant remitted $246.35. The motion was overruled, and judgment rendered for $79.50.

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*WILSON, C. J. and BROWNE, J. did not sit in the case.

The decision of the court below in overruling this motion for a new trial is the only error assigned.

The bill of exceptions, purporting to contain all the evidence in the case, discloses the following state of facts:

The plaintiff produced on the trial, a list of notes, accounts and judgment, in his favor, to which is subjoined the following agreement:

"Brownsville, May 3, 1839.

Be it remembered that on this day, a full and complete settlement has been made between A. M. Jenkins and Daniel H. Brush, of all matters heretofore unsettled between them, except as it relates to the above and foregoing list of notes and accounts, judgments and so on, in favor of, and due A. M. Jenkins, which are given to said Brush to collect; which said Brush agrees he will do, if he can, and when the whole or any part of them are collected, pay one half of the amount so collected, to said Jenkins, the other half he is to have as compensation for his trouble of collecting.

(Signed) A. M. Jenkins,
D. H. Brush."

The plaintiff then produced several witnesses, and a justice's docket, by which he established that at various times, commencing in the year 1839, the defendant had collected about $400.00. It appeared in the course of plaintiff's examination that a good many of the debts included in the list, were not collectable, and also that plaintiff Jenkins had, to a considerable extent, controlled many of the claims by giving direction to officers, and by making his own arrangements and settlements with the debtors. The amount so controlled, settled or received by Jenkins, amounts to something like $300.00.

The defendant, on his part, produced a note due him by plaintiff, amounting, with the interest, to about $45.00; also a certain paper, of which the following is a copy:

"A list of notes selected by Daniel H. Brush, April 19, 1839, to make up the balance of one thousand dollars, which he has advanced to A. M. Jenkins. [Here follows, a list of notes.] For value received of D. H. Brush, I hereby trans-

fer and make over to him the within and annexed list of notes and accounts, amounting to $343.42. May 3, 1839.

(Signed) A. M. Jenkins."

It is proper to remark here, that this assigned list of notes and accounts contains some claims not included in the list which contains the claims handed over to defendant, Brush, for collection, but which the plaintiff had proved to have been collected by Brush, and which claims so proved amount to about $150. This of course reduces the defandant's liability to that amount; $250, then, was all the defendant had collected on Jenkins' account of which Jenkins was intitled to one half viz; $125. This amount is larger than is claimed by plaintiff's counsel, on this account, but in the calculation which I have made of defendants liability, I have charged him with interest from the time of his respective collections up to the commencement of the action.

The defendant also proved a store account of about $40 against plaintiff, which it is contended here was not sufficiently proved, but which, as no objection appears to have been made below to the insufficiency of the proof must be considered as established. He further proved, that many of the claims which he had undertaken to collect were worthless and could not be collected. One of the defendant's witnesses also testified, that some time in the winter of 1843-4, he was shown a paper by the defendant containing a list of the notes and accounts due plaintiff, some items of which were credited and marked as paid, and that defendant asked him to examine the items not credited, and to give him his opinion as to what he thought of their goodness, and that he (witness) then thought, and gave it as his opinion, from the best of his knowledge and information, that about $475 were then still collectable. Defendant also introduced one Marshall, who testified, that about a year ago he had had a conversation with plaintiff on this subject, and that plaintiff told him that defendant had paid him over between $400 and $500 on the demands which he had collected on the halves. That he is under the impression that plaintiff said he had paid over between $400 and $500, and that he does not distinctly recollect whether plaintiff said that it was on one or two ac-

counts. That he understood plaintiff to say defendant had remitted between $400 and $500 to plaintiff. That plaintiff showed him a copy of the list and demands, the same as the one in court, at the same time that he said that defendant had so paid over, and that it was on the notes and accounts, which defendant was to collect on halves, he understood this payment was made. On his cross-examination, said witness stated that he thought Jenkins told him that Brush had collected that much, and that he (Jenkins) would not have known how much defendant had collected if he had not seen his books ; and said witness also stated on said examination, that this might have been the admission respecting the payment of the $400 or $500 of which he had spoken before, and that it was his impression that Jenkins had told him defendant had paid over that much to him.

This is the evidence in substance, and it shows clearly that the plaintiff was not entitled to recover on his first special count. In order to prove it the plaintiff had to show first, the receipts of claims by defendant, and promise to collect them ; second, the neglect of collecting them ; third, that by such neglect, plaintiff lost the benefit thereof. If he failed to show either of these facts, the count was not sustained. It is true, that on the second point, one of the defendant's own witnesses testified that some four years perhaps, after these claims had been placed in defendant's hands for collection, he had examined the items on the list containing a description of said claims, and thought that some $475.00 could be collected. But this does not suffice to charge the defendant with neglect. He may have differed in opinion from witness, or may have had satisfactory reasons for not making an effort to collect, at that time or even previous to it, on the point that these items, to which the witness refers in general, without specifying any had since become worthless ; the failure of proof is a total one. If these notes &c., &c., were kept by defendant for an unreasonably long time without exertions to collect them, the plaintiff had a right to demand them back, and upon refusal, could have pursued the proper remedy against the defendant.

Leaving the plaintiff's claim under the first count out of view, it appears that independent of the proof of payment as testified to by Marshall, plaintiff had shown himself entitled to claim of defendant about $125.00, while defendant had proved about $80.00 against the plaintiff, leaving a small amount in favor of Jenkins. The jury having found $335.00 for defendant it is manifest that they considered the payment to defendant as proved, to the amount of near $400.00, which, when placed to defendant's credit, nearly makes up the sum actually found, and the question now presents itself, were they justified in finding as they did?

I have set out the testimony of Marshall fully. He testifies to an admission of Jenkins. Without intending to impugn the veracity of the witness in the slighest degree, I am free to admit that I attach but very little weight to it. The admission was made a year before the trial. It related to a matter in which the witness was not concerned, and it is hardly necessary to say, how liable we are to misapprehend statements of others not involving our own interests. The evidence of admissions of parties, under circumstances as this was made, is considered by all legal writers and judges, who have had occasion to remark upon it, as the most frail and dangerous. The two statements said to have been made by plaintiff in his conversation with the witness, are moreover little reconcilable, since he could have had no reason to complain of defendant's conduct towards him with regard to these claims, when, in the same breath, he admitted that he had received from $400.00 to 500.00 from him on these claims. But we are not trying the case as a jury, and are not at liberty to substitute our own views for theirs. The only question for us to determine is, was their evidence sufficient to justify the finding, and this question we must answer in the affirmative. The evidence was competent, and in itself sufficient to establish the fact of payment, and it stands uncontradicted. Besides many circumstances may have been disclosed on the trial in varions ways, which, though they transpire, can rarely ever find their way into the record, as it is presented to an appellate court, and which may have

added great weight to the testimony in question. It was the privilege of the jury to let these circumstances enter into their considerations. The court below, who witnessed the trial and heard the living testimony, and had a much better opportunity to judge of the correctness of the verdict than we can possibly have with a barren record before us, has thought proper to refuse the motion for a new trial, and it would be too much for us to say that he erred, the testimony having been competent and sufficient to prove the fact, which the jury have actually found to exist.

The defendant, upon a motion for a new trial having been made, entered a remittitur, reducing his verdict to $79.25, which is near the amount of his account against plaintiff. From this, plaintiff's counsel wish the court to draw the inference, that the defendant himself thought that Marshall's testimony should be disregarded. The entering of a remittitur by the successful party, though it has the appearance of being his voluntary act, is often, in fact, forced upon him. It is very probable also, that there were transactions between the parties, which did not come to light on the trial, which, nevertheless, made it an act of justice in defendant to remit, although the payment was actually made by him. The parties, it appears by the record, had been partners, and their business was evidently much mixed up. Jenkins, while these claims were in defendant's hands for collection, had managed them himself, more or less, and thereby rendered it very difficult for the defendant to account for all these many items, most of which were of small amount, though rising in the whole, upwards of $2000.00. The evidence shows throughout a confused mass of facts and transactions; some relevant, others irrelevant to the issues, both parties having evidently misapprehended their ground, as well of attack as of defence.

If injustice has been inflicted, we cannot discover it from the record, and must presume in favor of the verdict below, found by a jury of the neighborhood, and chosen by the parties themselves. Judgment below must be affirmed, with costs.

Judgment affirmed.

PARIS MASON, plaintiff in error, v. GEORGE M. RICHARDS et al., defendants in error.

Error to Jersey.

A. sold to B. a lot of land, and gave a bond for a deed on the payment of the purchase money, for which the vendee gave a note at twelve months. Three years after the note became due, it was paid, having been merged in a judgment at the suit of the vendor. One year afterwards, the vendee commenced a suit on the bond; obtained a judgment by default, and the damages were assessed. At the term where the default was entered, the vendor tendered a deed to the attorney in the suit, which was not received. The title of the vendor was good but the land had depreciated in value. The vendor filed a bill in chancery to compel the acceptance of the deed and to enjoin the collection of the judgment, but did not bring the bill into court, nor was a copy filed therewith as an exhibit. At the hearing, the injunction previously granted by the Master, was dissolved, and the bill dismissed : Held, that, by obtaining and collecting the judgment against the vendee, and by not appearing and defending the suit on the bond, and by permitting a year to elapse after receiving the purchase money from the vendee before tendering a deed, he had made his election, and considered the contract of sale as still subsisting, and, under all the circumstances, must abide the judgment against him : Held, also, that he should have brought his deed into court to be placed within its control and made subject to its order, to have entitled himself to the relief prayed.

BILL IN CHANCERY for an injunction, &c., in the Jersey Circuit Court, filed by the plaintiff in error against the defendants in error, and heard before the Hon. Samuel D. Lockwood, at the May term 1845, when the injunction, previously granted, was dissolved and the bill dismissed.

The substance of the bill is set forth in the opinion of the court.

The defendants in error not appearing in this court, a default for non-joinder in error was entered against them, and the cause argued ex parte by

W. THOMAS, for the plaintiff in error.

The plaintiff in error assumes the following positions, as applicable to the facts of the case :

1. One of the most frequent occasions on which courts of equity are asked to decree specific performance of con-

tracts, is when the terms for the performance and completion of the contract have not, in point of time, been strictly complied with. 2 Story's Eq. Jur. 85.

2. Courts have been in the habit of relieving where the party, from his own neglect, had suffered a lapse of time, or from other circumstances, could not maintain an action at law. Ibid. 82–4, note 84.

3. Courts of equity frequently decree specific performance, when the action at law has been lost by the default of the party seeking specific performance. Ibid.

4. If there has not been gross negligence, and it is conscientious that the agreement be performed, Courts of equity will interfere. Ibid.

5. Time is not generally deemed, in equity, to be of the essence of the contract, unless the parties have so expressly treated it, or it necssarily follows from the nature and circumstances of the contract. Ibid. 87.

6. Courts of equity will relieve the party vendor by decreeing a specific performance, where he has been unable to comply with the contract, according to the terms of it, from the state of his title at the time, if he comes within a reasonable time, and the defect has been cured. Ibid.

7. Where delay in the performance is occasioned by the act of the vendee, and property has been injured by use, vendee shall be compelled to accept of deed, notwithstanding there has been a judgment upon the bond for breach in not conveying. Cook v. Hendricks, 4 Monroe, 500.

8. Where vendee remains in possession, sustains no material injury, impairs the value of property, or, from the state of the title, the vendor is unable to convey, courts will grant relief. Doss v. Cooper, 2 J. J, Marsh. 412.

9. Cases are numerous in which specific execution will be decreed in favor of vendor ; as where vendee is in possession, and vendor, without any positive fault, has omitted, or, on account of the state of the title, has been unable to comply. Craig v. Martin, 3 do. 54.

10. Upon the question as to time, &c., see Garnett v. Macon, 6 Call, 370 ; Brashear v. Gratz, 6 Wheat. 578 ;

Waters v. Travis, 9 Johns. 466; Moore v. Smedbury, 8 Paige, 607.

In view of the law and facts of the case, the complainant is entitled to relief,

1. Because the contract does not show that the parties intended that time should be considered as of the essence of the contract; and

2. Because the parties have not treated the contract as one in the completion of which time was regarded as of any importance.

3. The vendees were in default upwards of four years.

4. The vendees, by their conduct, have waived all right to insist upon strict performance.

5. The vendees, by not asking for deed, nor prosecuting the bond for deed, acquiesce in the delay of its execution.

6. No injury has resulted to vendees from the default of vendor, and the facts of the case show that they were consenting to the delay.

7. The facts show that the judgment is for twice as much as the lot was worth, when it was paid for, or when the last payment was made.

8. The judgment was for the value of the lot at the time when the purchase money was payable, and deeds should have been executed; whereas, according to the law as well as justice of the case, the judgment should have been for the value of the lot when the last payment was made. The judgment, therefore, is for a penalty.

The opinion of the court was delivered by

Caton, J.* In May, 1836, the defendants purchased of the complainant a lot in the town of Grafton, for $543.50, for which they gave their note at twelve months, and the complainant gave a bond to execute a deed on the payment of the purchase money. The complainant obtained judgment on that note, which was finally satisfied by the defendants in 1840.

* Wilson, C. J., did not sit in this case.

The defendants commenced a suit on their bond for a deed in 1841, and obtained a judgment by default, in 1842, and their damages were assessed at $500.00, and final judgment entered in April, 1842. At the term when the default was taken, the complainant tendered a sufficient deed to the attorney of the defendants, who declined accepting the same. The complainant made no defence to the suit on the bond. The case further shows that, at the time of the sale of the lot, and ever since, the complainant had a good title, and that neither party has been in the actual possession of the lot, or made any improvement thereon, or done any thing to depreciate its value. The lot has however, much depreciated in value since the sale, owing to the general decline in town property. The lot was sold at its fair value, at that time, as other lots were selling. The complainant has been, and now is ready and willing to make a good title. The defendants never demanded a deed, nor did the complainant ever tender one, except as above stated. The above facts appear from the pleadings and an agreed statement of facts. This bill was filed on the 10th day of May, 1842, and prays that the defendants may be decreed to accept a deed of the lot, and for a perpetual injunction against the collection of the judgment obtained on the bond. It does not appear that the complainant brought into court a deed with his bill. At the May term, 1845, a decree was entered, dismissing the bill and dissolving the injunction which had been previously granted by the Master. The complainant has brought the case here by appeal for the purpose of reversing that decree.

Although the defendants neglected to pay the purchase money at the time stipulated, yet by prosecuting them at law, and receiving the amount afterwards, the complainant chose to consider the contract of sale as still subsisting instead of repudiating it, as he, perhaps had a right to do, after the default on the part of the purchaser. On the receipt of the purchase money, the complainant was as much bound to make a deed as if it had been paid when due, even without demand, and failing to do so, he became immediately liable to a prosecution on his bond. By compelling

payment after the day, he waived any advantage which he might have had for the want of punctuality on the part of the purchasers. He could not receive the purchase money and still insist that the purchasers had no legal remedy against him on his bond. He was under the same liability that he would have been had they paid at the day, and failing to make a deed, became liable to an action on the bond. He was accordingly prosecuted, and allowed judgment to go against him by default. He now seeks to deprive the defendants of the fruits of that judgment, without showing that he had any legal defence to that suit, and without showing any pretence of an excuse why he did not apply to a court of chancery for leave to perform his agreement specifically, if the circumstances of the case would have authorized him to do so, before that agreement became merged in the judgment. By that judgment the bond became extinct, and the agreement between the parties was at an end. (*a*) It is not the specific performance of an agreement alone that he now seeks, but he calls upon the court first to resuscitate an agreement which has ceased to exist, and then enforce its specific execution. The agreement on the part of the complainant to make, and of the defendants to recieve a deed, was destroyed by the act of the defendants and the acquiescence of the complainant, and it is asking too much of the court to make an agreement for the parties, and then compel them to abide by and perform it. Had there existed any equitable circumstances which would have induced a court of chancery to have excused him for neglecting to make the deed for a year after he had received the purchase money, and become bound to make it, he should not have slept with supine indifference upon his rights, while he saw his adversaries prosecuting their legal claim, but should have applied to the court without delay, and while the contract was yet in existence, and enjoined them from proceeding to judgment, and compelled them to have accepted a deed. He received the last payment in the fall of 1840, and neglected for a whole year to tender his deed, before he was sued for that default, and then made no attempt to place himself right, by performance, from the commencement of

(*a*) Herrington vs. Hubbard, 1 Scam. R. 573.

the suit in October, 1841 till April, 1842, when judgment was obtained against him without objection. And even then, he contented himself with tendering a deed to the attorney, who was employed to prosecute that suit without going near the defendants at all; without making any excuse for his continued neglect; without making any, even the most formal objection to the judgment, and without making any application to the court for relief. If parties will not attend to their own business, they ought not to call upon the court to relieve them from the consequences of their own negligence, and especially in this most extraordinary way. Here was no misfortune, no unforeseen accident, no surprise, no circumstance beyond the control of the party, no fraud on the part of the defendants, and indeed no excuse of any sorte shown, why that suit was allowed to proceed to judgment without objection, which can authorize the court to interfere and do for the party what he neglected to do for himself. If time was not of the essence of the contract, as has been insisted, we think it is of the judgment, at least. The party cannot be allowed to stand by till he sees what judgment the party can get against him on his bond, and then take his choice, either to convey the land or pay the judgment, as he shall find most to his interest. He cannot be allowed to speculate upon the rights of his adversary in that way. He has made his election to let judgment go against him without objection, and he must now abide by it.

I will not set a limit to the powers of a court of equity by saying that circumstances might not exist which would authorize it to interfere, and grant the kind of relief which is sought by this bill. Indeed, we have been referred to a case where, under extraordinary circumstances, similar relief seems to have been granted; but a short examination of the circumstances of that case will show that it can be of but little avail to the complainant here. It is the case of Cook's Adm'r v. Hendricks, 4 Monroe, 500. There, Cook have covenanted to convey to B. Hendricks an acre of land in six weeks, who immediately took possession, and used it for a brick yard for a year and a half, when he conveyed it to his son R. H., who continued the possession, digging and

moulding brick on it. Nearly a year after that, R. H. received an order, furnished him by Cook, upon the persons who held the legal title, to convey it to him, on which he might have got the title, but which he never presented. R. H., to whom the covenant had been assigned, commenced a suit at law thereon, without having offered to return the order for a deed, without having been disturded in his possession, and after having greatly injured the lot by digging the earth and making brick thereof. Cook obtained title in himself, and tendered a deed to R. H. before a verdict at law. He refused to accept the title, and went on to assess the damages by default. Very promptly thereafter, Cook exhibited the bill and deed, as before tendered, and prayed for relief, which the Court granted. It would be a waste of time to point out the difference between the circumstances of that case and this. Besides, it does not appear that any final judgment was ever entered in the cause. It only appears that the damages were assessed on the judgment by default. But, admitting all that supposition, even, can claim for it, still it but establishes the power of the court to grant such relief under very extraordinary circumstances. None such exist in the case before us.

It was decided by the same court, in the case of Oldam v. Woods, 3 Monroe, 48, that where a party has neglected to make a conveyance of land according to his agreement, and judgment has been obtained at law on the agreement, he cannot get relief in equity, except under very extraordinary circumstances, sufficient to form an exception to the general rule. The same principle had been before established by the same court in the case of Edwards v. Handley, Hardin, 602. Afterwards, however, in the same court, in the case of Woodson's Adm'r v. Scott, a strong doubt seems to have been thrown over the whole doctrine, although the question was not expressly decided. As before stated, we will not say that the court may not have power to grant such relief under some circumstances; but, at least, it should be very sparingly exercised, even under strong circumstances, of which there is an entire absence in this case.

There is another fatal objection to the relief prayer for in this case, and that is, that the complainant has not brought the deed into court with his bill which should always be done. It is necessary in the first place, that the court may see that it is such a deed as the party would have a right to demand; and again, that it may be within the immediate control of the court, to be delivered over to the defendants, that they might have no further trouble in getting it should their judgment be enjoined. Here, no exhibit is made even of a copy of the deed which is said to have been tendered to the attorney of the defendants in the suit at law, and whose business it was, I may remark, to obtain a judgment, and not a deed.

The decree of the court below was proper, and is affirmed with costs.

Decree affirmed.

THOMAS LONGWITH et al., plaintiffs in error, v. THOMAS T. BUTLER, defendant in error.

Error to Scott.

At Common Law, a mortgage vested the legal estate in the mortgagee, liable to be defeated upon the performance of the condition. After default, the legal estate became absolute, but the parties might mitigate the rigor of the rule, by stipulating that the mortgagee, after default, might sell, so as to evolve the real value of the land, and have the debt satisfied and no more. Such a power was a common law power, an appointment, and considering the legal estate all the time in the mortgagee, it may be called a power appendant or annexed to the estate.

A mortgagee under a mortgage containing a clause to sell, may sell the mortgaged premises and convey a good title to the purchaser.

The rule is well established, that every thing done by the parties to a sale calculated to prevent competition, renders such sale void.

Sales of land by the mortgagee, or trustee, under a power to sell, contained in the mortgage, or deed of trust, being much liable to abuse, will be most jealously watched by Courts of Equity, and, upon the slightest proof of unfair conduct, or of a departure from the power, they will instantly be set aside.

BILL IN CHANCERY for relief, &c., in the Scott Circuit Court, filed by the defendant in error against the plaintiffs in error. The cause was heard before the Hon. Samuel D.

Lockwood, at the October term, 1845, when a decree was entered in favor of the complainant below.

The allegations of the bill and the answers, the depositions of the witnesses, and the decree are substantially set forth in the opinion of court.

The cause was submitted in this court upon the written arguments of counsel.

J. J. HARDIN & D. A. SMITH, for the plaintiffs in error.

M. MCCONNELL, for the defendant in error.

The opinion of the court was delivered by

KOERNER, J. Butler, complainant below, filed a bill in chancery in the Scott circuit court against the appellants, setting forth in substance, that on the 24th day of September, 1841, the said Butler and wife executed a mortgage to Gilham, M'Dow, Hitt and Cline, four of the defendants, on certain tracts of land, to secure the said mortgagees in their liability as his securities, for the payment of a certain sum of money, a part of which was owing to one Morgan, and another to the Bank of Illinois. The mortgage contained a clause, that in case of Butler's failure to pay the said sums of money when due, the said mortgagees might sell from time to time, and on certain terms, so much of the real estate mortgaged, as should be necessary to raise the amount due upon said claims against Butler, at public auction, and might execute deeds of conveyance, with covenants of warranty to purchaser and that said mortgagees might proceed by such sale or sales to reimburse themselves for all losses sustained by them, by the non-performance of the condition of the mortgage mentioned. The bill further avers that Butler made default in paying said debts, and that said mortgagees, being called on for payment, immediately sought to raise the money by sale, and did on the 26th day of Nov., 1842, without an application to a court, and in violation of law, actually sell said land. That about this time, Butler's indebtedness to Morgan amounted to $865.00, and his indebtedness to the

Bank of Illinois nominally to $1,784.00, though owing to the depreciation of the paper of said Bank, it might have been discharged with about $600.00 in good money; that in selling said land, they did also fail to pursue the power granted to them, and grossly departed therefrom; that at the said sale, Thomas Longwith, one of defendants, purchased a large tract of the lands mortgaged, for $1,515.00; a part of which however, he bought for the benefit of the defendants William Sharoon and John Morrison, according to a secret understanding with said last named defendants. That the mortgagees immediately executed an absolute deed to said Longwith, and put him in possession, and that Longwith executed deeds to Sharoon and Morrison for their respective shares of the purchase, and put them in possession. That one Martin Funk, another of the defendants, at the said sale, bought another tract of said mortgaged land, and obtained a deed and possession from the mortgagees; that M'Dow, one of the mortgagees, became the purchaser of two other tracts of land, and that all these tracts of land were sold greatly below their value, and for and inadequate price. The bill charges that the mortgagees and the purchasers had conspired to sacrifice said land by various fraudulent devices, as well in the manner of the sale, as by preventing fair competition, and states the facts in detail, supporting this allegation. Many other facts and transactions are set out on the bill, which it is unnecessary to state here, as they, under the view which the court has taken of the case, can have no bearing upon its decision.

The bill waives the oaths of all the defendants, except as to Martin Funk, and prays to set aside all these sales as utterly void, and that an account be taken of the rents and profits. Complainant alleges that he does not know how much these mortgagees have actually paid for him, or in fact, that they have paid any thing, as they have not surrendered to him the evidences of his indebtedness, and he offers to pay the full amount of money actually paid by them, and legal interest, whenever that amount is fairly ascertained by the aking of an account, and also asks for general relief.

The answer of the defendants, while it admits the indebtedness of complainant, the execution of the mortgage for the purposes mentioned in the bill, their sale of said lands without application to a court of chancery, the making of deeds to purchasers, denies that they sold without authority of law, or that they departed from the terms of sale, as provided for in the mortgage, in the slightest degree. It denies that they acted unfairly and fraudulently in the premises in any manner whatever. They insist in their answer, that Illinois bank paper was not so much depreciated as complainant alleges, and render an account of payments made by them, and for expenses, &c., by which they make it appear that the proceeds of said sale were no more than sufficient to reimburse them, and, in fact, left complainant in their debt to a small amount. The purchasers all insist that they are bona fide purchasers, and as such ask the protection of the court in the premises. To this answer there was a replication, and numerous depositions were taken by the complainant.

At the October term 1845, the court rendered a decree which, by agreement of parties, is to be considered made pro forma, setting aside and annulling all the said sales, and directing the purchaser to deliver possession of all said lands to complainant within forty days after service of copy of the decree ; that the Master in Chancery take an account of the rent and profits of said lands, and also of permanent improvements made thereon by the purchasers, (except as to the lands sold to Robert McDow,) from the day of their taking possession until surrendered, Also, that the said Master take an account of what is due on said mortgage, and of what mortgagees have paid for said complainant, and in what funds, and their value.

By agreement of parties, appearing on the record, this decree is considered final in the court below as to the rights of the parties under said sale, and so far final in all other respects as to enable the parties to take an appeal ; and it is also agreed that this court shall render such decree in this case, if the court shall be of opinion that said decree is in any way defective, as the circuit court ought to have rendered.

The defendants assign for error that said decree is erroneous in euery particular, and that the bill ought to have been dismissed for want of proof.

The first question presented by the record, as to the mortgagegee's right to sell under a power of sale, without the aid of a Court of Chancery, is one of considerable importance, and about which much diversity of opinion prevails amongst the profession in our State. For this reason, it becomes necessary to examine it with care, and to give it due deliberation. At common law, a mortgage vested the legal estate in the mortgagee, liable to be defeated upon performance of the condition. After default, the legal estate became absolute. There is no question that, by the consent of both the mortgagor and mortgagee, the harshness of this rule might be mitigated. The parties were at liberty to prevent the absolute foreclosure, by stipulating that the mortgagee, after default, might sell, so as to evolve the real value of the land and have the debt satisfied, and no more. Such a power was a common law power, an appointment, and considering the legal estate all the time in the mortgagee, it may be called a power appendant or annexed to the estate. 2 Cowen, 236. It seems clear, then that the power in question would have been a valid one at common law.

Equity has, however, obtained jurisdiction over the subject of mortgages, and has, in a spirit of humanity and justice, essentially modified the common law principles, and, as some eminent writers have said, has achieved a noble triumph over technical rules. 4 Kent, 158 ; 2 Story, § 1014. It will be conceded by all, who have any knowledge of the Roman law, that the equitable doctrines now universally prevailing in regard to mortgages, have been derived from that source. The civil law, in this as in many other instances, has been the great armory from which the Courts of equity in England have supplied themselves with the most efficient weapons to ward off the severities of the stern and unrelenting common law.

Should we, therefore, be able to ascertain what the rights of the mortgagee were, as is established by the civil

law, we will not find it difficult to satisfy ourselves what they were under the rules of Equity as laid down by the English courts.

Default of payment at the stipulated time worked no forfeiture of the mortgage or pledge by the civil law; but the creditor obtained a right to reimburse himself by sale, and ordinarily he might sell without any judicial sanction, after giving proper notice to the debtor of his intention, whether the authority to sell were expressly given to him or not. 2 Story's Eq. §1009, and the numerous authorities there cited. In fact, courts were generally applied to in such cases only where the sale of the mortgaged estate or personal property could not be effected, for the purpose of obtaining a decreta order to vest the property absolutely in the mortgagee. 2 Story's Eq. §1024. That an authority to sell after default gave to the mortgagee complete power to sell, is a principle of the civil law which has never been disputed, and there is no reason to believe that the English courts of Equity should have refused to adopt it, while they received the whole equitable doctrine on mortgages without essential modification, particularly when we reflect that it adapted itself so well to the common law principles of power and appointments.

The question has been hitherto considered independant of authorities, and merely with reference to general principles; let us now discuss it as it presents itself by adjudicated cases and the observations of approved legal writers.

Mr. Powell, in his treatise on mortgages, vol. 1, page 10, seems to intimate a doubt with regard to the validity of such powers, on the authority of a decision in Croft v. Powell Comy. 603. But the third volume of his work containing precedents of mortgages, he gives a form of one containing such a power, and his commentator, Mr. Coventry, himself the author of a work on mortgage precedents, remarks, in a note, that the case of Croft v. Powell does not support the doubt expressed in the text. Chancellor Kent also reviews this case, and thinks it rather an authority in favor of the validity of such powers. 4 Kent 146, note c. Coventry

considers the point as settled, and relies on 18 Vesey, 344; 1 Barn. & Cress. 364. Lord Eldon, in a comparatively late case, Robert v. Boson, ch. R. 1825, expressed some doubt in regard to the question, but it appears that he answered the question, which he then made, very satisfactorily himself. He says, in that case: "Here the mortgagee is himself made the trustee. It would have been more prudent for him not to have taken upon himself that character. But it is too much to say, that if one party has so much confidence in the other as to accede to such an arrangement, this court is, for that reason, to impeach the transaction." See 6 Madd. ch. R. 15; 2 Sim. & Stu. 323.

The legislature of New York, as early as 1788, passed a law regulating sales made by mortgagees under such powers, upon the supposition that they were recognized as valid, and the courts there have ever since considered such powers as perfectly proper. In an important case in the court of Errors in New York, Wilson v. Troup, 2 Cowen, 227, Woodworth, Justice, remarked, that the insertion of the clause to sell does not confer on the mortgagee a greater security than is intended in a simple mortgage. It applies solely to the remedy, and does not impair any right of the mortgagor. Chief Justice Savage, in speaking of the Statute of New York, observes, that it supposed such a power, and only undertook to gaurd its exercise properly. Other authorities, sustaining the power to sell, are to be found in 1 Caines' Cases, E. 1, 4 Johns. ch. R. 37; 7 do. 45.

In Kentucky, the court, on one occasion, waived the decision of the question, 3 Littell, 404; on another, leaves a strong inference to be drawn that such a power is valid, and may be executed by the mortgagee according to the stipulation. 7 Monroe, 587. Justice Story, in his treatise on Equity, vol. 2, § 1027, decides in favor of the validity of such powers, and concludes his remarks upon the point by saying: "And, although Lord Eldon at first intimated an opinion unfavorable to such power, as dangerous, it is now firmly established." Chancellor Kent,(4 Kent's Com. 146,] lays

down the same doctrine very positively, upon a review of many authorities, and seems to leave no doubt upon the point.

In the case of Bronson v. Kinzie, 1 Howard 321, the Supreme court of the United States had a mortgage similar to the present one under consideration, and the observations of the court shows clearly that no doubt was entertained as to the validity of such an instrument. Chief Justice Taney says (page 327,) "At the time this deed was executed, the right to sell free and discharged of the equitable estate of, the mortgagor existed in the State (Illinois) without the aid of the express covenant that the mortgagee might sell, and the only difference between the right annexed by law and that given by the covenant, consists in this, that in the former case the right of sale must be exercised under the direction of the court of chancery, upon such terms as it shall prescribe, and the sale made by an agent of the court; in the latter, the sale is to be made by the party himself. But even under this covenant, the sale made by the party is so far subject to the supervision of the court, that it will be set aside, and a new one ordered, if reasonable notice is not given, or the proceedings be regarded in any respect as contrary to equity and justice.

This court is satisfied, from an examination of the general principles applicable to the point in question, as also from these weighty authorites, none being produced to show that any court has decided to the contrary, that a mortgagee under a mortgage containing a clause to sell, may sell the mortgaged premises and convey a good title to the purchaser, though it must be admitted that legislative enactments prescribing uniform and proper regulations in the manner and mode of such sales, with a view to protect the interests of embarrassed debtors, would be extremely salutary, as well in cases of mortgages as deeds of trust.

It is insisted by the complainant's counsel, that this mortgage having been executed since the Act of our legislature, passed Feb. 19, 1841, in regard to judgments and executions, more generally known under the title of stay or property

law, in which it is provided that the mortgagor, or his judgment creditors, shall have the right of redemption for twelve and fifteen months respectively, after the sale of the mortgaged premises, in all cases, whether they have been sold under an execution or under a decree in chancery. The mortgagees in this case had no right to sell absolutely, so as to evade the operation of this law. Without deciding whether the language of this law would include sales made under a power to sell, or is confined to judicial sales it is deemed a sufficient answer to this proposition to say, that this bill is not filed by the complainant, or any of his judgment creditors, for the purpose of redeeming the said lands, and that if they were seeking relief for that purpose, they have suffered the time to expire within which, according to the construction which complainant puts upon the said law, he or they were entitled to redeem. The bill prays to annul the sales, as having been made without authority and in fraud, while a bill to redeem would necessarily have to admit the validity of the transaction.

Having disposed of this branch of the case, the next question which arises is one in relation to the actual fraud charged to have been committed by all the defendants.

The testimony is very voluminous, and cannot be set out in detail without swelling this opinion beyond all reasonable length. Substantially it amounts to this ; that defendant Longwith, the principal purchaser, offered to one Richard S. Walker, who had an intention of bidding for the land, $200.00 if he would not bid ; that shortly before the sale, however, he expressed an indifference as to Walker's bidding or not bidding. That Walker did not attend the sale, pricipally for want of funds, and that the promise of Longwith did not influence him in his course. That one Marshall Smith was present at the sale, that he had a claim on complainant, Butler, and was anxious that the land should sell for enough to pay this debt also, and that he communicated his intention to Longwith ; that Longwith then promised to pay said debt in the presence of the mortgagees,

if he and defendants Sharoon and Morrison would not bid. That said Marshall Smith was desirous to bid himself, and engaged in getting others to bid, but desisted after Longwith's promise. Said Smith states in his deposition, that he would not have been able to pay all if he had bid, but that his principal object was to get one Stephenson to bid, and that after Longwith had promised to pay the debt, he took no further interest in the matter. He states, also, that Longwith told him that he had offered Walker $200.00 not to attend the sale, and that he does not know, that Longwith knew he had not the money to pay for said land. John B. Campbell testifies, that such an arrangement was made between Longwith and M. Smith, as stated by Smith, in the presence of the mortgagees. Smith was not to bid for the land, and Longwith, on his part, agreed to pay the debt Butler owed Smith. Fleming Stephenson swears, that he attended the sale for the purpose of bidding for complainant's benefit ; that he was told before the sale, that the price would have to be paid down, and in good money, and that he declined bidding when he heard the sale was on these terms. That Longwith offered him $150.00 not to bid for said land, and that witness accepted said offer. He is not quite certain, whether this offer was accepted by him before or after he had understood that the money had to be good money. It is proper to remark here as applicable to the foregoing testimony, that all the persons to whom offers were made by Longwith, when interrogated by defendant, deny that they acted under the influence of said propositions, and assert that they had no corrupt motives. Martin Funk's case is next to be considered. His answer is sworn to, and by it, it appears, that previous to the sale, he made an agreement with the mortgagees to buy on certain terms, by which, amongst other arrangements, the mortgagee Hitt was to settle his own note due said Funk, on terms which could not have been but very advantageous to said Hitt. It was also agreed, that at the sale, his (Funk's) bid might be cried at $200.00, though in fact it is admitted by defendants, that

he paid $300.00, in good money. It is also proved that Funk made no bid at the sale, but that the land he purchased, was struck off for $200.00 by Hitt, who acted as crier, nobody bidding, but that the land was afterwards put down to Funk. It is also shown by the testimony of Wm. Coltis, that he (Coltis) attended the sale, and intended to bid for the land afterwards purchased by Funk, for the purpose of getting stock water, of which purpose he apprised said Funk ; that Funk then told him not to bid, and that he would, in case he became the purchaser, give him the right of way over the land to the water. Witness then declined bidding, but also states in his deposition, that he made no fraudulent and corrupt bargain with said Funk, in consequence of which he desisted from bidding. The evidence clearly establishes the following other points, which are deemed material ; that Sharoon and Morrison had previously arranged with Longwith, that he should purchase for them ; that in fact Longwith had no money at all of his own at the time of sale, but made the first part payment with the money Sharoon paid him the next day after the sale, for the portion of the land he purchased ; that the balance was paid from time to time, and the last instalment some seven months after the sale ; that Morrison did not pay cash down, but gave his note, so that in fact the sale was no cash sale, but one partly on credit, contrary to the terms of the sale as made public on the day of sale ; that Morrison agreed to pay a share of the money which Longwith had promised to pay Butler for not biddiug.

From the facts, as thus proven by the concurrent testimony of several witnesses, the court is clearly of opinion that the said sales from the mortgagees to Thomas Longwith and Martin Funk, as also the subsequent sales from said Longwith to Sharoon and Morrison were null and void. The rule is well established, that every thing done by the parties to a sale calculated to prevent competition, renders such sale void. The court refrains from citing authorities in support of a principle so plain and palpable. The counsel for defendants them-

selves, do not seem to deny the rule, but they insist that the principle can have no application to the present case, because, as they contend, the complainant has not proved that the persons whom the purchaser induced not to bid for the land, were actually influenced in their actions by the inducements so held out to them, and they ask, "how, on the true and just principles of mental or legal science, it could be properly said that any person was prevented from bidding for the lands, who never intended or deliberately proposed to bid for them." From the whole tenor of Marshall Smith's testimony, it is manifest that he desisted from bidding or getting others to bid because one of the purchasers had promised to pay him a debt, which he wanted to secure by bidding more for the land than would satisfy the mortgage. In fact, he expressly says so. But even without his testimony, will a court of chancery satisfy its conscience by such reasoning? It is sufficient to taint this transaction and avoid its effects, that the purchasers here have sown the seeds of evil. It is not for them to say that they have not taken root and borne their legitimate fruit. It is quite natural that the witnesses, when pressed by defendant's counsel, should deny that they acted corruptly, or from sordid motives. We must look at their acts, however, and not at their explanations. We cannot be content, upon the principles of "mental science," to take these persons as the true and proper exponents of their own deeds or motives. Human action hardly ever springs from one cause alone, but most generally from a combination of causes. But few men can trace their actions with certainty, to a preponderating motive. At the time they act, they have often become unconscious of many of the influences which indeed produced the result, and it is but too common for human nature to beguile itself into the belief that the motive which produced the act, was proper and unobjectionable, and that other less innocent causes, though they presented them, exercised no influence. (*a*)

The buying off of bidders, however, is not the only act of fraud and unfair dealing imputed to and proved upon the de-

(*a*) Greenup vs. Stoker, 18 Jll R. 27, and note.

fendants. The parties to this sale held out the idea that the sales were to be made for cash in hand and good money, while they had arranged it amongst themselves, that the purchasers might buy to the greater extent on credit. Nothing considering the times and the circumstances attending the whole transaction, as disclosed by the evidence, could have had a more powerful effect to deter bidders. This holding out of false colors as to the terms of the sale, of itself establishes the complainant's cause, and calls loudly for redress at our hands.

In this case it becomes our most imperative duty to give full scope to the remedial powers of equity. It is admitted by all courts that these sales, made by the trustee himself, under the power bestowed upon him by an over-confiding debtor, are much liable to abuse, and ought to be most jealously watched by chancery courts. Upon the slightest proof of fraud or unfair conduct, or of a departure from the power, they will be instantly set aside.

The mortgagees here were cognizant of many of these improper transcations, and one of them, Hitt, actually participated for his own advantage in them. The subsequent purchasers, Sharoon and Morrison, acquiesced in what was done by the others, and appear to have had full knowledge of the various schemes and devices resorted to to oppress complainant, and to drive him and his family from house and home. Longwith was their agent in buying the land, and his purchase was theirs. If he used fraud it must attach to them.

By an agreement of parties in the record, the question as to McDow's purchase is withdrawn from the consideration of the court. This relieves us from a discussion and decision of the point, whether he could, under any circumstances, being one of the mortgagees and trustees, have bought any of the land. The view which the court has taken of this case also relieves it from the consideration of numerous other points of much interest, raised by counsel in their written arguments, such for instance, as whether Butler was entitled to a formal notice of the sale, having had actual notice, whether the mortgagees could sell before they had first paid the debts

for which they were liable as securities, and whether under the power, they could sell all the land, or only so much as was necessary to raise a sufficient amount to renew the notes in bank.

The counsel for defendants, lastly insist that the decree below must be reversed, and the bill dismissed, because the complainant has failed to deposit the money actually paid by the mortgagees for his use, and the legal interest. As a general rule, he who seeks equity must do equity, and if a rescision of a contract is insisted on, the money received under it should be brought into court. But the peculiar circumstances of this case seems to take it out of the general rule. The complainant alleges that he never was informed of the real amount actually paid, and was never placed in possession of the notes and bills of exchange taken up by the mortgagees. It appears that some of these bills and notes were filed with the papers, by defendants, upon the hearing of the case, or perhaps with their answers, thus showing that his allegation, as to the evidences of indebtedness not having been surendered, was true. Besides, it was a matter of much uncertainty how much real money it took at the time to pay the bank money as the value of the notes and certificates of the Bank of Illinos was very fluctuating. The complainant is also entitled to the rents and profits, while the purchasers may have a counter demand for permanent improvements. From the nature of the case, it was impossible to anticipate what the precise amount would be, which was actually due from complainant to defendants.

As the decree is only final to a certain extent, to which by the express consent of the parties, we have considered it as final, and as further action has to be taken, we deem it proper to direct a modification of the decree made below, calculated to better secure the rights of the defendants. The deeds should not be ordered to be set aside and cancelled, but the Master should be directed to take an account, as ordered in the decree, and to report, and if it appear by such report that complainant is indebted to said defendants, he should, within a certain limited time, be ordered to

deposite the amount of money due by him in court, or with the Master, for the use of the defendants, upon which deposit, the defendants be decreed to re-convey within a certain time, by deed warranting against all incumbrances by them done or suffered, or in default thereof, that the Master should convey for them, and that they surrender possession upon the payment of such money.

The interlocutory decree below is affirmed as here modified, (the parties having expressly stipulated that this court might make the proper modification, if deemed necessary,) and the cause remanded for further proceedings consistent with the views here expressed, the appellants to pay the costs of this court.

Decree affirmed.

DECISIONS

OF

THE SUPREME COURT

OF THE

STATE OF ILLINOIS,

DECEMBER TERM, 1846, AT SPRINGFIELD.

PETER SEARS, appellant, v. ZEBINA SEARS, appellee.

Appeal from Kane.

A. sued B. and the cause was tried by a jury, who rendered a verdict for A. A motion for a new trial was made and overruled, and the following order entered, to wit: "Zebina Sears v. Peter Sears. Assumpsit. This day came the parties by their attorneys, and after argument it is ordered by the Court, that the defendant's motion for a new trial be overruled, and that the plaintiff have judgment and execution against the defendant for two hundred and fifty-six dollars and fifty-eight cents, his damages aforesaid, together with his costs herein." On error being assigned, that the Court erred in awarding execution against the defendant without rendering a judgment on the finding of the jury, it was held that there was a valid judgment on the verdict, and that the judgment was substantially good.

ASSUMPSIT in the Kane Circuit Court, brought by the appellee against the appellant, and heard at the October term, 1845, before the Hon. John D. Caton and a jury. Verdict and judgment for the plaintiff below for $256.58. A motion

for a new trial was made and overruled, and the defendant prosecuted an appeal in this court.

O. Peters, for the appellant.

I. G. Wilson, and W. B. Plato, for the appellee.

The second error, which is the only one relied on by the appellant, is not well taken. The judgment is substantially, if not technically correct. Comyn's Dig., title "Judgment," 741–2. But even if it be informal, this court will render such judgment as should have been rendered on the verdict in the court below.

The opinion of the court was delivered by

Treat, J.* This action was tried in the circuit court, and a verdict returned in favor of the plaintiff for $256.58. A new trial was demanded. Subsequently, the following order was entered of record:

"Zebina Sears v. Peter Sears. Assumpsit. This day came the parties by their attorneys, and after argument it is ordered by the court, that the defendant's motion for a new trial be overruled, and that the plaintiff have judgment and execution against the defendant for two hundred and fifty six dollars and fifty eight cents, his damages aforesaid, together with his costs herein."

An appeal was taken by the defendant. The only assignment of error relied on is, that the circuit court erred in awarding an execution against the defendant without rendering a judgment on the finding of the jury. This cannot be sustained. There is a valid judgment on the verdict; it may not be technically expressed, but is substantially good.

The judgment of the circuit court is affirmed with costs.

Judgment affirmed.

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*Justice Young was absent, &c.

THOMAS CHAPMAN, plaintiff in error, v. SCOVIL SHATTUCK, defendant in error.

Error to Boone.

A. sued B. in debt upon an appeal bond. At the return term, B. moved to dismiss the suit, and filed a stipulation signed by the parties, setting forth that the suit had been settled, and that it was to be dismissed at the cost of B. The plaintiff's attorney resisted the motion, and filed an affidavit stating that he and his client had agreed that he should receive a ballance of seven dollars, due for professional services, out of the proceeds of the judgment in the suit; that B. had notice of the agreement prior to the execution of the stipulation filed by him, and finally, that the settlement of the suit was made without his knowledge or consent. The court dismissed the suit: Held, that the court decided correctly. (*a*)

The doctrine is well settled, that a Court of Law will recognize and protect the rights of the assignee of a chose in action, whether the assignment be good at Law, or in Equity only. If valid in equity only, the assignee is permitted to sue in the name of the person having the legal interest, and to control the proceedings. The former owner cannot interfere with the prosecution, except so far as may be necessary to protect himself against the payment of costs. After the debtor has knowledge of the assignment, he is inhibited from doing any act which may prejudice the rights of the assignee. All acts transpiring between the debtor and creditor, after such knowledge and without the konwledge of the assignee, will be void as against the latter. But a case will not come within the principle laid down, unless there is an assignment of the whole cause of action.

DEBT upon an appeal bond in the Boone circuit court, brought by the plaintiff in error against the defendant in error, and heard before the Hon. Thomas C. Browne, at the April term, 1846, on motion of the defendant to dismiss the suit according to the terms of an agreement filed. The motion was allowed, and the suit dismissed at the costs of defendant. The intervening proceedings are substantially stated by the court.

The cause was heard in this court upon an agreed statement of facts, and the written arguments of counsel.

W. T. BURGESS, who claimed an interest in the appeal bond, contended, that after a debtor has had notice of the assignment of a chose in action, it was unnecessary to show

(*a*) Tonpin vs. Gargnier, 12 Ill. R. 79, and notes; Kendall vs. U. S. R. 7 Wal. U. S. R. 113.

fraud between debtor and creditor; and in support of the position, cited Pinder v. Morris, 3 Caines, 165, and several authorities referred to in that case.

The case resolves itself into this: Can a client pledge to his attorney the subject matter of the suit, to secure him his fees? Is not the adverse party bound, upon notice given to him, to respect such pledge, and will not the courts, ex debito et justitia, protect it?

F. B. Hamlin, for the defendants in error.

Did the agreement between plaintiff and his attorney, Burgess, create such a lien as would be binding on the defendant?

An attorney's lien does not commence until the rendition of the judgment so as to bind the adverse party, and his lien is confined to the attorney's taxable costs made in the suit. Mann v. Smith, 4 Barn. & Ald. 466; Baker v. Cook, 11 Mass 338; Welsh v. Hole, Doug. 238; 1 H. Black. 122; Bunker v. Locke, 13 Mas. 525; Potter v. Mayo, 3 Greenl. 34; Shapley v. Bellows 4 New Hamp. 347; People v. Hardenburg, 8 Johns 335.

It is well settled, that a plaintiff may, without consulting his attorney, compromise an action with the defendant, and take on himself the payment of the costs of the attorney, if there be no fraudulent conspiracy to cheat the attorney out of his costs. And where fraud or collusion is alleged, the attorney is bound to make out a clear case, in order to entitle him to aid from the court. Chapman v. How, 1 Taun. 341; Nelson v. Wilson, 4 Nev. & P. 385; 6 Bing. 568.

To constitute an actual fraud between two or more persons to prejudice a third, connivance and design to injure such third person by depriving him of some right, or otherwise imparing it, must be shown. Actual fraud is not to be presumed, but must be proved by the party who alleges it; and if the motive and design of any act may be traced to an honest purpose and legitimate source equally as to a corrupt one, the former ought to be preferred. McConnell v. Wilcox, 1 Scam. 365; Hubbard v. Turner, 2 McLean, 515.

The doctrine of attorneys' liens has never been so far extended in this county, or in England, as to reach the present case. People v. Hardenburg, 8 Johns. 335.

It has recently been decided, that an attorney has a lien on money which he has collected. for the amount due him in the particular case in which it was received, but not for any general balance due him for professional services rendered in another case. Pope v. Armstrong, 3 Smedes & Marsh. 214. See, also, Cross on Liens, 32 Law Lib. 147; Lane v. Church, 5 Madd. 207; John v. Dufendorf. 12 Wend. 261; Philip v. Stagg, 2 Edw. 108; Harney v. Demos, 3 Howard, 174; Blunden v. Desart, 2 Conn. & Laws. 111. In the last case referred to, it is decided that the lien of a solicitor upon deeds of his client's estate, cannot prevail against a judgment creditor for any greater amount of costs than those incurred at the rendition of judgment.

The opinion of the court was delivered by

Treat, J.* This was an action of debt commenced by Chapman against Shattuck. The declaration was on an appeal bond in the penalty of seventy one dollars. At the return term, Shattuck moved to dismiss the case and filed a stipulation signed by him and Chapman, stating that the suit had been settled, and agreeing that it should be dismissed at the costs of Shattuck. The motion was resisted by W. T. Burgess, Esq., the plaintiffs attorney. He read an affidavit, alleging in substance that it had been agreed between him and his client that a balance of seven dollars, due him for services as attorney in this and a former case, should be paid out of the proceeds of the judgment to be recovered in this suit. That before the date of the stipulation to dismiss, he notified Shattuck of the agreement between him and his client; and that the settlement was made without his knowledge or consent. The circuit court dismissed the case according to the terms of the stipulation. That decision is now assigned for error.

*Justice Young took no part in the decision of this case.

It is insisted that Burgess had such an interest in the subject matter of the suit, as to preclude the parties from compromising it without providing for the payment of the amount due him. If this possession can be sustained, it must be on the ground that he was the equitable assignee of the chose in action, on which the suit was instituted. The doctrine is now well settled, that courts of law will recognize and protect the rights of the assignee of a chose in action, whether the assignment be good at law, or in equity only. If valid in equity only, the assignee is permitted to sue in the name of the person having the legal interest, and to control the proceedings. The former owner is not allowed to interfere with the prosecution, except so far as may be necessary to protect himself against the payment of costs. After the debtor has knowledge of the assignment, he is inhibited from doing any act which may prejudice the rights of the assignee. Payment by him to the nominal creditor, after notice of the assignment, will be no defence to an action brought for the benefit of the assignee. Any compromise or adjustment of the cause of action by the original parties, made after notice of the assignment, and without the consent of the assignee, will be void as against him. Andrews v. Becker, 1 Johns. cases, 411 ; Littlefield v. Story, 3 Johns. 426 ; Raymond v. Squire, 11 do. 47 ; Anderson v. Van Allen, 12 do. 343 ; Jones v. Withe, 13 Mass. 304 ; Welch v. Mandeville, 1 Wheaton, 233 ; McCullom v. Coxe, 1 Dallas, 134. A partial assignment, however, of the chose in action, will not suffice to bring the case within the principle. The whole cause of action must be assigned. It was well remarked by Justice Story, in Mandeville v. Welch, 5 Wheaton, 277, that "a creditor shall not be permitted to split up a single cause of action into many actions, without the assent of his debtor, since it may subject him to many embarrassments and responsibilities not contemplated in his original contract. He has a right to stand upon the singleness of his original contract, and to decline any legal or equitable assignments, by which it may be broken into payments. When he undertakes to pay an integral sum to his

creditor, it is no part of his contract that he shall be obliged to pay in fractions to any other persons." In the case before us, it is not pretended that there was an assignment of the entire cause of action. By the terms of the agreement, Burgess was only to receive a portion of the proceeds of the bond. This gave him no power over the suit. Chapman had not so parted with his interest in the bond as to lose his right to control it. Shattuck was not bound to notice the claim of Burgess. The parties to the record were at full liberty to compromise the case, and having done so, the circuit court did right in carrying their stipulation into effect.

The judgment of the circuit court is affirmed with costs.

Judgment affirmed.

JOSEPH SAWYER, plaintiff in error, v. THE PEOPLE OF THE STATE OF ILLINOIS, defendants in error.

Error to Lee.

On the trial of an indictment for receiving stolen goods, the jury found the accused guilty and fixed his term of service in the penitentiary at two years. The Court, upon the rendition of the verdict, sentenced him to two years' imprisonment in the penitentiary: Held, that the verdict, under the statute, was too general, and substantially defective in not stating the value of the goods received, and that the judgment pronounced thereon was unauthorised.

INDICTMENT against the plaintiff in error for receiving stolen goods, tried at the May term, 1846, of the Lee Circuit Court, before the Hon. Thomas C. Browne and a jury. Verdict against the defendant below, in the form stated by the court in their opinion.

The cause was submitted to this court without argument.

J. O. Glover & B. C. Cook, for the plaintiff in error, made the following points:

The verdict of the jury was clearly insufficient in not finding the value of the stolen property alleged to have been received by the plaintiff in error. Highland v. The People 1 Scam. 392.

The statute provides that no person shall be confined in the penitentiary for receiving stolen goods, unless the value of the property so received shall amount to five dollars. Rev. Stat. 161, § 63.

D. B. Campbell, Attorney General, for the People.

The opinion of the court was delivered by

TREAT, J.* The plaintiff in error was tried and convicted on an indictment for receiving stolen goods. The goods were described in the indictment as two prices of broad-cloth of the value of sixteen dollars, and one piece of satinett of the value of four dollars. The verdict of the jury was in these words: "We the jury find the defendant guilty, and fix the period of service in the penitentiary at two years." On this verdict, the court sentenced the prisoner to two years' imprisonment in the penitentiary. To reverse that judgment, he has prosecuted a writ of error. The assignment of errors raises the question of the sufficiency of the verdict to sustain the judgment of the court. The sixty third section of the Criminal Code provides, that "no person convicted of larceny, or of buying or receiving goods or other things obtained by larceny, burglary or robbery, shall be condemned to the penitentiary, unless the money or the value of the thing stolen, bought or received, shall amount to five dollars." Rev. Stat. 161. Under this provision of the statute, it was decided by this court in the case of Highland v. The People, 1 Scam. 392, that a verdict of guilty on an indictment for larceny without finding the value of the property stolen, was not sufficient to uphold a judgment rendered on it. The court held that it was the value of the stolen property which determined the character of the offence, and regulated the mode of the punishment. It therefore became necessary for the jury to ascertain the value and state it in their verdict, that the court might know with certainty, whether the accused should be subjected to punishment by confinement in

*Justice YOUNG did not sit in this case.

the penitentiary, or by the payment of a fine and imprisonment in the county jail. The value of the goods might not be correctly alleged in the indictment, and the people might fail to show that all of them were stolen by the prisoner.

The jury in fixing the period of confinement in the penitentiary, ought to show on the face of their verdict that they acted within the provisions of the section herein before recited. That should appear affirmatively, and not require inference or implication to sustain it.

That decision is conclusive of the present case. The verdict is too general ; it is substantially defective in not stating the value of the goods received by the prisoner. The degree of the defence he has committed, and the character of the punishment he ought to suffer, are not clearly manifested by the finding of the jury. (*a*) The judgment pronounced by the circuit court on the accused was unauthorized, and must be reversed.

The judgment of the circuit court is reversed.

Judgment reversed.

JOHN A. YOUNG, plaintiff in error, v. SAMUEL MASON et al., defendants in error.

Error to Schuyler.

An appeal bond contained the following condition : "That if the said Samuel Mason and John Mason should prosecute their appeal with effect, and should pay whatever judgment might be rendered by the Circuit Court upon the dismissal of the said appeal, then the bond to be void," &c. Suit was brought thereon, a trial was had, and the Court rendered a judgment in favor of the plaintiff for the debt, and assessed the damages at six cents Held, that the bond, though not exactly in compliance with the statute by reason of the omission of the words "or trial," after the word "dismissal," was not void, but might still, to the extent of the obligation, be the foundation of the action : Held, also, that the plaintiff in the Circuit Court, during the pendency of the appeal, might have objected to the bond for informality and have required that it be perfected; and upon a refusal to perfect it, the appeal would have been dismissed.

DEBT upon an appeal bond given by the defendants in error to the plaintiff in error. The cause was heard in the Schuyler circuit court, at the September term, 1845, before

(*a*) Huggins vs. People, 39 Ill R. 241.

the Hon. Norman H. Purple, without the intervention of a jury, when a judgment was rendered in favor of the plaintiff for $85.65 his debt, and six cents damages.

W. A. Minshall, for the plaintiff in error, argued the cause ex parte.

The affirmance of the judgment in this case by default of prosecution is precisely analogous and equivalent to a dismissal of the appeal. Fournier v. Faggott, 3 Scam. 349; Mc Connell v. Swailes, 2 do. 571; Gardner v. Woodyard, 1 Ohio, 176, 179; Morse v. Hodsdon, 5 Mass. 314; United States v. Bradley, 10 Peters, 343.

The opinion of the court was delivered by

KOERNER, J.* Young, the plaintiff in error, brought suit in the Schuyler circuit court against the defendants in error, on an appeal bond, the bond containing the following condition: "That if the said Samuel Mason and John Mason should prosecute their appeal with effect, and should pay whatever judgment might be rendered by the circuit court upon the dismissal of the said appeal, then the bond to be void," &c.

The declaration on said bond avers, that said appeal was taken, and that the said Samuel and John Mason made default in the circuit court, whereupon the said court affirmed the judgment of the justice of the peace, and gave jugdment in addition for damages occasioned by the taking of the appeal and for costs. It assigns as breaches of the bond: first, that Samuel and John Mason did not prosecute their appeal with effect; second, that they have not paid the judgment so affirmed in the circuit court. At the September term of the Schuyler circuit court, 1845, the cause was submitted to the court for trial, the defendants having pleaded non est factum. The court found for plaintiff the debt in the declaration mentioned, and assessed his damages at six cents, overruled the plaintiff's motion for a new trial, and rendered

* Justice YOUNG did not hear the argument and gave no opinion.

judgment according to the finding and assessment of damages.

Three errors are assigned :

1. The court erred in assessing the plaintiff's damages at six cents, when, by law and the evidence of the case, they should have been assessed at eighty-nine dollars and ninety-two cents ;

2. In refusing a new trial ; and

3. In refusing plaintiff's motion to amend the bond in said cause.

The last error is manifestly not well assigned, and was not insisted upon on the argument. The first and second errors will be considered together.

The law, under which this appeal was taken, provides that the appeal bond shall contain the following condition : "that if the appellant shall prosecute his appeal with effect, and shall pay whatever judgment may be rendered by the court upon the dismissal or trial of said appeal, then the obligation to be void," &c.

The bond in question omits the words "or trial," and hence does not comply with the statute in the form laid down by it. Most of the authorities cited by the plaintiff in error establish the point, that voluntary bonds, though not exactly in conformity with the requirements of the statute, are not therefore void, but may still, to the extent of their obligation, be the foundation of an action. This court, in the case of Fournier v. Faggott, 3 Scam. 349, has fully adopted the same doctrine. (*a*) The court below also treated the bond under consideration as a valid one, and gave judgment on it, although but nominal damages. The point really in controversy is, can an obligor be held responsible by implication beyond the extent of his obligation, plainly expressed in the terms of the bond. Here the obligors had stipulated to pay a certain amount of money on the happening of a certain event, viz : the dismissal of the appeal. The record shows that the event did not happen, but that the case was considered by the court, the judgment below affirmed, and judgment for an additional sum, the damages and costs, given

(*a*) Sharp vs. Bedell, 5 Gil. R. 93 ; Erlinger vs. People, 36 Ill. R. 458.

The court is of opinion, that the record introduced by plaintiff in error, showing this state of facts, did not establish a breach of the condition in the bond. The first breach, however, was proved by said record, and the court found properly for the plaintiff on said breach. There being no evidence given that the mere non-prosecution of the appeal by the defendants in error caused any damages, the court correctly gave but nominal damages.

The plaintiff's counsel having principally relied on a former decision of this court (McConnell v. Swailes, 2 Scam. 571,) to establish his position, we think it proper to express our views on that case, and the distinction which we draw between the case at bar and the one referred to.

In that case, the bond given by the appellant was in the precise language of the law, as it then was, conditioned "to pay the debt and costs in case, the judgment shall be affirmed on the trial of the appeal." R. L. 1833, 395. In the circuit court the appeal had been dismissed, and in a suit on the appeal bond, this court decided that the dismissal of an appeal in its effect was equivalent to an affirmance of the judgment of the justice of the peace, so as to entitle the party to claim a forfeiture of the bond and to have his action therefor.

It will be perceived that the law, in the revised code of 1833, referred in terms to the case of a trial only; but it would have been absurd to suppose that it intended to secure the rights of but one class of successful suitors, and to exclude another clearly entitled to the same security. The appellant had given bond as the law required, and the appellee had it not in his power to call upon his adversary to give him a more comprehensive one. The appeal having been dismissed in the circuit court, it followed that the judgment below was, virtually, thereby affirmed. But when the appeal remains in court, and the court renders the same judgment which has been given below, adding judgment for damages for the delay, the judgment below becomes extinct, and a new one is created, attended with consequences very different from those which would have followed the

justice's judgment. In the case at bar, it was in the power of the plaintiff in error, when the appeal was pending in the circuit court, to object to the bond of the appellants for informality, and to have it perfected. If they had refused to do so, the appeal would have been dismissed, and the contingency would have happened provided against in the bond. The plaintiff in error must abide by his own neglect, and we cannot, however willing we might be, furnish the relief he has sought, upon legal principles.

We are of opinion there is no error in the record. Judgment below is affirmed with costs.*

Judgment affirmed.

THE PEOPLE OF THE STATE OF ILLINOIS *ex rel.* WILLIAM T. BURGESS, plaintiffs in error, *v.* ALBERT PERCELLS, defendant in error.

Error to Boone.

A. was duly elected a justice of the peace, and, within twenty days thereafter filed his official bond in compliance with the statute in such case made and provided, except that the condition thereof omitted to recite the following requirements: "and that he will well and truly perform all and every act, and duty enjoined on him by the laws of this State to the best of his skill and abilities." After the expiration of twenty days aforesaid, he filed a new bond with other securities, containing the provision omitted to be stated in the first: *Held,* that the first bond was insufficient, that the second was not filed within the time required by the Statute, and that, therefore, the office became vacant. (*a*)

The Clerk of the County Commissioners' Court may decide judicially what shall be the penalty of the justice's bond at any sum between five hundred and one thousand dollars, and also upon the sufficiency of his securities. But the conditions of the bond are fixed by law, and are beyond his discretion or control.

The proper practice in informations in the nature of quo warranto is, for the defendant to plead, instead of answering the same.

INFORMATION in the natute of quo warranto against the defendant in error, questioning his right to hold the office of justice of the peace of Belvidere precinct in the county of

(*a*) Green vs. Wardwell, 17 Ill. R. 279.

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* A petition for a re-hearing was filed in this case and denied.

Boone. The cause was heard in the circuit court of that county before the Hon. Thos. C. Browne, at the September term 1846, upon a demurrer to the defendant's answer. The demurrer was overruled, the information dismissed, and costs awarded to the defendant against the relator, who brought the case to this court by writ of error.

The case was submitted to the court upon the written arguments of.

S. A. Hurlbut and W. T. Burgess, for the prosecution, and of

J. L. Loop and F. B. Hamilton, for the defendant in error.

The opinion of the court was delivered by

PURPLE, J.* At the September term of the Boone county circuit court, A. D. 1846, the plaintiff filed an information in the nature of a quo warranto against the defendant, questioning his right to hold the office of justice of the peace of Belvidere precinct, in said county.

The information shows that the defendant was duly elected a justice of the peace of the precinct afore said, on the 25th day of October, A. D. 1845. That on the 4th day of November, A. D. 1845, he filed his official bond in compliance with the requisitions of the 10th section of the Revised Statutes of 1845, concerning justices of the peace and constables, except that the condition thereof omitted to recite: "and that he will well and truly perform all and every act and duty enjoined on him by the law of this State, to the best of his skill and abilities." That by his neglect to comply with this provision of the statute, the office became vacant. Notwithstanding which, the defendant has entered upon and continues to execute the duties of said office.

The answer of the defendant admits the statements in the information to be true; and shows further, that the defendant, on the 24th day of December, A. D. 1845, at the request of

*Justice YOUNG was absent and took no part in the decision.

his securities in his original bond, filed a new one, with other securities, containing in its condition the statutory provision which had been omitted in the first, and in all respects, except in regard to the time of filing in comformity to the statute before referred to. Both these bonds were in due form of law approved by the clerk of the county commissioners' court.

The plaintiff demurred to the defendant's answer. The defendant joined in the demurrer. Upon the hearing, the court overruled the demurrer, dismissed the information and awarded the defendant his costs against the relator. The plaintiff seeks to reverse this judgment.

Two questions are presented by the record: first, whether the bond filed by the defendant on the 4th day of October, A. D. 1845, was in substance the bond required by the statute: second, whether, if the same is substantially defective, such defect has been cured by the filing of the second bond. A consideration of the law and the reasons which influenced the Legislature in its passage, must determine these questions.

The Act concerning justices of the peace and constables, &c., R. S., § 10, provides that "every justice of the peace, before entering upon the duties of his office, shall execute and deliver to the clerk of the county commissioners' court of his county, and within twenty days after his said election, a bond, to be approved by said clerk, with one or more good and sufficient securities in the sum of not less than five hundred nor more than one thousand dollars; conditioned that he will justly and fairly account for and pay over all moneys that may come to his hands under any judgment or otherwise, by virtue of his said office; and that he will well and truly perform all and every act and duty enjoined on him by the law of this State, to the best of his skill and abilities."

The 12th section of the same Act further provides, that "if any justice of the peace or constable shall not, within twenty days after his election or appointment, take the oath and give bond as aforesaid, the said justice or constable shall not be permitted after that time to be so qualified, or to take his

said office; but the said office shall be considered as vacant, and shall be filled accordingly."

The conditions of the defendant's bond, of the 4th of October, 1845, are not substantially in accordance with the law. The variance is most material. The justice and his sureties are only bound that he will pay over such money as he shall collect as justice of the peace, while the obligation which the law imposes, "that he will well and truly perform all and every act and duty enjoined on him by the laws of this State, to the best of his skill and abilities," constitutes no portion of the condition of the bond.

The security required to be given by a justice of the peace was not alone designed for the protection of citizens and suitors, for whose use he might receive money, but generally for the protection of the people against any acts of misfeazance, malfeazance or nonfeazance of such justice.

It is the manifest duty of every justice of the peace, upon proper application, to issue a summons, capias, execution or other legal process within his jurisdiction, but his refusal to do so would be no breach of any condition in this bond; and the party who, by such refusal, should lose the debt, would be remediless unless the magistrate should chance to be personally of sufficient ability to respond in damages. Forasmuch, then, as property qualifications for office are somewhat, and perhaps justly, odious in a government, the foundation of which is equality of rights, the Legislature, having in view this fundamental principle, designed to distribute those offices, essential and necessary for the maintenance of order and law, and the preservation and perpetuation of the constitution of the country, equally amoung the poor and rich, according to their respective merits, and at the same time to afford protection to any and every citizen who might be injured by the act or omission of any such officer who might be personally irresponsible.

This bond is clearly defective in substance; it is not the bond required by the statute. The most essential and important part of the condition is wanting, and the justice and his sureties are only answerable upon it for the performance

of a single duty. For neglect or refusal to perform every other, it furnished no security.

If the conditions which were inserted, had been omitted, and those omitted had been incorporated into the bond, it would have been sufficient, for the reason that the obligation "to perform all and every duty enjoined on him by law," would have included the duty to pay over money received by the justice in his official capacity. But is this defect cured by the filing of the subsequent bond on the 24th December, 1845, more than twenty days after the election of the defendant as justice of the peace? It is not. The statute prescribes the particular condition of the bond to be filed, the time within which it is to be done, and expressly declares that if the justice shall not, within the twenty days after his election, take the oath and give the bond as aforesaid, he shall not be permitted after that time, to be so qualified or to take said office; but the said office shall be considered vacant, and filled accordingly.

The filing of a bond with the proper and legal conditions, more than twenty days subsequent to the election, confers no right upon the defendant to hold the office. Immediately upon the expiration of the twenty days, by express law, it became vacant. It could only be filled by an election. The execution and filing of the bond, with substantially such conditions as the statute prescribes, constituted a condition precedent to the defendant's right to hold the office. And although the bond filed by him after the vacancy had occurred, will be obligatory upon him and his securities as an indemnity against any misconduct of his under color of office, it cannot operate to invest him with an office which had become vacant through his negligence or inattention.

Neither is it true, as is contended by the defendant's counsel, that the approval of the bond by the clerk of the County Commissioners' Court is such a judicial act as is conclusive of the defendant's right. The clerk may decide judicially what shall be the penalty of the justice's bond at any sum between five hundred and one thousand dollars, and also upon the sufficiency of his securities. The conditions of the bond are fixed by law and are beyond his discretion or control.

In disposing of this case, it is deemed proper to remark that the proper practice in informations of this sort is, for the defendant to plead instead of answering to the same; and that the answer of the defendant has been treated as a plea in this decision, and the technical distinction between the two been disregarded. (*a*)

The judgment of the circuit court of Boone county is reversed, and judgment entered in this court, that the defendant is guilty of usurping, and intruding into, and unlawfully holding, and exercising the office of justice of the peace for Belvidere precinct, in the county of Boone, in the State of Illinois; and it is further adjudged that the said defendant be ousted and altogether excluded from the said office, and that the Relator recover his costs, both in this court and in the court below, and that execution from said courts respectively issue therefor.

Judgment reversed.

Hezekiah H. Gear, plaintiff in error, v. Thomas Clark, defendant in error.

Error to Jo Daviess.

A. sued B. in assumpsit, a capias ad respondendum was issued, and B. held to bail. Upon a return to the capias ad satisfaciendum of non est inventus, an action of debt was commenced upon the bail bond, and after the return day of the summons, the bail surrendered the principal debtor in open Court, who was taken into the custody of the sheriff. The bail pleaded non est factum, and two pleas setting forth the surrender, &c. The latter was demurred to, and the demurrer sustained by the Court: Held, that the demurrer was properly sustained, the statute not authorizing the surrender of the principal after the return day of the process against the bail.

Debt upon a bail bond executed by the plaintiff in error and others to the defendant in error, and heard before the Hon. Thomas C. Browne, in the circuit court of Jo Daviess county, at the June term, 1843.

During that term, the present plaintiff in error surrendered the principal debtor in open court before any proceedings were had, and he was ordered into the custody of the sheriff. A plea of non est factum, and two special pleas

(*a*) Clark vs. People, 15 Ill. R. 213.

setting forth the surrender, &c. were then filed, a demurrer to the special pleas interposed, the demurrer sustained, and judgment rendered for the plaintiff below.

J. J. Hardin & D. A. Smith, for the plaintiff in error.

The principal error relied upon in this case is, the sustaining of the demurrer to the special pleas.

The correctness of this assignment of error, we suppose must be tested by the true construction of the fifth section of the Revised Statutes, p. 82. We shall not undertake to construe it. The wording of the statute seems contradictory, contemplating in one part of it the surrender by the bail in vacation before the return of the process against him as such, and in another part the statute seems to give the bail the right to surrender his principal to the court in which the suit may be pending during the sitting thereof. As illustration of the common law rights of bail in such a case as that now before us we refer to 1 Bac. Abr. 342. At the common law, no reasonable doubt can be entertained as to the soundness of the pleas. A statute to repeal the common law must be clear and unequivocal as to its terms. We maintain that the statute before referred to cannot be so characterized. We trust that the court will give such a construction to it, as will most effectually protect the bail from a proceeding against him somewhat penal in its character and consequences.

A surrender before judgment in the second scire facias is sufficient. Cro. El. 618; 2 Com. Dig. 51.

In the reason and nature of things, and so far as the interest of the judgment creditor and its protection by the surrender of the principal is concerned, there can be no essential difference between his surrender on a day just before Court, and a surrender of him during the term to which process against the bail is returnable, and before judgment is rendered against the bail.

J. W. Chickering, for the defendant in error.

The defendant in error submits, with the plaintiff in error

that the decision of this case depends upon the construction which the court may give to the fifth section of the statute relating to bail, and in which it is conceived there is neither ambiguity nor uncertainty. The statute above referred to allows the bail to surrender his principal "at any time before the return day of the process sued out against him." Perhaps had the court below accepted a surrender after that day, and entered an exoneratur upon the bail bond, such an extension of favor might not have been ground for error; but in this case such a course has not been adopted. The apparent ambiguity in the section above referred to is removed, upon the supposition that process might be made returnable upon some day during the term after the first day. And if it is that a term of court is but one day, it is replied that this principle cannot apply where the legislature have taken integral portions of the term and designated them "days of term."

The statute in question, if not a direct affirmance of the common law, is, in its provisions, analogous to the principles of the latter, which are the same as laid down in 1 Bac. Abr. 342, and 2 Comyn's Dig. 48, et seq., appear to be that the bail may surrender his principal upon or before the return day of the process sued out against him, and not afterwards, except from the "grace and favor" of the court; that a surrender made upon or before such day may be pleaded by the bail in bar to any recovery against himself; but that a surrender after such day, not being "ex debito et justitia," cannot be so pleaded.

The opinion of the court was delivered by

Caton, J. * The only question presented for the consideration of the court in this case is, whether the surety in a bail bond can surrender his principal on or after the return day of the process sued out against the bail.

At common law, the delivering of the defendant to bail being a matter of record, the party was either entitled to a scire

* Justice Young took no part in the decision of this case.

facias, or he might bring debt, and although, upon the return of the capias with non est inventus, the recognizance was forfeited and the right of action was complete, yet, in view of the hardship on the bail, the Courts adopted rules by which the principal might be surrendered afterwards. In case the plaintiff proceeded by sci. fa., the principal might be surrendered on or before the return day of the second sci. fa. where two nihils were returned, or on or before the return day of the first sci. fa. where it was served, and the bail thereby discharged. Where the plaintiff proceeded by action of debt, the principal might be surrendered in open Court, within eight days after the return day of the process against the bail. 1 Bac. Abr. 342.

This discretionary power, however, has now been taken from the Courts by the legislature, and the whole matter settled by the law, as found in section five, chapter fourteen, of the Revised Statutes, upon the true construction of which the validity of these pleas depend. That section provides that "it shall be lawful for the defendant in any action in any Court of record, when bail shall have been given as aforesaid, to surrender himself, or for his bail to surrender him, at any time before the return day of the process which may have been sued out against him as bail, to the Court in which the suit may be pending during the sitting thereof, or in vacation, to the sheriff of the county in which process was served." At the first reading of this statute, it would seem to be almost unintelligible, or at least somewhat inconsistent, in view of our Practice Act, which provides that all original process shall be returnable on the first day of the term, so that if the principal be surrendered during the sitting of the Court in which the suit may be pending against the bail, it must be on or before the return day of the process against the bail. As such a reading of the law would be entirely inconsistent, we must look for some other meaning. The whole difficulty, however, consists in determining what the legislature meant by the terms "action" and "suit," as found in the passage quoted. If, in the construction, we apply either of these terms to the proceeding against the bail, we are utterly una-

ble to give it any sensible construction ; if, however, by those words we are to understand the original action against the principal, the whole passage becomes plain and intelligible. Thus, in any action in which the defendant is held to bail, the right is secured to the principal to surrender himself, or for the bail to surrender him, to the Court in which the suit is pending, in term time, or to the sheriff of the county in which the suit is pending, in vacation, at any time before the return day of the process sued out against the bail. This construction of the statute is rendered more apparent by a transposition of the passage quoted thus: "It shall be lawful for the defendant in any action in any Court of record, when bail shall have been given as aforesaid, to surrender himself, or for his bail to surrender him, to the Court in which the suit may be pending, during the sitting thereof, or in vacation, to the sheriff of the county in which the process was served, at any time before the return day .of the process which may be sued out against him as bail." This, we think is the true construction of the Statute, and, consequently the surrender of the principal after the return day of the process against the bail, did not exonerate him, and consequently the pleas demurred to, stating that fact, present no defence to the action, and the demurrer was properly sustained.

The judgment of the circuit court is affirmed with costs.*

Judgment affirmed

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* A petition for a re-hearing was filed in this case, and denied.

BENJAMIN G. WATSON et al., appellants, v. RUSSELL THRALL, appellee.

Appeal from Kane.

A. recovered a judgment in the Circuit Court against B. and four other defendants, all of whom prayed an appeal. The appeal was granted on condition that they enter into bond with a certain individual as surety. The bond was executed by four of the defendants with the surety required, and the appeal was duly entered in the Supreme Court. A moved to dismiss the appeal because the order of the Circuit Court was not complied with: *Held*, that the appeal was not perfect, and the same was dismissed.

THE appellee recovered a judgment in the Kane Circuit Court against the appellants, five in number, all of whom prayed an appeal to this court. It was granted upon comdition that the defendants enter into bond with Oliver Ellithrope, as surety. The bond was executed, within the time prescribed in the order of the court, by four of the defendants and the surety.

The appeal was duly entered in this court, and a motion was made by the counsel for the appellee to dismiss it, because the order of the court was not complied with by all the appellants.

I. G. Wilson and B. F. Fridley, for the appellee.

The order of the circuit court required all of the defendants to join in the execution of the appeal bond. This not being done the appeal should be dismissed. Such is the uniform practice of this court. Carson v. Merele, 3 Scam. 168; Ryder v. Stevenson, ib. 539.

J. Butterfield, for the appellants.

The case of Ryder v. Stevenson appears to be the mere statements of the Reporter. It is not the opinion of the court. If it is, it is submitted whether the court gave due consideration to the question. Two or more of several defendants may pray an appeal and subsequently one of them may not desire to perfect it. His non-compliance should

not operate against the others who have complied with the order of the circuit court. The statute authorizes those who do appeal to use the names of their co-defendants. Rev. Stat. 420, § 51.

The opinion of the court was delivered by

TREAT, J.* Thrall recovered a judgment against five defendants. They prayed an appeal, which was granted on their entering into bond with one Ellithrope as surety. The bond was executed by but four of the defendants and the surety. The appellee now moves to dismiss the appeal.

The statute authorizes one of the several defendants to remove a cause to the Supreme court by appeal; and in such case, no costs are to be taxed against those who do not join in the appeal. Rev. Stat. 420, § 51. Here the appeal was demanded by all of the defendants, and allowed by the court on the condition that they should all enter into the bond. Only a part of them have executed it. The condition has not been complied with. The appeal has not been perfected. In approving of the surety, the circuit court may have acted with reference to the circumstances of the parties who were to prosecute the appeal. The appellee has the right to insist on the benefit of all the indemnity intended by the court. If but a part of the defendants, desired an appeal, the application to the court should have been made and obtained on their behalf only. The cases of Carson v. Merle, 3 Scam. 168, and Ryder v. Stevenson, ib. 539, are in point.

The appeal will be dismissed with costs. (*a*)

Appeal dismissed.

(*a*) See Millenborg vs. Murphy, 40 Ill. R. 46.

* Justice YOUNG was absent.

William Rainey, plaintiff in error, v. The People of the State of Illinois, defendants in error.

Error to Clinton.

The only mode of preferring an indictment is through the medium of a grand jury, and it is their imperative duty to make their presentments in open Court. The indictment being the foundation of all the subsequent proceedings in the cause, the record ought to show affirmatively the returning of the indictment into Court by the grand jury. This is a necessary part of the record, and can no more be dispensed with than the verdict of the jury.

Indictment for murder, in the Washington circuit court, at the September term, 1845, against the plaintiff in error. The venue was changed to Clinton county and the cause there tried at the September special term 1845, the Hon. Gustavus P. Koerner presiding. The jury found the defendant guilty of manslaughter, and sentenced him to one years's imprisonment in the penitentiary. The defendant prosecuted a writ of error in this court.

L. Trumbull, and B. Bond, for the plaintiff in error.

The motion in arrest of judgment should have been sustained, the record not showing that the indictment was ever returned into court. It must appear on the record that the grand jury returned the indictment in open court, "a true bill." Rev. Stat. 409, § 3; 1 Chitty's Crim. Law, 324; Gardner v. The People, 3 Scam. 85; Mc Kinney v. The People, 2 Gilman, 540.

The record transmitted from Washington county to Clinton county contains no copy of the indictment, and the paper, upon which Rainey was tried, is not referred to in said record so as to identify it as the original indictment. That this was necessary, Wright v. Kirkpatrick, 4 Scam. 340.

D. B. Campbell, Attorney General, submitted the cause on the part of the defendants in error without argument.

The opinion of the court was delivered by

TREAT, J.* It appears from the record in this cause, that at the September term 1845, of the Washington circuit court, William Rainey was arraigned, and pleaded not guilty to an indicment for murder; that on his application, a change of venue was awarded to the Clinton Circuit Court, and that he entered into recognizance for his appearance at the next term thereof. This is shown by the transcript of the record certified to the Clinton Circuit Court. With the transcript, there was filed an indictment against Rainey for the murder of Alexander Keith, which purported on its face to have been found at the April term 1845, of the Washington circuit court. The foregoing is all of the evidence furnished by the record of the finding of an indictment against Rainey. He appeared at the September term 1845, of the Clinton circuit court, and was put on his trial. The jury found him guilty of the manslaughter of Keith, and fixed the period of his imprisonment in the penitentiary at one year. He was not present when the verdict was received. An order was thereupon made, forfeiting his recognizance, and awarding a capias against him. At the April term 1846, he appeared and entered motions for a new trial, and in arrest of judgment. These motions were denied by the court, and judgment pronounced on the prisoner in pursuance of the verdict. He then obtained a supersedeas and sued out a writ of error to this court.

The principal question arising on the assignment of errors are, first, does the record sufficiently show the finding of an indictment against Rainey; and second, was the verdict properly received in his absence.

On the first point there can be no doubt. There is nothing in the record to sustain the conviction. The only mode of preferring an indictment is through the medium of a grand jury It is the imperative duty of the grand jury to make this presentment in open court. The indictment is the foun-

*WILSON, C. J. and Justice LOCKWOOD did not sit in this case.

dation of all the subsequent proceedings in the cause; and to uphold them, the record ought to show affirmatively, the returning of the indictment into court, by the grand jury. This is a necessary part of the record, and can no more be dispensed with, than the verdict of the jury, or the judgment of the court. Gardiner v. The People. 3 Scam. 83; McKinney v. The People, 2 Gilman, 540. The record before us is manifestly defective. It does not appear that any indictment against Rainey was ever exhibited in open court by the grand jury of Washington county. The transcripts sent to the Clinton Circuit Court failed wholly to show it, and the prosecuting attorney ought to have obtained a record, showing this important fact, before putting the prisoner on his trial.(*a*) More attention should be paid to these matters by those having the charge of criminal prosecutions. Many of the records transmitted to this court in this class of cases, are carelessly made up, and are evidently imperfect and incomplete. In such cases, it would be very proper for the Attorney General to see that the defects are supplied, and when necessary, to suggest a diminution of the record, and sue out a certiorari to the court below. The first error fully disposes of the case, and no opinion will be expressed on the second question.

As the record here may not contain a correct history of the proceedings in the circuit court, the cause will be remanded to the end that further proceedings may be had in that court, should the state of the records there warrant it.

The judgment of the Clinton Circuit Court is reversed, and the cause remanded.

Judgment reversed.

(*a*) Gardner vs. People, 20 Ill. R. 433.

THOMAS LONGWITH *et al.* *v.* THOMAS T. BUTLER.

Motion to re tax Fee Bill.

Upon the filing of a record in the supreme court, the clerk has a right to issue a *scire facias* and file the writ of error, unless expressly directed by the parties not to do so. The writ of error in fact is never issued when the record has been filed, but remains on file in the office. The *scire facias* is only process which issues.

The twenty-second rule of the supreme court does not apply to written arguments, nor is the defendant entitled to have the making of his abstract and brief charged against the plaintiff, unless the court have first decided that the plaintiff's abstract and brief is insufficient, and the plaintiff's counsel have failed to file a satisfactory one.

THIS cause was decided at the last term of this court, (ante 32) and at the present term, the appellants, by Hardin & Smith, their counsel, entered a motion to re-tax the fee bill issued therein, which was as follows, to wit:

"Appellants, by their counsel, move the court to direct the clerk of said court to re-tax the fee bill by him issued 28th February, 1846, and to disallow and exclude from the same the second and sixth items in the same, because they have been therein taxed contrary to the rules and practice of this court

Appellants, in regard to the said sixth item, except to the same because, by their counsel, they filed on abstract and written argument in the case, on which it was snbmitted on their part, and were not ruled by the court, on the motion of the appellee, to file any other or further abstract of the case; and because said sixth item is and was on account of an argument filed by the appellee's counsel in the case, which the clerk in his own error caused to be printed, and for which, if he is entitled to any compensation, he of right ought to look to appellee or his counsel for the same."

M. McConnell, for the appellee, resisted the motion.

PER CURIAM. The first item objected to by the counsel for appellants is the charge for writ of error, scire facias, &c., &c., &c., while the case as it is alleged was brought here by agreement, and no process actually issued.

The court is of the opinion that the charge is a proper one. Upon the filing of the record, the clerk had a right to issue a scire facias and file the writ of error, unless he was expressly directed by the parties not to do so. The writ of error, in fact, is never issued, when the record has been filed, but remains on file in the office. The scire facias is the only process which issues.

The other item complained of, is the sixth, being a charge for making "copies of abstracts, 856 folio, $128." Upon an inspection of the papers in this case it appears, that the case was submitted by both parties upon briefs and written argument. The appellant had filed his abstract and written argument in compliance with the 20th rule of this court. Neither the court nor the counsel for appellee, made any objection to said abstract, and in fact, it was fully sufficient for the purposes intended, it being also accompanied with an elaborate argument.

The appellee also filed an abstract of the case together with an argument, copies of which abstract and argument he had made out by the clerk, and for which copies, the charge is made against the appellant, who was the unsuccessful party.

The 22d rule of this court, by which the defendant's counsel is permitted, if he be not satisfied with the abstract or abridgment by the plaintiff's (appellant's) counsel, to furnish each of the Justices of this court, which lack for the abstracts, as shall deem necessary to a full understanding of the merits of the cause, we think does not apply to this case.

It can never apply to a written argument, nor is the defendant entitled to have the making out of his abstract and brief charged against the plaintiff, unless the court have first decided that the plaintiff's abstract and brief is not sufficient, and the plaintiff's counsel have failed to file a satisfactory one.

We look upon the transaction in this case as one of a private nature between the clerk and defendant's counsel, and for which, none but the defendant can be held responsible by the clerk.

Motion allowed.

(a) Phelps vs. Funkhouser, 40 Ill. R. 27.

WILLIAM MCQUOID, plaintiff in error, v. THE PEOPLE OF THE STATE OF ILLINOIS, defendant in error.

Error to Edgar.

In an indictment for resisting an officer, it is not necessary to describe the mode of the opposition. That is properly a matter of evidence.

An indictment for resisting an officer set forth that the defendant opposed such officer while attempting to serve a summons, which summons was a lawful process: Held, that the averment that the process was a lawful one is as an averment of jurisdiction in the officer issuing it.

In an indictment for resisting an officer, it must be distinctly charged that the person resisted was an officer, was opposed while acting in such capacity, both of which facts must be proved at the trial. It is not necessary to set out in the indictments in haec verba, the process under which he was acting.

A plea of former acquittal omitted to state that an offence charged in two indictments were one and the same offence: Held, on demurrer to the plea, that it was bad, and that the demurrer only admitted the truth of the plea as pleaded.

A defendant cannot assign for error, in a cival or criminal proceeding, any decision, order or judgment of a Court which is manifestly in his favor.

INDICTMENT for resisting an officer, &c., against the plaintiff in error, in the Edgar circuit court, heard at the October term 1846, before the Hon. Samuel H. Treat and a jury. A verdict of guilty was rendered, and the defendant was fined $20.

The allegations in the indictment, and the several proceedings in the cause are substantially set forth in the opinion of the court.

J. PEARSON, for the plaintiff in error.

The indictment does not set out the means and manner of the opposition, as required by law. 1 Chitty's crim. Law, 227, 229 and note; 3 Bac. Abr. 554, G; ib I. 572; Archbold's crim. Pl. 315, note a; Cowper, 683; 3 Chitty's crim. Law, 1000.

Neither does it set forth that the officer issuing the process had jurisdiction. Robinson v. Harlan, 1 Scam. 237; State v. Tuell, 6 Blackf. 344.

The process should have been set out in the indictment in hæc verba.

The plea of former acquittal was a bar to the second indictment.

The judgment of the court upon the verdict was erroneous, the statute providing that the accused shall, on conviction, be fined and imprisoned. Rev. Stat. 167, § 92.

D. B. Campbell, Attorney General, for the defendants in error.

Every indictment or accusation of the grand jury shall be deemed sufficiently technical and correct, which states the offence in the terms and language of the criminal code, or so plainly that the nature of the offence may be easily understood by the jury. Rev. Stat. 181, § 162.

The opinion of the court was delivered by

Purple, J.* At the October term. A. D. 1846, of the Edgar county circuit court, the plaintiff was indicted under the 92nd section of the criminal code, for resisting an officer in the service of process. The indictment charges that the plaintiff, on the 14th day of January, 1846, at the county of Edgar, unlawfully, knowingly, and wilfully, did oppose one John A. Metcalf, (the said Metcalf then and there being a constable in and for said county, duly qualified,)in his, [the said Metcalf's] then and there attempting to serve a summons in favor of George Cunningham, for the use of William James, against Washington McQuoid, and William McQuoid, issued on the twelfth day of January, eighteen hundred and forty six, by Samuel Connelly, then and there being a Probate Justice of the Peace, in and for said county, duly qualified and commissioned, and then and, there acting as an ordinary justice of the peace, and the said summons then and there being a lawful process of the said Probate Justice of the Peace.

The plaintiff entered a motion to quash the indictment, which was overruled.

*Wilson, C. J. and Justice Lockwood did not sit in this case.

He then filed his plea of former acquittal to which there was a demurrer, which the court sustained.

The plea of not guilty was then entered by the plaintiff, a verdict of guilty was returned against him by the jury, a motion was made by the plaintiff in arrest of judgment, which was overruled by the court, and he was sentenced to pay a fine of twenty dollars and costs of prosecution, and to stand committed until the sentence was complied with.

The decisions of the court in overruling the motion to quash the indictment, in sustaining the demurrer to the plea of a former acquittal, in denying the motion in arrest of judgment, and in the rendition of final judgment against the plaintiff, are assigned for error.

The law, under which the indictment is preferred, is as follows: "If any person shall knowingly and wilfully obstruct, resist or oppose any sheriff, deputy sheriff, coroner, constable or other officers of this State, or other persons duly authorized, in serving or attempting to serve any lawful process or order of any court, judge or justice of the peace, or any other legal officer whatsoever; every person so offending, shall be fined in any sum not exceeding five hundred dollars, and imprisoned for a term not exceeding one year.

The first question presented in this record relates to the sufficiency of the indictment under the law above recited. It is contended by the plaintiff's counsel that the indictment is defective in not describing the manner in which the officer was opposed, and in omitting to set out the process in the hands of the officer in hæc verba, or in such a manner as to show to the court, by particular description of the process itself, that the court issuing the same had jurisdiction over the subject matter of the suit. It would frequently be impossible to set out in an indictment the manner in which an officer is opposed in the execution of process, nor has any authority been cited on the argument of this cause showing that the law requires it. On the contrary, it has been held that "it is not necessary, in an indictment for the obstruction of public officers, to set forth the particular exercise of the office in which they were engaged at the time or the par

ticular act and circumstances of obstruction. These are properly matters of evidence." United States v. Clark, 1 Gal. C. C. R. 497. We do not disagree with the plaintiff's counsel, that the indictment must contain a substantial allegation of jurisdiction in the officer who issued the process, in the service of which the resistance or opposition is made; but we hold that, under our statute, the averment that the process is a lawful one is an averment of jurisdiction in the officer who issued it. The offence is charged in the terms and language of the criminal code, and is so plain that it can be easily understood by the jury. This is what the statute requires. (*a*)

It is not to be understood, however, that this statute has dispenced with the substantial requisities which have hitherto entered into and composed any material portions of indictments for crime. These still remain. The object was to try defendants, who were accused, upon the facts and the law of the case, and to reject and discard mere formalities and technicalities. The cases of Robinson v. Harlan, 1 Scam. 237, and the State v. Tuell, 6 Blackf. 344, have been cited as opposed in principle to this doctrine. A close examination of these cases will show that, between them and this opinion, on this point, there is no necessary conflict. That of Robinson v. Harlan was a civil suit against a constable for neglect of duty, in refusing to serve an execution. The declaration neither showed nor alleged that the justice of the peace, who gave the judgment and issued the execution, had jurisdiction of the subject matter for which the judgment had been rendered, and the court, in their opinion, say that, for aught which appears by the declaration, the judgment might have been rendered in an action of slander. In the case in Blackford, the court says that, "an indictment for obstructing the execution of a search warrant must show the warrant to be legal; and it must, therefore, show that the warrant appeared upon its face, to be founded on a sufficient affidavit. In this case, the pleader had set out the warrant, and the affidavit upon which it had been issued, to show its legality. Upon its face, when thus set out, it ap-

(*a*) U. S. vs. Mills, 7 Pet. U. S. R. 143.

peared not to have been founded on a sufficient affidavit; and did not therefore justify the officer in its execution. The court were satisfied from an inspection of the process, that it was not a lawful one. There was no allegation in the indictment, that it was a lawful process, and if there had been, the indictment would still have been bad. When a process is set out, and is upon its face manifestly illegal, an averment of its legality would not change its character in that respect. The English precedent for indictment under their statutes against assaults upon officers are even more general than this indictment. They barely charge that the officer was assaulted "in the due execution of his said office, then and there being," without any statement whatever relative to the manner of the execution of the office, or whether he had or had not any writ which justified him in his conduct, leaving all these matters to be determined by evidence upon the trial. [*a*]

The gist of the offence is, resistance or opposition to the officer while acting in his official character. That he was an officer, and so acting, must be distinctly charged in the indictment, and proved upon the trial. Both are matters of fact to be determined by the evidence. There is no more occasion for setting out in the indictment the process or order, the execution of which was resisted or opposed, for the purpose of showing jurisdiction than there is to copy the officer's commission to show his official character.

The demurrer to the plaintiff's plea was properly sustained. The plea omits to state that the offences charged in the two indictments are one and the same offence; in this respect the plea is clearly defective. The demurrer only admits the truth of the plea as pleaded.

In the last error assigned, the plaintiff contends that he is injured by the judgment of the circuit court, because he was not imprisioned as well as fined, according to the provisions of the statute, under which he was convicted. If we were satisfied that a defendant, in a criminal prosecution, could assign for error a decision or order of the circuit court most manifestly in his favor, we should, if we had under the

(*a*) Post 356.

law, the power to do so, feel inclined, upon this assignment, to reverse the judgment and remand the cause, with directions to that Court to proceed according to the letter of the statute, to add imprisonment to the plaintiff's punishment. But we are of opinion that this omission of the court to perform the whole duty which the law requires, being in the plaintiff's favor, and for his benefit, cannot be assigned for error. Had the court inflicted any different punishment than that prescribed by law, whether more or less advantageous to the plaintiff, the judgment would have been erroneous. In this case, so far as it extends, the sentence of the court pursues the law. Properly, the plaintiff should have been imprisoned as well as fined. No imprisonment is imposed upon the plaintiff. It is singular, that with him it should be matter of complaint. With the same propriety might a felon who had been convicted and sentenced to the penitentiary, demand a reversal of the judgment of court because he had not also been sentenced to pay the costs of prosecution. We consider the law upon this point as settled by this court, that a defendant in a civil or criminal prosecution cannot assign for error a decision, order or judgment of a court which is manifestly in his favor. Bailey v. Campbell, 1 Scam. 47; Kitchell v. Bratton, ib. 300; Arenz v. Reihle, ib. 340; Schlencker v. Risley, 3 do. 486; Girard v. The People, ib. 363.

The judgment of the circuit court is affirmed with costs.

Judgment affirmed.

EDGAR COUNTY, plaintiff in error, v. JONATHAN MAYO, defendant in error.

Error to Edgar.

A county is not liable to the clerk of the Circuit Court for his fees accruing on a scire facias upon a recognizance, the State only being entitled to the benefit of the sum recovered.

A suit on a recognizance is a civil proceeding, in the nature of an action on penalty, against the accused and his bail, and if the penalty is recovered, it cannot be regarded as a fine imposed by law, as contemplated by the provisions of the one hundred and seventy first section of the Criminal Code.

THIS was an agreed case, originally filed in the Edgar Circuit Court. In that Court, the present defendant in error, its clerk, preferred a claim against the county of Edgar, amounting to $7-93, for fees accruing to him upon two forfeited recognizances on which the process of scire facias had been issued by him. The agreed statement was filed December 3, 1845, and the case was heard before the Hon. Samuel H. Treat, at the May term 1846, when a judgment was rendered for the plaintiff below for the sum above mentioned, with the costs therein expended.

The statement will more firmly appear in the opinion of the court.

J. Pearson, for the plaintiffs in error, cited Rev. Stat. 128, § 14; Ketchell v. Madison Co. 4 Scam. 163; Rowley v. The Board of Com'rs of Vigo Co. 2 Blackf. 355; United States v. Barker, 4 Peters' Cond. R. 181; Duncan v. The State Bank, 1 Scam. 262; United States v. Hooe, 1 Peters' Cond. R. 458; Rev. Stat. 182, § 171.

A. Lincoln, for the defendant in error.

By the common law, the defendant in error is entitled to remuneration for his services. The county called upon him to perform those services, and he has performed them. There is no law of this State, which contravenes the common law.

Cases have been cited by counsel to show that the United States never pay costs. This is not strictly true. No judgment can be rendered against the Government, and to this poin only do the decisions go.

The court is referred to the following cases as pertinent to the present case: Bright v. The Supervisors of Chenango, 18 Johns. 543; Mallory v. The Supervisors of Cortland, 2 Cowen, 533; The People, &c. v. Rockwell, 2 Scam. 3.

The opinion of the court was delivered by

KOERNER, J.* This was an agreed case between the parties and submitted to the decision of the court at the May term of the Edgar Circuit Court, A. D. 1846. The Circuit Court rendered a judgment of $7.93 in favor of Mayo, and against the county, and by agreement, this case is brought up here by appeal for a final decision of this court.

The agreed case is as follows: "It is hereby agreed between Elisha Houtt, George Redman and William D. Darnell, County Commissioners in and for the county of Edgar, on the behalf of the said county of Edgar, and Jonathan Mayo, clerk of the Edgar Circuit Court, that heretofore, to wit, on the day of the People of the State of Illinois, for the use of said county, sued out of the office of the clerk of the circuit court of said county a scire facias upon a forfeited recognizance against Andrew J. Hanks, and that such proceedings were had thereon that the said People recovered a judgment against the said Hanks; that an execution issued on the said judgment, but no part of the debt or costs was ever made; that the said Jonathan Mayo, clerk as aforesaid, rendered official services for and on behalf of the plaintiffs, amounting to the sum of five dollars and eighty seven cents according to the schedule of fees as regulated by law.

"It is further agreed between the parties, that in the case of the People of the State of Illinois v. Enos Rawley and others, the same proceedings were had, with this difference, that in the last case the plaintiffs failed to recover judgment and that the said clerk's fees, on behalf of the plaintiffs, amounted to the sum of two dollars and six cents. It is contended by the said commissioners, that the said county of Edgar is not liable for costs in any such cases; on the con-

*WILSON, C. J. and Justice LOCKWOOD did not sit in this case.

trary, it is insisted by the said Jonathan Mayo that he is entitled to have and receive of the said county all costs made by and on behalf of the plaintiffs.

"Upon this state of facts, the parties aforesaid submit this question to the court, whether the said county is liable to pay the aforesaid costs, and agree that judgment shall be rendered accordingly."

The facts agreed upon present the question, whether the officers of the court can claim costs from the county for services rendered to the plaintiff in a suit on a recognizance, where judgment is obtained and execution awarded against the defendant, but where nothing is made, or where the plaintiff has been the unsuccessful party.

In order to settle this question, it is only necessary to refer to the 105th section of the Criminal Code. Rev. Stat. page 101, which provides, "that all recognizances, having any relation to criminal matters, shall be taken to the People of this State." By virtue of this law, the People of the State of Illinois are the plaintiffs in a suit on such a recognizance, and if any recovery is had, it enures to the benefit of the State treasury. Hence it follows that in a suit of this kind, the county can under no circumstances be made responsible for costs. It cannot be said that services have been rendered to the county in the prosecution of a suit, from the result of which it can derive no benefit. The rule, therefore, which the counsel for Mayo have insisted upon, that each party ought to pay the costs made by their request, as being one founded in natural justice and recognized in the common law, can find no application here. We conceive that section 171 of the Criminal Code, Rev. Stat. 1845, page 182, to which we have been referred, and which provides that "all fines imposed by virtue of any laws of this State for the punishment of crimes and misdemeanors shall, when collected, be paid into the treasury of the county, where the offence shall be tried, for the use of such county," does not embrace the present cases. A suit on a recognizance is a civil proceeding, in the nature of an action on a penalty, against the accused and his bail, and if the penalty

is recovered, it can certainly not be said, that money so recovered is a fine imposed by a law for the punishment of crimes or misdemeanors. It is true that the agreed case states, that this proceeding on the recognizance was carried on by the people of the State of Illinois "for the use of said county of Edgar." But this allegation, being itself founded on a misapprehension of the law, which it must be admitted has been a very general one all over the State, cannot change the real position of the parties, and fix liabilities on one which has no interest in the suit, and cannot control it. (*a*) The circuit attorney, as the people's representative, prosecutes forfeited recognizances according to his own discretion or sense of duty, and acknowledges no controlling power on the part of the county officers; he cannot, therefore, by his acts, bind persons or corporations who are not his principals, but strangers to the proceeding.

We are of opinion that the court below ought to have given judgment in favor of the county of Edgar. Judgment is therefore reversed with costs.

Judgment reversed.

JOHN RONEY, appellant, v. OWEN MONAGHAN, appellee.

Appeal from Lake.

Where the evidence in an action of crim. con. taken and considered together, was of such a character as to warrant the inference drawn by the jury that a criminal intercourse existed between the parties charged, it was held, that the Court would not, upon an application for a new trial, disturb the verdict of the jury.

TRESPASS ON THE CASE for crim. con. brought by the appellee against the appellant in the Lake circuit court. The case was heard before the Hon. Hugh T. Dickey, Judge of the Cook County Court, and a jury, at the September term 1846, when a verdict was rendered for the plaintiff below for $225 damages. A motion for a new trial was made, overruled, and judgment entered upon the verdict of the jury.

(*a*) Laws of 1847, p. 74.

J. Pearson, argued for the appellant. A written argument was filed by B. S. Morris & J. J. Brown, who relied upon the following principle of law:

Whenever there is strong probable ground to believe that the justice of the case has not been tried fully and fairly, or that the verdict is clearly against the weight of evidence, a new trial should be granted. Bacon v. Brown, 1 Bibb, 336; Price v. Cochran, ib. 571; Nahan v. Jane, 2 do. 33.

A. Lincoln, G. Spring & G. Goodrich, for the appellee.

The opinion of the court was delivered by

Purple, J.* At the April term, A. D. 1846, of the Lake county circuit court, Monaghan sued Roney in an action of trespass for crim. con. The case was tried at the September term following, and a verdict found and judgment thereon rendered in favor of Monaghan for the sum of $225 damages. Roney entered a motion for a new trial upon the ground that the verdict was against law and evidence. The motion was overruled, and Roney excepted.

The bill of exceptions contains the instructions of the court, and the evidence in the cause. No objection appears to have been made upon the trial, either to the instruction or any portion of the testimony; and from any thing which the court have been able to discover, the testimony was pertinent, and instructions proper.

The only question presented by the record is, whether upon the evidence a new trial should have been allowed. We are of opinion that the motion was properly denied. We deem it unnecessary to review the evidence. Taken altogether, it is of a character to warrant the inference which the jury has drawn, that a criminal intercourse existed between Roney and the wife of Monaghan. In such cases, a court will never disturb the verdict of a jury.

The judgment of the circuit court is affirmed with costs.

Judgment affirmed.

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*Wilson, C. J. and justices Lockwood and Young did not sit in this case.

THE PEOPLE OF THE STATE OF ILLINOIS, ex rel., DANIEL S. HARRIS et al., v. THOMAS C. BROWNE, JUDGE, &c.

Motion for a peremptory Mandamus.

Where a party to a suit in the Circuit Court takes a voluntary nonsuit, he goes out of Court and cannot afterwards file a bill of exceptions

In this State, Courts cannot compel a plaintiff to become nonsuit, but he may if he elect, insist upon a verdict. (a)

MOTION for a peremptory mandamus to the Hon. Thomas C. Browne, one of the Associate Justices of this court, and presiding Justice in the Jo Daviess circuit court in the sixth Judicial circuit. The motion was made to require him to sign and seal a bill of exceptions taken during the progress of the trial of a cause before him, wherein the Relators were plaintiffs and John H. Rountree and others were defendants, at the October term of the Jo Daviess circuit court, 1852.

It appears from the transcript of the record, that a jury was impaneled to try the above mentioned cause, and that, upon the rulings of the court, the plaintiffs suffered a voluntary nonsuit. By an indorsement upon a bill of execeptions on file in this court, it appears that during the term of court aforesaid the same bill was presented to the presiding Judge to be signed and sealed, which he refused to do.

An application for an alternative mandamus was made to this court, at the Decemeber term 1842, and the writ was granted at the December term 1843, but was not issued by the clerk until so requested by the counsel for the Relators, on the 28th day of August, 1846.

At the present term the Respondent made return to the writ, and among other reasons assigned for refusing to sign said bill of exceptions, gave the following, to wit: "He further states that he has not signed said bill of exceptions since the service of said writ upon him, because of the foregoing reasons, and because of the additional reason, that the party in the suit presenting the bill, to which the bill was intended to belong had taken a voluntary nonsuit in the

(a) Amos vs. Sinnott, 4 Scam. R. 447, and notes.

cause before presenting said bill.“ A motion to quash the return, and for a peremptory mandamus was then made by the Relators' counsel, alleging that the return was insufficient in law and not in accordance with the facts, and for other reasons. The Court overruled the motion.

At a subsequent day of the term, the cause was submitted by counsel.

T. Campbell, and E. B. Washburne, for the Relators.

A. Lincoln, for the defendant, cited Morehead's Pr. 251, bottom of the page; 3 U. S. Dig. 58, title Nonsuit," §§ 30, 33, 34.

Per Curiam. The motion for a peremptory writ of mandamus is denied. The relator took a voluntary nonsuit in the circuit court, and having voluntarily gone out of court, he cannot call upon this court to reverse a judgment, which was entered at his own solicitation, whether the court committed errors in the proceedings of the course previous to the nonsuit or not. The rule seems to be different in states where the court compels the plaintiff to become nonsuit whether he will or not. This court has held, Amos v. Sinnott, 4 Scam. 447, that the circuit courts in this State, have no such authority, but that the plaintiff may, if he choose, insist upon a verdict. If the plaintiff could voluntarily take a nonsuit and still reserve the right of excepting to the decision of the court, he would have an unfair advantage over the defendant. If he wish to assign the decisions of the court for error, he must abide by them. The plaintiff, by taking a nonsuit, has waived his exceptions, and cannot compel the judge to sign the bill.

Motion denied.

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*Wilson, C. J. and Justice Lockwood did not sit in this case.

THE PRESIDENT, DIRECTORS AND COMPANY OF THE STATE BANK OF ILLINOIS, plaintiffs in error, v. THOMAS WILSON et al., defendants in error.

Error to Schuyler.

A writ of error was prosecuted against three defendants, and the scire facias was returned served on one of them only, and non est inventus as to the two others, A rule was obtained upon the defendant served to join in error, and he moved to have the rule vacated: Held, that before the plaintiffs would be entitled to the rule they must bring all of the defendants into Court either by the service of the scire facias or a publication against such as were non-residents, or could not be found.

A cause must be heard as between all of the parties to a writ of error.

In this case, Hart Fellows, one of the defendants in error, by his counsel, O. H. Browning and N. Bushnell, moved the court to vacate a rule upon him to join in error, for the reason that all of his co-defendants were not before the court. The motion was resisted by W. A. Minshall, in behalf of the plaintiffs in error.

The opinion of the court was delivered by

TREAT, J. This writ of error is prosecuted against three defendants, and the scire facias has been returned, served on one of them only, and non est inventus as to the two others. The plaintiffs have obtained a rule on the defendant served to join in error, which rule he now asks to have vacated. Before the plaintiffs are entitled to a rule for joinder in error, they must bring all of the defendants into court, either by the service of a scire facias, or a publication against such as are non-residents, or cannot be found. The cause must be heard as between all of the parties to the writ of error. The motion must granted, be and the order entered for a joinder in error will be vacated.

Motion allowed.

BEVERLEY M. CURRY, appellant, v. WILLIAM A. HINMAN, appellee.

Appeal from Schuyler.

A judgment was rendered in an action of ejectment in the Circuit Court for the recovery of the tract of land in controversy, and for damages and costs. An appeal was taken, and the bond recited that the judgment was rendered on a day which was not the day on which it was in fact rendered, and that it was for damages and costs. In the appellate Court, a motion was made to dismiss the appeal for the want of a sufficient bond: Held, that the bond was insufficient by reason of the variance.

MOTION to dismiss an appeal bond for insufficiency. The facts of the case are stated by the counsel for the appellee in their brief.

O. H. Browning & N. Bushnell, for the appellee.

In this case the judgment was entered on the 9th day of April, 1846, for the S. W. 27, 2 N 1 W. and for one cent damages and costs. On the 11th day of April, an order was made granting an appeal, requiring bond to be given in thirty days, in the penalty of $100, conditioned as the law directs. On the 6th day of May, 1846, the bond was executed in the penalty and with the security directed, reciting that a judgment was recovered by Hinman against Curry on the 11th day of April, 1846, for one cent damages and costs of suit, and conditioned for the payment of the judgment and costs, and that Curry should duly prosecute his appeal with effect.

The appeal should be dismissed because the judgment recited in the bond is variant from the judgment appealed from, in this, to wit:

First. The judgment appealed from was rendered on the 9th day of April, 1846, and the bond recites a judgment recovered on the 11th day of April, 1846; and

Second. The judgment appealed from was for the recovery of the S. W. 27. 2 N. 1 W. and for one cent damages and costs, and the bond recites a judgment for one cent damages and costs, omitting any notice of the land.

The case of Brooks v. Jacksonville, 1 Scam. 568, is relied upon as directly in point.

W. A. Minshall, for the appellant, resisted the motion.

1. It is admitted by the counsel for the appellee that the bond is, in every respect, in compliance with the order, except that it did not recite that the judgement was for the possession of a quarter section of land.

2. It is also admitted, that the bond recited a judgment on the 11th day of April, and the record shows a judgment on the 9th day of April.

As to the first position, it is insisted that it was not necessary to recite that the judgment was for land. The statute does not require it. It only requires that the bond be conditioned for the payment of the judgment, costs and damages, in case the judgment shall be affirmed, and for the prosecution of the appeal. Rev. Stat. 420, § 47. If the judgment is affirmed, the plaintiff obtains possession as a matter of course; there is no condition in the act necessary to be inserted in the bond, requiring him to restore possession of the land. The condition in the statute only contemplates the recital of a judgment which can be paid. The words of the act are, "shall be conditioned for the payment of the the judgment." It is not, therefore, necessary or proper to recite more in the bond than the judgment on which the condition of the bond is based, to wit: the judgment for damages and costs.

As to the second point that there is a variance, it is insisted that there is no variance, for on the rendering of the judgment on the 9th day of April, a motion for a new trial was interposed and not disposed of till the 11th day of April, when it was overruled, so that the judgment, in legal effect, was suspended by the motion until the latter day, and then, when overruled, the judgment took effect, and the party can recover on the bond because, both in pleading and evidence, the legal effect is sufficient in the allegation and proof. 3 U. S. Dig. 147; Dorr v. Fenno, 12 Pick. 521; Lent v. Paddleford, 10 Mass. 236; Moore v. Boswell, 5 do. 306.

It is a universal rule that the party may recover on proving the legal effect of the contract, &c. 1 Starkie's Ev. 401, 402.

The courts have departed from the strict rule in variance. Hull v. Blaidsdell, 1 Scam. 332 ; Stevens v. Stebbins, 3 do. 25, 26.

The opinion of the court was delivered by

TREAT, J. A judgment was rendered on the 9th day of April 1846, that Hinman recover of Curry the possession of a quarter section of land, and one cent damages and the costs of the action. On the 11th of April, the court overruled a motion interposed by Curry for a new trial, and allowed him an appeal. The appeal bond recited the rendition of a judgment on the 11th of April, 1846, for one cent damages and costs.

The appellee now moves to dismiss the appeal, because of the insufficiency of the bond. The motion must be granted. The judgment was recovered on a different day than the one stated in the bond. The judgment is not correctly recited in the bond. It was for the recovery of a tract of land, as well as for damages and costs. These variances might be material in an action on the bond. The bond ought to afford the appellee an effectual remedy. Brooks v. Jacksonville, 1 Scam. 568.

The appeal will be dismissed with costs.

Appeal dismissed.

Roswell Munsell, plaintiff in error, v. William H. Temple, defendant in error.

Error to Mc Lean.

A license to keep a grocery was granted by the county commissioner's cour to A. for $25, for which he gave his note with security. Subsequently the license was changed from A. to B. by the said court, for which charge A. gave his note for $21.38 to the treasurer of the county: Held, that the treasurer had no authority to take the note to himself in his official capacity: Held, also, that the payment of the license and the filing of the bond required by statute in such cases were conditions precedent to the granting of the license, and that none could be granted for a less sum than twenty five dollars; and that the note executed by B. was void in law

As a general rule, where the undertaking upon which a plaintiff relies was either upon an unlawful consideration, or to do an unlawful act, the contract is void; and this, whether the contract be illegal as being against the rules of the common law, or the express provisions or general policy of any particular statute.

A license to keep a grocery is not transferable. It attaches to the person and cannot be used by others, even with the consent of the court which granted it.

Agreed case submitted to the Circuit Court of McLean county, at the April term 1846, the Hon. Samuel H. Treat presiding. Judgment for Temple, who was the plaintiff in the court below, for $24.68.

The evidence in the case is embraced in the opinion of the court.

A. Lincoln, for the plaintiff in error.

The note of Parke was void because the license was not valid; the money was not paid for it, as required by law. Besides, it was not a license to the plaintiff, but to Parke, and was not legally transferable. Rev. Stat. 342, § 9.

The note given by Munsell to the treasurer was also void. He could not, in his official capacity, take a note. Berry v. Hamby, 1 Scam. 468.

J. B. Thomas, for the defendant in error.

This case differs from that of Berry v. Hamby. In this case, the word "treasurer" is merely discripto personœ.

The note is perfect in all its parts; it has the proper parties, &c.

If the county commissioners exceeded their authority, the license is not thereby void. If they give a credit, or take a note for a license, they are personally liable. They have a discretion in the matter.

The opinion of the court was delivered by

KOERNER, J.* The parties submitted in this case, by agreement, to the decision of the circuit court of McLean county, at the April term 1846. The court rendered judgment for Temple, the plaintiff below, in the sum of $24.68, which decision is now assigned for error.

The following was the evidence produced below. The plaintiff read a promissory note to sustain his action, as follows: "One day after date, I promise to pay Wiliam H. Temple, treasurer of said county, (McLean,) twenty one dollars and thirty eight cents, to be paid in county orders or cash, for value received. R. Munsell."

The defendant, by consent, read the following statement of the county clerk as evidence:

"State of Illinois, }
McLean County. } Commissioners' Court, March term, 1843. Said court, at said term, granted to James E. Parke a license to keep a grocery or bar in the town of Bloomington, said grocery to be kept in the Bloomington Hotel, for which said Parke gave a note, with security, for twenty five dollars. And at the June term of said court, 1843, Rosewell Munsell applied to said court to have his license changed from Parke to him, which change was made by said court; for which change and transfer of license, the said Munsell gave his note to William H. Temple, treasurer of said county, for the sum of twenty one dollars and thirty eight cents."

The decision of the court was made upon this evidence, and by the assignment of error the question is presented,

*WILSON, C. J., and LOCKWOOD, J. did not sit in this case.

whether the note so given by Munsell to Temple, for the consideration above shown, can be collected by the plaintiff or not.

The first objection is, that Temple, in his capacity of treasurer, had no authority to contract, and cannot therefore sue. In the case of Berry v. Hamby, 1 Scam. 468, it has been decided, that the treasurer of a county has no authority whatever to take a note payable to himself as treasurer; that he is not created an artificial person in law, capable of suing as treasurer, and that no suit can be maintained in the name of the "treasurer." In that case, however, the note had been taken to the "treasurer of Alexander county," and no natural person had been named as the payee. In the present case the note is made payable to William H. Temple, and if it were founded on a sufficient consideration, this court would be inclined to consider the words "treasurer of McLean county" as merely descriptive of the person, and to allow William H. Temple to recover of the defendant.

We will pass now to the question of consideration. The 9th section of the License Act, Rev. Stat. 1845, page 342, provides as follows: "county commissioners may grant licenses to keep groceries upon the following conditions, to wit: First, the applicant shall pay into the county treasury, for the privilege granted, a sum not exceeding three hundred dollars, nor less than twenty-five dollars, in the discretion of the court. Second, the applicant shall execute bond in the penalty of five hundred dollars, with one or more securities, to be apporved by the court, conditioned that the applicant shall keep an orderly house, and so forth."

The language of this section admits of no doubt that the payment of the license, as assessed by the county commissioners' court, and the filing of a proper bond, are conditions precedent to the granting of a license; and also that no license can be legally granted for a less sum of money than twenty five dollars.

The present case shows that Munsell obtained a license for twenty one dollars and thirty eight cents, and also that

he did not pay this amount into the treasury before the license was issued, but gave his note payable at a future day for said sum.

As a general rule, where the undertaking upon which the plaintiff relies, was either upon an unlawful consideration, or to do an unlawful act, the contract is void ; and this whether the contract be illegal as being against the rules of the common law, or the express provisions or general policy of any particular statute. It is needless to cite authorities to so well established a principle. I will give, however, one reference, the case of Wheeler v. Russell, in the 17th Mass. 257, where there is a very full and interesting collection and review of English and American cases upon this subject. [*a*]

The policy of our legislature has always been to restrain the selling of spirituous liquors by retail. The section referred to is conceived in this spirit, and prohibits, in language not to be misunderstood, the county commissioners from issuing a license unless the conditions prescribed by law have been previously complied with.

In requiring less than twenty five dollars, the county commissioners must have acted upon the idea that licences are transferable, and that they might be granted for the residue of a term. But this is a mistake. Licenses attach to the person, and cannot be used by others, even with the consent of the court, for what remains of the annual term for which they have been originally given.(*b*) It is a plain violation of the express letter of the statute to issue a license on credit, and the undertaking of Munsell to pay was consequently founded on a contract against the express provisions and the general policy of the statute, and was therefore void in law, and cannot be enforced.

The judgment of the court below is reversed with costs.

Judgment reversed.

(*a*) Post 473-525-Cook vs. Shipman, 24 Ill. R. 614 ; Marshall Co. vs. Cook, 38 Ill. R. 56 ; Bank &c. vs. Owens, 2 Pet. U. S. R. 539 ; Same vs. Wagener, 3 Pet. U. S. R. 378.

(*b*) Ager vs. Weston, 14 Johns. R. 231-Post 469.

NATHANIEL BUCKMASTER, for use of George. W. Denham, plaintiff in error, v. MANNING BEAMES et al. defendants in error.

Error to Madison.

A plaintiff, who brought a suit for the use of another which was revoved to the Supreme Court, made a motion in that Court founded on affidovit that the person beneficially interested had removed from the State and was insolvent, that the writ of error be dismissed unless he should give security for cost: Held, that the beneficial plaintiff had the right to prosecuite the suit in thename of the nominal plaintifi, but that he would be required to demnify and protect the latter against the payment of costs. (a)

Where a party is required to give security for costs, and presents a bond if the same is objected to as insufficient, it is incumbent on the party presenting it to satisfy the Court by competent proofs that it is sufficient.

In this cause a motion was made to dismiss the writ of error, unless the beneficial plaintiff should indemnify the nominal plaintiff against the costs of the suit. The affidavit, upon which the motion was founded, is substantially stated in the opinion of the court sustaining the motion. It was argued on behalf of the nominal plaintiff by J. Gillespie, counsel for the defendants in error, and resisted by L. Trumbull and J. B. Thomas, counsel for the beneficial plaintiff in error.

The opinion of the court was delivered by

TREAT, J.* This suit was originally instituted in the name of Buckmaster for the exclusive benefit of Denham, on a bond made payable to the former, for the use of the latter. Failing to recover in the court below, Denham prosecutes a writ of error to this court in the name of Buckmaster. Buckmaster now files his affidavit, alleging that Denham resides out of the State and is insolvent, and moves the court to dismiss the writ of error unless Denham shall give security for costs. The application will be allowed. Denham has the right to prosecute in the name of Buckmaster, but he is bound to indemnify and protect him against the payment of costs. A rule will be entered

(a) Young vs. Campbell, 4 Gil. R. 157.

* YOUNG, J. did not sit in the case

requiring Denham to show cause why he shall not give security for costs, and unless cause is shown, or security given, the writ of error will be dismissed.

Motion allowed.

At a subsequent day of the term, the beneficial plaintiff, in compliance with the foregoing order of court, filed a bond for costs, which was objected to by Gillespie, for the defendants in error, who asked that the plaintiff might be required to show that the bond was a sufficient indemnity to Buckmaster. The point was taken under advisement.

The following opinion was delivered by

Treat, J. At the instance of Buckmaster, the nominal plaintiff in this writ of error, a rule was granted on a former day of this term, requiring Denham, the beneficial plaintiff, to shew cause why he should not give security for costs. In answer to the rule, he now presents a bond for costs, which is objected to by Buckmaster. No proof has been introduced by either party as to the responsibility of the person executing it. Must the party offering the bond show its sufficiency, or must the one objecting to it shew its insufficiency? The question is one of easy solution. Denham, having failed to shew cause against the rule, is bound to give good security for costs. This is an affirmative act on his part. If the security tendered is objected to, it is then incumbent on him to satisfy the court, by competent proof, that it is sufficient to indemnify Buckmaster against the payment of costs. He has knowledge of the pecuniary circumstances of his surety, and if they are adequate, he can readily produce the proof. The other party is not presumed to know any thing re-respecting them, and may therefore require him to make the proof. The bond will be rejected and the writ of error dismissed, unless satisfactory proof is presented of the responsibility of the person signing it, or other security is given.

Rule nisi.

Abiel Kenyon, plaintiff in error, v. Mason Sutherland, defendant in error.

Error to Cook.

Accord and satisfaction must be specially pleaded in an action of trespass, and cannot be given in evidence under the general issue.

The reading of an improper paper by counsel in the agreement of a cause cannot be assigned for error. The opposite counsel, in such case, should request the Court to instruct the jury, that nothing which was said or read by counsel in his argument was evidence before them.

There is a distinction between a plea setting up matter of defence, which has arisen since the commencement of the action but before plea pleaded, and pleas alleging matters defence, originating after plea pleaded. A plea of the former kind is not, properly speaking, a plea of puis darrein continuance. Such a plea differs from a plea in bar in this only, that it cannot destroy the original cause of action, and cannot be pleaded in bar generally, but must be pleaded to the further maintenance of the suit.

Trespass quare clausum fregit, in the Cook circuit court, brought by the defendant in error against the plaintiff in error, and heard before the Hon. Richard M. Young and a jury, at the March term 1844, when a verdict and judgment was rendered in favor of the plaintiff below for the sum of $33.40.

The various proceedings in the case are stated in the opinion of the court. The case was submitted on briefs and written arguments.

H. Brown, for the plaintiff in error, made the following points:

I. The court erred in striking the notice of special matter from the files of the court, on account of its being inconsistent with the plea of the general issue. Rev. Stat. 415, § 14.

II. The court erred in sustaining the demurrer to the defendant's plea of puis darrein continuance.

III. The court erred in excluding evidence of settlement.

IV. The court errer in permitting the plaintiff's counsel below to read the affidavit of George Cook, in his argument to the jury.

V. The court erred in refusing a new trial.

It appears conclusively from the case, that after the commencement of the suit, the whole matter in controversy was settled by the defendant giving his note for $17, with security, which was accepted and received by the plaintiff below in full satisfaction of damages and costs, and the suit was to be dismissed. This fact being stated in the plea, and admitted by the demurrer, authorities on behalf of the defendant below are entirely superfluous. The above facts were pleaded by a special notice in the first place; they were repeated in the plea of puis darrein continuance; they were afterwards offered in proof on the trial, and a motion for a rehearing made and refused. The defendant below was not, therefore, guilty of laches.

I. N. Arnold, and B. S. Morris, for the defendant in error.

I. The first error assigned is, that the notice attached to defendant's plea should not have been stricken from the files. In reply to this we may say:

First, The notice was insufficient, and therefore properly stricken from the files; and

Second, The notice was waived by the subsequent plea. The objection to the plea was in the nature of a demurrer to a plea. On sustaining the objection to the notice, defendant could elect to stand by the notice, or plead over. He did plead over, and thereby waived the notice. He could not stand by the notice and still plead over.

II. The second error assigned is the sustaining the demurrer to the defendant's plea of puis darrein continuance. The demurrer was rightfully sustained. The plea was bad. It alleges that the suit was settled, &c., on the 7th November, 1842. The plea of general issue was filed on the first day of April, 1843. The motion to strike the notice from the files was granted in March, 1844. In Ross v. Nesbit, 2 Gilman, on page 257, the court say: Such a plea (a plea puis darrein continuance) must show facts happening after the last continuance, and not before it."

This plea sets forth facts alleged before the plea of the general issue was ever filed. It is clearly bad as a plea of

puis darrein continuance. The plea to which the demurrer was sustained is also objectionable on the ground of its being double. It purports to be a plea in bar, but closes as a plea in abatement.

III. The third error assigned is not well taken, because evidence of a settlement is not competent under the plea of "not guilty."

IV. The affidavit of Cook was read, if at all by counsel, as a part of his argument, and not as evidence, and merely as an offset to the reading (very improperly) of the plea sworn to, to which a demurrer had been sustained. Neither, perhaps, can be assigned as error, and both were, perhaps, equally improper.

The opinion of the court was delivered by

KOERNER, J.* In March, 1842, Sutherland, the plaintiff below, commenced an action of trespass against Kenyon, defendant below in the Cook circuit court, and filed his declaration to the May term, 1842, of said court. No further steps appear to have been taken by the parties until the March term, 1843, when the defendant Kenyon, filed his plea of general issue, and also a notice to plaintiff, in which he sets forth, as a special matter of defence, that after the commencement of the suit, the subject matter thereof was settled between the said plaintiff and defendant; that on the 7th day of November, 1842, the defendant gave the plaintiff his note with security, for $17, payable thereafter, which the said plaintiff accepted and received in full satisfaction and discharge of the damages and costs in this suit, and that plaintiff, in consideration of its receipt, agreed to dismiss the suit and pay the costs.

No further proceedings were had in said case, it never having been reached on the docket, as the record states, until at the March term 1844, when the plaintiff made a motion to strike the notice and plea accompanying it from

* WILSON, C. J. and Justice LOCKWOOD and YOUNG took no part in the decision of this case.

the files, which motion was allowed, to which decision the defendant excepted.

By leave of the court, the defendant then at the same term filed by a plea of puis darrein continuance, as it is called by him, and as it seems to have been treated by the court, against the plaintiff's further maintenance of the action, which plea sets out the same matter more precisely, which is insisted upon as a defence in the notice, concluding with a verification and which plea was sworn to by the defendant.

The plaintiff filed a general demurrer to this plea, which was sustained by the court.

The parties then went to trial under the general issue, as the record shows, although it previously stated that the said plea was stricken from the files. But we presume that there was a clerical mistake in entering up the first order. On the trial the defendant's counsel asked a witness the question, if the subject matter in the suit had not been settled by the parties, which question was objected to, and the objection sustained.

The bill of exceptions also notices that defendant's counsel objected to the reading of a certain affidavit by the plaintiff's counsel, when he argued the case, which objection was overruled by the court. The jury found a verdict in plaintiff's favor, whereupon defendant moved for a new trial, upon an affidavit, which however is not contained in the record, which motion was overruled, and judgment rendered for plaintiff according to the verdict.

The errors assigned are:

1st. The court erred in striking the defendant's notice from the files;

2d. In sustaining plaintiff's demurrer to the defendant's plea of puis darrein continuance;

3d. Rejecting defendant's evidence, tending to show a settlement of the suit; and

4th. In overruling the motion for a new trial, and allowing plaintiff's counsel to read the affidavit of Cook in the argument.

The third error is not well assigned. Accord and satisfac-

tion must be specially pleaded in an action of trespass, and cannot be given in evidence under the general issue, which was the only issue remaining before the jury. 1 Chitty's Pl. 545.

The fourth error is also, not well assigned. Nothing appears on the record which would have justified the granting of a new trial, none of the affidavits which are mentioned in the bill of exceptions appearing of record. We think, however, that the reading of an improper paper by counsel in the argument of a cause can never be assigned as error. If the defendant had thought himself prejudiced by such a course, the court would certainly, upon his motion, have instructed the jury that nothing was evidence before them, which was either said or read by counsel in his argument.

I will now pass to the points presented by the assignment of the other errors.

It is unnecessary, under the view which we take of this case, to consider whether by the filing of the plea, called a plea puis darrein continuance, the defendant waived his exception to the decision of the court in striking the notice from the files. We are of opinion that the plea itself was a good one, and that the general demurrer to it ought to have been overruled. As a plea of puis darrein continuance it was objectionable, because it set forth matter of defence, which arose before the last continuance, and before plea pleaded. Ross v. Nesbit, 2 Gilman, 253. According to the imperfect record before us, the defendant did not file any plea in the case before the March term, 1843, while his plea alleges accord and satisfaction in November, 1842. The cause was never called after general issue and notice filed, until the March term, 1844, when the notice was decided to be insufficient, and the defendant immediately filed his plea.

There is a distinction between a plea setting up matter of defence, which has arisen since the commencement of the action but before pleaded, and pleas alleging matter of defence originating after plea pleaded. A plea of the former kind is not properly speaking, a plea of puis darrein continuance. Such a plea differs from a plea in bar in this only

that it cannot destroy the original cause of action, and cannot be pleaded in bar generally, but must be pleaded to the further maintainance of the suit. 1 Chitty's Pl. 696.

The plea in question, it will be perceived, goes only to the further maintainance of the plaintiff's action, for matter occurring since the action was commenced and before plea pleaded. The defendant, at the earliest stage of his pleading, set up his defence under the notice, and as soon as this notice was ruled out, he embodied the same defence in his plea. This plea, being a substitute for the notice, must be considered in contemplation of law as having been filed together with the general issue. In fact whenever amended pleadings are filed, they must be considered as having been filed in point of time, when the original pleadings were filed.

From the very nature of the case, the defendant could never have made his defence in a plea of puis darrein continuance, as the settlement between the parties was made before the record showed the last continuance, or before there was any plea pleaded. Shall he lose his defence by misnaming his plea? We think not. It contains all the averments necessary in a plea which goes only to the further maintainance of the suit; and also sufficient to show accord and satisfaction. 5 Johns. 390, and authority there cited. 1 Inst. 212. The plea is substantially good as a plea to the further maintainance of the action, though not as one of puis darrein continuance. On special demurrer it would have been objectionable for the reason that it was contradictory, which arose from the fact that the pleader intended it for a plea since the last continuance.

The plaintiff might have objected to this plea, as not having been filed in compliance with the order of the court, which allowed him to file a plea puis darrein only. But having joined issue on the plea, by demurring he waived this objection.

The demurrer ought to have been overruled. Judgment must be reversed, with costs, and cause remanded for further proceeding.

Judgment reversed.

Henry Rector, who sues by his guardian, Stephen Triggs, plaintiff in error, v. Lydia Rector et al., defendants in error.

Error to Alexander.

Although, as a general rule, it is not licensable, on account of the multiplicity of irrelevant and improper issues which would thereby be presented, to attack the general character of an impeaching witness, yet it is proper and highly important for the purposes of justice that a Court or jury trying a cause should know whether such, as well as any other witness, is incapacitated from giving testimony on account of mental alienation, without regard to the causes by which it may have been produced.

In the absence of any positive provision of law to the contrary, an infant will not be prejudiced or injured by lapse of time.

The general rule is, that the answer of one co-defendant in Chancery shall not be evidence against another; but to this rule there are exceptions. When such defendants are partners, or when one has acted as the other in any transaction to which the answer may relate, and the agency or partnership at the time of filing such answer still exist, the answer of the partner will be evidence against his copartner, and that of the agent against his principal, when such copartner or principal claims through or under such agent or partner.

After a long period has elapsed, Courts will be cautious in enforcing the specific performance of a contract where there is any real doubt about its existence and its terms; and specially when the contract is lost or destoyed, it should be made satisfactorily to appear what were the substantial condition and covenants which are sought to be enforced.

The presumption of innocence may be overthrown, and a presumption of guilt be raised by the misconduct of a party in suppressing or destroying evidence which he ought to produce, or to which the other party is entitled

The rule is, when a party refuses to produce books and papers, his opponent may give secondary or parol proof of their contents, if they are shown to be in the possession of the opposite party; and if such secondary evidence is imperfect, vague and uncertain as to dates, sums, boundaries, &c., every intendment and presumption shall be against the party who might remove all doubt by producing the higher evidence.

Bill in Chancery, in the Alexander Circuit Court, filed by the plaintiff in error against the defendants in error, and heard before the Hon. Walter B. Scates at the October term 1842. The bill was dismissed for want of equity.

The substance of the bill appears in the opinion of the court.

S. T. Logan, and A. T. Bledsoe, for the plaintiff in error.

I. Though the complainant's bill was founded on a lost instrument, it was not necessary to file an affidavit of loss. The rule which requires an affidavit of loss to be filed, applies only to cases in which, if the instrument had not been lost, a complete remedy might have been had upon it at law. 3 Barb. & Har. Dig. 40, 41 ; Story's Ed. Jur. § § 477–8 ; 2 Bibb, 558.

II. As the bond in question is proved to have been in possession of defendant, and there is some proof of the contents thereof, so it is to be taken most strongly against him. The court will presume that it contained everything which such bonds usually contain, and which can be in favor of complainant. 1 Stra. 505 ; 1 Camp. 8 ; Life & Fire Ins. Co. v. Mech. Ins. Co. 7 Wend. 31 ; 1 Greenleaf's Ev. 43.

III. Notice to agent is notice to principal. 2 Powell on Mort. 581–6 ; 3 Atk. 646 ; Fomb. Eq. 420 : Prin. & Agent 283; Story on agency, 131, § 140.

IV. Every artifice or device by which a man is designedly deprived of his right to fraud ; and a court of equity will afford relief. 2 Vesey, 155 ; Story's Eq. Jur. § § 187–8, 192, 254.

D. J. Baker, for the defendants in error.

A decree for a specific performance of a contract for the conveyance of land was refused, because a certain and definite contract was not made out, &c. Carr v. Duval, 10 Peters, 77.

A court of equity will not enforce a specific performance of a contract as between the original parties, unless its terms are clear, definite and positive ; and a fortiori, when the specific performance is sought to be enforced against an assignee. Kendall v. Almy 2 Sumner, 298 ; 1 Peters' Dig. 471, § 448 ; Colson v. Thompson, 3 Conn. 143.

The discretion of the court in granting or refusing a spe-

cific execution is regulated by established principles. Revel v. Hussey, 2 Ball & Beatty, 288.

To obtain a specific performance, the case should be clear of doubt. Hammond's Dig., 16; 2 Scho. & Lef. 7; ib. 549. A bill for a specific performance is an application to the discretion, or extraordinary jurisdiction of the court, which cannot be exercised in favor of persons who have slept upon their rights, or have acquiesced for a long time in a title or possession adverse. 1 Ball & Beatty, 69.

A party seeking to disturb another in the possession of the legal title ought to show a clear equity. Rucker v. Howard 2 Bibb, 268.

To authorize a decree enforcing a contract, the agreement should be complete in all its parts. 3 A. K. Marsh. 400, 445; 1 Wash. 290; 3 J. J. Marsh. 546.

A mere gratuity will not be enforced in equity. 3 A. K. Marsh. 436.

Equity will not enforce a contract specifically, which, by subsequent events, will impose great loss or hardship on the defendant, but will leave the party to his remedy at law. 4 Littell, 398.

The power of the Chancellor to enforce specific performance is one exercised, not on every occasion, but is guided by legal discretion, and does not belong, as of right, to every meritorious contract. As a general rule, the Chancellor will not interfere with a party's remedy at law upon a breach of contract for conveyance, unless there are circumstances calculated to make it an exception. Caldwell's Heirs v. White, 4 Monroe, 567.

A bill for specific performance if addressed to the discretion of the court. Gilman's Dig. 131; 3 Blackf. 273.

After a long delay and laches, a court of equity will not decree a specific performance; especially where there has been a material change of circumstances and injury to the other party. A fortiori, it will not decree against purchasers, even with notice, if their vendor is dead and insolvent, so that they can have no remedy over. 5 Mason, 244.

The opinion of the court was delivered by

Purple, J.* On the 8th day of May, A. D. 1834, the plaintiff in error filed his bill in Chancery in the Alexander circuit court, complaining that Elias Rector, in his lifetime, contracted with Stephen Rector for the purchase of one half of fractional section No. 27, in township 15 south, of range 1 east, of the third principal meridian in the said county of Alexander. That the price for which the parties contracted was unknown, but the purchase money was fully paid. That Stephen Rector executed his bond to Elias Rector, covenanting therein to convey the same to said Elias by general warranty, as soon as he should receive a patent therefor from the United States; he, Stephen, at the time only claiming a right to the land by virtue of a certificate of entry and purchase from the United States, which showed that one fourth of the purchase money due on the land ($309.56) only had been paid. That Stephen was to pay the residue of the purchase money. That Stephen died, not having performed the conditions and covenants of his bond. That Lydia Rector, his widow, became his administratrix. That Elias died also before any deed for said land had been made to him, leaving Henry Rector, the plaintiff, his sole heir. That William Rector administered on Elias' estate, died, and administration de bonis non was granted to Stephen Triggs. That Stephen Rector, in his lifetime, and his administratrix after his death, had failed to pay to the United States the balance of the purchase money due on the land. That Lydia Rector, although notified of the bond and covenants made by Stephen, her husband, sold and transferred the certificate of purchase for the land to John Skiles, or to him and one James Riddle, who were thereby enabled to obtain a patent for the same, and hold it in their own names. That the said Lydia, together with Stephen, George K. and Thomas C. Rector, had combined and confederated with John Skiles and James Riddle to defraud the plaintiff, and

*Young, J. did not sit in this case.

that they have refused, and still refuse to make him a deed for the land so purchased by the said plaintiff's ancestor, Elias Rector. That Skiles and Riddle, or one of them, purchased the said certificate of Lydia Rector with full notice of the bond and covenants made by Stephen to and with Elias Rector; and that Skiles has paid the balance of the purchase money for the land to the United States, with full knowledge of the plaintiff's claim. That the bond has been lost or mislaid, so that the same cannot be produced. That James Riddle had died, leaving Esther Riddle his executrix, and Mary, James, Henry D., Esther, Charles K. and Margaret J. Riddle his heirs at law.

The bill concludes with a prayer for a conveyance from John Skiles and the heirs of Stephen Rector and James Riddle, of the undivided half of the land before described, to the plaintiff, and for general relief.

The answer of John Skiles, filed on the 4th day of November, A. D. 1834, states, that the land was entered by Stephen Rector at the land office in Shawneetown, on the 10th day of May, A. D. 1816, one fourth of the purchase money, $309.56, having been paid at the time of such entry. That on the 17th day of September, 1821, Stephen Rector obtained from the land office a certificate of further credit on the same, by which payments were to be made in eight annual instalments, commencing on the 31st day of March, A. D. 1822. That Stephen Rector died insolvent, having made no further payment on the land. That Lydia Rector was appointed his administratrix, and that on the 9th day of June, 1828, she, as administratrix, by deed sold, transferred, and conveyed the said certificate of every entry and purchase to the said John Skiles, for the sum of $530.87. That in December, 1828, he lost the certificate, and after due notice procured a duplicate thereof from the land office, and about the same time, he paid the residue of the purchase money due on the land, which, after deducting the amount originally paid by Stephen Rector, was $580.42, and on the 12th January, 1831, after due proof of the transfer of the certificate, obtained a patent for the land in his own name.

That James Riddle furnished a portion of the purchase money and after he had procured the patent he deeded to Riddle one half of the land, pursuant to a prior agreement with him. That he knows of no bond from Stephen to Elias Rector, as stated in the bill, and calls for the proof. If there ever was such a bond, he admits that it was made when Stephen had paid only one fourth of the purchase money on the land. That Stephen paid $309.56, and died without performing the covenants in the bond, if it existed; but he has no knowledge whether or not Stephen was to pay the residue of said purchase money. He denies that at any time before he purchased from Lydia Rector, or before he made the final payment to the land office, he had any knowledge of the existence of any such bond, or that he made the purchase with any design to defraud the plaintiff. Admits that Elias Rector died some ten years since, but does not know, who are his administrator or heirs, and requires proof. Admits that Lydia, administratrix of Stephen, never paid the residue of the purchase money for the land. Does not know whether she had notice of the bond to Elias before she sold the certificate, and requires proof. That he has no knowledge who are the heirs of Stephen Rector.

The heirs of Stephen Rector and James Riddle, by their guardian ad litem, Wilson Able, answer generally that they are strangers to the matters charged in the bill.

There is no amendment or supplement filed to the original bill, suggesting the death of John Skiles, but James Skiles, Robert King and Jane his wife, Abraham S. Latta and Elizabeth his wife answer and admit that James Skiles is the son, and Jane King and Elizabeth Latta are sisters of John Skiles deceased, and his sole heirs; and state that they are strangers to all the matters stated in the bill, except that they have heard that John Skiles purchased the land, and in good faith obtained a patent therefor from the United States, and require strict proof. They refer to, and rely upon the answer of John Skiles.

The plaintiff filed a general replication to the answers.

By the depositions taken in the cause, the complainant

below, proved by Joseph Garnein, that Henry Rector is the son and only heir of Elias Rector deceased, that he believes Skiles paid Lydia Rector $400, or $500, for the certificate of purchase, and that Stephen Rector was insolvent at the time of his death.

By Augustus H. Evans, that in September, 1822, he made an inventory of Elias Rector's papers at the house where he died, and recorded such inventory in a book. That among these papers was a bond, executed by Stephen Rector to Elias Rector, for one half of fractional section, number twenty seven, township fifteen south, range one east, third principal meridian. That he is enabled to make this statement from the circumstances that a list of said Rector's papers appears on file in the county clerk's office, in the hand writing of John H. Langham, and he recollects that Langham made the copy of the list from his book above mentioned, and further, that in 1825 or 1826, a gentleman came from Kentucky, who wanted to purchase said land. That he, witness, went to see Rector (Stephen,) and that he, (Stephen,) then told him he did not own the land, that his Brother and one Barcroft owned the most, if not all of it, but that Barcroft should never have any of it. That after Stephen Rector's death in 1826 or 1827, in a conversation with Mrs. Rector, his widow, he told her of all the circumstances of the sale made by her husband to his brother Elias. He does not remember whether or not the bond expressed that it was made for a valuable consideration, but is of opinion it conveyed all the right of Stephen Rector to one half the land, when the same should have been paid for by said Stephen. He believed the bond acknowledged the receipt of the consideration money. That Henry Rector is the sole heir of Elias Rector, deceased.

By U. S. Hults, that some time between August and October, 1833, Skiles in a conversation with witness about valuable tracts of land on the river, informed him that Mr. Webb owned the Caledonia tract, and that he (Skiles) and the Heirs of James Riddle owned the adjoining tract on the north, bounding on the Ohio river. That he expressed sur-

prise that Webb had not purchased said last mentioned tract before Skiles did, as he (Webb) had been a long time in the country. That Skiles stated that Webb and others were afraid to purchase, owing to the existence of a certain title bond. That when he (Skiles) came on, he shortly found out that he could make a safe purchase. That he had been to St. Louis, and there ascertained that the bond was lost and would never be found. That this was a bond given for this tract of land. That he then made the purchase of the widow for one half the said land. That then he went to Shawneetown to get the certificate in his own name. That he had made also the purchase of the other half. That he gave a certain sum for the land, the amount not recollected, and that he gave Mrs. Lydia Rector $50.00 for her right. That he inquired of Skiles if they would not be on him about the bond he had mentioned. That Skiles replied, "How can they when I have the patent from the United States?" That in the course of the conversation Skiles said that he understood that the bond which was said to have been given by Stephen to Elias Rector had been lost. That he understood from him that it had been lost previous to his purchase of the widow Rector, and about the time of the death of Elias Rector. That he never heard Skiles say he had seen or had any personal knowledge of the bond except from information.

By Henry L. Webb, that in May, 1820, there was a sale of town lots at America; Stephen and Elias Rector were present, and while there Elias proposed selling section twenty seven, in township fifteen north, range one east, third principal meridian, to Doct. Wm. Alexander and witness, at $4 per acre. That under this proposition, if they purchased they were to pay the residue of the purchase money, one payment of fifty cents per acre having been made, which would have made the land cost them $5.50 per acre. That he understood from both Stephen and Elias that the land was their joint property.

By James S. Smith, that in 1828 or 1829, having become acquainted with John Skiles, and having had frequent conver-

sations with him in relation to land in the neighborhood, he, witness, mentioned to him, Skiles, section twenty seven, and told him the situation of the land. That Stephen Rector had executed to Elias Rector, a bond for a part of it. That Elias was dead, and there would be no difficulty in procuring the land, provided he could obtain the part held by Elias Rector's heirs. That in consequence of this information, Skiles went to St Louis, and on his return, informed the witness, that he had got on a track for obtaining the bond. That he could obtain it from the widow of Stephen Rector; at this time there was some conversation about the loss of the certificate of entry. That Skiles made three journeys to St. Louis, before he completed the purchase. That upon witness inquiring of him about the claim of Elias Rector's heirs, he replied, that he had got the bond. That he had headed the boys. That the bond was no longer in their possession, nor ever would be again. At this time he held a paper in his hand, shaking it towards witness, remarking as above stated. That he, witness, did not read the paper. That he had always understood that James Riddle was interested with Skiles in the purchase. That one day Riddle told him he was dissatisfied with Skiles' conduct towards him. Afterwards he heard Riddle inquire of Skiles for the bond from Rector for one half the land in question. Skiles at each time refused to show it; Riddle was irritated. That after one interview, Skiles said to a witness that he did not know that Riddle had any more right than others to see the bond. That no one should see it; and that at another time when Skiles had refused to let Riddle see the bond, Riddle said he would have no responsibility in the purchase from Mrs. Rector. That they, Skiles and Riddle, would divide the lots and land, and Skiles must take the responsibility of that purchase and do as he could with it. That Skiles gave several reasons for the title papers being taken in his name first. That Riddle was not then a resident of the State, and had not then been consulted on the subject. That he might never come to the State to reside, and was pecuniarily embarrassed. That perhaps the cause that Skiles conveyed to

Riddle with waranty, was on account of Riddle's objection to the manner of obtaining the part of the land claimed under the bond to Elias Rector. That he never saw the deed to Riddle, and never heard Barcroft's name mentioned in any of the conversations.

William Price, a witness for the defendants, stated that he once saw a bond from Stephen Rector to Elias Barcroft.

Cyrus Lynch and Nichols Smith testified, on the part of the defendants, that they would not believe U. S. Hults under oath.

Jesse Echols stated that he thought Skiles purchased the land he lived on about 1828. That he understood the same had before that time belonged to Stephen Rector.

Joseph W. Echols stated, that while Smith lived with Skiles, he heard Skiles speak about a bond to Barcroft ; that he never heard him speak of one to Elias Rector.

Eli B. Clemson, for plaintiff,. stated that Skiles had great influence over Nicholas Smith and Cyrus S. Lynch. That Nicholas Smith was a very intemperate man, and his intellect in his opinion, impaired by drink. That he should discredit his testimony when Skiles was a party. That he had a good opinion of Hults, and would credit his testimony.

Henry L. Webb stated that Nicholas Smith was intemperate and vindictive, and his character bad. That he had known Hults for some years, and should have implicit confidence in his word or testimony. That at the time Skiles made the purchase of Mrs. Rector, it was generally known in the neighborhood that Capt. Spotts had declined to purchase the land, on account of the claim of Elias Rector's heirs.

William Echols stated that Nichols Smith was intemperate. That he died in the fall of 1838. That his testimony could not be relied upon, when he or his friends were interested.

Considerable other testimony is introduced into the record, but most, if not all of it, is hearsay, irrelevant and unimportant in its character.

The most important questions involved in this case are questions of fact merely.

The first is, in relation to the existence of the bond set forth in the bill of complaint.

The solution of this question depends upon the testimony of Evans, Hults and Smith. That such a bond might have existed, is, not positively denied by any of the defendants. It is a matter about which they could not answer by direct denial, or in such manner as to render it necessary to disprove the answer by the testimony of more than one witness.

Evans distinctly states, that he saw a bond executed by Stephen to Elias Rector, for one half of the land in controversy, in September, 1822. This bond was then, which was subsequent to Elias Rector's death, among his papers. The witness believed it acknowledged the receipt of the consideration money, and conveyed all the right of Stephen to one half the land, when the same should have been paid for by Stephen. This testimony alone, uncontradicted and unimpeached, as it is, is sufficient to prove the existence of substantially such a contract as the complainant's bill describes. That the consideration money had been paid, is properly inferred from the admission of Stephen Rector to Webb and Evans, at a time when he had no interest to misrepresent the facts. The admission in substance is, that one half the land belonged to Elias Rector. Add to this the statements of Skiles to the witnesses Hults and Smith, and if the witnesses are credible, every reasonable doubt must be removed.

The next question of fact to be determined is, had Skiles, at the time he purchased the certificate of entry of Mrs. Rector, Stephens administratrix, notice of the existence and conditions of this bond ? This, in his answer, he most positively denies. His answer must be considered as true unless disproved by two witnesses, or by one witness and corroborating circumstances.

We think the evidence justifies the conclusion, that in this respect, his answer is untrue. According to the statement of Smith, he was the first to give Skiles information relative to the situation of the land ; and at the same time he

told Skiles of the claim of Elias Rector's heirs to a portion of the tract. Skiles acted upon this information, went several times to St. Louis, and finally, as he admits, got possession of the bond. Substantially the same facts testified to by Smith are related by Hults, as having been detailed to him by Skiles. That in 1833, Skiles told him, that when he first came to the country, he ascertained that Webb and others were afraid to purchase the land, on account of the claim of Elias Rector's heirs. That he (Skiles) went to St. Louis, and ascertained that the bond to Elias Rector had been lost, and that he could safely make a purchase of the land; that he then purchased of the widow Rector one half, and of some other persons the other half of said tract.

Skiles cross-examined this witness himself, and in that examination asked him, if he had heard him say that he had ever seen, or had any personal knowledge of the bond; and did not by any interrogatory, or otherwise, so far as this record shows, intimate that the bond to Barcroft, or to any other person than Elias Rector, was the subject matter of the conversation; nor can any reasonable inference be drawn from any of the testimony, that these conversations and admissions had reference to any other bond.

Webb also testifies, that at the time Skiles purchased, it was generally known in the neighborhood that Elias Rector's heirs had a claim to the land. This circumstance alone would not conclude the defendant Skiles upon this point; but in connection with the other evidence, it tends to establish his knowledge of the plaintiff's equity. Hults and Smith are sustained by each other in almost every material portion of their testimony bearing upon this question. Either their evidence, or the answer of defendant Skiles must be discredited. They are not susceptible of reconciliation. The law attaches greater weight and importance to the former, and leaves us no alternative but to declare that the latter is disproved.

An unsuccesful effort is made to impeach the character of Hults for truth and veracity. Cyrus S. Lynch and Nicholas Smith swear that they would not believe him under oath.

The reason assigned by Smith is, that on an occasion when he was indicted and Hults was a witness in the case, his testimony was different from what he had reason to expect it would have been from intimations which he had received from Hults. Smith is not asked, nor does he state, whether he knows Hults' general reputation for truth, but says he would not believe him under oath nor any other way.

Now it appears from statements made by other witnesses, that Smith was an intemperate man, and by the opinion of one that his intellect was somewhat impaired. They also add that he was naturally vindictive in his character, that Skiles had an undue influence over him, and that little reliance could be placed upon his testimony.

Although as a general rule it is not licensable on account of the multiplicity of irrelevant and improper issues which would thereby be presented, to attack the general character of an impeaching witness, yet it is proper and highly important for the pusposes of justice, that a court or jury trying a cause should know whether such as well as any other witness, is incapacitated from giving testimony on account of mental alienation without regard to the causes by which it may have been produced. Webb and Clemson both declare that every reliance can be placed upon the testimony of Hults. Under these circumstances, we do not consider the testimony or character of this witness at all impeached. Several questions of law have been presented and argued by the counsel, some of which will be briefly noticed. On the part of the defendants it has been urged [*a*]

First, That the complainant below is barred by lapse of time, from insisting upon a specific performance of this contract;

Second, That Riddle was a bona fide purchaser from Skiles, and therefore he and his heirs cannot be affected by Skiles' knowledge of the existence of the bond from Stephen to Elias Rector; and that Skiles' answer is not evidence against him or them, to prove any fact material to the issue;

Third, That there is no sufficient evidence of the contents of the contract alleged to have been lost; and

a) Trye vs. Bank &c. 11 Ill. R. 379.

Fourth, That in transferring the certificate of purchase, the administratrix of Stephen Rector was justified by law, and therefore the plaintiff, after such sale, could have retained no legal or equitable interest in the land.

The first objection is answered by the record, which shows that this suit was instituted in the court below, while the complainant there was yet a minor, and personally incapable of asserting his claim in a court of justice; and however reluctant courts may be to decree specific performance in ordinary cases, when parties have long and voluntarily slept upon their rights, as yet they have never held that this inclination on their part against stale claims can properly apply in such a case as this, when by reason of his tender years, the party is disqualified to prosecute his suit in person. If such is the general rule, the present case is clearly an exception. In the absence of any positive provision of law to the contrary, an infant will not be prejudiced or injured by lapse of time.

With reference to the second point, independent of the answer of Skiles, there is sufficient in the record to raise the presumption that Riddle was his partner in the original purchase of the land. This is manifest from his conversations with Skiles about the bond, as detailed by Smith, and his declarations to Smith before Skiles conveyed to him. The general rule is, that the answer of one co-defendant in Chancery shall not be evidence against another. To this rule also there are exceptions. When such defendants are partners, or when one has acted as the agent of the other in any transaction to which the answer may relate, and the agency or parnership at the time of filing such answer still exists, the answer of the partner will be evidence against his copartner, and that of the agent against his principal, when such copartner or principal claims through, or under such agent or partner. [*a*]

But in this case, Riddle was not a bona fide purchaser from Skiles. The evidence warrants the conclusion that they were alike interested in the purchase from Mrs. Rector, Skiles acting as the agent of Riddle in the transaction.

(*a*) Martin vs. Dryden, 1 Gil. R. 208; Rust vs. Mansfield, 25 Ill. R. 338.

Their interests are identical and not adverse, and so far as is shown by the record, the representatives of each still occupy the position of their ancestors as joint proprietors of the land. This community of interest being proved by other testimony, the answer of Skiles is evidence against Riddle and his heirs, especially so far as it may tend to prove the existence or notice of the existence of the bond from Stephen to Elias Rector. Notice to Skiles, who was his agent and partner in the purchase, is notice to Riddle and to his heirs. But in this particular case, the heirs of Riddle are not in fact prejudiced by the answer of Skiles. In it he denies all knowledge of the bond whatever.

A third objection to the decree, as prayed for in this case, is not unworthy of attention. After a long period had elapsed, courts will be cautious in enforcing the specific performance of a contract where there is any real doubt about its existence and its terms; and especially when the contract is lost or destroyed, it should be made satisfactorily to appear what were the substantial conditions and covenants which are sought to be enforced. (*a*) To ascertain the terms of this contract we must rely mainly upon the testimony of Evans, the admission of Skiles, and such presumptions as the law applicable to the facts implies. Evans saw the contract, knew that it was conditioned for the conveyance of one half the land in question, and believed that it acknowledged the payment of the consideration money, and that the conveyance was to be made when the obligor should have paid the residue of the purchase money to the United States. Skiles admits the existence of a bond executed by Stephen to Elias Rector for the conveyance of one half the same land to two, and that he had got the bond into his own possession, to one of the witnesses whose testimony has been given in this case.

The evidence goes further, and, by showing that Skiles having had the same in his possession and neglecting or refusing to produce it upon the trial, raises strong presumptions and intendments of law against himself.

"The presumption of innocence may be overthrown, and a presumption of guilt be raised by the misconduct of a

(*a*) Hough vs. Coughlan, 41 Ill. R. 134.

party in suppressing or destroying evidence which he ought to produce, or to which the other party is entitled. Thus, the spoliation of papers material to show the neutral character of a vessel furnishes a strong presumption in odium spoliatoris against the ship's neutrality. A similar presumption is raised against a party who has obtained possession of papers from a witness after the service of a subpœna duces tecum upon the latter for their production, which is withheld. The general rule is omnia presumuntur spoliatorum. His conduct is attributed to supposed knowledge that the truth would have operated against him." 1 Greenl. Ev 43.

"The rule is, when a party refuses to produce books and papers, his opponent may give secondary or parol proof of their contents, if they are shown to be in the possession of the opposite party; and if such secondary evidence is imperfect, vague, and uncertain as to dates, sums, boundaries, &c., every intendment and presumption shall be against the party who might remove all doubt by producing the higher evidence." Life & Fire Ins. Co. v. Mechanics' Ins. Co. N. Y. 7 Wend. 31.

We think there is sufficient evidence to warrant the belief that Skiles once had this contract in his possession. If so the preceding principles of law apply with all their force against him. The most material portions of it are proved. It is only uncertain as to the date, penallty, and unimportant particulars of the covenants or conditions, and in these respects the plaintiff's case is aided by legal intendment and presumption.

In favor of the fourth point no sound argument can be advanced. It is true, that by the laws of this state the administratrix of Stephen Rector had a right to dispose of the certificate. Rector himself in his lifetime had the same right. Although by the payment of one fourth of the purchase money he had not acquired a title as against the United States, yet he had an incohate interest, which upon the payment of the residue, would confer upon him or his assignee a perfect legal title.

The law had made these certificates and the interest ac-

quired under them property; and as between the holder and third persons, subject to the same rules, and the same assignable and transferable qualities, as other property of a similar character.

Whether the owner's interest then was of a real or personal nature, would be entirely immaterial. If in his lifetime, he had parted with that interest, or any portion of it, it would be a volation of first principles to contend that such interest could descend to, or vest in his heirs or administratrix, or that they, or she could transfer the same to another, in fraud of a prior bona fide purchaser.

The decree of the circuit court of the county of Alexander is reversed, and a decree entered in this court, that the plaintiff in error, Henry Rector, pay into the hands of the clerk of the circuit court of the county of Alexander the sum of two hundred aud ninety dollars and twenty one cents, and interest thereon, at the rate of six per cent. per annum, from the first day of December, A. D. 1828, up to the time of such payment, being one half of the purchase money advanced by John Skiles and James Riddle for the tract of land in this decree hereinafter mentioned, and legal interest thereon from the time of such advancement, to and for the use and benefit of the defendants, the legal heirs of John Skiles and James Riddle, deceased; which said sum of money shall be paid out and distributed to them, the heirs of said Skiles and Riddle, under the order and direction of the circuit court of Alexander county, in such sums as they may in the judgment of said court, be respectively entitled to receive. Said money and interest to be paid to the said clerk within six months from the date of this decree.

And it is further ordered and decreed, that the said defendants, James Skiles, Robert King, and Jane King, his wife, Abraham S. Latta, and Elizabeth Latta, his wife, (the said James, Jane and Elizabeth being the heirs at law of John Skiles, deceased,) Esther Riddle, Mary Riddle, James Riddle, Henry D. Riddle, Esther Riddle, Jr., and Charles K. Riddle, heirs at law of James Riddle deceased, within the period of two months after the expiration of the six months

before mentioned for the payment of said money, in case the same shall have been paid as aforesaid, make, execute and deliver to the said Henry Rector, plaintiff in error in this suit, a deed, or deeds, in fee simple, with covenants of special warranty against all incumbrances done and suffered by them, or any of them, to the equal undivided half part of fractional section number twenty seven, (27,) in township number fifteen, (15,) south, of range number one, (1) east of the third principal meridian in the county of Pulaski, formerly Alexander.

And it is further ordered and decreed, that in default of the said defendants, making and delivering said deed or deeds, in manner aforesaid, that the master in chancery of the county of Alexander be, and he is hereby appointed a commissioner on their behalf, to make, execute and deliver the same, pursuant to the decree hereby rendered.

It is further ordered, adjudged, and decreed, that in case the plaintiff in error shall neglect and refuse to pay said sum of money, and interest thereon, within the time prescribed herein, that then his said bill of complaint shall stand dismissed at his costs, both in this court and in the court below. And in case the same shall be duly paid, in manner aforesaid, then each party shall pay one half the costs of this proceeding, both in this court and in the court below.

Decree reversed.

JAMES BRANIGAN, appellant, v. ORRIN J. ROSE et al., appellees.

Appeal from Cook.

The principal on which pleas in abatement of another action pending are sustained is, that the law will not permit a debtor to be harassed and oppressed by two actions to recover the same demand, where the creditor can obtain a complete remedy by one of them. If the same remedy is furnished by the first action, the subsequent one is wholly unnecessary, and is, therefore, regarded as vexatious, and will be abated. But if the remedy by the former action may be partial or ineffectual, the plea in abatement to the latter cannot prevail.

A plea in abatement, alleging the pendency of a proceeding in attachment, ought not of itself to abate a subsequent suit in personam, an attachment being generally a mere proceeding in rem. If such a plea is interposed, it show by a proper averment, that the defendant was personally a party to the proceeding by attachment.

Where a demurrer to a plea in abatement was sustained, no judgment was rendered at the time against the defendant, but a judgment was subsequently rendered : Held no error, for the defendant was not precluded from answering over after the decision sustaining the demurrer, and that, on his declining to do so, the court proceeded to dispose of the case.

The mere order of the court granting an appeal to a defendant does not divest the plaintiff of a right to an execution upon the adjournment of court. The judgment becomes operative from the last day of the term, and continues so until the appeal is perfected by the filing of the bond. The refusal of the court to stay proceedings on an execution, under such circumstances, cannot be assigned for error, the application being addressed to the sound discretion of the court.

ASSUMPSIT, in the Cook county court, brought by the appellees against the appellant. The case was heard at the November term 1846, the Hon. Huge T. Dickey presiding. The defendant pleaded the pendency of an attachment suit in abatement, which plea appears in the brief of the counsel for the appellees. There was a demurrer to the plea, which the court sustained. The defendant not answering further, the court assessed the plaintiff's damages, and rendered a judgment upon the assessment.

J. B. Thomas, and B. S. Morris & J. J. Brown, for the appellant.

The court erred in deciding the plea in abatement bad.

In 5 Johns. 101-2, the court say: "If then, the defendant could have been protected under a recovery had by virtue of the attachment suit, and could have pleaded such recovery in bar," &c.

The same principles will support a plea in abatement of such attachment pending and commenced prior to said suit. 19 Wend. 215.

In Kentucky, it has been held that an attachment pending has uniformly furnished a good plea in abatement. 5 Littell, 352.

In Pennsylvania, the same decision has been made. 1 Binn. 25.

The court erred in refusing to stay proceedings on the execution, which was improperly issued

A. T. Bledsoe, J. A. McDougall & E. Peck for the appellees.

The only question in this cause arises upon the sufficiency of the following plea in abatement:

"James Branigan ads. Orrin J. Rose et al. } Cook County Court. Assumpsit.

And the said defendant, Branigan, by Morris & Brown, comes and prays judgment of the said writ and declaration thereon, because he says, that before emanation of said writ, to wit: on the 20th day of August, A. D. 1846, in the Cook county court, sued out their certain writ of attachment, upon the same indentical account, promises and undertakings in the said declaration mentioned in this present suit, as by the record and proceedings thereof remaining in the said court of Cook county more fully appears.

And the said defendant further saith, that the parties in this and the said former suit by attachment are the same, and not other or different persons, and that the supposed causes of actions in this and the said former suit, all and each, and every of them are the same, and not other or different causes of action: and that the said former suit, so brought and presented against him, the said defendant, by ths said plaintiffs as aforesaid, is still depending in the said

court. And this the said defendant is ready to verify: Wherefore he prays judgment of the said writ and declaration in this suit, and that the same may be quashed, &c.

Morris & Brown deft's. att'ys.

James Branigan, the above named defendant in this cause, maketh oath and saith, that the plea hereunto annexed is true in substance and matter of fact.

James Branigan."

Subscribed and sword to before me, }
this 6th day of Oct. 1846. }

James Curtiss, Cl'k.

It was held by the court to lack the certainty which the law requires in pleas of abatement. There was some other objections made to it ; but the want of certainty in the plea was so apparent, that the other points were not considered by the court below.

There is no averment as to who sued out the attachment, or against whom the attachment was sued out; a recital connected with the avermemt that former suit is still pending, is all that would indicate who were parties to the former action.

The plea should have averred the names of parties plaintiff and defendant in the former; if then the parties did not appear to be the same, plaintiff could demur; if parties appeared to be the same and were not, there would be a variance in the proof.

The plea is otherwise defective, but as this defect is palpable, we do not think it necessary to refer to them.

For the rule as to the decree of certainty and precision required in pleas in abatement, see Graham's Pr. 228, under head of "Ples in abatement;" 2 Saunders, 209, a. b., being in 3d vol. of modern editions; Docker v. King, 5 Taun. 652; Roberts v. Moon, 5 T. R. 487; Haworth v. Spraggs, 8 do. 516; 1 Chitty's Pl. 495.

The doctrine contained in all these cases is, that a plea in abatement must be certain to the greatest extent; that the plea will be closely scrutinized, and meet with no favor as it is but an obstruction to the administration of justice in the darticular case ; that the averment of parties' names cannot

be supplied by reference to the title in the margin, but must of itself be perfect and complete in its averments, and must be pleaded according to the strict forms of the law.

It was further insisted below, that a proceeding in attachment was generally a mere proceeding in rem, and as such, would not abate a subsequent suit in personam. The proceeding may become personal by appearance, but in pleading an attachment suit in abatement, the plea should aver sufficient to show(if such was the fact) that the defendant was in person a party thereto.

In Delahay v. Clement, 3 Scam. 203, it was held that a proceeding to enforce a mechanic's lein could not abate a subsequent suit for the debt, for the reason that the former proceeding was in rem, and it was held that the remedy was cumulative.

The case of Embree & Collins v. Hanna, 5 Johns. 101, was relied on by defendant below to sustain the plea, but the court will perceive that there is not the least anology between the cases. There the defendants owed Hanna. Bach & Puffer, creditors of Hanna, attached this debt in the hands of defendants; it was held that Bach & Puffer acquired a lein upon the debt, and that their proceedings would abate a subsequent suit against defendants by Hanna himself. Here, had both suits been permitted to progress, there would have been separate recoveries by different parties of the same debt, and payment of one would not discharge the other. Both proceedings were in personam, that is, against defendants in person, and both for the recovery of the debt.

We have no occasion to question the correctness of this decision, and while this is the only case that might be misunderstood to contain doctrine in support of the plea that we have been able to meet with, we feel confident that it has been nowhere held that an attachment in rem was matter of abatement to subsequent proceedings by the same parties in personam.

In Winthrop v. Carleton, 8 Mass. 456, and Morton v. Webb, 7 Verm. 124, are rules such as are contended for by us.

It seems to us, that in no view can an attachment suit proper, that is, a proceeding in rem, abate a subsequent

action. Could not an attachment be taken out in two jurisdictions, or in two counties, at the same time, reaching different properties? In this county, proceeding against goods; in another, against real estate. And could it be strictly said, in abatement of any personal action, that the attachment suits were between the same parties? Certainly not, for until appearance, there is but one party, and that party seeking a remedy, not against the person, but the property of the defendant.

Should the court think it necessary to consider the point, we insist upon the position assumed as the law, i. e., that an attachment proceeding does not abate a subsequent suit for the debt, according to the ordinary course of the common law.

A question is made as to the regularity of the execution. It is assumed that there is nothing in this point. The only authority we have seen is that reported in 1 J. J. Marsh. 93, in which the court say, that praying an appeal does not ipso facto suspend the judgment or prevent any proceeding for its enforcement. Granting an injunction does not enjoin judgment until bond is given, and the cases are analogous. If he chooses, he may give the bond promptly, &c.

This must be the law. A judgment once operative, once complete, retains all its properties until discharged in fact or by law, or suspended by law. There is no law which stays the effect of a judgment until the appeal bond is executed. When the appeal bond is filed the appeal is perfected, and the case is for review in the appellate court; but until then, there being no law to the contrary, it must be a valid, subsisting, and operative judgment, liable at any time to be enforced by process of law.

The opinion of the court was delivered by

Treat, J.* This action was commenced in the Cook County Court, by Rose & Rattel against Branigan. The declaration was in assumpsit. The defendant filed a plea in

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*Justices Lockwood and Young did not sit in this case.

abatement, averring in substance the pendency in the same court of a proceeding in attachment on the same cause of action, commenced prior to the institution of this suit. The court sustained a demurrer to the plea, but rendered no formal judgment of respondeat ouster. The defendant failing to answer further to the action, the plaintiff's damages were assessed by the court, by the agreement of the parties. Judgment was rendered on the assessment. The defendant prayed an appeal to this court, which was granted on the condition that he should enter into bond within ten days. Before the expiration of the ten days, and before the execution of the bond, the plaintiff caused an execution to issue on the judgment. The defendant then applied to the Judge at his chambers for an order to stay proceedings on the execution until he could move the court to set it aside, which was denied.

The chief point in the case is, as to the validity of the plea in abatement. The principle on which pleas of this character are sustained is, that the law, which abhors a multiplicity of suits, will not permit a debtor to be harrassed and oppressed by two actions to recover the same demand, where the creditor can obtain a complete remedy by one of them. If the same remedy is furnished by the first action, the subsequent one is wholly unnecessary, and is, therefore, regarded as vexatious, and will be abated. But if the remedy by the former action may be partial or ineffectual, the plea in abatement to the latter cannot prevail. Bacon's Abr. "Abatement," M; Gould's Pl. 283. On this principle, it is clear that the pendency of a proceeding in attachment ought not of itself to abate a subsequent suit in personam. Under our statute, an attachment is generally a mere proceeding in rem. The judgment is in rem, and not in personam. It can only be satisfied out of the estate attached. No action can be maintained on the judgment, the record not affording prima facie evidence of indebtedness. The plaintiff's remedy may, therefore, be but partial and incomplete. If no estate of the debtor is attached, it fails altogether. (*a*) It is true that this proceeding may become personal by an appearance, but in

(*a*) Manchester vs. McKee, 4 Gil. R. 520; Green vs. Van Buskirk, 7 Wal. U. S. R. 148.

pleading the pendency of an attachment in abatement, the plea ought to show by a proper averment that the defendant was personally a party to the proceeding. In the opinion of the court the plea in question is bad. This view of the case is sustained by the authorities. In Morton v. Webb 7 Verm. 123, it was decided that the pendency of a trustee action could not be pleaded in abatement of a subsequent suit, in the common law form, for the same cause of action. That case is identical in principle with the present. In Delahay v. Clement, 3 Scam. 201, this court held that a proceeding under the statute to enforce a mechanic's lien could not abate a subsequent action for the same demand, on the ground that the former proceeding was in rem, and might not, therefore, afford a complete remedy. See, also, the case of Winthrop v. Carleton, 8 Mass. 456. We have been referred to the cases of Embree & Collins v. Hanna, 5 Johns. 101, and Scott v. Coleman, 5 Littell, 349, as establishing a different doctrine, but on examination they fail to snstain the position. In the first case, Hanna was indebted to Embree & Collins, and Bach & Puffer, creditors of the latter, attached the debt in the hands of the former. To a subsequent action brought by Embree and Collins to recover the same debt, Hanna was permitted to plea in abatement the pendency of the attachment, for the reason that the attachment of the debt in the hands of Hanna fixed it there in favor of the attaching creditors, and that he could not afterwards lawfully pay it to the plaintiffs in the second action. In the latter case, the court simply decided that the payment of a judgment rendered in Pennsylvania, in a foreign attachment against the defendants, was a good defence to an action brought in Kentucky, on the same cause of action.

It is assigned for error, that the judgment in sustaining the demurrer to the plea in abatement, was in chief, and not respondeat ouster. Technically the latter judgment should have been entered of record, but in point of fact no judgment, interlocutory or final, was then rendered. This omission was not to the prejudice of the defendant. He was not thereby precluded from answering over to the declaration,

but had an undoubted right so to do. On his declining to do it, the court proceeded properly to dispose of the case. Bradshaw v. Morehouse, 1 Gilman, 395, is an authority in point. (*a*)

The refusal of the Judge to stay proceedings in the execution is also assigned for error. That application was addressed to the sound discretion of the Judge, and his decision thereon cannot be assigned for error. As well might the refusal of a Judge to allow an injunction, or grant a writ of habeas corpus be assigned for error. The discretion, however, was properly exercised. The plaintiffs had the unquestioned right to an execution on the adjournment of the court. The mere order granting the appeal did not divest that right. The judgment became operative from the last day of the term, and continued so until the appeal was perfected by the filing of the bond. The allowance of the appeal was conditional, and did not operate as a supersedeas on the proceedings until there was a compliance with the condition.

The judgment of the Cook County Court is affirmed with costs.

Judgment affirmed.

James Branigan, appellant, v. Walter S. Gurnee et al. appellees.

Error to Cook.

This case was argued in connection with the preceding, depended upon the same facts, and the same questions of law arose as in the former case.

J. B. Thomas, B. S. Morris & J. J. Brown, for the appellant.

A. T. Bledsoe, J. A. McDougall & E. Peck, for the appellees.

(*a*) Smith vs. Harris, 12 Ill. R. 466.

The opinion of the court was delivered by

TREAT, J. The questions arising on this record are precisely like those presented in the case of Branigan v. Rose & Rattle, and consequently the same judgment must be entered.

Judgment affirmed.

JAMES SEMPLE, plaintiff in error, v. DAVID HAILMAN et al. defendants in error.

Error to Madison.

A suit was brought on four different writings obligatory which were set forth in as many different counts in the declaration. Issue was joined on all, the cause was submitted to the Court for trial, the Court found the issues joined on the three first counts in favor of the plaintiffs, and assessed their damages accordingly: Held, that the judgment was erroneous, there being no finding on the fourth count of the declaration.

DEBT, in the Madison circuit court, brought by the defendants in error against the plaintiffs in error, and heard before the Hon. Gustavus P. Koerner, at the October term 1845, when a judgment was rendered in favor of the plaintiffs below for $2402, debt, and $1400, damages.

The case, for the purposes of this decision, is sufficiently stated by the court.

W. Martin, and M. Brayman, for the plaintiff in error, as to the point that all the issues must be found, cited 4 Conn. 190. and 8 Cowen, 406.

D. J. Baker, for the defendants in error.

I. The plaintiff in error complains that no judgment was given, or finding had, on the fourth count of the declaration. It is submitted, that this is a sufficient finding on that count in favor of the defendant. In the case of Talbot v. Talbot 2 J. J. Marsh. 3, it is said, that in an action of detinue for different articles, and verdict for plaintiff as to some silence

as to residue is equal to a verdict for the defendant as to the article not noticed, and a bar to a future action. No objection was made in the court below, and this description of objection is not favored. 16 Peters, 319. Where there are several counts in the declaration, aud after interlocutory judgment damages are assessed on each count, and judgment is arrested on the first count, no objection being made to the others, the plaintiff will be allowed to enter a nolle prosequi on the first count, and take judgment on the others. Livingston v. Livingston, 3 Johns. 189. When the general issue and other pleas are pleaded, and the jury find a verdict on only the general issue, it is a sufficient finding. Thompson v. Britton, 14 Johns. 84-6. If the declaration contain two counts, it was held, if one be sufficient, judgment may be entered on the good one. 16 Pick. 541. Where two issues are joined to different facts of the same declaration, and judgment is arrested as to one, the verdict as to the other is not affected. 2 U. S. Dig. 663, § 628. A judgment will be arrested if one count is defective; but the verdict may be entered on the good counts only. Ib. 656, § 48. Where there are several counts, some good and some bad, a general verdict shall be applied to the good ones. Ib. 631, § 122. A verdict against one only, in an action against three, (the names of the others being struck from the proceedings), will not be set aside. Ib. 631. If a verdict is given for more than the case warrants, the party has the right to remit. Ib. 635, § 231. The presumption is in favor of verdicts. Ib. 632, § 150. A verdict is amendable in the court of Errors. 8 Cowen, 652.

II. If this be error, the defendant has no cause of com plaint. It is one to his advantage, and not to his disadvantage; and the principle is general, that a man cannot assign for error that which he cannot show is to his disadvantage. 1 Blackf. 54; 2 Bac. Ab. 490. A party cannot assign for error decisions, however erroneous, which could not have been prejudicial to himself. Arenz v. Reihle, 4 Scam. 342; Schlenker v. Risley, 3 do. 486. A party cannot assign for error that which makes in his own favor, unless under pe-

culiar circumstances. Bailey v. Campbell, 1 do. 47; Harrison v. Clark, Ib. 131; Kitchell v. Bratton, Ib. 303. Although he decree of the inferior court be erroneous in some of its details, yet if the aggregate result be more favorable to the plaintiff in error than it should be, he cannot ask a reversal. 3 J. J. Marsh. A party is not permitted to avail himself of an error not to his prejudice. Gano v. Slaughter, Hardin 76. Where, upon the whole record, it appears that the judgment is right, although the errors assigned exist, the judgment shall be affirmed. Saunders v. Johnson, 1 Bidd, 322.

The opinion of the court was delivered by

Caton, J * The judgment in this case must be reversed. The suit was brought on four different writings obligatory set forth in as many different counts in the declaration. Issues were joined upon pleas to all of these counts, and the cause submitted to the court for trial by the agreement of the parties. The court found the issue joined on the three first counts in favor of the plaintiffs below, found their debt and assessed their damages. There was no finding upon the fourth count. In this there is manifest error. In Miller v. Trets, 1 Lord Raym. 324, the issue joined was, whether the defendant was guilty of selling lace and silk. The jury found him guilty of selling lace, but said nothing of the silk. The court held that the plaintiff could not amend, and the finding being insufficient, the judgment was reversed. In 2 Salk. 374, the court hold that "a verdict which finds part only of the issue, is void as to the whole." A verdict was set aside for the same cause in the case of Van Benthuysen v. De Witt, 4 Johns. 213. (*a*)

In the case of Patterson v. The United States, 2 Wheat. 221, the court say: " A verdict is bad if it varies from the issue in a substantial matter, or if it find only a part of that which is in issue." Numerous other authorities might be mentioned to show that the finding must be as broad as the issues, otherwise no judgment can be pronounced upon it,

*Wilson, C. J. and Justices Lockwood and Young did not sit in this case

but it is unnecessary. The proposition is too clear to admit of doubt. It necessarily results from the nature of the case.

Questions were made upon various demurrers presented by either side, which do not seem to have been directly acted upon by the court, but they were all waived by the subsequent pleadings of the parties.

An application was made by the defendants in error to discontinue, in this court, as to their fourth count, but it cannot be allowed. The party cannot be permitted to amend his record here, so as to obviate the error which is well assigned. The case in 1 Lord Raym. above referred to is in point.

The judgment of the Circuit Court is reversed with costs, and the cause remanded, and a venire de novo awarded.

Judgment reversed.

Ex parte Robert Birch.

Motion for a Habeas Corpus.

A person accused of the crime of murder, and jointly indicted with others for tha offence, was not put upon his trial, but was used by the State's Attorney as a witness on the trial of the others, who were convicted and executed. In giving his testimony, he did not, in any way, admit that he participated in the commission of the murder. Neither did it appear, in his petition by him filed for a writ of habeas corpus, that he was guilty, or had been convicted of any crime: Held, that he was not in a condition to avail himself of the rights and privileges of accomplice.

By the Constitution of Illinois, the Governor cannot pardon before conviction.

Motion for a writ of habeas corpus, &c. The grounds of the application made to this court will appear in the petition filed and the affidavit accompanying it, doth of which are incorporated into the opinion.

O. Peters, for the applicant.

This application is made for a writ of habeas corpus, for

the purpose of bringiug the applicant before this court, that he may be discharged on bail.

The prisoner claims this as an equitable right, based upon an implied contract made between him and the Government, by its proper officer and organ.

The petition, and affidavit of the District Attorney annexed thereto, show that tne prisoner was indicted jointly with others for the murder of George Davenport; that three of those others were put upon their trial; that the District Attorney, under the order of the court, had Birch brought into court, and used him as a witness against his accomplices; that he testified fully and fairly, and to the satisfaction of the District Attorney.

On this state of facts we contend that Birch is entitled to a pardon, and being thus entitled, and being no longer in danger of losing his life, even if convicted, that he ought to be dischared on bail.

It is entirely immaterial, whether the District Attorney gave him any pledge that he should be no further prosecuted, or that he would recommend him to clemency, or not. It is not this pledge, or any assurance on the part of the Government that gives the right to the accomplice. It is the fact that he has been used as a witness by the Government, that creates the right. Whenever the Government, by its proper officer, uses the accomplice as a witness against his partners in crime, it acknowledges its own weakness, and that it is compelled to resort to the evidence of one acknowledged to be polluted with crime, for aid. It is a species of evidence that should be resorted to with great caution, but when resorted to, the implied pledge of the Government should be faithfully redeemed. Unless this is done, the evidence of accomplices can never be obtained, and great criminals will escape punishment. For what criminal will make disclosures against his companions in guilt, if he is afterwards to be tried, and convicted, and executed? If the faith of the Government is not regarded, the chain that binds those together who follow the trade of crime will never be

broken, but will be strengthened. Men are now banded together who prey upon the community. They feel strong; they are stronger than the law. The law is measurably powerless, and cannot reach them. They will not be persuaded by the "terrors of the law" to turn away from evil doing. But once create distrust and want of confidence in one another, and their power will be broken, and the law will be again supreme.

This is the proper mode, and the most appropriate time, to have this question settled, and settled rightly; for if the law was ever weak, it is true now. If the perpetrators of crime were ever strong, above and stronger than the law, it is so now. And now is the time when the Government should act in good faith to those who lend it assistance, even though that assistance comes from those who are steeped in crime.

This is no new question. In the case of Rex v. Judd, 1 Cowp. 183, the prisoner was indicted for forgery. When brought before Lord Mansfield on habeas corpus, for the purpose of being discharged on bail, he, with the other judges, expressed no doubt but that the prisoner ought to be discharged on bail, on the ground of her having been called as a witness for the prosecution, if she had made full and fair disclosures against her accomplices; but as it appeared that she had not, they refused to bail her.

When she was brought to trial, the same point was again made, and the judge suspended the trial until he could take the opinion of the twelve judges; and all the judges concurred, that if she had made full and fair disclosures against her accomplices, she ought not to be tried. But it appearing that she had not done this she was put upon her trial. But none of the judges entertained any doubt but that she ought not to have been tried, if she had fulfilled the contract on her part.

In the case of the Commonwealth v. Knapp, 10 Pick. 487, Mr. Webster, arguendo, says: "The moment an accomplice is permitted to testify, by the Attorney General, to make

disclosures, he is safe. He is then as safe as if he had his pardon," &c. And Putnam, J., in delivering the opinion of the court, fully recognizes the same doctrine.

This subject underwent a very full and able discussion in the case of The People v. Whipple, 9 Cowen, 707, and the argument and decision of the court most clearly shows that an accomplice, having made full and fair disclosures, cannot and ought not to be further put in jeopardy. And the case of the negro man Jack is referred to. Jack was guilty of murder. He was called as a witness against his accomplices. He was told by the Judge, that if he testified, he must not expect or hope for any recommendation for pardon. Yet he testified, and afterwards the eminent counsel for the prosecution felt bound to recommend him to pardon, and the Judge himself joined in the recommendation. Jack was disposed of by a special act of the Legislature.

Numerous other authorities might be referred to, in support of this application, but it is not deemed necessary. The public faith has been impliedly pledged to this prisoner. He has fulfilled the condition on his part; and I now, in his behalf, ask this court to redeem this solemn pledge of the Government, and discharge him from his imprisonment.

D. B. Campbell, Attorney General, in resisting the application, contended that the court could not take cognizance of this question. It was one which could only be acted upon by the Executive. But if that position be incorrect, and the court can adjudicate upon the merits, it is necessary that the applicant should be here in person, and that witnesses should be examined, that the court might determine upon the facts of the case.

From the only evidence offered here, the affidavit of the State's Attorney in the circuit where the applicant is in custody, it appears that he did not testify in relation to himself. He did not testify to the whole truth, but was guilty of perjury. He failed to comply with his contract, if any contract can be implied from the circumstances of the case, and there was no express contract, of course.

The opinion of the court was delivered by

Purple, J. * The petitioner, by his counsel, has applied to this court for a writ of Habeas Corpus, upon the following state of facts, as set forth in his petition and the accompanying affidavit of the State's Attorney, who prosecutes in the case, in which he was admitted as a witness against others jointly indicted with him for murder.

"To the Honorable the Justices of the Supreme Court of the State of Illinois, at a term of said court, begun and holden at the City of Springfield, on the second Monday of Deber, in the year of our Lord, eighteen hundred and forty six :

Respectfully represents Robert Birch, that at the October term of the Rock Island Circuit Court, A. D. 1845, the Grand Jury then and there duly selected, impanelled and sworn, found and returned into the said circuit court, an indictment against your petitioner, and John Long, Aaron Long, Granville Young, John Baxter and William Fox, charging them with having committed the crime of murder upon one George Davenport, on the fourth day of July, A. D., 1845.

A copy of the said indictment is hereto annexed and made part hereof, marked [A]

And your petitioner further shows unto your Honors, that at the time of the finding of the said indictment, your petitioner is informed and believes by virtue of a warrant issued by some justice of the peace of said county, upon the charge of having committed, in conjunction with the said Longs, Young, Baxter and Fox, the crime of murder aforesaid; that after the finding of the indictment as aforesaid, your petititioner was detained in custody in said jail until about the month of June last, when he was removed to the county of Knox, and committed to the jail of that county, where he

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* Wilson C. J. did not sit in this case.

ever since hath been, and still is confined and detained in custody to await his trial upon the said indictment; the venue in said cause, on the application of your petitioner, having been changed from said county of Rock Island to said county of Knox, and the said indictment is now pending and undetermined in the circuit court of said couuty of Knox.

And your petitioner further shows, that at the same October term 1845, of the Rock Island circuit court, the said John Long, Aaron Long and Granville Young were put upon their trial upon said indictment, they having severally pleaded not guilty thereon.

And your petitioner further shows, that Thomas J. Turner, Esq., then and long after the district attorney for the sixth judicial circuit, elected, not to put your petitioner upon trial at the same time with the said Longs and Young; but upon the trial aforesaid of the said Longs and Young, your petitioner was then still detained in custody, and confined in the jail of said Rock Island county, being so charged as an accomplice of the said Longs, Young, Baxter and Fox, in the said crime of murder as aforesaid; and your petitioner upon the said trial, by the request and direction of the said district attorney, and by the order of the said circuit court, was brought into said court from said jail as a witness for the people and against the said Longs and Young; and being so called as a witness by the same district attorney, your petitioner was sworn, and was examined by said district attorney on behalf of the people, and cross-examined by the counsel for the defendants then upon trial; and being thus called and sworn, your petitioner then and there freely, fully, fairly and impartially disclosed and testified to all the facts and circumstances within his knowledge touching the guilt of the said Longs and Young so far as he knew or was acquainted therewith; nor did your petitioner then and there knowingly or designedly withhold, conceal, or in any manner omit to testify to and state any fact within his knowledge material to the issue then on trial.

And your petitioner further shows unto your honors, that upon the said trial, the jury to whom the case was submitted returned a verdict of guilty against the said Longs and

Young; and thereupon, at the said October term, the said circuit court passed upon them severally the sentence of death; and in about four weeks thereafter, the said Longs and Young, in pursuance and conformity to said sentence, were executed at said Rock Island county.

And your petitioner further states, that the testimony so given by him upon the said trial was material to the issue, and, in connection with the other evidence, essentially contributed to the conviction aforesaid.

And your petitioner further shows to your honors, that at the same October term of said Rock Island circuit court, Henry H. Redding and George G. Redding were indicted as accomplices of the said Longs and others, in the murder of the said Davenport, and at the same term, but after the trial of the said Longs and Young, they, the said Reddings, were put upon their trial; and the jury could not agree and were discharged without rendering any verdict. On the trial of the said Reddings, the said district attorney, then and there conducting the same on the behalf of the people, directed, and the said circuit court, on the application of the said district attorney ordered, that your petitioner should be again brought from the said jail into court; and being brought into court in pursuance of said order and direction, the said district attorney again called your petitioner as a witness, and he was sworn and testified on the behalf of the people and against the said Reddings; and your petitioner then and there made full and plain disclosures of all he knew concerning the guilt of the said Reddings, and neither concealed nor kept back any fact within his knowledge and recollection, material to the issue.

Your petitioner refers to the affidavit of the said Turner, hereto annexed and made part thereof, marked [B.] for a corroboration of the facts in this petition stated.

Your petitioner further represents, that he is now detained in the custody of the sheriff of Knox county, and confined in the jail of said Knox county, for the purpose of putting him upon his trial upon the said indictment above referred to, and for no other purpose whatsoever.

Wherefore, your petitioner prays that your Honors will

award him a writ of habeas corpus, directed to the Sheriff of said Knox county, requiring and commanding him, forthwith, to bring your petitioner before your Honors; and that, upon the execution of said writ by the said Sheriff your Honors will order that your petitioner be wholly discharged and released from his said custody and imprisonment, or admit him to bail in some reasonable sum; and for such other and further relief, as to your Honors shall seem meet, and to law and justice shall appertain, and as in duty, will ever pray.

Robert Birch,

By his Attorney,
Onslow Peters."

[A.]

"Of the October term of the Rock Island county circuit court, in the year of our Lord one thousand, eight hundred and forty five,

State of Illinois,
Rock Island county, } ss.

The grand jurors chosen, selected, and sworn in and for the county of Rock Island, in the name and by the authority of the people of the State of Illinois, upon their oaths present. That John Long, Aaron Long, Robert Birch, Granville Young, William Fox and John Baxter, late of the county of Rock Island and State of Illinois, not having the fear of God before their eyes, but being moved and seduced by the instigation of the devil, on the fourth day of July, in the year of our Lord one thousand eight hundred and forty five, with force and arms at, and within the county of Rock Island aforesaid, in and upon one George Davenport, in the peace of God and the people of the State of Illinois, then and there being feloniously, wilfully, and of their malice aforethought, did make, an assault, and that the said John Long, Aaron Long, Robert Birch, Granville Young, William Fox and John Baxter, a certain pistol of the value of five dollars, then and there loaded and charged with gunpowder and one leaden bullet, (which pistol they, the said John Long, Aaron

Long, Robert Birch, Granville Young, William Fox and John Baxter, in their hands then and there had and held,)to, against and upon the said George Davenport, then and there feloniously, wilfully, and of their malice aforethought, did shoot and discharge; and that the said George Davenport, with the leaden bullet aforesaid out of the pistol aforesaid, then and there by the force of the gunpowder and shot, shot forth as aforesaid the said George Davenport in and upon the left thigh of him, the said George Davenport, then and there feloniously, wilfully and of their malice aforethought, did strike, penetrate and wound, giving to the said George Davenport then and there with the leaden bullet aforesaid, so as aforesaid shot, discharged and sent forth out of the pistol aforesaid, by the said John Long, Aaron Long, Robert Birch, Granville Young, William Fox and John Baxter, in and upon the left thigh of him, the said George Davenport, one mortal wound of the depth of ten inches, of which said mortal wound the said George Davenport on the said fourth day of July, in the year aforesaid, at the county aforesaid, did languish and languishing did live, on which said fourth day of July in the year aforesaid, the said George Davenport, at the county aforesaid, of the said mortal wound died; and so the jurors aforesaid, upon their oaths aforesaid, do say that the said John Long, Aaron Long, Robert Birch, Granville Young, William Fox and John Baxter, the said George Davenport, in manner and form aforesaid feloniously, wilfully, and of their malice aforethought, did kill and murder.

And the jurors aforesaid upon their oaths aforesaid, do further present, that John Long, Aaron Long, Robert Birch, Granville Young, William Fox and John Baxter, late of the county of Rock Island aforesaid, on the fourth day of July, in the year of our Lord one thousand, eight hundred and forty five, with force and arms at, and within the county of Rock Island aforesaid, in and upon George Davenport aforesaid, did make an assault, and that the said John Long, Aaron Long, Robert Birch, Granville Young, William Fox and John Baxter, with their hands about the neck of him, the said George Davenport, feloniously, wilfully and of their malice

aforethought, did choke, suffocate and strangle, of which said choking, suffocating and strangling, he, the said George Davenport, then and there died and so the jurors aforesaid upon their oaths aforesaid, do say that the said John Long, Aaron Long, Robert Birch, Granville Young, William Fox and John Baxter, the said George Davenport, in manner and form aforesaid, feloniously, willfully, and of their malice aforethought, did kill and murder, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the same people of the State of Illinois,

Thomas J. Turner, State's Att'y."

"Attest.
Achilles Shannon, clerk of the Knox Circuit Court,
Knox county, Illinois."

(B)

State of Illinois, }
Sangamon county, } ss.

Thomas J. Turner, being first duly sworn, doth depose and say, that he was State's Attorney in and for the Sixth Judicial District, before and since the October term of the Rock Island County Circuit Court A. D. 1845. That at said October term, an indictment was returned into said court by the Grand Jury, against John Long, Aaron Long, Granville Young, John Baxter, William Fox, and Robert Birch, for the murder of George Davenport, the indictment charging the murder to have been committed by the above named persons on the 4th day of July, A. D. 1845.

This affiant further says, that afterward at the same term of the said court, holden at Rock Island aforesaid, the said John Long, Aaron Long, and Granville Young were arraigned in said court, and after having severally plead "Not Guilty" to said indictment, were put upon their trial on said indictment. This affiant then being State's attorney as aforesaid, aided by other counsel, conducted said trial on the part of the People; affiant as such State's attorney, then believed it to be material and important for the interest of the People and for the furtherance of justice, that said Robert Birch

should be used as a witness in behalf of the People, and against those charged as his accomplices in the said crime to-wit, John Long, Aaron Long and Granville Young, the said Robert Birch being then confined in the jail of said Rock Island county upon the said charge of murder. This affiant moved the court that he, the said Robert Birch, be brought in to court to testify in behalf of the People; and, thereupon, the court directed the sheriff to bring the said Robert Birch into court, and he was brought in accordingly. This affiant then called the said Robert Birch as a witness, who was duly sworm, and testified in behalf of the People. This affiant deemed the testimony of said Robert Birch important and tending to produce a conviction of the defendants then on trial. Said Birch in giving his testimony against the said Longs and Young, appeared to make a full and fair disclosure of the facts within his knowledge, concealing only the part he had taken in the matter, and this affiant saw nothing to induce him to believe that said Birch did not make a full disclosure of the facts pertinent to the issue. The jury returned a verdict of " guilty" against the said John Long, Aaron Long and Granville Young upon said trial, and they were severally sentenced by the court to suffer the punishment of death, which sentence was executed by the sheriff of said Rock Island county, as this affiant has been informed and believes.

This affiant further says, that after the trial of the said Longs and Young, this affiant called the said Robert Birch as a witness in behalf of the People and against Henry H. Redding and George G. Redding, who were also indicted in said Rock Island county circuit court, as accomplices in the murder of the said George Davenport, at which trial the jury disagreed and returned no verdict. George G. Redding afterwards plead guilty to a charge of being accessory after the fact in the murder of George Davenport aforesaid, and was sentenced to serve two years in the penitentiary of the State.

After the trials above alluded to, this affiant had an interview with the said Robert Birch, at which interview this

affiant informed Birch that he should probably call him as a witness to testify in behalf of the people on the trials of other persons charged with the murder of the said Davenport, and other crimes which had been committed in the district, and affiant then urged the said Birch to adhere on all occasions to stating the truth strictly and whenever called upon to testify, to state fully and fairly all he knew relative to any transactions connected with the causes in which he might be called. The said Birch assured this affiant he would do so, and declared at the same time that he had done so on the trials of the Longs and Young, to which this affiant replied, that he was satisfied with the testimony he had given on that trial, and believed it to be the truth.

At each time when the said Birch was called to testify as above mentioned, he was confined in the jail of Rock Island county, and was brought into court at the request of affiant as State's attorney and by the order and direction of the court, and further this affiant saith not.

Tho's J. Turner.

Subscribed and sworn to before me this 2d day of January, A. D. 1847.

J. Calhoun, clerk Sangamon Circuit Court."

The counsel for the applicant have expressed a desire that the writ may be denied, unless, under the circumstances disclosed, the court should be of opinion that the prisoner could properly be admitted to bail.

Whether he is to be considered as an accomplice, entitled to the recommendation of the proper court to executive clemency, is, at present, unnecessary and perhaps improper to be determined. At all events he is not, at this time, in a condition to avail himself of the rights and privileges of one thus situated.

He has neither admitted that he is guilty of, or been convicted of any crime. As yet he has no occasion to apply for pardon. By the Constitution of our State, the Governor cannot pardon before conviction. In many of the other States of this Union, and also in England, this power may at

any time be exercised. For this reason the courts in those States and countries where this power exists, have sometimes admitted accomplices, who had testified fairly and fully against their confederates, to bail, in order that they might the more conveniently make application for that mercy, to which, by their disclosures, they had become entitled.

No necessity, nor as we can discover, propriety, exists for such proceeding in this State.

If at large, the prisoner could not now, apply for pardon. He may never need to make such application. And for this court to decide upon a motion for, or upon the hearing of a writ of habeas corpus, that one accused of crime will, if convicted, be entitled to the clemency of the Executive, would in effect be to determine that which rests in the discretion of the tribunal where his prosecution and that of his accomplices is, or has been pending, and where he has been admitted as a witness, that he shall or shall not receive a recommendation to pardon. This discretion cannot be fettered or controlled. If the circuit court, after a conviction, should deny such recommendation, this court could not interfere with the exercise of such discretion. What we could not do directly after trial and conviction, we should not be warranted in doing indirectly before.

The motion is denied.

Motion denied.

FREDERIC A. CARPENTER v. THE PEOPLE OF THE STATE OF ILLINOIS.

Motion to quash a Fee Bill.

The general principle upon the subject of costs is, that the party who requires an officer to perform services, for which compensation is allowed, in the first instance, liable therefor. In legal contemplation, he prays the costs as they accrue, and it is upon this ground, that the successful party, in a civil action, recovers a judgment for his cost. If he has not actually advanced them, he is still responsible to the officer.

In a criminal case, a successful defendant is not entitled to a judgment against the State for his costs; but he is, nevertheless, liable to pay then to the proper officer, where the costs accrue in the Supreme Court. The ninth section of the eighth article of the Constitution does not exempt him from liability for costs.

Motion to quash a fee bill, issued by the clerk of this court for his fees on a writ of error prosecuted by one convicted in a criminal case in the circuit court. The judgment of the court below was reversed, and the question arose here as to his liability for the costs which he had made.

J. Gillespie, in behalf of Carpenter, relied upon the following points:

1. That it would be a great hardship to subject an innocent person,—as one who is acquitted must be considered,—to the payment of costs in asserting his innocence;

2. That the clerk of the supreme court is supposed, in cases where the defendant is convicted and in all civil cases, to receive such fees as will compensate for their loss in cases wherein the defendants are acquitted

He referred to the ninth section of the eighth article of the Constitution, and the fifteenth section of the "Act concerning courts." Rev. Stat. 144.

L. Trumbull, for the People, cited the following section from 1 U. S. Dig. 618, title, "Costs in Criminal Cases":

If a defendant in an indictment is acquitted, or if a nol.

pros. is entered, he pays his own costs only. State v. Whitehead, 3 Murph; S. P. State v. Hargate, C. & N. 63.

The opinion of the court was delivered by

Treat, J. A judgment against Carpenter, on a conviction for a criminal offence, was reversed in this court. The clerk has issued a fee bill for the costs made by Carpenter in the prosecution of the writ of error. A motion is made to quash the process, on the ground that he is not liable for the costs. The general principle on the subject of costs is, that the party who requires an officer to perform services, for which compensation is allowed, is, in the first instance, liable therefor. In legal contemplation, he pays the costs as they accrue. (*a*) On this ground, the successful party in a civil action recovers a judgment for his costs, If he has not actually advanced them, he is still responsible to the officer. The judgment is for his benefit, and not on behalf of the officer. The only difference between a civil and a criminal case is, that the successful defendant in the latter is not entitled to a judgment against the State for his costs. He is, nevertheless, liable to pay them to the officer, unless our statute excepts his case from the operation of the general rule. There are some special provisions of the statute relative to the fees of the clerks of the circuit courts and sheriffs, in cases where the defendant is acquitted, but there are none which apply to the fees of the officers of this court in such cases. The ninth section of the eighth article of the Constitution does not exempt the defendant in a criminal prosecution from liability for costs. It is the opinion of the court that Carpenter is liable for all the costs made by him in the prosecution of his writ of error.

The motion, therefore, to quash the fee bill will be denied.

Motion denied.

(*a*) Skinner vs. Jones, 4 Scam. R. 193; Morgan vs. Griffin, 1 Gil. R. 566; Wells vs. McCullock, 13 Ill. R. 608; People, vs. Harlow, 29 Ill. R. 43.

JOSHUA J. MOORE, appellant, v. NORMAN H. PURPLE, appellee.

Appeal from Peoria.

In an action of assumpsit, the defendant failing to plead, a default was entered to gether with an interlocutory judgment, requiring the sheriff to summon a jury to assess the plaintiff's damages, &c. A writ of inquiry was issued and on the same day returned into Court with the following indorsement thereon: "We the jury summoned in this cause, after being duly sworn, do assess the plaintiff's damages at $148.96," which return was signed by all the jury; and judgment was rendered for the amount assessed by the jury. The sheriff made no return upon the writ, and the plaintiff appearing in the Supreme Court, on affidavit filed, had leave to apply to the Circuit Court to permit the sheriff to make the proper return upon the writ, and the cause was continued. The Circuit Court allowed the sheriff to make his return, and the same was entered of record in that Court, a transcript of which was filed in the Supreme Court: Held that the Circuit Court did not err in permitting the return to be made; that the counsel for the appellant being in Court when the con tinuance was granted, it was sufficient notice to him of the application to be made to the Circuit Court; and that the appellant should have moved, in the latter Court, to quash the writ of inquiry if he should deem it insufficient.

A writ of inquiry may be executed, before the sheriff at any place within his bailiwick, and a want of notice to the defendant, on executing the writ, cannot be assigned for error; nor can the insufficiency of the writ, the proper practice being to move the Court below to quash it.

ASSUMPSIT in the Peoria circuit court, brought by the appellee against the appellant, and heard before the Hon. John D. Caton, at the October term 1845. The defendant, failing to plead, his default was entered, and the plaintiff's damages were assessed by a jury, who assessed the same at $148.96, upon which the court rendered a judgment for that amount.

The other proceedings in the court below and in this court are stated in the opinion.

O. Peters, and E. N. Powell, for the appellant, filed the following brief:

The appellant, to reverse the judgment in this case, relies upon the following points and authorities:

1. By the 15th section of the practice act, Rev. Stat. 415, where a judgment is rendered by default in an action upon an instrument of writing for the payment of money only, the clerk may assess the damages. And in all other actions where a judgment is taken by default, the "plaintiff may have his damages assessed by a jury in court."

2. This section of the statute clearly does not authorize a writ of inquiry to issue to the sheriff to assess the damages in such a case, in vacation or out of court, and it is questionable whether a sheriff could assess damages even in open court.

From the record in this case, it appears that the damages were assessed by a jury summoned by the sheriff, and not in court. Then, from whence does he derive his authority? clearly nor from our statute, as the damages are to be assessed by a jury in court.

3. Has a plaintiff, in such a case, a right to proceed at common law? If so, the whole of the proceedings are irregular and defective, because the writ has no return day, or day certain when the writ was to be returned into court. 1 Tidd's Pr. 573, 574, side paging.

It also does not appear by the return of the sheriff to the writ, that any notice was given to the appellant of the executing of the writ. Notice must be given. 1 Tidd's Pr. 576, side paging; 9 Wend. 149.

A. Wheat, for the appellee.

The errors, if such they were, suggested in the first three assignments, are cured by the amended transcript filed at the present term of this court. If the appellant had no notice of the inquisition, the proper course for him to have taken, would have been to move in the court below to set it aside. 1 Tidd's Pr. 582; 1 Duer's Pr. 636. And this he could have done at any time during the term. Frink v. King, 3 Scam. 149. He was in court after the writ of inquiry was returned, and prayed an appeal, but did not seek to take advantage of a want of notice. Therefore, the court

will presume he had notice, and that the proceedings were regular, the record showing nothing affirmatively to the contrary. Vanlandingham v. Fellows, 1 Scam. 233.

No notice is required to authorize the court to permit a sheriff to amend or make a return to a writ of inquiry or other process. The motion, though usually made by the party who will be benefitted by the amendment, is notwithstanding, really the motion of the officer who amends, or refrains from so doing at his peril. Therefore, if the appellant in this case had been present, he could not have objected to the amendment, consequently he was not entitled to a notice of the motion to permit it; and such amendments the court will permit at any time, even after the lapse of years. Smith v. Hudson, 1 Cowen, 430; Emerson v. Upton, 9 Pick. 167; Irvine v. Scober, 5 Littell, 70; Thatcher v. Miller, 11 Mass. 413; Hall v. Williams, 1 Fairf. 278; Lawless v. Haskell, 16 Johns. 148; and see, also, Rev. Stat. title "Amendments and Jeofails."

But if the court should be of opinion that such notice was required, I would suggest, that in this case a sufficient notice was given, the affidavit upon which the motion of the appellee for a continuance at the last term of this court was based, specifying the intended application to the court below for leave to the sheriff to amend his return.

The appellant is mistaken in supposing that the writ of inquiry does not appear to have been executed. The record shows it was executed; and this court has already decided, that it may be executed out of court. Vanlandingham v. Fellows 1 Scam. 233.

I see no irregularity whatever in the writ, nor has any been pointed out, except the omission of a return day. The writ was evidently intended to be one which the sheriff was required forthwith to execute, and the omission of the word forthwith is manifestly a misprision of the clerk. Therefore it cannot be assigned for error, (Rev. Stat. "Amendment and Jeofails,) especially since the appellant was in the court below, after the return of the writ, and made no objection on this ground.

The opinion of the court was delivered by

LOCKWOOD, J.* This was an action of assumpsit, commenced in the circuit court of Peoria county, by Purple against Moore. The declarations contained two counts, one on a promissory note, the other for money had and received, and work and labor.

At the October term 1845, the defendant having failed to plead, his default was entered, together with interlocutory judgment, and the sheriff was thereupon commanded, that by the oath of twelve good and lawful men of his bailiwick, he diligently inquire what damages the plaintiff has sustained by reason of the premises, and that he return the inquisition, which he shall thereupon take, to the present term of this court, together with the names of those by whose oath he shall take that inquisition.

It appears by the record, that a writ of inquiry was issued by the clerk to the sheriff of the county, dated on the 17th of October, 1845, which was returned into court by the sheriff on the same day with the following indorsement, to wit: "We, the jury summoned in this cause, after being duly sworn, do assess the plaintiff's damages at $148.96;" which return was signed by all the jury.

On the return of the writ of inquiry, indorsed with the verdict, the court below gave judgment for Purple for the amount assessed by the jury.

Moore prayed and obtained an appeal to, and filed the record at the last term of this court, and assigned his errors.

At the last term, Purple filed an affidavit, stating that the sheriff of Peoria county, through inadvertence, had neglected to make any formal return upon the writ of inquiry, and prayed the Supreme Court to continue the cause, to enable him to apply to the circuit court of Peoria county for leave to the sheriff to make the proper return upon the writ of inquiry, and that when made, the same may be certified to this court, as a part of the record in this case.

This motion was granted.

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*YOUNG, J. did not sit in this case.

At this term of this court, Purple obtained leave to file, as part of the record in this cause, the proceedings of the circuit court of Peoria county at the May term 1846, from which it appears that Purple obtained leave of that court, at the May term thereof, for the sheriff to amend his return to the writ of inquiry, which was done as follows, to wit: "By virtue of the within writ, I did, on the 17th day of October, A. D. 1845, summon the following named persons, to wit, [naming them,] twelve good and lawful men of the county of Peoria, who, after being duly sworn well and truly to assess the plaintiff's damages, returned into court the verdict by them below subscribed, assessing said damages at $148.96. Smith Frye, Sh'ff. P. C."

At the December term, 1845, of this court, the plaintiff in error assigned several errors, relying principally on the grounds that there had been no legal assessment of the damages, and that the defendant below had received no notice of the execution of the writ of inquiry. Since the filing of the proceedings of the circuit court at the May term 1846, the plaintiff has assigned the following additional errors, to wit:

1st. That there was no notice of the motion to amend the record of the circuit court, or for the officer to amend his return to the writ of inquiry;

2d. That the writ of inquiry does not appear to have been executed in open court; and

3d. There was no sufficient writ of inquiry to authorize the inquiry into the assessment of the plaintiff's damages.

All the errors relied on to reverse the judgment below can be disposed of under the last assignment of errors. And, first, was it necessary that notice should have been given to Moore to authorize the circuit court to allow the sheriff to amend his return. We think not, for two reasons. 1st. Amendments by the sheriff to their returns to process are of course. No resistance could have been made to the application to amend.[*a*] Should the sheriff make a false return, he is responsible for the consequences. 2d. If, however,

(*a*) Morris vs. Trustees &c. 15 Ill. R. 270, and notes.

notice was necessary, Moore, by his counsel, being in court when the continuance was granted, was fully apprised of the intention of Purple to move the circuit court for leave to the sheriff to amend his return. This was sufficient notice. The question raised by the second assignment of error was investigated and decided by this court in the case of Vanlandingham v. Fellows, 1 Scam. 233. (*a*) We there held that a writ of inquiry might be executed before the sheriff at any place within the sheriff's bailiwick, and that should any irregularities take place, such as want of notice, &c., the proper course would be to apply to the circuit court upon affidavit of the facts to set aside the inquisition. Want of notice cannot, therefore, be assigned for error in this court. The third error is also addressed to the wrong forum. If the writ of inquiry was not sufficient, application should have been made to the court below to quash it. The insufficiency of the writ of inquiry cannot be assigned for error. The judgment is affirmed, with costs.

Judgment affirmed.

SAMUEL HOARD, plaintiff in error, v. NOAH BULKLEY, defendant in error.

Error to Cook.

A. sued B. in an action of assumpsit in 1844, but the suit was finally dismissed at the plaintiff's costs The clerk of the Circuit Court, in taxing the costs, charged the plaintiff with a jury fee of three dollars. On these facts, the Circuit Court in 1846 decided that it was improperly taxed: Held, that jury fee is only taxable in such causes as are tried by a jury.

MOTION in the Cook Circuit Court at the November term 1846, made by the defendant in error, to quash a fee bill. The motion was sustained by the circuit court, the Hon. Richard M. Young presiding. The cause is brought into this court upon an agreed statement of facts, which are briefly stated by the court.

(*a*) Vallandigham vs. Lowry, 1 Scam. R. 241.

The cause was here submitted upon this statement, and the following argument filed by

S. Hoard, pro se.

The defendant objects to the decision of the court below, because the 19th section of the Act in relation to jurors is mandatory, and cannot be construed to apply merely to actions thereafter to be commenced, but must apply to cases thereafter to be decided. The law is clearly intended to create a special fund for the payment of jurors; and the services of jurors were required as much to dispose of all cases on the docket at the time of the passage of the Act, as those which might be instituted thereafter. The 19th section requires, that a jury fee shall be taxed in each suit, to constitute a special fund for the payment of jurors. What jurors? All that might thereafter attend upon courts. In what cases? The cases thereafter to be disposed of. The costs of a suit cannot be taxed until the services are performed, and the entire costs could not be ascertained, and the fee bill made out, until the case was disposed of. If a jury is required at all, it must be at the final disposition of the case, and the fund being specially created for the payment of jurors' services, it must be raised to pay for services performed after the passage of the Act, and from the cases disposed of thereafter.

For illustration: Suppose that a law should be passed increasing or decreasing the sheriff's fees for serving a process of law, and it became necessary that an alias process should be issued and served, under what law would the sheriff make his return, and calculate his fees? Clearly, under the law in force at the time the services were performed. So in this case, the law in question requires a jury fee of three dollars to be taxed with the costs of each suit. The jury attend and perform their services, and the case is tried and disposed of after the passage of the Act regulating the mode of creating a fund to pay their services. So that it would seem most clear, that the court erred in deciding

that the law was only applicable to cases commenced after and not before the passage of the Act.

It was contended on the trial in the court below, that the law in question could not be construed literally, because, to take a jury fee in all cases, would include Chancery as well as Common Law proceedings, and no jury being allowed in the disposition of Chancery suits, it would be manifestly unjust and wrong to charge a jury fee in suits where their services were not required. In answer, it may be said, that the law is designed to create a special fund in the nature of a tax upon judicial proceedings, to defray a portion of the expenses necessary to their ultimate disposition, and it matters nothing whether it be in the nature of a jury fee, or docket fee. The former law in relation to docket fees had been so modified, that but a very small amount was received from that source, and this charge of three dollars was undoubtedly directed by the Legislature, to make up the deficiency which had arisen from curtailing the docket fee. The jury and docket fees are both appropriated to a common purpose, and being intended as a tax upon judicial proceedings to create a fund for a specific purpose, it would seem that the fee should be taxed, as well in Chancery as Common Law cases. But whether this be true or not in relation to Chancery proceedings, the reasoning is not applicable to the case under consideration. This cause was on the Common Law docket,—a jury was in attendance to try the Common Law suits, and if the plaintiff preferred to abandon his case, and dismiss it without impaneling a jury, he could not exonerate himself from the liability which the law imposed upon him, to defray his proportion of the expense incident to the calling of a jury to attend upon the court during the term at which his suit was disposed of.

This being an agreed case, in which the parties themselves have little or no interest, but made with a view of having the law determined, and being one, the decision of which is vastly important to the public, it is hoped the court will make their decision to cover the entire ground, and embrace Common Law and Chancery cases.

The opinion of the court was delivered by

TREAT, J. Bulkley commenced an action of assumpsit against Shelby in the year 1844. The cause was continued from term to term without a trial, till March 1846, when it was dismissed by the plaintiff at his costs. The clerk in taxing the costs, charged the plaintiff with a jury fee of $3.00. On the foregoing state of facts, the circuit court decided that the jury fee was improperly taxed. That decision is assigned for error. The only provisions of the statute which have any bearing on the question, are as follows: "A jury fee of three dollars shall be taxed with the costs of each suit, which, with the docket free provided by law, shall be collected by the clerk of the court, and paid into the county treasury there to remain and be held as a special fund for the payment of jurors." Rev. Stat. 311, § 19. "No docket fee shall be charged where final judgment or decree shall be for costs only, nor when the case shall be decided without impaneling a jury, nor in suits which do not originate in the circuit court," Rev. Stat. 243, § 12. It is the opinion of this court, that a jury fee is only taxable in such causes as are tried by a jury.

The judgment of the circuit court is, therefore, affirmed with costs.

Judgment affirmed.

MARQUIS D. LUSK et al. plaintiffs in error, v. HENRY HARBER, defendant in error.

Error to Madison.

Under the Revenue Law of 1839, if the plaintiff produce the judgment against the land, the precept and the sheriff's deed for the premises, and prove that the defendant was in the possession thereof at the commencement of the action, a prima facie case is made out.

Before a defendant in ejectment can go behind a judgment against the land for the taxes due thereon, to show that the preliminary proceedings were irregular, he must establish the following facts, to wit: that he or the person under whom he claims, had title to the land at the time of the sale or that the title has since been obtained from the United States or the State. (a)

A sheriff's deed for land sold for taxes, based upon a valid judgment and precept, is conclusive against all but the former owner and those claiming through or under him.

EJECTMENT in the Madison circuit court, brought by the plaintiffs in error against the defendant in error, and heard at the October term 1845, before the Hon. Gustavus P. Koerner and a jury, when a verdict was rendered in favor of the defendant.

All the material facts of the case appear in the opinion of the court

D. J. Baker, and L. B. Parsons, Jr., for the plaintiffs in error.

The plaintiffs having produced in the court below a sheriff's deed to themselves, founded on a valid judgment and precept, the defendant could not be permitted to question the title acquired by such deed, or to introduce any evidence to show irregularity in previous proceedings, until he should shows that he, or the person under whom he claims, had title to the land at the time of the sale, or that the title was obtained from the United States or this State after the sale, and that all taxes due upon the land had been paid by himself or the person under whom he claimed. Revenue Act of 1839, § 43 ; Rev. Stat. 448, § 73 ; Hinman v. Pope, 1 Gilman, 138 ; Atkins v. Hinman, 2 do. 453–4.

(a) Bestor vs. Powell, 2 Gil. 119, and notes.

L. Trumbull, for the defendant in error.

1. So much of the Act of 1839 as makes the deed conclusive evidence is repealed by section 113 of the Revenue Act of 1845. Hence the defendant was at liberty to attack the plaintiff's title without first showing title in himself.

2. The testimony shows the defendant to have been in possession of the premises, claiming them as his own at the time they were sold for taxes, and if it were necessary to show title in the defendant before he could attack the plaintiff's title, a possessory title is sufficient.

The opinion of the court was delivered by

TREAT, J. * This was an action of ejectment, commenced in the Madison Circuit Court, in June 1844, by Meeker and Lusk against Henry Harder, for the recoverv of claim 1833, survey 675, containing 400 acres. The cause was tried before a jury, at the October term 1845. The plaintiff read in evidence the record of a judgment of the Madison Circuit Court, rendered at the September term 1841, in favor of the State of Illinois and against the tract of land in question, among others, for the taxes due thereon for the year 1840. Also, a precept issued thereon, to which the sheriff made return that he sold the lands, as directed, on the 18th and 19th day of October, 1841. Also, deed from the sheriff to the plaintiffs for the premises, bearing date the 8th day of November, 1843. The plaintiffs then proved that the defendant was in the possession of the premises at the commencement of the action, and closed their case. The defendant read in evidence a Patent from the United States to Nicholas Jarrot for the premises, and then proved the death of the patentee, leaving a widow and several children, one of whom was the wife of Clayton Tiffin, and then introduced three deeds, first, from Tiffin and wife to the other heirs of the patentee, second, from the heirs of the patentee to Vital Jarrot, and third, from Vital Jarrot to Leopold Carrier. The defendant also offered in evidence book returned by the

*WILSON, C. J. and YOUNG, J. did not sit in this case.

assessor to the clerk of the county commissioners' court, for the purpose of showing that the premises were not legally assessed for the taxes for the year 1840, and also the advertisement of the collector, giving notice of the application for judgment. The plaintiffs then introduced a second book, returned by the assessor at the same time, and which differed in some respects from the one introduced by the defendant. The plaintiffs requested the court to instruct the jury, "that the neglect of the assessor to return two complete copies of his assessment books (provided the assessment be actually made and returned in time to the proper officer,) to the county commissioners' clerk in one copy, is not such an irregularity as will render the judgment void;" also, "that the validity of the assessment was not affected by the act of the clerk in giving out the complete copy, if any, to the collector;" which instructions the court refused to give. The court, at the instance of the defendant, instructed the jury "that if they believe, from the evidence, that in the original list of taxable property returned by the assessor, and filed and preserved by the clerk in 1840, and which embraced the land in question, no value was affixed to said land, then said assessment is defective, and the jury must find for the defendant." The jury found for the defendant, and the plaintiffs entered a motion for a new trial, which the court denied. The plaintiffs prosecute a writ of error.

A new trial should have been granted. According to the construction given to the revenue laws, under which the proceedings in this case were had, by this Court in the cases of Hinman v. Pope, 1 Gilman, 131, and Atkins v. Hinman, 2 do. 437, the plaintiffs made out a prima facie case, by the production of the judgment, precept and sheriff's deed for the premises, and the proof that the defendant was in the possession thereof at the commencement of the action [*a*]. As decided in those cases, it was then incumbent on the defendant to have brought himself within the provisions of the statute, before he was entitled to go behind the judgment and show that the preliminary proceedings were irregular. The provisions alluded to, forbid a party from questioning

(*a*) See Spehnan vs. Curtentus, 12 Ill. R. 412, and note; Morgan vs. Camp, 16 Ill. R 177, and notes; Holbrook vs. Fellows, 38 Ill. R. 440.

the title acquired under a sheriff's deed on a sale for taxes, unless he first shows that he, or the person under whom he claims, had title to the land at the time of the sale, or that the title has since been obtained from the Uuited States, or this State. The defendant did not place himself in the proper position to assail the plaintiff's title. He traced up the title from the Government to Leopold Carrier, but failed altogether to show that he had any interest in the title vested in Carrier. For aught that appeared in evidence, he may have been a mere intruder on the land, without color of title. Showing no title in himself, and failing to connect his possession with the title of the former proprietor, he was precluded by the express terms of the statute, from any attempt to undermine the foundation of the plaintiff's title. The sheriff's deed, based on a valid judgment and precept, was conclusive against all but the former owner, and those claiming through or under him. The statute is so clear and positive in its terms, that there can be but little difficulty in determining how the party in possession must establish a title that will enable him to go back of the judgment and inquire into the regularity of the previous proceedings. He may unquestionably do it by the production of documentary evidence, showing that the legal estate was vested in him, or the person under whom he claims, on the day of sale. He may likewise show, that he, or the person under whom he claims, was in the actual possession of the land at the time of the sale, claiming title thereto ; for such possession and claim will raise the presumption of title, and dispense in the first instance, with the production of the title papers. He need not show a title to the whole estate. It is sufficient if he has a substantive legal interest in the land. If the title is not vested in him, he may connect his possession with the title by showiug a subsisting tendency between him and the proprietor. If the title has been obtained from the United States, or this State, since the sale for taxes, the title deeds should be exhibited. The party in possession, who can show in any of these ways that he has a subsisting legal interest in the premises, may go behind the judgment and

show that any of the material pre-requisites of the law have not been complied with. If he succeeds in doing it, the title acquired by the purchaser necessarily falls. Whether these requisitions were complied with in the present case, need not now be inquired into. It will be in proper time to determine this when the defendant shows that he has the legal right to institute the inquiry.

The judgment of the circuit court is reversed with costs, and the cause remanded for further proceedings.

Judgment reversed.

SILAS BEEBE, appellant, v. CORNELIUS J. SWARTWOUT, appellee.

Appeal from Adams

In a mistake of law, when legal counsel could have been readily procured, the rule that ignorance of the law is always fatal knows of no exception in the Civil Law, the source of the doctrime respecting the effect of mistakes in contracts.

To constitute a breach of the covenant of quiet enjoyment, there must be a union of acts of disturbance and lawful title. The covenantee must exert himself, in some way, to enjoy his possessions, or must affirmatively prove that his adversary has a paramount title so that his struggle would be unavailing, before he can sue on the covenant, or obtain redress in a Court of Chancery.

There is a distinction between contracts of an executory character, and those which are fully executed by deeds or conveyances. In the latter case, there can be no rescission of the contract unless it has been tained by actual fraud.

BILL IN CHANCERY in the Adams circuit court, brought by the appellee against the appellant to foreclose a mortgage. The defendant below filed a cross-bill, which, at the hearing before the Hon. Norman H. Purple, at the September term 1845, was dismissed, and a decree of foreclosure was rendered as prayer for in the original bill. The defendant appealed.

An abstract of the pleadings and evidence in the cause will be found in the opinion of the court.

A. Williams & A. Johnston, for the appellant.

The title to Swartwout is void, because,

1. The power of attorney is executed before the Patent issued for the land. Gordon's Dig. U. S. Laws, 387, § 1351; 2 Story's U. S. Laws, 1243–44 Laws of 6th May, 1812, §§ 2, 4; 3 do. 1562, § 5 Law of 16th April, 1816.

2. The deed is improperly executed by the attorney in his own name. 4 Bard. & Har. Dig. 146; Elwell v. Shaw, 16 Mass. 42; Fowler v. Shearer, 7 Mass. 14; Ward v. Bartholomew, 6 Pick. 409, 414.

The adverse possession of Grigsby, (Blackwell) and others, coupled with the want of title in Swartwout and his grantee, and the consequent inability of Beebe to obtain possession, are equivalent to an actual eviction, and would sustain an action for breach of covenant: There was also an action of ejectment against Grigsby, in which Swartwout retained an attorney. An entry by a person having title, is sufficient, and possession may be lawfully yielded, and will be equal to eviction. So, also, an inability to obtain possession is equal to eviction. 2 Sugden on Vendors, 84, 85, 96, 97; 1 Wheaton's Selwyn, 477; Ludwell v. Newman, 6 T. R. 458; Hawkes v. Orton, 5 Ad. & Ellis, 356; 5 Went. Pl. 53, 55; Foster v. Pierson, 4 T. R. 617, 20,; 8 Com. Dig. 359, IX, 11, 2; Duval v. Craig, 4 Cond. R. 32; Hamilton v. Cutts, 4 Mass. 352; Sprague v. Baker, 17 Mass. 589; Park v. Bates, 12 Verm. 385–6; Loomis v. Bedel, 11 New Hamp. 83–4; Fitchburg Cotton Co. v. Melvin, 15 Mass. 258; Smith v. Shepard, 15 Pick. 149, Gore v. Brazier, 3 Mass. 523 1 U. S. Dig. 686–7, §§ 293, 301, 306, "Covenant," Art. VIII. d. e.

In New York alone has the doctrine of strict technical eviction been insisted on. In one case, Waldron v McCarty, 3 Johns. 473, the plaintiff was in possession, and had bought in under a prior mortgage voluntarily. In another, Kortz v. Carpenter. 5 do. 120, there is no allegation of adverse possession since the sale, and the Court say it cannot be distinguished from the former.

In Bumpus v. Platner, 1 Johns. Ch. R. 213, Chesterman v. Gardner, 5 do. 33, and Abbott v. Allen, 2 do. 519, the

ground of refusing relief is, that the parties has been long in undisturbed possession, and were not threatened. In the last case, 2 do. 525, the court expressly declines to lay down any rule, and limits the decision to the special circumstances of the case.

In Gouveneur v. Elmendorf, 5 Johns. Ch. R. 81, the Court proceeds on the ground that it was plainly a speculation trade; land warrants, an uncertain but flattering investment of capital; $8000 for 19000 acres of land, with $4 to $5 an acre; no covenants except against grantors and heirs; fully advised of all the titles, neglect of suits, &c.

But whatever may be the rights of the parties in a court of Law, where strict and technical rules may apply to them, in a court of Equity, which is to afford relief in cases where the law does not suffice for purposes of justice, to do right between man and man, and to prevent irreparable mischief, courts of Equity will and do interpose. They are not restrained even to cases and precedents already made, but they extend their aid and to new cases and circumstances, which are analogous in principle to those already adjudicated. Their jurisdiction shapes and accomodates itself to the various and ever changing pursuits and interests of mankind, and to the unexpected and novel relations which they produce. 1 Story's Eq. Jur. §§ 32, 29; 2 do. §§ 863, 864, 868, 871, 872, 884, 926, 928, 929, 694.

New cases, in which the court has extended its jurisdiction to prevent irreparable mischief. Ambler's Rep. 66, 67; Chedworth v. Edwards, 8 Vesey, Jr., 50; Lloyd v. Gordon, 2 Swanston, 100; Osborn v. Bank U. S., 5 Peters' Cond. R. 741.

Equity will interfere to relieve a purchaser who has bought under a mistake, from paying his money for nothing, even where there is no fraud nor warranty. It seems a question, whether they will not relieve, both for mistake of law and fact, and when it is necessary for purposes of justice, they construe it either way. Willan v. Willan, 16 Vesey, 72; Bingham v. Bingham, 1 Vesey, Sr., 127; Corking v. Pratt Ib. 400; Shish v. Foster, Ib. 88. American cases where

Equity has relied against mistake. See the doctrine well reviewed in the opinion of the Vice chancellor. Chaplin v. Laytin, 6 Paige, 196; and Senator Paige, 18 Wendell, 407.

But if the court will not interpose to rescind the contract, it will at least not interfere where its aid is asked by the purchasers to collect the money, where he has conveyed no title to the vendee.

In Johnson v. Gere, 2 Johns. ch. R. 546, where a suit was brought for collection of the purchase money, the Court stayed the suit because an ejectment was pending for the land. Suppose the ejectment had terminated in the loss of the land by the vendee, would not the court have made the injunction perpetual? And what necessity is there to do a nugatory act? Why bring a suit against adverse possessors without title to maintain it? Why enter on a possession, vacant, between the outgoing and incoming of tenants, to be expelled by the right of prior possession? Gaines v. Buford, 1 Dana, 492; 1 Story 's Eq. Jur. § 64e, difference of position in equity of plaintiff and defendant.

In Kerr v. Shaw, 13 Johns. 236, it is said that recovery in ejectment, without actual ouster, does not amount to eviction. It is clear from a reference to the case above of Johnson v. Gere, that the courts of equity, in such a case, would at least enjoin the collection of the purchase money. The common law courts of New York may be technical, but they do not so much control the equity courts as to render them powerless.

Failure of title, without eviction, is a good defence to suit for the purchase money. Frisbie v. Hoffnagle, 11 Johns. 50.

A purchaser of land, in possession, without either actual or virtual eviction, is entitled to the aid of a court of equity on showing that his vendor's title is defective, that an adverse title is asserted, and that the vendor is insolvent. Steel v. Pride, 1 Speer's (S. C.) R. 119; Hodges v. Connor, Ib. 120, 125-6; Simpson v. Hawkins, 1 Dana, 318.

In the last case, the defect of title is a conveyance from an administrator who was not qualified under the laws of the

State, and who assumed to sell under a will. The defect is analagous to our own.

O. H. Browing & N. Bushnell, for the appellee.

I. The covenant for quiet enjoyment relates only to rights existing at the time the covenant is made.' Ellis v. Welch, 6 Mass. 246 ; 2 Saund. 178 a, note A. and 181, note 10 ; Grannis v. Clark, 8 Cowen, 36. And it goes to the possession and not to the title. It is a technical rule, that nothing amounts to a breach of the covenant but an actual eviction, or disturbance of the possession of the covenantee. 4 Kent, 471 ; Waldron v. McCarty, 3 Johns. 471 ; Kortz v. Carpenter, 5 do. 120 ; Kerr v. Shaw, 13 do. 236 ; Prescott v. Trueman, 4 Mass. 627 ; 4 Halsted, 28, 141 ; 8 Johns. 198. And the eviction, disturbance, or ouster, must be by a person having the paramout title. It relates to lawful interruptions, and not to the acts of strangers and wrong doers. Dudley v. Folliott, 3 T. R. 583 ; 2 Tho's Coke, 260-1 ; Ellis v. Welch, 6 Mass. 246, 250, 252 ; Greenby v. Kellogg, 2 Johns. 1 ; Wotten v. Hill, 2 Saund. 177, notes 8, 10 ; Webb v. Alexander, 7 Wend. 281, 284 ; Lansing v. Van Alstine, 2 Wend. 565, (note). The only exception to this rule, is where the covenator himself enters tortiously and without title. This is a breach. Corus' case, Cro. Eliz. 544 ; Crope v. Young, 2 Show. 415 ; Dyett v. Pendleton, 8 Cowen, 727 ; Sedgwick v. Hollenback, 7 Johns. 380 ; Floyd v. Tompkins, 1 T. R. 660. And it is not sufficient to show, in order to constitute a breach of the covenant of warranty or of quiet enjoyment, that there is an outstanding title, or that there are persons in possession, holding adversely ; But it must be shown that such persons are in under that title, and that in consequence thereof the covenantee can not get possession. Jenkins v. Hopkins, 8 Pick. 346, 350. And when there has been an eviction by suit at law, it must appear affirmatively that the covenantee was thus evicted by a paramout title. Kelly v. Dutch Church, 2 Hill 's [N. Y.] R. 105, 111, 113, 114 ; Grannis v. Clark, 8 Cowen, 36. It is the general rule, that a covenant of warranty is not broken

till eviction or ouster under paramount title. Twambly v. Henly, 4 Mass, 441, 442; Bearce v. Jackson, Ib. 408, 410. And the party alleging the paramount title must prove it. Emerson v. Proprietors, &c. Mass. 464, 465; 2 Hill's (N. Y.) R. 113, 114; Chappel v. Bull, 17 Mass. 213, 218. And where there has been no possession there can be no eviction as is said. 17 Mass. 219. But a party, whether in possession or out of possession, under a covenant of warranty, or of quiet enjoyment, may voluntarily yield to a paramount title, and this will be an eviction within the meaning of the covenant. But the burden of the proof is upon him, to show that the title was in fact paramount, while an eviction at law would be conclusive proof of that fact. Hamilton v. Cutts, 4 Mass. 349, 352; Greenwault v. Davis, 4 Hill's R. 643–5–6; Stone v. Hooker, 9 Cowen, 157. Or being in possession he may buy in an outstanding title, or perfected incumbrance, under which possession might have been obtained, and on which demand of possession has been made. Sprague v. Baker, 17 Mass. 586, 590; White v. Whitney, 3 Metc. 81, 88. But the mere existence of the paramount title, or of the right to possession in a third person, is not sufficient. Some particular act of disturbance must be shown, as demand of possession, &c.; otherwise the covenantee has no right to abandon the premises, or buy in an outstanding claim. 4 Mass. 352; 17 do. 590. Francis' case, 8 Coke, 89; 2 Saund. 181, note 10. If the lands are unoccupied, it is sufficient that a third person exercises acts of ownership under paramount title; but if they are occupied, there must be an actual ejectment or disturbance. Saint John v. Palmer, 5 Hill's (N. Y.) R. 600. And being in possession of land with a claim of title, is not sufficient to prove the title in favor of a covenantee, in a covenant for quiet enjoyment. Kelly v. Dutch Church, 2 Hill's (N. Y.) R. 112, 113.

II. But it has been decided in Vermont, that in order to constitute a breach of the warranty of title, it is not necessary to prove an eviction, where the covenantee, never had possession; that to maintain tne action on the covenant, it is only necessary to commence an action of ejectment against

the person in possession, give notice to the warrantor, and fail to establish the title. Park v. Bates, 12 Verm. 381. To this we answer: 1. That decision is a mere obiter dictum, as the point did not properly arise in the case. 2. It is not sustained by the authorities on which it was based, to wit, Ludwell v. Newman, 6 T. R. 458; 5 Went. Pl. 53; Hawkes v. Overton, 31 Eng. Com. Law R. 356. Now these are all cases on covenants for quiet enjoyment in leases where the possession was refused or disturbed by the lessor; a case in which, as has been already shown, it is not necessary to show, an eviction or disturbance under title. 3. An attempt to apply this decision to the present case, is to confound the covenant of warranty of title with the covenant for quiet enjoyment; a covenant which goes to the title with a covenant which goes only to the possession, and which is broken only when eviction, or disturbance, or ouster occurs under title. 4. The decision may have been right, as it related to the particular case, as the warrantor was bound by his covenanat to shown title, and being vouched, a decision against his title was conclusive on him. Somerville v. Hamilton, 4 Peters' Cond. R. 436; 2 Thomas' Coke, 245, and note A.

III. If the case of Grannis v. Clark, 8 Cowen 36, is used against us, we reply: In that case, the word demise in a lease for years is a covenant of title in the lessor, and of power to make the lease. The principle on which the decision was made, was that the covenant was broken as soon as made. The case referred to in the decision of the court (6 Johns. 50,) was of a covenant broken immediately; the lessee is not, in such case, bound to enter the premises, and commit a trespass. The covenant in Grannis v. Clark is not therefore a covenant for quiet enjoyment, properly so called. The word demise imports a covenant of power to lease, (1 Saund. 332, note 2) and is analogous to a covenant of power to sell contained in a conveyance in fee, which is similar to a covenant of seizin, and, like a covenant of seizin, is broken as soon as made, (Howell v. Richards, 11 East, 633, 641; Sedgwick v. Hollenback, 7 Johns. 376;) while

the covenant of warranty and quiet enjoyment are wholly prospective, and run with the land, (4 Kent's Com. 470–471); and the covenant of quiet enjoyment, being thus broken only where there is a union of paramount title and disturbance, the covenantee is bound to enter if he can peaceably, though he thereby commit a trespass. Grannis v. Clark, 8 Cowen, 36, 40; Greenwault v. Davis, 4 Hill's (N. Y.) R. 644; Kortz v. Carpenter, 5 John. 120. And for the same reason that a covenant against incumbrances is broken as soon as it is made, (Tufts v. Adams, 8 Pick. 547,) the covenantee, where the incumbrance ripens into title, is not bound to enter and commit a trespass. Jenkins v. Hopkins, 8 Pick. 349. And the case of Howell v. Richards, 11 East, 633, 641–2, shows clearly the distinction and the true reason for the distinction, between the covenant for quiet enjoyment and the covenant of warranty of title.

IV. But it is said that in this case there was and is an adverse possession in Beebe and others under title, this possession being prima facie evidence of title, to which we answer: 1. The law requires, to constitute a breach, two facts; 1st, possession, and 2d, title. The argument requires proof of but one fact, the possession; for if the title is to be inferred from the mere possession, then, in effect, the mere possession constitutes the breach. It is not enough, however, to show possession; the title and the nature of it, and the person in whom it resides, must be specifically shown in pleading. Grannis v. Clark, 8 Cowen, 36; 5 Went. Pl. 66. Nor is the possession under claim of title sufficient evidence of title to constitute a breach of this covenant. Kelly v. Dutch Church, 2 Hill's (N. Y.) R. 112–113. So in relation to the covenant of warranty of title. Jenkins v. Hopkins, 8 Pick. 346, 350; Sprague v. Baker, 17 Mass. 586. 2. The defendants have in their deed set out, by abstract in the bill of exceptions, their title papers, which in fact, show that they had no title. 3. The defendants and others have shown neither paper title nor the extent of their occupancy; and the doctrine that possession is prima facie evidence of title relates only to actual occupancy, in the absence of

paper title. 2 Black. Com. 196. As to mixed possession under true and false titles, see Green v. Liter, 3 Peters' Cond. R. 170.

Where the defendant relies solely on possession with an assertion of title, his seizin and possession is confined to actual occupancy, or enclosure and improvements. Jackson v. Shoemaker, 2 Johns. 230; Jackson v. Camp, 1 Cowen, 605, 609; Jackson v. Woodruff, Ib. 276.

V. As to the measure of damages. On a covenant of warranty, the measure of damages is the value of the land at the execution of the deed, and the rule is the same on a breach of the covenant for quiet enjoyment. 4 Kent's Com. 476. And if the eviction or ouster be of only a part of the premises purchased, the measure of damages in the covenant for quiet enjoyment is the relative value of the land lost to the whole—the principal with six years interest. Wager v. Schuyler, 1 Wend. 533; Webb v. Alexander, 7 do. 286. And in relation to a covenant of title, the amount paid to extinguish an outstanding paramount title, is the measure of damages. Leffingwell v. Elliott, 10 Pick. 204; Thayer v. Clemence, 22 do. 490.

VI. Now it is well settled that at law, in the absence of fraud, the grantee can have no remedy beyond his covenants. Frost v. Raymond, 2 Caines, 188; Bree v. Holbeck Doug. 654; Emerson v. County of Washington, 9 Greenl. 88. The fact that the grantee was, at the time of the conveyance, in possession of a part of the premises, is immaterial. Unless he can show that he was imposed upon and induced by improper means to accept of the deed, he must look only to his covenants. Jackson v. Ayres, 14 Johns. 224; Fitch v. Baldwin, 17 do. 161, 165. And this rule of law is adopted to its full extent in courts of Equity. Where there are covenants, the ground of relief beyond those covenants is fraud. Abbott v. Allen, 2 Johns. Ch. R. 519, 523–4; Woodruff v. Bruce, 9 Paige, 443–4; Gouverneur v. Elmendorf, 5 Johns. Ch. R. 79, 85, 87; Chesterman v. Gardner, Ib. 29; 1 Sugden on Vendors, 554-5; 2 do. 103; Parkum v. Randolph, 4 How. [Miss.] R. 435, 550, 452.

Nor does the fact that there was an adverse possession at the time of the sale make any difference where there was no fraud. Gouverneur v. Elmendorf, 5 Johns. Ch. R. 87. And particularly where both parties knew of the possession, in which case there could be no fraud. Whitney v. Lewis, 21 Wend. 133. Where the deed has been made, and the bond and mortgage taken for the purchase money, on a bill to set aside the bond and mortgage for the failure of title, the court will look at the convenants in the deed to see if they are broken. If they are not broken, no relief will be granted even though it appear that there is an outstanding title which may be paramount to that conveyed by the deed. A court of equity is no place to try legal titles. Bumpus v. Platner, 1 Johns. Ch. R. 213, 218; Prewit v. Kenton, 3 Bibb 280. Nor will the court interfere to stop the payment of purchase money to prevent circuity of action when the question depends upon a legal title, brought up directly by the bill and which question has not been settled at law. Abbott v. Allen, 2 Johns. Ch. R. 524. And even if the covenants are broken, and the case is one for the consideration of a court of equity, the court will act on the principle of cross actions and decree offset to the extent only of the breach. Simpson v. Hawkins, 1 Dana, 305.

As to the alleged parol contract. No parol evidence of a verbal contract before or at the time of the deed is admissible to materially vary the written contract. Lane v. Sharp, 3 Scam. 566. Whatever was said between the parties before or at the time of the making of the deed was merged in the deed. Stephens v. Cooper, 1 Johns. Ch. R. 425; Parkhurst v. Van Cortland, Ib., 273.

The opinion of the court was delivered by

KOERNER, J.* This case was heard at the September term of the Adams Circuit court, A. D. 1845, when the court dismissed the cross-bill filed by Beebe, the defendant below, and rendered a decree of foreclosure in favor of

* YOUNG, J. did not sit in this case.

Swartwout, the criginal complainant below. The dismissal of defendant's cross-bill, and the rendition of decree in favor of complainant, Swartwout, by the court below, is now assigned for error. For a proper understanding of the decision of the court in this case, I have deemed it necessary to give the following abstract of the pleadings and evidence in the cause:

On the first of June, 1840, Swartwout filed his bill in the Adams circuit court, to foreclose a mortgage executed by Beebe to him upon the south east quarter of section four, township three south, eight west, for the sum of $1206. Beebe answered the bill, stating in his an wer most of the facts set out in the cross-bill afterwards filed, and Swartwout filed his replication. Beebe subsequently filed a cross-bill, leave having been obtained for that purpose, which alleges, that he purchased from said Swartwout the said tract of land on the 7th day of September 1837, paid him $300 in cash, and gave mortgage and bond for the balance, $1200; the whole being $1500. payable in instalments. That Swartwout and wife executed a deed to said Beebe, on the said 7th of September, with a covenant, "that they would warrant and defend the premises in the quiet and peaceable possession of said Beebe, his heirs and assigns, against themselves, their heirs, and against all and every person and persons whomsoever, lawfully claiming and to claim the same." That before and after said deed was made, as well as at the time, said Swartwout agreed to put said Beebe in the quiet possession of said land before the instalments should become due in the mortgage, and that payment of them should not be demanded until possession was given. That before the said sale, and at the time thereof, Beebe was in possession of forty acres of the said land, claiming under another and a different title from Swartwout, and the remaining one hundred and twenty acres were, and had been for some time previous, in the possession of Amos Beebe, Rial Crandall and William Blackwell, respectively, claiming also under a title different from and independent of said Swartwout's title. That in January, 1838, Swartwout commenced in Beebe's name an action

of ejectment to recover possession from Grigsby of a part of the land, but discontinued it afterwards. That Swartwout has never put him in possession of the land, nor made any other attempt to do so, and that he retains possession only of the forty acres, which he held under a different and independent title before he had anything to do with Swartwout at all. That before and at the time of the sale, Swartwout falsely and fraudulently represented that he had a good title to the land, and that he, Beebe, bought it, relying on that representation, paying a price for it, which was a full equivalent for the land, with a clear and indefeasible title, and that it was so understood at the time. That Swartwout, although requested, hath always failed and refused to exhibit his title and he believes the said title is not good. That in Swartwout's deed to Beebe, his chain of title is recited as the same granted to Benjamin Hobbs, the patentee, and conveyed by deed from him by his attorney to Francis Gantz, jr., by like deed from him ; said Gantz on the 9th of May, 1818, granted to Samuel Chard, and by deed, on the first of August 1837, from G. W. Snedeker and his wife, heirs of Chard, to Swartwout. That in the records of Adams county, transcribed from Madison county, is a power of attorney from Benjamin Hobbs to John L. Bogardus, dated 5th of August, 1815, made before the patent issued, and purporting to authorize Bogardus to sell said land when the patent should issue, and there is also on said records a deed from Bogardus to said Francis Gantz, Junior, which recites said power of attorney, and purports to convey the land, which said deed, however, is signed by said Bogardus in his own name, the name of the principal appearing in the recital only ; and there is also on said record in Adams county, a deed from Francis Gantz, jr., to Samuel Chard, conveying this land among other tracts, dated 10th May, 1818, but of which the certificate of acknowledgement is the 9th of May, 1848. That Swartwout is embarrassed and insolvent, and that Beebe fears he will lose what he has paid him, and all that he may be compelled to pay. That Swartwout has commenced suit on the mortgage, alleges the sub-

sequent proceedings thereon, and concludes with praying that Swartwout be enjoined, be compelled to produce his title and put Beebe in possession, or that the contract be rescinded, and money repaid, and for general relief.

To this cross-bill Swartwout filed his answer, in which he admits the execution of the deed and the covenant as stated. Denies any understanding as to possession, except what is expressed in the covenant in the deed, either before, at, or after the execution of the deed. Denies that at any time was mentioned or agreed upon for giving Beebe possession, but avers that he was placed in possession from the time of making the deed, according to the true intent and meaning of the covenant therein, and has not been disturbed in, or evicted from said possession. He alleges that he believes it to be true, that Amos Beebe was in possession of forty acres at the time of the sale, but that said Beebe never pretended to claim under any other title at said time, and avers that subsequent to the purchase, and in accordance with the agreement between this defendant and said complainant, said Amos Beebe surrendered the possession to said complainant, Silas Beebe, &c., and also admits an agreement between himself and said Silas Beebe at the time of the purchase in relation to fifty acres, then represented by said Silas Beebe to be in possession of William Blackwell, by which Beebe was to bring an ejectment against Blackwell, and if it proved unsuccessful, was to deduct a proportionate amount from the purchase money; and if he, Swartwout, should be able to procure possession of said Blackwell's tract within a reasonable time, he was to deliver it to Beebe; and he avers that the possession of said Blackwell's tract became vacant and he tendered it to Beebe, who refused it. That subsequently Grigsby got into possession, and Beebe brought the action of ejectment against him. Denies that he was to bring the action of ejectment, and denies any concern with it, except the employment of William Darling at the request of Amos Beebe, complainant's father, to assist the counsel of Silas Beebe, and alleges that he exercised no kind of control over

said suit, and that if said suit was dismissed, it was without the knowledge, consent, or advice of him, the said Swartwout. Admits that at the time of the purchase, besides the parts in possession of Amos Beebe and William Blackwell, that Silas Beebe, the complainant, had possession of forty acres, and Rial Crandall had possession of thirty acres, and avers that complainant had notice of the possession of all these persons at the time of the purchase. Alleges that he represented his title to be good and perfect, and that it is the same recited in his deed. Avers that he exhibited his chain of title to Beebe before the purchase, who examined and approved it, and has had it ever since, and purchased on the strength of said examination, and denies that he made any false or fraudulent representations. Admits that he is embarrassed and cannot pay his debts, but that he could pay his debts if other people (especially the complainant,) would pay him what they owed him, &c. Admits the payment of the $300, as alleged in the bill, and the suit on the mortgage for the balance of $1200, and resists the relief prayed for.

Beebe filed a general replication to the answer.

The deposition of Benjamin Grigsby proved, that on the 5th of September, 1837, all the improved land in the south half of section four, township three, eight west, (embracing this, south east, quarter and the south west quarter) was occupied by Amos Beebe, Silas Beebe, Rial Crandall, Steele and Blackwell, except twenty two acres in the south west corner, (not in this quarter,) which was then unoccupied, but had been and was afterwards occupied by tenants of John B. Young. The two Beebes and Crandall claimed in their own right, Steele claimed as tenant to Silas Beebe, Blackwell as tenant to Slayton, who was guardian for Singleton's heirs, Crandall had possession of fifteen or sixteen acres, claiming sixty, lying in both quarter section, Blackwell had about eighteen acres, claiming fifty, lying in both quarter sections. The other depositions are pretty much to the same effect. It appears further, that it is agreed between the two parties that the possession of the several tracts or parcels of land set out in the depositions by Young, Crandall, Blackwell and Steele, had been so held at the time of

the sale from Swartwout to Beebe, and from that time ever since, and also, that such adverse possession was known to Beebe at the time of the purchase. It is also admitted upon the record, that a judgment to the amount of about $400, exclusive of costs, was standing in Adams county against Swartwout unsatisfied. That execution had been issued to the sheriff of said county, and after due search and inquiry it was returned "no property found." The abstract of deeds from the Recorder's Office was admitted, on which appears the chain of title to Swartwout, already set out, being the only title to him of record; also, copies of the power of attorney to Bogardus and the deed from him to Gantz. In the abstract there appear a number of other deeds to the whole and to parts of the land, which are unconnected with Swartwout's title, but at the same time showing no title in the persons in possession.

From the pleadings of the parties and the evidence adduced as shown by this abstract, we think the following case to be established: That Startwout's title when he conveyed to Beebe was technically defective, (*a*) so far at least as the execution of the deed by Bogardus, who was an agent merely, is concerned, that at the time when he covenanted for quiet enjoyment, both porties knew the fact that other persons were actually in possession of portions of the premises, not claiming from the covenantor, but that Swartwout did not know that they set up any title; that there was no other agreement between the parties legally binding upon Swartwout, as to the surrendor of possession, or forebearance to sue until possession was obtained by Beebe; that Swartwout, however, employed assistant counsel in an action of ejectment brought by Beebe against one of the parties in possession, which suit Beebe had dismissed without the consent or knowledge of Swartwout; that some time elapsed between the commencement of the negotiation and its completion, and that the title papers of Swartwout were shown to Beebe and examined by him, the deed to the latter, moreover, reciting the chain of title; that no fraud was practiced by Swartwout, nothing appearing to induce the belief that he did not think his title as good, as Beebe must have thought

(*a*) Mears vs. Morrison, Beechers Breese R. 223; Pensoneau vs. Blakely, 14 Ill. R. 16; Lessee of Clark vs. Courtney, 5 Pet. U. S. R. 351.

it was, at the time he purchased; that Swartwout is insolvent, or at least unable to answer in damages in an action of covenant, should that be successfully maintained against him in a court of Law; and lastly, that the persons in possession have no better or paramount title to the one conveyed by Swartwout, nor indeed a connected paper title of any kind.

We are now called upon to pronounce the law arising on these facts, and to decide whether Beebe, the defendant in the bill of foreclosure, but complainant in the cross-bill, is entitled to the relief for which he had asked. Before, however, advancing to the main legal points in the case, I deem it proper to dispose of some other questions of a preliminary character. There being no proof, in the opinion of the court, of fraud having been committed by Swartwout, or of any misrepresentations having been made by him to complainant Beebe, it is clear that a court of Chancery would have no jurisdiction, were it not for the fact of defendant's inability to pay damages in case a recovery were had against him on the covenant. It is this circumstance alone which confers jurisdiction on the Chancellor, under the head of preventing irreparable mischief. Beebe's counsel, it is true, have sought to invoke the aid of Chancery, on the ground of mistake, insisting that when a person has paid money for nothing by mistake, whether such mistake was one of fact or even of law, Equity will always interfere and prevent the collection of the purchase money. It will be observed, however, in the first place, that Swartwout does not seek to collect the purchase money in this case; he simply asks to have the equity of redemption foreclosed if the purchase money is not paid. He cannot obtain a judgment against Beebe and pay himself out of the general property of Beebe. If he obtained any money at all it is out of the special fund, the land, upon which he holds a mortgage. In this view of the case, the failure of title in his grantor can hardly affect him. His equity of redemption is worthless, if the legal title to the premises fail. In the next place, it is clear that in this case there was no mistake in fact, inasmuch as the proof shows that Beebe examined the title papers and

had full knowledge of the existing possessions at and before the time of the sale. Although it may be conceded, that in some particular and doubtful cases, courts of Equity have construed mistakes of law into mistakes of facts for the purpose of preventing gross injustice, yet it would be doing violence to every rule of law to say that a failure of perceiving the legal defect in the execution of a deed, as was the case here, amounted to a mistake of fact.(*a*) In a mistake of law, where legal counsel could have been readily procured, the rule that ignorance of law is always fatal, (error juris nocet,) knows of no exception in the civil Law, from which we have adopted the general doctrine respecting the effect of mistakes on the contracts and legal obligations of parties, and I am not aware that the courts of chancery in Great Britain or this country have ever changed this well established principle. This, then, being neither a case of fraud or mistake, but one in which chancery only acts upon the principle that the remedy at law, if obtained, affords no actual but merely nominal relief, on account of the inability of the defendant to pay the damages, it seems necessarily to follow, that we have to divest ourselves from all other extraneous circumstances, and that we have to confine ourselves to the sole question, whether Beebe, if he were to sue at law, would recover on the covenant of quiet enjoyment; or in other words, whether the facts of the case as presented here, constitute a breach of the covenant of quiet enjoyment.

As far as one branch of this controversy is concerned, there is but little difficulty in settling it. I refer to the alleged breach of covenant for quiet enjoyment of the forty acres of the land in question, which was in possession of the vendee, Silas Beebe, when he purchased of Swartwout. Whatever title he may have had in himself at that time, and however adverse his possession of any right of Swartwout's to the land, he is estopped from setting it up now against his vendor. By taking a deed from his grantor, he conceded to him as far as respects any liability under the covenant at least, a superior title. In 17 Johns. 166, the court says: "That it can never be permitted to a person to except a

(*a*) Shafer vs. Davis, 13 Ill. R. 397; Bailey vs. Moore, 21 Ill. R. 170.

deed with covenants of seizin, and then turn round upon his grantor and allege that his covenant is broken, for that at the time he accepted the deed, he himself was seized of the premises." What is there said of a covenant of seizin does apply, in my opinion, with still greater force to a covenant of quiet enjoyment.

I will now pass to the principal point in the case, in the discussion of which, as indeed of all other questions in this case, counsel on both sides have exhibited an unusual degree of research. Our attention has been directed to a very great number of authorities, which in justice to the counsel and their cause, I have examined with some care.

It may not be unprofitable in the outset to advert to a few general principles respecting the nature of the covenant for quiet enjoyment, and the evidence necessary to establish a breach of it. A covenant for quiet enjoyment, is of a prospective character; it is in the nature of a real covenant, runs with the land, descends to the heirs, and vests in assignees and purchasers. (*a*) 4 Kent, 471. It is one which goes to the possession and not to the title. 5 Johns. 121. To constitute a breach of it, an actual ouster and eviction is necessary. 4 Kent, 471. The covenant for quiet enjoyment requires the assignment of a breach by a specific ouster or eviction by paramount legal title. 4 Kent, 479; 3 Johns. 471; 2 Johns. Ch. R. 522. To sustain an action for the breach of the covenant for quiet enjoyment, it must appear that the grantee has been evicted by title both lawful and paramount. 2 Hill's (N. Y.) R. 105. There must be an actual eviction or disturbance of the possession of the covenantee. 5 Johns. 121. (*b*) Most of the principles here stated are also applicable to the covenant of warranty, and as a general thing, are familiar to courts, and the profession. The great difficulty arising in this as in many other cases, consists in this, that courts have departed (and I think not improperly,) from the stern technical rules of requiring actual ouster and eviction in cases both of breach of warranty and covenant for quiet enjoyment, and have held many acts, or rather the concurrence of certain acts, as being equivalent to actual eviction by due process

(*a*) Brady vs. Spurk, 27 Ill. R. 479; Baker vs. Hunt, 40 Ill. R. 266.
(*b*) Lisk vs. Woodraff, 15 Ill. R. 19.

of law. It is not surprising that in deciding what shall be considered not as acts of eviction, but as acts equivalent in law to actual eviction, and what shall not be so considered, some conflict of views has occurred, so much so, that it may almost be said, that where no actual legal eviction has taken place, no general rule applicable to all cases can be laid down, and that each particular case must be determined on its own merits.

It is not contended here, and indeed the circumstances of the case forbid the idea, that the appellant was actually ousted from the land purchased by persons having better or paramount title; but the position assumed by counsel, as I understand it, is this: "The adverse possession of Grigsby aud others, coupled with defect of title in Startwout and his grantee, and the cousequent inability of Bebee, to obtain possession, are equivalent to an actual legal eviction, and sustain an action for breach of covenant." In support of this proposition, we have been cited to very numerous authorities, some of which, and which are those I consider the most favorable for this position, I will now proceed to review. The case of Ludwell v. Newman, 6 Term Reports, 458, I find to be a case where the disturber of the possession claimed under a prior lease from the defendant who was the covenantor. The case in 4 Mass. 352, was a case where the possession had been demanded of the covenantee, by one who held a prior mortgage from the original grantor, under whom, though remotely, the covenantee claimed. The case of Hawkes Orton, 5 Ad. & Ellis, 359, was a case where the breach of the covenant was committed by the covenantor himself. The precedent in 5 Wentworth's Pleading, 53, 55, is for a case where the disturbance was committed by one claiming under the covenantor. These authorities. and also a case in 7 Johns. 376 confirm the rule, that when the covenantor himself does an act asserting title, it will constitute a breach of the covenant for quiet enjoyment, but go no farther. (*a*) And even this doctrine is rather an exception to the general rule, and was not formerly recognized. 1 Roll. Abr. 428, pl. 7. The cove-

(*a*) Hamilton vs. Doolittle, 37 Ill. R. 473.

nant for quiet enjoyment extends to lawful disturbances only, and not to tortious acts. Sugden on Vendors, 85, bottom page. And in case of the covenantor disturbing the possession, he must do so asserting title, or else there is no breach. Ibid. 84, bottom page. It is manifest that this doctrine does not apply to the case now under consideration as there is no pretence that either the covenantor, or any one claiming under him, is alleged to have disturbed the possession of Beebe. The disturbers here hold, not only independent of the covenantor, but, as it is said, adversely to him. This disposes of one class of cases cited by appellant. There is, however, another which seems to be more favorable to his position. Under the latter class falls, in my opinion, the case of Duval v. Craig, 4 Peters' Cond. R. 32, where it is said, that if the grantee be unable to obtain possession in consequence of an existing possession, by a person claiming and holding under an elder title, this would certainly be equivalent to an eviction and breach of the covenant. So the case in 4 Mass. 490, where it is decided that lawful disturbance, by a stranger having a paramount title, and where some particular act is shown, by which the plaintiff is disturbed, amounts to a breach of covenant for quiet enjoyment. To this effect is, also, the case in 17 Mass. 589; see, also, 3 Fairfield, 499; 1 U. S. Dig. 687, and 293, where it is laid down, that although the mere existence of a better title is not a breach of this covenant, sufficient to give an action thereon, yet if it be accompanied with possession under it, commenced before the deed containing such covenant was executed, it will amount to a breach of covenant. 3 Dev. 200. In Foster v. Pierson, 4 Term R. 117, the court in their decision, speak of a disturber having lawful title, the word lawful being italicised in the report. The case in 15 Pickering, 149, was a case where the lessee of the covenantor was disturbed by the mortgagee, after the mortgagor, who was the covenantor, had failed to pay the mortgage, and this was held equivalent to an actual ouster and eviction. I find no difficulty in arranging under this head also two other cases, cited by the appellant, and on

which he seems to have placed a great deal of reliance. I mean the cases in 8 Cowen, 36, and 12 Vermont, 85. In the first case, the declaration of the covenantee alleged that his covenantor, neither at the date of the lease or since, was seized of the premises and had no interest therein, which would authorize him to demise ; and that the plaintiff could not enter, but was by the rightful owner of the premises hindered and could not quietly hold and possess the same. Here no eviction was alleged, and the court say: "this was not necessary; nor indeed could there be any eviction where the lessee never had possession." The complaint is, that from want of title in the lessor, the lessee could not get possession, but was kept out by the true owner. The substance of the decision in the 12th Vermont, is contained in the following passage in the Opinion of the court, delivered by Williams, Ch. J. "I apprehend that on the covenant for quiet enjoyment, and a fortiori on this covenant of warranty, it is not necessary to state and prove a technical eviction, but the action may be maintained, if the plaintiff is hindered or prevented by any one having a better right, from entering and enjoying the premises granted." Now what is the rule which may be extracted from all these cases ? Is it, that the mere possession or intrusion of a stranger claiming title, or right of possession, amounts to a breach of covenant for quiet enjoyment ? I think not. None of the cases just considered go that far. It will be perceived that in every one of them, the disturber of the possession, enters, or holds possession, having or claiming an "elder," a "better" a "lawful" or a "paramount title." They clearly establish the principle, that to constitute the breach, there must be a union of acts of disturbance and lawful title. (*a*) It is not denied by appellant's counsel, that the decisons found in the New York Reports all go to affirm the doctrine just stated, and that they go even much farther, and require, in many cases, strict technical eviction, where other courts have been much more indulgent. In 7th Wendell, 281, it was held, that it is not sufficient evidence of a breach of this covenant (quiet enjoyment) that the covenantee has been

(*a*) Moore vs. Vail, 17 Ill. R. 190 ; Harding vs. Larkin, 41 Ill. R. 414.

sued and recovery had against him in trespass by a third person claiming title to the land, unless the plaintiff avers and proves that such person, before or at the date of the covenant, had lawful title, and by virtue thereof, entered and arrested the plaintiff. See also as to this point, 4 Hill's (N. Y.) R. 643, 645; 2 do. 112, 113. This rule that it requires disturbance and lawful title to constitute a breach of this covenant, is well supported by decisions in other States besides New York. See 4 Mass. 352; 17 do. 589, 590, and 8 Pickering, 350, which last case I consider a case peculiarly apposite, and where the court say, "that it is not sufficient in order to constitute a breach of the covenant of warranty, (or of quiet enjoyment), to show that there is an outstanding title, and that in consequence thereof the covenantee could not get possession." "The depositions," the court goes on to say, "show an actual possession and occupancy, and payment of taxes by several persons; but there is no legal evidence of their title. The fact of possession as proved by the witnesses stands disconnected from any title, and therefore we cannot know, that it was not unlawful, and if it was so, it is no breach of the covenant of warranty." The case in 1 Speers, 120, I also hold to be affirmatory of our views. Let us now apply this rule to the case at bar. There is no averment in Beebe's bill, that the persons in possession at the time of his purchase had any lawful title, or any present right of possession; there is no proof indeed that they had any title whatever. The complainant has undoubtedly made the strongest case here, which he could have possibly made in a court of Law from the facts as they were. But had he failed to aver in his declaration, or to prove upon the trial that the persons in possession had a good or better title, he could not have recovered. For aught we know, the persons in possession claim under Beebe, the appellant himself, while he himself has taken a title from the convenantor. The appellant has made no effort whatever, as I think, to assert his own rights, or at least, to ascertain the real rights of the disturber, for the action of ejectment, dismissed by him, before his title

was ever passed upon, cannot be considered in such a light. These disturbers may yield to his title such as it is, (and it is very likely that it may be capable of being perfected, though we are not called upon to express an opinion on this point), upon a demand of possession made by him. It appears to me, that he must exert himself in some way to enjoy his possession, or must affirmatively prove that his adversaries have paramount and superior title to his, so that his struggle would be unavailing, before he can sue on the covenant, or obtain redress in a court of chancery. He must not only show that he is weak, for weak as he may be, he may yet be strong enough for his adversaries, but he must show that his adversaries are stronger than he is. To paramount title, provided he can establish it, he may peaceably and voluntarily yield; but he cannot be permitted to abandon the premises or buy in an outstanding claim, where a mere claim is set up by another, which may be destitute of all foundation, or may rest on a fabric of his own construction. 2 Saund. 181 a, note 10; 4 Mass. 352; 17 do. 590; Francis' case, 8 Coke, 89.

In conclusion, I will advert to another question, which, as it had been made, I deem it best to consider, and that is, the kind of relief which would have to be granted in case that the court should have been satisfied that the covenant had been broken. It will be recollected that Beebe prays that Swartwout be enjoined from the collection of any of the purchase money, be compelled to produce his title, and to put Beebe in possession; or, that on failure to put him so in possession, the contract be rescinded, and the money already paid on the land be repaid to Beebe. This court is of opinion, that under the circumstances of this case, the relief specially asked for by Beebe, that is, a rescission of the contract, could not be granted to the appellant, Beebe. There is a distinction between contracts of an executory character and those which are fully executed by deeds or conveyance. In the latter case there can be no rescission of the contract, unless it has been tainted by actual fraud. In a case like the present, unaffected by fraud, and where it

moreover appears that the contract, if broken at all, is only broken as to part of the premises conveyed,—for the land not actually occupied by others, or occupied by Beebe himself, cannot be embraced in the breach,—all that the appellant would be entitled to, under the prayer for general relief would be to obtain an injunction to restrain the collection of the purchase money, and to have it finally set off against the damages sustained. 1 Dana, 305.

To recapitulate, then, we are of opinion, 1st. That, under the circumstance of this case, Chancery could only afford relief, if the appellant could have successfully maintained an action on the convenant for quiet enjoyment, at law. 2d. That at law he would have failed to do so, as he does not insist that the persons who are in possession, and prevent him from taking possession, have a valid and paramount title; it being necessary, before a recovery can be had on this convenant, to show both acts of disturbance and paramount title, or at least a right of possession. 3d. That the facts presented in the case, if sufficient to entitle him to some relief, would yet not have warranted a recission of the contract, but would have given him a right to set off his damages against the purchase money.

The decree below dismissing the cross-bill and rendering a decree of foreclosure in favor of the original complainant, is affirmed, at the costs of the appellant, Beebe.

Decree affirmed.

JESSE FELL et al., appellants, v. ROBERT PRICE et al., appellees.

Appeal from McLean.

A. since dead, obtained a judgment and execution against B. and others, which was levied upon certain parcels of land. The land was sold, and the son of A., acting as his agent, purchased the premises, took a certificate of purchase in his own name, and paid no money for the land, but acknowledged satisfaction of the judgment upon the record, and paid the costs with money given him by his father for that purpose. C. one of the judgment debtors, the time of redemption having nearly expired, made an agreement with A. by which he conveyed to him by a deed absolute on its face, said lands, and also, for further security, another tract of land. A. with a view of giving C. further time to redeem said land, executed a bond for a deed, conditioned for the payment of the money by a specified time. The only object in view was an extension of the time of redemption by the arrangement aforesaid. The money was not paid as stipulated in the bond, and A. by the consent of C. sold to D. two of the said tracts of land, and D. sold to E. giving the latter a bond for a title. E. made improvements to the amount of $1,000. The land was valued at $100. About eighteen months after the recovery of A.'s judgment, another creditor of C. obtained a judgment and execution against him, which was levied on the last mentioned lands, already sold on A.'s execution, and were about to be sold, when E. filed a bill for an injunction against the judgment creditor and the sheriff. Subsequently D. was made a complainant with E. and a decree was rendered against the said complainants, requiring them to pay to the said judgment creditor the sum of $100, to be credited on the judgment, from which decree the complainants appealed: Held, that the decree was erroneous; that the injunction should have been made perpetual; and that A. or his heirs might, at any time. obtain a sheriff's deed upon the certificate, which deed would relate back to the sale and judgment as to the time of acquiring title against subsequent purchasers or incumbrancers.

BILL IN CHANCERY for an injunction, filed in the McLean Circuit Court by the appellants against the appellees, and heard at the April term 1845, before the Hon. Samuel H. Treat. It was then decreed that the complainants pay the defendant, Price, the sum of $100 by the first day of the next term, &c., and if payment was made, the injunction should be made perpetual. The complainants appealed from this decree.

The material facts are stated by the court.

A. Lincoln, for the appellants.

U. F. Linder, for the appellees.

The opinion of the court was delivered by

KOERNER, J.* On the sixteenth day of September, 1844, Jesse Fell, one of the appellants, filed a bill for an injunction and relief in the Circuit Court of McLean county, against Robert Price and Richard Edwards, the latter being sheriff of said county, and a mere nominal party. Robert Price alone answered, and upon his answer coming in, leave was given to complainant to amend his bill. At the April term 1845 of said Circuit Court, an amended bill was filed, which made Carlton H. Perry a complainant with the original complainant, and John N. Low a co-defendant. By agreement of parties the former answer of Price was considered as an answer to the amended bill, and whatever new matter was set forth in the same was to be considered as denied. John N. Low filed his separate answer to the amended bill. It appears that by consent parol testimony was heard by the Court, and all the evidence and admission of parties preserved in a bill of exceptions.

Upon a final hearing of the cause, it was decreed by the Court that the complainants pay the defendant, Price, the sum of one hundred dollars by the first day of the next term of the said Court, to be credited on the judgment mentioned in the pleadings, and that in case of such payment being made, the injunction should be made perpetual. From this decree Fell and Perry, the complainants below, have appealed to this Court.

The pleadings of the parties, and the evidence in the cause, which is preserved in a bill of exceptions, the parties having admitted parol evidence, present the following case:

At the May term of the McLean Circuit Court, A. D. 1838, one Nathan Low, since dead, obtained a judgment against one Jesse W. Fell and others, for the sum of $220.81 and costs, upon which an execution was issued on the 10th March, 1839, which was levied upon two tracts of land, one being described as lot number two, of the north east quarter of section sixteen, township twenty three north, two east of

* DENNING, J. did not sit in this case.

third principal meridian, and the other being described by metes and bounds as a five acre tract of land near the town of Bloomington in said county, as also, on a town lot in said town, being number twenty seven, block five. Said real estate was owned at the time of said levy by said Jesse W. Fell, and was sold under said execution on the 16th June, 1839. John N. Low, son of said Nathan Low, acting as agent for his father, purchased said premises for the sum of $235.16, in full for said judgment, taking from the sheriff the certificate of purchase in his own name, douting his authority to have it made to his father, as the latter had not been present at the sale. John N. Low paid no money for the land, but acknowledged satisfaction of the judgement on the record, and paid the costs with money given him by his father for that purpose. By the certificate he was entitled to receive a deed for said land. after the expiration of fifteen months from the day of sale, if the land was not redeemed.

Jesse W. Fell, on the 11th of May, 1840, the time of redeeming by him (twelve months) having nearly expired, but being still anxious to have an opportunity of acquiring the ownersnip in the lard back again, made an arrangement with Nathan Low, his judgment creditor, by which he conveyed him by a deed, absolute on its face, the land purchased under the execution, and also for further security, an additional tract of land described as lot number sixteen, in said section sixteen, being a piece of timber land. Nathan Low on his part, with a view to give Jesse W. Fell futher time to redeem said land, executed a bond for a deed of said land to said Fell, conditioned to be void, if, at a certain subsequent time, the payment of the amount of said judgment, interest and costs was not made. It appears from the statements in the bill and the evidence, that it was no part of said agreement that the purchase under the execution should be set aside by the new contract, and that the parties only intended to extend the time of redemption by the arrangement, the additional lot sixteen being included in the conveyance for the sole purpose of giving the said Nathan Low additional security while he gave

further time to the judgment debtor. Jesse W. Fell, however, was not able to pay the money mentioned in the condition of said title bond, and with his assent Nathan Low sold two of the tracts of the land, to wit; lot two, in said section sixteen, and the five acre tract near Bloomington, to C. H. Perry, one of the complainants, by a warranty deed, dated November 20th, 1840, Perry paying down the purchase money, which was the full value of said premises at the time of the sale. Subsequently Perry sold this land, the same originally sold under the executions, to Jesse Fell, Sr., the other complainant, giving him a bond for a title dated November 20th, 1842. Jesse Fell, Sr., since the purchase has made valuable improvements on the land, worth about one thousand dollars, while the land itself, at the time it was first purchased of Low, was worth but one hundred dollars. At the October term 1839, some eighteen months after Nathan Low had obtained his judgment, the defendant Price recovered also a judgment against the said Jesse W. Fell for $513.97, which was levied by the co-defendant Edwards, sheriff of McLean county, upon the said two tracts of land, which had been once before sold under Low's execution. When the complainant's bill was filed, said premises were about being sold by the said sheriff.

The decree of the court below, making the injunction perpetual, upon payment of one hundred dollars by the complainants, Jesse Fell, Sr., and Carleton H. Perry, manifestly proceeded upon the ground that the lands, first sold to Low under his judgment, were liable to be sold again to satisfy the subsequent judgment of Price, exclusive, however, of the improvements made thereon by the elder Fell. The value of the land without the improvements was one hundred dollars, the precise amount which complainants were decreed to pay before the injunction should be made perpetual. The court must have been of opinion that by the subsequent arrangement between Nathan Low and the younger Fell, the latter conveying to the former the same land by deed, all the former proceedings under the judgment and execution had been waived, and that Low derived his title solely by said

conveyance, which was made after Price had acquired a lien on the land. The same view has been urged here by the appellees' counsel.

We cannot look upon this transaction between Nathan Low and Jesse W. Fell in this light, even if it were unexplained by the parties and the evidence. Nathan Low might at any time before his death, or his heirs may yet obtain the sheriff's deed for said land on the certificate of purchase, and the deed will necessarily relate as to the time of acquiring title against subsequent purchasers or incumbrancers back to the sale, and even back to the judgment. Low's title then can be made perfect in law, and it cannot certainly be affected by his having taken in addition a deed from the judgment debtor, although such deed was made after a subsequent judgment. But the matter is perfectly explained by the complainants' bill, which states what the intentions of the parties were ; and the defendants' answer does not deny the truth of this explanation, but merely states his belief that Nathan Low renounced his rights under the former sale, and argues from the facts, but does not set up as a fact, the waiver of said sale. The testimony of witnesses is, however, conclusive upon this point, and sustains the allegations in the bill throughout.

We are satisfied that Price acquired no rights on the land in question by his subsequent judgment, and that, consequently, the decree of the circuit court was erroneous. The injunction ought to have been made perpetual without a condition, and at the costs of the defendant. As it is in the power of the court here to render such decree as ought to have been rendered below when sufficient appears on the record to enable the court to do so, the proper decree will be given here.

The decree of the court below is reversed at the costs of the appellees, and the injunction granted by the court below is made perpetual ; the defendants below to pay the costs in the court below.

Decree reversed.

NATHANIEL J. BROWN, plaintiff in error, v. WILLIAM T. PEASE et al., defendants in error.

Error to Cook.

Three promissory notes were executed to B. payable on the first days of September, October and November, which notes, before maturity, were assigned to C. who brought suit on them on the fifth day of the ensuing January, returnable on the first Monday of March, that being the commencement of the first term of the Circuit Court after their maturity. The Municipal Court was by law required to be held on the first Mondays of November, January and March. At the November term, the Judge gave notice that he should not hold the January term, and acted accordingly. Judgment was obtained on the notes at the November term, the cause having been contested and continued from the March term, when an execution was duly issued, and returned nulla bona. C. then sued B. as assignor of the three notes, and the jury returned a verdict in his favor for the note and interest last due only: Held, that due diligence was not used to collect two of the three notes, as a suit might have been brought to the November term of the Municipal Court, but as to the third, the suit was duly brought. (a)

ASSUMPSIT in the Cook Circuit Court, brought by the defendants in error against the plaintiff in error, as assignor of three several promissory notes. The cause was heard at the October term 1843, before the Hon. Richard M. Young and a jury, when a verdict was rendered in favor of the plaintiffs below for $193, the amount of the note last due.

The material facts will appear in the opinion of the court.

J. Butterfield, for the plaintiff in error.

J. Y. Scammon & N. B. Judd, for the defendants in error.

The opinion of the court was delivered by

TREAT J.* On the 22d of July, 1837, Taylor, Hunt & Co. executed to N. J. Brown, the plaintiff in error, three promissory notes for $133.33 each, and payable respectively on the first days of September, October and November thereafter. Before maturity, these notes were assigned by Brown to the

(a) Chalmers vs. Moore, 22 Ill. R. 361.

*DENNING, J. did not sit in this case.

defendants in error. On the 5th of January, 1838, the defendants in error brought an action on the notes in the Cook circuit court. The process was returnable on the first Monday of March, that being the commencement of the first term of the circuit court after the maturity of the notes. The action was contested, and was continued until the November term 1839, when a judgment was rendered against the makers for the amount of the notes and interest. An execution issued thereon on the 20th of November, 1839, on which the sheriff made the return of nulla bona. The Municipal Court of the city of Chicago was by law required to be held on the first Mondays of November, January and March. During the November term 1837, the Judge of that court informed the Bar that he should not hold the coming January term, and the result was that he did not hold it. In October, 1843, the defendants in error brought this suit against Brown to recover the amount of the notes. On the foregoing state of facts, the jury returned a verdict in favor of the defendants in error for $193, the amount of the note which last fell due, and the interest thereon. The court refused to grant a new trial, and rendered a judgment on the verdict. That decision is assigned for error.

It is insisted that the defendants in error did not use due diligence to collect the notes of the makers. This may be true of the two notes first becoming due. An action might have been brought on those notes to the November term of the Municipal Court. The jury so decided, and the propriety of their finding in that respect is not now questioned. The position is not tenable as to the third note, which fell due within ten days of the commencement of the term. The action was brought to the first term of the circuit court, the process was sued out in reasonable time to be served, the suit was prosecuted diligently to final judgment, and an execution was issued in due season, on which the sheriff made the return of nulla bona. These acts of diligence made out a clear prima facie cause of action as to the third note, and there was nothing in the evidence to contradict or defeat it. The defendants in error were under no obligation to

sue is the Municipal court. There was no term of that court held sooner than the circuit court. The Judge had given public notice that the January term would not be held, and suitors had the right to rely on the declaration. The bringing of a suit to that term would have been a useless act, which the defendants in error were not bound to do.

The judgment of the circuit court is affirmed, with costs.

Judgment affirmed.

JOHN WRIGHT, plaintiff in error, v. JOHN TAYLOR, defendant in error.

Error to Menard.

A. gave to B. his promissory note for $672.08, payable in two years, and negotiable in the State Bank of Illinois, and secured the same by a mortgage of real estate. The note was assigned to said Bank by the payee, and its paper having depreciated, B. without the assent or concurrence of A. when said note became due, paid the said note in such depreciated paper. B. then brought his bill in Chancery to foreclose the mortgage, and the Circuit Court rendered a decree in his favor for the amount of the note and interest, and that the mortgaged premises be sold, &c : Held, that B. only succeeded to the rights of the Bank, and could not, by his voluntary act, have any better right or superior equity; that A. was entitled to discharge his indebtedness in the paper of the Bank, and that B. could only recover the value of the funds at the time he paid the note. (a)

BILL IN CHANCERY to foreclose a mortgage, &c., brought by the defendant in error against the plaintiff in error in the Menard circuit court, and heard before the Hon. Samuel H. Treat, when a decree of foreclosure, &c., was rendered. The facts appear in the opinion of the court.

A. T. Bledsoe, for the plaintiff in error.

A. Lincoln, for the defendant in error.

The opinion of the court was delivered by

PURPLE, J.* On the 18th day of October, 1843, Taylor, the defendant in error, filed his bill in chancery in the court

(a) Scofield vs. Bessenden, 15 Ill. R. 78.

* DENNING, J. did not sit in this case.

below, to foreclose a mortgage executed by Wright, the plaintiff in error.

The bill describes the mortgage as having been executed on the sixth of March, A. D. 1841, and alleges that it was given to secure the payment of three notes, each for the sum of $672.08, due severally at one, two and three years; that the first note had been paid, and the second is due and unpaid, and concludes with a prayer for a decree, that the defendant below pay said note and interest, and in default thereof, that the mortgaged premises be sold, &c.

The following is a copy of said note: "Two years after date, I promise to pay John Taylor or order, six hundred and seventy two dollars and eight cents, value received, payable and negotiable in the State Bank of Illinois.

March 6th, 1841.

(Signed) John Wright."

Wright filed his answer, admitting the execution of the note and mortgage, and that he had not paid the note. But he charges that Taylor assigned the note to the State Bank of Illinois, in payment of a debt due by him to the Bank; and that being so assigned, and the property of the bank, he (Wright) had by law, and the charter of the bank, the right and privilege of paying the same in the paper of the bank. He further charges, that after the assignment, the paper of the bank depreciated, so that it was worth only about twenty six cents to the dollar, and that upon such depreciation, the note having became due and unpaid, Taylor, without any authority from him, paid the note to the bank in such depreciated paper, and that the bank delivered the note back to Taylor, who seeks to collect the same in money.

The cause was heard upon the bill, answer and exhibits, and a decree rendered in favor of the complainant in the circuit court for the amount of the note and interest, and that the mortgaged premises be sold, &c. The plaintiff here seeks to reverse this decree, and contends that in equity he is only bound to pay the specie value of the bank paper at the time it was advanced by Taylor, and interest thereon from the date of the advancement.

The case, I think, is plain and easy of solution. The general doctrine of the law relative to the transfer, and indorsement of promissory notes, has necessarily but little application to the question, and the controversy may be settled equitably and legally without the slightest interference with any known or established principle.

What are the facts? The Bank was the holder and legal owner of this note. It was over due. The maker had an unquestionable right in law to pay it in the paper of the Bank. If the Bank had assigned it to a stranger, its assignee could only have succeeded to its rights, subject to every equity existing between it and the maker. The payee and assignor can have no better rights nor superior equity by voluntarily taking up the note. His liability depended upon the failure of the bank to collect the amount due upon the note, by due course of law against the maker. In no event could he be compelled to pay in any funds except the paper of the bank. This had depreciated, and as the answer states which, for the purposes of this decision must be taken to be true, was worth but twenty six cents to the dollar. I cannot understand how Taylor, under the circumstances, could have any legal or equitable right, especially before he was liable to a suit as indorser of the note, to purchase it of the bank and charge Wright more than he had paid for it himself. It is clear that no other person could have done so. Having been once the absolute property of the bank, and over due the maker's right to discharge it in bank indebtedness accompanied it into whose hands soever it might afterwards fall, as fully and to all intents and purposes, as it would have done if it had been so stipulated upon the note itself. If any doubt had previously existed upon this question, it was put at rest by the act of the general assembly of this state, approved December 22, 1842, (Laws 1842–3, page 21) by which it is provided: "That all debts and demands due by note or otherwise, unto the President, Directors and Company of the bank of Illinois, or to the State bank of Illinois, or that may hereafter become due unto either of said banks, may, after or before suit brought thereon, be dis-

charged and paid in notes and bills of said banks respectively to which said debt or demand may be due, whether the same be in possession of said bank or banks, or assigned or transferred to any corporation, person or persons."

The precise time when the note was paid by Taylor to the bank does not appear. It is shown in the answer, that it was not done until after the same fell due, which was on the sixth of March, A. D. 1843. This was subsequent to the passage if the law before referred to, and also to the act of the 24th January, 1843, (Laws of 1842–3 page 21,) putting the bank in liquidation. In order to do ample justice to the complainant in the court below, I shall assume that he paid the note on the seventh of March, 1843, the day after its maturity.

According to the answer, the value of the funds in which the same was paid or purchased would be $174.74; which sum, with interest thereon at the rate of six per cent. per annum from the date last aforesaid until the money shall be paid, Taylor is entitled to recover.

The decree of the circuit court is, therefore, in part reversed; but inasmuch as it is competent for this court to render the proper decree in the premises, it is ordered, adudged and decreed, that the defendant in the court below pay to the complainant in said court, the sum of one hundred and seventy four dollars and seventy four cents, with interest thereon at the rate of six per cent. per annum from the seventh day of March, A. D. 1843, to the time such payment shall be made, within twenty days from the date of this decree; and that the same shall be in full satisfaction and discharge of the note referred to in and exhibited with said complainant's bill; and that in default of such payment, that the mortgaged premises described in said bill be sold, and said mortgage be foreclosed in the manner directed and required by the decree of the circuit court herein, and that the commissioner appointed by said decree to make said sale and execute to the purchaser or purchasers of said mortgaged premises a certificate, or certificates of purchase pursuant to the directions of said decree; and that, for the

purposes aforesaid, so much of the said decree shall stand affirmed and be in force. And it is further decreed, that the defendant in error recover his costs in the Court below, and the plaintiff in error his costs in this Court, and that executions from said Courts issue respectively therefor; and that this cause be remanded for further proceedings not inconsistent with this decree.*

Decree reversed.

UPTON D. WELCH et al., plaintiffs in error, v. JAMES SYKES defendant in error.

Error to Clark.

Under the Constitution of the United States, and the laws of Congress made in pursuance thereof, judgments in-personam of the various States are placed on the same footing as domestic judgments, and are to receive the same credit and effect when sought to be enforced in different States, as they by law and usage have in the particular States where rendered.

A judgment fairly and duly obtained in one State is conclusive between the parties when sued on in another State. But the defendant may show, in bar of an action on such judgment, that the judgment was fraudulently obtained, or that the Court pronouncing it had neither jurisdiction of his person, nor of the subject matter of the action. If he succeed in establishing any one of these defences, the judgment is entitled to no credit, and the plaintiff must rely on his original cause of action. The defendant may admit the existence of the record, and set up by special plea any of these matters of defence in avoidance of the judgment; and the plaintiff may traverse the allegations of the plea, or reply new matter in avoidance.

The record of a judgment, in an action on the judgment, may be used in evidence on the trial, and, when introduced, affords conclusive evidence of the facts stated in it. If, however, a record states that the defendant appeared by attorney, it is conclusive proof that the attorney appeared for him, but only prima facie evidence of his authority to appear.

Where a judgment has been obtained, there is a strong legal presumption that the Court had jurisdiction, and that in proceeded conformably to the laws of the State in which it was rendered. The rule. therefore, is that a plea

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*WILSON, C. J. and LOCKWOOD, J. dissented.

denying the jurisdiction of the Court must, by certain and positive averments, negate every fact from which the jurisdiction may arise.

If a record of a judgment shows that the defendant appeared by attorney, the plaintiff must reply this fact to the plea, and the defendant may rejoin that the attorney had no authority to enter his appearance. The record affords prima facie evidence of his right to appear.

Each State of the Union may prescribe the mode of bringing parties before its Courts, and although its regulation, in this respect, can have no extra-territorial operation, they are, nevertheless, binding on its own citizens.

DEBT on a judgment of a court in Maryland, brought by the defendant in error against the plaintiffs in error, in the Clark Circuit Court, and heard before the Hon. William Wilson, on a demurrer to pleas, which was sustained. The substance of those pleas will appear in the opinion of the court.

A. Lincoln, for the plaintiffs in error.

C. H. Constable, for the defendant in error.

The opinion of the court was delivered by

TREAT, J.* This action was commenced in the Clark Circuit Court by Sykes against Welch and others. Watson, one of the defendants, only was served with process. The declaration was in debt on a judgment recovered by Sykes against the defendants, in the Ann Arundel County Court, in the State of Maryland, on the 26th of October, 1835, for $340.00 debt, and $10.84 damages. Watson appeared and pleaded seven pleas. The court sustained a demurrer to the third, fourth, fifth and sixth pleas; and the defendant thereupon withdrew the other pleas, and the plaintiff had judgment for his debt and damages. The decision of the circuit court sustaining the demurrer to the pleas is assigned for error.

The third plea alleges, that from the commencement of the suit in Maryland until the rendition of the judgment therein, the defendant resided in the State of Ohio, and

*Justices KOERNER, THOMAS and DENNING did not sit in this case.

m. A. R. G.

during all of that time was not within the limits of the State of Maryland, and that he never appeared in person, nor authorized any one to appear for him.

The fourth plea alleges in substance, that from the commencement of the suit until the rendition of the judgment, the defendant resided in Ohio and was not in Maryland, and that he did not appear in the suit in person or by attorney.

The fifth and sixth pleas aver generally, that the defendant was never served with process, and that he had no notice of the pendency of the suit.

Under the Constitution of the United States and the laws of Congress made in pursuance thereof, the judgments in personam of the various States are placed on the footing of domestic judgments ; and they are to receive the same credit and effect when sought to be enforced in different States, as they by law or usage have in the particular States where rendered. A judgment fairly and duly obtained in one State is conclusive between the parties when sued on in another State. The defendant may show, in bar of an action on the record of a judgment of another State, that the judgment was fraudulently obtained, [*a*] or that the court pronouncing it had neither jurisdiction of his person, nor of the subject matter of the action. If he succeed in establishing any one of these defences, the judgment is entitled to no credit, and the plaintiff is driven to his suit on the original cause of action. Bimeler v. Dawson, 4 Scam. 536, and the cases there cited. The defendant may admit the existence of the record, and set up by special plea any of these matters of defence in avoidance of the judgment. Harrod v. Barretto, 2 Hall, 302 ; Shumway v. Stillman, 6 Wend, 447 ; Starbuck v. Murray, 5 do. 148. The plaintiff may traverse the allegations of the plea, or reply new matter in avoidance. The record of the judgment is to be used as evidence in the trial of the issue ; and when introduced, affords conclusive evidence of the facts stated in it. Thus if the record shows affirmatively that the defendant was personally served with process, or personally appeared to the action, it furnishes conclusive evidence of the fact stated, and the defendant

(a) Lawrence vs. Jarvis, 32 Ill. R. 310 ; Carr vs. Miner, 42 Ill. R. 180, Christmas vs. Russell, 5 Wal. U. S. R. 303.

D. H. Haws

cannot controvert it. Hall v. Williams, 6 Pick. 232 ; Shumway v. Stillman, 6 Wend. 447; Rust v. Frothingham, Bre. 258. If either of these facts clearly and distinctly appear on the face of the record, the plaintiff may reply that the defendant is estopped by the record from denying that the Court had jurisdiction over his person. Hall v. Williams, 6 Pick. 232. If the record states that the defendant appeared by attorney, it is conclusive proof that the attorney appeared for him, but only prima facie evidence of the authority of the attorney to appear, and which latter fact the defendant is at full liberty to disprove. (*a*) Hall v. Williams, 6 Pick. 232; Shumway v. Stillman, 6 Wend. 447. The pleas in question seek to invalidate the judgment declared on, by showing that the court in which it was recovered had no jurisdiction over the person of the defendant, and consequently no authority to render the judgment. Where a judgment has been obtained, there is a strong legal presumption that the court had jurisdiction, and that it proceeded conformably to the laws of the State in which it was rendered. The rule therefore is, that a plea denying the jurisdiction of the court must, by certain and positive averments, negate every fact from which the jurisdiction may arise. Harrod v. Barretto, 1 Hall, 155; Shumway v. Stillman, 4 Cowen. 292. The third and fourth pleas clearly come within the rule. If the averments contained in them are true, the court in Maryland could not have acquired jurisdiction over the persons of the defendant, either by the service of process, or by any notice which he was bound to attend to. If he was a citizen of Ohio during the pendency of the suit in Maryland, the only modes by which the court could have acquired the authority to render a personal judgment against him, were either by the service of process on him while he was temporarily within the limits of the latter State, or by voluntary submission of his person to the jurisdiction of the court. That the court obtained jurisdiction in either of these ways, is explicitely and positively denied by the pleas.

Although no part of the record of this case, a copy of the

(*a*) Rust vs. Frothingham. Beech. Breese R. 331 ; Lyon vs. Baldwin, 2 Gil. R. 635 ; Lake vs. Cook, 15 Ill. R. 356 ; Whittaker vs. Murray, 15 Ill. R. 294, and notes.

record of proceedings in the suit in Maryland, has been submitted to the inspection of the Court. It appears therefrom that an attorney appeared for the defendant. The proper course will be for the plaintiff to reply this fact to the pleas, and the defendant may rejoin that the attorney had no authority to enter his appearance. On the trial of such issue, the record will afford prima facie evidence of the right of the attorney to appear, and the defendant will be allowed to overthrow the presumption, by proving that he never authorized the attorney to appear for him. And this question of the authority of the attorney will probably be the only one arising on the future trial of the case. [*a*]

The fifth and sixth pleas are manifestly bad. These pleas may be true in point of fact, and still the Court may have had jurisdiction of the person of the defendant. It is competent for each State to prescribe the mode of bringing parties before its Courts. Although its regulations in this respect can have no extra-territorial operation, they are, nevertheless, binding on its own citizens. For aught appearing on the face of these pleas, the defendant may have been a resident of the State of Maryland, and received such notice of the pendency of the suit, as conferred authority on the Court to hear the case and pronounce the judgment. If he was a resident of another State, it may be that prior to the commencement of the suit and in anticipation of its being brought, he retained an attorney to enter his appearance and defend it. He may have done this, and afterwards have had no personal knowledge of the pendency of the suit. These pleas, like the others, should have contained the additional averments that he was beyond the jurisdiction of the Court, and that he had never authorized his appearance, or such other allegations as would have negatived every presumption of jurisdiction (*b*)

The Circuit Court decided correctly in sustaining the demurrer to the fifth and sixth pleas, but erred in sustaining it to the third and fourth pleas. For this error the judgment will be reversed with costs, and the cause will be remanded for further proceedings.

Judgment reversed.

(*a*) Rae vs. Hulbert, 17 Ill. R. 478; Warren vs. McCarthey, 25 Ill. R. 95.

(*b*) Sim vs. Frank, 25 Ill. R. 125; Shufield vs. Buckley, 45 Ill. R. 223.

DARIUS GREENUP, appellant, v. NANCY STOKER, appellee.

Appeal from St. Clair.

The rule of the common law, which prohibits the party calling a witness proposing to him such questions as will indicate the answer which is desired to be obtained, has not, in practice, usually been considered so strict and imperative as to divest the courts of a reasonable discretion in permitting questions to be asked and answered, which may be leading in their character, and especially so, when the same is only introductory to the more material matters directly in issue.

On the trial of an action for a breach of a promise to marry, a witness, introduced by the plaintiff, was asked the following question: "Did he court her?" The question was objected to by counsel for the defandant, but the objection was overruled: Held, that it was neither objectionable in form, nor in substance; that it was an inquiry about a mere matter of fact, which could be answered by a person of common observation.

The rules applicable to contracts of marriage do not differ materially from those governing contracts in general. Where there has been an absolute, unqualified refusal to perform a contract of this nature, the law will not require of the injured party either a request or offer of performance. It is enough that there has been a promise and a refusal inconsistent with the promise.

Where there are several counts in a declaration, and a general instruction is asked, which is a correct principle of law and applicable to some of those counts and to the evidence given under them, the giving of such instruction to the jury is not a cause of error.

A court will not grant a new trial, or reverse a judgment on error, because of the admission of improper, or the rejection of proper testimony, or for want of proper direction or misdirection of the Judge, who tried the cause, provided the court can clearly see, by an inspection of the whole record, that justice has been done, and that the error complained of could not have affected the merits of the cause, or influenced the verdict of the jury.

A request to marry, or the refusal, as well as the promise, may be proved by circumstances.

The doctrine laid down by this court, in the case of Guykowski v. The People, 1 Scam. 476, in regard to the disqualification of aliens to sit as jurors, is limited to capital cases.

Suits on such contracts. (*a*)

ASSUMPSIT in the St. Clair Circuit Court, brought by the appellee against the appellant, and heard before the Hon. Gustavus P. Koerner and a jury, at the October term 1846. Verdict for the plaintiff below for $525.00, upon which the court rendered judgment.

The pleadings, instructions asked, &c., appear in the opinion of the court.

(*a*) Tubbs vs. Kleek, 12 Ill. R. 446; Fider vs. McKinley, 21 Ill. R. 313; Burnet vs. Simpkins, 24 Ill. R. 264; Prescott vs. Guyler, 32 Ill. R. 312.

L. Trumbull, for appellant, relied upon the following points and authorities for a reversal of the judgment:

1. It was erroneous to permit Fulweiller, who had seen the parties together but once, to give his opinion as to the character of the attention paid by Greenup. The witnesses should state facts, and it is for the jury to draw conclusions. The question, "Did he court her?" was also leading, and therefore improper. 1 Starkie's Ev. 150, 152.

2. If no time or place for the marriage is appointed, which was the case in all the counts except the first, an offer to perform must be alleged and proved; allegations of readiness and willingness are not sufficient. Bucks v. Shane, 2 Bibb, 341; Martin v. Patton, 1 Littell, 235; Gough v. Farr, 12 Eng. Com. Law R. 293; Gould's Pl. 176.

The first instruction given on the part of the plaintiff, which was general to all counts, that it was not necessary for plaintiff to prove a request, and was therefore erroneous. Coke v. Ferrall, 13 Wend. 285; Porter v. Rose, 12 Johns. 209; Tapping v. Root, 5 Cowen, 204; Nelson v. Bostwick, 5 Hill's (N. Y) R. 37; 1 Chitty's Pl. 363; 1 Saunders, 33, note 2.

3. The third count is upon a special contract made and to be performed at a certain time; and the third instruction given on behalf of plaintiff, that the time of making the marriage contract and the time of the refusal by Greenup need not be proved precisely as laid, and that proof of different times would sustain the declaration, was erroneous when applied to this count; and for the same reason the third instruction asked by the defendant should nave been given. The allegata and prabata must correspond.

4. The eleventh instruction asked by the defendant should have been given.

5. The fifth count of said declaration, which is on a promise to marry on request, avers no request, and is therefore defective, and the instruction to disregard it should have been given. Rev. Stat. 417, § 25; Bach v. Owen, 5 Johns. 409.

6. A special request and refusal being alleged in the first and second counts, it was incumbent on the plaintiff below

to prove said request was laid, and that the instructions to that effect asked by defendant should have been given.

7. The verdict was manifestly contrary to evidence, and for this cause a new trial should have been granted.

8. The fact that two of the jurors who rendered the verdict in said cause were aliens, which fact was unknown to the defendant till after the rendition of the verdict, is a ground for a new trial, and the court erred in not granting it. Guykowski v. The People, 1Scam. 476.

The want of a freehold qualification in one of the jurors is a ground for a new trial, if the fact was not known to the party making the motion at the time of the trial. Briggs v. Georgia, 15 Vt. 61 ; King v. Tremaine, 16 Eng. Com. Law R. 318.

W. H. Underwood, and J. Gillespie, for the appellee.

A witness may be asked whether, from the appearance of parties, they were or were not sincerely attached. McKee v. Nelson, 4 Cowen, 257.

A leading question is no ground for error. It is addressed to the sound discretion of the court. 2 Phil. Ev. 724, note 506 ; Warren v. McHatton, 2 Scam. 33 ; 1 Starkie's Ev. 151.

The question in this case was not leading. It only called the attention of the witness to a collateral fact. Williams v. Jarrot, 1 Gilman, 130 ; Leonard v. Thomas, 4 Scam. 557, 558.

The time and place of making contract must be alleged, but need not be proved. Martin v. Patton, 1 Littell, 236 ; 1 Greenl. Ev. 56.

Injury to plaintiff's character is a proper subject for the consideration of the jury in assessing damages. Johnson v. Calkins, 1 Johns. 119. The damages depend upon the peculiar circumstance of each case. 2 Tidd's Pr. 875 ; Southron v. Rexford, 6 Cowen, 261.

Greenup failed to use due diligence, by inquiring of jurors as to their competency. 2 New Hamp. 360 ; People v. Jewett, 6 Wend. 389 ; Crawford v. Breagle, 1 Ala. 593 ; Simpson v. Pitman, 13 Ohio 367 ; Jeffries v. Randall, 14

Mass. 206; Amherst v. Hadley, 1 Pick. 41, 42; Vennum v. Harwood, 1 Gilman, 661; 15 Verm. 73. It is no ground for a new trial that one of the jurors was an alien. 2 Peters' Cond. R. 499 and 500; 15 Eng. Com. Law R. 253

The informality of the verdict should have been objected to in the court below, or it is waived. Schlencker v. Risley, 3 Scam. 487; Bank v. Batty, 4 Scam. 202.

A refusal to marry dispenses with the necessity of a request. 2 Chitty's Pl. 322, n.

The opinion of the court was delivered by

Purple, J.* This action was instituted by the appellee against the appellant, to recover damages for the breach of a marriage contract.

The declaration contains five counts, to one of which (the fourth) the circuit court sustained a demurrer.

The first count is upon a promise to marry within a reasonable time, and avers that such reasonable time has elapsed, and that the appellee, to wit, on the 25th March, A. D. 1844, after the making of the promise, requested the appellant to marry her, and that he, upon such request, refused.

The second count is upon a promise to marry generally, and avers that appellee has always been ready and willing to marry the appellant; and also that appellee, (to wit,) on the 20th March, 1844, requested appellant to marry her, and that he refused.

The third count is upon a special contract to marry the then next morning, that is to say, on the 1st day of January, A. D. 1844, and avers a readiness and willingness on the part of appellee to perform the contract, and that appellant, although often requested, on his part always wholly refused.

The fifth count is upon a promise to marry upon request, and avers a readiness and willingness on the part of appellee to marry, and a positive refusal on the part of the appellant.

The appellant pleaded the general issue.

The jury found a general verdict for the appellee, and assessed her damages at $525.

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* Young, J. did not sit in this case.

The circuit court, at the request of the plaintiff's counsel in the court, instructed the jury :

1. That to entitle the plaintiff to recover, it is not necessary that she should prove an express contract on the part of defendant to marry her ; but that an agreement to marry may be inferred from those circumstances which usually accompany an agreement to marry ;

2. That if the jury believe from the evidence, that the defendant refused to marry plaintiff, then it is not necessary that plaintiff should prove a request to defendant to marry her, in order to maintain this action ;" and

3. That the time of making the marriage contract and the time of refusal by Greenup need not be proved precisely as alleged ; but proof of different times will sustain the declaration if such times be before the commencement of this suit.

The counsel for the defendant below requested the court to instruct the jury :

1. That in order to sustain the first count of her declaration on the part of the plaintiff, it is necessary for her to prove a request and refusal, and that unless the jury believe from the evidence that the said Miss Stoker requested said Greenup to marry her on the 25th of March, A. D. 1844, as stated in said count, and that he refused upon such request so to do, they must find for the defendant upon said first count ;

2. That unless it has been proved by testimony so as to satisfy the jury of the fact that the said Miss Stoker requested said Greenup to marry her on the 20th of March, A. D. 1844, as alleged in the second count of said declaration, they are bound to find for the defendant upon said second count ;

3. That unless the jury believe from the evidence that the said Miss Stoker and the said Greenup mutually promised each other to marry on the then next morning as alleged in said third count, they must find for the defendant upon the third count of said declaration ;"

4. That unless they believe from the evidence that the said Miss Stoker was ready and offered to marry the said

Greenup, and that he refused to marry her at the time stated in said third count, they must find for the defendant;

5. That unless the jury believe from the evidence that Miss Stoker and the said Greenup promised on the 31st day of December, 1843, to marry each other on the next morning, January 1st, 1844, and that she being ready, he actually refused to marry her, they must find for the defendant upon said third count;

6. That the fourth count of the declaration is not before the jury and that they have nothing to do with it;

7. That unless the jury believe from the evidence, that the said Greenup promised to marry the said Nancy Stoker on request, and that upon being requested or without request, that having the opportunity, he refused to marry her, they are bound to find for the defendant upon the fifth and last count of the declaration;

8. That the jury are bound to find in favor of the defendant upon the first and second counts of said declaration unless they believe from the evidence before them, that the said Nancy Stoker requested said Greenup to marry her and that he refused to do so; that proof of the bare omission or neglect of the defendant to marry the plaintiff even after he has agreed to do so is not sufficient to entitle the plaintiff to recover upon either of said counts;

9. That unless it has been proved by testimony that the said Nancy Stoker requested the said Greenup to marry her, and that he refused upon such request to do so, or that some acts were done by the parties which in their opinion are tantamount to a request and refusal, they are bound to find the issues upon the first, second and fifth counts for said Greenup, although they should believe from the evidence that he once promised to marry the said Nancy;

10. That even should the jury believe from the evidence, that Greenup promised generally to marry the said Nancy Stoker, or to marry her in a reasonable time, or on request, without agreeing upon any particular time, still they cannot find in her favor upon such proof without proof, also, that she subsequently requested said Greenup to marry her and he refused to do so;

11. That this suit is brought to recover damages for a breach of contract, and in no event will the jury be justified in giving any other or greater damages than justly arise out of a failure to perform said contract, should they believe that one existed;

12. That it is not proper for the jury, in their estimate of damages, should they even find for the plaintiff, to take into consideration any injury to the plaintiff's reputation or character; and

13. That the jury should disregard the fifth and last count of said declaration, because the same is faulty.

The court gave the 6th, 7th, 8th 9th and 10th instructions, and also the 11th and 12th, qualified as follows:

11. That this suit is brought to recover damages for a breach of contract, and in no event will the jury be justified in giving any other or greater damages than justly arise out of a failure to perform said contract, should they believe that one existed; but the injury inflicted to the feelings of the plaintiff, and to her standing in society, are consequences which may justly arise out of the contract; and may be taken into the consideration of the jury in the assessment of damages.

12. That it is not proper for the jury in their assessment of damages, should they even find for the plaintiff, to take into consideration any injury to the plaintiff's reputation or character, only so far as it may be a consequence of the non-performance.

The residue of the instructions asked by the counsel for the defendant below were refused, and an exception taken to the opinion of the court in denying the same, and qualifying the eleventh and twelfth instructions, as above stated, and also to the giving of those asked by the plaintiff below. The bill of exceptions contains all the evidence in the cause.

During the progress of the trial before the jury, a witness testified that he had known the parties since 1838; saw appellant pay attentions to appellee; these attentions commenced in the fall of 1838, and continued four or five years, &c., &c. The counsel for the appellee then asked the witness, "Did he court her?" This queston and the answer to the

same was objected to, the objection overruled, and an exception taken. Witness answered, "yes, it was my impression." The same counsel then asked the following question: "How long did he court her?" Witness answered, "four or five years." This question and answer also objected to, objection overruled, and exception taken.

Upon the return of the verdict of the jury, the appellant moved the Court to set the same aside and grant a new trial.

1. Because the verdict was contrary to evidence;

2. Because it was contrary to law;

3. Because the damages were excessive;

4. Because the Court misdirected the jury;

5. Because the Court refused to give proper instructions; and

6. Because two of the jurors who tried the cause were aliens and not naturalized citizens of the United States, which fact was unknown to appellant till after the verdict was rendered.

The last reason assigned is supported by the affidavit of appellant, which is made part of the record, that two of the jurors were alien born, and had not been naturalized, and that this fact was unknown to him and as he was informed and believed, to his counsel, until after the return of the verdict.

The motion for a new trial was overruled, and judgment rendered on the verdict, to which decision the appellant also excepted.

The appellant now assigns for error:

1. That improper questions were allowed to be asked, and improper testimony to be given in evidence to the jury;

2. That illegal and improper instructions were given to the jury;

3. That legal and proper instructions were refused;

4. That the motion to set aside said verdict and grant a new trial was refused when said verdict was contrary to both law and evidence, and was rendered by a jury, part of whom were aliens, which fact was unknown to the defendant or his counsel till after the rendition of said verdict;

5. That judgment was rendered upon a verdict finding only one of the issues for the plaintiff, without specifying which, or making any disposition of the other issues ; and

6. That judgment was rendered for the plaintiff, when, by law, judgment should have been rendered in favor of the defendant.

The first point made by the appellant is, that it was erroneous to permit Fulweiler, one of the defendant's witnesses to state his opinion as to the character of the plaintiff's attentions to the defendant.

This witness had testified that he had known the parties since 1838. That he had seen appellant pay attentions to the appellee. That these attentions commenced in the fall of 1838, and continued four or five years ; was in the habit of observing this several times. That he waited on her as a gentleman would wait on a lady. Saw him walking with her ; could not say attentions were frequent. Saw him walking with her once from church, and but once. Here the counsel asked the witness, "Did he court her?" The witness answered that such was his impression.

This question and answer were objected to, and the objection overruled by the court ; and it is urged that the ruling of the court was erroneous, both on account of the impropriety of the evidence and the leading character of the interrogatory proposed to the witness.

However much we may be disposed to question the policy of the continuance of the established rule of the Common Law, which prohibits the party calling a witness, proposing to him such questions as will indicate the answer which is desired to be obtained, the practice has been too long settled and acquiesced in to be disturbed, except by legislative intervention. Originally it may have been a useful and necessary method of eliciting truth. It was based upon the supposition that the witnesses were inclined to favor the party by whom they were called, and to testify in his favor if they could but receive an intimation of his wishes. It would be but charitable to conclude that the necessity which introduced the doctrine has for a long time ceased to exist.

This rule, however, in practice has not usually been considered so strict and imperative as to divest the courts of a reasonable discretion in permitting questions to be asked and answered which may be leading in their character, and especially so when the same is only introductory to the more material matters directly in issue; and seldom, if ever, has it been considered that a mere practical error in this respect would afford even the slightest grounds for a new trial, or to reverse a cause on error. The witness is present in court, and may be subjected to such cross-examination as would tend to elicit the truth, or to satisfy the court and jury how far he is entitled to credit, whether the interrogatories which he has answered have been leading or otherwise. (*a*)

Having said thus much in relation to the form of the question proposed to this witness, I proceed to the character of the evidence and the propriety of permitting the witness to answer the interrogatory. The point has been argued by counsel upon the assumption, that the witness has been permitted to express an opinion upon some matter involving the exercise of science or skill, without having first laid the foundation for such testimony by proof of his ability and qualifications to form a correct conclusion upon the subject matter about which his opinion is solicited. To the court it appears to be an inquiry about a mere matter of fact, which could be answered by any one who had the requisite knowledge, without the aid of any science or skill, except common observation and universal experience, and which might have been obvious to the senses of any man of ordinary understanding and discernment. It is universally understood to mean those attentions which a man pays to a woman when he manifests an intention to engage her affections. In the common language of the country, to court or to pay attentions to a lady, are synonymous terms. The latter is but a method slightly more refined and genteel of expressing the same thing.

The second point made by the counsel for the plaintiff involves the consideration of the sufficiency of the declaration and several of the instructions given and refused, as

(*a*) Williams vs. Jarrot, 1 Gil. R. 130.

applicable to particular counts of the same; and it is contended, that if no time or place for the marriage is appointed, an offer to perform must be alleged and proved, and that allegations of readiness and willingness are insufficient.

The rules applicable to contracts of marriage do not differ materially from those governing contracts in general. In both, the intention of the parties must be collected from the terms employed, whether the contract be verbal or in writing, and their rights and liabilities determined accordingly. In the case of mutual and dependent promises, neither can maintain an action without first showing a willingness and an offer to perform on his part, or that the other party has done some act dispensing with such offer. 1 Saund. 33; Bach v. Owen, 5 Term R. 109; Porter v. Rose, 12 Johns. 208; Topping v. Root, 5 Cowen, 404; Cook v. Farrell's Adm'rs, 13 Wend. 285; Nelson v. Bostwick, 5 Hill's (N. Y.)R. 37.

So, also, in actions for breaches of marriage contracts it has been held, that in such action for not marrying in a reasonable time the plaintiff must aver a request to marry or make some other allegation to dispense with it. 1 Chitty's Pl. 363.

"Marriage contracts do not differ in principle from other species of contracts where mutual and concurrent acts are to be performed. Neither party to such contract can maintain an action against the other without showing performance or an offer to perform; and when the time and place of performance are not fixed by the agreement of the parties to entitle either to an action, an averment of an offer to marry is indispensably necessary." Burks v. Shaine, 2 Bibb, 341.

If the declaration be upon a promise to marry upon request, or in a reasonable time, the plaintiff must aver and prove a special request, or an offer to perform: a bare allegation of readiness and willingness is not sufficient. Martin v. Patton, 1 Littell, 234.

It is not, however, to be supposed that the law intended to impose upon the party, who had been guiltless of a violation of a marriage or other contract, and who was entitled to recover damages for a breach thereof by the other, the unmean-

ing, idle ceremony of either a request or offer of performance, where there had been an absolute unqualified refusal.

Such strictness is not required, even in cases of ordinary traffic when money is to be paid or tendered as a condition precedent to the party's right to insist upon performance. The necessity of such a tender may be waived by a previous refusal to receive the money. And will it then be said, that when the marriage contract has been fairly and freely made, and the mutual affections of the parties sacredly pledged to its solemn consummation and fulfilment, that she whose heart has been betrayed into unrequited or forgotten love, whose young hopes have been blighted by cold neglect and causeless infidelity, scorned, refused, despised, must still submit to the humiliating task, the senseless mockery of tendering her hand to the man of broken vows and dishonored faith, before the law can interpose that feeble, paratial remedy which it affords in her behalf? Happily, it demands no such useless sacrifice of sense to sound, or substance to mere form.

It is enough that there had been a promise, and a refusal inconsistent with the promise. When this appears, an offer or request is wholly unnecessary. 1 Chitty's Pl. 363; Gough v. Farr, 14 Eng. com. Law R. 294. This veiw of the law disposes of the objection made to the fifth count in the declaration, and shows, that in the refusal of the court to direct the jury to disregard to same as being faulty, there was no error.

The count is upon a promise to marry on request. It avers a readiness and willingness on the part of the defendant to marry; and contains a special allegation that on the 20th of March, A. D. 1844, the plaintiff positively, wrongfully and injuriously refused and wholly declined to marry, contrary to his promise and undertaking, &c.

It is the opinion of the court, both upon authority and the reason of the case, that this count is good in substance, and that the court decided correctly in refusing to direct the jury to disregard it.

I will now briefly notice several of the instructions which

were given and refused by the court, together with their application to the respective counts of the declaration. The principle objection taken to the instructions asked by the plaintiff below, as to the third, upon the ground that it is general and applicable to all the counts, and that this instruction is erroneous when applied to the third count of the declaration, for the reason that this count is upon a special contract made and to be performed at a certain time.

We regard this objection as a sort of special demurrer to the instruction, for the first time attempted to be set up, and insisted upon in this court. No such reason appears to have been urged against it in the court below. There the objection and exception was general, that the proposition was illegal. Here the exception is special, that it is inapplicable to a particular state of facts, about which, as I shall hereafter show, there was no evidence or controversy. The instruction was general, it was a correct proposition of law, and applicable to several counts of the declaration and to the evidence given under them. It would be a refinement upon technicality indeed, and would amount to a denial of justice if we were to reverse a judgment upon such grounds.

I shall pass over the first, second, fourth and fifth instructions asked by the plaintiff's counsel, and refused by the court, with the single remark, that they were all properly refused for the reason that they attempt to make the time of the promise, request, or offer on the part of the defendant material, when in law, the same is immaterial.

Upon the questien presented by the refusal of the circuit court to give the third instruction asked by the appellant's counsel, we have had considerable difficulty in arriving at a conclusion. We have not finally done so without some hesitation.

The proposition was strictly a legal one, and directly appropriate to the third count of the declaration, to which alone it was sought to be applied. The authorities upon this point have been carefully and critically examined.

It is no new doctrine that a new trial will not be granted or judgment reversed on error, on account of the Judge who

tried the cause having given improper or withheld proper instruction from the jury.

To show the propriety of this remark, and to collect authorities from which to deduce a general rule applicable to this and cases of like character, I will proceed to make extracts and references to several decisions, which have heretofore been made, bearing upon this question.

When the objection merely is, that what was proved by one witness could have been proved by two, there being no denial of the fact which he was called to prove, there is no ground for the Court to interfere by granting a new trial. It is no ground for a new trial, that a witness, who was competent, was rejected upon the trial on the ground of incompetency, when the same fact was established by another witness. Edwards v. Evans, 3 East, 452.

The Court will not grant a new trial on a technical objection in point of law to the direction of the Judge, when they see that justice has been done, even though such misdirection may have swayed the jury. Edmunds v. Mitchell, 2 Term. R. 4.

Though the Judge may have made some little mistake in his directions to the jury, yet if justice be done, the Court ought not to interfere. The Court are always bound to determine how far the observation of the judge was materia and affected the merits of the case. 5 do. 425.

The case of Seare v. Prentice, 8 East, 348, is quite analogous on this point to the one now under consideration. The plaintiff employed the defendant, who was a shoemaker, as a surgeon, to reduce a dislocated limb. In his declaration, he complained that the defendant had "negligently, ignorantly and unskilfully performed the operation." The evidence showed negligence, but not want of skill. The Judge charged the jury that if there was no negligence, the defendant was not answerable for want of skill. The instruction was held erroneous, as mere matter of law; but there being no evidence of want of skill, it was considered that the opinion of the Judge did not aflect the merits of the verdict upon the evidence in the cause, and a new trial was refused.

When a question on a misdirection arises, the inquiry is whether it was a materal point and affected the merits of the case. The Court always make this inquiry, and they are bound, in the exercise of a sound discretion, to do so, otherwise there would be no end to new trials, and the remedy would be worse than the disease. Fleming v. Gillbert, 3 Johns. 528.

The court are bound to judge how far the observation is material, as well as erroneous. Doyle v. Lyon, 10 do. 417.

It is undoubtedly true, that a judgment will not be reversed on account of an erroneous opinion expressed or decision made by the court, where it clearly appears that the error did not or could not have affected the verdict or judgment. But this very position implies that we are to look beyond the letter of the exception into the case itself to ascertain what the effect of the error was. Clark v. Dutcher, 9 Cowen, 680.

The same doctrine has been repeatedly recognized by this Court in the case of Leigh v. Hodges, 1 Scam. 18; Gillet v. Sweat, 1 Gilman, 475; Hill v. Ward, 2 do. 285.

From all thsre authorities the rule may be easily deduced, that a Court will not grant a new trial, or reverse a judgment on error, because of the admission of improper or the rejection of proper testimony, or for want of proper direction or misdirection of the Judge who tried the cause, provided the Court can clearly see, by an inspection of the whole record, that justice has been done, and that the error complained of could not have affected the merits of the cause, or influenced the verdict of the jury. (*a*)

This being the rule, it remains to be seen whether the plaintiff here has been injured by the refusal of the Court to give this instruction, which we are free to admit was a legal one, and might, without any impropriety, have been given. Could the refusal to give this instruction have had any effect upon the verdict of the jury? We are clearly of the opinion that it could not for two reasons:

First, because there was no evidence whatever applicable to the count; and

(*a*) Newkirk vs. Coue, 18 Ill. R. 454; McClerg vs. Mungen, 46 Ill. R. 114.

Second, because there was sufficient evidence to warrant the finding under the other counts of the declaration.

If the instruction had been given, and the jury under it had found for the appellant upon this count, and, as they did find, against him upon the other counts, is there the least reason for supposing that the verdict would have been lessened, or in any respect changed, from what it was as returned by the jury? Is there the smallest probability that any sensible or conscientious jury would estimate the damages any greater for a breach of promise to marry "the then next morning," than for a violation of any agreement to marry "upon request, or in a reasonable time;" or, that if it had been clearly shown that all three of the promises had been made and broken at the same time, instead of one, that it would have produced any different result? In either event the misfortune, the disappointment, the injury to the defendant would have been precisely the same.

It will be unnecessary to enter into any detailed statement of the evidence given upon the trial. It may, however, be proper to state generally that if the witnesses are credible, there is abundant testimony to sustain the promises and the alleged breaches upon the first, second and fifth counts of the declaration. The jury found their verdict generally upon these as well as upon the third count. We cannot entertain even a suspicion that the verdict would, or could have been a fraction more or less, if this count had been stricken from the record.

The qualifications given by the court to the 11th and 12th instructions were strictly in accordance with law.

By the 11th, if given as asked, without explanation, the jury would necessarily have been obliged to have settled the legal proposition involved in the instruction, as to what damages justly arose out of a failare "to perform the contract." It was, therefore, not only proper, but important, that they should be advised by the court, of the character of those damages which might thus "justly arise," and of the nature of the circumstances to be considered in estimaing them.

This advice was correctly given in this instruction as modified by the court.

We are unable to perceive anything erroneous in the qualifications to the 12th instruction. It directs the jury that, in their assessment of damages, they should disregard any injuries inflicted to the character of the plaintiff below, except so far as might result as a conseqnence from the non-performance of the contract.

The next point in order as made by the plaintiff's counsel is, that the verdict is contrary to the evidence. And under this division of the question it has been strenuously urged, that the two most material witnesses, the father and brother of the appellee, were so impeached in their general characters for truth, that their testimony must be entirely disregarded in the consideration of the cause. If this position were admitted to be correct, we are by no means prepared to say, that there would not still be sufficient evidence remaining to warrant the finding of the jury. Contracts of this sort are not usually made in the presence of witnesses, but in private and secresy between the parties. For this reason, the law has wisely provided, that they may reasonably be inferred from unusual and marked attentions, and long continued intimacy, and those manifestations of attachment and regard which usually precede their consummation. Independent of the direct testimony of these two, several witnesses have testified that the visits and attentions of the plaintiff to the defendant, were constant and unremitted for a period exceeding four years; that they then ceased; and one witness also states, that about this time he declared his intention not to marry the appellant or any one else; which fact the witness shortly afterwards communicated to the defendant.

The request to marry, or the refusal, as well as the promise, may be proved by circumstances. Martin v Patton, 3 Littell, 234. But it is not for this court to decide, whatever may be their impression as to the weight of testimony upon the subject, that the two witnesses before referred to are unworthy of belief. That was peculiarly a question for the jury, with which we are not at liberty to interfere. They

were strongly corroborated by the other evidence in the case, and under all the circumstances, the jury might well have given credit to their statements, even if their general characters for truth were questionable, about which it is unnecessary that we should express any opinion.

The remaining question in this case is, whether the circuit court decided erroneously in overruling the motion for a new trial, for the reason that two of the jurors who sat upon the panel and tried the cause were aliens, and unnaturalized; and that this fact was unknown to the plaintiff until after the trial of the cause.

By the first section of chapter fifty eight of the Revised Statutes, it is provided that "all free white male taxable inhabitants in any of the counties in this State, being natural born citizens of the United States, or naturalized according to the Constitution and laws of the United States and of this State, between the ages of twenty one and sixty years, not being judges of the supreme or circuit court, county commissioners, judges of probate, clerks of the circuit or county commissioners' court, sheriffs, coroners, postmasters, licensed attorneys, overseers of the highways, or occupiers of mills, ferries, toll bridges or turnpike roads, being of sound mind and discretion, and not subject to any bodily infirmity amounting to a disability, shall be considered and deemed competent persons, (except in cases where legal disabilities may be imposed for the commission of some criminal offence,) to serve on all grand and petit juries in and for the bodies of their counties respectively."

This is the only statutory provision in our law relative to the qualification and competency of petit jurors. By this statute, as well as by the common law, unnaturalized aliens are disqualified to serve on juries. Although we are aware that it has been stated in the opinions of the court, delivered in the case of Guykowski v. The People, that "an alien is not capable in law to discharge the functions of a juror"; and that in relation to their competency, a distinction is attempted to be drawn between such alien and others mentioned as exceptions in the act; yet we find it extremely difficult to understand the force and reason of the argument,

or upon what grounds it is contended that in the one case there is an exemption merely from the performance of a duty, and in the other a total disqualification, so as to render a verdict an entire nullity.

All persons except aliens and others who are enumerated are declared to be competent jurors. The inference would seem to be, that those excepted are alike incompetent. We feel compelled to state that we are not satisfied with the decision to the extent to which it would seem to be carried by the argument, in the case of Guykowski v. The People; but, as it was made in favorem vitæ, in a case where a prisoner is presumed to stand on all his rights, and to waive nothing as applied to such a case, we are unwilling to disturb or overturn it.

Stability and uniformity of decisions in the judicial tribunals of the country conduce much to the welfare and happiness of the people for whose benefit alone governments are instituted and administered; and when a question has once been settled by solemn adjudication, and no positive rule of law has been violated or contravened, and no serious detriment is likely to arise prejudicial to the public interest, such adjudication ought to stand.

It is, however, requiring to much of mere men, even although they may for the time being occupy the position of judges of the courts, and as such, be entrusted with the authority of determining controversies between citizens, that they will not sometimes err in their opinions, and pronounce judgments which are fundamentally wrong, and which, if adhered to, would be productive of serious oppression and incalculable evil. Such cases have frequently occurred and will occur again with men of the profoundest learning and purest morals. But when they have arisen, it has never been considered more or less than an act of common honesty on the part of the tribunal where the error had been committed, to acknowledge and speedily reform it. Although we may doubt the correctness of the decision in the case before referred to, as a rule applicable to all cases for reasons and upon anthorities which will hereafter be shown and referred to, still, inasmuch as in the particular case then under

consideration, and cases of a similar character, we cannot perceive that the doctrine will be productive of any positive ev.l, and will throw an additional safeguard around the life of the citizen, which is one of the cherished objects of the law, and as the contrary has not to our knowledge, in such a case, ever been expressly ruled, we have reluctantly concluded that it is not indispensable to hold that it is not law.

We feel called upon, however, by a sense of justice and propriety to limit the rule to capital cases. To extend it farther and permit its application to felonies of a lower grade, misdemeanors and civil suits, besides being opposed to the strong current of authorities both in England and this country, would be productive of much mischief, subvert the ends of justice, and transform the trial by jury from a bulwark of protection around the rights and interests of the citizen, into a piece of ingenious machinery to delude the people with the semblance without the reality of justice. [*a*]

Let us look for a moment at the consequences of such a construction of the law as is here contended for, in ordinary civil cases in this country. It is well known, and part of the general history of the country, that our population is composed to a considerable extent, of emigrants from almost all portions of the world. From the peculiar character of our institutions they become entitled, almost upon their arrival here, to many of the privileges of natural born and naturalized citizens ; they readily accommodate themselves to our habits, laws and customs, and often with the knowledge and tacit assent of the parties are permitted to serve on juries, and thus to determine conflicting claims between citizen and citizen. They are declared by law to be incompetent to act in such capacity.

Judges, clerks, attorneys, millers, sheriffs, &c., &c., are alike exceptions to the number and kind who are by law held to be competent. But does it follow as a consequence that the verdict rendered by either is a nullity ? That it cannot be the verdict of a jury ? If so then the party in a civil as well as a criminal case must be presumed to stand on all his rights, and to waive none of them, when in truth the con-

(*a*) Chase vs. People, 40 Ill. R. 356.

trary is the established and well settled doctrine of the law ; and the presumption, in such cases is, that all rights are waived where the parties knowing, or having opportunity by the exercise of reasonable diligence and attention, of knowing them, omit or neglect to insist upon or assert them. A person, who upon bare inspection, is obviously and notoriously under the age of twenty one years is certainly as incompetent as an alien ; he is not, according to the maxim of the Common Law, a " lawful man " ; but if one were to be called upon a jury, and the parties were present and permitted him to try their cause without objection, I apprehend that a motion for a new trial upon that ground would receive but little favor or encouragement ; that the verdict would not for such cause be void. Admit that it would be sustained upon the principle that the parties had consented, wherein would it differ, but in degree, from the present question ?

What, in a civil cause a party might by the exercise of reasonable and proper diligence ascertain, he will in law be presumed to know, and neglecting to avail himself of this legal knowledge at the proper time, he will not be permitted to take the chances of a verdict in his favor, and afterwards set up his own want of common prudence to avoid its consequences. If the doctrine contended for should obtain, it must often happen in this country that verdicts and judgments will be set aside and reversed, when there is not even a pretence that injustice has been done, at great and unnecessary expense to parties, besides opening wide the door for the practice of the grossest frauds, and the encouragement of countless perjuries.

I propose now, to show upon authority, that in misdemeanors and in civil cases at least, alienage, and other disqualifications are grounds of challenge only, and cannot be assigned as reasons for new trials or to reverse a cause on error.

In the case of Hill v. Yeates, 12 East, 229, a son, who had not been summoned upon the jury, answered to his father's name and served in his place. Held to be no ground for setting aside the verdict.

The court will not grant a new trial because one of the

jurors was related to one of the parties, for the other party, who might have challenged this person, ought to suffer for his neglect. 6 Bacon, 661.

In the case of Simpson v. Pitman, 13 Ohio 365, three of the jurors who sat on the trial, before they were impaneled, had repeatedly expressed opinions publicly as to the merits of the case; that the defendant was guilty, &c.; which the defendant did not learn until after the rendition of the verdict; and it was held to be cause of challenge only, and no ground for a new trial.

In Egleston v. Smiley, 17 Johns. 133, one of the jurors who tried the cause was a half uncle of the plaintiff's wife. The court say that "the objection to the juror, even if it had been sufficient at the trial, is now too late to be made."

In Massachunetts, in a suit between the inhabitants of two towns, one of the jurors was chosen and drawn at a meeting of the inhabitants of Enfield, holden more than twenty days before the sitting of the court at which the venire facias was returnable, contrary to the statute, and it was decided to be no ground for a new trial. 1 Pick. 40–1

A verdict, either in a civil or criminal case, will not be set aside merely on the ground that one or more of the jurors had not the property qualifications, &c. required by law. If the objection is not raised when the juror is drawn, the parties are concluded, although the fact may not have come to their knowledge until after the trial. People v. Jewett, 6 Wend. 386.

It is admitted that these cases are not precisely, in point of form, the case now under consideration. They are, however, strictly analogous. In some, the jurors had been irregularly summoned or placed upon the panel; in others, they wanted the requisite qualifications to render them competent. Aliens are only incompetent. But there is a case which decides the very question which is here made. It is the case of the King v. Sutton, 15 Eng. Com. Law R. 253. The defendant was indicted for a conspiracy, and convicted. A motion was made for a new trial, upon the ground shown by the affidavit of a juror who sat upon the trial that he was an alien; and it farther appeared that this fact was unknown to

the defendant until after the trial. It was refused, upon the ground that this was cause of challenge only.

In Pennsylvania, alienage is a good cause of challenge, but it cannot be taken advantage of after verdict. Hollingsworth v. Duane, 4 Dall. 353.

Against the weight and strong current of these decisions, the court has been cited to some paragraphs in 6 Bacon, 661, and to the case of Briggs v. Town of Georgia, 15 Verm. 61.

In Bacon, it is said, that "if there were good cause of challenge to one of the jurors, but this was not known, and consequently could not be taken advantage of upon the trial the court will grant a new trial."

This doctrine, if it were intended to be general in its application, is in conflict with the whole current of the authorities in the English courts, and even with the paragraph which I have before cited upon the same page of the same work. The cases referred to in support of it in Bacon are not within our reach. But we feel warranted in making the inference, that they must have been of a special character when, by the exercise of reasonable diligence, the cause of challenge could not have been ascertained before the trial.

The case in the Vermont Reports is against the doctrine, which we have under the authorities before cited, here advanced. It is, that the want of a freehold qualification in one of the jurors is a ground for a new trial, if the fact was unknown to the party making the motion at the time of trial. The only authorities cited by that court in support of this decision are 1 Conn. R. 401 ; Cro. Car. 278.

Thus it will be seen, that the whole current and weight of the decisions are against the position assumed by the appellant here. From the peculiar position of our country, and the diversified national character of its inhabitants, there arises a strong, powerful, almost indispensable additional reason why his construction of the law should be rejected. From an attentive consideration of the whole case we are satisfied that no injustice has been done, and that there is no error in this record.

The judgment of the circuit court is affirmed, with costs.

Judgment affirmed.

RICHARD D. LALOR, plaintiff in error, v. WILLIAM P. WATTLES, defendant in error.

Error to Will.

The voluntary branch of the Bankrupt Law of the United States, passed August 19, 1841, is constitutional and valid.

THIS suit was commenced before a Justice of the peace on the 17th day of May, 1841, by Wattles against Lalor. Wattles recovered a judgment for $81.44, and costs, from which judgment Lalor took an appeal to the Will circuit court.

At the May term, A. D. 1843, of said circuit court, the bankruptcy of the defendant was suggested and the cause thereupon continued. At the October term, Lalor filed his plea of bankruptcy and final discharge from all his debts under the United States bankrupt law then in force, to which plea Wattles demurred, and assigned the following as his ground of demurrer, to wit: That "that part of the Act of Congress, entitled an Act to establish a uniform system of bankruptcy throughout the United States, under which the defendant pleads a discharge from his debts, is in violation of the Constitution of the United States."

The Hon. Richard M. Young, the presiding Judge of the Will circuit court, by agreement of counsel, took the cause under advisement, and at the October term, A. D. 1844, sustained the demurrer, to which judgment Lalor excepted, and brought the case into this court by writ of error.

U. Oswood & W. E. Little, for plaintiff in error. H. Dusenbury, on the same side, filed a brief argument in favor of the constitutionality of the bankrupt law.

D. L. Gregg, for defendant in error, filed an elaborate argument against the constitutionality of said law.

The opinion of the court was delivered by

LOCKWOOD, J. Wattles sued Lalor before a Justice of the peace, who rendered a judgment in his favor for $84.44. The cause was removed to the Will circuit court by appeal, where Lalor plead his discharge, as a bankrupt, under the act of congress, passed the 19th August, 1841. To this plea Wattles demurred, on the ground that the voluntary part of the bankrupt law violated the constitution of the United States. The circuit court of Will county sustained the demurrer, and gave judgment for the plaintiff below. To reverse this judgment, the cause is brought to this court by writ of error.

The only question submitted for our consideration is, whether the voluntary part of the bankrupt law is a violation of the constitution of the United States. This is truly a grave and momentous question. As it arises under the constitution and laws of the United States, its ultimate decision devolves on the supreme court of the Union, and it is matter of deep regret that the question has not been presented to that tribunal, whose determination can alone put an end to all controversy on the subject. Fortunately, however, this court is not without strong indications of what will be the decision of that court, whenever the question shall be brought before it. The bankrupt act has been before most of the Judges of the supreme court on their respective circuits, and questions either directly or indirectly made as to its constitutionality, and we believe that a decided majority of the Judges have pronounced the law to be constitutional. If the supreme court of the United States had expressly decided this point, it would be our imperative duty to conform to their decision. (*a*) And when it can be clearly ascertained, from the individual action of the Judges, what will be their decision when the question shall be presented to them in their collective capacity, it seems to be reasonable that we should follow in the path thus indicated. We do not, therefore, deem it our duty to enter into any argument on the subject. This question has, however, been argued before the supreme court of New York, and

(*a*) Linn vs. State Bank, 1 Scam. R. 90, and notes.

the law held by that court to be constitutional. We, therefore, consider it incumbent on this court to decide that the voluntary branch of the Bankrupt Act is constitutional and valid.

The judgment of the court below is consequently reversed. with costs, and the cause remanded.

Judgment reversed.

MATTHEW H. HAWKS, plaintiff in error, v. SAMUEL LANDS, defendant in error.

Error to McLean.

If a declaration is defective in substance, and can be reached by a general demurrer, or not being defective in substance, any new matter is introduced in an amendment, showing a new or different cause of action, or extending in any manner the liability of the defendant, he will, as a matter of right, be entitled to a continuance.

Unliquidated damages arising of covenants, contracts, or torts totally disconnected with the subject matter of the plaintiff's claim, are not such claim or demands as constitute the subject matter of set-off under the statute.

Interrogatories accompanying a commission to take a deposition need not be copied into the deposition. It is sufficient if they were proposed to the witness, answered by him, and so referred to, that the Court can see that it was fairly taken.

ASSUMPSIT in the McLean circuit court, brought by the defendant in error against the plaintiff in error, and heard before the Hon. Samuel H. Treat without the intervention of a jury, at the September term 1841, when a judgment was rendered in favor of the plaintiff below for $419.43.

The pleadings and ruling of the court below are stated in the opinion.

A. Lincoln, for the plaintiff in error.

As to the sufficiency of the plea of set-off, that it shows a cause of action in covenant, see 2 Cond. R. 157, 160; 1 Ohio, 171–2; 2 Mass. 455; and that being such cause of action, it may by our statute be set off. Edwards v. Todd, 1 Scam. 464; Nichols v. Ruckels, 3 do. 298.

As to the question of continuance, see Covell v. Marks, 1 Scam. 525; Ewing v. French, 1 Blackf. 170; Kelly v. Duignan, 2 do. 420; and as to matter of substance, see 1 Eng. Com. Law R. 136; Cooper, 286, 288, head paging; 9 Johns. 291; 3 J. J. Marsh. 332.

J. B. Thomas, for the defendant in error, made the following points in answer to plaintiff's several assignments of error.

That the court below denied defendant's motion for a continuance.

1. The record shows only a motion for a continuance, which was on affidavit. The motion referred to by the bill of exceptions does not show any other. That motion was properly overruled, as the facts in the affidavit were admitted.

2. If the record shows a motion on account of the amendment, that was properly overruled. 1 A. K. Marsh. 561.

The amendment was not one of substance. Covell v. Marks, 1 Scam. 525; Bre. 37; 1 Eng. com. Law R. 136.

First. The third count showed a sufficient cause of action without this amendment.

Second. It was only defective in the matter of uncertainty.

Third. The evidence admissible under the count as amended was admissible under the common counts, and under the third count before amendment.

II. As to the second error assigned. This is untrue in point of fact. The court did sustain demurrer to the third count. There was no plea to the third count.

III. The defendant took leave to amend his plea of set-off, and did amend it. He therefore cannot now assign for error that the demurrer was sustained to that plea. And as to amended plea, this court cannot inquire into its legal sufficiency, because it nowhere appears upon the record. Gilman's Dig. 596; Bre. 19; 1 Scam. 281; Ib. 310; 2 do. 355; Ib. 77; 3 do. 92.

IV. The exceptions to deposition were properly overruled. The deposition of Tompkins does appear to have

been taken on the interrogatories attached to the commission, which is all that is required by law. See Gale's Stat. 244, § 1; Ib. 245, § 3.

First. This appears by examination of the dedimus and interrogatories returned by the commissioner, as required by the same section of the law.

Second. The requisition of the law, that the interrogatories shall be reduced to writing, &c. is merely directory to the commissioner, and the want of a literal compliance with it will not vitiate the deposition. It was so decided in reference to another branch of this same requsition. Ib. § 3; Ballance v. Underhill, 3 Scam. 457.

The opinion of the court was delivered by

PURPLE, J.* This was an action of assumpsit commenced by Lands against Hawks, in the circuit court of McLean county. The declaration contained three counts:

First, for money lent and advanced, paid, laid out and expended, and for money had and received to the use of the defendant in error;

Second, upon an account stated;

Third, upon a special count alleging that Lands and Hawks had been partners in trade and had dissolved; that the property and claims of the firm had been transferred to Hawks, who had agreed to pay all the debts of the firm; that Hawks had refused to comply with this agreement, and Lands had been compelled to pay $500 of said debts. This count, by leave of the court, was amended so as to state that this payment of $500 was made to Thomas C. Rockhill & Co.

At the same time when this amendment was allowed, Hawks moved for a continuance which was overruled, and an exception taken. Upon the same day, and as it appears by the record, before the amendment made to the third count in the declaration, Hawks filed three pleas:

First, non assumpsit;

Second, a special plea of set-off, that in the year 1838

*WILSON, C. J. and LOCKWOOD, J. did not sit in the case. THOMAS, J. having been of counsel, took no part in its decision.

Lands conveyed to him lot No. (1) in Yager's addition to the town of Washington, for the consideration of $1200, with a covenant of seizin, alleging a breach of said covenant and claiming a set-off of the consideration money. A demurrer was sustained to this plea.

Third, a plea of payment.

Depositions had been taken in the cause to which an exception was filed by Hawks; that the interrogatories which accompanied a commission, and were returned with it, were not written out at length in the deposition; but it appeared that they were proposed to the witness by their numbers and a few of the first words of each. The exception was overruled.

The errors relied upon by the plaintiff are,—the overruling the motion for a continuance, the sustaining of the demurrer to the second plea, and the overruling of the exception to the deposition. The court is of opinion that there is no error in this record.

The amendment to the third count was unnecessary and immaterial. It is shown by the record that the circuit court did sustain a special demurrer to this count. The demurrer, however was filed after the plea of non assumpsit to the whole declaration and issue upon the plea, consequently the demurrer to a particular count was irregular, and will not be noticed in this court. The demurrer was a special one, and only reached supposed formal defects in the count; consequently, if it had been filed before the plea, the decision here would have been the same. The count, without the amendment, was good in substance. The defendant could have given all the evidence under it, that he could have been permitted to introduce under the amendment. No new matter essential to the cause of action or demand was introduced into the court. It was only a more particular specification of the defendant's claim, as originally set out in the declaration. In fact, it defined and limited, rather than enlarged and extended his cause of action.

The authorities cited do not sustain the plaintiff's position upon this point.

The case in the 1st English Com. Law R. 136, decides

that an issue made upon a general allegation of the breach or performance of the conditions of a penal bond is an immaterial issue. That case differs from the one under consideration in this: That the count here alleges, not only that the defendant below had not performed his promises and undertakings, but also, that the plaintiff in that court had been compelled to pay the sum of $500 to the creditors of the firm. Had it contained only the first allegation, the cases would have been parallel and the issue immaterial.

In the case of Covell v. Marks, 1 Scam. 205, the amendment made was by adding to the description of the note, the words "with twelve per cent. interest from date until paid." This amendment was held to be material, and properly so. It made another and different cause of action; it extended and enlarged the defendant's liability, and without the amendment, there would have been such a variance between the note declared on and the one offered as would have excluded the evidence upon the trial.

In the case of Ewing v. French, 1 Blackf. 170, French had sold Ewing a quantity of wheat, for which Ewing was to pay in flour when requested. The declaration was amended so as to aver a demand for the flour. The amendment was held to be matter of substance and necessary to the plaintiff's right to recover. In the course of their opinion the court held the following as the t.ue rule which should govern in these cases: "The substantial parts of a declaration are those things which are material in constituting the plaintiff's right to recover; the omission of which lies within the reach of a general demurrer."

The same doctrine is re-affirmed in the case of Kelly v. Duignan, 2 Blackf. 420. The action was covenant. The amendment introduced the words, "by his certain writing obligatory." They were neld to be essential, as descriptive of the instrument sued on, and the court say that if the cause had proceeded to judgment without the amendment, it would have been reversed on error.

The reasonable rule upon this subject is, that if a declaration is defective in substance, and can be reached by a

general demurrer, or, not being defective in substance, any new matter is introduced in an amendment, showing a new or different cause of action, or extending in any manner the liability of the defendant, he will, as a matter of right, be entitled to a continuance.(*a*)

We are also clearly of opinion, that the demurrer to the plaintiff's second plea was properly sustained. Unliquidated damages arising out of covenants, contracts, or torts totally disconnected with the subject matter of the plaintiff's claim, are not such "claims or demands" as constitute the subject matter of set-off under our Act of Assembly. To give this construction to the statute would invest justices of the peace with full jurisdiction over questions involving the title to and covenants concerning real estate, compel parties to litigate all their rights, of whatever nature or kind, in one action, and result in irremediable injustice and endless confusion. (*b*)

The cases of Edwards v. Todd, 2 Scam. 462, and Nichols v. Ruckels, 3 do, 298, have only gone the length of deciding that damages arising out of the contract on which the suit is brought are properly the subject matter of set-off in such suit. These decisions are within the true meaning and spirit of the law. We find no warrant in the law for extending the doctrine so as to permit it to embrace the subject matter of this plea.

The last point made by the plaintiff's counsel is not much relied on. The decision of the court was right. There was no necessity that the interrogatories aocompanying the commission should be copied into the deposition. It is enough that they were proposed to, and answered by the witness, and so referred to, that it could be seen by the court that the depositions were fairly taken. The design of omitting the interrogatories was probably to save expense to the parties. If so, it was a laudable one, and, as in general it cannot operate unjustly, worthy of imitation.

The judgment of the Circuit court is affirmed, with costs.

Judgment affirmed.

(*a*) Miller vs. Metzger, 16 Ill. R. 390; C. & M. R. R. Co. vs. Palm, 18 Ill. R. 22.
(*b*) Sargent vs. Kellogg, 5 Gil. R. 280; Bush vs. Kindered, 20 Ill. R. 94; DeFores vs. Oder, 42 Ill. 502.

JACOB RUSSELL, appellant, v. EDWARD H. HADDUCK, appellee.

Appeal from Cook.

If a note or bill is taken, before it is due, absolutely in payment and satisfaction of a precedent debt, and in the usual course or business, that is a sufficient consideration to protect the holder against any equities which might exist as between any previous parties to the note or bill. (*a*)

The rule undoubtedly is, that when a party is about to receive a bill or note, if there are any such suspicious circumstances attending the transaction or within the knowledge of the party as would induce a prudent man to inquire into the title of the holder, or the consideration of the paper, he shall be bound to make such inquiry; or, if he neglects to do so, he shall hold the bill or note subject to any equities which may exist between the previous parties to it.

The true principles upon which a banker's lien must be sustained, if at all, is this: There must be a credit given upon the credit of the securities, either in possession or expectancy.

ASSUMPSIT in the Cook County Court, brought by the appellee against the appellant, as acceptor of a certain bill of exchange. The case was heard at the February term of said court, 1846, before the Hon. Hugh T. Dickey, without the intervention of a jury.

It was taken under advisement, and on the 30th day of October, 1846, the court decided in favor of the plaintiff for the amount of the bill declared on, &c. The defendant excepted to the decision, and moved for a new trial, which motion was overruled, and judgment rendered for the plaintiff.

The cause was submitted in this court upon written arguments of counsel.

M. Skinner, for the appellant, cited 4 Mass. 372, and Bailey on Bills, 114, 544.

J. Young Scammon & N. B. Judd, for the appellee, cited Swift v. Tyson, 16 Peters, 1, and Bank of Metropolis v. New England Bank, 1 Howard's (U S) R. 234.

The opinion of the court was delivered by

CATON, J.* One Gracie drew a bill of exchange in favor

(*a*) Conklin vs. Vail. 31 Ill. R. 166; Foy vs. Blackstone, 31 Ill. R. 542; Manning vs. McClure, 36 Ill. R. 490; Butters vs. Haughwont, 42 Ill. R. 18.

*DENNING, J. did not sit in this case.

of John T. Smith & Co. of New York city, on Russell for $180.35, which was accepted by him. The bill was indorsed by Smith & Co. to Newberry & Burch, of Chicage, to whom it was sent for collection. John T. Smith & Co. were bankers and brokers in New York city, and Newberry & Burch were engaged in the same business in Chicago. These two firms were correspondents of, and depositaries for each others; and when money was collected by one for the other, it was entered in the cash account as a credit. Before the maturity of the bill, Smith & Co. failed, upon learning which, Newberry & Burch, by their successors in business, J. H. Burch & Co., sold the bill to the plaintiff below, for which he gave them in payment a check on J. H. Burch & Co. After the sale of the bill to Hadduck, and before its maturity, one Tuckerman presented an order from John T. Smith & Co. to J. H. Burch & Co., requesting them to deliver the bill to Gracie, the drawer.

Although I do not think it is proved, yet I shall assume for the present that the case shows that the bill was in fact drawn merely for the purpose of collecting the amount of Russell, and that Smith & Co. never paid Gracie anything for it, and that Newberry & Burch gave Smith & Co. nothing for it. At the time of the failure of Smith & Co. the balance was against them and in favor of Newberry & Burch more than the amount of this bill. Before the commencement of this suit against Russell, he was notified by Gracie not to pay the bill to Hadduck. In answer to a bill of discovery, he admits that he suspected that J. H. Burch & Co. wished to get rid of the bill, but for what reason he had no idea.

The case was tried by the court, and a judgment rendered for the plaintiff for the amount of the bill, which alone is questioned by the assignment of error.

In deciding the case it must be only necessary to determine whether Hadduck was a bona fide purchaser. That is, whether he gave a valuable consideration for it and received it without notice of the interest of Gracie. It is insisted on the part of Russell that it was taken by Hadduck in payment of a precedent debt due from J. H. Burch to him, which

is not a sufficient consideration to protect the indorsee. That such has been repeatedly held to be the law in New York is not denied. The case of Coddington v. Bay, 20 Johns. 637, decided in the court of errors in that State, is the leading case on that subject, and was generally followed there, in principle, till the decisions of the cases of The Bank of Salina v. Babcock, 21 Wend. 499, and the Bank of Sandusky v. Scoville, 24 do. 115, and in a still later case (Stalker v. Mc Donald, 6 Hill's (N. Y.) R. 93,) the court of errors of that State re-affirm the doctrine of Coddington v. Bay. This question was befo.e the Supreme court of the United States in the case of Swift v. Tyson, 16 Peters, 1, where all of the cases are reviewed by Mr. Justice Story, and the rule as laid down in Coddington v. Bay, held not to be the law. This decision is reviewed and the question again discussed at great length by Chancellor Wallworth, in the case of Stalker v. McDonald, above referred to, where he endeavors to prove that Justice Story had entirely misunderstood all of the English cases on the subject, as well as those in 21 and 24 Wend.

Admitting the authorities to be conflicting on this subject, as they most undobtedly are, I think the most sensible and reasonable rule is, that if a note or bill is taken, before it is due, absolutely in payment and satisfaction of a precedent debt and in the usual course of business, that is a sufficient consideration to protect the holder against any equities which might exist as beeween any previous parties to the note or bill. In the case above referred to, reported in 6th Hill, Chancellor Walworth admits this to be the rule in Maine, Connecticut and Pennsylvania ; but while admitting this, he still adheres to the former decision in New York. In the conclusion of his opinion he says : "Nor do I think that the settled law of this State is so manifestly wrong as to authorize this court to overturn its former decision, for the purpose of conforming it to that of any other tribunal whose decisions are not of paramount authority." Fortunately we do not find ourselves thus trammeled, and are disposed to adopt the rule, which we may infer from the above remark, the Chan-

cellor would have adopted but for the previous adjudications in that State on the subject.

But so far as the present case is concerned, it comes strictly within the rule as held in the cases of the 21st and 24th Wend. above referred to. Here J. H. Burch & Co were Hadduck's bankers, with whom he had deposites; he purchased this bill and gave them his check on themselves for the amount. This was as much paying money for the bill, as if he had gone through with the idle ceremony of drawing the money out on his check and immediately paying it over again to them for this bill. Hadduck was not only a purchaser of this bill for a valid but for a valuable consideration.

The rule undoubtedly is, that where a party is about to receive a bill or note, if there are any such suspicious circumstances accompanying the transaction or within the knowledge of the party, as would induce a prudent man to inquire into the title of the holder or the consideration of the paper, he shall be bound to make such inquiry, or if he neglects to do so, he shall hold the bill or note subject to any equities which may exist between the previous parties to it. In other words, he shall act in good faith, and not wilfully remain ignorant when it was his duty to inquire into the circumstances and know the facts. But there is no proof here showing such to have been the case. The evidence relied upon by the defendant in the court below, is contained in the answer of Hadduck to a bill of discovery. After denying, in the most unequivocal and unqualified terms, any knowledge or suspicion of a want of title in Newberry & Burch to this bill he says: "This defendant has occasionally purchased bills of exchange or negotiable paper, and he knows of nothing in connection with this purchase to distinguish it from other purchases. This defendant admits that he suspected there was some reason why said Newberry & Burch desired to sell said bill, but what said reason was he does not known, but he is informed and believes that it was for the purpose of enabling them to assert their just and legal rights, and not for any such purpose as was alleged by said

complainant in his said bill of complaint." He admits that he suspected there was some reason why Newberry & Burch wished to sell the bill, but what it was he did not know. This is not sufficient of itself to enable us to say that he was not a bona fide holder of this bill. The bill was fair upon its face in every particular. This tranaction took place in Chicago, and we infer from the whole record that the drawer and the drawees lived in New York, so that any inquiry of them was absolutely impracticable, and the acceptor could not be presumed to know what consideration had moved between the drawer and the drawees, nor does it appear now that he could have got any information from Russell on the subject. I think, therefore, that there can be no reasonable pretence for charging Hadduck with having been guilty of wilful negligence, in not having inquired into the consideration passing between the original parties to the bill. The presumption of law was, that Smith & Co. had paid Gracie a valuable consideration for this bill, and there was nothing in the case calculated to raise a suspicion in the minds of Hadduck that such was not the case.

It seems to me also, that this case is very analagous to, if not precisely identical with the case of The Bank of the Metropolis v. The New England Bank. 1 How. (U. S.) R. 234. There the Bank of the Metropolis had, for a long time, been in the habit of corresponding with the Commonwealth Bank. They mutually remitted for collection such notes or bills as either might have which were payable in the vicinity of the other, which, when paid, were credited to the party sending them in the account current kept by both banks, and regularly transmitted from the one to the other, and settled upon these principles. The balance was sometimes on one side and sometimes on the other. The New England Bank indorsed several notes, bills, &c. to the Commonwealth Bank, which were by that bank transmitted to the Bank of the Metropolis, in the usual way, for collection. Before this paper fell due, and while it was still in the hands of the latter bank, the Commonwealth Bank failed, being indebted at the time to the Bank of the Metropolis in

the sum of $2900, neither at the time of their transfer had the Commonwealth Bank any interest in the notes, bills, &c. but the entire interest in them belonged to the New England Bank, and they were merely sent to the Bank of the Metropolis for collection by the Commonwealth Bank, according to their usual practice. After the failure of the latter bank, the New England Bank claimed the notes, &c. and the Bank of the Metropolis asserted a lien upon them for the balance due from the Commonwealth Bank; and this claim was sustained by the supreme court of the United States. Ch. J. Taney, after alluding to the general principle that a banker, who has advanced money to another, has a lien on all paper securities in his hands for the amount of his general balance, remarks, that prima facie the paper belonged to the Commonwealth Bank, and if an advance of money had been made on this paper to that bank, the right to retain for that amount would hardly be disputed. He then says: "We do not perceive any difference in principle, between an advance of money and a balance suffered to remain upon the faith of these mutual dealings. In the one case as well as the other, credit is given upon the paper deposited or expected to be transmitted in the usual course of the transactions between the parties."

Here, then, is the true principle upon which this, as well as all other bankers' lien must be sustained, if at all. There must be a credit given upon the securities, either in possession or in expectancy.

Counsel suppose they can perceive a difference between that case and this, because Willard, a clerk of Newberry & Burch swore that they had kept funds in the hands of J. H. Smith & Co. to draw against. Whether funds were kept in their hands by remitting money directly, by accepting their drafts, or by transmitting paper for them to collect alone, does not appear. It is most probable that it was done in the two latter modes at least, as is most usual with all bankers and brokers, nor does it seem to me to make any difference in principle. If they placed funds in the hands of Smith & Co. in either of these modes, it was upon the faith of the

securities already on hand, with the expectation that they would continue to remit paper for collection as formerly, as well as upon the expectation that their draft would be honored.

There is no pretence that Newberry & Burch or any of the other parties to the bill except the drawer and the drawee, had any knowledge whatever that the bill did not belong to Smith & Co.

I am of opinion that Newberry & Burch had such a lien upon this bill that they might have maintained a suit upon it in their own names and for their own benefit, if they had not transferred it to Hadduck.

It is clear to my mind that the evidence is entirely insufficient to prove that the interest of Gracie in this bill as is alleged, but that would involve an inquiry into a question of fact which is not necessary for the decision of the case, and I shall therefore not pursue it.

The judgment of the County Court must be affirmed with costs.

Judgment affirmed.

JOHN TURNEY, administrator, &c. et al. plaintiffs in error, v. EDWARD E. SAUNDERS, defendant in error.

Error to Jo Daviess.

A. and B. obtained a judgment in a proceeding to enforce a mechanic's lien on certain real estate, the premises were sold to satisfy the same, and they became the purchasers. Subsequently a motion was made to set aside the sale, and notice served on A. only. The motion was heard ex parte, and denied: Held, that notice to both judgment creditors was indispensable, and that therefore the Court did not err in denying the motion.(a)

MOTION to set aside a sale on execution, in the Jo Daviess circuit court, made by the plaintiffs in error against the defendants in error, and heard before the Hon. Thomas C. Browne, at the March term 1846. The motion was heard ex parte, and denied. The facts are briefly stated by the court.

(a) Sears vs. Law, 5 Gil. R. 284; Dunning vs. Dunning, 37 Ill. R. 301; Blosson vs. Milwaukee, &c. 1 Wal. U. S. R. 655.

Thompson Campbell, and H. O. Merriman, for the plaintiffs in error, contended that the judgment having been reversed by this court, and Saunders and Crook having become the purchasers, the sale should be set aside. Turney v. Saunders, 4 Scam. 534.

E. B. Washburne, for the defendant in error, filed the following brief :

The parties who are now seeking to set aside this sale were not the defendants in the suit in which the judgment was rendered. The case below was Saunders and Crook v. John Turney, administrator, and Frances G. Campbell, administratrix of William Campbell and John W. Campbell. The parties here are different.

Irregularities in the sale of land on execution will not be corrected, unless the court be called upon to do so by the defendant in the execution. They cannot be disturbed by any one else. Swiggart v. Harber, 4 Scam. 364.

The defendants in the execution in this case did not move the court to set aside this sale. Other and different parties made this application, and in this proceeding the court will not collaterally inquire into the regularity of the proceedings connected with the sale.

The court will not set aside an execution, levy, or sale, unless the party who attacks the excution shall give notice to the opposite party. The reason is, that it is a new proceeding, and the opposite party should have an opportunity of being heard in a matter where his interest might be seriously affected. Sears v. Low, 2 Gillman, 281, and the authorities there cited.

Although the motion was made on the 8th of November, 1844, it was only served on Saunders, one of the parties, on the following day. Crooks was never served with notice at all, and the record nowhere shows any appearance by either party. It is expressly decided in 1 Scam. 535, that notice must be given previous to the making of the motion.

Crook, although a joint purchaser with Saunders under the execution, is not before this court, as he was not in the

court below. Saunders is the only party defendant in error here. If the sale be set aside and the execution quashed, the interest of Crook might be seriously prejudiced, without any knowledge on his part of any such proceeding. The notice was not sufficient even for Saunders, it not being served upon him until after the motion was filed. But a notice to one cannot be considered as notice to both, no more than the service of a writ upon one of two joint defendants could be a notice to both to appear and answer.

When the plaintiff in the execution is the purchaser, and has not conveyed the property to a third person, the injured party may have the sale set aside on motion ; but if he has conveyed to a third person who is a purchaser, the remedy is in equity. Day v. Graham, 1 Gilman, 435.

The bill of exceptions in the case does not show but there had been a conveyance to a third party, which was, in point of fact, the case, and the very ground upon which the court refused to grant the motion.

The bill of exceptions has been decided by this court to be the pleading of the party, presenting the same, and it is to be taken most strongly against him.

It not appearing by the bill cf exceptions that the plaintiffs had not transferred their interest to third parties, this court below decided correctly.

The report of the decision of this case, at a former term of this court,(4 Scam. 527,) which was introduced, was not evi dence of anything.

The opinion of the court was delivered by

Treat, J. In June, 1843, Saunders and Crook obtained a judgment against the administrators of William Campbell, in a proceeding to enforce a mechanic's lien on certain real estate. On the 31st of August 1843, they purchased the premises at the sheriff's sale in satisfaction of their judgment. At the October term 1844, the administrators entered a motion to set aside the sale, and gave Saunders notice of the motion. At the March term 1846, the motion was heard

ex parte, and denied by the court. That decision is assigned for error.

Without inquiring into the merits of the application, the decision of the circuit court must be sustained. All of the parties interested in the disposition of the motion were not before the court. It was substantially a new proceeding, of which both of the judgment creditors were entitled to reasonable notice. They had purchased in the real estate in full satisfaction of their judgment. The object of the motion was to defeat the purchase, and deprive them of the fruits of their recovery. They were as much entitled to notice of the motion, as of the pendency of a writ of error to reverse the judgment. Notice in such cases cannot be dispensed with. An opportunity should be afforded the parties interested in sustaining a sheriff's sale, of showing that the execution properly issued, and that the proceedings under it were valid and regular ; or if irregular, but capable of amendment, of entering a cross motion to correct them See the case of Sears v. Low, 2 Gilman 281. The notice having been served on one of the parties only, the circuit court was not bound to entertain the motion, and committed no error in denying it.

The judgment of the circuit court is affirmed, with costs,

Judgment affirmed.

JOSEPH SCOTT, administrator of SAMUEL SCOTT, deceased, impleaded, &c., appellant, v. JOSEPH BENNETT, appellee.

Appeal from St. Clair.

A. being about to purchase of B. a certain tract of land, discovered, upon examining the title, that C. had recovered a judgment against B. and another individual, for a large amount which had been partially paid. He refused to purchase, unless C. would release the land from the lien of the judgment, and so informed C. who agreed to release it, and accordingly executed the following instrument: "This to certify that I, Joseph Scott, administrator of Samuel Scott, deceased, do relinquish all claim, by virtue of a judgment obtained against R. M. Lacroix, to a certain tract of land formerly belonging to Henry Stout, and now belonging to R. M. Lacroix, and about to be traded to Joseph Bennett. Belleville, February 9. Joseph Scott, administrator." Confiding in C.'s promise to release, A. purchased and paid $2,000 in cash towards the purchase money, and one half thereof was immediately applied to the judgment aforesaid. About one thousand dollars remaining due on said judgment, C. caused an execution to be issued and levied on said land. On a bill being filed for an injunction, C. in his answer admitted the above facts, but alleged that, by an agreement made between the parties at the time of the execution of the above instrument, A. agreed, as a part of the consideration of the release, to pay towards said judgment, the sum of $500, &c., which he had failed to do. It was objected that the instrument was not a valid release, being without consideration, a seal and parties, &c. Held, that the instrument, though not technically a release, not being made for the benefit of any particular person, and not importing upon its face a consideration for want of seal, still might, without the slighest encroachment upon even a technical rule of law, be averred and proved to have been made for the benefit of some one, and that there was, in fact., a consideration for its execution.

It is a familiar principle that evidence may be given to explain but not to vary, add to, or alter a written contract. But if there is doubt and uncertainty, not about what the substance of the contract is, but as to its particular application, it may be explained and properly directed. For instance, a receipt for the payment of money may be explained. The consideration of a note, though expressed to be for value received, may be inquired into; and if made payable to one person, when another was intended, the holder may sue on it in his real name, alleging the mistake and prove it on trial.

BILL IN CHANCERY for an injunction, &c., in the St. Clair Circuit Court, brought by the appellee against the appellant and others, and heard at the May term 1846, before the Hon. John D. Caton, who subsequently ordered a decree to be entered in vacation, making the injunction perpetual. Scott, one of the defendants, appealed to this Court.

The substance of the bill, answers and testimony in the case is set out in the opinion of the court

L. Trumbull, for the appellant.

1. This is a bill for an injunction in the nature of a specific performance, and to entitle the party to such performance he must show a valid contract founded upon a sufficient consideration. The paper signed by Scott, is not such a contract. It is not under seal; it lacks parties and a consideration. Equity will not enforce a voluntary contract, much less will it supply defects in the execution of such a contract, and particularly where there is no allegation of consideration in the bill.

Every bill must contain in itself sufficient matters of fact, per se, to maintain the case of the plaintiff, and the answer or proofs cannot be resorted to supply defects in the bill. Harrison v. Nixon, 9 Peters, 502, 503; Boone v Childs, 10 do 209; Moore v. Hunter, 1 Gilman, 328; 1 Story's Eq. Jur. § 433 and note, 2 do. § 706 *a*, 787, 793 *a*; 1 Fomb. Eq. 256 and 258, and notes; Mintum v. Seymour, 4 Johns. Ch. R. 497; Coleman v. Sarrell, 1 Ves. 52, 54; 4 B. & H. Dig. 37, Consideration," § 1; Ellison v. Ellison, 6 Vesey, 662; Tubman v. Anderson, 4 Har. & McHen. 357, 362; Chandler's Ex'r v. Hill, 2 Hen. & Muns. 126; Black v. Cord, 2 Har. & Gill. 100 1 B. & H. Dig. 81, §37; Tate v. Hilbert, 2 Vesey, Jr. 117, 121. The release of Scott is also void for want of mutuality. Parkhurst v. Van Cortland, 1 Johns. Ch. R. 282; Benedict v. Lynch. Ib. 375.

2. If the paper signed by Scott was a valid release of his lien upon the land, then to avail himself of it, Bennett must have complied with the conditions upon which it was executed. That it was executed upon certain conditions, with which Bennett failed to comply is shown by the answer of Scott, and the testimony of complainant's own witnesses. Bates v. Wheeler, 1 Scam. 54; 2 Tuck. Com. 464; 1 Bac. Abr. 109.

3. The whole case shows a combination between Lacroix and Bennett to defraud Scott out of the amount due upon the

note. What motive could Lacroix have had, in accepting worthless notes from Bennett in discharge of Bennett's note? And what motive could Bennett have had in retaining $20, to pay the expenses of a law suit, and in taking bond with security from Lacroix to refund the amount paid, if they intended acting honestly with Scott?

He who asks equity must do equity. 4 B. & H. Dig. 44, § 40; 1 do. 104, § 53.

4. Lacroix honestly owes Scott, and ought to pay him. By compelling Bennett to pay Scott according to his agreement, at least the amount due upon the note, this will be accomplished in part, and injustice done to no one, as Bennett has bond and security to protect him. This will, in fact, be compelling Lacroix to pay his own debt, as the money ultimately comes from Lacroix.

Parol evidence of an alteration stipulated for at the time of making a contract and upon the faith of which the party executed, is admissible on the part of the defendant to defeat a party seeking the execution of the agreement. Distinction between the case of a defendant refusing, and a plaintiff seeking the execution of an agreement under such circumstances. Clark v. Grant, 14 Vesy, 519.

W. H. Underwood, for the appellee.

1. The written release affords the only evidence of its conditions and of the terms of said contract. Lane v. Sharp, 3 Scam. 573; Francisco v. Wright, 2 Gilman, 691; Crosier v. Acer, 7 Paige, 141; Broadwell v. Broadwell, 1 Gilman, 605, 607.

2. Scott should resort first to the property owned by Lacroix after the sale to Bennett, before he resorts to the property of Bennett. Clowes v. Dickenson, 5 Johns. Ch. R. 240; Fonblanque's Eq. 514, 515.

3. A court of Equity will not relieve a party on account of a mistake in a matter of law. Lyons v. Richmond, 2 Johns. Ch. R. 60; Hunt v. Rousmaniere's Adm'r, 1 Peters, 12, 13, 14; Broadwell vs Broadwell 1 Gil R. 610.

4. An answer on oath is evidence so far as it is respon-

(a) Broadwell vs. Broadwell, 1 Gil R. 610.

sive to the allegations in the bill, but matter set up in avoidance must be proved by defendant. Hart v. Ten Eyck, 2 Johns. Ch. R. 87-90, and note.(*a*)

5. It is said, that to make the release valid, it should be such as to enable either party to maintain a suit upon it. This rule is only applicable to contracts, and not to receipts or general releases.

6. It is said that the release was given without any consideration, and is a nudum pactum. The release was the inducement for Bennett to purchase the land, and Scott actually received part of the purchase money. The case cited by appellee's counsel, from 4 Johns. Ch. R. was without any consideration proved, but one was alleged. The case in 2 Hen. & Munf. 499, was where an indemnification bond was given to a person for having become security for his son; and the case in 4 Har. & Johns. 357, where the sale had been made before the naked agreement.

The Opinion of the court was delivered by

Purple, J.* Joseph Bennett, the appellee, filed his bill in Chancery in the St. Clair circuit court against Joseph Scott, administrator of Samuel Scott, deceased, Rene M. Lacroix, William R. Scott and Thomas Ward, alleging that in January, A. D. 1841, he was about purchasing of Lacroix a tract of land in said county, describing it. That upon examining the title he found that the appellant, as administrator of Samuel Scott, deceased, had a lien upon the same by virtue of a judgment in his favor, rendered in the St. Clair circuit court on the 20th August, A. D. 1840, against Rene M. Lacroix and William R. Scott, for the sum of $2533.01, upon which $578.75 had been paid. That he refused to purchase the said land unless Scott would release it from the lien of said judgment. That about the 8th of January, 1841, in company with Lacroix, he called upon appellant and in-

*Koerner, J. having been of counsel in this case, took no part in its decision. Lockwood, J. did not hear the argument, &c.

(*a*) 15 Ill. R. 94.

formed him he was about to purchase the land, but was unwilling to do so unless the lien aforesaid could be removed. That before he consented to purchase, Scott agreed to release the land from said lien and executed to appellee a writing in the following words and figures:

"This is to certify, that I, Joseph Scott, administrator of Samuel Scott, deceased, do relinquish all claim by virtue of a judgment obtained against R. M. Larcroix, to a certain tract of land formerly belonging to Henry Stout, and now belonging to R. M. Lacroix, and about to be traded to Joseph Bennett.

Bellville, February 9th, 1841.

Joseph Scott, administrator."

That the tract of land in the said instrument of writing described, as formerly belonging to Henry Stout, is the same described in the bill, and which he was about to purchase of Lacroix. That confiding in the appellant's promises to release the land from the incumbrance of the judgment, he purchased it of Larcroix for $2500 00, paying two thousand dollars down, one thousand of which was paid by Lacroix to Scott upon the judgment before referred to at the time. That Lacroix deeded the land to him on the 9th of February, 1841, and that he entered into the possession of the same. That since the purchase, Lacroix has paid to Scott the amount of the judgment against him and William R. Scott, except about one thousand dollars. That since his purchase of Lacroix, Lacroix had been the owner of real estate in Belleville, upon which said judgment was a lien worth the sum of $500 00, and that, in like manner, William R. Scott had had title to real estate in said town worth $75 00.

That appellant had caused execution to be issued upon the judgment against said Rene M. Lacroix and William R. Scott, and levied upon the land so by him purchased of the said Lacroix, and advertised the same for sale.

The bill concludes with a prayer for a perpetual injunction restraining the sale, and for general relief.

Joseph Scott answers and admits, that Bennett was about to purchase the land at the time and in the manner stated in his bill, the existence of the judgment and the lien, and the

payment of 568 25 upon the judgment as alleged. That Bennett and Lacroix called on him about the 8th of February, 1841, and Lacroix informed him that Bennett was about purchasing the land, but was unwilling to do so unless he could have assurance that the judgment lien would be released. That Lacroix stated that Bennett was to pay him $2500, $2000 of which was to be paid down, $1000 of which Lacroix agreed to pay Scott on said judgment. That it was understood between the parties that Scott was to have execution issued on the judgment, and levied on William R. Scott's interest in his father's estate of which he died siezed, known as the "homestead;" and that Lacroix agreed that, with the other $1000, he would purchase William R. Scott's interest in the "homestead" on the sale; which interest it was estimated would sell for about $400, and satisfy thereby so much of the said judgment. That Lacroix failed to pay the $1000 on the judgment, and only paid $568 25, and purchased William R. Scott's interest in the homestead with the balance of the $1000, and kept the other $1000 himself. That Lacroix stated that Bennett was to give his note for the balance of the purchase money, $500, to Lacroix, to be paid 1st October, 1841, with ten per cent. interest, which Lacroix agreed to place in his hands for collection, and when collected to be applied on the judgment; and that Bennett agreed also to pay the note to him (Scott,) to be applied on the judgment. That in consideration of these agreements, he executed the writing in the bill set out. That the next day, Bennett and Lacroix called on him, and Lacroix stated that he owed T. Harrison & Co. $100, and requested that he would let Bennett pay it to them in wood, and take Bennett's note for $400. That he assented, and the same was done; the note of $400 being made payable to Lacroix and due 1st October, 1841. That this note was placed in his [Scott's] hands for collection, and to be applied when collected on Scott's judgment, and that Bennett agreed to pay the same to him when due, for the purposes aforesaid. That after the note became due, Bennett paid him $100 on it. That afterwards, Bennett fraudulently paid the balance of the note to

Lacroix, knowing that the same remained under the contract in his, (Scott's,) hands, and obtained from Lacroix the receipt which he, (Scott,) had given Lacroix for the note. That he presented the receipt and demanded the note, which he, (Scott,) gave up under a mistaken notion of his rights. That the residue of the note has never been paid to him. He admits that the land mentioned in the writing is the same which Bennett was about purchasing of Lacroix. That he did purchase the same and pay down $2000, and Lacroix executed the deed as stated in the bill. Denies that the judgment is paid, except $1000 ; says there is still about $1300 due. That he does not know whether Lacroix and William R. Scott has title to real estate in Belleville as charged in the bill. He admits the execution and levy, as stated in the bill, but denies that Bennett ever requested him not to levy on the land in question. Avers that Bennett and Lacroix had both failed to comply with their agreement, and claims a legal right to proceed with his execution.

In an amended answer subsequently filed, Scott further states, that since filing his answer he has ascertained, that since the rendition of the judgment in his favor aforesaid, William R. Scott has not had title to real estate in Belleville, and that he has been informed and believes, that Lacroix had not title to any real estate in Belleville, upon which his judgment was a lien. That Lacroix purchased his after the sale made by him to Bennett, and sold the same in about three months to Minerva Orr, as whose property the same had since been sold on execution; and that he knows of no property, real or personal, of Lacroix or William R. Scott, subject to execution on said judgment ; believes them both insolvent, and that he will lose his judgment unless he can make the same out of the lands levied upon. He again repeats, that Bennett expressly agreed to pay to him the balance of the purchase money of said land $500.00, and that in consideration of the agreement only, he executed the release, or writing; and that the reason, why the note of $ 500.00 was not made payable to him was that

he wished the release of judgment to depend upon the payment of the note, and he was unwilling to take Bennett's note without security when he had a lien on the land. That since filing his first answer, he has been informed and believes, that Bennett did not pay Lacroix the full amount of the note of $400, but received about $20 to defray the expense of a suit of which he expected with Scott on account of having paid the note to Lacroix. That what was paid was in notes upon third persons, and that he, (Bennett,)took a bond with security from Lacroix, as an indemnity against the payment of the note to him.

Accompanying this amended answer, Scott filed interrogatories to be answered by Bennett, requiring him to explain the manner in which the balance of the $400 note had been paid, and to disclose whether the same had not been discharged in notes upon third persons; whether a portion had not been retained, and for what purpose; and whether he had not taken a bond with security, as an indemnity against damages which he might sustain on account of the payment to him of said note.

William R. Scott answers generally, that he has little knowledge of the matters in controversy; he admits the existence of the judgment against Lacroix and himself, but denies, that since that time, he has had title to any real estate, as is therein stated.

The answer of R. M. Lacroix substantially admits all the material statements in the bill.

Bennett answers Scott's interrogatories, and states that he paid $330 of the balance due on the $400 note in notes, and overpaid the note in wood, and in a note paid to one John Wilson for $4.00, and an order to John Sargeant for $7.00, and that the excess was paid back by way of a set-off in a suit between him and S. B. Chandler as assignee of Lacroix. That the amount of notes paid was a little short of his note, about $20, as he thinks. That he did take an indemnifying bond from Lacroix, with S. B. Chandler as security, when he paid the note; a copy of the bond is set out. He further states that Lacroix called on him for the pay on

the note ; showed him Scott's receipt for the same, which receipt is set out in Lacroix's answer, as follows: "Received of R. M. Lacroix, for collection, one note for three hundred and fifty three dollars, thirty three cents, payable the first day of October last. January 15, 1842. Joseph Scott." That Lacroix threatened to sue him on the note, and told him that he wanted the pay upon it to give to Chandler, to whom he was indebted. That from these statements, and the production of the receipt, to avoid being sued by Lacroix, and believing that the note still belonged, to him he paid it, taking the indemnifying bond out of abundant caution.

The evidence in the case consists of the depositions of Henry Smith and Rene M. Lacroix, one of the defendants in the Court below.

The substance of Smith's testimony is, that about the month of October, 1843, Scott informed him that he had got into a difficulty about a release, as he, (witness,) thought about a judgment on some land, in consequence of the confidence he had reposed in Bennett. That it was talked and understood that the money which was coming from Bennett was to apply on Scott's judgment against Lacroix. That they offered to give a note payable to Scott, and he refused to take it in that way, for the reason that if he did so, he would have to credit that amount upon the judgment. That afterwards Lacroix offered to indorse the note and others over to him, (Scott) and that he would not take them then. Witness thought that Scott stated that the reason why he released the judgment was that he thought he could make the balance out of William Scott and Lacroix some other way. That he had not the "scrape" of a pen against Bennett ; that the note was payable to Lacroix.

On his cross- examination, he stated further, that Scott at the same time said that Lacroix had promised the balance of the money to apply on the judgment ; that this was the reason he gave the release. That Bennett and Lacroix were together, and Lacroix told Bennett to pay the money to him, (Scott,) and that he promised, when paid, to credit

it on the judgment. That the note referred to was the note Bennett gave for the balance of the purchase money of the land, for $500 That he understood from both paties that this note was afterwards taken up and two others given.

The substance of Lacroix's testimony is, that when he was about to sell the land to Bennett, he proposed to Scott that he would pay him $1,000 of the purchase money and give him Bennett's note for $500 more, retaining one half the money himself. That he would also buy William R. Scott's interest with part of the money. That Scott,at the time, had a judgment which was a lien upon the land. Bennett agreed to pay $2,500, $2,000 in cash and his note for the residue, if Scott would release the lien of his judgment ; that this being agreed upon, he and Bennett closed the contract. Bennett paid the money, and gave his note to Lacroix for the balance. The deed was executed, and Scott took $1,030 of the money and Bennett's note, and gave a receipt releasing all claims against the land, and gave to him, (Lacroix,)a receipt for the note. This witness further stated as follows : "I must here remark that six hundred and about thirty dollars of this money received by said Scott, was received as redemption money on a house and lot Mr. Scott previously purchased, sold to satisfy said judgment, the property being mine and redeemed in my own name, and I getting a receipt for about $360, making in all about one thousand dollars Mr. Scott received in pay of that judgment."

That the $500 note was due eight months after date. Scott kept it fifteen or sixteen months, collecting in that time about $100. That a few days after the trade, Scott consented that Bennett should pay T. Harrison & Co. $100 of this note in wood, and gave a new note of $400 for Scott's benefit ; that he intended Bennett should pay this note to Scott ; that Scott had ample time to collect it, and that he should not have thought of collecting it, if Scott would have given him credit for it. That he did not choose to stand between Bennett and Scott ; that Scott would have held him responsible, if he had not collected the note from Bennett. That he believed that the property he then had subject to

the lein of the Scott judgment, and what he afterwards acquired, was more than sufficient to pay the balance of the judgment, and he did not believe Bennett would have bought the land unless Scott had released the lien of the judgment. That the $400 note was not assigned to Scott; that Scott received it for collection. That he considered that he had parted with his control over the note, and intended that Bennett should pay it to Scott. That he believed Bennett, on paying the note to him, (Lacroix,) got it from Scott on presenting the receipt which witness had held for the note. That he proposed to Scott to credit the note on the judgment, and believed that Scott refused.

On cross-examination, he stated that he believed that the release was given to Bennett, and understood that one of the conditions upon which the release was given was, that Bennett should pay the $500 note to Scott. That he, (witness,) received notes on other persons for the balance of the $400 note. That about $20 was retained by Bennett, because he thought he might be put to trouble by Scott. That it was one of the conditions, at the time of the trade, that Bennett was to pay the $500 note to Scott, and he was to indorse the same upon the judgment. That he owned lots No's 272 and 273 about three months, from March to June, 1841, and sold the same for $500.

On re-examination, he stated that he did not recollect hearing Bennett promise positively to pay the note to Scott, but he so undestood it: that is, that he would pay to Scott as collecting it for his, (witness') use. That all he knows relative to the manner in which Bennett obtained the note from Scott was derived from what Bennett told him.

Upon this state of facts, the circuit court entered a decree perpetually enjoining Scott from proceeding to enforce the collection of his judgment by execution against the land upon which the said execution had been levied, as referred to and described in the bill of the complainant in that court.

The counsel for the appellant now contends, that the appellee's bill, upon its face, shows that he is not entitled to the relief he seeks. That it is in the nature of a bill for a specific performance, and that the appellee must set forth and

show a valid contract founded upon a sufficient consideration. That the paper signed by Scott is not such a contract. That it is not under seal, and lacks parties and a consideration, and that there is no allegation of consideration in the bill; and that in such cases equity will not supply defect or afford relief.

If all these premises in point of fact were true, the conclusions drawn from them would follow as a matter of necessity. A portion of the premises are correctly stated. The writing signed by Scott is not a techincal release. It is not made for the benefit of any particular person by name. It is not under seal, and does not therefore, upon its face, import a consideration. But does it follow as a consequence that it may not be averred and proved that it was made for the benefit of some one, and that there was in fact a consideration? We think this may be done without the slightest encroachment upon even a technical rule of law.

It is a familiar principle, that you may give evidence to explain, but not to vary, add to, or alter a written contract. This is a general rule. (*a*) Where parties have made an agreement in writting, courts cannot alter, change, add to, or make a new one for them by parol. But if there is doubt and uncertainty, not about what the substance of the contract is, but as to its particular application it may be explained and properly directed. A receipt for the payment of money may be explained. The consideration of a new note, although expressed to be for value received, may be inquired into; if made payable to one person, when another was intended, the holder may sue on it in his real name, alleging the mistake and prove it on the trial. (*b*) So in the present case. No rule of law is violated in allowing Bennett to allege and show that this release or writing was intended for his benefit, and that it was given for a consideration. (*c*) Such evidence does not change the nature of the contract. It only shows the reason of execution, and points out its use and application. But upon the case made in his bill, the appellee would have been entitled to relief, even if the written agreement to release the land from the judgment lien had been omitted to be stated. Lacroix and Bennett called on

(*a*) Penny vs. Graves, 12 Ill. R. 289, and notes.
(*b*) Post 637- 641.
(*c*) Benjamin vs. McConnell, 4 Gil. R. 536; Ill. C. R. Co. vs. Read, 37 Ill. R. 484.

Scott and informed him of the pending negotiation for the purchase of the land by Bennett, and, of his refusal to purchase unless the lien of the judgment could be removed. Scott agreed to release the land from the incumbrance, thereby inducing Bennett to part with his money. This was a sufficient consideration to make the contract binding, an agreement which a court of Equity must enforce. If it had been of no benefit to Scott, it was a disadvantage to Bennett, and this is all the law requires to constitute a consideration for a contract. It would be fraud on the part of Scott afterwards to attempt to enforce his lien, which in a court of law or equity could not be tolerated. I speak now only of the case made by the bill; and we are of opinion, that whether the written agreement be in or out of it, the appellee, upon the facts presented would be entitled to the relief he asks. The authorities cited upon this point have been examined. They are admitted to be law, and applicable to such a case as the counsel seems to have supposed this bill presented. But if we are correct in the views which we have given the subject, they have no bearing on the present question.

It is further contended by the counsel for the appellant, that if the release is a valid one and obligatory upon him, that it was made upon conditions upon the part of the appellee to be performed, with which he has not complied, and that this is shown by the answer of the appellant and the testimony of the witnesses of the appellee. The bill alleges that the conditions of the release where the purchase of the land by the appellee from Lacroix, and the payment of the money. It goes no farther. The answer admits that these were some of them, but avers that there was another, the agreement on the part of the appellee to pay the $500 note to the appellant; and that this condition was not performed. Whether this portion of the answer is strictly responsive to the bill, and as such, evidence in favor of the appellant, is a question of some doubt. We are inclined to the opinion that it is not. In the light in which we look upon this portion of the case, it is not material to decide this point.

Independent of the answer, we think that Bennett's an-

swer to the interrogatories of the appellant, and the testimony of both the witnesses, leave little room to doubt that the contract was, that this note was to be paid to the appellant, and not to Lacriox, and that this agreement constituted a portion of the consideration upon which he agreed to release his lien upon the land.

All parties appear to have so understood it. The note, though payable to Lacroix, was given to Scott, and by him receipted for collection. The day after its date, Lacroix solicits Scott to permit Bennett to pay $100 of it to T. Harrison & Co. for his, (Lacriox's,) accommodation. Lacroix says distinctly, that it was the understanding between him and Scott, that Bennett was to pay the note to Scott, and when paid, Scott was to endorse it on his judgment. When Bennett paid the note, it was in Scott's hands, and he took an indemnity against any claim Scott might have against him on account thereof; and Lacriox in his testimony says that $20 was witheld by Bennett to defray the expenses of an anticipated suit with Scott. This is denied by Bennett in his answer to Scott's interrogatories. These are the principal circumstances attending the transaction of the payment of this note. In our judgment they show beyond any reasonable doubt, that the contract was as is contended by the appellant, and the appellee well understood that he was not acting in entire good faith in paying the note to Lacroix.

It is said that Scott voluntarily gave up the note to Bennett upon the presentation of his receipt which had been given for the same to Lacroix. Scott says he gave it up in ignorance of his rights. Upon this question there really is no evidence. Lacroix states nothing except what Bennett told him. It is of little consequence in what manner the possession was surrendered or obtained, unless from some circumstances we can reasonably infer that Scott assented to the payment having been made to Lacroix. There is nothing to satisfy us that such assent was given. On the contrary the facts appearing, and the conduct of the parties strongly induce the belief that it was witheld. It was not long after this transaction occurred, (the record does not show the time precisely,) that Scott re-asserted his right to

enforce his judgment lien upon the land. This was done by causing execution to be issued on the judgment on the 31st day of March, 1843.

Again, if the contract was as we have supposed is shown in evidence, the bare giving up the note by Scott to Bennett, after its payment to Lacroix, instead of raising the presumption that he thereby ratified and approved the act, and especially when taken in connection with his subsequent conduct in issuing execution shortly afterwards upon his judgment, rather tends to prove the contrary. At all events, after a failure on the part of Bennett to fulfil the stipulations of the agreement, Scott was under no obligation to keep the note, and attempt by legal process to collect the same from Bennett, and would have been justified in issuing his execution for the collection, out of the land, of the sum due him upon the note, thus improperly, and as we must think, in violation of the contract, paid to Lacroix. To this extent we are of opinion, that the lien of the judgment ought still to operate. The contract has been in part executed in good faith. For a violation or departure in one particular we should not rescind it. We could not do so with justice to either party. But we think good conscience, equity and fair dealing, demand that we should permit the appellant to collect on execution to be issued on his judgment the sum due, as the balance of the five hundred dollar note, and interest to this time.

The decree of the Circuit Court of St. Clair county is reversed, and a decree entered in this court that the appellee, Joseph Bennett, pay to the appellant, Joseph Scott, administrator of Samuel Scott, deceased, the sum of three hundred dollars, and six per cent. per annum interest thereon, from the 8th day of June, A. D. 1842, on or before the 1st day of August, A. D. 1847; and that in default of such payment, that the said appellant shall have execution upon the judgment in the bill of complaint in this case mentioned, to be levied upon the lands therein described, for the collection of the said sum of three hundred dollars and interest as aforesaid. And it is further ordered and decreed, that upon the

payment or collection of the said sum of three hundred dollars and interest as aforesaid by the said appellee, that the said appellant do make, execute and deliver to the said appellee a good and sufficient release, under seal, releasing and discharging said land from the lien of said judgment; and that the said appellant be thereafter forever perpetually enjoined and restrained from collecting any of the remaining portion of the said judgment out of the lands in the said bill described, and therein stated and mentioned as having been purchased by the said appellee of the said Rene M. Lacroix, and that each party pay one half the costs of this suit, both in this court and the court below.

Decree reversed.

LORING SNOW, appellant, v. WILLIAM BAKER, appellee.

Appeal from Winnebago.

A. assigned to B. and B. to C. the amount of a judgment recovered before justice of the peace, from which an appeal was taken, when judgment was rendered for the defendant. The assignment was as follows: "For a valuable consideration, I hereby assign the within named judgment (which was described in another assignment on the same paper,) to Loring Snow, and guarantee the collection of the same, if well attended to. Dec. 4, 1838. (signed) William Baker;" Held, that the terms "well attended to" clearly referred to the collection of the judgment, and not to the sustaining of it upon the contingency of an appeal.

THIS action was originally brought in a justice's court to recover of the defendant the amount of a justice's judgment in favor of W. P. & H. Hunt, against Jabez Giddings, which judgment had been assigned by Hunt to the defendant, and by him to the plaintiff.

Judgment was rendered against the defendant by the justice of the peace, from which judgment the defendant appealed to the Stephenson Circuit Court, and took a change of venue to the Winnebago Circuit Court, where the cause was tried at the April term 1844, before the Hon. Thomas C. Browne and a jury, who found for the defendant. A new trial was granted, and the cause was again tried at the April

term 1845, before a jury who rendered a verdict for the defendant.

The bill of exceptions contained all the evidence and exceptions taken at the trial.

It is proved on the part of the plaintiff, that Giddings, the defendant in the judgment which was assigned by defendant to plaintiff, took an appeal to the Jo Daviess circuit court, where the judgment was reversed.

It appeared from the record of that cause, that the judgment against Giddings was bad, for the reason that the justice had no jurisdiction of the cause, because the capais was issued by him without an affidavit, because there was no service of process on Giddings, and because there was a discontinuance of the cause, and no subsequent proceedings had to give him jurisdiction.

Hunt employed counsel to attend to the suit against Giddings in the Jo Daviess circuit court.

The plaintiff proved that he paid a consideration for the judgment, and Hunt had assigned the original claim, on which the judgment against Giddings was founded, to the defendant.

The plaintiff on the last trial, asked the court to instruct the jury that the defendant's guaranty of collection of the judgment against Giddings, if well attended to, was a guaranty that the judgment was a valid judgment, and that the terms "if well attended to" in the assignment related to the dilligence to be used in the process of collection, and not to the sustaining of the judgment in another court, which instruction the court refused to give, and the plaintiff excepted.

The plaintiff moved for a new trial, which was refused by the court, and the plaintiff excepted.

The plaintiff brought the case into this court by appeal, and assigned for error, that the court erred,

1st. In refusing to give the instructions asked by plaintiff; and

2d. In overruling the motion for a new trial.

J. Marsh, for the appellant.

Anson S. Miller, and M. Y. Johnson, for the appellee.

The opinion of the court was delivered by

WILSON, C. J. This action is brought to recover back money paid for a judgment on a justice's docket, which was afterwards appealed to and reversed in the circuit court.

The judgment was assigned by the appellee to the appellant in these words: "For a valuable consideration, I hereby assign the within named judgment (which was described in another assignment on the same paper) to Loring Snow, and guarantee the collection of the same, if well attended to, in December 4th, 1838:" and signed by W. Baker, the appellee.

Upon the trial of the cause, the appellant asked the court to instruct the jury that the appellee's guaranty of the judgment, if well attended to, was a guaranty that the judgment was a valid one, and that the terms "well attended to," in the assignment, relate to the diligence to be used in the process of collection, and not to the sustaining of the judgment in another court. This instruction the court refused to give, and a verdict and judgment was rendered against the appellants. The refusal of this instruction is relied on for the reversal of this cause, and we think it sufficient. The sale of the judgment, like the sale of an article of personal property, implies a warranty of title to the thing sold, and entitles the purchaser to recover back the price paid for it, if the title proves defective. (*a*) In this case, the reversal of the judgment by the circuit court destroyed all title and interest in it, as the justice's judgment was reversed for want of jurisdiction, no attention on the part of the appellant to the prosecution of the case in the circuit court could have produced a different result. But we do not think that the terms of the assignment imposed upon him any such attention. The terms "well attended to," in the assignment, clearly refer to the collection of the judgment, and not to the sustaining of it upon the contingency of an appeal. The instructions ought, therefore, to have been given.

The judgment is reversed and the case remanded.

Judgment reversed.

(*a*) Wilson vs. VanWinkle, 2 Gil. R. 684; Misner vs Granger, 4 Gil. R. 74; Fowles vs. Vallandigham, 43 Ill. R. 269; Hurd vs. Slaten, 43 Ill. R. 348.

AUGUSTUS O. GARRETT, appellant v. ANDREW STEVENSON et al., appellees.

Appeal from Tazewell.

A contract for mechanic's labor was made on the 3d day of March, A. D. 1840, the labor commenced and continued until July 1, 1840. A petition for a lien was filed October 27, 1841, in the Peoria circuit court, from which the venue was changed to the Tazewell circuit court, and there tried at the April term 1846, when a verdict was rendered for the petitioners. The "Act to provide for securing to mechanics' and others, liens for the value of labor and materials," by virtue of the 19th section of the 3d Article of the Constitution, became a law, December 10, 1839: Held, that, by the terms of this law in force when the contract was made, no limitation in point of time is fixed upon the right of the creditor to enforce the lien created by it, as against the debtor merely; and, therefore, that the right of the petitioners was in no wise affected by their delay to institute legal proceedings to enforce their lien.

An answer to a petition for a mechanic's lien, so far as the same is responsive thereto, is proper evidence for the consideration of the jury.

A decree on a petition for a mechanic's lien can only affect whatever legal and equitable interest the defendant has in the premises, when such interest is less than a fee simple estate.

PETITION for a mechanic's lien, filed by the appellees against the appellant, in the Peoria circuit court. on the 27th day of October, A. D. 1841, where the cause was brought to an issue, but the venue was changed to Tazewell county in October, 1844, and, after being continued from term to term, was finally determined at the April term 1846, of the circuit court in said county, the Hon. Samuel H. Treat presiding. The issue was submitted by the court to a jury, a special verdict returned in favor of the petitioners for $2,595.20, and the court rendered a judgment thereon, less $515.76, against the said Garrett.

A. Lincoln, and H. O. Merriman, for the appellant.

O. Peters, and L. B. Knowlton, for the appellees.

The opinion of the court was delivered by

THOMAS, J. This suit was originally commenced in the circuit court of Peoria county in October, 1841, by Ste-

venson & Wardwell against A. O. Garrett to enforce a mechanic's lien, and afterwards taken by change of venue into the Tazewell circuit court, and there disposed of by the rendition of a decree against the said defendant. From thence it comes by appeal into this court.

In dragging its slow length along, from its inception to its termination, it necessarily accumulated much matter by the way. Accordingly, its history is exhibited to us, swollen into a very voluminous record, but in tracing that History through all its various stages, it is found to present no question for our adjudication, growing out of any proceeding intermediate, between the commencement of the suit and the trial resulting in the decree now complained of. The appellant denies the right of his adversaries, at the time when they commenced their action, and under the circumstances of the case, to the remedy sought for by it, and insists, if overruled in that respect, that in the proceedings of the circuit court of Tazewell county, on the trial of the cause, and in the rendition of the decree, there will be found such error as to require the reversal of that decree.

This denial by the appellant of the appellees' right to the enforcement of a specific lien upon the premises described in the petition, involves no controversy as to matters of fact. But, assuming the law, entitled "An Act for the benefit of mechanics," approved February 22d, 1833, to have been in force when the contract was made, under which the lien is claimed, he contends that they cannot now avail themselves of the benefit of such lien, because the suit for that purpose was not commenced within three months from the time that payment should have been made by virtue of said contract, as required by the second section of the law referred to, in cases arising under its provisions Gale's Stat. 461.

But this is an erroneous view of the subject. The law relied upon as governing and controlling the rights and obligations of the parties, under their contract, was not in existence on the 3d of March, 1840, when that contract was made. It had then been repealed by the law, entitled "An Act to provide for securing to mechanics and others, liens

for the value of labor and materials, found on page 147 of the Laws of 1839–40.

That law was passed by the General Assembly at their session of 1838–9, and had it received the necessary Constitutional sanction, would, by its own provision have gone into effect on the first day of May, 1839. But it did not receive such sanction, and consequently its operation was for a time suspended. From the certificate of the Secretary of State attached to the law, it appears that ten days did not intervene between the time when the bill was laid before the Council of Revision, and the adjournment of the General Assembly ; and that the said bill not having been returned with the objections of the Council on the first day of the next ensuing session of the General Assembly, it had then, (on the 10th day of December, 1839, the second day of the last mentioned session of the General Assembly,) become a law. Such was the Constitutional result. State Const. Art. III. § 19.

Therefore, as by the terms of this law, thus shown to have been in force when the contract out of which this suit originated was made, no limitation in point of time is fixed upon the right of the creditor to enforce the lien created by it as against his debtor merely, it follows, that the right of the petitioners in this case to the enforcement of the lien claimed by them was in no wise affected by the delay on their part, in the institution of their proceedings for that purpose.

It may here be remarked, that between this view of the subject and the decision of this court in Turney v. Saunders, 4 Scam. 527, there is no conflict, as assumed by the counsel for the appellant in argument. The question settled in this case did not arise in that. It is there only determined, that where work was commenced under a contract entered into before the law of 1839 took effect, but not completed until afterwards, neither the lien, created thereby under the operation of the law of 1833, in force when the contract was made, nor the right to enforce it, was in any wise affected by the repeal of said last mentioned law. But as the right of action was incohate and imperfect when the law of '33

was superseded by that of '39, they hold in recognition of a well established principle, that while the right is conferred by the former, and exists subject to all the limitations and restrictions imposed upon it thereby, the remedy must of necessity, be sought under the latter. The record in that case shows, that the work, commenced in October, 1839, was not completed until August, 1841, and that the suit was commenced in October 1841, and within the time prescribed by the law of 1833. Had the fact in that respect been otherwise, the principle above referred to would have required a different result. The limitation upon the "right" of the plaintiff to sue, and the "liability" of the defendant to be sued, imposed by the law creating such "right and liability," was, on the repeal of that law, continued as the inseparable concomitant of such "right and liability." By its disregard, they would be materially affected, beneficially to the plaintiff, and to the defendants prejudice. This, the repealing law provided should not be done. Laws 1839–40, 150, § 28.

Having thus shown that the appellees' right to the remedy sought by the lapse of time, I now proceed to inquire, whether there was any error in the proceedings of the court, allowing him such remedy, either in the extent, or manner of its allowance.

The appellees filed their petition and amended petition, against the appellant and his wife, Mary G. Garrett, seeking to enforce a mechanic's lien upon certain lots in the town of Proria, for materials furnished, and work done by them, as they alleged in and about the erection of a house on said lots, under a contract with said appellant.

The appellant and his co-defendant answered said petition and amended petition, denying all of the material allegations therein contained, except as to the execution of the contract aforesaid, and the former (the appellant,) in his answer claimed to have made large payments to the appellees under said contract ; and to be entitled to set off against their demands, a large sum of money for damages sustained by him,

as he alleged, by reason of the unskilful and unworkmanlike manner in which the appellees had done their work, &c. and called upon the appellees to answer certain interrogatories in his said answer contained, touching his said claim of payment and set-off. The appellees answered said interrogatories,(as will hereinafter be more fully shown,) and replied generally to the auswers of appellant and wife; and issue being formed on these pleadings, a jury was impaneled for their trial. They, having heard the proofs and allegations of the parties, found the following special verdict, to wit:

First. That the brick work was done in a workmanlike manner, and amounted to 682,098 brick.

Second. That the plastering was done in a workmanlike manner, and amounted to 6,112 yards.

Third. That the defendant, Garrett, is entitled to credits to the sum of $1776,00.

Fourth. That the complainants are entitled to the further sum of $100.00, for furring, $135.00 for stone wall, and lathing, &c. $168.37.

Fifth. That the complainants fulfilled the contract on their part, and that the defendant, Garrett, failed to perform his part of the contract, in furnishing materials and making payments; and on the whole case, we find that Augustus O. Garrett is indebted to the complainants, for materials furnished and labor performed, under the contract, and on the lots of ground mentioned in the pleadings, in the sum(including interest,)of $2595.20.

The appellant, thereupon, entered successively his motions for a new trial, and in arrest of judgment, which were overruled, and he expected.

The court then, deducting from the amount found by the jury the sum of $514.86, for the value and interest thereon of 11,598 brick and 1712 yards of plastering, as having been allowed by the jury to the appellees, beyond the amount claimed by them in their pleadings, rendered a decree against the appellant for the balance of $2,080.34, and decreed a lien in favor of appellees upon the legal and equitable estate and interest of the appellant in and to the lots described in the

pleadings, and that the same be sold for the payment of the amount of said decree, &c. That decree the appellant now brings into this court for revision, and assigns the following errors, to wit: that the court erred,

1. In refusing to instruct the jury, on request of appellant's counsel, that the appellant's answer was evidence of the payments therein alleged.

2. In refusing to give instructions to the jury as asked by appellant's counsel.

3. In refusing to grant a new trial.

In rendering judgment against appellant.

4. When the verdict was not sufficient to establish the allegations of the pleadings on the part of the appellees.

5. When the certificate of the clerk of the Peoria Circuit Court did not identify the pleadings in this case.

6. When the verdict did not conform to the issues joined and was contrary thereto, and contrary to the case made by the appellees.

7. When material issues had not been found, and there was no finding as to Mary G. Garrett.

8. When the petition and the amended petition did not show that appellees were entitled to any lien on the premises claimed.

9. When the verdict allowed appellees for more work and materials than they claimed in the pleadings under the contract.

10. When the balance of payments made and proved by appellant was not deducted by the court from the amount of the judgment.

11. In overruling appellant's motion in arrest of judgment.

12. In rendering judgment against appellant without disposing of his co-defendant.

13. In not showing in the judgment what interest or estate the appellant had in the premises, nor what estate should be sold.

14. General assignment.

The questions arising on these assignments of error, involv-

ing as they do the correctness of the proceedings on the trial of the cause, and the validity of its results, would seem to demand for their proper understanding and correct solution, a thorough examination of the record not only as to matters put in issue by the pleadings of the parties also as to the testimony introduced by them pro and con upon such issues. But it is not so. The case comes before us in such an attitude as necessarily to confine out investigations within much narrower limits. In a bill of exceptions taken upon the trial, the sufficiency of the appellees' testimony to sustain the verdict, except as to the appellees' account, distinctly appears by the admissions of the appellants. As to that point, therefore, no examination need be made.

I will now proceed to consider and dispose of the assignment of errors, but not in the order in which they are made.

The refusal of the circuit court to instruct the jury on application of appellant's counsel, that appellant's answer was evidence of the payments therein alleged, constitutes the basis of the first and second errors assigned. Its efficacy for such purpose is, therefore, the question involved in these assignments of error. That it was evidence in the particular referred to, if responsive to the appellees' petition, is expressly settled by this court, in Kimball v. Cook, 1 Gilman, 434. Then was it so responsive? We will see.

The appellees base their right of recovery, not upon their completion or fulfilment of the contract on their part, but upon the alleged fact that after they had commenced the work under their said contract, and when, being ready and willing on their part to prosecute and finish it, they were progressing towards its completion, they were compelled to abandon it by reason of the appellant's refusal to pay them therefor from time to time as payments became due to them according to the terms of said contract. In their petition they say: "Your complainants commenced working for said Garrett, according to the terms of the contract, and continued to work for said Garrett till long after the time he had refused to pay them, (your complainants,) according to

the terms and conditions of the written contract above recited, " &c., and pray that " he may be summoned to answer to this bill, and each fact therein contained."

In their amended petition, they use the following language, to wit: " And your orators say they were always ready, and willing, and desirous of proceeding in the erection and completion of said building, and were always provided with workmen and materials, as they were required to do by the terms of the said contract ; but the said Garrett, at all times, from the time of making and entering into said contract, neglected and refused to pay to your orators the money due to your orators for the work, labor, and materials, done and performed, and furnished by your orators for said Garrett, as aforesaid, as he was required to do by said contract, though your orators often requiring and demanding payment of said Garrett, during the time when they were in the performance of said labor, and often thereafter." And again they say: " And the said Garrett has not paid your orators for their work, labor and materials done and furnished as aforesaid, though the same long since became due and payable, to wit: on the 1st day of July, 1840, and though often required so to do by your orators, but the same remains due and unpaid." And this amended petition concludes by requiring the appellant " to answer the petition and amended petition." How, then, any one can doubt that the allegations of payment in appellant's answer are responsive to the allegations of the appellees, in their petition and amended petition, that he had not paid, I cannot conceive. He is called upon to answer " each fact" stated in the petition, and his non-payment of the money becoming due from him under the contract is one of the alleged " facts" therein stated, and, as I think, of all others the most important, as not only affecting the appellees' right of action, but also limiting the extent of their demand. Nor can it be said that the exhibition by the appellant of his bill of particulars, showing specially each item of payment claimed to have been made by him, any the less entitled the answer to admissibility in evidence than it otherwise would have been. Why, exceptions might well have been taken

to the answer, as not responding to all the material allegations of the petition, if it had been silent as to payments by appellant, and if answering as to that point in general terms, that he had made payments, and not accompanying his answer by a bill of particulars, he would have been compelled, on appellee's request, to file one. Therefore, tried by that test, (and it is an unerring one,) the answer was legal evidence of the allegations of payment made by it.

But as to the claims set up by appellant in his answer, of a set-off for damages sustained by him on account of the unskilful and unworkmanlike manner in which, as he alleges, the appellees performed their work, &c., it is otherwise. These allegations, not being responsive to the petition, furnished no intrinsic evidence of their own truth, and therefore the answer, for the purpose of proving such demands, was not admissible in evidence.

This case furnishes an illustration of the rule laid down by this court in Webb v. Lasater, 4 Scam. 547, the correctness of which is now recognized. The court there, in speaking of the extent to which the answer of a party to a suit commenced before a justice of the peace, when called upon by his adversary to testify, according to the statute in such case made and provided, may and should be received as evidence on the trial of such suit, say: "Like a defendant in a bill of discovery in aid of a proceeding at law, the interrogatories addressed to him must have exclusive reference to the matters alleged to rest exclusively, in his knowledge and that of the party calling for his testimony, and his answers, so far as responsive to such interrogatories, but no farther, must be evidence. If he has paid or discharged the demand in reference to which he was sworn and interrogated, he may state that fact, and such statement will be responsive to the questions propounded to him. But if he only claims that he is not legally bound to pay such demand, by reason of his having a subsisting account or set-off against the party calling on him to testify, he cannot proceed to establish such account or set-off by his own oath, by virtue of his having been sworn at the instance of the adverse party."

Nor is this rule confined in its application to answers to bills of discovery merely, as supposed by the appellees' counsel, although in other proceedings in chancery for relief, the appeal to the conscience of the defendant is not, as in cases of bills of discovery, made ex necessitate rei, but grows out of the very nature of the tribunal whose aid is invoked as a court of conscience, yet the operation of the defendant's answer is in both cases the same. His statements in either case are supposed so far as they respond to the allegations of the bill, to be made not of his own volition, but in obedience to the requisition made upon him by the complainant, for the disclosure of facts resting within his knowledge, and affecting the complainant's right to a judgment at law or a decree in equity, as the case may be. He is made pro hac vice, the complainant's witness, and, therefore, the testimony given by him in that capacity may not be rejected at complainant's instance.

The circuit court, therefore, erred in refusing the instructions asked for by the appellant's counsel, and were this a proceeding at law, that error would have entitled the appellant to a trial in that court, and in this, to have the jugdment reversed, and the cause remanded for a venire de novo, unless it had further appeared from the record, that the allegations of payment in appellant's answer had been disproved by other testimony, but as will be shown presently, it is within the power of this court to correct the erroneous action of the court below, by reforming its decree, if there be enough apparent upon the record to enable us to do so; and looking at the interests of both parties, and consulting their wishes as expressed by their respective counsel on the augument, it is perhaps our duty to make such disposition of it.

Then, have we such light before us as may guide us, in our investigations of the rights of the parties involved in this controversy, to a correct conclusion?

The appellant, not relying alone on the efficacy of his own answer as evidence of his claim for payments therein made, chose to submit it as well as his demand for set-off to the test of his adversaries' oath, by interrogating them in

his answer in refer ence thereunto. Then considering the answer so far as such interrogatories are concerned, as in the nature of a cross bill, and the answer of the appellees thereto, as evidence of the matter contained in it, so far as responsive to those interrogatories, it remains to be seen whether such answer of the appellees contains any statement invalidating the appellant's claim for payments, already established prima facie, by his own answer.

The appellees, after admitting in their answer specific items of appellant's account for payments, amounting to the sum of $1406.21½, go on to say, " Complainants further say that they have no account of the amount of payments as charged in said schedule or bill of particulars ; but after an inspection of the orders drawn by them, (complanants,) on the said Garrett, and such memoranda of their own as they have had opportunity to inspect, and the pass-books, so called, of the defendant, they admit the charges above herein indicated, but they have no means of determining as to any other of the items in said schedule or bill of particulars charged, aud they, therefore, deny the same and call for the proof thereof."

This hypothetical impeachment of appellant's account for payments, neither destroys nor in any wise effects the evidence supporting it, as found in appellees' answer, while it does not render the statement itself admissible in evidence, as contradictory of appellants's answer, it is insufficient to create the necessity for corroborating that answer by evidence aliunde. For such purpose, there should have been a direct and unqualified denial of appellant's claim, and not such a halting, evasive negation of appellant's affirmation, as that under consideration, and which indicates a disposition on the part of the appellees, while they cannot conscientiously say that the appellant's demand is unjust, unconcientiously to require him to prove that it is just. Such mental reservations as seem to lurk in this answer, Equity abhors. If made, or appearing to be made, as in this case, they bring with them no immunity to him who uses them ; nothing

of inconvenience to his adversary. 6 Har. & Johns. 288, 291; 1 Paige, 210.

It follows from this view of the subject, the evidence found in the appellant's answer in support of his accouut for payments to appellees remaining unshaken by any thing contained in appellees' answer, and there being no other evidence contradictory of it, that his claim to an allowance to the full amount of that account was thereby fully substantiated.

But in addition to this, looking at the character of this entire transaction, the manner of appellant's making his payments from time to time, and preserving his evidences thereof, the admissions of the appellees, as proved by several witnesses, of the correctness of portions, if not of the whole of appellants account, and the great difficulty necessarily to be encountered in making absolute proof of every item of such an account, and I think the appellant's claim to its allowance, is fully sustained by the other testimony in the cause, as shown in the bill of exceptions, and wholly irrespective of his own answer.

But not so as to the other items of appellant's account claimed by way of set-off. His answer, as has been shown, furnished no evidence to prove them; they are expressly denied by appellees' answer, and there was no testimony offered to sustain them; therefore, they were properly disregarded by the jury.

It being thus determined that the whole account of appellant for payments should have been allowed him, and not merely the amount found by the jury, and the appellant, (as has b en shown,) having admitted that the evidence heard on the trial on the part of appellees was sufficient to sustain the verdict, except as to the appellant's account, it might be supposed that no difficulty could be encountered in determining what modification should be made by this Court of the decree of the court below. It would seem to follow, as a corollary, that our inquiry for the purposes of such modification would have exclusive reference to the amount

of appellant's account, and could in no wise affect the finding of the jury as to the amount of appellee's account, and consequently that the decree of the circuit court should be reformed, by deducting from the sum found by the jury in favor of the appellees an amount equal to the difference between the amount of appellant's payments, which should have been allowed him, and the amount which by the verdict was allowed him. And such would be the result, were the matter unembarrassed by other considerations than the mere determination of the state of accounts between the parties, as proved on the one hand, and admitted to have been proved on the other. But it is not thus unembarrassed, and the difficulty already overcome, in determining that there should be some modification of the decree, is no greater than that yet to be encountered, in determining what the extent of that modification should be.

This difficulty finds its origin in several circumstances:

1. Although the appellant, having admitted the sufficiency of the appellees' testimony to sustain the finding in their favor, so far as their account against him was concerned, is now estopped from mooting that point, yet he is at liberty to show, and does show another good and sufficient reason why the amount of that finding should be reduced, independently of his, (appellant's,) account. He shows by the record, that the verdict is in several respects broader than the claim of appellees, as exhibted by their petition and amended petition. This is complained of in the ninth error assigned, and will be more fully noticed presently.

2. The jury, as appears from their verdict, would seem to have allowed interest on the appellees' account, and if such allowance was made, and was not authorized by law, a deduction must of course be made therefor.

I will now proceed to demonstrate these positions, and so far as the means within my reach will unable me to do so, to place this case in the position, which justice and the rights of the parties demand that it should occupy.

First. The finding of the jury in favor of the appellees

exceeded their demand. As to the quantity of brick furnished by appellees, the number of brick found by the jury was 682,098

The appellees claim in their petition, as appears by reference thereto, and to their bill of particulars, as		
Laid in the house,	575,000	
" " privy,	45,000	
" " ice house,	13,500	
" " cistern,	3,000	
" " front wall,	7,000	
In all amounting to		643,500
And leaving over appellees' claim an excess of		38,598

In their amended petition, they claim as having been laid in the house, 600,000, leaving the other items precisely as stated in the original petition. This would swell their claim to the extent of 25,000, which, deducted from the excess found in their favor according to the claim of the original petition, to wit 38,598, still leaves the excess in the verdict over their claim to the amount of 13,598 brick.

The amount of deduction to be made from the sum found by the jury to be due from appellant to appellees, is in reference to this excessive finding as to brick, easily ascertained. The prices charged by the appellees for their brick, (as appears by their original and amended petitions,) and which were of course allowed by the jury, were for the 600,000 laid in the house, at the rate of $4 per M. and for the residue $5, but as will be presently shown they probably estimated the whole number found at $4. The excess of 13,598 found by the jury is, therefore, to be estimated at $4 per M. and shows the amount of deduction to be made on that account, to be $54.39.

Second. The jury found the plastering done to amount to	6,112 yards.
The appellees claim, inclusive of 400 yards of rough coating in the ball room, only	4,400 "
Making an excess in favor of appellees of	1,712 "

The price at which this plastering was probably estimated by the jury, was 21 cents per yard. This appears from the statement in a bill of exceptions taken by the appellees, that 400 yards of two coat plastering was proved on the trial, and more than 4000 yards of three coat; of course showing all over 400 yards to have been of the latter character. The price charged for it in the petition was that above stated, (21 cents per yard.)

The excess found in favor of appellees, viz: 1712 yards at 21 cents, amounts to	$359.52
To which add the value of the excess of brick, as estimated above,	54.39
And it shows an allowance by the jury, exceeding appellees' claim, of	$413.91

It may here be remarked, that it appears by reference to the bill of exceptions, that the circuit court fixed the excess of brick found by the jury in favor of appellees over their claim at 11.598; and of plastering, as found by this court at 1712 yards, and for the value thereof, with interest, deducted as already appears by a recital of its decree, the sum of $ 514.86.

I have shown that the entire account of appellant for payments under his contract was proved, and should have been allowed by the jury:

It amounted to	$2673.23
He was allowed only	1776.00
Showing an error against him of	$897.23
To this add the excess allowed for brick and plastering, as shown above,	413.91
And it appears that the sum of	$1311.14

was found against him by the jury, against the law and the evidence. This sum, therefore, should certainly be deducted from the balance found by the jury to be due from the appellant to the appellees, for work done and materials

furnished under the contract. It remains to be seen whether any further deduction should be made or not.

As already said, it would seem from the language of the verdict, that the jury allowed interest on the appellees' account, and hence the inquiries arise, was any such allowance made? If so, was it authorized by law? and if made, and not anthorized by law, what was the amount, thus improperly allowed? A negative answer to the first of these questions would, of course, supersede the necessity of examining or deciding either of the others.

For the solution of these questions, we find in the record the most abundant data. The jury not only find, that upon the whole case, the appellant owes the appellees a certain sum of money for work done and materials furnished under the contract, but they likewise exhibit the grounds on which they base that result.

On the one hand, they find as to two items of the appellees' account, (brick and plastering,) the quantity of materials found and work done under the contract, and as to the remaining items, the value thereof in terms; thus furnishing the means of ascertaining the whole amount of the appellees' account, as estimated by them; while on the other hand, they show the amount of credits to which appellant is entitled upon that account.

Then by adding to the sum specifically found due to appellees, that which would arise from a computation of the value of the brick and plastering found to have been furnished and done, at the prices fixed thereupon by the contract, or shown by the bills of exceptions to have been probably allowed by the jury, we have the gross amount of appellees' account; and deducting therefrom the amount of credits allowed appellant by the jury, and the result shows the balance due from appellant to appellees, according to the finding of the jury. If that balance be less in amount than the balance found due upon the whole case, by the verdict, from the appellant to the appellees, then to the extent of that deficit interest was allowed; but it was other-

wise if there was no such deficit. Let us examine the matter by that test.

The jury allowed for 682,098 brick; the price claimed in the petition was for 600,000 at the rate of $4 per M. making

	$2400.00
For the residue $5 per M. amounting to	410.49
They also found 6,112 yards of plastering to have been done; of this all but 400 yards, viz: 5,712 yards was three coat work, for which appellees claim in their petition 21 cents per yard,	1199.52
The 400 yards were one or two coat work, and it was proved, as appeared by the bill of exceptions, to have been worth half as much as the other, viz: 10 cents per yard,	42.00
They also fouud for furring, lathing, &c.	403.37
In all,	4455.38
They found appellant entitled to credits of	1776.00
This leaves a balance against appellant of	$2679.38

But looking at the result, and we are brought to the conclusion that the jury allowed for all of the brick, only $4 per 1000. If so, we should make a deduction from the balance above stated, of $1 per M. on 82,098 brick, to wit: $82.09, and thus a balance would remain against the appellant of $2597.29, differing only to the extent of $2.09 from the balance as found by the jury. Then who shall say, that to make up the balance asscertained by the verdict, the account of the appellees was swollen by the allowance of interest? To my mind, it is clear that such was not the case.

It will be recollected, that the calculations made in estimating the value of the excess of brick and plastering found by the jury for the purpose of a reduction pro tanto of the amount of indebtedness fixed upon the appellant by the verdict, was based upon the same hypothesis as to prices, tha the above calculations are:

The result is, that from the balance found by the jury against appellant, viz: $2595.20
There is to be deducted the sum already found of 1311.14

Leaving against appellant a balance of $1284.06
for which the decree of the circuit court should have been rendered.

These questions being settled, but very little remains to be said of the errors assigned by appellant, yet to be disposed of.

The power and duty of this court to correct the proceedings of the circuit court, and upon the state of case made by the whole record, to reform its decree, without reversing it and remanding the cause appearing, it follows that the third and eleventh errors in the order of assignment, assuming that the refusal of the court to grant a new trial or arrest the judgment, so vitiated its decree as to require its reversal, are untenable. It may not, however, be improper here to add a few suggestions on that point.

In courts of Law, the agency of juries is indispensable. Their province is to determine the facts of the case, that of the court, to settle the law arising on such facts. Hence the right of trial by jury in such courts is secured by constitutional guaranty, and a verdict being found there as to material facts submitted for the settlement of a jury, the court in the rendition of its judgment, may not disregard such finding. If, in the estimation of the court, it is wrong either as to law or evidence, the court can avoid it only by setting it aside, and granting a new trial, or by arresting the judgment. The refusal to do so, is, in this State, assignable for error by statutory enactment. But in the machinery of courts of Equity, no such agency is necessary This results from the constitution of such courts, and the peculiar character of its jurisdiction. Every question made before it is supposed to be addressed to the conscience of the Chancellor, and the law and facts involved in any such question,

must necessarily be determined by him; therefore, when in complicated cases of account or fraud, the aid of a jury is invoked by the Chancellor, it is only to advise his conscience, and the verdict being rendered, is not conclusive upon him, nor necessarily to goveren in the rendition of his decree. Its office is not to settle the facts, but to aid him in their ascertainment that he may settle them. Then although, the Chancelor undoubtedly may set aside a verdict, and order another trial by a jury, yet this should be of his own mere motion the better to satisfy him as to the matters of fact in issue, and not as a matter of right, on the motion of either party. But the Chancellor rejecting the verdict, so far as inconsistent with the issues or incompatible with the testimony, may go on to dispose of the case, as equity and justice may demand, without either granting a new trial or arresting the judgment, as in a court of law in such cases might be necessary. Consequently, his refusal to do so is not assignable for error.

This view of the subject disposes of most of the remaining errors assigned, based as they are upon objections to the verdict or the decree. The sixth, seventh, ninth, (which has already been fully considered,) and thirteenth, respectively complain of defects in the verdict, which, in a proceeding of law would have vitiated it, and required the court to grant a new trial, or arrest the judgment; and the fourth and twelfth attack the decree, for being rendered on a verdict so defective; but while the power of the court below to render its decree according to the justice of the case was left unimpaired by the defects in the verdict, either in not finding as to matters that were in issue, or in finding as to matters which were not in issue; or in allowing more than was claimed by the appellees, this court possesses plenary powers to correct any defect or error found either in the verdict or decree, and thus to do justice between the parties.

With this general view of the subject, I might perhaps properly, dismiss the further consideration of the assignment of error, but there are several points demanding a more specific notice.

First. There was no finding by the jury, nor decree by the court as to the defendant, Mary G. Garrett, as alleged in the seventh and twelfth errors assigned, but these assignments of error, although true in point of fact, are unsound in law. Even if such defect could be made the ground work here of an attack upon the decree below, as I have already shown it cannot, still it would be wholly immaterial.

The only object of the appellees in making the said Mary G. Garrett a party to this proceeding, as appears by their amended petition, was to subject the fee simple estate in the lots improved by them to sale, for the enforcement of their lien ; for that purpose, alleging such estate to be in her, the said Mary , but that the equitable estate therein was in the appellant.

This allegation was contradicted by the appellant and his co-defendant, only in so far as it claimed that the former was the owner in equity of the lots in question. Upon that point no evidence was adduced by the appellees to sustain their allegations ; consequently no finding, as against Mary G. Garrett, was necessary. But it would have been proper that the circuit court should have dismissed the bill as to her, and the defect in their decree in omitting to do so must be rectified here.

Secondly. The estate of the appellant in the lots in question was not determined by either the verdict or the decree as urged in the thirteenth error assigned.

This objection, the appellant's counsel seem to consider fatal to the appellee's right to enforce their lien against said property, but it is not so. It does sufficiently appear by the pleadings and proofs, that the said property was owned, in fee simple, by the said Mary G. Garrett, the wife of the said appellant, and consequently, that he owned an interest therein, less than the fee simple. What that interest may be, whether it simply embrace the rents and profits during the coverture, or shall ripen into an estate for life, by reason of his surviving his said wife, and thus becoming tenant by the curtesy, is immaterial. Whatever it is, or may be, the appellees are entitled to the full benefit of it, for the pay

ment of their demand against the appellant, for the improvements put by them upon the property in which it exists, in pursuance of their contract with him.

This disposes of the entire assignment of errors except the fifth and eight; and of them, it is only necessary to say, that the appellant does not rely on them, and moreover, that for anything that appears to us, they ought not to affect the result in any respect.

And now, having eliminated from the great mass of matter embodied in the record, those few prominent points, around which the controversy of the parties seemed to settle, and shown wherein the results of such controversy in the court below ,were otherwise than they should have been, it only remains for this court, by its final decree, to apply the proper corrective to the evils growing out of those erroneous results.

It is the opinion of the court, that there was no error in the decree of the circuit court, in allowing enforcement of appellees' lein upon the appellant's interest in the lots described in the petition, for the balance due upon the demands exhibited by them for materials furnished and work done by them, in pursuance of their contract with said appellant, but that in the amount of said balance as fixed by said decree there was, and that in that particular said decree should be reformed.

It is therefore ordered, adjudged and decreed, that the said appellees do have and recover of the said appellant, the sum of twelve hundred and eighty four dollars and six cents for materials furnished and work done by them in and about the erection of a certain building upon the lots in the petition mentioned, to wit: Lots No. four and five, in block No. eight, in the town and county of Peoria, in pursuance of their contract with said appellant; and also their costs by them about their suit in this behalf in the court below expended. And that said appellees have their lein upon the legal and equitable interest of the said appellant in and to the aforesaid lots and improvements thereon; and that, for the satisfaction of the aforesaid sum of $1284.06, with interest

thereon at six per cent. per annum from April 14th, 1846, the date of the decree in the court below, and costs, the same be sold; and that special execution for the sale thereof issue to the sheriff of the aforesaid county of Peoria.

And it is further ordered, adjudged and decreed, that if the proceeds of such sale shall be insufficient to pay and satisfy the aforesaid sum of $1284.06 and costs, the said appellees shall have their execution for the balance thereof then remaining due, against the goods and chattels, lands and tenements of the said appellant, as upon a judgment at law. And if the proceeds arising from such sale shall exceed the amount of the aforesaid sum of money and costs, the excess shall be paid to the said appellant. (*a*)

It is further considered, that the appellant recover of the appellees his costs by him about his suit in their behalf in this court expended.

And as to the defendant, Mary G. Garrett, it is decreed that the amended petition be dismissed, and that she recover her costs, &c.

Decree amended.

William Williams, appellant, v. Jacob Judy, appellee.

Appeal from Jo Daviess.

The rule is well settled, that the admissions of an assignor of a chose in action may be given in evidence against the assignee, if the admissions were against his interest when they were made.

To an action upon an assigned note brought by the assignee against the maker, it was pleaded that the note was given for money won at gaming. The plea contained no averment that the note was assigned after it became due: Held, that such an averment was unnecessary, notes for money won at gaming being, by the statute, absolutely void.

Assumpsit in the Jo Daviess circuit court, brought by the appellee against the appellant, upon an assigned note, and heard before the Hon. Thomas C. Browne and a jury at the June term 1846, when a verdict and judgment were rendered for the plaintiff below for $282.

(*a*) Lien Law Sec. 26.

The pleadings and evidence in the cause are stated by the Court.

J. Butterfield, for the appellant.

The declarations of Whiteside, made after the note was due, before it was negotiated, and while it lay dishonored in his hands, were competent evidence .

The admissions or declarations of the assignor of a chose in action, made while he is the holder, are evidence against his assignee and all claiming under him ; when made before the assignment, the rule is universal, and the only qualification lies in bills of exchange and promissory notes which pass from the hands of the declarant, before due, to a bona fide holder in the course of trade. 2 Phil. Ev. Notes, 663 ; 1 Greenl. Ev. 230, § 190 ; 21 Eng. Com. Law R. 296 ; 9 Greenl. 83 ; Story on Bills, § 220.

The cases on this question are all collected and explained in the Notes of Cowen & Hill to Phil. Ev. 663 to 668.

The principle is, while the vendor is in possession, are his declarations the same as his acts ? Does the indorsee stand in privity with the indorser, or is his claim paramount as an innocent holder ? If the latter, his indorser's previous declarations do not affect him, for he claims a right not under, but superior to his indorser, directly from the law-merchant.

But the indorsee of a note, which is overdue when negotiated, takes it subject to all the equities existing between the original parties he holds it under and in privity with his indorser.

The general principle which lets in these declarations, whenever a strict privity has been made out, has never been broken in upon by the English courts, nor by the American courts, excepting the supreme court of New York has pursued a divided course, sometimes letting in these declarations on the ground of privity, and sometimes rejecting them as mere naked, independent hearsay.

In the case of Beach v. Wise, 1 Hill's (N. Y.)R. 612, Bronson, J. says : After reading the elaborate and learned review in 2 Phil. Ev. 644 to 668, and considering the

authorities there collected, I put my judgment upon the sole ground that the point has been adjudged against the defendant by those who have gone before me in this court. As an original question, I should be unable to see any solid distinction between cases relating to real property, where the declarations of the former owner are constantly admitted and those relating to choses in action," &c.

A. T. Bledsoe, for the appellee.

The opinion of the court was delivered by

Caton, J. * This suit was brought by Judy against Williams on a promissory note made by Williams, and payable to one Whiteside, and dated on the 13th of April, 1839, for the sum of two hundred dollars, and payable 30 days from date, and by Whiteside assigned to Judy. The defendant filed pleas of the general issue, and that the consideration of said note was for money won at gaming. On the trial of the cause, the defendant proved by one Reed, that he had seen the note in the possession of Whiteside in September, 1839, after the same became due, and that at that time the note had not been assigned. The defendant then offered to prove, that at the same time Whiteside, the payee of the note, admitted that it was given for money won at gaming. Upon the objection of the plaintiff's counsel, the court held these admissions to be incompetent evidence. This decision of the court presents the only material question for our consideration, and is presented for the first time to this court for its decision.

We find it abundantly settled by authority, and it is well supported by reason, that the admissions of an assignor of a chose in action may be given in evidence against the assignee, if the admissions were against his interest at the time, especially if a cause of action existed presently, when the admissions were made.

In the case of Pocock v. Billing, 2 Bing. 269, Best, C. J.

*Thomas, J. having been counsel in this case, took no part in its decision.

said: " In order to render these declarations receivable, it ought to have been shown, that the party making them was the holder of the bill at the time. They are admissions, and as such receivable only when they are supposed to be adverse to the interest of the party." In this case, subsequently, at Nisi Prius, these admissions of the assignor of the bill were admitted in evidence against the assignee it having been proved that the admissions were made before the assignment. Ry. & Mood. 127.

In Shirley v. Todd, 9 Greenl. 83, it was held that such admissions were competent evidence. Weston, J. in giving the Opinion of the Court says: "We are satisfied that the declarations of Moses Shirley, the payee of the order, while the interest was in him, are admissable in evidence." In that case the admissions were made, as in this, after the maturity of the paper, and before its transfer (*a*)

We deem it unnecessary to refer to the great multitude of cases on this subject, especially as they are principally all collected and commented upon by Messrs. Cowen & Hill in their notes to Phillips' Evidence, 663-8. It may be said that there is but one Court whose decision forms an exception to this rule, and that is the Supreme Court of New York Since the collection of the cases on this subject by Cowen & Hill, this question has again been before that Court in the case of Beach v. Wise, 1 Hill's (N.Y.) R. 612. There the present Chief Justice of that Court, in the decision of the case, expresses his disapprobation of the rule, as formerly established by that court, but finally follows the former decisions, not feeling himself at liberty to overrule the decisions of those who had gone before him. He says: "As an original question I should be unable to see any settled distinction between cases relating to real property, where the declarations of the former owner are constantly admitted, and those relating to choses in action and other personal property, where, as we have seen, such declarations are rejected." I confess myself unable to see any distinction at all.

It was objected by the defendant in error that there is no

(*a*) Dazy vs. Mills, 5 Gil. R. 70.

averment in the pleas, that the note was assigned after it became due. That was unnecessary, for by our statute, notes, &c. given for money won at gaming are declared to be absolutely void, even in the hands of the assignee; hence, it was unnecessary to snow that the note was received by the assignee mala fide. Besides, this is not a question of pleading, but of evidence, and the presence or absence of such an averment could have no influence upon the admissibility of the proposed evidence.

The judgment of the Circuit Court must be reversed with costs, and the cause remanded for a new trial.

Judgment reversed.

EDWARD J. DUNLAP, appellant, v. HENRY ENNIS, appellee.

Appeal from Morgan.

A. sued B. before a Probate Justice of the Peace. The summons in the cause concluded thus: "Given under my hand and seal at my office at Jacksonville. this 27th day of November, 1845. Mat. Stacy, P. J. P. [Seal.]" Judgment was rendered against the defendant by default, and he appealed to the circuit court, where a motion was made to dismiss the case, because the Probate Justice had not affixed his seal of office to the original summons, but the motion was denied: Held, that the motion was properly denied.

Under the existing law relating to Probate Courts, the powers of the Probate Justice are of a two-fold charac er: first, he is to preside over the Probate court, and perform the duties imposed on that court; and second, he is vested with the jurisdiction of a justice of the peace in civil cases. The statute requiring the Probate court to keep a seal, when acting in the capacity of Probate justice merely, he must annex such seal to his process and certificates: but when only exercising the powers of a justice of the peace, he is not required to use the official seal. (a)

THIS was an appeal to the Circuit Court of Morgan county from the Probate Justice of the Peace, who issued a summons in the case, but did not attach thereto his seal of office, but affixed [Seal.] at the end of his signature. The summons was served upon the defendant below, Dunlap, and a judgment by default was rendered against him, for $70.22.

In the Circuit Court, at the May term 1849, the Hon.

(a) Laws of 1839 p. 62

Samuel D. Lockwood presiding, the defendant entered a motion to quash the summons issued by the Probate Justice of the Peace, and dismiss the proceedings, because it did not issue under the seal of said Probate Court, as required by law. The motion was overruled, and a judgment was rendered against the defendant for $72.31 debt and interest, and five per cent. damages, [$3.61,] in addition thereto.

The refusal to dismiss the suit and quash the writ, and the rendition of the judgment aforesaid, were assigned for error in this court.

M. McConnell, for the plaintiff in error.

The Probate Court is required to have a seal. Rev. Stat. 427, § 8.

All kinds of process issued by him must be under the seal of said court. Ib. 428, § 16.

If there is no public seal, his private seal will answer. Ib. § 11. Those laws are positive upon the subject, and admit of no misconstruction.

All process issuing without seal from a court having a seal is void. Boal v. King, 6 Ham. 11.

As to what is a seal, see Warren v. Lynch, 5 Johns. 239. A scrawl or ink, in the place of a seal, does not constitute a seal. Perine v. Cheeseman, 6 Halsted, 174: 5 Johns. 239; State v. Vaughn, Harper, 213; Filkins v. Brockway, 19 Johns. 170.

H. Dusenbury, for the appellee, admitted the general doctrine, that "all process issuing without a seal, from a court of record having a seal, is void," but insisted that this doctrine does not apply to Probate Justices of the Peace, when acting, in the State of Illinois, in the capacity of justices of the peace.

The Probate Justice of the Peace is, by the statute laws of Illinois, created a duplex officer. He is required to act as a Probate Judge, and also as a justice of the peace. When acting in the ministerial character of Probate Judge, his powers and duties are, by the Revised Statutes, plainly defined, and

the writs which issue from his Probate court must issue under his official seal. His other character is that of an ordinary justice of the peace. In this, he is invested with the same powers and jurisdiction in civil cases which are conferred by law upon other justices ef the peace, and, in the exercise of such powers and jurisdiction, the same rules of law which are applicable to ordinary justices of the peace are applicable to the said Probate Justices of the Peace, and to all proceedings before them growing out of such power and jurisdiction. Rev. Stat. 427, § 4.

The writ of summons is in the form required by the statute. Ib. 317 § 21. A scrawl has the same effect as a seal. Ib. 421, § 56.

The appellant cannot here take any exception to the form or service of the original summons which he could not take on the trial of the appeal in the court below. Ib. 325, § 66.

The defendant below was entitled to his damages, in consequence of the delay. Ib. 421, § 57.

The opinion of the court was delivered by

Treat, J. This suit was commenced before the Probate Justice of the Peace of Morgan County by Ennis against Dunlap, to recover the amount due on a promissory note for $70, made by the latter to the former, bearing date the 11th of November, 1844. The summons was in the usual form, concluding thus : "Given under my hand and seal, at my office in Jacksonville, this 27th day of November, 1845. Mat. Stacy, P. J. P. [Seal.]" It was served on Dunlap, and a judgment by default was rendered against him for $70.22, from which he appealed to the circuit court. In the latter court, he entered a motion to dismiss the case, because the Probate Justice had not affixed his seal of office to the original summons. The motion was denied, and the judgment of the Probate Justice affirmed.

The decision of the circuit court, overruling the motion to dismiss, is assigned for error. It is insisted that the summons was void, for the want of the official seal of the Probate Justice. For a correct determination of this question,

it will be necessary to look into the constitution of the court of Probate as at present organized. Formerly, this court was held by an office styled the Judge of Probate, who in the exercise of the functions of his office, was limited to matters strictly appertaining to the court of Probate. This court was abolished and its powers and jurisdiction were transferred to the present court of Probate, established in its stead; and the officer of Probate Justice of the Peace was created to discharge the functions of the new court. This officer now exercises all the powers formerly vested in the Judge of Probate. The present court of Probate, like the one which preceded it, is required to have a public seal, and to issue its process and certify its proceedings under such seal, except where no seal has been provided for the court, when the private seal of the Probate Justice may be substituted. See the 8th and 11th sections of the 85th chapter of the Revised Statutes. In addition to the powers formerly possessed by the Judges of Probate, the Probate Justices are "vested with the same powers and jurisdiction in civil cases which are or shall be conferred by law upon others justices of the peace, and in the exercise of said powers and jurisdiction, the rules of law, which are or shall be applicable to ordinary justices of the peace, shall be applicable to Probate Justices of the Peace hereby created, and to all proceedings before them, growing out of such power and jurisdiction." Ib. chap. 85, § 4. It is manifest that the powers of the Probate Justice are of a two-fold character, for, first, he is to preside over the Probate court, and perform the duties imposed on that court; and, second, he is vested with the jurisdiction of a justice of the peace in civil cases. The two classes of powers, although conferred on the same officer, are distinct in their nature, having no necessary connection with each other. While he is acting in the capacity of Judge of the Probate court, the process and proceeding thereof must be issued and certified under the public seal, or under his private seal if no seal has been provided for the court. The seal required by the statute is the seal of the Probate court, and

not of the officer holding the court; and he need only make use of the seal when he is discharging the duties properly pertaining to the court. When he is exercising the jurisdiction of an ordinary justice of the peace, he is to be governed by the rules applicable to that officer. A justice of the peace has no seal of office, and when the Probate Justice is acting in that capacity, he need not affix the seal of the Probate court to his process. The 21st section of the 59th chapter of the Revised Statutes precribes the form of the summons to be issued by justices of the peace, and the process in the present case pursues the form precisely. (*a*) The subject matter of this case was clearly within the jurisdiction of a justice of the peace; and neither of the parties being an administrator or executor, the Probate court had no jurisdiction whatever over it. The Probate Justice, in taking cognizance of the case must, therefore, have acted in the capacity of a justice of the peace. His proceedings have been regular, and the circuit court decided correctly in refusing to dismiss the case, and in affirming the judgment. The judgment of the circuit court is affirmed, with costs.

Jndgment affirmed.

(*a*) Williams vs. Blakenship, 12 Ill. R. 122.

CHARLES BALLANCE, plaintiff in error, v. BARTHOLOMEW FORTIER et al., defendants in error.

Error to Peoria.

A complaint for forcible entry and detainer contained the following averments, to wit: that the complainant was the owner of the premises in question and had, for more than ten years, been in the actual possession; that he put A. and B. into possession as his tenants for a specified rent; that soon after, B. left the country, A. still remaining in possession, who continued his tenant for a long time, paying rent occasionally; that before he left the premises he and C. called on complainant to obtain permission for A. to transfer his lease to C. and the complainant assenting thereto, C. entered into possession and paid a portion of the rent; that recently, D. claiming to own said premises, bribed C, to attorn to him, and D. then entered and underlet the premises to C.; and that said C. and D. hold the premises against the affiant, refuse to pay rent to complainant, and that, by non-payment of rent, he was, by the terms of the lease, entitled to re-enter and possess said premises and had demanded the same in writing: Held that the complaint was substantially sufficient; that it was only necessary to aver a demand in general terms and that the lease provided for a re-entry for non-payment of rent; that the defendants, under the circumstances, were not entitled to six months' notice; and that the collusion between C. and D. avoided their contract of attornment.

COMPLAINT for a forcible entry and detainer, before Thomas Bryant, Esq. a justice of the peace of Peoria County, brought by the plaintiff in error against the defendants in error. At the trial before the said justice and a jury, a verdict and judgment were rendered for the complainant. The defendants appealed to the Circuit Court of Peoria County, and at the October term 1846, the Hon. John D. Caton presiding, the complaint, or motion of the defendant, was dismissed.

A copy of the complaint is embodied in the opinion of the court.

C. Ballance, pro se replied on the following points:

1. A tenant attorning to a stranger forfeits his lease;

2. A tenant refusing to pay rent or acknowledge his landlord forfeits his lease; and

3. The lease is void by its own provisions for non-payment of rent.

In support of these positions, he citied the following authorities: Rev. Stat. 325, 257: Brubaker v. Poage, 1 Monroe, 128; Ewing v. Bowling, 2 A. K. Marsh. 36; The People v. Runkle, 9 Johns. 147; Moore v. Read, 1 Blackf. 177; The People, &c. v. Godfrey, 1 Hall, 240; Same v. Van Nostrand, 9 Wend. 52; Pollard v. Otter, 4 Dana, 516; Elms v. Randall 2 do. 100.

O. Peters, and E. N. Powell, for the defendants in error.

The only question presented by the assignment of errors, is, whether the complaint was sufficient, and whether the Court properly dismissed the suit for such insufficiency.

The complaint is insufficient for the following reasons, to wit:

1. It does not show how, or when demand was made of the defendants to deliver up possession. This should appear in the complaint, by averring it, or by copy of the demand verified by affidavit attached, as in ejectment, or in some other way, so that the court may see that proper demand was made. Rev. Stat. 256, 701.

2. It does not show that the relation of landlord and tenant existed between the parties, or if this does incidently appear, it does not appear that the defendants held over "wilfully and without force," after the determination of the lease. Wells v. Hogan, Bre. 264.

3. The complaint does not show that the complainant, at the commencement of the suit, was entitled to the possession of the premises. It alleges, that by the terms of the lease he had a right to re-enter and take possession, but nowhere avers or claims a present right. It states what the complainant claims to be the legal construction and effect of his lease, but claims no legal subsisting right of possession, nor does it show that he ever entered, or attempted to re-enter. This should be done, because by the language of the statute, § 1, no offence is incurred by the tenant until after demand made by the person entitled to such possession. .

4. It does not show that the relation of landlord and tenant

existed, or ever existed, between Ballance and Fortier, but it shows that Blumb became the tenant of Fortier. Without this relation, the plaintiff cannot have this remedy. Atkinson v. Lester, 1 Scam. 407. And this relation must exist between the complainant and all of the defendants, for where there are several defendants, and one of them shows that the action is not well brought as to him, it fails as to all. 2 U. S. Dig. 433, § 79. Fortier was not the tenant of the plaintiff, either directly, or as the sub-tenant of Blumb or Nachand. There is no privity whatever between them. Fortier claimed title, and entered under that claim of title. Blumb acknowledged the right and attorned; but the complaint does deny the title of Fortier. The complaint must show that both were tenants. 2. A. K. Marsh. 38. Defendants must as tenants of plaintiff.

5. It does not show when the lease or tenancy terminated, nor when the demand for the possession was made, whether before or after the tenancy terminated; or whether before or after the plaintiff had a right to re-enter. The complaint is silent as to this ; it may have been made before Mr. Ballance was the owner, or before there was any pretence of forfeiture ; non constat, but the demand was made the next day after the commencement of Blumb's term, and before Fortier set up any claim of right, or made any entry ; so that it does not appear that there was any holding over "wilfully and without force."

6. Though the plaintiff claims to oust the defendants by reason of a forfeiture for the non-payment of rent, yet it nowhere appears that there was any rent in arrear. By his own showing, the term had not expired. He charges that the defendants refuse to pay rent ; defendants answer that they may well do so, because plaintiff does not even charge them that there is any rent in arrear, but says that rent has been paid, but he does not know how much.

7. If complaint impliedly shows any tenancy, it does not show whether it was tenancy for years, or from year to year, or at will.

The complaint shows that the Nachands were to pay an annual rent of $30. This probably made them tenants from

year to year; thus they were entitled to six months notice to quit. This does not appear to have been given. 4 Kent's Com. 111, and post. Ellis v. Paige, 2 Pick. 71, note.

If the defendants were (or either of them) tenants at will, then this remedy is not given by the statute. The remedy is only where the tenant holds over after the time they were let to him. This can only mean a time certain, a time fixed by the parties, and not an uncertain and capricious determination of the will of the landlord. The statute means a "letting" for a "time."

But if the paying of an annual rent made the lessees tenants from year to year, and thereby rendered a notice of six months necessary, and a demand of possession after the expiration of the six months, and before suit brought, it shows still more the necessity of alleging in the complaint when the demand was necessary.

"This proceeding being contrary to the course of the Common Law," the jurisdiction must be shown, the justice must see that he has jurisdiction, and not leave it to be shown in pais. It is matter of averment, and not of proof without averment. Wells v. Hogan, Bre. 264.

8. The complaint does not show what kind of estate the plaintiff has in the premises. This is necessary. See 1 U. S. Dig. 242, 432, § § 63–69; 13 Johns. 158; 1 Hall, 240.

Nor does it show that he had any legal estate until the day he commenced this suit. He says he is the owner, and for ten years has been in the possession of the lot, but what title or right he had when he demanded possession, does not appear.

9. Though the complaint alleges that Fortier bribed Blumb to attorn it does not allege that Blumb did in fact attorn. The distinction between an agreement to attorn, and actually attorning is palpable.

The opinion of the court was delivered by

KOERNER, J.* This was an action commenced by Charles Ballance, the plaintiff below, under the 43d chapter of the

*PURPLE, J. did not sit in this case.

Revised Statutes, providing a remedy in cases of forcible entry and detainer, before a justice of the peace. Verdict and judgment were for plaintiff, and the defendants, Fortier and Blumb, appealed to the circuit court of Peoria County, where, at the October term 1846, the suit was dismissed on defendant's motion, for the reason that the complaint filed by the plaintiff was uncertain and insufficient, and showed no cause of action. The dismissal of the canse for the reason just mentioned is the only error assigned.

The complaint is as follows:

"The complaint of Charles Ballance, of Peoria, in said county, who being duly sworn, upon his oath gives Thomas Bryant, Esq., one of the justices of the peace of said county to understand and be informed, that he, the said Ballance, is the owner, and for more than ten years has been in the actual possession of a lot of ground in the town of Peoria, in said county, bounded as follows: Beginning at the northeasterly corner of the house built by Isaac Underhill and Aquilla Wren for a pork house, but which is now used by William R. Hopkins as a foundry; running thence up to Water street sixty feet; thence across from said street at right angles 171 feet; thence down at right angles the course of Water street 60 feet; thence to the place of beginning; and on the 10th day of December, 1841, affiant put one John Nachand and Philip Nachand into possession of said premises as tenants of affiant, for a specific rent, to wit: the annual rent of $30. That soon after, but the date is not now known, said Philip left this part of the country, leaving said John in possession of said premises, and said John occupied the same as tenant of affiant for a length of time not recollected, but supposed to be as much as three years, and paid rent occasionally during said time, to this affiant, but how much of said rent was thus paid he cannot state, because a settlement has not been made between said John and this affiant; afterwards, and before said Nachand left said premises, he and one Peter Blumb called upon this affiant to know if he, affiant, would consent that said John should transfer said lease to said Blumb, and except him as a tenant instead of

said John, whereupon this affiant consented to said arrangement, and said Blumb thereupon entered into said premises as the tenant of this affiant, and paid in carpenters' work a part of the rent for the same, but how much this affiant cannot state, not knowing the value of said work. About ten days ago, affiant is informed and believes, that one Bartholomew Fortier who pretends to have a claim to said lot, bribed said Blumb to attorn to him, and acknowledge him as his landlord; and in pursuance of this arrangement, said Fortier did enter said premises, and underlet a part thereof to said Blumb; and now said Blumb and Fortier hold said premises against this affiant, and both refuse to pay rent, and acknowledge him as landlord of the premises.

Affiant further gives said justice to understand and be informed, that the lease under which said John and Philip Nachand entered into said premises has long since been forfeited for non-payment of rent, and affiant, by express provision of said lease, has a right to re-enter and take possession of said premises; but said Fortier and Blumb refuse to let him do so; wherefore affiant saith that said Fortier and Blumb wilfully hold the possession of the said premises against law and the will of this affiant notwithstanding demand has been made in writing by this complainant upon them to quit and deliver up possession thereof to him. Therefore he prays that the said Bartholomew Fortier and Peter Blumb may be summoned to answer to the said complaint.

C. Ballance.

Sworn to March 2d, 1846, before T. Bryant, J. P."

The clause of the statute which is applicable to the case presented by this complaint reads as follows: "If any person shall wilfully and with out force hold over any lands, tenements or other possessions, after the determination of the time for which such lands, tenements or possessions were let to him, or to the person under whom he claims, after demand made in writing for possession thereof, by the person entitled to such possession, such person shall be adjudged guilty of a forcible detainer."

It is true that the complaint contains some immaterial

matter, and that what is material, is not stated with great clearness or precision. We are, however, of opinion that it is sufficient in substance. Although this is a statutory remedy, which requires that the proceedings under it should strictly conform to the provisions of the statute, it does not necessarily follow that the pleadings of the parties should be as technical as they are required to be in the Superior Courts. In the complaint of this kind, which must be made before a justice of the peace in the first instance, who by the fourth section of said chapter is required to set down the complaint in writing, the rule that every intendment must be taken against the pleader, would be manifestly unjust and would but illy comport with the liberal spirit in regard to proceedings before justices of the peace, which seems to pervade the acts of our Legislature. The complaint shows that Blumb was the tenant of Ballance, that he had paid only a part of the rent; that the lease to which Blumb had become a party contained an express provision, giving Ballance a right to re-enter for non-payment of rent; that by collusion with Blumb, Fortier was let into possession, and was acknowledged by him as landlord, and that Blumb now holds part of the premises under Fortier. Also, that demand has been made in writing by the complainant for the possession of the premises.

The defendants' counsel have raised very numerous objections to this complaint, some of which I deem it proper to notice. It is objected, that it is not shown how or when the demand for possession was made, nor what the terms of the lease were. This, in my opinion, is matter of proof, and all that is necessary to aver is, that demand was made and that the lease provided for a re-entry for non-payment of rent. It is also objected that the complaint does not show that Ballance was entitled to the possession at the time of the commencement of the action; but as Blumb was at the time his lesse, he was certainly entitled to possession as to him. If his own right had ceased, and an exception existed to the general rule, that the tenant cannot dispute his landlord's title, so that Blumb had a right to attorn, it was matter

of defence, and Ballance was not bound to negative it by allegations in his complaint. It is also urged, that the defendants were entitled to six months notice to quit; but if Ballance had a right to re- enter under the lease, or if the lease was forfeited by attornment, and the complaint assumes both these grounds, no notice farther than the statute requires was necessary, even if a tenant from year to year were entitled under our laws to six months' notice. It is also insisted, that there was no privity between Fortier and Blumb, inasmuch as Fortier does not claim under Blumb, but Blumb under him, and that consequently Fortier was no party, and the proceeding irregular. But we cannot admit this plea; for the purposes of this peculiar remedy, which would not be worth the name, if another construction were given, we must necessarily consider Fortier as holding under Blumb. The collusion between the parties which is charged here, avoids their contract of attornment, and leaves the naked fact remaining, that Fortier, in some way or another, came in by permission of Blumb, and, as against Ballance, holds under Blumb. (*a*)

Upon the whole, we are satisfied that the complaint, though justly liable to many objections of a formal character, contains substance enough to give the magistrate jurisdiction, and that is all the law requires. The judgment below is reversed with costs, and the cause remanded for further proceedings.

Judgment reversed.

(*a*) Walker vs. Ellis, 12 Ill. R. 476; McCartney vs. Hunt, 16 Ill. R. 78.

Elihu Granger plaintiff in error, v. Henry Warrington, defendant in error.

Error to Du Page.

A party, who has obtained a change of venue, taken several steps in the cause, consented to a continuance, and at a subsequent term, submitted the cause for trial without objection, cannot obtain an order of dismissal, for the reason that the original papers in the cause had not been transmitted by the clerk from the county where the suit was commenced. Application for a rule upon the clerk of the court to send the original papers should be made at the first term after obtaining a change of venue. (*a*)

A party, who has neglected to join in demurrer, cannot complain that the cause was submitted for trial on other issues properly formed, without any disposition being made of such demurrer.

In an action on the case for malicious prosecution, the record of the suit alleged to be malicious was offered to be read in evidence. Objection was made that it contained improper matter to go before the jury, but the objection was overruled, and the record was introduced: Held, that if a transcript contains any matter not pertinent to the issue on trial the proper course is to apply to the court for an instruction to the jury to disregard it.

To exclude evidence from the jury, because of irrelevancy, the irrelevancy must be clear.

To entitle communications between individuals to be considered as confidential and privileged, the relation of client and attorney must exist. The party must consult the attorney in a matter in which his private interest is concerned, and make his cause, so that he may manage with greater or skill; or if legal advice only is wanted, to enable the attorney the better to counsel him as to his legal rights.

Grand jurors are competent witnessess to prove facts which came to their knowledge while acting in such capacity.

The law is well settled, that parol evidence may be given of the contents of a lost writing after the fact of the loss has been satisfactorily established.

A refusal to grant a motion for a new trial for want of evidence cannot be assigned as error, when the whole evidence is not stated to be contained in the bill of exceptions.

Case for a malicious prosecution, originally commenced by the defendant in error against the plaintiff in error in the Cook Circuit Court, but removed by change of venue to the Du Page Circuit Court, and heard before the Hon. Richard M. Young and a jury at the May term, 1846, when a verdict

(*a*) Hitt vs. Allen, 13 Ill. R. 592.

was rendered for the plaintiff for the sum of $500. A motion for a new trial was made and overruled, to which the defendant excepted.

The various proceedings in the cause are stated by the court.

I. N. Arnold, for the plaintiff in error, contended

I. That the cause was not properly in the Du Page Circuit Court. Wight v. Kilpatrick, 4 Scam. 340.

2. That the cause was not properly before the jury, there being an issue of law pending and undetermined. Nye v. Wright, 2 Scam. 222 ; Weatherford v Wilson, Ib. 256 ; McKinney v. May, 1 do. 534 ; Bradshaw v. Mc Kinney, 4 do. 54.

3. That the transcript of the proceedings in the trespass case should have been excluded, as it contained the affidavit of Warrington. Anthoine v. Coit, 2 Hall's Sup. Ct. R. 40.

4. The testimony in regard to Moffet's pecuniary circumstances was irrelevant and incompetent.

5. Evidence of the conversation between Granger and Curtiss, the prosecuting attorney, was improper, it being privileged and confidential. 1 Greenl. Ev. § § 237, 240, 252, and notes ; 2 Phil. Ev. 282: McLellan v. Richardson, 13 Maine, (1 Shepley,) 82.

6. Gray, the grand juror, was an incompetent witness.

7. The parol evidence of the bill of sale of the horse was improperly admitted.

8. A new trial should have been granted.

E. W. Tracy, for the defendant in error.

It was too late for the party to raise the objection in regard to the transmission of the original papers, after having pleaded in the Du Page Circuit Court. Rev. Stat. 529, § 9. Further, they are referred to in the bill of exceptions and assignment of errors as the original papers. Consensus tollit errorem. In the case of Wight v. Kirkpatrick, no

steps had been taken in the progress of the cause, but the objection was taken in the first instance.

There was no joinder in demurrer. In the case referred to in 2 Scam. 222, there was a joinder in demurrer, a plea and issue to the jury. Greenleaf's Lessee v. Burt 5 Peters, 131.

The record of the trespass case was properly admitted in evidence. The affidavit was proper to go to the jury as a part of the record. If liable to objection, the party should have asked the court to instruct the jury that it was not evidence. The plaintiff in error has cited a case in 2 Hall's Sup. Ct. R. The affidavit came in incidentally, and was not material as evidence. See 2 Saund. on Pl. and Ev. title, "Malicious arrest," &c.; 3 Stephens' Nisi Prius, 2266, same title.

It is objected that the testimony in relation to Moffett's circumstances was improperly received. The testimony was proper, as showing the security frivolous, and tended to show malice, rather than a desire to secure a just debt. There are two kinds of malice, legal and express. The former is made out by proof of want of probable cause.

As to the defect, if any, in making up the verdict, &c. That was a mere matter of form, and cured by the Statute of Amendments and Jeofails. Ross v. Reddick, 1 Scam. 74; Lincoln v. Cook, 2 do. 61.

The objection to the testimony of the grand juror, Gray, is without foundation. Grand jurors may testify as to extrinsic facts, though public policy dictates, as a general rule, that their proceeding should be kept secret. 2 Wheat. Selw. 1091, 1 Greenl. Ev. 300, note; Freeman v. Arkill, 2 Barn. & Cres. 494; 3 Stephens' N. P. 2286; Lowe's case, 4 Greenl. 439; Rogers v. Hall, 3 Scam. 45; 3 Johns. 234; 4 C. & P. 444.

The assignments of error are too vague and general. Rowan v. Dosh, 4 Scam. 461; Rogers v. Hall, 3 do. 45; McKee v. Ingalls, 4 do. 30; Camden v. Doremus' 3 How. (U. S.) R. 530; Campbell v. Stokes, 2 Wend. 137; Henry v. Cuyler, 17 Johns. 469; 2 Cowen, 31.

The opinion of the court was delivered by

LOCKWOOD, J.* This was an action on the case for malicious arrest, imprisonment and prosecution, commenced by Henry Warrington against Elihu Granger in the Cook circuit court. The declaration contains four counts, but are all based on the same facts. They state in substance that Granger not having any reasonable or probable cause of action, maliciously caused Warrington to be arrested on a capias ad respondendem, in an action of trespass; which capias was, by the procurement of Granger indorsed for bail for $60. That Warrington was arrested on said capias and imprisoned for thirty days, and until Warrington procured one James Moffett to become his especial bail. That said suit was maliciously prosecuted in said court, and finally tried by a jury, and a verdict of not guilty, was given in favor of Warrington, and a judgment rendered thereon.

At the May term 1845, of the Cook circuit court, Granger filed three pleas; to wit; 1st, not guilty; 2nd nul tiel record; and 3rd, that Granger had reasonable and probable cause of action against Warrington. At the same term, the venue was changed to Du Page, on the affidavit and motion of Granger.

At the June special term in 1845, of the circuit court of Du Page county the cause, by consent of both parties, was continued to the next term.

At the September term of the Du Page circuit court, the plaintiff below entered a similiter to the defendant's first plea, and demurred to the second and third pleas; which demurrer was confessed and leave granted to amend the same, and the amendment being made, the plaintiff filed his demurrer to the second plea, in which the defendant joined, and the court sustained the demurrer. The plaintiff also again demurred to defendant's third plea, to which there was no joinder. At that term a jury was impaneled and sworn to try the cause, and by consent a juror was withdrawn and the cause continued.

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*Caton, J. did not sit in this case.

At the May term 1816, the defendant moved the court to dismiss the suit because the original papers did not appear on file, which motion was overruled, and thereupon a jury was sworn to try the cause, who found a verdict for plaintiff below for $500. A motion was made for a new trial, which was overruled, and defendant below excepted. It appears from a bill of exceptions taken on the trial, that plaintiff offered the record of a former suit, in which Granger was plaintiff and Warrington defendant, to show that Granger had commenced an action of trespass against Warrington, in which he had been held to bail, and that said suit had resulted in a verdict and judgment for Warrington. To the reception of this record, Granger objected, on the ground that it contained facts which cannot be proved by such evidence. The court overruled the objection and permitted the record to be read in evidence.

It appears from an examination of the record thus given in evidence, that it contained an affidavit of Warrington, which he had made of the loss of a bill of sale of a horse,(the taking of which horse from Granger, was the subject of controversy in the suit) in order to lay the foundation for giving parol evidence of the contents of the bill of sale. Granger then read his own and the affidavit of one Carlisle Mason to the court, of the loss of a bill of sale of a horse, given by Granger to Warrington and Mason, and then offered to prove by a witness the contents of said bill of sale, to which Granger objected, but the objection was overruled, and the witness was permitted to testify and give parol evidence of its contents. Warrington then called a witness and asked him what were the circumstances of James Moffett as to property, in March, 1843; to which question defendant below objected and the court overruled the objection, and the witness answered that all the property he ever knew of Moffet's having in his possession, was a wagon and pair of horses, which he parted with in March, 1843. The plaintiff below then called James Curtiss, who testified that he was prosecuting attorney of Cook county in the year 1843. That in the spring or fall of that year and after the commencement of the trespass suit of Granger against Warrington, Granger came to

him and stated that Warrington had taken his,[Granger's,] horse, out of his,[Granger's,] stable, and that he,[Granger,] contemplated making a complaint against him before the grand jury about it. That Granger counselled with witness as State's attorney, and related to witness various circumstances, and witness thereupon told him that witness did not think that an indictment could be sustained. Witness also stated that notwithstanding this advice, that Granger made a complaint before the grand jury, who refused to find a bill.

To the reception of this testimony Granger objected, but the objection was overruled and Granger excepted.

Plaintiff below then called John Gray who testified that he was one of the grand jurors of Cook county in the spring or fall of 1843, and that Granger made a complaint against Warrington, and that no bill was found. This testimony was objected to as inadmissable, but the objection overruled and Granger excepted. Numerous errors have been assigned, but the following only were relied on:

1st. The original papers in the cause were never transferred from Cook county to Du Page, and consequently, the cause should have been dismissed.

2nd. There was a trial by jury, while no decision had been made on the demurrer to defendant's third plea. There never was an issue on that plea except by demurrer. If demurrer decided, then a plea amended and unanswered.

3rd The transcript of the proceedings in the trespass case should have been excluded. It contained matters improper to go to the jury. The affidavit of Henry Warrington was improperly read in evidence.

4th. The testimony in regard to Moffett's pecuniary circumstances was irrelevant and incompetent.

5th. The conversation between Granger and Curtiss, the prosecuting attorney, was a privileged, confidential conversation, and should not have been admitted.

6th. The evidence of Gray, the grand juror, was incompetent.

7th. The parol evidence of contract of sale was improperly received.

8th. The court erred in not granting a new trial.

The assignment of errors will be considered in their order. The first assignment questions the correctness of the decision below, in refusing to dismiss the cause in Du Page, for the reason that the original papers had not been transmitted by the clerk of the Cook Circuit Court to the Du Page Court. The statute relative to a change of venue requires that the clerk shall transmit all papers filed in the cause and appertaining or forming part of the record. But can a party who has obtained a change of venue, taken several steps in the cause, consented to a continuance, and at a subsequent term went to trial without objection, make this motion? We think not. The declaration and other pleadings and proceedings in the cause must have been before the Du Page Court in some form, as all the proceedings of the Cook Court have been sent up in the record. If only copies were transmitted by the clerk to Cook to Du Page, it only amounted to an irregularity, which was waived by the defendant below appearing in Du Page and consenting to a continuance, and subsequently to a trial without objection. Doubtless at the first term of the Du Page court, if the defendant had objected to proceeding in the cause, without the original papers, it would have been the duty of the Court on the application of either party, to have giving a rule upon the clerk of the Cook court to send the original papers, and if the court had refused the rule, it would have been error. The facts in the case of Wright v. Kirkpatrick, 4 Scam. 340, where this court held, that the dismissal of the case because the papers were not properly sent from Jo Daviess county to Adams, were dissimilar in several respects. In that case it does not appear at whose instance and for whose benefit the change of venue took place. Nor does it appear, although the cause was continued on the docket for several terms, that the defendant had consented to these continuances or had even appeared in court until the term he moved to dismiss the cause. This court also intimate in that case, that Wight, the plaintiff, did not take any "step indicating an intention to proceed in trial of the cause." (*a*) The decision

(*a*) Holiday vs. People, 4 Gil. R. 113.

of the case at bar, does not therefore conflict with the case of Wight v. Kirkpatrick.

The second error is entirely technical. It appears from the record that plaintiff below demurred to the defendant's third amended plea, but to which the defendant did not join. It is now contended that this is error. If the defendant had joined in demurrer, so as to have formed an issue in law, perhaps this would have been fatal. The defendant, however, by neglecting to join in demurrer, has not placed himself in a position to make any objection. He was in default in not presenting an issue, which the court could decide. To suffer trivial defects in making up the pleadings, to be assigned for error in an appellate court, and thus recover judgments for which have been fairly tried and decided, does not comport with the ends of justice. What good object can be answered by reversing this judgment, and sending this case back for the court below to decide on a plea which this court sees must be held to be bad. The third plea only amounted to the general issue, and that plea being filed, the defendant under it, could give every thing in evidence that he could if issue had been joined on the third plea. The cases of Phillips v. Dana, 1 Scam. 493, and Waters v. Simpson, 2 Gilman, 570, sustain the positions here advanced.

3d. The transcript of the record in the trespass suit was correctly received in evidence. Before the plaintiff below could produce any evidence of malice; it was incumbent on him to prove by legal evidence the institution of the trespass suit, his arrest in that suit, and the subsequent termination of the cause. This proof could only be made by the production of the record or a transcript. If this transcript had been rejected, the foundation of the plaintiff's action would have been gone, and he would have been under the necessity of submitting to a non-suit.

If the transcript contained any matter not pertinent to the issue on trial the proper course would have been to have applied to the court below to have prevented the reading in evidence of the improper matter, or to instruct the jury to disregard it.

The fourth assignment of errors, questions the relevancy of the testimony in relation to Moffett's pecuniary circumstances. What use the plaintiffs below intended to make of this testimony, cannot readily be perceived. Malice, as well as want of probable cause, being the gist of the action, can in general only be made out by circumstances, and considerable latitude should be allowed in showing collateral circumstances that may be remotely connected with the transaction. In this case, however, the bill of exceptions does not profess to include all the testimony that was given on the trial. It is then possible, if not probable, that by other testimony not contained in the bill of exceptions, some pertinency may have been given to this testimony. As was suggested on the argument, it may have been proved, that Granger consented that Moffett's should be received as Warrington's special bail, notwithstanding Granger knew that Moffett was worth nothing. Such a circumstance, if proved, might have weighed with the jury in establishing malice. To exclude evidence from the jury because of irrelevancy, the irrelevancy must be clear. The law on this subjeci is well laid down in the Court of Appeals in Kentucky, reported in 1 A. K. Marsh. 3. That Court say: "There is no question, that in strict propriety, the parties should confine their evidence to the matters in issue, and that proof wholly foreign to such matters is inadmissible; but to sustain an objection merely on the ground that it is irrelevant, it ought to appear to be so beyond all doubt, for it is a settled rule in all cases where the competency of evidence is doubtful, to admit it to go to the jury, leaving them to determine as to the weight to which it shall be entitled, and this rule ought to apply with peculiar force to a case like the present, where the objection to the evidence is founded solely on its relevancy." As, then, this court cannot determine with certainty, that this testimony was irrelevant, we think the judgment below ought not to be reversed on account of its reception. (*a*)

The question raised by the fifth assignment of error is one of great importance in the administration of justice. The

(*a*) Ante 216.

rule of law applicable to confidental communications between client and attorney received a thorough investigation by the Supreme court of Massachusetts, in the case of Hatton v. Robinson, 14 Pickering, 420 and he gave both the rule and its limitations were correctly laid down in that case. Chief Justice Shaw, in delivering the opinion of the court, says: "The rule upon which the plaintiff's counsel in the present case replied, to exclude all that part of the testimony of Mr. Ames, which consisted of statements made to him by Winch, as to his views and motives in making the sale, upon which the plaintiff founds his title, is that well known rule of evidence, founded on the confidence which a client reposes in counsel, attorney or solicitor. By this rule, it is well established, that all confidential communications between attorney and client are not to be revealed at any period of time, nor in any action or proceeding between other persons, nor after relation of attorney and client has ceased. The privileges is that of the client, and never ceases unless voluntarily waived by the client." "But the privilege of exemption from testifying to facts actually known to the witness, is in contravention to the general rules of law; it is, therefore, to be watched with some strictness, and is not to be extended beyond the limits of that principal of policy upon which it is allowed. It is extended to no other persons than an advocate or legal adviser, and those persons whose intervention is strictly necessary to enable the client and attorney to communicate with each other, as an interpreter, agent, or attorney's clerk. And this privilege is confined to counsel, solicitors and attorneys, when applied to as such and when acting in that capacity." Wilson v. Rastell. 4 T. R. 753.

The same Judge, in the course of the same opinion, further says, in illustrating the doctrine, that "when the matter is communicated by the client to his attorney for purposes in no way connected with the object of the retainer and employment of the attorney as such, then the communication is not privileged." The Court also say: "The difference is,

whether the communications were made by the client to the attorney in confidence, as instructions for conducting his cause, or a mere gratis dictum."

It is apparent from the principles laid down in the case of Hatton v. Robinson, that to entitle communications between individuals to be considered as confidential and privileged, the relation of client and attorney must exist. The party must consult the attorney in a matter in which his private interest is concerned, and make his statements to him with a view to enable the attorney correctly to understand his cause, so that he may manage it with greater skill; or if legal advice only is wanted, to enable the attorney the better to counsel him as to his legal rights. (*a*)

Did, then, Granger employ Curtiss as an attorney, either to investigate a question of law, in which his private interests were concerned, or to commence or defend a suit in which he was a party? He clearly had no such object. He had no personal interest in the result at which Curtiss should arrive, and he did not expect to compensate him for his advice. Consequently the relation of client and attorney did not arise; and consequently the conversatien was not privileged from being disclosed by Curtiss as a witness. Granger can be considered in no other light than a witness on the part of the people, communicating to the law officer of the Government, his knowledge in relation to the commission of a supposed crime, and inquring of that officer whether the facts thus communicated amounted to an offence. We think that no considerations of public policy require, that the conversation between Granger and the State's attorney should be regarded as confidential and privileged. It would be an unnecessary extension of the rule in relation to confidential communications, and ought not, therefore, to be allowed, The evidence of Curtiss was, consequently, properly received.

Several authorities have been adduced in support of the sixth assignment of errors. In England, and in several of the States, grand jurors are sworn to observe secrecy as to all matters that appertain to their duty as grand jurors, and

(a) Gotra vs. Wolcott, 14 Ill. R. 90.

there would be a manifest impropriety, when the juror has taken his oath, to compel or permit a joror thus situated to be a witness as to any matter that was given in evidence before him in that capacity. In this State, however, no such oath is prescribed by law, and there seems to be no good reason why the members of a grand jury should not be called on to testify. In many cases that may readily be supposed, the members of the grand jury would be the only witness to prove facts that are necessary to be established, and without whose testimony there might be a failure of justice. In actions for maliciously procuring a party to be indicted, unless the members of the grand jury can be used as witnesses, the fact that the defendant was the prosecutor before the grand jury should not, in general, be proved. Unless the defendant had confessed that he was the prosecutor, the members of the grand jury are the only persons that can know the fact. Again, suppose, on the trial of a person for a crime, a witness should swear diametrically opposite to what he had testified before the grand jury, ought not the party to be permitted to call on members of the grand jury to prove this discrepancy, and thus show the witness to be unworthy of belief? The reason however, for not receiving the testimony of grand jurors in England and several of the States, not exisiting under our laws, we are clearly of opinion that the grand juror was a competent witness. [*a*]

In relation to the seventh assignment of errors, we perceive no good objection to the parol evidence of the contract of sale of the horse. The law is well settled, that parol evidence may be given of the contents of a lost writing, after the facts of the loss has been satisfactorily established. The affidavits of the loss were suffieient for that purpose. [*d*]

As the whole of the evidence is not stated to be contained in the bill of exceptions, this court has not the means of determining whether the court below should have granted a new trial. The refusal to grant a new trial cannot consequently be assigned for error. We are therefore, of opinion that the judgment below must be affirmed, with costs.

Judgment affirmed.

(*a*) Dormad vs. State Bauk, 2 Scam. R. 244.
(*b*) 1 Geenl. Ev. Sec. 252.

FREDERIC PEARL, appellant, v. HIRAM B. WELLMAN et al. appellees.

Appeal from Tazewell.

A levy on execution vests in the officer making it, a special property in the goods seized, for the purpose of a sale for the benefit of the judgment creditor. By such levy, the latter acquires a perfect lien, and his right to proceed further on his judgment, by prosecuting another suit thereon, or suing out another execution, is suspended until the levy is disposed of, and so far is considered as a satisfaction of the judgment. But it is different with a mere seizure of goods on a writ of attachment. In this case, the attaching creditor merely acquires an imperfect, incohate lien, which, when followed by a judgment, will have relation to the date of the levy.

A defendant, in order to plead successfully a seizure of his goods on attachment as a ground of defeating a suit upon a judgment rendered in such attachment, should show by his plea, that such goods are specifically bound by law for the satisfaction of that judgment and still held for that purpose by seizure on execution or otherwise.

In an action of debt upon a judgment, among other pleas, one of payment was interposed, to which tho plaintiff failed to reply: Held, that the defendant was entitled to a judgment on that plea.

DEBT upon a judgment recovered in the St Louis Court of Common Pleas, in the State of Missouri, brought in the Trazewell circuit court by the appellees against the appellant, and heard at the April term 1856, before tha Hon. Samuel H. Treat, without the intervention of a jury. A judgment was then rendered in favor of the plaintiffs for the sum of $851.55 debt, and 57.86 damages. From that judgment the defendant appealed.

The pleadings on the trial below are substantially recited in the opinion of the court.

H. O. Merriman, for the appellant.

There is no answer to the plea of nul tiel record. "Plaintiffs bring record," &c. is no assertion that there is such a record, nor any replication to plea of payment. There should have been a replication. Graham's Pr. 765 ; 1 Chitty's Pl. 619 ; 3 do. 1181 ; 6 Com. Dig. title "Pleader," 378. This defect is not cured by trial and verdict. A verdict

cures irregularities, but not a want of pleading, and canno help an immaterial issue; a fortiori, it cannot help where there is no issue at all. 6 Com. Dig 141, E. 38 ; 1 Chitty's Pl. 713, 721, 722. There was no trial of the plea of nul tiel record. The objections now made to third plea are

1. That it is a matter of abatement only;

2. That the plea professes to answer the whole, and in reality only answers but part of the declaration, in not saying that the property equalled in value the "debt, interest and costs;"

3. It does not show what are the laws of Missouri; and

4. It does not show its detention.

Neither of these objections are well taken.

1. It is not matter in abatement but in bar of the action. 1 Chitty's Pl. 506; 3 do. 994; Ladd v. Blunt, 4 Mass. 402; Green v. Burke, 23 Wend. 501. The plaintiff never had a cause of action on the judgment not due.

2. The plea does not answer the whole declaration.

3. The laws of Missouri are not in issue. The effect of a seizure under the judgment depends upon the common law, and the plea alleges that it was a process issued in the case in which judgment sued on was recovered. It admits, and plaintiff claims jurisdiction over the case, &c. The seizure is by virtue of the writ, and the writ explains itself.

4. It shows a sufficient detention. The levy is prima facie satisfaction, and if anything has destroyed the force of the levy, it should be shown by replication. Ex parte Lawrence, 4 Cowen, 417; 7 do. 21; Green v. Burke, 23 Wend. 501. Do the facts stated in the third plea amount to a defence? A levy under an execution upon personal property is a satisfaction to the extent of the value of the property seized. Why?

1. Because it is unknown how, for the judgment may be satisfied by sale of the property in custodia legis;

2. The sheriff acquires a special property in goods seized, and may maintain trespass, trover, &c. Ladd v. Blunt, 4 Mass. 402; Bayley v. French, 2 Pick 586; Greene v. Burke, 23 Wend. 499, 501; 14 do. 460; 3 Missouri, 353.

The dictum in Ladd v. Blunt is overruled.

Personal property seized under attachment is in custodia legis, subject to the judgment and the satisfaction of the debt, condemned in satisfaction by the judgment. The rights of the plaintiff and the property of the sheriff therein, after judgment at least, are the same in every respect, as if seized under execution, and the rights acquired relate back by operation of law, and the lien attaches from the date of the levy. Watson v. Todd, 5 Mass. 271 ; Vinton v. Bradford, Ib, 114, 116 ; Ladd v. North, 2 Pick. 514, 518 ; Fairfield v. Baldwin, 12 Pick. 388 ; Brownell v. Manchester, 1 do. 234 ; Badlam v. Tucker, Ib. 389 ; The People v. Cameron, 2 Gilm. 471 ; Martin v. Dryden, 1 do. 213.

The principle is true in whatever way the property is seized lawfully to pay debts. It extends to distress. Green v. Burke, 23 Wend. 501 ; Bradby on Distresses, 130 ; 1 Burrows, 417. There is no one principle applicable to levies under executions, that does not apply with equal force to a levy under an attachment, especially after judgment. The case in 5 Gill & Johns. 102, 109, seems to have been decided upon the principle that a suit upon the appeal bond might be prosecuted notwithstanding the levy, and regarded the conditions of the bond as forming an exception to the general rule. But a judgment cannot be sued on while the levy is pending. 23 Wend. before cited.

T. J. Littell, O. H. Browning & N. Bushnell, for the appellees. The following written argument was filed by N. Bushnell :

1. The record offered in evidence was properly authenticated. Ferguson v. Harwood, 2 Peters' Cond. R. 548.

2. The record offered in evidence is not preserved in the bill of exceptions, but only the certificates authenticating it. The court, then, have no means of determining whether the evidence did, or did not authorize the judgment rendered below. But as the record, though not preserved in the bill of exceptions, is copied into the record in this case I will add, that although the suit in St. Louis was by attachment, yet the defendant

was in fact personally served with process, and afterwards appeared in and defended the action. In such a case, the jungment in an attachment suit is personally binding on the defendant, and the record is conclusive evidence of the debt, in a suit upon it in another State. Mayhew v. Thatcher, 5 Peters' Cond. R. 34.

3. The third plea was bad, and the demurrer to it was properly sustained. The plea is a special plea of payment. The payment is made to consist in the fact, that property "worth the full amount" of the debt mentioned in the attachment writ was seized on that writ, and that the plaintiff had never returned the same to the defendant. It is difficult to ascertain on what principle the mere attachment of personal property, can amount to the payment of the debt on which it was attached. It is a mere incohate lien. It is for the time being in custodia legis. The sheriff or other officer who levies the writ acquires a special property in the goods, for the purpose of securing them to answer unto a future demand, which may or may not be perfected against it, but for no other purpose. (Watson v. Todd, 5 Mass. 271,) while the debtor retains his general property in the goods attached, which is not affected or changed until after a levy and sale on execution, [Blake v. Shaw., 7 do. 505 ;] and he may, if he can obtain peaceable possession of them, sell and deliver the same to a purchaser, [Fettyplace v. Dutch, 13 Pick. 388,] while the attaching creditor acquires no property in the goods whatever ; [Ladd v. North, 2 Mass. 514 ; Perley v. Foster, 9 do. 112 ;] nor does the creditor thereby acquire any right to the money to be derived from a sale of the attached properly. For the duty of the attaching officer is to keep the goods, not to sell them, and if he is ever authorized to sell, it must be in pursuance of some future order or process of the court made in pursuance of law. Whether any such order or process has been made or issued by such court in Missouri—whether in fact, by the Laws of Missouri, the attached property is to be specifically sold to satisfy the judgment in the suit, or whether there, as in many other states, the attachment is simply to secure the appearance of

the party, and judgment is renderedgenerally against the defendant, and to be satisfied out of his general effects, does not appear by this plea. If the lien of the plaintiff was perfected— if the plaintiff has the right and the power to sell the attached property on execution to satisfy that judgment, it was the duty of the defendant to have shown it, to bring the case within the principles applicable to the case of the levy of an execution, in which the execution creditor has a present unconditional right and power to have the property sold, and a present right to the money derivable from the sale, and these facts not appearing cannot be presumed to exist.

Whether a plea might not be drawn which would abate a suit founded on a judgment in attachment, till the goods attached were legally disposed of, is a question not now before the court.

The attachment in this case is not pleaded in abatement, nor as a temporary bar to this suit, but as a bar to any suit at any time, (1 Chitty's Pl. 481, 502,) as a full, perfect and absolute discharge of the judgment. And the real question is, whether the mere levy of an attachment, of itself, without more can amount to a payment. Whether a payment can arise from a transaction in which the debtor still retains the full ownership of the goods, and the creditor acquires no present interest, either in the property out of which the payment is said to issue, or in the proceeds of it. The statement of the proposition carries with it its own refutation. To call this payment, is to make words important, things of no consequence.

It is often said, that the levy of a fieri facias execution on goods sufficient to satisfy it, is a payment pro tanto, or in other words, suspends the right of action or of execution till the goods are disposed of. But I am not aware of any decision, which shows in what way the defence must be set up, nor the precise facts necessary to be averred in a plea to a suit on the judgment. But from the fact that all the cases show that it is a temporary defence only, an answer to a particular suit, and for a particular time, and not a bar to a suit generally, it comes clearly within the principle of

a plea in abatement, and not of a plea in bar, and as such, ought probably to be pleaded.

But what facts are essential to the validity of the plea in whatever pleaded? The mere levy of an attachment on goods, cannot of itself constitute a payment of the debt. This cannot be said even of the levy of an execution [Saccer v. Walker's Executors, 5 Gill. & Johns 102, 109; Green v. Burke, 23 Wend. 490,] a case much stronger than the instance of attachment, in which we have seen the debtor retain his property in the goods, while in the case of a levy of an execution, the lien being a perfect one, it is said that by this "lawful seizure, the debtor has lost his property in the goods;" [Ladd v. Blunt, 4 Mass. 402;] so that, admitting the seizure on attachment to be analagous to a seizure on execution, it does not make a payment, but merely suspends the right to sue; the principle is suspension, not payment. Of this, although there is a great want of precision in the books, in reference to this node of payment, quasi payment, and payment pro tanto, an attentive examination of the case will clearly demonstrate. Whether, then, at the time this suit was commenced, and to which time the plea must refer, the seizure of these goods should be held to suspend our right of action on the judgment, must depend upon whether they were still held in lawful custody, subject to the satisfaction of that judgment. For if the lawful seizure, in the first instance, orginated the bar or suspension of the right to sue, then the continuance of such bar or suspension must depend on the continuance of such lawful seizure. If from any legal cause the goods are no longer answerable in the suit in which they were attached there is no longer any just reason for a further prohibition against seeking other satisfaction of such judgment. The suspension of our right must then depend upon the fact, that at the time this suit was brought, the goods attached were still answerable in the former suit. The defendant who insists on this suspension, must, according to every principle of pleading, aver in his plea every fact necessary to show that our right to sue was in fact suspended, to wit that at the time this suit

was instituted, the goods attached were still legally held subject to the former judgment.

The counsel for the defendant seemed fully aware of this difficulty, and attempted to meet the difficulty by alleging, that the "plaintiff hath never returned the goods to the defendant." But because the plaintiff hath never returned the goods, does it follow that they remain still undisposed of and legally held subject to the judgment? It does not appear from the plea that they were lawfully attached—that they were ever legally subject to attachment. But admitting they were once in lawful custody, might not the officer in whose custody the goods were, and who alone could return them, have returned them, even if the plaintiff failed to do so? May not the property, though attached, have been taken from the custody of the attaching officer on a prior lien? May not the vendor, finding them attached, have exercised his undoubted right of stoppage in transitu? May not the property have perished by natural decay, without the fault of any one, and without the existence of any law authorizing the sale of it, to prevent such an occurrence—and the court cannot know what the law of Missouri is on this subject? May not the defendant even have obtained peaceable possession of the goods, and used them for his own benefit? Yet if any one of these things, or of many other suppositions which might be made, is true, then at the time this suit was commenced, the goods were not held subject to the judgment, the judgment was not paid, and there could be no pretence that our right of action was suspended. Every one of these facts may be true, and the facts stated in the defendant's plea be true also. As it is the part of the defendant to aver all facts which constitute his defence, these facts, and all other facts inconsistent with it, should be negatived in his plea. This should be done, not by a negative averment, denying every supposable fact inconsistent with his defence, but by an affirmative averment, that at the time this suit was brought, the goods were still undisposed of, and held subject to the judgment. This averment would negative every fact inconsistent with the main fact

constituting the defence—that our right of action was still suspended. It is an averment required on every principle of pleading, and the only direct authority I have been able to find on this point, sustaines the necessity of making it. Mountney v. Andrews, Croke Eliz. 237. That was on scire facias to revive the judgment. The plea was in substance, that the plaintiff had, by the former execution, levied upon certain goods and chattels of the defendant, and still detained them. If the fact that the detention of the goods constituted a necessary part of the defence in that case, it would be equally so in this. The principle of the two cases cannot well be distingushed.

So much then as to the point of the suspension of our right of action. If we are correct, then the plea in question is substantially defective, in not showing that the goods were still undisposed of, and held subject to the original judgment.

If a payment in fact is relied on, then it would be necessary for the same reason, and to show a complete bar, to aver that the goods had in fact been disposed of on that judgment, and that the proceeds were sufficient to pay the same. For whatever may be the value of the goods attached, the extent of the payment must depend, not on that value, but on the amount brought at the sale; and no payment in fact could possibly be made, till the goods were thus disposed of. For then only, could the creditor acquire a present right to money derivable from the sale, and in which alone the payment could be made. If, then, a payment in fact is insisted on, then the plea is substantially defective, in not averring the sale of the property and the amount of it.

There are several other minor, but equally fatal objections to the plea.

1. It is in form a plea to the whole declaration, but in fact answers but a part of it. One cannot but observe the studied language of the plea, to evade a full and direct reply to the plaintiffs' demand. The plaintiffs sue on a judgment, for $851.55, debt, and $500 damages. The substance of a plea of payment, whether general or special,

consists in a substantive averment, that the debt and damages in the plaintiff's declaration mentioned, are fully paid. Instead of this, however, the defendant simply avers a levy by attachment, on property equal in value to the sum specified in the writ, and which sum, as shown by the plea, was $813.28, that being the only sum specified therein. If the defendant, in his plea, intended to aver that the value of the attached property was equal to the "sum specified" in the writ, together with the interest and costs of suit, it would have been easy to make that averment, either by inserting those words in his plea, or by averring—what would be the usual averment for such a case—that the property was of value equal to the judgment sued on—by pleading to the demand now sued on the judgment, and not to the writ which was merely preliminary and incidental to that demand. The plea is hence equivocal and evasive ; in form, a plea to the whole action, it is, in substance, a plea to but part ; and to escape detection, the pleader has employed doubtful expressions, and given to the plea a vague and unusual form. It is a proper case for the application of the rule, that equivocal language shall always be taken most strongly against the pleader.

2. All the cases show that where an attachment or levy of execution on property is relied on as a defence, the averment must be that the property thus seized must be sufficient to satisfy the debt. (23 Wend. 490, and the numerous cases there cited.) Now, in this case there is no such averment. The only averment is, that the property was in value equal to the sum specified in the writ. The value of property has little to do with the amount it will bring on sale. If there has been a payment in this case, it is because property enough to pay the debt on sale has been seized and detained ; and if the property seized, whatever its value, was insufficient for this purpose, then a payment thereby was impossible. The business of making out the payment devolves on the defendant. That the property was in value only equal to the debt, is the strongest possible evidence that it would not have sold on execution for a sum equal to the debt. As the debt was to be paid by a sale, the averment should have shown, that the property was sufficient to pay the debt

in due course of law, by some apt term. The evasiveness and insufficiency of the plea in this particular is hence another and sufficient ground for sustaining the demurrer to it.

The opinion of the court was delivered by

THOMAS. J. This was an action of debt commenced in the Tazewell Circuit Court, by the appellees against the appellant, on a judgment of the Court of Common Pleas, of the county of St. Louis, in the State of Missouri.

The defendant pleaded,

I. Nul tiel record, to which the plaintiffs, by their attorney, say: "plaintiffs here bring record, &c. Jones."

II. Payment, to which there was no replication.

III. That said judgment was recovered (if at all) in a certain action by attachment, instituted in the St. Louis Court of Common Pleas, by the appellees against the appellant, in which said plaintiffs caused to be issued out of the office of the clerk of said Court, a certain writ of attachment, dated &c., directed to the sheriff of St. Louis county aforesaid, commanding him, among other things, to attach the said defendant, by all and singular his lands and tenements, goods and chattels, moneys, credits, and effects, or so much thereof as should be sufficient to secure the sum of $813.28, with interest and costs of suit, in whose hands the same might be, in his bailwick; and that under and by virtue of said writ, said sheriff did attach and levy upon certain property of said defendant, to wit, &c. and that said property so seized and levied upon as aforesaid, was then and there worth the full amount of the said sum specified in said writ of attachment; and that the same has not by said plaintiffs been restored to said defendant, and that said judgment in said declaration mentioned, was, if any such there be, recovered in said action, and the same is, in manner aforesaid, satisfied, &c.

To this plea the plaintiffs demurred generally. Their demurrer was sustained by the Court; and therefore a trial being had by the Court, a judgment was rendered for the

plaintiffs for $851.55 debt, and $54-86 damages, together with their costs.

That judgment the defendant brings in to this court by appeal, and asks its reversal for the following grounds assigned by him for error, to wit:

1. That the circuit court sustained the demurrer to the third plea.

2. That the record of the judgment of the St. Louis court of Common Pleas was admitted in evidence; the same not having been properly authenticated.

3. That the court rendered judgment against the defendant upon the evidence produced.

4. That judgment was rendered upon insufficient pleadings, there being no answer to defendant's first and second pleas.

The question involved in the first assignment of error is as to the validity of appellant's third plea, whether the facts therein alleged warranted its conclusion that the judgment sued on had been satisfied?

In support of the affirmation of this proposition, the appellant insists, that a seizure of goods on attachment stands on the same footing as if made by levy on execution, and consequently, that such seizure may be pleaded in bar of any suit upon a judgment rendered in such attachment. This position, however, is wholly untenable.

The difference in the operation of levies on execution and on attachment, is deducible, as a necessary result, from the difference in the nature and destined offices of the two writs. The one is final, the other mesne process; the one is "the life of law," and operative to put the creditor in possession of the fruits of his judgment, the other as a mere means of giving the court jurisdiction to proceed to judgment against the debtor or his property.

A levy on execution vests in the officer making it, a special property in the goods seized, for the purpose of a sale thereof, for the benefit of the judgment creditor, while it confers upon such creditor, a present unconditional right to have such sale made, to have the money derivable there-

from. By such levy, therefore, the plaintiff acquires a perfect lien. Hence the doctrine established by numerous decisions and recognized by this court, in Gregory v. Stark, 3 Scam. 612, that the levy of a fi. fa. on personal property will, until disposed of, suspend the plaintiff's right to proceed further on his judgment, either by prosecuting another suit, or suing out another execution, and that such levy will consequently be, for such purpose, considered as a satisfaction of the judgment.

But such cannot be the consequence of a mere seizure of goods on attachment. The attaching creditor thereby merely acquires an imperfect, inchoate lien, which, when followed by a judgment, will have relation back to the date of the levy. Martin v. Dryden, 1 Gillman, 213. The goods attached, for the time being, or in custodia legis, the officer levying the writ having a special property in them for the purpose of securing them to answer to a further demand, which may or may not be perfected against them, but for no other purpose. Watson v. Todd, 5 Mass. 271. While the debtor retains his general property in such goods, which is not affected or changed until after a levy and sale on execution. Blake v. Shaw, 7 do. 505. And he may if he can obtain peaceable possession thereof, sell and deliver them to the purchaser, as against every one except the attaching creditor. Fettyplace v. Dutch, 13 Pick. 388. And the attaching creditor has no property whatever in the goods. Ladd v. North, 2 Mass. 514; Perley v. Foster, 9 do. 112. Nor does the creditor thereby acquire any right to the money to be derived from a sale of the attached property, unless such sale be authorized by some further order or process of the court, made in pursuance of law. Until then, the duty of the officer is to keep the goods, not to sell them.

If the seizure of goods on attachment operated like a levy on execution, its effect would be to defeat the very object of its use, the rendition of a judgment against the debtor, or his goods. While relied upon as giving the court jurisdiction for the purpose of subjecting the goods attached to sale for the payment of the debt sued upon, the seizure of the goods might as a consequence of such doctrine be pleaded

as a payment of that very debt, and thus be made to defeat a judgment therefor. The statement of the proposition carries with it its own refutation.

This court, at its present term, has held that the pendency of a prior suit by attachment, on which goods have been seized, may not even be pleaded in abatement of a subsequent suit in personam, against the debtor for the same debt. Branigan v. Rose, ante, 123.

But the doctrine contended for is unsound for another reason. The reason of the doctrine established by the courts, that a levy on personal goods, by virtue of an execution, is operative to stay further proceedings, by suit or execution, until such levy is disposed of, is, that the further aid of legal process is uunecessary for the purpose of enforcing the rights of the creditor, until the operation of that already issued in his behalf shall have been exhausted. That to permit further process to issue under such circumstances, would be to make the process of the law not beneficial to the creditor, but vexatious and oppressive to the debtor. Consequently, a defence based upon the levy of an execution, must show it to be a subsisting levy when pleaded. Such is the doctrine held in the case of Mountney v. Andrews, Cro. Eliz. 237, to which all the cases on this subject go back. In that case, the language of the plea was, that "the sheriff hath taken divers sheep and yet detaineth them." And in the case of Gregory v. Stark, 3 Scam. 612, the validity of such a defence is admitted in cases where the levy is still subsisting, and the result of a sale has not proved the insufficiency of the property levied on to satisfy the judgment.

The mere allegation of a seizure of goods on attachment, shows no subsisting lein upon such goods when pleaded. The special property of the officer levying the writ may have been divested, and the plaintiff's inchoate lein defeated by many means after the seizure of the goods, and if so, there can be no good ground for refusing to the plaintiff the further aid of the courts and their process to enable him to enforce his rights ; therefore, a defendant relying upon a seizier of his goods on attachment, as a ground of defeating a suit upon the judgment rendered upon such attachment,

should in order to bring himself within the rule above stated, show by his plea, that such goods are specifically bound by law for the satisfaction of such judgment, and still held for that purpose, by seizure on execution or otherwise.

Upon the exhibition of such a state of facts, the defendant might, in such a case, well insist that the plaintiff's right of proceeding further against him should be suspended, until the execution of the remedy already progressed beyond its mere incipiency, by the seizure and detention of his goods. He would thus show a satisfaction sub modo; a temporary bar to judgment or execution whose extent would be limited by the result, ripening into a full and perfect satisfaction of the judgment, if the proceeds arising from the sale of the goods attached should be sufficient in amount for that purpose: if not, furnishing a satisfaction pro tanto, and leaving the plaintiff at liberty to perfect his remedy by further proceedings. Further than this we cannot go, but in this connection adopt the language of the Supreme Court of New York in the case of Green v. Burke 23 Wend. 490, that "there are so many ways invented by which goods may be got from the sheriff; some times by fraudulent claims, sometimes by prior leins, and even by his own negligence; that it behoves the courts to look into the rule now urged upon us as working by a sort ot magic, to cut a man off from his debt without the show or pretence of satisfaction."(*a*)

Tested by these principles, the plea under consideration will be found wholly defective in not showing, that by the laws of Missouri, the attached property was specifically liable to be sold for the satisfaction of the judgment to be obtained on the attachment, and that they were, when the plea was filed, still legally held for that purpose.(*b*)

For anything that appears from the plea the process of attachment may be used in Missouri simply for the purpose. of securing the appearance of the defendant; but if not, still the plea does not show a seizure by the sheriff, and he alone, and not the plaintiffs, had the custody of the goods, and could control their possession. Consequently, the allegation that the said goods have not been restored by the plaintiffs to the defendant does not exclude the conclusion that the sheriff

(*a*) Montgomery vs. Wayne, 14 Ill. R. 374; U. S. vs. Dashiel, 3 Wal. U. S. R. 699
(*b*) Yourt vs. Hopkins, 24 Ill. R. 326.

may have done so or that said goods, by some other means, had been discharged from the operation of the plaintiffs' lien, if they had any.

The Circuit Court did not err in holding the authentication of the record sued on sufficient, and admitting it in evidence, the defendant's objection to the contrary notwithstanding, as alleged by the second error assigned. That record, as appears by reference to the bill of exceptions taken on the trial, was proved by the attestation of the clerk of the court rendering the judgment, and the seal of the Court annexed, together with the certificate of the sole Judge of that court that the said certificate was made by the proper officer, that said attestation was in due form, &c. This was in strict compliance with the requisition of the Act of Congress in such case made and provided.

The ground on which the appellant bases his third assignment of error, to wit, that the evidence produced on the trial was insufficient to warrant the judgment rendered upon it, might, if true in point of fact, have constituted a sufficient reason for the granting of a new trial in the court below but in the shape in which it is now sought to be presented, is not examinable in this court. To have made it so, a motion should have been made in the Circuit Court for a new trial, and then such motion being overruled, the action of the court thereon might have been assigned for error, Barnes v. Barber, 1 Gilman, 401.

But this assignment, if inquirable into here is not sustained by the record. The bill of exceptions does not profess to exhibit all the evidence here on the trial, but nevertheless does show enough to warrant the rendition of the judgment of the Court now complained of.

The only question remaining to be disposed of, is one of pleading, and it is p erhaps to be regretted, that in determining it, as we must do, upon long established and well settled principles of law, the benfit growing out of the reversal of a judgment, appearing from the evidence in the cause to have a good and sufficient foundation in law and fact, should be made to enure to a defendant who is not shown by the record to have had any valid and sufficient

defence to the suit against him, if put upon his proof of such defence by the pleading of his adversary. But our province is to expound the law as we find it, and not to give to it an attribute of flexibility which it does not possess, for the purpose of varying results. Then, without an entire departure from the line of our duty, we cannot say otherwise than that one of the defects in pleading complained of in the fourth assignment of error does exist, and is such as imperatively to require a reversal of the jugdment.

This defect is not found in the replication to defendant's plea of nul tiel record. That is substantially sufficient. To such a plea the plaintiff should reply, "there is such a record," and conclude his replication "prout patet per recordum." 6 Com. Dig. title, "Pleader," 378; 1 Chitty's Pl. 619. The omission of such conclusion is cured by verdict, and will not affect the judgment. Rev. Stat., Ch. V.§ 9; 1 Chitty's Pl. 723.

But the defendant's plea of payment is wholly unanswered, and this defect is entirely incurable by and intendment of law.

It is not the case of a defect in matter of from, which is cured by verdict. 6 Com. Dig. 141. Nor of a party attempting to take advantage of his own defective pleading, which he may not be permitted to do. Ib. ; Waters v. Simpson, 2 Gilm. 577. Nor does it prevent the question sometimes assuming a doubtful aspect, as to the extent to which defects in an insufficient bar or replication will be cured by verdict; but the defendant interposes a plea which completely answering the declaration entitles him, if successful on if, to judgment in bar of the action. Dana v. Bryant, 1 Gilm. 104. As to this plea, there was no controversy. The matter set up by it not being denied, the defendant was entitled to judgment on it, and the court consequently erred, as well in proceeding to the trial of the remaining issue in the cause, as in rendering judgment against the defendant. For this error the judgment will be reversed with costs, and the cause remanded to the circuit court of Tazewell county for further proceedings on a venire de novo.

Judgment reversed.

ROBERT SANS, impleaded with John P. Jordan, plaintiff in error, v. THE PEOPLE OF THE STATE OF ILLINOIS, defendants in error.

Error to Scott.

A capias was issued against one indicted, and an order of court indorsed thereon directing the sheriff to take bail in the sum of one hundred dollars. An arrest was made, and a joint and several recognizance for his appearance, with surety under the penaty of fifty dollars, executed and delivered to the sheriff. The sheriff, perceiving that the penalty was not in compliance with the order of court, returned it to the principal, who changed it to the sum of one hundred dollars. A few days after, the sheriff, having the recognizance in his hand, saw the surety, informed him of the alteration, and asked him if he would stand on the bond as it was then, to which he replied in the affirmative, and that he would as soon be his security for one hundred as for fifty dollars. The principal not appearing as required by recognizance, the same was forfeited and a sci. fa. issued against him and his surety, which was served on the surety and returned nihil as to the principal. The surety pleaded non est factum, and verified the same by affidavit. The facts in regard to the alteration were proved at the trial. The court instructed the jury that " by the alteration, the bond was rendered void, but, in the opinion of the court, the subsequent assent of Sans, (the surety,) cured this defect and rendered him liable : Held, that the instruction was erroneous, the bond being rendered void by the alteration and a nullity, it could not be made valid by the subsequent assent of the surety.

The object of a sci. fa. on a recognizance is, to have execution according to the form, force and effect of the recognizance. Against the issuing of such execution, the party summoned may show for cause, that the principal in the recognizance has complied with its conditions, that the debt is paid, that there is no such record, &c. ; but he cannot be permitted by plea, or otherwise, to change its nature or effect. If the recognizance is joint and several, and a sci. fa. is issued against the several cognizors in proper form, is served on one or more, and the writ returned "nihil" as to the others, judgment may be rendered against those served, that execution issue against them and each of them according to the conditions of the recognizance.

The writ of sci. fa. upon recognizances was given by the Statute of Westminister 2, 13 Edw. 1, and this statute being adopted in this State, a return of two writs "nihil" upon a sci. fa. issued on such instruments, is equivalent to actual service, and will justify the award of execution against those of the cognizors who cannot be personally served with process. (*a*)

The doctrine laid down by this court in the case of McCourtie v. Davis, 2 Gilm. 298, which was a sci. fa. against a garnishee in attachment, is reaffirmed ; but the case of Alley v. The People, 1 Gilm. 109, so far as it conflicts with the doctrine of the present case, is overruled.

SCIRE FACIAS upon a joint and several recognizance, in the Scott circuit court. The cause was heard before the Hon. Samuel D. Lockwood, and a jury rendered a ver-

dict in favor of the People for penalty mentioned in the recognizance.

The evidence, pleadings and instructions are fully stated by the Court.

M. McConnnell, in support of the assignments of error, cited Alley v The People, 1 Gilm. 109-12; Rolle's Abr. 29(u) pl. 5; Dickens' case, 6 Cowen, 59, 60; Cleaton v. Chambliss, 6 Rand. 86; 1 Espinasse, 81; 5 T.R. 537.

D. B. Campbell, Attorney General, for the People.

A bond may be altered by consent of parties. 9 Cranch, 28; Dickens' case, 6 Cowen, 59.

The judgment against Sans was properly rendered, he having been served with the sci. fa., although Jordan was not served, or two returns of "nihil" as to him. 2 Pirtle's Dig. 315; Ibid. 366; 2 A. K. Marsh. 131; 4 Bibb, 181; 2 Littell, 286; 3 Blackf. 337; 1 do. 202.

H. Dusenbery, Circuit Attorney, filed the following brief:

1. It is insisted that the authorities referred to by the counsel for plaintiff in error do not apply to this case.

The Court below had jurisdiction, gave correct instructions to the jury, and properly entered the judgment against the party served. Rev. Stat. 413, § 2; United States v. Cushman, 2 Sumner, 310; Chinn v Commonwealth, 5 J J. Marsh. 29; Burd v. Colgan, 2 Littell, 284; Lucket v. Austin, 4 Bibb, 182; Madison v. Commonwealth, 2 A. K. Marsh. 131.

2. The plaintiff in error consented to the alteration made in the bond, and he cannot therefore take any advantage of such alteration.

A material alteration or interlineation does not render a bond void, if it be made by the consent of parties; whether the alteration or interlineation be made before or after execution, it is not avoided, and such consent may be proved by parol. Sparks v. United States, 9 Cranch, 23; Wolley v. Constant, 4 Johns. 54; S. P. Kerwin's case, 8 Cowen, 118 Camden Bank v Hall 2 Greenl. 583; Warring v. Williams, 8 Pick. 322; United States v. Adm'rs of Hilligas,

3 Wash. C. C. R. 70; Miller v. Steward, 9 Wheat. 680, 5 Peters' Cond. R. 727.

The opinion of the court was delivered by

PURPLE, J.* John P. Jordan was indicted at the May term 1845, of the Scott county circuit court, for obtaining money under false pretences. A capias was issued for his arrest, upon which the sheriff was directed to take bail in the sum of one hundred dollars, for his appearance at the succeeding term. Jordan was arrested, and applied to Robert Sans to become security for his appearance at court. A joint and several recognizance was drawn up, with a penalty of fifty dollars, and signed by Jordan and Sons, and delivered to the sheriff. Upon receiving it, the sheriff noticed that the penalty was not sufficient in amount as required by the order of the court. Whereupon, Jordan, as it appears, in the absence of Sans, altered the penalty, by striking out $50 and inserting $100. A few days after, the sheriff, having the bond or recognizance in his possession, and holding it in his hand, saw Sans, told him of the alteration, and asked him if he would stand upon the bond as it was then. To which Sans replied that he would; that he would as soon stand Jordan's security for $100 as $50.

At the October term succeeding, Jordan not appearing to answer to the indictment, his recognizance was forfeited, and a scire facias issued against him, and Sans, his security. Process was served on Sans, and returned nihil as to Jordan. Sans appeared, and pleaded non est factum, and verified his plea by affidavit. On trial, the facts before recited in relation to the alteration of the recognizance appeared in evidence.

The counsel for Sans requested the court to instruct the jury.

"That the alteration of the bond from $50 to $100, under the circumstances, rendered it void, and being a nullity, the subsequent verbal assent of Sans, as stated in the evidence, did not make it valid."

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* WILSON, C. J. and Justices LOCKWOOD and YOUNG did not sit in this case.

This instruction was refused, and the court instructed the jury that

"By the alteration, the bond was rendered void, but, in the opinion of the court, the subsequent assent of Sans cured this defect, and rendered the plaintiff liable." Sans excepted to the opinion of the court, and tendered his bill in the cause. The jury returned a verdict against the plaintiff, upon which judgment was rendered by the court.

The plaintiff now assigns for error the decision of the court in its instruction to the jury, the witholding of the instruction asked, and the rendition of the judgment against Sans alone upon a return of one nihil only against Jordan.

The question arising on the last point made will be first considered. It is deemed important to the public interest and espeically so to the due administration of criminal jurisprudence, that the law applicable to the writ of scire facias upon recognizances should be settled and understood. The writ is of ancient origin. As a common law process in real actions, it was much used prior to the thirteenth century and in the time of Edward I. during whose reign it was extended to several species of actions personal in their character.

As defined, it is a judical writ, founded upon some matter of record as judgments, recognizances and letters patent, on which it lies to vacate, set them aside or enforce their execution.

Although it is a judical writ, or writ of execution, yet it is so far in the nature of an original action, that it may be pleaded to by a defendant. 6 Bacon's Abr. 103. The same author on the succeeding page says, that "it has been doubted whether this writ lay at common law; but this doubt arose for want of distinguishing between personal and real actions. At common law, if after judgment given or recognizance acknowledged, (in personal actions,) the plaintiff sued out no execution within the year he was driven to his original upon the judgment, and the scire facias in personal actions was given by Statute of West. 2 13 Edw. I." The question directly presented by this record is, whether, when a scire

facias is issued against two upon a joint and several recognizance, execution can be awarded against one served, without personal service upon, or two returns of nihil as to the other,

In the case of McCourtie v. Davis, 2 Gilm. 298, the writ of scire facias for the appearance of a party to answer to a criminal charge is among those enumerated as being given by our statute. Upon mature reflection and examination we are satisfied that it is not thus given, but only its existence and the right to use it therein recognized. The language of the statute is, that "the bail for the appearance, &c., may, at any time before judgment is rendered upon scire facias to show cause why execution should not issue, &c., seize and surrender the principle in discharge of such recognizance ;" thus clearly indicating that the process and the right of the people to employ it in obtaining execution upon such recognizance is derived from some other source than this statutory enactment. The Common Law of England, so far as the same is applicable, and the Acts of the British Parliament made in aid thereof prior to the fourth year of the reign of James I., with certain specified exceptions, are the law of this State.

We have before shown, that the writ of scire facias in actions like the present was given by the Statute of West, and not by Common Law. This statute is made in aid of the Common Law, and is not one of the exceptions mentioned in our Act adopting the Common Law and Acts of the British Parliament made in aid thereof. It is applicable to our situation and condition, and so far at least as this question is concerned, is in force within this State. A recognizance, when forfeited, becomes a debt of record, having many of the attributes and qualities of a judgment of a court of record. In England, it had priority in point of payment and was a lien upon the lands of the cognizor. In this State, for the want of statutory regulations upon the subject, the law in these respects has been held otherwise. But even here it is the acknowledgment of a joint and several debt of record. Each of the several cognizors admits upon the record that he, separately as well as jointly with his co-obligors, is indebted

to the people of the State in the sum specified in the recognizance to be paid upon certain conditions therein expressed. What, then, is the object or office of the scire facias which issues upon such recognizance ? Not to permit the defendant to appear and defend himself by a denial of the existence of the debt which he has already admitted upon the record ; not that he shall allege that another who is not summoned has admitted the same debt in the same solemn manner against himself ; but to have execution, not in the manner used in ordinary cases of judgment at Common Law, but according to the form, force and effect of the recognizance. Against the issuing of such execution the party summoned may show for cause, that the principle in the recognizance has complied with its conditions ; that the debt is paid ; that there is no such record, &c.; but he cannot be permitted by plea or otherwise to change its nature or effect. By the record, to do this, he is estopped.

The authorities upon this point are numerous, consistent, uniform, universal. We have examined many and have not found an exception.

" In debt, the plaintiff may bring one action against all the persons bound in the recognizance ; or several actions against each. But one scire facias seems in all cases to be sufficient ; and the recognizance being joint and several, it is holden, that the execution may be several, though the scire facias was joint ; for the judgment is not to recover, but to have execution according to the recognizance. " 2 Tidd's Pr. 1099.

" If two persons acknowledge a recognizance jointly and severally, the conusee may sue out several writs of scire facias against the conusors. 2 Saunders, 71, note.

" If two acknowledge a recognizance of £100, jointly and severally, the conusee may sue several sci. fa. against the conusors upon this recognizance. " 6 Bac. Abr. 109.

These cases all make reference to Co. Litt, 292, and 2 Inst. 395, authorities which we have not been able to examine.

The case of Sainsbury v. Pringle, 10 Eng. Com. Law R. does not controvert the principle before laid down. In that

case the scire facias was against two jointly, as bail of a third person. The summons was joint, commanding them, not each of them, to appear and show cause, &c. One was served, and two returns of nihil made as to the others. The declaration, which by our statute is dispensed with, the scire facias being substituted therefor, was against the one served only. The court held, that the scire facias being joint, and not several in its terms, the declaration should be joint, and no proceeding could properly be had against one until all were brought into court. The decision, however, appears to have been made entirely upon the technical ground of the irregularity proceeding from the variance between the discriptive and mandatory parts of the scire facias, and the declaration.

All the American authorities which we have examined, lay down the law as settled, that where a scire facias upon a joint and several recognizance issues in proper form against the several cognizors, if one or more are served, and the writ is returned nihil as to the others, judgment may be rendered against those served, that execution issues against them, and each of them, according to the conditions of the recognizance. We shall only refer to some of the adjudicated cases, deeming it unnecessary particularly to review them. Madison v. Commonwealth, 2 A. K. Marsh. 131 ; Chinn v. Commonwealth, 4 Bibb ; Bruce v. Colegrove, 2 Littell, 284 ; Lucket v. Austin, 4 Bibb, 181 ; Fourlee v. Commonwealth, 4 Munroe, 128 ; Adair v. The State, 1 Blackf. 201 (*a*) These authorities being in point, and based upon sound legal principles and obvious distinctions, are decisive of this question.

We are, also, of opinion that inasmuch as the scire facias in cases like the present, is not given by our statute, and the statute of Westminster is by adoption in force in this State, that a return of two writs nihil upon a scire facias upon such recognizance is equivalent to actual service, and will justify the award of execution against those of the cognizors who cannot be personally served with process.

In the case of McCourtie v. Davis, which was a scire fa-

(*a*) Post 351-406- McFarlan vs. People, 13 Ill. R 14 ; Wheeler vs. People, 39 Ill. R. 432.

cias against a garnishee in attachment, for the reason that the statutes of our State have in several instances made use of the terms summons, scire facias, and scire facias in the nature of a summons, indiscriminately, without regard to the original sense and meaning of the words, in some cases plainly indicating that personal service was still required, in others leaving it doubtful and uncertain, and again in others showing that manifest injustice must ensue, and the grossest frauds be perpetrated, if personal service was not made upon defendants the court felt constrained to lay down a general rule relative to such process thus given and unknown to the common law, by which the spirit of the enactments might be preserved, and the disastrous and unjust consequences apprehended from an opposite one might be avoided.

We believed the rule established in that case the more equitable and just one, and the best which, under the circumstances, could be adopted. We are of that opinion still. But, upon reflection and careful consideration, we are convinced that the case of Alley v. The People, 1 Gilm. 109, so far as it conflicts with the principles here advanced, is not law, and the same to that extent is overruled. And the law is held to be, that where a scire facias issues upon a joint and several recognizance of this nature, and service is had upon one or more of the cognizors, execution may be awarded against those served with process upon a return of nihil against such as are not found; and, also, that in cases like the present, under the statute of Westminster before referred to, two returns of nihil upon writs of scire facias are equivalent to actual service on the party.

We have had considerable difficulty in arriving at a conclusion relative to the other question presented by this record. No authority expressly in point has been cited or found. It is settled by numerous cases, that where a blank is left in a deed at the time of its execution, and special authority is given to a third person to fill up the same at a subsequent period on ascertaining facts necessaryto enable him to do so according to the original understanding of the par-

ties, and also that where an alteration or interlineation is made in the presence of the parties and with their assent, the instrument will be valid.

Upon the question whether the consent or admission of the obligor in a bond, or grantor in a deed, given or made after an alteration or interlineation, will be binding, there seems to be much doubt and uncertainty from the decisions which have been made bearing upon it. I will briefly state some of the cases, and the principles decided upon both points.

In Decker's case, 6 Cowen, 59, one Baker recovered a judgment against Decker before a justice. Decker sought to appeal. A bond with a blank for a penalty was proposed, executed by Decker and a surety which was delivered to a subscribing witness with power to fill up the blank and make other alterations to render it valid according to the statute. The witness carried the bond to the justice, ascertained the amount of the judgment and filled up the bond. Afterwards and within the time for appealing, the witness, supposing the bond defective, added a clause obliging the obligors to pay the judgment before the justice, with the interest and costs. The court say: "Though the agent might have had power to correct the bond on its delivery,(a point on which it is not necessary to decide,) he certainly had no right to tamper with it in this way. He could not alter it again and again at his discretion. Such a general power cannot extend beyond the time of its delivery. Its force was spent on filling up the blank."(*a*)

In the case of Sparks v. United States, 3 Peters' Cond. R. 244, a bond after its execution was altered by striking out one obligor and inserting another by the consent of all the parties. This was held valid upon the ground that the alteration was made by the concurrence of all. To the same effect are the cases of Warring v. Williams, 8 Pick. 322, and Wolley v. Comstock, 4 Johns. 54.

In Kerwin's case, 8 Cowen, 118, one Polley appealed from the judgment of a justice. A bond in blank as to the recital of the judgment was prepared and signed by Polley and his surety.(*b*)The surety, by parol was authorized to fill

(*a*) Maus vs. Worthing, 3 Scam. R. 27; Smith vs. U. S. 2 Wal. U. S. R. 219.

(*b*) *contra* People vs. Organ, 27 Ill. R. 27.

up the blank and deliver the bond for both, which was done and the bond held to be obligatory upon both obligors.

In the case of Byers v. McClenahan, 6 Gill and Johns. 250, the defendant had executed a bond entirely in blank. It was filled up and afterwards shown to him, and he admitted his signature and did not deny that he would be bound by it. Held, that it was a valid bond.

"If the name of an obligor be signed without his authority, yet if he afterwards acknowledge the bond to be his, he will be bound." Hill v. Scales, 7 Yerger, 410.

The consent of an obligor to an alteration of a bond given after an alteration is made will not repel the plea of non est factum ; but if given before or at the time of the alteration, it will be considered as a re-execution." Cleaton v. Chambliss, 6 Rand. 86. (*a*)

The two last cases cited are only found in 1 U. S. Digest, the reports referred to not being within our reach for examination. From the brief statement therein made, they would seem to be in conflict. There is however, one general principle which runs through all the cases in relation to alterations and interlineations of a material character in all instruments under seal. And that is, that as to such of the parties thereto who have not, prior to or at the time, assented to the alteration or interlineation, the instrument is absolutely void. O'Neale v. Long, 2 Peters' Cond. R. 24 ; 4 Wash. C. C. R. 26 ; Warring v. Williams, 8 Pick. 322.[*b*]

The question, then in this case, is, shall that, which, in contemplation of law so far as the plaintiff in this record is concerned, was absolutely void and of no more efficacy than a sheet of blank paper without a signature, become valid and obligatory upon his subsequent parol assent that he would be bound by it as altered and amended ?

In determining questions of this sort, it is the duty of the court to look beyond the particular case under immediate consideration, to the consequences which must result from the workings of the general rule to be established. Probably, in this instance, no great injustice would be done by holding the plaintiff to the payment of this penalty. It is most likely

(*a*) Reed vs. Kemp, 16 Ill. R. 445 ; Vincent vs. People, 25 Ill. R. 502.

(*b*) Turrett vs. Wainwright, 4 Gil. R. 27.

although the alteration was not pointed out nor the bond read to him, that he fully understood its extent and character, and designed and intended to become liable thereon in case the principal failed to appear and answer to the charge preferred against him. But was it his deed? If, without any previous consultation with the plaintiff, the sheriff who took this bond had drawn it up, signed it with the plaintiff's name and attached his seal, and afterwards met the plaintiff in the street, informed him what he had done, and asked him if he would be bound by such act, and the plaintiff had consented, we apprehend it would scarcely be pretended that such an acknowledgment would have rendered the plaintifi liable upon the bond; or that any binding contract under seal or otherwise could be thus signed, sealed and delivered by parol. Wherein consists the difference between the supposed and the present case? In either, at the time the instrument is written it is void. It is not then the party's deed. Can it then become so by a bare acknowledgment of the supposed obligor that he is willing to be bound by it, and that, too, without any examination of its contents and conditions? The very thought is startling. Accustomed, as we have always been, to the idea that there was a deliberative solemnity about a written .contract under seal, we are naturally alarmed at the inroads which the progressive science of the law is continually making upon ancient and well established landmarks which have stood the test of ages and of time.

When the party to be charged consents at the time to the alteration, there is a mixture of consideration and deliberation in the act which gives evidence of his i ntention to make the deed his own. But an agreement to be responsible, after such alteration has been made, should not bind him unless the act of recognition should be of a character so unequivocal that no doubt could remain that in legal contemplation at least, there was a making and delivery of the deed. Delivery is essential to the validity of every instrument under seal. It is not indispensable that this should be done in person by the party singing it. It may be done by some person in his behalf, and in some cases even by legal implication.

But it must be done. When was this bond delivered? What has the plaintiff done, which, in contemplation of law, amounts to such an act? He had been informed that it had been altered that the penelty had been increased without his knowledge or consent, and upon such information he stated that he was still willing to be bound by it in its amended form. It was then void. In fact the plaintiff has neither signed, sealed or delivered it since, in person or by agent, nor, as we think, done any act equivalent thereto.

If, under the circumstances, we hold this bond obligatory, we know not where we could establish the boundary line between mere verbal, parol and written contracts under seal, and should be reduced to the necessity of permitting it to rest entirely in the recollection of witnesses, and not in the solemn act of the party to prove whether a written instrument was his deed or not. On the whole, we are of opinion that the plaintiff should have had judgment in his favor in this case upon his plea of non est factum, and that the court should have instructed the jury as requested by the plaintiff, and withheld the instruction given.

The judgment of the circuit court is reversed.

Judgment reversed.

SAME v. SAME.

Motion to quash a Fee Bill.

A judgment rendered in the circuit court against a surety in a recognizance was reversed in the Supreme Court and not remanded. The Clerk of the latter court issued a fee bill for his costs, and, among other items, a fee was charged for making a copy of the judgment, for the certificate and seal: Held, that as, under the circumstances of the case, it did not follow that the Opinion was to be copied and certified to the circuit court, the surety was not bound to pay for such copy and certificate, unless he require them to be made.

A plaintiff in error, in a cause where the People are defendants in error, who succeeds in reversing the judgment against him, is only responsible for the costs made by him in the prosecution of the writ of error.

MOTION to quash a fee bill issued for the costs of the Clerk of the Supreme court, in the foregoing cause. The

motion was made by the plaintiff in error, who had succeeded in the prosecution of his writ. The items of the entire bill are embodied in the opinion of the court. The fee bill was quashed and a re-taxation of the costs ordered.

M. McConnell, for the plaintiff in error.

D. B. Campbell, Attorney General, for the People.

The opinion of the court was delivered by

TREAT, J.* A judgment was rendered in the circuit court against Sans on a recognizance for the appearance of one Jordan to answer to a criminal charge. On a writ of error the judgment was reversed. The clerk of this court has taxed the following items of costs against Sans and issued a fee bill for the collection thereof:

No. 1. Filing transcript 20 cents, docketing cause 12½ cents, 32½
No. 2. Writ of error made supersedeas 1.00, filing same 6¼. 1.06¼
No. 3. Scrie facias and seal 1.00, filing 6¼, 1.06¼
No. 4. Supersedeas and seal 1.00, filing same 6¼, 1.06¼
No. 5. Filing assignment of errors 6¼ 6¼
No. 6. Entering joinder in error 25, filing joinder in error 6¼ 31½
No. 7. Filing abstracts, 10 copies 62½; making copies thereof, 60 folio, 9.62½
No. 8. Entering argument 25, entering submission 25, order taking time 25, 75
No. 9. Entering judgment and opinion, 60 folio, 10.80
No. 10. Making copy thereof 9.00, certificate and seal 50, 9.50
No. 11. Making fee bill 37½, making copy thereof 25, cert. and seal 50, 1.12½
No. 12. Entering sheriff's return 25, entering satisfaction 25, postage 20, 70

A motion is now made by Sans to quash the fee bill, on

*DENNING, J. did not hear the motion, &c.

the ground that he is not liable for the payment of the costs charged. According to the decision of this court in the case of Carpenter v. The People,(a)he is responsible for all the costs made by him in the prosecution of the writ of error. The court is of the opinion that all of the charges in the fee bill, but the sixth and tenth items, are properly taxable against Sans. The services contained in the sixth charge were performed on the part of the People, and Sans is not bound to pay for them. The tenth item is not taxable against Sans unless he require the clerk to perform the services. The cause was not remanded, and it does not follow that the opinion of this court is to be copied and certified to the circuit court. If Sans require this to be done he will then be bound to pay for it. The eleventh and twelfth items are properly included in the bill of costs, but are not to be collected unless the services are actually rendered.

The fee bill will be quashed, and re-taxation of the costs ordered.

Fee bill quashed.

ELI HENDERSON, appellant, v. DAVID WELCH, appellee.

Appeal from McHenry.

The equitable assignee of a chose in action may sue upon it in the name of the party having the legal title; but he is bound to indemnify such part against the payment of costs.

A suit was brought in the name of A. for the use of B. against C. and D. C. only was served with process, and the suit being dismissed, judgment was rendered for costs in favor of C. which A. paid. A. sued B. in assumpsit for money paid. On the trial, a fee bill was introduced and an execution against A. for the costs adjudging C. and D. both returned satisfied. A. then proved by the sheriff that the costs were paid by A. Judgment was accordingly rendered in his favor: Held, that the evidence clearly established the fact of his having discharged the liability, though the execution did not technically pursue the judgment

ASSUMPSIT in the McHenry circuit court, brought by the appellee against the appellant, and heard before the Hon. Richard M. Young, without the intervention of a jury, at the November term 1846, when a judgment was rendered

(a) Ante 147.

in favor of the plaintiff below for $95.24. The defendant appealed from this judgment.

A. Lincoln, for the appellant, argued the case in this court, and cited 2 Comyn on Cont. 142; 1 U. S. Dig. 281, § ?25; Ibid. 283, § 251; 12 Mass. 11; 3 Har. & Johns. 57; 9 do. 548; 2 Wend. 481; 1 Greenl. 76; 7 Wend. 284; 2 Starkie's Ev. 58; 8 Johns. 249; 8 Wend. 112.

I. G. Wilson, on the same side, filed the following brief:

In an action for money paid, there should appear either 1st, a request, or 2d, a legal compulsion to pay.

Here there was no request shown. Then, does the record show that Welch has been compelled to pay any money for the use of Henderson?

1. The execution relied on by plaintiff below was in favor of Samuel Shaw and Daniel Shaw, against David Welch. It is to be presumed that the clerk did his duty correctly, and that such a suit as described in the execution existed in he Du Page Circuit Court. Surely this execution contains no evidence of money paid for the use of Henderson. The record introduced by plaintiff below showed a judgment in favor of Samual Shaw v. David Welch & Eli Henderson. This judgment does not aid the execution. Both of the parties are different. Suppose the plaintiff below had introduced an execution in favor of John Doe and Richard Roe against himself, it would certainly be no evidence of money paid by him for the use of Henderson.

2 The plaintiff below failed to introduce with his execution, a bill of the costs. This was necessary in order to have made out his cause. The statute provides, Rev. Stat. 249, § 26, "that none of the above fees (including clerks, sheriffs, &c.) shall be payable until a bill of the same shall have been presented to the person chargeable with the same, stating the particulars of the said bill," &c. The defendant had a right to insist on the production of this bill in order that he might know with what he was charged. The plaintiff below was not compelled to pay without this bill, and if he did make payment it was voluntary, and he can not, in such case, recover.

E. E. Harvey, I. N. Arnold, A. T. Bledsoe, for the appellee.

The opinion of the court was delivered by

TREAT, J. This suit was commenced in the McHenry Circuit Court by Welch against Henderson. The declaration was for money paid; the plea non assumpsit. On the trial before the court, the plaintiff read in evidence the record of the proceedings had in a cause in the Du Page Circuit Court, which Welch for the use of Henderson was plaintiff, and Samuel and Daniel Shaw were defendants, showing that Samuel Shaw only was served with process, and that the suit was finally dismissed, and a judgment entered that Samuel Shaw recover of Welch and also Henderson his costs, and that he have execution therefor. He then introduced a fee bill against Welch for the costs made by the plaintiff, amounting to $14.87½ and an execution against Welch for the costs adjudged to Samuel and Daniel Shaw, both of which were returned satisfied. He then proved by the sheriff that the same were paid by Welch. The defendant objected to all of this testimony. The court found the issue for the plaintiff and assessed his damagesat $95.24, the amount of the fee bill and execution, and the interest thereon from the time of paymemt. The court overruled a motion for a new trial, and rendered a judgment on the finding. Henderson prosecuted an appeal to this court.

The equitable assignee of a chose in action may sue upon it in the name of the party having the legal title but he is bound to indemnify such party against the payment of costs. Here, the former action was in assumpsit and no doubt founded on a chose in action, the legal interest in which was vested in Welch. Henderson having the beneficial interest only had to sue in the name of Welch, who thereby became the plaintiff on the record, and as such, liable in the first instance for the costs. The action failing, the whole of the costs were adjudged against him. If he has paid them he has a clear cause of action against Henderson for so much money paid for his use. The production of the judgment showed the liability of Welch to pay cost incurred for the

benefit of Henderson. The only question is, did the evidence establish the fact that he had discharged the liability. Of this there can be no reasonable doubt. The execution does not technically pursue the judgment, but enough appears on its face to warrant the presumption, that it was issued on the identical judgment. It issued out of the same court, on a judgment rendered at the same term, and in a case between the same parties. The only discrepancy between the judgment and execution, consists in the recital in the latter, that the costs were adjudged to the Shaws, when in fact the judgment was in favor of but one of them, although both of them were defendants. The variance was not material for the purposes of this case. The execution was only collaterally in question. It was introduced merely to prove the fact of payment, and not as a foundation to uphold rights acquired under it.

The judgment of the circuit court is affirmed with costs.

Judgment affirmed.

THOMAS BRYANT et al. plaintiffs in error, v. GILES DANA, defendant in error.

Error to Peoria.

Where a sheriff returns an execution without having made a levy, his authority is at an end. But if he has made a levy during the life time of the execution, he has the right to sell the property, or receive payment of the judgment afterwards, notwithstanding he has in the mean time returned the process.

An equitable assignee of a judgment has the right to sue a sheriff in the name of him who has the legal interest therein to enforce a liability incurred by such sheriff.

The Circuit Court may in their discertion, allow or refuse an application for leave to file additional pleas and the exercise of that discertion cannot be assigned for error.

A levy by a sheriff, or a payment of money to him, may be shown by parol testimony.

THIS was the case of an application made in the Peoria Circuit Court, by the defendant in error, under the statute, for an assessment of damages in his favor against the plaintiff in error,

Bryant, the former sheriff of Peoria county, and his securities, for official neglect, &c. The substance of this application and the various proceedings thereon will appear in the opinion of the court. The jury assessed the damages at $576.74, when the defendants moved for a new trial, which motion was overruled, and judgment rendered as stated in the opinion.

C. Ballance, for the plaintiffs in error, relied on the following points and authorities :

1. If either of defendants' pleas was bad, the demurrer thereto ought to have reached the declaration, or complaint which occupies the place of a declaration. It is entitled, and the suit is carried on in the name of Dana, whereas, by plaintiff's own showing, it is only an additional proceeding in the case of the People v Bryant. The second plea denies the reception of the money on the execution by Bryant, in his capacity of sheriff. This will be important on motion for a new trial.

2. Although, in general, the defendant cannot as a matter of right file additional pleas after the issues have been made, this case is an exception, and after plaintiff had been permitted to file a new replication, the defendants ought to have been permitted to file a new plea.

3. The fourth plea ought to have been sustained. This case is distinguishable from Dana v. Philips, 3 Scam. 552. There, the proceedings show that the sheriff had the execution, and received the money on it. Here, it is alleged that the clerk would not let him have it.

4. If the sixth plea is true, ought not plaintiff to have replied, showing his right, notwithstanding, to receive and receipt for the money?

A new trial ought to have been granted, because there was no legal evidence to sustain either the issue on the second or fifth plea- The declaration, or that which occupies the place of a declaration, states the existence of the facts, " as by said writs of fieri facias and the returns and indorsements thereon, on file in said court, will more fully appear. "

Then these documents alone should have been resorted to prove the facts. The return, on plaintiff's motion, had been quashed, and was no evidence of the existence of any fact at the time of the trial. In the case above referred to, the court decide: "It is the duty of the officer, when once he has made the levy, no matter what becomes of the execution, to go on with the sale," &c. But here there was no legal evidence of the levy. That which once had been a levy had ceased to exist, and that by the act of the plaintiff.

Oral proof cannot be substituted for any instruments which the law requires to be in writing. 1 Greenl. Ev. 102.

Certificate of clerk, being sworn, cannot be supplied by parol. Commonwealth v. Sherman, 5 Pick. 239; see, also, 4 do. 66; Tripp v. Garey, 7 do. 266; Gifford v. Woodgate, 11 East, 297; 2 Duer's Pr. 295.

H. O. Merriman, on the same side, in continuation.

1. The whole record relating to the subject matter should be produced, so that the court can see if the same is not set aside. 7 Com. Dig. 427; 1 Phillips' Ev. 219; Creswell v. Byrne, 9 Johns. 287.

2. If set aside it is a nullity, and does not support the allegation in the declaration, and the plaintiff below has no rights under it. 2 Duer's Pr. 295; 3 Johns. 523; 15 East, 614, note c; 3 Wilson, 345; 2 do. 385; 1 Strange, 509.

The plaintiff below seeks to recover on the force of the levy only; otherwise the plaintiff has no right to receive the money. Phillips v. Dana, 3 Scam. 537.

The return of the levy, &c. having been quashed, it is the same as if it had never been made. 2 Bac. Abr. 740, supported by 1 Strange, 509; 3 Johns. 323, and 15 East, 614.

E. N. Powell, for the defendant in error.

It is sufficient if the substance of the issue be proved. 1 Greenl. Ev. § 56.

Where the record mentioned in the pleadings is mere inducement, and not the gist of the action, then a variance

between the allegation and the proof is immaterial. Ibid. § § 51, 70.

Secondary evidence, when allowed. Ib. § 90.

Mere matter of evidence need not be stated in pleading. 1 Chitty's Pl. 258.

When a profert, or an excuse for the omission was unnecessary, the statement of it will be considered as surplusage. 1 Chitty's Pl. 399. And if made, Ib.; Stephen's Pl. 437-8-9.

Now, if the return of the levy was quashed, it no longer was in existence, and parol evidence was properly received. 1 Greenl. Ev. 102, § 86.

The opinion of the court was delivered by

Treat, J. Giles C. Dana filed an application in the Peoria circuit court, alleging, in substance, that at the October term 1839 of said court, the people of the State of Illinois, for the use of Peoria county, recovered a judgment against Thomas Bryant, Charles Ballance, Augustus O. Garrett, John C. Caldwell, and Luther Sears, upon the official bond of said Bryant as sheriff of Peoria county, for the sum of $10,000 debt, the penalty of the bond, and $470.30 damages, by reason of certain breaches thereof, as by reference to the record of said judgment will more fully appear; that he has sustained damages to the amount of $700, by reason of the neglect of said Bryant to perform the duties of the office of sheriff, and prays for a writ of inquiry on said judgment to assess the same; and he suggests, as a particular breach of said bond, that on the 23d of May, 1838, he recovered a judgment in said court against Thomas Phillips for $373.60 damages, and $20.82 costs; that, on the 18th of March, 1839, an execution was issued thereon and delivered to said Bryant, as sheriff, to be executed, and that said Bryant, on 16th of June, 1839, received in part satisfaction thereof the sum of $5, and, on the 18th of the same month, returned the execution with an indorsement of such payment; that, on the 18th of September, 1839,

an alias execution was issued on the judgment and delivered to said Bryant, as sheriff, to be executed, and that, on the 17th of December, 1839, he levied the same on certain lands, and on the following day received from said Phillips the whole amount of the execution, interest and costs, as by said executions and the returns and indorsements thereon will fully appear. The defendants in the judgment appeared and pleaded six pleas. The first denies that an execution was issued on the judgment against Phillips on the 18th of March, 1839, directed to the sheriff of Peoria county to be executed. The second denies that Bryant, as sheriff, received on the 18th of December, 1839, the amount of the alias execution. The third alleges that the money was paid to Bryant after the expiration of ninety days from the issuance of the execution, and after the execution had been returned to the clerk's office and filed among the records thereof. The fourth alleges, that on the 18th of December, 1839, the execution had been returned to the clerk's office and filed among the records of the court, and that the clerk refused to let Bryant have it to receive the money on. The fifth alleges that the money was received by Bryant without legal authority, and was not received by him as sheriff. The sixth alleges that Dana had no interest in the subject matter of the suit, and that it was commenced without his knowledge or consent. The first, second and fifth pleas concluded to the country, and issues were joined thereon. The court sustained demurrer to the third, fourth, and sixth pleas. At a subsequent term, the defendants asked leave to file additional pleas, which the court denied.

On the trial before a jury, the plaintiff, after introducing the judgment and executions against Phillips, offered in evidence the sheriff's indorsements on the alias execution, which showed a levy on land on the 17th of December, 1839, and a payment of the amount of the judgment, interest and costs on the following day; to the reading of which indorsements the defendants objected, and produced an order of the Peoria circuit court, entered at a previous term, showing that the sheriff's return on the alias execution was

quashed at the instance of the plaintiff; and the court thereupon sustained the objection. The plaintiff then proved by the duputy of Bryant, that the levy was made as stated in the plaintiff's motion; and by other witnesses that the money was paid as stated in the motion, but not until the day after the execution was returned to the clerk and filed in his office. The defendants objected to the introduction of this testimony.

The jury found the issues for the plaintiff, and assessed his damages at $576.74. The court overruled a motion for a new trial, and a judgment was entered that the plaintiff recover of the defendants the amount of the verdict and costs, and that execution issue therefor on the original judgment against them. They prosecute a writ of error. The several decisions of the circuit court, sustaining the demurrers to the pleas, refusing the motion to file additional pleas, admitting the evidence respecting the levy of the execution and the payment of the money to the sheriff, and denying the motion for a new trial, are assigned for error, and will be considered in their order.

The third and fourth pleas are intended to present the same defence and may be disposed of together. These pleas are framed on the erroneous supposition that a sheriff has no authority to receive money in satisfaction of a judgment, after he has returned the execution to the office from whence it issued. This position may be true of some cases, but is not of all. Where the sheriff returns an execution without having made a levy, his authority is at an end; but if he has made a levy during the lifetime of the execution, he has the right to sell the property or receive payment of the judgment afterwards, notwithstanding he has in the meantime returned the process. These pleas are defective in not negativing the fact that a levy may have been made by the sheriff during vitality of the execution. The precise defence sought to be interposed by these pleas was before this court in a case between the parties to the execution, and it was determined that the payment to the sheriff after the return of the execution, was a good satisfaction of the judgment. It is useless now to discuss the question. Phil-

lips v. Dana, 3 Scam. 541. The sixth plea is clearly bad. It is a matter of no importance whether the plaintiff had any substantial interests in the subject matter of this proceeding, or whether it was commenced with his knowledge, or by his consent. It is sufficient if he had the legal interests. Of this the record affords conclusive proof. He was the plaintiff in the judgment against Phillips, and the cause of action against the sheriff must be prosecuted in his name. If he has parted with the beneficial interests, the equitable assignee has the undoubted right to sue in his name to enforce the liability. The cases of Mc Henry v. Ridgely, 2 Scam. 309, and Chadsey v. Lewis, 1 Gilm. 153, are expressly in point.

It was insisted on the argument that the plaintiff's motion was insufficient, and therefore, that the demurrers should have been carried back and sustained to it. In the opinion of the court, the motion shows on its face a proper case for an assessment of damages on the original judgment against the sheriff and his securities.

The refusal of the court to permit additional pleas to be filed cannot be assigned for error. The circuit courts may in their discretion, allow or refuse such applications. The exercise of that discretion cannot be reviewed here.

The decision of the court admitting the parol testimony was not erroneous. So far as this case is concerned, the only effect of the quashing of the sheriff's return was to prevent the plaintiff from proving the levy and receipt of the money by the sheriff, by his indorsements on the execution. It left the matter in the same condition as if no such indorsements had been made. The plaintiff in his suggestion of breaches alleged that these facts appeared by the return, and perhaps he might have been compelled to establish them in that way, if the defendants had put the allegation in issue. This they did not do. The first plea only relates to the first execution. The second and fifth pleas only put in issue the receipt of the money by Bryant as sheriff, thus leaving the plaintiff to prove the payment by any legitimate testimony. A levy by a sheriff, or a payment of money to him, may be

shown by parol evidence. Suppose a sheriff should receive full payment of an execution, and should fail to make an indorsement thereof on the process, would the plaintiff in seeking to charge that officer with the receipt of it, or the defendant in attempting to set it up as a satisfaction of the judgment, be precluded from showing it by parol. The proposition is too plain to need elucidation. Or, suppose the sheriff had made a levy on land and had sold and conveyed the same, would the title of the purchaser be defeated because the officer had omitted to make an indorsement on the execution of the levy and sale ? The law is equally clear that it would not. (*a*)

The last error is not otherwise relied on than for the purpose of presenting the question already disposed of. The whole of the evidence is not reported. The proceeding was properly commenced and carried on in the name of Dana as the plaintiff. The final order, that the payment of his damages should be enforced by issuing execution on the original judgment, was correct.

The judgment of the circuit court is affirmed with costs.

Judgment affirmed.

(*a*) Phillips vs. Coffee, 17 Ill. R. and notes.

GEORGE CRISMAN et al., plaintiffs in error, v. THE PEOPLE OF THE STATE OF ILLINOIS, defendants in error.

Error to Morgan.

A recognizance was entered into the Morgan circuit court, which was subsequently forfeited by reason of the default of the principal to appear as required. A sci. fa. was issued from that court to Scott county, and there served on three of the sureties. They appeared in court, and, by their counsel, objecting to its jurisdiction, moved to quash the sci. fa. because it was issued without legal authority and contained no averment that the cause of action accrued in Morgan county : Held, that the court had full power to issue its process to any county in the State where the defendants, or any of them resided, or might be found ; held, also, that the rule is universal, that recognizances must be prosecuted in the court in which they are taken or acknowledged, or to which they are by law returned; held, further, that where a recognizance is joint and several, the sci. fa. upon it, is in the nature of a several process against each, having for its object the procurement of an execution according to the force and effect of the recognizance.

A scire facias upon a recognizance is not the commencement of a suit, within the meaning of the Practice Act prohibiting suits from being brought out of the county where the cognizors may reside ; but it is a judicial writ to have execution upon a debt of record.

SCIRE FACIAS upon a joint and several recognizance entered into in the Morgan circuit court, &c. issued to Scott county, and there served upon three of the several sureties therein. Those served with process appeared before the said court at the May term, 1846, the Hon. Samuel D. Lockwood presiding, and by counsel, moved to quash the writ because it contained no sufficient averment to give the court jurisdiction of the cause, &c. The motion was overruled, the defendants' default entered, and judgment accordingly.

M. McConnell, for the plaintiffs in error.

1. Has the court power to issue writs of scire facias upon recognizances of bail at all ?

This is not a common law power. By the common law this writ could issue only in real actions and in proceedings in rem. 6 Bac. Abr. 105, 108 ; McCourtie v. Davis, 1 Gilm. 191 205. If this be the rule of the common law, all the

rules referred to in the English law books as governing writs of scire facias were rules prescribed by Acts of Parliament. Has the statute of Illinois provided for this writ in a case like the present? The only section of law is in the Revised statutes, 187, § 196.

II. If the circuit court had power to issue this writ at all, where is the power to issue it to a foreign county? The statute only confers jurisdiction upon the circuit courts within their counties. Rev. Stat. 146, § 29. Why was it necessary to pass an express law giving the Sangamon circuit court jurisdiction over civil causes in favor of the People or the state, if the circuit courts had that power without that law. Ib. §§ 51, 60-64. Why was it necessary to pass the 194th section authorizing the issuing of executions to foreign counties if the circuit court had such power without that section. The first section expressly directs that the first process shall be directed to the county where the court sits. Ib. 413. The second section of the same Act provides, that it may issue to a foreign county in certain cases, but this is not one of them, not coming within its provisions. If the scire facias stands for a declaration, it has not the necessary averments giving the court jurisdiction. This is a civil action and the people occupy the place of plaintiff; but where is the county of this plaintiff under the provisions of that section? The cases decided in this court under that section, and in relation to confining the circuit courts to their counties will be found in Key v. Collins, 1 Scam 403; Van Horn v. Johnston, 2 do. 2; Shepherd v. Ogden, Ib. 260; Clark v. Harkness, 1 do. 56. Cases in other states tending to shed light upon this subject are numerous. 2 Bibb, 570; 2 Littell, 156; 6 J. J. Marsh. 578; 1 Richardson, 308; Walker v. Hood's Ex'rs, 5 Blackf. 266–7.

III. Suppose the court had power to issue the writ of scire facias, and also had power to issue it to a foreign county yet it was error to r nder a judgment against three out of five of the defendants, and at the first term without making the principal also a party. Alley v. The people, 1 Gilm 109; 2 Duer's Pr. 41, note 82; Graham's do. 433–4; 2 Tidd's do.

1124 ; 1 East, side page, 89, note 6 ; 6 Bac. Abr. 121 ; 3 A. K. Marsh. 641.

IV. This judgment is upon a scire facias against five persons, founded upon a recognizance against five persons, which recognizance is in the nature of a judgment, and the object of the suit is to have execution upon that judgment. Now, must not this execution be against all the defendants in that judgment, or against one only? Can a plaintiff have an execution against three of five defendants? If he has a judgment against five, must he not revive it against all, or only against one? 6 Bac. Abr. side page, 109.

V. There is no principle better settled, than the plaintiff upon a scire facias cannot recover costs or interest, unless there is an express statute authorizing it. In this case judgment was rendered for cost against the defendants. 6 Bac. Abr. side page, 103. The eleventh section of the Act in relation to cost, [Rev. Stat. 127,] gives cost in such cases, where plea was pleaded or demurrer joined thereon, if judgment be rendered against defendant. But here no plea was pleaded or demurrer filed and joined.

J. W. Evans, on the same side, cited 1 Tidd's Pr. 253, side page ; Idid, 1323 ; 6 Bac. Abr. 121 ; Alley v. The People 1 Gilm. 112; White v. Thomas, Bre. 43 ; Cox v. McFerron, Ib. 10 ; State v. Humphreys, 4 Blackf, 535.

D. B. Campbell, Attorney General, for the People.

The sci. fa. could be sent to another county. Rev. Stat. 413.

A sci. fa. can only issue from the court in whose possession the record is. 9 Mass. 520 ; 7 do. 343.

A sci. fa. must be directed to the county where the cognizor resides. 2 Pirtle's Dig. 370 ; 3 J. J. Marsh. 642.

Judgment can be rendered by default when defendant fails to plead. Bre. 43.

Judgment can be rendered against one security on sci. fa. without the other being served, or two returns of "nihil."

1 Gilm. 109 ; 2 Tidd's Pr. 1091–2 ; 1 Blackf. 202 ; 3 do., 337 ; 2 Pirtle's Dig. 318, 366.

H. Dusenbury, Circuit Attorney, filed the following brief :

It is insisted that the bond upon which the sci. fa. was issued against the plaintiffs in error was joint and several, and is not like the cases cited by the counsel for the plaintiffs in error.

The court below had jurisdiction, and the record shows no error. The sci. fa. could only issue from the court where it was a matter of record ; there the cause of action arose, and that court possessed legal authority to send its process to any county in the State of Illinois where the defendants resided. The court correctly entered judgment only against the parties served with prosess. Rev. Stat. 413, § 2 ; Madison v. Commonwealth, 2 A. K. Marsh. 131 ; Lucket v. Austin, 4 Bibb, 182 ; Bruel v. Colgan, 2 Littell, 284 ; Chinn v. Commonwealth, 5 J. J. Marsh. 29 ; United States v. Cushman, 2 Sumner, 310 ; 3 U. S. Dig. 389, §109.

The opinion of the court was delivered by

Purple, J,* In this case a writ of scire facias was issued upon a forfeited recognizance, entered into at the May term of the Morgan circuit court, by Charles Crisman, as principal, James Babbitt and William Read, together with the plaintiffs in error as sureties, for the appearance of the principal at the next circuit court of said county, to answer to an indictment for larceny.

The recognizance, which is set out in hæc verba in the scire facias, was taken, acknowledged and entered of record in open court.

It is joint and several, and in other respects in the usual form.

The plaintiffs were served with process, and the same was returned nihil as to Charles Crisman, Babbitt and Read. The writ was issued from the Morgan circuit court to the Sheriff of Scott county, and executed and returned

*Wilson, C. J. and Justices Lockwood and Young did not sit in this case.

by him. The plaintiff appeared and moved to quash the writ, which motion was overruled; and in default of further answer, judgment was rendered against them that execution issue for the amount of said recognizance. Two points are relied on to reverse the judgment.

1. That the circuit court erred in issuing process to the county of Scott.

2. That no judgment awarding execution could be entered against the plaintiffs without service upon all the cognizors, or two returns of nihil as to those not served.

The last question has been fully considered and settled in the case of Sans v. The People, decided at the present term of this court. (Ante, 327.) In that case it is held, that the recognizance being joint and several, the scire facias upon it is in the nature of a several process against each, the object of which is, to obtain execution according to the force and effect of the recognizance.

There can be no doubt about the jurisdiction of the court. It had full power to send its process to any county in the State, where the plaintiffs, or any of them, resided or might be found.

It is a universal rule, that recognizances must be prosecuted in the court in which they are taken or acknowledged, or to which they are by law returned.

The cognizors, by the acknowledgment of this recognizance, had already submitted themselves to the jurisdiction of the court. The scire facias is not the commencement of a suit, within the meaning of our Practice Act, prohibiting suits against defendants from being brought out of the county where they may reside; but a judicial writ to have execution upon a debt of record.

There is no error in this proceeding. The judgment of the circuit court is affirmed with costs.*

Judgment affirmed.

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*A petition or a re-hearing was filed in this cause, and denied. There was a second cause between the same parties, depending upon the same state of facts and questions of law, and the same judgment was rendered.

TILMAN B. CANTRILL, plaintiff in error, v. THE PEOPLE OF THE STATE OF ILLINOIS, defendants in error.

Error to Franklin.

An indictment for obstructing an officer in the execution of process, should show that such process was legal. If issued from a Court of limited jurisdiction, for instance, the Court of Probate, it should be made to appear that the Court in issuing it, acted within the sphere of its authority.

INDICTMENT, in the Franklin circuit court, against the plaintiff in error for obstructing a constable in the execution of process, tried before the Hon. Walter B. Scates and a jury, at the August term 1846, when a verdict of guilty was rendered, and a fine of $30 imposed by the court.

The defects in the indictment are noticed by the court.

H. Eddy and D. J. Baker, for the plaintiff in error.

The facts stated in the indictment do not constitute an offence, because

1. The authority of the Probate Justice to issue the process is not alleged; and

2. That the process was a legal one.

In support of these positions, see 1 Chitty's Crim. Law, 60–2; 3 do. 144, and note a; 1 Russell on Crimes, 361–2, side paging.

D. B. Campbell, Attorney General, for the People, submitted the cause without argument.

The Opinion of the Court was delivered by

WILSON, C. J. The defendant below was indicted for obstructing an officer in the execution of process. The indictment charges that one Fielding Madox was a constable, duly qualified, &c.; that there was put into his hands for collection a certain execution from the office of Simeon M. Hubbard Probate Justice of the Peace in and for said county, &c.;

and then proceeds to charge the defendant in the usual form, with obstructing the constable in the execution of the said process.

Upon the trial of the case, the defendant moved the court to quash the indictment, which the court refused to do, but proceeded to trial and judgment against him. The refusal of this motion, overruling of a motion in arrest of judgment, the refusal of a new trial, and also the instructions given by the court to the jury, and the refusal of those asked for by the defendant are each assigned for error.

No error is perceived in the opinion of the court, either in the giving or in the refusal of the instructions referred to. But the judgment must be reversed because of the imperfection of the indictment. The process charged to be in the hands of the constable is not set out, nor is it alleged to be a lawful process, or so described as to show it to be so. The Probate court is one of limited jurisdiction. It must, therefore, appear that in issuing the execution, it acted within the sphere of its authority. This is not shown. It is merely stated that a certain execution from the office of S. M. Hubbard, Probate Justice of the Peace, &c., was placed in the hands of the constable, &c. If this and all the other charges in the indictment were admitted, it would not necessarily follow that the defendant was guilty, for the execution may have issued upon a judgment in an action of slander, or upon one for a greater amount than the Probate Justice had jurisdiction of.(*a*)

The judgment of the court below is reversed.

Judgment reversed.

(*a*) Ante 80.

JOHN W. FERGUSON, plaintiff in error, v. JESSE MILES, defendant in error.

Error to Peoria.

After the expiration of a rule to plead in an action of ejectment, the Circuit Court may, in its discertion, grant an application for leave to plead, and its decision cannot be assigned as error.

To render a conveyance operative, a delivery to the grantee is essential, though, in many cases, where the deed is supposed to be for the benefit of the grantee, the law will, in the absence of proof to the coutrary, presume his assent to the delivery to a stranger.(*a*)

It is a general rule, that a party will not be allowed to give parol evidence of the contents of a paper in the possession of his adversery, unless he has given him or his counsel reasonable notice to produce it on the trial. But if a deed has been recorded, a transcript may be introduced, the party swearing that the original was not in his custody. and was beyond his control; or if a party has voluntarily exhibited his deed in evidence, the instrument is under the control of the Court, and no notice is required to produce it.(*b*)

The law is well settled, that for the advancement of a right and the furtherance of justice, and where the rights of third persons are not to be injuriously affected, a deed will have relation to and take effect from the time the grantee was entitled to receive it.

In an action of ejectment instituted by the purchaser at a sheriff's sale against the defendant in the execution, the defendant cannot controvert the title. The plaintiff is only required to produce the judgment, execution and sheriff's deed. The tenant who goes into possession subsequent to the sale is in no better situation, is estopped from denying the title of his landlord, and, consequently, the title acquired under the judgment But if the tenant went into possession before the lien accrued, then the plaintiff, to eject him, must show that the tenancy has expired. It is only when the action is brought against a stranger, that the plaintiff must prove that the judgment debtor had actual possession of the premises, or title thereto, at the rendition of the judgment, or date of the levy.

EJECTMENT in the Peoria Circuit Court, brought by the plaintiff in error against the defendant in error, and heard before the Hon. John D. Caton and a jury, at the October term 1846. Verdict and judgment for the defendant below.

The evidence submitted to the jury is substantially set forth in the Opinion of the Court.

E. N. Powell, for the plaintiff in error.

1. In an action of ejectment by a person claiming under a judgment and sheriff's deed, if the suit be against the judg-

(*a*) Walker vs. Walker, 42 Ill. R. 311.
(*b*) Bowman vs. Wettig, 39 Ill. R. 422.

ment debtor, he need only show the judgment, execution and sheriff's deed. But if the suit be against a person claiming under the judgment debtor, he must, in addition, show that the defendant came into possession under the judgment debtor subsequent to the judgment. Adams on Eject. 301, and n. 1. And if the property be in the adverse possession of a third person, then he must show a title in the judgment debtor. Ib.

2. The declarations of one in possession of land, as to the nature of his title, are evidence against him. 4 Cowen, 587; Thompson v. Robertson, 4 Johns. 230, and note.

3. The instruction asked for by the plaintiff, and refused to be given by the court, should have been given, the proof being clear that the defendant came into the possession under Morton, as his tenant. No other title need be proved.

4. There being no affidavit, or any excuse shown by the defendant for not complying with the rule to plead, the court erred in permitting the defendant to file his plea. Kelly v. Inman, 3 Scam. 28.

5. The court erred in excluding the tax deed of May 11th, 1843, as the court assumed the power of judging of a fact which belonged to the jury alone. This deed was properly before the jury, and it was for the jury to determine from the evidence, under the instruction of the court, whether it was void or not.

6. The title of Morton to the premises in question was a vested title when the time for redemption had expired, which was before the rendition of the judgment against him in favor of Hill. And a deed of a sheriff for lands sold on execution, although made long after the time when the purchaser was entitled to a deed, will relate back to the time when the purchaser might have demanded his deed. Jackson v. McMichael, 3 Cowen, 75; Jackson v. Bull, 1 Johns. Cases, 81, 85; 3 Caines, 262; Jackson v. Bard, 4 Johns, 234; Heath v. Ross, 12 Johns, 140; 15 do 306; Jackson v. Dickenson, 309; 20 Johns. 3; 4 Wend. 494; Klock v. Cronkhite, 1 Hill's (N. Y.) R. 107; Scribner v. Lockwood, 9 Ohio, 184; Boyd's Lessee v. Longworth, 11 Ohio, 235.

The plaintiff, therefore, having laid the proper foundation for the introduction of said deed, by showing the judgment and precept, the court most manifestly erred in excluding as evidence the said deed, dated, June 21st, 1844, when offered as evidence by the plaintiff.

7. The revenue laws have placed the judgment against lands, and all the proceedings under it, precisely on the same footing as any other judgment. Consequently, the same doctrine of relation of a sheriff's deed would be the same under a sale of a tax judgment as under a sale of any other. This court, in several cases, have so construed these laws. Hinman v. Pope, 1 Gilman, 131; Bestor v. Powell, 2 do. 119; Atkins v. Hinman, Ib. 437.

8. There can be no difference between the two kinds of sale and the rights of the purchasers. The time for redemption having expired on the 29th of April, 1843, which was before the rendition of the judgment in favor of Hill v. Morton, the deed then to Morton, of June 21st, 1844, related back to the time when redemption expired, and Morton's title dates from the time when he might have demanded his deed; consequently, the sale made by the sheriff under the execution issued upon the Hill judgment sold the interest of Morton. But if sheriffs' deeds do not relate back, then the deed to plaintiff from the sheriff, by virtue of the sale under the Hill judgment, is executed subsequent to the tax deed to Morton, and consequently it conveys to the plaintiff all the title Morton had at the time of the execution of the deed. This court, then, to maintain the decision of the court below must decide that one class of sheriffs' deeds relate back and another does not.

9. The title of Morton to the premises in question became vested when the time for redemption had expired; all that then remained to be done to perfect it was to make out the mere technical evidence of that right which he had acquired by operation of law. Jackson v. Bull, 1 Johns. Cases 31. The deed of the sheriff for lands sold for taxes does not give to the purchaser the right to the lands; it only gives the evidence of that right, which he obtained by operation of

law. Ibid. 81—85; 12 Johns. 140. But the right to the land in such cases is conferred by the statute, and the deed of the sheriff only gives the technical consummation or evidence of the grant made by the statute. 15 Johns. 309. The grant, therefore, to the purchaser being complete when the time for redemption had expired, the sheriff was empowered by the law, to furnish to the purchaser the evidence of that grant, and it matters not when he performs this duty, as it in no manner affects the purchaser's right. Atkins v. Hinman, 2 Gilm. 437.

C. Ballance for the defendant in error.

The opinion of the court was delivered by

TREAT, J.* This was an action of ejectment commenced in the Peoria Circuit Court by John H. Ferguson against Jesse Miles, to recover the possession of the South West quarter of section twenty (20), in township nine (9) north of range eight (8) east. The plaintiff filed his declaration at the October term 1845, and obtained a rule on the defendant to plead within twenty days. At the May term 1846, and before a judgment by default was entered, the court gave the defendant leave to file the plea of not guilty.

At the October term 1846, the cause was submitted to a jury for trial. The plaintiff, to sustain the issue on his part, read in evidence the record of a judgment rendered in the Peoria Circuit Court, on the 9th of June, 1843, in favor of David B. Hill and against George Morton for $714.46. Also, an execution issued thereon on the 7th of July, 1843, on which the sheriff of Peoria county made return, that he sold the premises in question to Hill on the 8th of August, 1843, for $533.34. Also, a deed from the sheriff to the plaintiff, as the assignee of Hill, for the premises, dated the 11th of November, 1844. Also, a lease from Morton to the defendant for the premises, bearing date the 11th of January, 1845.

* WILSON, C. J. did not sit in this case.

He then proved by the sheriff that the defendant was in possession of the premises at the time of the service of the declaration: and by another witness, an admission of the defendant that he held the premises as the tenant of Morton. He next read in evidence the record of a judgment of the Peoria Circuit Court, rendered on the 15th of April, 1841, in favor of the State of Illinois, against the premises for the amount of the taxes due thereon for the year 1840. Also, a precept issued thereon on the 24th of April, 1841, on which the sheriff returned that he had made sale of the premises and referred to the register of sales kept by the clerk of the County Commissioners' Court for the particulars thereof. Also, the register of sales, showing that the whole of the premises were sold to Morton on the 29th of April, 1841. Also, a deed dated the 11th of May, 1843, from the sheriff to Morton for the premises. The plaintiff here rested his case. The defendant then proved by the sheriff, that the deed of the 11th of May, 1843, was made at the instance of Hill and delivered to him, without the surrender of the certificate of purchase; and that he afterwards received the certificate and made another deed to Morton. He also proved, that the premises were vacant at the time of the sale to Hill, and the date of the deed to the plaintiff. He further proved that Morton had been a non-resident of the State for several years; that the agent of Morton purchased the premises at the tax sale, and kept the certificate of purchase until the 20th of June, 1844, when he surrendered it to the sheriff and received from him a deed of that date to Morton for the premises. The defendant then produced this deed and offered to read it in evidence, for the purpose of showing an outstanding title in Morton, to the reading of which the plaintiff objected. The court thereupon excluded the deed of the 11th May, 1843, and the plaintiff excepted. The plaintiff then offered to read in evidence the deed exhibited by the defendant, to the reading of which the defendant objected, because it was in his possession and the plaintiff had given no notice to produce it,

and because it was executed after the title of Hill accrued, which objection was sustained by the court and an exception taken by the plaintiff. This was all of the testimony.

The plaintiff then asked the court to instruct the jury, "that to entitle the plaintiff to recover, he had only to show a judgment, execution and sheriff's deed for the premises in question, and to prove that the defendant was in possession under Morton, the judgment debtor, claiming to hold under him as his tenant." The court refused to give the instruction, but instructed the jury, "that it was incumbent on the plaintiff in addition to showing the judgment, execution and sheriff's deed, and the proof of the tenency of the defendant under the judgment debtor, to prove that at the time of the sale of the premises in question, that Morton was in the actual possession of the premises by himself, or by his tenant, or had title." The plaintiff excepted to the decision of the court in refusing to give the instruction as called for, and in giving it as qualified. The jury returned a verdict of not guilty, and the defendant had judgment thereon.

Ferguson prosecuted a writ of error. He insists that the court erred in permitting the defendant to plead to the declaration after the expiration of the rule. That decision cannot be revised here. The application for leave to plead was addressed to the sound discretion of the court. (*a*) A motion of that character rests on the same principle as an application to set aside a default, the granting or refusing of which, this court has uniformly held cannot be assigned for error. The case of Kelley v. Inman, 3 Scam. 28, was not intended to establish a different rule. It is contended that the court improperly excluded the deed of the 11th of May, 1843. We perceive no error in that decision. To render a conveyance operative, something more is requisite than the signing and sealing. A delivery to the grantee is essential to its validity. The evidence showed that the deed was never accepted by Morton, or any one authorized to act for him; and a ratification of the delivery to Hill did not appear from the subsequent conduct of Morton. In many cases where the deed is supposed to be beneficial to the grantee, the

(*a*) But see Chapin vs. Curtenius, 15 Ill. R. 427; Short vs. Coulee, 27 Ill. R. 226.

law will, in the absence of proof to the contrary, presume his assent to the delivery to a stranger; but such a presumption is effectually repelled by the circumstances of this case. The evidence of his right to demand a deed remained in the hands of his agent, who subsequently surrendered it to the sheriff, and accepted a deed of a later date. The deed in question was procured by Hill in his own wrong, and without the assent of Morton, and was invalid for the want of a delivery.

It is also insisted that the court erred in rejecting the deed of the 21st of May, 1844. The decision was erroneous. The deed was the evidence of a consumation of the title of Morton, acquired by the purchase at the sale for taxes. The bare fact that no notice had been given to Morton, or the defendant to produce it, constituted no valid objection. The general rule undoubtedly is, that a party will not be allowed to give parol evidence of the contents of a paper in the possession of his adversary, unless he has given him or his counsel reasonable notice to produce it on the trial. The object of the notice is, that the party having the custody of the original may bring it with him, and thereby furnish the best evidence of what it contains. Here the object was fully accomplished without a notice. The defendant voluntarily exhibited it as a part of his evidence, and thus placed it under the control of the court. If the deed had not thus been produced, the want of notice would have defeated the plaintiff in any attempt to prove its contents by parol. If the deed had been registered, he might have introduced a transcript of the record, by swearing that the original was out of his custody and not subject to his control. The further fact that the deed was executed subsequent to the purchase by Hill, furnished no good objection to the introduction of the deed. The time allowed the owner to redeem the premises from the sale for taxes expired before the recovery of the judgment against Morton, and Morton thenceforward had the right to receive a deed from the sheriff on surrendering the certificate of the purchase. As between these parties, the legal effect of the deed, when executed, was to vest the title in Morton at the time the deed was demandable. The

law is well settled, that for the advancement of a right and the futherance of justice, and where the rights of third persons are not to be injuriously affected, a deed will have relation back to, and take effect from the time the grantee was entitled to receive it. Thus a deed may relate back to avoid the effects of an adverse possession, intermediate the conclusion of the contract of sale, and the execution of the deed (Jackson v. Raymond, 1 Johnson's cases 85 ;) (*a*)or to render valid an intermediate alienation by the grantee ; (Jackson v. Bull, 1 Johnson's cases, 81 ;)or, to enable the grantee to maintain trespass for an injury to the inheritance, after the purchase but before the making of the deed ; [Heath v. Ross, 12 Johns. 140 :] or, to pass whatever interest the judgment debtor had at the time of the levy of an execution on lands which he had previously purchased at a sheriff's sale, and for which he afterwards received a conveyance. Boyd v. Longworth, 11 Ohio, 235. See, also, the cases of Case v. DeGoes, 3 Caines, 262; Jackson v. Bard, 4 Johns. 234 ; Jackson v. Dickenson, 15 do. 309 ; Jackson v. Ramsey, 3 Cowen, 75 ; Everston v. Sawyer, 2 Wend. 507, and Klock v. Cronkhite, 1 Hill's (N. Y.)R. 107. If it was necessary, in order to sustain the plaintiff's title, this case would come clearly within the doctrine of relation. At the time of the sale on execution, Morton was entitled to a deed for the premises, which would vest in him such an interest as could be sold on execution. He has no good reason to object to the application of the principle, for he was bound to pay the judgment, or permit it to be satisfied out of his property. The defendant having become the tenant of Morton after the deed was executed, succeeded to no greater right than Morton had.

The instruction demanded by the plaintiff asserted a correct legal principle, strictly applicable to the facts of the case, and should have been given. The law is, that in an action of ejectment instituted by the purchaser at a sheriff's sale against the defendant in the execution, the defendant cannot controvert the title. The plaintiff is only required to produce the judgment, execution and sheriff's deed. [*b*] The

(*a*) Pole vs. Fleeger, 11 Pet. U. S. R. 211.

(*b*) Hayes vs. Bernard, 38 Ill. R. 301.

tenant, who goes into possession subequent to the sale, is placed in no better situation. He is estopped from denying the title of his landlord, and consequently, the title acquired under the judgment. But if the tenant went into possession before the lien accrued, then the plaintiff, to eject him, must show that the tenancy has expired. It is only when the action is brought against a stranger, that the plaintiff is bound to prove that the judgment debtor had actual possession of the premises, or title thereto, at the rendition of the judgment or the date of the levy.[a]

The judgment of the circuit court is reversed, with costs, and the cause remanded for further proceedings.

Judgment reversed.

AARON COREY, appellant v. WILLIAM RUSSELL, appellee.

Appeal from Madison.

Motions were made in the Circuit Court to quash two executions, which were denied. Certain papers were copied into the transcript, but no bill of exceptions was taken. The decision of the Circuit Court was assigned for error: Held that the papers, in order to be regarded as evidence, should have been incorporated in a bill of exceptions.

MOTIONS, in the Madison circuit court, to quash two executions issued from that court in favor of appellee against appellant, made by the appellant at the May term 1846, the Hon. John D. Caton presiding. On hearing the motions, the court denied the same, and an appeal was taken from that decision.

J. W. Chickering, and W. Martin, for the appellant.

L. B. Parsons, Jr., and L. Trumbull, for the appellee.

The record contained no bill of exceptions. There is nothing before this court except the order of the court below refusing the motion to quash, and consequently this court

(a) Post 533-Filghman vs. Little, 13 Ill. R. 241.

cannot judge of the correctness of the decision below. Browder v. Johnson, Bre. 62; Kimmel v. Shultz, Ib. 129; Rust v. Frothingham, Ib. 258; Sims v. Hugsby, Bre. App. 27; Cole v. Driskell, 1 Blackf. 16; Vanlandingham v. Fellows, 1 Scam. 233.

The opinion of the court was delivered by

TREAT, J. It appears from the record in this case that the Madison circuit court, at its May term 1846, denied an application of Aaron Corey to quash two executions in favor of William Russell and against said Corey. That decision is now assigned for error. The testimony on which the circuit court based its decision is not before us, and we cannot therefore inquire into the propriety of the decision. The clerk has copied into the transcript certain papers, which were probably read as evidence on the hearing of the motion. That, however, does not make them a part of the record. The appellant should have introduced the evidence into the record by tendering a bill of exceptions. See the case of Saunders v. McCollins, 4 Scam. 419, and the cases there referred to. (*a*)

The judgment of the circuit court is affirmed with costs.

Judgment affirmed.

(*a*) Vandruff vs. Craig, 14 Ill. R. 295; Smith vs. Wilson, 26 Ill. R. 187.

JOHN BAXTER, plaintiff in error v. THE PEOPLE OF THE STATE OE ILLINOIS, defendants in error.

Error to Warren.

The practice Act has application to civil cases only. Motions for continuances, therefore, in criminal cases are addressed solely to the discretion of the Court, and its decisions thereon cannot be assigned for error. (*a*)

If a juror is able to respond to the question, so as to satisfy his own conscience, "Is the prisoner guilty or innocent?"— then he is incompetent; but if, from not being convicted of the existence or non-existence of certain facts, he is unable to determine that question, then he is competent.

During the progress of a trial for murder, one of the jurors, while one of the counsel for the prisoner was addressing the jury, had a chill, and was, by order of the Court, placed upon a pallet, and for a time did not fully comprehend the whole of the argument, being in a drouse, though he had understood all of the evidence, and all that had been said by counsel previously. The fact that he was asleep was known to the prisoner, but the attention of no one was called to it: Held, under the circumstances, to be no ground for setting aside the verdict.

A person, who had assisted in the arrest of one accused of murder, and for whose arrest rewards had been offered by the State and sundry individuals, on being called upon to testify, stated these facts, as also, that he had received the reward from the State, but not from the individuals, and did not expect to receive anything from them: Held that he was a competent witness.

When instructions are so drawn, either by carelessness or design, that they will be more likely to mislead than instruct a jury, it is the duty of the Court to refuse them.

By the Criminal Code of Illinois, the distinction between accessories before the fact and principals is, in fact, abolished. By it, is declared that such accessories shall be deemed and considered as principals, and punished accordingly, and therefore, as principals they must be indicted. (*b*)

Courts cannot pronounce a judgment or do any other act strictly judicial on Sunday, unless expressly authorized by statute so to do. A verdict of a jury, however, may be received on that day.

A jury, in a trial for murder, returned a verdict of guilty into Court, against the accused, and the Court pronounced a judgment thereon on Sunday: Held, that the verdict was properly received, but that the judgment of the Court was absolutely null and void.

INDICTMENT for murder against the plaintiff in error, tried in the Warren Circuit Court, at the November term 1846, before the Hon. Norman H. Purple and a jury, when a verdict of guilty was rendered and sentence of death pro-

(*a*) *Contra* Laws of 1857 pp. 28-103.

(*b*) Breman vs. People, 15 Ill. R. 511; Kennedy vs. People, 49 Ill. R. 488.

nounced. A previous trial was had in the Rock Island Circuit court, with a like result, when the accused brought the cause to this Court by writ of error, (see 2 Gilm. 578,) procured a reversal of the former judgment, and subsequently obtained a change of venue to the Warren Circuit court.

The prominent facts and proceedings upon the last trial are adverted to by the court in their Opinion.

O. C. Skinner, for the plaintiff in error.

1. The plaintiff in error was indicted as principal. The evidence shows that he was accessory before the fact. As to what constitutes such accessory, see Rev. Stat. 153 § 13; Const. U. S. on page 25, of Rev. Stat. Art. VI.

2. The court erred in refusing to grant a continuance. Rev. Stat. 415, § 13.

3. The jurors, Leper and Clark, were disqualified, and should have been set aside. Smith v. Eames, 3 Scam. 78; Gardner v. The People, Ib. 88; Sellers v. The People, Ib. 414. Another juror, Sisson, was rendered incompetent to sit by reason of sudden illness during the progress of the trial.

4. The sixth instruction was improperly refused. 3 Blackf. 424.

5. The verdict, judgment and sentence were on Sunday, all of which was contrary to law. 3 Thomas' Coke, 354; 4 Black. Com. 278; 3 Tomlin's Law Dic., title "Sunday," 538; 7 Comyn's Dig. 399, B. 3; Mackelday's case, 5 Coke, 66; Dakin's case, 3 Saund. 290; Swann v. Broome, 3 Burrow, 1595; Story v. Elliott, 8 Cowen, 27; Pearce v. Atwood, 13 Mass. 347; Bayley v. Smith, 12 Wend. 59; Frost v. Hall, 4 New Hamp. 158; King v. Strain, 6 Blackf. 447; Arthur v. Mosby, 2 Bibb, 589; Shaw v. McCombs, 2 Bay, 232; Nabors v. The State, 6 Ala. 200.

6. The reversal of a judgment operates necessarily as a reversal of all former proceedings. 1 Chitty's Crim. Law, 755; 3 Comyn's Dig. title "Error," B. 568; 2 Hawk. P. C. 655, §§ 18, 19; 2 Bac. Abr. 503, M; The King v. Ellis, 11 Eng. Com. Law R. 260; Same v. Bourne, 34 do. 37; Commonwealth v. Shepard, 2 Metc. 419-20.

J. Knox, for the defendants in error.

1. The statute makes an accessory before the fact a principal. Rev. Stat. 153, § 13.

2. As to the continuance, the court gave all the indulgence that could be asked. The cause had been once continued since the change of venue to the county of the last trial. Moreover, the Practice Act in regard to this matter does not apply to criminal cases, but the whole lies within the discretion of the court.

3. The court committed no error in permitting the jurors Leper and Clark, to be sworn. They had formed no definite and fixed opinion as to the merits of the case, such as would bring them within the cases cited by the counsel who has opened the case. Nor was there a valid objection to th juror, Sisson ; he could not, by his affidavit, impeach his own verdict.

4. The sixth instruction was unintelligible to the court and calculated to mislead or confuse the jury, and it was properly refused.

5. The verdict was properly received on Sunday. 15 Johns. 118, 178 ; 8 Cowen, 31. There being no statutory regulation upon the subject of entering judgments, &c. on Sunday, and the prohibition if any, being by the Common Law, it is resolved into this : Is the Common Law applicable to this country? We think not. If the court think otherwise, we then contend, that as the verdict was properly received on that day, the court here, according to a well established practice, may now render such judgment as should have been rendered in the court below.

D. B. Campbell, Attorney General, concluded the argument in behalf of the People.

J. Manning, for the plaintiff in error.

The continuance was improperly refused. The act of the summer session of 1837, is applicable to criminal as well as civil cases, and the fact that it has been incorporated into the Practice Act of the Revised Statutes is no reason why it should not now, as before, be considered thus applicable.

The plaintiff in error should have been indicted as accessory, not as principal. The allegata et probate did not correspond, as required by all authority on the subject. Roscoe's Crim. Ev. 649; Arch. Crim. Pl. 6, 382; King v. Hughes, 24 Eng. Com. Law R. 241; 1 Russell on Crimes, 30; 4 Black. Com. 36; Ib. 39.

Upon the question of the competency of the jurors, see Commonwealth v. Knapp, 9 Pick. 476. They could only state facts, not their opinions as to the merits of the case, &c.

The making up and rendering of a verdict on Sunday varies in no material respect from an inquest. 1 Strange 387; 15 Johns. 177; and, therefore, from analogy it is void in this case.

In this State, in a criminal case the finding of the jury is a judicial act, they being made, by the statute, judges both of the law and the facts.

A verdict is like an award, and an award made on Sunday is void. Story v. Elliot, 8 Cowen, 31.

To the statement of counsel that this court may now render the proper judgment, we have a conclusive answer. The Revised Statutes, 188, § 198, only confer the power on this court so to do, where the judgment is affirmed. In the present case, the judgment cannot be sustained.

The Opinion of the court was delivered by

CATON, J.* Some of the questions presented in this record are important in themselves; all are important from the nature of the case, and from the consequences which may flow from our determination.

It is assigned for error, that the court overruled the defendant's motion for a continuance, and we will first inquire whether such decision can be assigned for error here. It is not pretended that it could be at Common Law. It is however, insisted, that that right is secured under our statute.

The Common Law prescribes no given state of facts,

* YOUNG, J. did not set in this case, and Justices THOMAS and DENNING were not on the Bench, when it was heard.

which shall entitle the party to a continuance in any case, but the whole subject is left entirely to the discertion of the court to which the application is made. Our Legislature, by the Practice Act of 1827, enacted that a party should be entitled to a continuance of a cause upon filing an affidavit of certain facts, and yet this court has held that an application for a continuance was still addressed to the discretion of the court, and could not be assigned for error.(*a*) Vickers v. Hill, 1 Scam. 308. This Practice Act, however, only applies to civil proceedings, and has never been held or supposed to apply to criminal cases. Had the courts in all criminal cases required affidavits for continuance to be as full as required under this statute, it might, and would frequently have operated most oppressively upon prisoners.

In view of such hardships, the circuit courts have hardly considered it an intimation of what should be required in an affidavit for a continuance in criminal cases; most frequently feeling themselves called upon to continue cases, especially at the first term, upon affidavit not as full as required by the statute, very frequently feeling constrained to require affidavits still more explicit, and frequently requiring the defendant's affidavit to be corroborated. Indeed, it is manifest that it would be utterly impracticable to apply that statute to criminal cases, for that entitles a party to a continuance on his own affidavit alone, if it contains the necessary statements, and it is easy to preceive that many cases would never be tired. But this Act precribes the practice in civil common law cases only, and was most manifestly never intended to apply to any others, as this court had repeatedly held, that exceptions could not be taken to the decision of the circuit courts on motions for continuance and for new trials in civil cases.

The Legislature on the 21st of July, 1837, passed a law entitled "An Act to amend An Act entitled "An Act concerning practice in courts of Law," approved 29th January, 1827, in which it is provided that "exceptions taken to opinions or decisions of the circuit courts overruling motions in arrest of judgment, motions for new trials and continuances

(*a*) Laws of 1857 pp. 28-103.

of cause shall hereafter be allowed, and the party excepting may assign for error any opinion so excepted to, any usage to the contrary notwithstanding."

In the Revised Statutes, this provision is incorporated into the chapter prescribing the practice in civil cases, to which, as originally passed, it was an amendment, and we are now to inquire whether this statute applies to criminal cases. We entertain no doubt that such was not the intention of the Legislature, and that such is not its true construction. The very title of the Act shows that it was only intended as an amendment to a law, which had never been pretended, and is not now pretended to have applied to criminal cases. Its provisions are totally inapplicable, and this, of itself would clearly show that the Legislature had in view civil cases alone. As a further proof that it was not intended to apply the general Practice Act to criminal proceedings, we, see that the Legislature has, in the sixteenth division of the Criminal Code, gone on and fully prescribed a system of practice for the courts, when administering the criminal law, and in that division, by the 188th section, it is expressly declared, that "all trials for criminal offences shall be conducted according to the course of the Common Low, except when this chapter points out a different mode, and the rules of evidence of the Common Law shall also, unless charged by this chapter, be binding upon all courts and juries in criminal case. Juries, in all casss, shall be the judges of the law and the facts." The whole course of our legislation distinctly indicates an intention to maintain an independence between the civil and criminal jurisdiction and practice, as much as between those of the Common Law and Chancery. For each, the Legislature has established a distinct code, and the wisdom of that distinction cannot be doubted. We have a precedent of the highest authority for not applying the provisions of this statute to criminal cases. Anciently, by no error could be assigned, except for an error in law, apparent upon the face of the record itself; to remedy this hardship, bills of exceptions were invented, and, by the Statute of Westminister 2d, it was provided: "When one

impleaded before any of the Justices alleges an exception, praying they will allow it, and if they will not, if he that alleges the exception writes the same, and requires the Justices will put to it their seals, the Justices shall do so; and if one will not, another shall: and if, upon complaint made to the Justices, the King cause the record to come before him, and the exception be not found in the roll, and the plaintiff show the written exception, with the seal of the Justices thereto put, the Justice shall be commanded to appear at a certain day, either to confess or deny his seal, they shall proceed to judgment according to the exception, as it ought to be allowed or disallowed." This statute has been held by the English Courts not to apply to criminal cases, Bacon says: "It seems agreed that no bill of exceptions is to be allowed in treason or felony, for the words of the statute are, cum aliquis implacitatur coram aliquibus Justiciariis, &c., and if such bills were allowed, it would be attended with great inconvenience, because of the many frivolous exceptions that might be put in by prisoners to delay justice: besides, in criminal cases, the Judges are of counsel with the prisoner, and are to see that justice is done him." 1 Bac. Abr. 528.

More substantial reasons might be assigned for restricting the statute now under consideration to civil cases. It was not denied on the argument, that a motion for a continuance must necessarily be addressed to the sound discretion of the court to which it is made; but, then, it was insisted that still the defendant might take his exception, and ask this court to examine and see if we think the court below has exercised a proper discretion. Nothing could be more dangerous, not to say disastrous, both to the public and to prisoners, than the assumption of such a right by this court. To the public, there would be great danger that the most hardened and unscrupulous offenders, regardless of every other consideration but procrastination and ultimate escape from the punishment which they are conscious they justly deserve, might perpetually delay justice; and to prisoners, there would be a still greater danger that applications for continuances would sometimes be overruled by the circuit courts, when the Judge

reflects that much of the responsibility is taken from his shoulders, and he enjoys the comfortable reflection that no ultimate injury is likely to befall the prisoner by his decision, of wrong, for in that event the Supreme court may set him right, where he may suppose the final responsibility will rest; whereas, if he saw that his decision was final, he would pause and deliberate long, and throw every doubt in favor of the application, when he reflected that the whole of the solemn responsibility rested upon himself, and that if he erred, the error would be irretrievable. These considerations must afford the surest guaranty that the rights of the accused will be most scrupulously guarded by the courts to which such applications are made. All who are conversant with the administration of criminal law must know, that it is impossible for the appellant court to have all of the circumstances before it to enable it to exercise a proper discretion which are palpable to the circuit court, and knowing this, it might be induced to affirm a decision which, but for the reflection that it might be reviewed by another tribunal, might possibly have been the other way.

Should we undertake to review such decisions, in all human probability, we should often reverse decisions, which were most manifestly correct to the minds of all who were possessed of all the circumstances, in view of which the decisions were made, and affirm others which were made in doubt, relying upon the hope of reversal if wrong.

We are well convinced, that the rights both of the public and of the accused, are much better secured by throwing the entire responsibility upon the court below, and we cannot entertain a doubt of the wisdom of the Legislature, in leaving it where the common law left it, to the sound discretion of the court, to whom the application for a continuance is made. Although now the courts are not nominally of counsel with the defendant, it is still none the less their duty to vigilantly watch and see that all his rights are secured to him, and that injustice is not done him. It is not their duty to punish any, unless their guilt is clear and manifest. Although we are clearly of opinion that the decision

of the court, on this motion for a continuance, is one which we have no right to review, still, we cannot refrain from saying that we are far from being convinced that the circuit did not exercise a sound discretion in overruling it.

We will next inquire whether Leper was an impartial juror, for although it does not appear that he finally sat upon the jury and tried the case, yet as the prisoner may have been compelled to use a peremptory challenge to exclude him, we think he ought to be allowed the benefit of the exception, if the court improperly decided him to be a competent juror. Although the books are full of cases deciding what shall and what shall not disqualify a juror, yet the task of laying down a rule so clear and distinct as to leave no difficulty in its application in pratice, is so difficult that it has never yet been accomplished. The difficulty consists in describing that condition of the mind, which the courts have considered requisite to make an impartial juror, so that it might be comprehended by all. From the slightest imaginable impression conceived, from the most vague and unsatisfactory rumor, which hardly leaves a trace upon the mind, to the most positive and determined conviction, which defies all effort to shake it, there is an infinite variety of imperceptible shades, and the difficulty consists in describing the point between these two extremes, which shall render the juror incompetent, so that it may be understood alike by the court who is to decide, and the juror who is to explain the nature and extent of his opinion or belief. Hence the variety of modes adopted by different courts, in laying down the rule which should govern in determining the question. All seem to agree, that to disqualify a juror, he should have something more than a vague and indefinite impression, not founded upon facts, which are established in his own mind to be true, and yet that it is not necessary that he should have so far prejudged the case, that his mind is not still open to conviction. It seems sufficient, however, if the judgment of the juror is convinced; if his belief is established from facts, of the truth of which he has no reasonable doubt, of the guilt or innocence of the accused, or that

one party or the other should recover. Has the existence of certain facts been so established in his mind, as to produce conviction? If so, he is incompetent, for neither party should be put to the necessity of producing proof to move a preconceived opinion. If the juror is already able to respond to the question, if put to him, so as to satisfy his own conscience, "Is the prisoner guilty, or is he innocent?"—then he is incompetent; but if from not being convinced of the existence or non-existence of certain facts, he is unable to determine that question, then he is competent. Such seems to be the rule indicated by the several decisions, which have already been made by this court. But there is much less difficulty in establishing than in applying the rule. This arises in a great measure from the want of a clear perception on the part of jurors, as to what in reality constitutes such an opinion, and from the difficulty which they experience in explaining, so that it may be fully comprehended, the true condition of their mind on the subject of inquiry. Most jurors, when first inquired of as to their opinions, have not been in the habit of carefully analyzing their minds on the subject, and the first answer which they give, especially to questions ingeniously framed to elicit a desired reply, may be very far from giving the true state of the jurors mind. Hence, it is not uncommon to observe during the examination of the counsel on either side, the most palpable contradictions in the expressions used by jurors in giving the extent of their opinions, and that too by men of intelligence and integrity. It often happens that a juror may suppose that his belief in the existence of a certain fact, will constitute an opinion, when in truth it may be necessary to etstablish a great many other facts, before the guilt or innocence of the party could be established. A man may be charged with murder, and a juror may have no doubt but the person alleged to be murdered, was killed, and that the accused killed him, and yet have no sort of an idea whether the homicide were justifiable, excusable or felonious. No one will pretend that such a juror has an opinion of the guilt or innocence of the accused. If such opinions were

to disqualify jurors, it would be in very many, if not in a majority of instances, be utterly impossible to get a jury in these cases ; yet it is not uncommon for juries, whose belief even extends no farther than this, to answer in the first instance that they have an opinion ; so on the other hand, there are persons who suppose they do not allow themselves to form an opinion no matter what they may have heard, till they hear the facts sworn to, while in truth their judgments are all the time convinced one way or the other, while they are unwilling to acknowledge it, even to themselves. In such cases it often requires the closest scrutiny to detect the true state of the juror's mind, hence it frequently becomes necessary, in order to a full understanding of the case, for the court, (after the counsel on either side have put such questions as they think necessary,) to go on itself and examine further, and thus endeavor if possible to get at the true state of the juror's mind. When first examined, Leper, stated that he had formed and expressed an opinion from reports, a part of which he believed. When further examined, he stated that the opinion which he had formed, was on the hypothesis, that the rumors were true, only a part of which he believed ; in fact, that he had no opinion, whether the rumors which he had heard were true or false, and that the opinion which he had formed, was not of a fixed and definite character. This juror the court held to be competent to try the cause and very properly, for it is manifest that the mind of the juror had settled down upon no conviction, whether the prisoner was guilty or innocent ; that was a question still undetermined in his own mind. This is not so strong a case as that of Smith v. Eames, 3 Scam. 76, and certainly no stronger than that of Gardner v. The People. Ib. 83, and comes precisely within the rule laid down by this court in other cases. (*a*)

The same remark would apply to another juror whose name is not given in the bill of exceptions, but as it nowhere appears whether the court decided him to be competent or incompetent, it is not necessary to say more about him.

The objection that Sisson, one of the jurors who tried the

(*a*) Thompson vs. People, 24 Ill. R. 60.

cause, became incompetent during the trial may be disposed of in a few words. He complained to the court of being unwell, when the court caused a pallet to be provided for him near the jury box, upon which he laid down during a portion of the time, and he states in his affidavit, that during the argument of one of the defendant's counsel, he had a chill, and for a time was in a sort of drowse, and thinks he did not comprehend fully the whole of the argument. He understood all of the evidence, and all that was said by the two other counsel for the prisoner in their addresses to the jury. This is by no means sufficient to disturb the verdict. In case a juror becomes unable to go on with the trial, the court, on ascertaining the fact, will either suspend the trial, or discharge him altogether and impanel another in his place, and commence the trial again. But to establish the rule that, because some one of the jurors did not hear and comprehend everything which was said to them, the verdict shall be set aside, would endanger altogether to many verdicts, and would introduce an inquiry which would be most embarrassing in its consequences. Besides, it appears from the prisoner's own affidavit, that he knew that the juror was asleep at the time, and yet called the attention of no one to the fact, and it does not appear that the court or any one else observed or knew it. I will not say that a case of this nature might not be presented so strong, as to induce the court, in its discretion, to set aside the verdict for this cause alone, but it would have to go very far beyond the one which is now before us.

An exception was taken to the decision of the court in allowing Gregg to testify and as that decision is assigned for error, it becomes necessary to dispose of it, although it was not insisted upon in the argument. He swore that he assisted in the arrest of the prisoner, that a reward was offered by the state and the young Davenports for the arrest and conviction of the murderers of Col. Davenport, that he has received the reward offered by the state, but that he had received nothing from the young men and had not ex-

pected to receive anything from them ; the court properly decided that the witness was competent.

We will next inquire whether the court erred in giving or refusing instructions. On this branch of the case, the only question worthy of consideration, arises upon the refusal to give the sixth, seventh, eighth, ninth and eleventh instructions and in the qualification given to the tenth. All the other instructions asked for by the defendant's counsel were given, and no question was made on the argument, and none can be made, but that the other instructions given were proper, and such as were calculated to aid the jury in arriving at a correct determination, in case it shall be found that the court decided correctly in overruling the above mentioned instructions for the prisoner.

The instructions refused shall be disposed of in their order. The sixth instruction, as asked for by the defendant, was as follows; "If the jury believe, from the evidence, that an intention existed on the part of other persons, and who actually committed the murder, in the indictment charged, to rob the house of the person murdered, on a particular night, and do the same against all opposition, and the prisoner not participating in the same intention, but being advised of such plan and intention, under a real subsisting fear of his life, from existing actual threats of the same which sufficiently showed that his life was in danger, advised and procured the putting off of the same robbery until a time when there was no probability of loss of life being the consequence of such robbery, and in doing the same, acted with a bona fide intention of preventing such and every murder, and under such then existing fear, founded upon actual threats made of his life if he exposed such other persons, he is not guilty of the murder although he afterwards knew of and permitted such robbery, under circumstances when murder could not reasonably arise out of the same robbery, if the prisoner, during the period of the same acts, acted under the influence of such subsisting fear that his life would be taken if he acted otherwise." This in

struction was refused because it was unintelligible to the Court, and most properly. When instructions are so drawn, either from carelessness or design, that they will be more likely to mislead than instruct a jury, although after careful study and investigation, we may be able to extract a correct principle of law from them, it becomes the undoubted duty of the court to refuse such instruction. The object of instructions is to convey to the midns of the jury correct principles of law, as applicable to the evidence which has been laid before them; and nothing should be given them unless it will promote that object. Such was not the character of this instruction. Had it been given, it would have tended to confuse and mislead, rather than to have directed and enlightened them, and it would have been improper, if not error to have given it. Instructions ought not to be given unless they may be fairly understood and easily comprehended by the jury. The same principle which was probably aimed at by this instruction, is embraced in the tenth instruction, which is intelligible, and which will be noticed hereafter.

By the seventh, eighth, ninth and eleventh instructions, the Court is substantially asked to instruct the jury, that if the evidence shows the defendant to be guilty as accessory before the fact, that he cannot be convicted under this indictment for murder. The correctness of the decision of the court in refusing to give these instructions, must depend upon the construction of our statute. By the thirteenth section of the Criminal Code, it is declared: "An accessory is he or she who stands by and aids, abets or assists, or who not being present, aiding, abetting,or assisting, hath advised, or encouraged, the perpetration of the crime. He or she who thus aids, abets, or assists, advises, or encourages, shall be deemed and considered as principal, and punished accordingly;" and the inquiry is, whether proof that the prisoner was accessory to the crime before the fact will sustain an indictment against him as principal. The Act says that such accessories shall be deemed and considered as principals and punished accordingly. This Act, then, makes all accessories at, or before the fact, principals. The declaration

that they shall be "deemed and considered," is as unequivocal an expression as if the Act had said, "are hereby declared to be." It is true, the Act states what an accessory is, but then it declares in substance that he is principal. It was in perfect harmony with the system pursued by the Legislature, to go on and define what an accessory is, as it has defined all other offences, which it has attempted to enumerate and it does not detract from the force of the provision, that they shall be deemed and considered as principals. The distinction between accessoies before the fact, and principals, is in fact abolished. At the Common Law an accessory at the fact might be indicted and convicted as principal, for the Common Law declares that he who stands by, advises and encourages the murderer to give the blow gives the blow himself as much as if he held the weapon in his own hands.

Our Legislature has gone one step further, and provided, that he, who not being present hath advised or encouraged the given of the blow, hath given the blow as much as if he had stood by and encouraged it, or even had struck with his own hands. It is no more a fiction of law to declare that he gives the blow, by advising and encouraging it beforehand, than it is to affirm that he gives it by advising and encouraging it at the time. Both proceed upon the principle that what we advise or procure another to do, in the eye of the law we do ourselves. All are principals, and as such, should be indicted and punished. Indeed they must be indicted as principals or not at all, for they are declared by the Act to be principals. If they are not to be indited as principals, the very object of the law is defeated; if they are to be indicted as accessories, they must be tried and convicted as accessories, and then they could not be tried till after the conviction of the principals, for as we have before seen, we are bound by the rules of evidence of the Common Law, of which that is one. Such is the inevitable consequence, unless they are indicted and tried for murder, of which the statute says they shall be deemed and considered guilty. There is no doubt but the the pleader may, if he choose

and perhaps it would be advisable to describe the circumstances of the offence as they actually transpired, as it is in an indictment against an accessory before or at the fact; but if the stating part of the indictment be that way, it should conclude as for murder, for that is really the offence of which the party is guilty, if at all. It was urged, that there was a variance between the proof and the allegations. That is true in one sense, and so it is true of an indictment for murder against an accessory at the fact; so it is true of an indictment for larceny against a clerk, an apprentice, a bailor, or a lodger for embezzlement, which is declared by our statute to be a larceny, and they are always indicted as for stealing, taking and carrying away, in the usual form. They are charged with a felonious taking, when in truth, it is only a felonious conversion, and yet it is held there is no variance, for the law declares in effect, that the felonious conversion shall make the original taking felonious, although it were lawful at the time.

Then, as by the law in this case, the acts of the principal are made the acts of the accessory, he thereby becomes the principal, and may be charged as having done the acts himself. He shall be deemed and considered as principal, and be punished accordingly. The circuit court decided correctly in refusing these instructions.

The tenth instruction asked is as follows: "If the jury believe from the evidence, that the defendant only consented to the robbery of the house of George Davenport, and not to his murder, and that the defendant at the time of giving such consent, had reasonable cause to believe that his life would be immediately taken unless he gave such consent, then the law is, that the defendant is not guilty." This instruction was given with the very proper qualification, "unless they further believe that he subsequently consented, advised, aided, abetted, or assisted in the robbery." It hardly requires an argument to prove, that if the prisoner, after the immediate danger had passed away, [if any such ever existed,] consented, advised, aided, abetted or assisted in the robbery, that he was guilty as if such danger had never threatened him.

The trial was commenced on Friday, and the case submitted to the jury late on Saturday evening. After twelve o'clock, they came in to the court, and the foreman delivered a verdict of guilty; but upon being polled one of the jurors stated, that he did not find the defendant guilty in manner and form as he was charged in the indictment, when they returned, and subsequently, on the same day, being Sunday, they returned with a verdict of guilty. Motions were made for a new trial, and in arrest of judgment, which were overruled by the court and sentence pronounced. Errors are assigned on all of these various proceedings. Had the court a right to receive the verdict and pronounce judgment on Sunday? The courts have no right to pronounce a judgment, or do any other act strictly judicial on Sunday, unless expressly authorized by statute, seems to be too well settled to admit of a doubt by the decisions in England and in this country. The leading case on this subject, is that of Swann v. Broome, 3 Burrow, 1595, where it was held by the court of King's Bench, that the court could not sit on Sunday and give a valid judgment, it not being a judicial day. It appears that anciently among the christians, courts did sit on Sunday, but by a canon of the Church, made in the year 517, this was prohibited, and that rule seems to have been adopted into the common Law, and may be considered as well settled. But this prohibition seems to be confined to the entering of judgments of record, and other like judicial acts, for we learn from the opinion of Lord Mansfield in the same case, that it was assigned for error in the Exchequer, "that the information (for engrossing butter and cheese contrary to the statute,) was exhibited to the court on the 13th day of October, which in the year (20 Jas. 1,) was on Sunday, and therefore not "dies juridicus." But it was held by Hatton and Jones that it was good, for although it was not dies juridicus, for the award of any judicial process, or to make an entry of any judgment on record, yet it was good for accepting an information on a special law;" and the judgment was affirmed by the whole court. The question seems to have been frequently before the English Courts, and the courts of most of the States of the Union, and the decisions

are very uniform, that a judgment cannot be entered of record on Sunday. See 5 Coke, 66 ; 1 Strange, 380 ; 13 Mass. 347 ; 5 Blackf. 111 ; 6 Ala. 200 ; 4 N. Hamp. 158 ; 2 Bibb, 589 ; 8 Cowen, 27 ; 1 Wend. 57. The cases all show that a judgment entered of record on Sunday is not only erroneous, but is absolutely void.

But although the law seems to be well settled, that a judgment cannot be entered of record on Sunday, yet I think it equally settled that a verdict of a jury may be entered of record on Sunday. I have already referred to a case, where a presentment made on Sunday was held to be good; and in the case of Harrington v. Osborn, 15 Johns. 119, the court says :" It was proper to receive the verdict on Sunday, presuming the jury were impaneled before Sunday commenced, but it was illegal to render the judgment on Sunday." In Buttler v. Kelsey, Ibid. 178, the court set aside an inquisition because it was taken on Sunday. They say: It is not like the case of a trial at the circuit, where a verdict is sometimes taken on Sunday morning because the jury must otherwise be kept together during Sunday." In Story v. Elliot, 8 Cowen, 27, the court held that an award of arbitrators made and published on Sunday, was void upon the ground that an award is a judicial act of a tribunal of the parties' own choosing and is conclusive when fairly and legally made, from which there is no appeal. In that case, ch. J. Savage quotes, with approbation, the language of Yates, J. in the case of Van Cortland v. Underhill, 15 Johns. 416, where he says: "It certainly would be a dangerous innovation to place them, (awards,) on a footing with the verdict of a jury." In 3 U. S. Dig. 635, § 220, it is said : "A verdict returned on Sunday is void, and a new trial will be granted." And the case of Shaw v. McCombs, 2 Bay 232, is referred to. I find the same case referred to in Comyn's Digest, as supporting the same principle. Such is the decision in that case, but the opinion of the court indicates that it was made without a very thorough examination, or much reflection; not an authority is referred to, nor a reason given, except that Sunday is not a judicial

day. I have not been able to find but one other case or reference asserting such a principle, and in the same section in the U. S. Dig. we are referred to Huidekoper v. Cotton, 3 Watts, 56, and Van Riper v. Van Riper, 1 South. 156 as holding the contrary rule. We have not access to, either of these references, but presume they are correctly quoted. In the case of Nabois v. The State, Ala. 200, a verdict was set aside which was received on Sunday, principally upon the ground that the term expired at twelve o'clock, on Saturday night; although the circumstances of that case are like those of the one before us, yet we cannot agree with that court in its conclusions. We think the authorities clearly establish that when a cause is submitted to the jury before twelve o'clock on Saturday night, the verdict of the jury may be received on Sunday; but that it is not a judicial day for the purpose of rendering any judgment, and if it attempt to render a judgment, still, in law, it would be no judgment, but absolutely void, and will be so declared, and may be reversed by this court; not that such reversal will take from it any force or vitality, for it never had any, not having been rendered by a court having authority to render any judgment whatever at the time. (*a*)

There is another question still remaining not less important than any of the others, and that is, what is to be the effect of the reversal of this judgment? It is laid down in 1 Chitty's Crim.. law, 755, that "when a judgment is erroneous, that it and all former proceedings, in case of a conviction, are defeated by a reversal," and the same rule is laid down in 2 Hawk. P. C. 655; and in 3 Comyn's Digest, 568, it is said: "A judgment in a criminal case must be affirmed or reversed altogether; it cannot be affirmed or reversed in part." In the case of Rex v. Ellis, 11 Eng. Com. Law R. 257, it was held, where the prisoner had been sentenced to transportation for fourteen years, when the law authorized only seven years, the judgment was held erroneous, and reversed. It was further determined that it could not be remanded, and the prisoner was discharged. In the case of King v. Bourne, Lord Denman, C. J. says: "This is a writ of erorr upon a judgment of transportation passed

(*a*) Johnson vs. People, 31 Ill. R. 469; McIntrye vs. People, 38 Ill. R. 521; Scammon vs. Chicago, 40 Ill. R. 148; Metcalf on Con. 254.

on three persons, none of whom was subject by law to any but capital punishment. In that case, it was contended that the court might either render the proper judgment, or remand the case for the court below to render such judgment as the law required. The court decided that it could do neither. The Chief Justice says: "We cannot say that the court below has given no judgment; if it had been so, and the case had merely come before this court for the purpose of obtaining its opinion, we might have heard the point discussed, and remitted the case again to the court below for judgment." The judgment was reversed, and the prisoners discharged. These cases seem to establish the rule, that when a judgment has been pronounced in a criminal case, by a court of competent jurisdiction, and having full power at the time to pronounce judgment, it gives an erroneous judgment, that may not only be reversed, but also the verdict and all antecedent proceedings, which were entirely regular in themselves. But if no such judgment has been given, then the cause may be remanded for a proper judgment. Such is distinctly decided to be the law in the case of the King v. Kenworthy, 8 Eng. Com. Law R. 196. There the defendant was convicted of perjury, and, after the entry of the verdict, the record proceeded as follows: Whereupon, all and singular the said premises being seen by the said Justice here, and fully understood, it is thereupon ordered that the said Lawrence Kenworthy, be transported to the coast of New South Wales, or some one or other the islands adjacent, for and during the term of seven years, and that he, the said L. Kenworthy, be in mercy, &c." The record was removed into the court of King's Bench, and various errors assigned, and it was held not to be a sufficient judgment and for want of a judgment in the court below, the cause was remanded, with an order to that court to proceed and give judgment on the conviction. If these cases are to be considered as indicating what the law is, then it is to be determined whether a judgment which is void, being pronounced by a tribunal not having authority to pronounce any judgment at all, be in law a judgment. The very state-

ment of the proposition is sufficient to show that it is not. We have already seen that the court has no right and no jurisdiction to proceed to judgment on Sunday. Suppose after this verdict had been received, and the court adjourned to the next term, the clerk had entered up a judgment that could have been more than a void judgment, and no more void than this; or suppose, after this verdict had been received, the cause had been continued to the next term for judgment, and the court adjourned, and that some time during the vacation, and without appointing a special term, through some misapprehension, the Judge had opened court and rendered judgment, such a judgment would have been a nullity, but no more so than this. This last is not entirely an imaginary case, for a term of the Cook Circuit Court was once held, after the time for holding that court had been changed, the law making the change having passed the Legislature but a few days before the court was held, and not yet known there. This court held, that every thing that was done at that term was absolutely void. Galusha v. Butterfield, 2 Scam. 237; Archer v. Ross, Ib. 303, and note. Suppose, then, that a prisoner had been convicted at a previous term, and the verdict recorded, and continued till the next term for judgment, and the court had gone on and rendered judgment at that term, can any one suppose that such void judgment could vitate the verdict and all antecedent proceedings? A void judgment, powerless for good, cannot be potent for evil.

But counsel seem to think that, Arther v. Mosely, 2 Bibb, 589, is an authority directly in point, showing that where the verdict is received, and judgment pronounced on Sunday, both will be reversed, yet such is not the case. There, a part of the evidence was heard, and the cause submitted to the jury on Sunday, as well as the verdict received and the judgment entered on that day. The trial of the cause being a judicial proceeding, of course could not be done on Sunday, which is admitted on all hands not to be a judicial day. There, the judgment was reversed, the verdict set aside and the cause remanded. It is also urged in this case, that, al-

though no part of the trial took place on Sunday, yet as the record shows that the jury deliberated and finally agreed upon their verdict on Sunday, for that reason it was illegal and void, because the jury were the judges of the law as well as of the facts, their deliberating and agreeing upon their verdict was a judicial act, and, hence, void. The objection cannot prevail. If it could, all verdicts in criminal cases, where the jury are kept together over Sunday, and their verdicts received on Monday morning, would have to be set aside, if it could be established that they agreed upon their verdict, or even deliberated on the case on Sunday, for their deliberation would be as objectionable as their agreement.

Although the decisions of the motions for a new trial, and in arrest of judgment, being judicial acts, were also void, and those motions may be again urged by the prisoner, if he shall be so advised, yet we feel it our duty to state, that he may not be beguiled into a groundless hope, that what has been already decided, disposes of the one, and we have been unable to discover any grounds for the other.

The judgment of the circuit court is declared to be absolutely null and void, and the cause is remanded, with a procedendo to that court, to render the judgment of the law upon the verdict of the jury.*

Koerner, J. delivered the following dissenting opinion:

In dissenting from the opinion of the majority of the court, I deem it proper to assign briefly the reasons for so doing.

The Common Law recognizes three different degrees of guilt in the commission of a felony, (high treason excepted,) where several persons participate: 1. The principal in the

*The Legislature, soon after this decision was pronounced, passed an Act changing the punishment in this case from death to imprisonment in the Penitentiary for life, should the plaintiff in error at the next term of the Warren Circuit Court, after sentence was again passed upon him, assent to such change. His assent was given at the time stated.

first degree; 2. The principal in the second degree; 3. The accessory before the fact.

The first was he who actually committed the felony; the second he who was present at the act, aiding and abetting; the third he who, not being present, had encouraged or advised the commission of the felony.

Principals in the second degree (accessories at the fact,) could not be tried, as the Common Law originally stood, until the principal had been convicted or outlawed; (Foster, 347;) but, at a later period, they could be arraigned and tried before the principal in the first degree had been found guilty. 2 Hale, 223.

At Common Law, an accessory before the fact could not be tried without his own consent, (unless tried with the principal,) until the guilt of his principal had been legally ascertained by conviction or outlawry. When principal and accessory were tried together, the jury were charged to inquire first of the principal, and if they should not find him guilty, to acquit the accessory; but if they should find him guilty, then to inquire of the accessory. 1 Hale, 624.

At Common Law, the accessory before the fact cannot be indicted as principal; and though the offence of an accessory before the fact is felony at Common Law, yet such offence is not punishable with death, unless it be so expressly provided by statute. Archb. Crim. Pl. 646.

I will now consider how far the Common Law, upon this subject has been changed by our statute.

The thirteenth section of the Criminal Code of Revised Laws, 1845, page 153, reads as follows: "An accessory is he or she who stands by and aids, abets or assists, or who, not being present, aiding, assisting and abetting, hath advised and encouraged the perpetration of the crime. He or she, who thus aids, abets or assists, advises or encourages, shall be deemed and considered as principal, and punished accordingly." I will remark here, that our statute sets out with defining the offence of an accessory with much precision, which would have been useless if it had intended to treat them in every respect as principals. If such had been

the object, it would have been sufficient to have said, all accessories before and at the fact shall be deemed guilty of having committed the offence of which the principal is charged.

This section certainly establishes the distinction between principals in the second degree and accessories before the fact. It also, by necessary implication at least, does away with the principle, that an accessory cannot be tried, except on conviction or outlawry of the principal. It also enacts that, in all cases, the punishment shall be the same which is provided for the principal. Here then are obvious and important changes wrought in the Common Law by our statute, and an ample meaning is given to almost every letter of it.

There seems to be no necessity whatever for still enlarging its operation by further implication, beyond what is plainly meant by it. It being in derogation of the Common law, it ought not to receive a latitudinarian construction. The statute does not say that accessories shall be indicted and proceeded against in every respect as though they were principals, but merely that they shall be punished as principals. It does not mean in my opinion, that an accessory may be charged as having actually, with his own hands, committed the crime. If this legal fiction is allowed, one may be charged in an indictment with having murdered another, on a certain day, at a certain place in the State of Illinois, by discharging a pistol, then and there by him in his right hand held, and may be convicted upon proof that the murder was committed by a third person, whose name he may never have heard, and while he, the accused, was a thousand miles off, provided he had advised and encouraged such murder before it was perpetrated, although he remains wholly ignorant of the precise time when he is accused of having given the encouragement.

If by such proof under the simple charge of actual murder, the accused is not taken by surprise, in a legal sense at least, then indeed I do not know what is meant by a party being taken by surprise. The ninth section of the 8th Art. of

our Constitution provides, that the accused in all criminal prosecutions shall have a right to demand the nature and cause of the accusation against him. Does an indictment, as is preferred in the present case against Baxter, who is established to have encouraged the crime before its commission, comport with the spirit of this provision? I think not I am of opinion that when a person is supposed to be guilty as an accessory before the fact, the indictment must charge him accordingly. It must set forth the commission of the crime by the principal and then charge him with having advised and encouraged the perpetration of the offence. It would indeed be very desirable for Legislatures to provide for the preferring of criminal accusations in plain and intelligible language, so that the accused might comprehend the "nature and cause" of his charge, without being an adept in the doctrine of fictions. It is time that indictments should be divested of the barbarous and unintelligible jargon, with which they still abound.

The question respecting the propriety of indicting an accessory before the fact as principal, is presented by several instructions which were asked by the defendant's counsel. These instructions were refused. In my opinion they ought to have been given, and I think this error is well assigned.

There is another point in which I have the misfortune to differ with the majority of the court. The court held, that Sunday, by the Common Law of England, is not a judicial day, and that this portion of the Common Law is applicable to our institutions and conditions of our people. Be it so. The reason of this rule certainly is, that Sunday being set apart as a day of rest, and for purposes of public worship it would be wrong to permit public officers to exercise their functions, which would, in many instances, defeat the objects which temporal and spiritual governments had in view, in the setting apart one day in the week. The distinction which seems to have been drawn by some courts between ministerial and judicial acts, and that the former may be lawfully done, but not the latter, appears to me to have no foundation in reason; it is an ingenious device for upholding

certain legal acts, which it would have been inconvenient to set aside. The dovotions of the public are certainly as much interrupted by the execution of a criminal, as by an assessment of damages before a sheriff in his office, and yet the first, according this distinction, could be legally done, while the assessment, made on Sunday, would be a nullity.

There are authorities which lay it down as law, that a verdict may be received on a Sunday, when it appears that this jury was impaneled on Saturday previous. It seems to me, however, that these decisions proceed upon the principle, that the Court will presume in such a case that the verdict was actually found on Saturday, and merely delivered on Sunday, which delivery may be said to be a mere mechanical act. In 2 Bay, 232, it was held, that no verdict whatever can be received on Sunday. In the present case the record shows, that the verdict was actually found on Sunday. The jury were impaneled on Saturday, brought in a verdict on Sunday, but having been polled, would not stand to it. They then went back to consider, and on the same day returned the verdict upon which sentence was pronounced. And is it to be said that the solemn finding of a verdict, upon full deliberation, affecting the life of a human being, by a jury, who by our Constitution are made the judges of law as well as of fact in criminal cases, is a mere ministerial act? An award made by arbitrators on a Sunday, it is said, is void, but a verdict finding a citizen guilty of murder, is valid.

But admitting that it were legal to receive a verdict on Sunday, but illegal as the Court say, to pronounce judgment, what are the consequences of the reversal of the judgment? By the Common Law, when a judgment in a criminal case is erroneous, all former proceedings in case of conviction are defeated by the reversal. 1 Chitty's Crim. Law, 755. It is said, however, that there is a difference between a judgment which is erroneous, and one which is void. I am at a loss to comprehend this distinction. If, in the present case, the Court had sentenced Baxter to be shot, inste ad being hung, he would have been entitled to a new trial;

as he was sentenced to the proper punishment, but on a wrong day, the verdict must stand. I cannot accede to this reasoning. I presume however, that the Court does not wish to be understood as deciding, that the decisions of the Court in overruling a motion for a new trial and in arrest of judgment, are also to stand, for they surely were judicial acts; and that the prisoner will be entitled to renew his several motions.

In declaring this judgment as utterly void, and of no effect whatever, it seems to follow, that if Baxter had not taken the appeal, and had been executed, the sheriff would have been guilty of murder, as he then would have acted without any authority whatever. But I will not pursue this inquiry any further, and will conclude by stating that I believe that a verdict found on Sunday in a criminal case cannot be received, it being a judicial act, upon the assumption that judicial acts are void; and that even if such verdicts could be received, they would have to be set aside, if sentence were pronounced upon them on Sunday, upon the well established rule, that if a judgment in a criminal case is reversed all previous proceedings must also be reversed.

Case remanded.

JAMES PURVIANCE, appellants, v. ISSAC HOLT, appellee.

Appeal from Madison.

When an instrument in writing, which is the basis of a suit or action, is lost, to confer jurisdiction upon a court of chancery, there must be an affidavit of its loss. This rule, however, only applies in cases where, if the same had not been lost, the remedy of the party would have at law, and not in chancery.

Parol evidence may be admitted to show that an absolute deed, whatever may be its covenants, was intended as a mortgage, or mere security for the payment of a debt, and the grantor can have relief in equity.

BILL IN CHANCERY for relief, &c. in the Madison Circuit Court, brought by the appellee against the appellants. The allegations of the bill, the answers of the defendants below,

the testimony of witnesses, and the decree of the circuit court are substantially set forth in the Opinion of the court.

L. B. Parsons, Jr., & H. W. Billings, for the appellants.

1. The court below should have dismissed the suit for want of jurisdiction because

First. The court had no jurisdiction, as the party had a remedy at law; and further, the suit depending, as shown by the pleadings and evidence, entirely upon the loss of a bond, it was necessary to give a court of Equity jurisdiction to have annexed to the appellee's bill an affidavit of the loss of the bond. 1 Story's Eq. Jur. 99; §§ 83-4, and note; Pennington v. The Governor, 1 Blackf. 78; Cooper's Eq. Pl. 125–6, 208; Walmsley v. Child, 1 Vesey, Sen. 341-6; Whitchurch v. Goulding, 2 Peere Williams, 540; Rayburn v. Shortridge, 2 Blackf. 481; Pert's heirs v. Taylor's devisees, 2 Bidd, 558; 1 Mad. Ch. 27; Story's Eq. Pl. 342-3, § 313.

Second. Advantage of a want of jurisdiction may be taken at any stage of the proceedings. 1 Bard. Ch. Pr. 39; Story's Eq. Pl. 9. § 10; Bryan v. Blythe, 4 Blackf. 251, and note.

2. The court allowed parol evidence to be introduced to vary and contradict instruments under seal, contrary to law. Broadwell v. Broadwell, 1 Gilm. 605-8.

The only cases where such testimony can be introduced, is where fraud, accident, mistake or surprise are alleged, and then the allegation must be sustained by the clearest and most conclusive proof. 1 Story's Eq. Jur. §§ 152–3, 6, 7; Griswold v. Smith, 10 Verm. 455; Stevens v. Cooper, 1 Johns. Ch. R. 425–9; Parkhurst v. Van Cortlandt, Ib. 282; Botsford v. Burr, 2 do. 415; Lyman v. United Ins. Co. Ib. 631-3; Moran v. Hays, 1 do. 342-3; Wesley v. Thomas, 6 Har. & Johns. 26-8; Hale v. Jewell, 7 Greenl. 437; Child v. Wells, 13 Pick. 123; Paine v. McIntire, 1 Mass. 68; Thomas v. McCormac, 9 Dana, 108.

3. The court should have declared the bond void on account of the failure of consideration by a breach of the covenants of the appellee.

The deed contains full covenants of warranty against all

lines, charges and incumbrances. The deed is dated 14th September, 1842, and subsequent to the date of the arrest of the appellee, for the crime of which he was convicted fined and imprisoned, and to pay which sum the land was sold to Barnsbach. So that the covenants of the appellee were broken and the land entirely lost, for which alone the bond was executed. Rev. State., Crim. Code, §§ 52, 192.

The land was bought at the sale by Barnsbach without collusion with the other appellants for his own use, and by which sale all the title of appellants passed to him, and the appellants. Purviance now holds under a title from Barnsbach, and not from appellee. Hence, the appellee cannot seek successfully to set up a bond, the consideration of which has totally failed by his own crime. Frisbie v. Hoffnagle, 11 Johns. 50; Rice v. Goddard, 14 Pick. 295; Miller v. Howell, 1 Scam. 500; Rev. Stat. 385, Ch. 73, § 10; Tillottson v. Grapes, 4 New Hamp. 446.

Nor does it make any difference whether it was known to the grantee at the time of purchase, that there were incumbrances of any kind on the land, as it is presumed unless such incumbrances are expressly named in the deed and reserved from the general warranty. Against that, the grantor will settle them and protect the property. Syndam v. Jones, 10 Wend. 182-6; Townsend v. Weld, 8 Mass. 146-7; Harlow v. Thomas, 15 Pick 69–70; Frisbie v. Hoffnagle, 11 Johns. 50; Ingersoll v. Jacksons, 9 Mass. 469.

4. The appellants were not bound to have paid off such incumbrance, and not permit the land to have been sold, they might not be able to do so; the record shows they were not, and were obliged on purchasing the land from Barnsbach to borrow all the money at an exorbitant interest, and mortgage the land to secure its payment. Had they, however, been able to have purchased it, and done so, they could then have recovered the $365 paid for it from the appellee, as the measure of their damages, and which must have gone as an off-set to their bond, unless it was paid up to appellants. Stannard v. Eldridge, 16 Johns. 255; DeLasergue v. Morris, 7 do. 358; Hall v. Dean. 13 do. 105.

Inadequacy of consideration is no ground of relief. 1 Story's Eq. Jur. § 245–6, 257.

The gift of the personal property is such a one as a court of Equity will sustain, at least on condition of the appellants' paying off the $70 of debts. 2 Story's Eq. Jur. 102–3, § 793.

W. Martin, for the appellee.

The opinion of the court was delivered by

PURPLE, J. * The record in this suit shows that Isaac Holt filed, on the 15th of October, 1844, his bill of complaint against said appellants, stating that on the 14th of September, 1842, he conveyed to Purviance and Holt, two of the defendants in this suit, 106 acres of land; that the consideration was to be made up by paying about $70 of debts due by the appellee, by supporting him during life, and paying him an anuuity of $60 a year, commencing with 1st January, 1843; that the appellee at same time gave said two appellants a power of attorney to enter up judgment against appellee, for $1,100, for the purpose of making them judgment creditors: that appellant had been bound over, previous to conveyance above, to answer a charge of an assault and battery with intent to kill, and said two appellees were his securities; that at time of conveyance of said land he also conveyed to appellants between $500 and $600 worth of personal property, for the purpose of enabling appellants to redeem land, if sold to pay any fine inflicted on appellee; that at same time said two appellants executed their bond, conditioned to pay consideration as above named: alleges that the land was subsequently sold to satisfy a judgment against appellee, on account of said assault and battery, for the sum of $361; that said Barnsbach bought said land at sale, for said appellants; alleges Barnsbach had no interest in said land, but colluded with the other appellants to defraud appellee; that the certificate of purchase was assigned to said Pur-

*WILSON, C. J. did not sit in this case.

viance and Holt, and they alone paid the $361 ; alleges $361 was far less than value of personal property aforesaid ; that appellants had other money and effects belonging to appellee ; that they have not complied with their said bond : that bond was stolen and destroyed by said Purviance and Holt ; that they made false representations to obtain said conveyance, and to cheat appellee ; prays appellants may be decreed to make a quit-claim deed to appellee of said land ; to account for rent and profits, and also for the amount of personal property received over $361, and the bond declared void ; or, that bond stand as set out in bill, and master decide how much shall be paid for board and lodging from date of deed, and that such amount, as also the $60 a year, be made a lien on said land. An answer under oath was waived.

To this bill the appellants, Purviance and Holt, answered, admitting the execution of a deed by the appellee, and a bond by themselves ; but deny that the consideration of deed or condition of bond were as alleged in bill ; admitting a transfer of personal property ; but deny it was at the time of the value, or for the purpose set forth ; admit the sale of the land, but allege it was to satisfy a fine inflicted on appellee ; expressly deny that it was purchased by Barnsbach for them in any manner ; also, expressly deny taking or destroying the bond, or that they know any thing about it, unless the appellee has it : state that on the 8th September, 1842, the appellee came to said two appellants, proposed a transfer of personal property, executed and delivered to them a receipted bill of sale of said property ; made no agreement for consideration ; that they received it as a gift, knew but little about it, as to how much really existed or what was its value ; all they ever found was not worth $180.50 ; state that on the 14th September, 1842, the appellants received, at the urgent request of appellee, a deed of said land, with full covenants of warranty against all liens, charges or incumbrances ; that various considerations were proposed for said land, all of which the appellants rejected, except to pay the appellee fifty dollars a year, from 1st January, 1843 ; that such, and no other, was the

consideration agreed upon and given for said land ; that at the same time, at the appellee's request, they agreed, in consideration of the personal property previously transferred, to pay certain small debts due by him, amounting to about seventy dollars ; that at same date last aforesaid, they executed their bond, conditioned to pay said annuity of fifty dollars a year and $70 of debts, and nothing farther ; that the power of attorney was given by appellee with the design of preventing his wife from obtaining alimony, in case she obtained a divorce, for which she was then suing, and which she has since obtained, and to secure the appellants on the recognizance bond by them entered into for the appellee ; that the land was not worth over $700 at most, and no more than fair consideration for bond ; that appellee was brought to trial on an indictment, with two counts, at the October term, 1843 ; nol. pros. was entered to first count, and appellee pleaded guilty to the second for an assault and battery with intent to commit great bodily injury, and was fined by said court $300 ; that by virtue of such conviction the said fine and costs became a lien, charge and incumbrance on said land, from the date of the arrest of said appellee, and which was on or about the 2d day of September, 1842, and before the conveyance of said lands ; that it was under such conviction and fine, that said land was sold, and not to satisfy a judgment as in the bill was alleged ; appellants allege that they were not bound to have appeared at the sale; that the purchase of Barnsbach, under a lien anterior to the date or deed to appellants discharged them forever from the conditions of their bond ; that they found Barnsbach present at the sale and intending to purchase for himself ; that they persuaded him to agree to transfer the certificate of purchase to them, if they would pay him the purchase money and ten per cent. interest by the last day of March term of the Madison County Commissioners' Court, in 1844, or in case they did not do it, would give up any and all claim to said land ; that to comply with said agreement, Purviance borrowed $365, at twelve per cent interest, which he now owes, and for which the land is mortgaged: answer further

denies that the appellants had any money or effects of appellee other than aforesaid, except one note for $13, and that p rt of the money received for it was paid to appellee and part to another person at his request: states that appellee was sick at Purviance's house in October, 1843, and not in March; that in May, June and July, 1843, appellee was sick at one Kinder's, on account of which appellants paid said Kinder $45, and requested said appellee to indorse the same on their bond, that the appellee refused to produce bond or indorse the same; that this was some months before the appellee was sick at Purviance's house when he alleges said bond was taken from him: answer denies not having complied with bond so far as legally bound to do so; states there has been paid $141.22 on said bond; and, further, that appellants have been at an expense of $120 besides, on account of appellee, and paid $365 for the land to Barnsbach, on account of incumbrances and sale, contrary to covenant of warranty of appellee; appellants did not know or suppose that any fine would have become a lein, otherwise would never have given their bond, as all the property would have been no adequate consideration; appellants claim an entire release from bond, but are ready to abide by it, if appellee will pay or discharge the above sums, amounting in all to $626.22, by them expended for appellee and by breach of his covenants; expressly deny any representations, as alleged, to procure the transfer, but allege that all propositions for the same came from appellee; appellee was a grossly intemperate, quarrelsome and dangerous man, and appellant never did or would consent to have him reside with them.

The answer of Barnsbach states, that he purchased the land at Sheriff's sale and paid for the same the sum of $361.00. the amount of the fine and costs assessed against Issac Holt, the appellee; That he had intended, aud made an arrangement to purchase the said land for himself, and for his own exclusive use and benefit, but that on or about the day of sale, viz: the 30th December, 1843, Purviance came to him and informed him, that he and John Holt were interested in the land by purchase from appellee, and requested him not to

persist in purchasing the land upon his own account, but to aid said Purviance and Holt in redeeming the same from the sale; that it was then agreed, Barnsbach should purchase in the land, and that Purviance should be permitted to redeem the same by the March term of the county commissioners' court, 1844, by paying $362.00, and interest thereon at ten per cent; that said Barnsbach did so purchase with his own money and paid $361.00. That Purviance paid him according to the contract, and took an assignment of the sheriff's certificate of purchase to himself; that he believes if it had not been for the solicitation of Purviance, he would have bought the land himself, and Purviance and Holt would have lost the same.

George T. M. Davis and John R. Purviance are the only witnesses who testify to any facts in relation to the consideration of the conveyance by appellee to appellants.

Davis states, that on the day of the date of the deed, all the parties came to him and employed him to draw up the papers between them; that they all stated that the appellee had been arrested, and bound over on a charge of an assault with an intent to commit murder; and, that Purviance and Holt, appellants, had become his sureties for his appearance at court in the sum of $500.00; that they desired to be secured against their liabilities in the event that Holt, [appellee,] did not appear at court and take his trial pursuant to his recognizance; that it was also stated by both parties, that in addition to giving the securiety above named, it was the mutual understanding of the parties that the debts appellee owed should be provided for, and he be supported during his natural life; that to accomplish this appellee agreed to convey the land; that he drew the deed pursuant to the agreement which was duly executed; that appellee also transferred to appellants his personal property, as the parties informed the witness, estimated at $500 or $600; about the personal property, he had no definite recollection; that appellants executed to the appellee a bond, which was drawn by witness, in which they bound themselves to pay to appellant according to his recollection, the sum of sixty dollars annu-

ally during his natural life; that it might have been $50.00 instead of $60 annually, the first payment to be made on the 1st January, A. D. 1843; that appellants also bound themselves to pay off certain small debts owing by the complainant, exclusive of the yearly allowance; that he could not distinctly remember the amount of debts to be paid; thinks between $70.00 and $80.00. There was one to one Starr, of $50.00 which was contingent, depending on the result of a divorce suit between appellee and his wife; that there was another agreement which was not in the bond, but which constituted a portion of the consideration of the conveyance of the land; that appellants were to take free of expense, the appellee's youngest son, and keep him until they could provide a good place for him which they were to do; that the papers were all executed in his presence; that appellee gave the appellants a power of attorney to enter up a judgment against him for about $1100.00, as an additional means of perfecting the title; that his understanding was that in case the appellee was tried, and appellants did not have to pay the recognizance, appellee was to retain his interest in the land.

J. R. Purviance testifies, that he was present at Davis's when the papers were drawn and executed; that at the time Purviance and Holt agreed to pay Isaac Holt $50.00 per year, and all his debts which amounted to less than $100; that he thinks the land was not to be re-conveyed to Isaac Holt; that he understood, that the $50.00 per year and the payment of the debts was to be in full satisfaction of the conveyance of the land, and that he believed there was no bargain as to board, lodging, &c.

Henry Aheman stated that he was present at the transfer of the personal property; that he understood that it was given to appellants, but in lieu of it they were to assist the appellee out of difficulty; but knew of no positive agreement that the personal property was worth from $168 to $178.

The residue of the testimony is in relation to the value, and annual rent of the land conveyed, and the itims of account which the appellant claim against the appellee for expenditures and advances on his account. The estimated

value of the land varies in the opinion of different witnesses from $6.00 to $20.00 per acre; and the value of the rent of the improved portion, (about fifty acres,) from 75 cents to $1.80 per acre. The papers referred to in the bill and answers are made part of the record. From an attentive examination of the whole record, we are satisfied that the estimate made in the circuit court of the expenditures and advances of appellants for appellee, was the proper one, and, therefore, the evidence relative to the same is not noticed particularly. The court decreed that the bond executed September 14, 1843, to pay $70 of debts, and $50, 1st day of January, 1843, and an annuity of $50 thereafter during life of appellee, be considered in full force and effect; and the court, on taking account, found appellant indebted to appellee on 1st of November, 1845, $29—appellants decreed to pay this $29 on 1st January, 1846, and also, other $50 a year ever thereafter during life of appellee; that the land be subject to pay said sums of money, and liable to be sold on failure to pay the same; said lien, however, not to interfere with the said mortgage executed to secure Waddel and Whitesides—appellee to pay costs of suit.

The errors assigned are

First. That the court erred in not dismissing the bill for want of jurisdiction;

Second. In allowing parol evidence to vary and contradict instruments under seal;

Third. In not declaring the bond void by reason of failure of consideration by breach of covenants of appellee;

Fourth. In not allowing the $365 and interest, paid on account of an incumbrance existing at the time of the conveyance of the land as so much paid on the bond; and

Fifth. In rendering any decree against the appellants, and not allowing the entire sum of $626.22 paid by appellants for appellee.

It will not be necessary to consider these questions in the order in which they are presented by these assignments of error. They present but two points worthy of consideration. The first is as to the jurisdiction of the court. The argu-

ment upon this point has been made upon the assumption, that the existence of the bond is the foundation of the appellee's equity upon which he bases his right to file this bill; and numerous authorities have been cited to show, what is not denied, that when an instrument in writing, which is the basis of a suit or action is lost, to confer jurisdiction upon a court of chancery, there must be an affidavit of its loss. This rule, however, only applies in cases where, if the same had not been so lost, the party's remedy would have been at law and not in chancery. The affidavit is required to confer jurisdiction in cases only, where ordinarily the remedy would be strictly a legal one.(*a*)That is not this case. A court of chancery would have jurisdiction in this controversy, if there was no allegation of the existence or loss of the bond. The object of the bill is to ascertain by a judicial determination, what was the consideration of the conveyance of the land; and to subject it to the lien of an annuity, which the appellee contends was one of the constituent portions of the consideration.

This brings me to the second, and really, only remaining point presented by the record. What was the consideration for this conveyance? Let us look at the facts. The appellee had been arrested for crime. The appellants had become security for his appearance at court, and wished to indemnify themselves against their liability upon his recognizance.[*b*] He had made them a bill of sale of his personal property, amounting in value to $180, without any apparent consideration, unless, as one witness stated, he understood it, they were in return to assist him in his defence. That they might be made liable to the amount of his recognizance, $500 was fully understood by them when they made the bond conditioned to pay the annuity and the appellee's debts. He was an old man, very intemperate, and had parted with all his property placing the same in their hands. Is it at all probable, then, setting aside the other evidence in the cause, that they placed any reliance upon the covenants in his deed? And when the testimony is considered, we are compelled to come to the conclusion that they assumed the risk of his

(*a*) Bennit vs. Waller, 23 Ill. R. 97.

(*b*) Jennings vs. McConnell, 17 Ill. R. 148.

failure to appear and answer to the charge against him, together with the payment of his debts and the annuity of $50 per annum for the land, and that these things constituted the consideration of the conveyance. This was the price at which the land was purchased. It contradicts none of the written contracts, nor any portions of them, and he is as much entitled to have the payment enforced, as though they had agreed to pay in money for the whole. True, the covenant in the deed is a covenant against incumbrances. An incumbrance did exist. It is less in amonnt, however, than the parties by their contract contemplated that the appellants might be compelled to pay upon their recognizance.

The evidence of Davis in relation to the contract about the land and the conditions of the bond is positive. That of John R. Purviance is doubtful and uncertain. He thinks, believes and understands, but states nothing with certainty. The fact that Barnsbach purchased the land at the sheriff sale, under an agreement to convey the same to the appellants, does not change the case nor the relative position of the parties. As against the rights of the appellee the appellants acquired no new title. In equity they were bound by their contract to remove this lien; and whether they had done so or not, they would still have been liable for the payment of the annuity. There was no error in the court's permitting the consideration of the deed to be thus investigated. It violates no rule of law. Whatever covenants an absolute deed may contain, parol evidence may be admitted to show that it was intended as a mortgage, or mere security for the payment of a debt, and the grantor can have relief in Equity. (*a*)

In this case we cannot discover that any injustice has been done to the appellants, or that there is any substantial error in the record.

The decree of the circuit court is affirmed with costs.

Decree affirmed.

(*a*) Post 547-Kinzie vs. Penrose, 2 Scam. R. 520, and notes; Delahay vs. McConnell, 4 Scam. R. 158, and notes; Roberts vs. Richards, 36 Ill. R. 339.

GEORGE PASSFIELD, plaintiff in error, v. THE PEOPLE OF THE STATE OF ILLINOIS, defendants in error.

Error to Sangamon.

A. as principal, and B. and C. as his sureties, entered into a joint and several recognizance to the People for the appearance of A. at court, &c. A. failed to appear, and the recognizance was forfeited. A sci. fa. was issued, and returned served on C. An alias was also issued, returnable at a subsequent term, which was served on B. In each case, there was a return of nihil as to A. Judgment by default was rendered against B. alone, with an order for execution, which was assigned for error : Held, that the recognizance being joint and several, the judgment was properly rendered.

SCIRE FACIAS, upon a recognizance to the People, &c., at the July term 1842, of the Sangamon Circuit Court, the Hon. Samuel H. Treat presiding. The plaintiff in error, who was one of three defendants in the court below, was duly served, but made default, and judgment was rendered thereon against him only for $800. There had been two returns of "nihil" as to one of the others, and service upon a third.

The cause was submitted without argument by S. T. Logan, for the plaintiff in error, and D. B. Campbell, Attorney General, for the defendants in error.

The opinion of the court was delivered by

PURPLE, J. * On the 22nd day of September, 1841, Love S. Cornwell, George Passfield, and James Shepherd, the first as principal, and the others as sureties, acknowledged a joint and several recognizance, before a justice of the peace of Sangamon county, in the sum of eight hundred dollars, conditioned for the appearance of the principal at the next term of the Sangamon Circuit Court, to answer to a charge of larceny. Cornwell failing to appear, his recognizance was forfeited, and a scire facias issued against him and his sureties, returnable to March term, A. D. 1842, which was served on Shepherd, and returned nihil as to

*DENNING, J. did not sit in this case.

Cornwell and Passfield. An alias scire facias was issued, returnable to the July term, A. D. 1842, which was served on Passfield, and returned nihil as to Cornwell.

At the same term, judgment by default was entered against Passfield alone, with an order for execution.

The rendition of the judgment, in the manner aforesaid, is assigned for error.

The main question presented in this record we consider as settled in the case of Sans v. The People, decided at the present term. The recognizance is recited at length in the scire facias, by which it manifestly appears that it is joint and several. In principle, there is no distinction between this and the case before referred to. Under the proceedings in the court below, judgment might have been rendered againt all the cognizors, but of this the People only can complain. (*a*)

There is a technical inaccuracy in the form of the judgment in the circuit court. It is rendered in the usual form of judgments in ordinary actions at laws, with an award of execution against the defendant, Passfield. Strict formality would have required that it should have been entered that the said People have execution against the said George Passfield, &c. according to the force, form and effect of his said recognizance, &c. Passfield, however, is in no way prejudiced on this account, and the judgment will not, for this reason, be reversed.

The judgment of the circuit court is affirmed, with costs.

Judgment affirmed.

(*a*) Mussulman vs. People, 15 Ill. R. 52.

The Unknown Heirs of ROBERT BOWLES, deceased, plaintiff in error, v. RUDOLPHUS ROUSE, adm'r, &c. defendant in error.

Error to Peoria.

A writ of error must be prosecuted by a natural or artificial person, against whom a judgment for costs can be rendered, should the judgment of the circuit court be affirmed.

IN this case, a motion was made by the counsel for the defendant in error to quash the writ of error, first, because the writ would not lie, and second, because it was prosecuted in the name of unknown persons.

A. Williams, and J. Butterfield, for the defendant in error, to support their motion relied upon the following authorities: Groenwelt v. Burwell, 1 Salk. 144; 2 Tidd's Pr. 1134; Rev. Stat. 559, § 109; Watson v. May, 8 Ala. 177. 12 Peters 140.

O. H. Browning & N. Bushnell, for the plaintiffs in error, resisted the motion and cited Rev. Stat. 143, § 7; Ibid. 420, § § 47, 49-51, 53-55; Bowers v. Green, 1 Scam. 43; Sloo v. The State Bank, Ib. 440; Greenup v. Porter, 2 do. 417; Rev. Stat. 559, § 109; Bromagham v. Clapp, 6 Cowen, 611; S. C. 8 do. 746; C. 9 do. 304, 530.

PER CURIAM. It is necessary that a person, either natural or artificial, should prosecute a writ of error. There must be some definite person as plaintiff in error, against whom a judgment may be given for costs in case the judgment below should be affirmed. Leave is, however, given to amend the writ of error, which, if not done within ten days, the writ of error will be dismissed. (*a*)

The motion to dismiss because a writ of error will not lie, is overruled.*

Motion overruled.

(*a*) Schooner vs. Woodworth, 1 Scam. R. 511.

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*On the decision of this motion, the counsel for the plaintiffs entered the appearance of Robert L. Catherwood and Ellen Catherwood, his wife, as plaintiffs in this case.

Same v. Same.

Error to Peoria.

An administrator seeking to subject real estate to sale for the the payment : the debts of the deceased, may give a general notice by publication of his intention to apply for leave to sell, without naming particular persons as defendants, the statute having regard to all persons interested, whether defendants or not. (a)

In a notice of an application for leave to sell real estate, where unknown heirs were interested, the words, "State of Illinois," were not mentioned with the words, "County of Peoria." There was an appearance by the only known heir in the case : Held, that the defect was cured by such appearance. (b)

A decree on a petition by an administrator for the sale of lands directed the sale of the whole land, or so much thereof as would pay the debts: Held, to be sufficient, and, further, that it was unnecessary that it should state what was the particular interest the deceased had in the land ordered to be sold.

The provisions of the first section of the act supplemental to the Statute of Wills, approved March 1, 1834, is not restricted in its application to cases of the death of resident proprietors of real estate, but embraces all classes of persons.

The proper county in case of non-residents' dying, leaving lands in this State, is the county where such lands or a part of them lie, and in such county administration to be granted.

Bill in Chancery, for leave to sell real estate, &c. filed by the defendant in error against the plaintiffs in error, in the Peoria Circuit court, and heard before the Hon. John D. Caton at the October term 1843. A sale was ordered, &c.

The facts and proceedings in the case are sufficiently stated in the argument of the counsel for the plaintiffs in error, and in the Opinion of the Court.

O. H. Browning & N. Bushnell, for the plaintiffs in error, filed the following written argument:

It appears on the face of the petition in this case, that Robert Bowles was a citizen of New York ; that he died there some years ago, intestate ; that he had no personal estate of any kiud in this State, neither goods nor chattels,

(a) Gibson vs. Roll, 27 Ill. R. 91 ; Stow vs. Kimball, 28 Ill. R. 93 : Goudy vs Hall 36 Ill. R. 313 ; Morris vs. Hogle, 37 Ill. R. 165.

(b) Stow vs. Kimball, 28 Ill. R. 99 ; Seerist vs. Green, 3 Wal. U. S. R. 751.

rights nor credits. It is not shown that he was ever in the State of Illinois. That at the time of his death he was the owner of thirty eight quarter sections of land in Illinois, three of which were in the county of Peoria, six in Adams, five in Hancock, five in Fulton, five in Henderson, &c. That on the 11th of April, 1842, (but how long after Bowles' death does not appear, only by the statement that he died some years before,) the defendant in error was appointed administrator of the estate of said Bowles, by the Probate Court of Peoria county. That on the 15th April, 1842, a claim was allowed by said court against said estate, in favor of one Joshua J. Moore, for $1360.34. That there are no assets to pay this debt, that the names of Bowles' heirs are unknown. and they are made parties to the petition by the style and description of "the unknown heirs of Robert Bowles, dec'd."

On this state of case ought the Circuit Court of Peoria county to have made a decree authorizing and directing the sale of the said lands? We insist not, for the following reasons :

I. Because the Probate Court of Peoria county had no jurisdiction to grant administration upon the estate of said Bowles, and having assumed to do so without authority, the grant was void, and conferred no power upon the pretended administrator to act in the premises.

At Common Law, the right to grant administration was generally determined by the domicil of the intestate at the time of his decease. Thus, if a man had two houses in different dioceses, and resided chiefly at one, but sometimes went to the other, and being there for a day or two, died having no bona notabilia in the first house, probate should be granted by the bishops of the diocese in which the testator died, for he was commorant there, and not there as a traveller. Toll. on Ex'rs, 52 ; Hillard v. Cox, 1 Salk 37.

And if an intestate died, having bona notabilia in several dioceses, administration was granted by the archbishop of the province. 1 Comyn's Dig. title "Adm'r," B. 3. But if he had not bona notabilia, administration was granted by the

bishop of the diocese where he died. Or, if he died within a peculiar, by the judge of the peculiar jurisdiction. 1 Com. Dig. title "Adm'r," B. 5; Bac. Abr. 36.

It is not contended that these rules are to govern in the grant of administrations here, but an understanding of them may be of service in constructing and applying our statutes upon the same subject.

The second section of the Act relative to wills and testaments, Rev. Code, 1833, provides that proof of the execution of wills shall be made before the Probate court of the proper county.

By the 17th section, if a testator shall have a mansion house, or known place of residence, his will shall be proved in the court of probate of the county wherein such mansion house, or place of residence shall be. If he has no known place of residence, and lands are devised by the will, it shall be proved in the Court of Probate of the county wherein the lands lie, or in one of them, if such lands lie in several different counties. If he has no known place of residence, and no lands are devised in the will, then it shall be proved either in the county where the testator died, or wherein the greater part of his estate shall lie.

This section ascertains what is meant by the term "proper county," wherever it occurs in other parts of the law, either in its application to the probate of wills, or the granting of administration.

The 51st section, after providing that administration shall be granted to the husband upon the goods and chattels of the wife, and to the widow, or next of kin, upon the goods aud chattels of the husband, &c., adds, that in all cases where such intestate shall have been a non-resident, or without a widow, next of kin, or creditors in this State, but having property within this State, administration shall be granted to the public administrator of the proper county, and to no other person.

The 53rd section—that when any non-resident shall die intestate, leaving goods and chattels, rights and credits, or either, in this State, and no widow,. next of kin, or creditor

within the State, administration shall be granted to the public administrator of the county in which the goods and chattels, rights and credits and effects shall be found.

These are all the provisions found in the law of 23d January, 1829, relating to the grant of administration, which are supposed to be pertinent to this case.

The question then arises by virtue of the laws above referred to, had the Probate Court of Peoria county power or jurisdiction to appoint the defendant in error administrator of the estate ef Robert Bowles, deceased?

The following positions are thought to be fairly deducible from the law cited.

1. That where a deceased person was, at the time of his death, an inhabitant of this State, the power of granting administration upon his estate, appertains exclusively to the Probate Court of that county in which the deceased dwelt.

2. That if the intestate shall be a non-resident, leaving goods and chattels, rights and credits, or either, in this State, then the power of granting administration upon the estate can only be exercised by the Probate Court of the county in which the goods, chattels and effects of the intestate may be found at the time of his death.

3. That if such non-resident intestate shall leave no widow, next of kin, or creditor in this State, then administration shall be granted to the public administrator of the county in which the goods, chattles and effects shall be found, and to no other person.

4. That when a non resident intestate leaves lands only in this State, and neither goods nor chattels, rights nor credits, then there is no power or jurisdiction in any of the Probate Courts of this State to grant administration upon his estate.

The view taken of the law in this fourth porposition, is sustained by legislative construction. In 1833, on Act was passed amendatory to the Act of 1829, for the express purpose of enabling Probate Courts to grant administration, when resident intestates left land, but no personal effects

in this State. The provision is, "that in all cases where any person shall die seized or possessed of any real estate, within the State, and shall have no relative, or creditor within this State, or if there be any, who will not administer upon such deceased person's estate, it shall be the duty of the Judge of Probate, upon the application of any person interested therein, to commit the administration of such estate to the public administrator of the proper county."

Are non-resident intestates embraced by this section? They are not. When general terms are adopted, "as when any person shall die seized or possessed of any real estate within this State," it must be meant of persons dying within this State, within the jurisdiction of some of the Probate courts, and will not by implication, be extended to the citizens of other States. In all the provisions of the law when non-residents are intended they are expressly mentioned, and when not mentioned, residents alone must be understood.

This construction is supported by the language adopted in the latter part of the section above quoted, "administration shall be granted to the public administrator of the proper county." What is the proper county, and how is that to be determined? It has already been shown that in England the proper jurisdiction is determined by the domicil of the intestate. So by our law, the proper county is the county where the intestate resided. No other rule is given when general terms are used, by which the proper county may be ascertained; and the terms "proper county," and "place of residence of intestate," are used indifferently, and as importing the same thing throughout the law.

The jurisdiction of the courts of Probate is nowhere made to depend upon the locality of the land of the intestate. It could not be so, for the lands might lie in many counties; administration might be granted in several, and granted simultaneously, and in what way could this conflict of jurisdiction be settled or reconciled? It is not to be supposed that if the Legislature had intended non-resident intestates, they would have left the jurisdiction thus involved in difficulty, but would have given some rule by which to

determine what was meant by the proper county. If it is answered, the county in which the greater part of the lands lie, still the objection to the jurisdiction of the Probate court of Peoria county is not obviated, for a much greater quantity of the land in this case is situated in each of several other counties than in Peoria.

The intestate then having been a citizen of another State, and having died in another State, leaving neither goods nor chattels, rights, credits nor effects in this State, the Probate court of Peoria county could not lawfully grant administration of his estate; and having assumed and exercised a jurisdiction which it did not possess, the grant was void, and all acts done under, and by virtue of the grant, are likewise void.

Administration shall be void if granted by an incompetent authority, as by a bishop, where the intestate had bona notabilia, or by an archbishop, of effects in another province. 3 Bac. Abr. 36; Toll. Ex. 120; 1 Salk. 39; 1 Peere Williams, 44; Cro. E. 460; 1 Com. Dig., title "Adm'r," B. 3, and B. 5.

And if the Probate court had no jurisdiction in this case, then the grant of administration was void ab initio, and all the acts of the grantee are void. Griffith v. Frazier, 3 cond. R. 12; Holyoke v. Haskins, 5 Pick. 25, 27; same case, 9 do. 263; Sigourney v. Sieley, 22 do. 508; Wales v. Willard, 2 Mass. 124; Cutts v. Haskins, 9 do. 583; Embry v. Miller, 1 A. K. Marsh. 300; Pawling v. Speed's Executors, 5 Monroe, 583; Nelson's Lesse v. Griffin, 2 Yerger, 624.

II. The petition is filed against the unknown heirs of Robert Bowles, dec'd, which is unauthorized by law. The proceedings should have been against the heirs, and persons interested, by name, and if any of them were minors, a guardian ad litem should have been appointed by the court. See Statute of Wills and testaments, Rev. code, 1833, §§ 98, 103.

The Act authorizing suits against persons unknown, relates to applications for dower, partition of real estate, and suits in chancery. Gales's Stat., 25–6–7.

If applicable to this case, it is under the description of

suit in Chancery, which clearly relates only to such suits in Chancery as might be brought independent of statutory enactments. Where others are intended, they are enumerated in Act the. This proceeding not being mentioned, is not embraced, for it is not a suit in Chancery in contemplation of law. A suit in Chancery must be commenced by bill, filed before process issues. This is a petition for the sale of real estate by an administrator, which may be commenced by giving notice in the prescribed mode, and by filing the petition at, or during the term of Court to which the notice relates.

The proceeding of an administrator to convert the real estate of an intestate into assets, is a creation of the statute. It had no existence before, and the statute has appointed the forms of that proceeding, which must be strictly pursued Every statute which limits a thing to be done in a particular form, although it be done in the affirmative, includes in itself a negative, viz: that it shall not be done otherwise. And this is clearly so of all statutes which, in affirmative words, appoint or limit an order, or form, in things which were not known to the Common Law. Atkins v. Kinnan, 20 Wend. 250; Ford v. Walsworth, 15 do. 450.

A special power granted by statute, affecting the rights of individuals, and which divests the right of real estate, ought to be strictly pursued, and should appear to be so on the face of the proceedings. Smith v. Hileman, 1 Scam. 325. And where a bill is filed against unknown heirs, publication made, and decree pronounced against them, except in cases expressly provided for by law, the whole proceeding is coram non judice, and void. Hollingsworth v. Barbour 4 Peters, 474, et seq.; Hynes v. Oldham, 3 Monroe, 267.

III. No sufficient notice of the intention to present a petition for the sale of the real estate was given. The notice is defective in the following particulars:

1. It does not show where the suit is pending. Peoria county, but no State is mentioned, and the State of Illinois will not be intended. The Court cannot take notice that there is not a Peoria county in some other State. There

may be, and the notice does not give such information as would enable the persons interested to determine where the suit is depending.

2. The advertisement gives no notice of an intention to present a petition to the circuit court for the sale of the whole, or so much of the real estate of the intestate as will be sufficient to pay his debts, nor of an intention to present a petition for any such purpose nor does it request all persons interested in the real estate to appear and show cause why it should not be sold. All of which are, by law, required to be specified in the notice. Rev. Code, 1833, § 98.

3. It does not show what real estate is proceeding against, nor for what purpose.

The notice, then which the law requires, not having been given the proceedings of the court in the case were void, for it may be laid down as a general rule, that whenever the court rendering the decree or judgment has not jurisdiction, or if rendered against a person in his absence, without having the warning which the law requires, the decree or judgment will be void. Hynes v. Oldham, 3 Monroe, 267.

IV. The decree is erroneous in the following particulars:

2. It orders a sale of all the lands, or so much thereof as may be necessary for payment of the debts, leaving it to the administrator to determine how much was necessary, instead of ascertaining that fact by the decree, which should have been done. Rev. code 1833, 644, § 99.

2. It states that it appeared to the court that Robert Bowles was the owner, or had an interest in the lands, and then orders the sale of said lands. It should have ascertained his interest, whether he was the owner of all, or an undivided part, and have directed the sale accordingly.

3. It does not show, as required by law, that the personal estate of the deceased, was insufficient for the payment of his debts, but only that there was no personal property of assets in the hands of the administrator for the payment or claims."

The record shows that there was an appearance below for Ellen Catherwood, who is now made a party to the record,

and it will no doubt be insisted that by that appearance we are precluded from urging some of the objections which we rely upon for a reversal of the decree.

She was, at the time of that appearance, and still is a feme covert, and could not, therefore, bind either herself or husband by that appearance.

Before a married woman can defend a suit separately from her husband, she must first obtain leave of Court to answer separately. Mitford's Pl. 105 ; Perine v. Swaine and wife, 1 Johns. Ch. R. 24.

And a wife becomes a substantial party to the suit, only from the time of the order that she should answer separately. Garay v. Whittingham, 1 Sem.& Stu. 163.

And in a suit against husband and wife, the service of the subpœna on the husband alone is good service on both. Ferguson v. Smith, 2 Johns. Ch. R. 139.

A. Williams, and J. Butterfield, for the defendant in error.

The appearance of Ellen Catherwood in this case was a sufficient bar to the objection of want of notice. She had field a demurrer, which, being overruled, a plea was filed.

It is said that the decree is wrong. It was as definite as the circumstance of value would admit. The supervisory power of the court was a sufficient safeguard, &c.

The objection to the administrator should have been made before the Probate court, by parties interested, and a revocation of the letters prayed for. It is now too late to raise it.

The Opinion of the Court was delivered by

Koerner, J. At the October term of the Peoria Circuit Court, 1843, Rudolphus Rouse filed a bill of complaint on the chancery side of said court, setting forth that one Robert Bowles, late of New York city, had departed this life intestate several years ago ; that the names of the heirs of said Bowles, were unknown to complainant, as also their place of residence ; that on the 11th day of April, 1842, he had been appointed, by the Probate Justice of Peoria county, administrator of said Bowles, and that a claim had been

filed and allowed against the estate in favor of one Joshua J. Moore, for the sum of $1316.34. The bill further states that said Bowles left no personal property of any kind in the State of Illinois, but, at the time of his decease, was the owner of numerous tracts of land in said State, which are particularly described in said bill, and contain several thousands of acres, some of which tracts are situate in said county of Peoria. The bill prays for an order to sell said lands, for the payment of said debts, and general relief.

The notice in this case was given in pursuance of the fifth section of the Act authorizing suits against persons whose names are unknown, approved 27th February, 1837, and the fifth section of Chancery Practice Act of 1833. Gale's Stat. 257 and 140. This notice also complied, in regard to the length of time for which it must be given, and to the number of publications in a newspaper, with the 98th section of the Statute of Wills of 1829. Idid. 711.

Ellen Catherwood, styling herself one of the heirs of Robert Bowles, appeared by counsel, and filed a demurrer to said bill or petition, which was overruled by the court, aud, on leave, a plea was then filed for the defendants, as the record states, denying that Rouse was,(at the time of filing the plea,) the public. administrator of Peoria county; which plea, having been set down for argument, was decided to be insufficient. The certificate of the Probate Justice, showing indebtedness, &c, was produced, and a decree made for the sale of the lands mentioned in said bill, or so much thereof as should be necessary to pay said debts and costs, upon giving six weeks notice of time and place of such sale.

The errors assigned on this record are

1 That the court had no jurisdiction;

2 The notice of pendency of suit was not sufficient;

3 The petition did not present such a case as would authorize the court to make a decree in the premises;

4 The court erred in overruling demurrer and plea; and,

5 The decree is informal and erroneous.

The objections presented by the first and second assignments of error are, in our opinion, not well founded. The

law authorizing an administrator to apply for a sale of real estate of his intestate provides that "he shall present his petition to the circuit court; (Sec. 98, Wills; Gale's Stat. 711;) and (Sec. 99,) that it shall be the duty of the circuit court, at the time and place specified in the notice, to hear and examine the allegations and proofs of such administrator, or such other persons interested in said estate as may think proper to resist the sale, and, upon due examination, &c., to order and direct the sale of the whole, if necessary, but if not, then of so much of the said real estate, from time to time, as will be sufficient to pay such debts." Under these provisions, it is not perceived why an administrator may not give to his petition the form of a bill in Chancery. It is not usual to do so, and was probably adopted in this case for the purpose of making unknown persons parties to this petition, but we can see no objection to it, as the same notice, and, in fact, longer notice is required in this form of proceeding, and as the defendants cannot possibly lose any advantages whatever which are secured to them in the more ordinary proceeding by petition.

The counsel for the plaintiffs in error seem to think that if the administrator had proceeded in the usual way, he would have had to make the heirs of Bowles defendants by name, and could not have given notice to persons unknown. But this is a misapprehension. The administrator may give a gene al notice, by publication, of his intention to apply for the sale of real estate, without naming particular persons or defendants, and in this he is warranted by the language of the statute, which says, that said notice shall request all persons interested in said real estate, to show cause why it should not be sold, and which allows any one, whether made a defendant or not, to resist such sale, provided he has any interest therein. See said sections 98 and 99. And indeed such is the general practice in our State. There is a slight defect in the notice in this, that the words "State of Illinois" are not added to the words "County of Peoria." But as the only known heir, Ellen Catherwood, appeared and demurred, and all the defendants, if there were more than

one, put in their plea, all other insufficiencies in the notice, if there be any, were waived. Plaintiffs' counsel insist in their argument, that the appearance of Ellen Catherwood was not binding, because she was at the time of her appearance, and still is a married woman. The record of the circuit court is silent upon this subject, and we have no right to presume any female to be married, unless the fact of her marriage be established. We can see no informality or error in the form of the decree as is alleged by the fifth error assigned. The order is for the sale of the whole of the land, or so much thereof as will pay the debt. (*a*) The court might have directed the sale of a part only, and then it would have been necessary to specify what part. In this case the decree means no more nor less than this, that all the land should be sold, that in case, however, a part of the premises should bring enough the administrator should sell no more, a direction which was only expressive of what the duty of the administrator already required of him, independent of any order to that effect. Nor was it necessary, as it is contended, for the court to determine in the decree the particular estate which Bowles had in the land. The bill alleges that he died the owner of the land, and as the bill was taken as confessed, the defendants declining to answer further, the fact of ownership was sufficiently proved for the purposes of this order.

The main objection to this order, however, is presented by the third and fourth assignments of error. It is contended that the petition does not show such a case, as would authorize the court to act in the premises, because the Probate Justice of the Peace had no power to grant letters of administration at all, where a non-resident dies leaving no personal, but only real estate within our State. It is true that the Statute of Wills of 1829, made no provision for the granting of administration in any case where the intestate, whether a resident or non-resident, left no personal estate. It provided in the 53rd section, "that whenever any person shall die intestate in any county in this State, or when any non-resident shall die intestate, leaving goods and chattels, rights and credits,

(*a*) Stow vs. Kimball, 28 Ill. R. 111.

or either in this State, and no widow or next of kin, or creditor or creditors shall be living within this State, administration of the goods and chattels, &c., shall be granted to the public administrator of the county in which such intestate died, or in which the goods and chattels &c. shall be found, in case such intestate shall have been a non-resident."

In order to remedy this omission and to carry out the principle of converting realty into personalty, for the purpose of discharging debts, a principle which our Legislature has been always anxious to establish and extend, a supplemental Act was passed in 1833, Gale's Stat 723, the first section of which reads as follows: "In all cases where any person shall die seized or possessed of any real estate within this State, or having any right or interest therein, and shall have no relative or creditor within this State, or if there be any, who will not administer upon such deceased person's estate, it shall be the duty of the Judge of Probate. upon the application of any person interested therein, to commit the administration of such estate to the public administrator of the proper county, and such public administrator may be made a party to any suit or proceeding in law or equity, and shall to all intents and purposes be liable as the personal representative of such deceased person." We cannot agree with the plaintiff's counsel, that this section only applies to cases where residents die seized or possessed of real estate. The language is broad and comprehensive, embracing all classes of persons, and the necessity of providing for such administration is certainly much greater in case of non-residents dying intestate, than in cases of residents, because the latter are seldon wholly destitute of relatives in the State in which they die. We freely admit that this law may be much abused, but still we cannot for this rerson repeal it judicially. Courts should be extremely cautious in applications of this kind, and should carefully watch the interests of r elatives, so as to prevent a sacrifice of the estate by all the means which the law has placed in their hands for the protection of the fatherless, againit the cupidity of heartless creditors, or the devices of mere pretenders.

(a) Unknown hrs. &c. vs. Baker, 23 Ill. R. 489 ; Schnell vs. Chicago, 38 Ill. R. 388; Wright vs. Wallbaum, 39 Ill. R. 563.

The counsel for plaintiffs in error attach great weight to the words "proper county," used in this section, and argue from that expression, that non-residents could not be meant to be embraced by the law, as no county could be said to be the proper county for administration on their estate, since they had no domicil in the state nor personal property any where within it. We cannot see any difficulty in these words. The proper county in case of non-residents dying, leaving lands in this state, is the county where such lands or a part of them lie, and in such a county administration is to be granted. (*a*)

There is nothing, however in the case before us, which makes it absolutely necessary to consider the said Bowles as a non-resident at the time of his death. The expression used in the bill "late of New York city," might have been applied to him although he may have died in Illinois. But whether he was a resident or not, the letters were not properly granted in Peoria county, some of the lands being situated there.

The plea filed by the defendants was properly overruled. It did not deny that Rouse was public administrator at the time administration was granted to him. The certificate of the Probate Justice filed, with the pleadings, showed that he was such administrator when he took out the letters. The plea was also in other respects informal and insufficient.

We have examined the proceedings in this case with much care and with a certain degree of jealousy, as we are well aware that great injustice may be committed under the provisions of the law as it now stands, and as in this case we could not shut our eyes to the fact, that a large estate, nominally so at least, has been sold for the satisfaction of a comparatively small debt proved before the Probate Justice, perhaps, without notice to any one, or without resistance by any one, but yet we have not been able to discover any error or irregularity which would justify the court in reversing the order and in avoiding the sale.

The decree is therefore, affirmed with costs.

Decree affirmed.

(*a*) Doe ax dem. vs. Hileman, 1 Scam. R. 322.

ELISHA S. WADSWORTH et al., appellants, v. GEORGE THOMPSON, who sues for the use of Lewis Peet, appellee.

Appeal from Cook.

The time of performance of a contract in writing may be extended by a subsequent parol agreement, and no new consideration is necessary, where there are mutual acts to be performed by the parties.

Where goods have been placed by a debtor in the hands of his creditor, as collateral security for the debt, and an extension of the time of payment has been given, the goods cannot be sold by the creditor before the expiration of such extension.

ACTION ON THE CASE, in the Cook circuit court, brought by the appellee against the appellants, and heard at the November term 1845, before the Hon. Richard M. Young without the intervention of a jury, when a judgment was rendered in favor of the plaintiff below for $1001.32. The facts, &c. are stated by the court.

J. Butterfield, for the appellants, made an able argument upon the distinction between a mortgage and a pledge, and upon the rights and duties thereto appertaining. But, as the decision turned on another point, that portion of his brief is omitted, and so much only thereof is inserted as was considered by the court, which is as follows :

A promise to extend the time for the payment of a note is void, unless founded on a sufficient consideration.

A promise to pay a part of the note when due, and to renew it for the residue, is not a sufficient consideration. Miller v. Holbrook, 1 Wend. 317.

A. T. Bledsoe, for the appellee.

1. The time of performance mav be extended by a subsequent parol agreement. 1 Phil. Ev. 562 ; Baker v. Whiteside, Bre. 132–3 ; Erwin v. Saunders, 1 Cowen, 249 ; Frost v. Everett, 5 do. 497 ; Dearborn v. Cross, 7 do. 50 ; Franklin v. Long, 7 Gill & Johns. 407 ; Robinson v. Batchelder, 4 New Hamp. 45.

2. There was a sufficient consideration for the extension. Story on Bailm. 154, §§ 217, 218.

The Opinion of the court was delivered by

KOERNER, J.* George Thompson, the appellee, sued E. S. & J. Wadsworth, in the Cook circuit court, at the November term 1839, in an action on the case. The declaration contained two special counts, and also a count in trover. The defendants demurred to the first count and filed pleas of the general issue to the second and third counts. Issue was joined on said pleas, and the demurrer sustained to the first count, which was thereupon amended, and a plea of not guilty interposed to it, upon which issue was joined. At the November term 1845, the cause was submitted to the court without the intervention of a jury, and the court found the defendants not guilty as to the first and second counts in the declaration, and guilty as charged in the third count, and assessed the plaintiff's damages by reason of the trover and conversion, at the sum of one thousand and one dollars and thirty two cents. The defendants moved for a new trial, which was overruled, and judgment rendered for the amount of damages found by the court. The defendants prayed an appeal to this court.

The bill of exceptions taken by the defendants' counsel discloses the following case: On the 11th July, 1838, the appellee, Thompson, plaintiff below, gave his two promissory notes to E. S. & J. Wadsworth, due in ninety days from date, and also placed in their possession a lot of goods. E. S. & J. Wadsworth gave to Thompson the following instrument in writing:

"Received of George Thompson two cases of hats, one keg of tobacco, one box of dry goods and one cask of crockery, collateral security for the payment of a note of two hundred and eighty seven dollars 50-100; also, a note of seventeen 50-100 dollars, bearing even date with this, due ninety days from date, said goods to be forfeited in case of failure to pay said note at the time it becomes due. Goods to re-

* WILSON, C. J. did not sit in this case.

main at the risk of said Thompson against damages by fire or otherwise. Chicago, July 11, 1838.

E. S. & J. Wadsworth."

The delivery took place when the receipt was given. The understanding at that time was that the Wadsworths were to have a thousand dollars' worth of goods. One of the Wadsworths, on examining the goods, said there was not enough to make a thousand dollars in consequence of which remark, Thompson added the cask of crockery. Wadsworth then admitted that he had a thousand dollars' worth, but from other testimony in the case, it is appareut that the goods were not actually worth that much, though they must still have been worth more than twice the amount of the notes.

A short time before the notes became due, Thompson called upon J. Wadsworth, one of the defendants below, and told him that he was not prepared to pay the notes when they would become due, and wanted Wadsworth to renew them. This, Wadsworth declined doing, but said that he would extend the time three weeks longer. Within a few days before the expiration of the three weeks, Ryan, Thompson's attorney, tendered the amount due on said notes to J. Wadsworth, who was willing to accept the money, but stated that a part of the goods had been sold at auction, and that he would account for those sold at the price which they brought, and give credit accordingly. He offered to deliver those remaining unsold. Thompson refused to take back a part of the goods only. J. Wadsworth contended that the goods had become forfeited, and that he had a right to sell them. The amount actually sold was not stated by Wadsworth. No notice of this sale had been given to Thompson. The tender of the money was made on the 24th day of October, 1838.

On the 31st of the same month, the defendants placed a notice in the hands of said Ryan, informing the plaintiff that the goods (not already sold,) mortgaged to them would be sold at auction on the 10th day of November next, unless the balance due would be paid before that day.

Upon this evidence, the court found the defendants guilty of trovre and conversion of said merchandize, found

the value of the same at the time of the conversion to have been $703.92, computed the interest thereon at $297.40, principal and interest making in all the sum of $1001.32, and offered to deduct from the amount of damages so found, if the plaintiff's counsel assented, the sum due defendants on the notes, computed with interest at $434.62.

The defendants, by their counsel, insisted upon this deduction as a matter of right, the plaintiff's counsel at the same time offered to enter a remittitur for the $434.62, provided that the defendant's counsel would produce the notes and deliver them to plaintiff, or put them on file and cancel them, which the counsel for defendants refused to do. The court then entered a verdict for the full amount of plaintiff's damages, whereupon the defendants, as already stated, moved for a new trial.

Upon this motion coming up for argument, the defendants' counsel offered to place said notes on file, if the plaintiff would enter a remittitur, without prejudice to the defendants' right to an appeal to the Supreme court, and to cancel said notes, if the judgment of the circuit court should be affirmed.

The motion for a new trial was overruled, and judgment entered up in conformity with the finding of the court.

The errors now assigned upon this record are substantially these, that the court found against the evidence and the law applying to the case, and that the court would not deduct from the damages the amount of the debt, which was intended to be secured by the delivery of the goods.

If the law was properly understood and applied to the facts disclosed on the trial, there can be no doubt that the finding of the court was fully warranted by the evidence. The only conflict in the testimony seems to have been in regard to the value of the goods at the time of the conversion, and we have seen that the court allowed much less than the evidence of the plaintiff's witnesses alone, would have warranted. The extension of time by the defendants for the payment, the tender before such extended time had expired, the absence of all notice before the first sale, and the com-

version of the goods, if they were sold before the law permitted it, were clearly established by the testimony. It is, then, on the law governing this case, that the propriety or impropriety of the finding of the court must necessarily turn.

The question as to the character of the writing given by the Wadsworths to Thompson, and as to the real nature of the transaction of which it was intended to be the evidence, has been very fully discussed by counsel. The plaintiff's counsel has contended that the transaction was a mere pledging or pawning of the goods, and that the insertion of the words, "to be forfeited in case failure to pay said notes, when due," had no legal operation, and could not convert the contract of pawning into that of mortgaging the goods, and for this position we have been referred to the opinions of two very distinguished American jurists, Chancellor Kent and Justice Story. 2 Kent's Com. 583 ; Story on Bailments, § § 317, 318, 345. There is also an authority to the same effect in 7 J. J. Marsh. 323. This was unquestionably the rule in the civil law, as it is found in the compilation of Justinian, (Constitutio 3 Codicis, 8, 35,) though such contracts of forfeiture had been considered as binding previous to the time of the Emperor Constantine, (320 C. Ch.) who abolished the law (lex commissoria,) allowing such contracts.

The defendant's counsel has denied this to be the common law, which will not permit courts of law to make contracts for the parties, or to destroy their intended effect, and has insisted that the goods became the absolute property of the defendants by the non-compliance of the plaintiff, and that the instrument or receipt in question must be looked upon as a mortgage of personal property, by which the title passed immediately to the mortgagee, and is defeasable only by a strict performance on the part of the mortgagor, so far, at least, as a court of law can adjudicate. The view, however, which this court has taken of this case renders it unnecessary to decide upon the precise nature and character of this written instrument, and upon the rights of the parties, as growing out of it, if the contract should receive the one

or the other construction. If the transaction be considered as a pawn, and not affected by the stipulation of forfeiture, then the plaintiff was clearly entitled to notice before the Wadsworths could rightfully sell and convert the property to their own use. 2 Kent, 502 ; 2 Story on Bailments, § 310 ; 2 Story on Equity, 1033 ; Jones on Bailments ; 2 Johns. ch. R. 100 ; 1 U. S. Dig. 369, § 37. If, however, the contract be considered in the light of a mortgage, as either passing at once the legal estate to the defendants below, or having vested such estate in them after forfeiture, [Pow. on Mortgage, 3 ; 8 Johns. 96 ; Story on Bailments, §§ 207, 345 ;] we are still of opinion that the defendants had no right to dispose of the property, and treat it as absolutely their own, for the reason that time had been given for the payment of the money, and hence, also, for the redemption of the goods. (*a*)

That the time of performance of a contract in writing may be extended by a subsequent parol agreement, seems to be unquestionable, and has been held so by this court in the case of Baker v. Whiteside, Breese, 132--3. See, also, Phillips on evidence, 562 ; but it is objected that the promise of Wadsworth to extend the time was without a sufficient consideration, and, therefore, void.

It is conceded that it is settled by many decisions that a promise to extend the time for the payment of a note, is void, unless founded on a new consideration. But there is certainly a distinction between cases where but one party has to do a certain act, and the other remains wholly passive, and between cases where something is to be done mutually by both parties. The books are full of cases where the time of performance has been subsequently extended, and the party who failed to perform under the former contract, has been considered as excused from such performance. I have examined many such cases, and the point of want of consideration seems not even to have been mooted in any of them. The case of Keating v. Price, 1 Johns. Cases, 22, is one of that class. In that case the defendant promised, in writing, to deliver a quantity of staves, on or before the first day of May, 1796. The plaintiff agreed to extend the time until the Spring following. The court said that " an extension of

(a) Rhines vs. Phelps, post 455.
(*b*) Leow vs. Forbe, 18 Ill. R. 568.

time may often be essential to the performance of contracts, and there can be no reason why a subsequent agreement for that purpose should not be valid, and proved by parol evidence." That case is cited with approbation by the Supreme court of our State, in the case of Baker v. Whiteside. The case of Fleming v. Gilbert, 3 Johns. 528, bears also upon this point. In 2 Wend. 587, it was held "that there can be no doubt that a parol enlargment of the time set in a sealed instrument for the performance of convenants, is good." The same is substantially decided in 9 Wend. 68.

The whole doctrine of consideration is one founded on strict law. The moral obligation to fulfil a promise voluntarily made and having a rational object, is not denied. For this reason courts have been always anxious to support promises where the slightest consideration can be made to appear. The giving of a peppercorn is a sufficient consideration in law; hence the benefits to the party promising, or the prejudice to the one to whom the promise is made, either of which constitutes a consideration, need not be very great. It is enough if it is perceptible.

Now, in the present case, besides the contract for the payment of the notes, there was another, though one inseperately connected with the first existing between the parties. Goods had been delivered to the defendants, of considerably greater value than the amount due them by the plaintiff. Whether mortgaged or pledged, they were to be re-delivered to plaintiff if he performed his part of the stipulation. If he failed, they belonged to the defendants,assuming the contract of forfeiture to have been valid,if they were merely pledged. Let us see what the incidents of this contract were, and here it may be as well to remark, that even if the goods were mortgaged, yet the defendants, before forfeiture, substantially occupied the position of pledgees or pawnees in regard to there rights and duties. At Common Law, as well as at the Civil Law, the pawnee could sell or assign all his interest in the pawn. Story on Bailm. § 324; 20 Pick. 399. He may subpledge it to another person. Ibid. note 2, and 1 Cod. 8, 28; Lex. 7, § 2; Dig. 20, 5.

If the use will be beneficial to the pawn, or if it be indif-

ferent to it, then the pawnee may use it. Story, Ib. § 329; Jones on Bailm. 81. Coggs v. Barnard, 2 Lord Raym. 909, 916. On the other hand, the pawnee is bound to apply ordinary diligence on the thing pawned, [Story Ib. 342, and L. 13, § 1; Dig. 13–7,] a liability which, in the present case, seems even to have been intended to be avoided on the part of the defendant, by the terms of the agreement, "goods to remain at the risk of said Thomson by fire or otherwise." In § 332, Justice Story says: "A bailment (of pawning) is for the mutual benefit and interest of both parties."

It seems to me clear, that such being the character of the then subsisting contract between the parties a continuance or extension of it, it being for the mutual benefit and interest of both parties, does rest upon a sufficient consideration. The defendants were amply secured, might have used the goods to raise money from others by sub-pledging, and were permitted to make a reasonable use of them, while they had them in their possession. Thomson, on the other hand, was deprived of there use They were dead as to him, while the interest was accumulating on his debt. But aside from the question of consideration, we may well place our decision in this case on more enlarged grounds. Neither a court of Law, or a court of Chancery, can permit fraud or circumvention to be perpetrated in this manner. I do not mean to say that there was actually a fraud intended in this case, but the failure to keep the promise had identically the same effect as if wilful deceit and imposition had been practised. If the promise of extension had not been made, it is not reasonable to suppose that Thomson would have strained every nerve to rescue goods, considered by him worth $1000, from impending sacrifice? He had several days left to make arrangments for the redemption of his property, but by the act of the defendants he was lulled into a false and dangerous security. He suspended his efforts, and when he proposed paying the money within the time, he had been told that his property would not be considered as forfeited, he had found to his great surprise, that part of it had already been disposed of under the auctioneer's hammer, and at great loss. We cannot now, in justice, admit of such a

defence as this: "True, we extended the time, and told you that he would not claim the goods as our own, but as you did not pay us a cent, or hand over a pepper-corn, we were not bound by our promise, and you must submit to the loss." Even if the promise of the defendants had been wholly gratuitous, we would still hold that under the peculiar circumstances of this case, the extention of time would be binding upon the defendants. A principle analogous to the one which we have applied to this case, is recognized in the law books in many cases, of mere gratuitous acts. In Comyn's Dig. 18, it is said: "The Common Law in some cases considers the mere entrusting a thing with another and his undertaking the care of it, a sufficient consideration for his faithful discharge of the trust. And, therefore, though a person who gratuitously engages to do an act for another is not liable in law to an action for not doing it; yet if the goods are delivered to him, and he undertakes to carry them, or do something about them without reward, an action of assumpsit will lie on this bailment, if there be any neglect on the part of the bailee, by which the goods are injured." For a further exposition of this interesting branch on the question of consideration, I refer to Story on Bail. §§ 217, 219.

In regard to the second point, that the court erred in not allowing a deduction from the damages to the amount of the notes and interests due from plaintiff to defendants, we do not exactly see that it arises on this record. It does not appear that the defendant either before the trial, by plea or notice, claimed this debt as an off-set, or that he at the trial placed himself in a condition to have such deduction made. The court might well have supposed from the silence of the defendants on this subject, that defendants in case judgment should go against them, meant to rely on their independent action on the notes, or that they had previously parted with their interest in the same. The court suggested the propriety of having the deduction made in this action, if the plaintiff would consent, which suggestion was rather extra-judicial, and solely intended for the benefit of the defendants. It appears that the plaintiff's counsel was willing to have such deduction made, provided the defendants' counsel

would deliver the notes to him, or place them on file and have them cancelled, but the defendants refused to do so.

Perhaps it was requiring too much to ask for a delivery or cancelling of the notes, but then the defendants should have offered to do what the plaintiff was legally entitled to, that is a production of the notes and placing them under the control of the court without prejudice as to the right of appeal. (*a*)No offer of any kind, however, was made at that time. He could not claim a deduction in the judgment for the amount of the notes, and retain them, they, being negotiable instruments, at the same time. It is true, than after the rendition of the verdict, and on the motion for a new trial, the defendants offered to place said notes on file, but surely they were then too late. The court could not be required to go behind the verdict and open it, as it were, for any thing which transpired subsequently. At the time the verdict was pronounced, it was given on the facts as they then existed, and unless the plaintiff had consented, it would have been highly improper in the court to have changed the verdict, so as to conform to a different and subsequent state of facts. Suppose the verdict had been found by a jury, and there is no difference between a verdict found by the court and one rendered by a jury, would the court have been authorized to set aside their verdict for matter introduced on the motion for a new trial? The statement of the proposition contains its refutation.

We apprehend that no serious injury can arise to defendants from not having the deduction made in this action, as they may sue the plaintiff on his notes, and in case of his insolvency, which was suggested on the argument, may apply to the proper tribunal and prevent the collection of more than the plaintiff is equitably entitled to.

The decisions of the court, which are alleged here for error, appear to us to have been correct.

Judgment is, therefore, affirmed with costs.

Caton J. dissented.

Judgment affirmed.

(a) Keagy vs. Hite, 12 Ill. R. 101.

DANIEL HOWELL et al. plaintiffs in error, v. RUEBEN BARRETT, administrator of Eliakim Simonds, deceased, defendant in error.

Error to Winnebago.

Where the action is in debt, and the verdict and judgment are in damages, both are erroneous.

In an action upon a promissory note executed by five persons, four were served with process. One of them pleaded nil debet, two demurred to the declaration, and the fourth did not appear. The cause was tried upon the plea aforesaid, and the jury returned a verdict against the defendant for $361.50 in damages, and a separate judgment was rendered against him. On the next day, the demurrer being overruled, the clerk assessed the damages against the remaining three at $362.50, and a separate judgment was rendered against them for that amount: Held, that the judgment must be an unit, and that the jury who tried the plea should have assessed the damages as against the other defendants served.

The Supreme Court will not render such a judgment as the circuit court should have rendered, unless the evidence on which a verdict was founded is before it.

DEBT, in the Winnebago Circuit Court, brought originally by the intestate of the defendant in error against the plaintiff in error. The cause was heard before the Hon. Thomas C. Browne and a jury, at the August term 1846, when two judgments were rendered for the plaintiff below, of different amounts against different defendants, one upon the verdict of the jury, and the other upon the clerk's assessment of the damages.

The case is briefly stated in the opinion of the court.

J. Marsh, for the plaintiffs in error.

When one of several defendants pleads, and the others, make default, the jury should assess the damages as to all, at the same time. Teal v. Russell, 2 Scam. 319.

The proceeding by petition and summons is in debt, and the verdict and judgment, being in damages only, were defective in form, and incurable. Rev. Stat. 418, § 33 ; Jackson v. Haskell, 2 Scam. 565 ; Heyl v Stapp, 3 do. 95 ; Mager v. Hutchinson, 2 Gilm. 266.

J. Butterfield, for the defendant in error.

The opinion of the court was delivered by

Treat, J. The history of this case is as follows: The action was by petition and summons brought by Simonds, as the payee of a promissory note, against Howell, Wheeler, Horsman, Sanford and Potter, as the makers thereof. Process was served on all of the defendants but Howell. Sanford pleaded nil debet, and gave notice of set-off. Wheeler and Potter demurred to the declaration. The death of Simonds was suggested, and Barrett, his administrator, made plaintiff. The demurrer to the declaration was overruled, and an interlocutory judgment entered against the demurrants. The cause as against Sanford was tried by a jury, and a verdict returned in favor of the plaintiff for $361.50, in damages. Sanford entered a motion in arrest of judgment, which the court denied; and a separate judgment was rendered against Sanford for the amount of the verdict. On the next day, the clerk assessed the damages as against the defendants Wheeler, Potter and Horsman at $362.50, for which amount a separate judgment was entered against them. The defendants prosecuted a writ of error.

The judgments must be reversed. The action was in debt, and the verdict and judgments are in damages. It was error to render two judgments in the same case. The judgment must be an unit. The correct practice was not pursued in assessing the plaintiff's damages. The jury that tried the case as against Sanford, should have assessed the damages as against the other defendants. This case shows the impropriety of departing from the proper practice. Verdict of the jury, and the assessment of the clerk, are for different amounts; and that in an action founded on joint liability, and where recovery must be for the same amount against all. Teal v. Russell, 2 Scam. 319; Frink v. Jones, 4 do. 170; Wright v. Meredith, Ib. 360.

The proper judgment cannot be entered in this court. The evidence on which the verdict was founded is not before us. We cannot, therefore, ascertain what portion was

for the debt, and what for the damages. Jackson v. Haskell, 2 Scam. 565; Heyl v. Stapp, 3 do. 95; Mager v. Hutchinson, 2 Gilm. 266.

The judgments rendered by the circuit court in this case are reversed, with costs to be paid by the defendant in error, as the administrator of Simonds; and the cause is remanded with directions to the circuit court to award a venire de novo.

Judgment reversed.

THOMAS COWLES, appellant, v. ANN COWLES, appellee.

Appeal from Edwards.

A court of chancery is vested with a broad and comprehensive jurisdiction over the persons and property of infants, and their parents, who are bound for their maintenance; and will take such action in relation to the charge of their persons or the management of their property, as circumstances may require.

In determining the fitness of the person to whom the custody of infants shall be given to act as guardian, the court of chancery is not bound down by any particulnr form of proceeding. It may either be referred to a Master to inquire and report as to who will be a fit person; or that may be inquired of in open court, or the court may determine from its own knowledge alone. No certain rule can be laid down for its government, in all cases, except that the best interests of the child must be consulted.

The court of chancery may remove all guardians, whether appointed by the court itself, by the court of Probate, by testament, or even by express Act of the Legislature, whenever it is satisfied that the guardian is abusing his trust, or the interests of the ward require it.

Where infants are taken from the custody of the father by a court of chancery, and have no property of their own, the father is bound for their support, and in determining what is sufficient for a bare maintenance, the court will have regard to the ability of the father. Such ability may be determined by a reference to a master, or by the court itself directly by the examination of witness in open court, or it may direct depositions to be taken.

BILL IN CHANCERY, for an increase of alimony, the custody of two infant children, and an allowance for their maintenance. The bill was filed in the Edwards circuit court by the appellee against the appellant, and heard before the Hon. William Wilson, at the September term 1845. A decree was

rendered, awarding the custody of the children to the complainant below, their mother, and an allowance of sixty dollars a year for five years. The defendant appealed to this court.

A. Lincoln, for the appellant.

A. T. Bledsoe, for the appellee.

The opinion of the court was delivered by

CATON, J. This bill was filed by Ann Cowls against her late husband for the purpose of obtaining the custody of their children, and a reasonable allowance for their support. In a former suit between the same parties, Mrs. Cowls had obtained a divorce from the present plaintiff, but in that decree no provision was made in relation to the children. There were two children living at the time the decree was entered, Mary Jane, aged six, and Thomas, aged four years. The reasons assigned in the bill why they should not longer be allowed to remain with their father, and which are not denied by him, but are admitted by his demurrer, are, that since the time when the divorce was granted, he had lived in a state of fornication with a woman, until within a few weeks of the time when this bill was filed, when he married her. That she was a woman of notoriously bad character, and not in any way qualified for the care and education of the children. That they are now left entirely under her care, and the influence of her bad example. That he neglects them and is addicted to excessive and frequent intoxication. That he is in the habit of quarrelling with his present wife, in the presence of the children and driving her from the house. That he is in the habitual use of profane, indecent, immoral and vulgar language, as well in the presence of the children as elsewhere. For these reasons the court decreed that the children should be taken from the father, and placed in the custody of the mother, and the court also allowed for their support thirty dollars per annum each, for the period of five years, to be paid by the defendant.

The power of the court of Chancery to interfere with and control, not only the estates but the persons and custody of all minors within the limits of its jurisdiction, is of very ancient origin, and cannot now be questioned. This is a power which must necessarily exist somewhere, in every well regulated society, and more especially in a republican government, where each man should be reared and educated under such influences that he may be qualified to exercise the rights of a freeman and take part in the government of the country. It is a duty, then, which the country owes as well to itself, as to the infant, to see that he is not abused, defrauded or neglected, and the infant has a right to this protection. While a father so conducts himself as not to violate this right, the court will not ordinarily interfere with his parental control. If, however, by his neglect or his abuse, he shows himself devoid of that affection, which is supposed to qualify him better than any other to take charge of his own offspring, the court may interfere, and take the infant under its own charge, and remove it from the contro of the parent, and place it in the custody of a proper person to act as guardian, who may be a stranger.

The powers and the duty of the court, on this branch of the subject, are very satisfactorily laid down by Story. He says: "The jurisdiction of the court of Chancery extends to the case of the person of the infant, so far as is necessary for his protection and education, and to the care of the property of the infant, for its due management and preservation, and proper application for his maintenance. It is upon ths former ground principally, that is to say, for the due protection and education of the infant, that the court interferes with the ordinary rights of parents, as guardians by nature or by nurture, in regard to the custody and care of their children. For although, in general, parents are intrusted with the custody of the persons and education of their children, yet this is done upon the natural presumption that the children will be properly taken care of, and will be well brought up, with a due education in literature, and morals, and religion, and that they will be treated with

kindness and affection. But whenever this presumption is removed; whenever (for example) it is found that a father is guilty of gross ill-treatment or cruelty towards his infant children; or that he is in constant habits of drunkenness, and blasphemy, or low and gross debauchery; or that he professes atheistical and irreligious principles; or that his domestic associations are such as to tend to the corruption and contamination of his children; or that he otherwise acts in a manner injurious to the morals or interests of his children; in every such case, the court of Chancery will interfere, and deprive him of the custody of his children, and appoint a suitable person to act as guardian, and to take care of them, and superintend their education." 2 Story's Eq. Jur. § 1341. (*a*)

Infants thus taken under the charge of the court of Chancery for the protection of their persons and property, are called wards of the court, and the guardian, or person appointed by the court to act as guardian, is an officer of the court and is entirely under its direction and control, and entitled to its aid in enforcing a proper obedience and submission on the part of the ward, and to prevent the improper interference of third persons. A jurisdiction thus extensive, and liable as we have seen, to enter into the domestic relations of every family in the community, is necessarily of a very delicate, and often of a very embarrassing nature; and yet its exercise is indispensable in every well governed society. It is indispensably necessary to protect the persons and preserve the property of those who are unable to protect and take care of themselves.

It becomes clear, then, that our Legislature, by providing that "when a divorce shall be decreed, it shall and may be lawful for the court to make such order touching the alimony and maintenance of the wife, the care, custody and support of the children, or any of them, as from the circumstances of the parties and the nature of the case shall be fit, reasonable and just," has conferred no new authority or jurisdiction upon the court. It was by its original jurisdiction clothed with the same powers before. The cases provided for in this

(*a*) Miner vs. Miner, 11 Ill. R. 49; In re. Smith, 13 Ill. R. 138.
(*b*) Davis vs. Harkness, 1 Gil. R. 178; Smith vs. Sackett, 5 Gil. R. 534.

statute are necessarily embraced in that broad and comprehensive jurisdiction with which the Court of Chancery is vested, over the persons and estates of infants and their parents who are bound for their maintenance. To apply these principles to the case before us. What are its circumstances? After a divorce had been decreed between the parties, without making any provision as to the care, custody, or maintenance of the children, the mother files a bill, and asks that the custody of the children shall be taken from the father for the reasons, that he has for sometime been living with a prostitute, whom he has finally married, and that the children, who are of tender age, are left principally under her control, and pernicious example and influence; that he is very intemperate in his habits, profane, and is in the habit of using vulgar and obscene language in the presence of his family and these children. Here we have grouped together into one disgusting and revolting picture, those features of a father's character who has become unworthy of the charge of his own offspring, and any one of which, as we have seen it laid down by Mr. Justice Story, will authorize the court in its discretion, to interfere and remove the child without the influence of such a polluted atmosphere. Under such circumstances, if these children are allowed to remain with their father, it is impossible to expect that they will be properly reared and educated. It would be too much to hope that they will not be affected and polluted by the pernicious examples constantly before them. We cannot doubt but a due regard for the well being of these children requires the court to take them under its own care and control.

And now the question arises, whether the court acted judiciously in giving the custody of these children to their mother. In determining the fitness of the person to whom the custody of these children shall be given, to act as guardain, the court is not bound down by any particular form of proceeding. It may be either referred to a Master to inquire and report as to who will be a fit person; or that may be in-

quired of in open court; or the court may determine from its own knowledge alone. At the time, or after a divorce is decreed, when the court finds itself called upon to remove the children, or a part of them from the custody of the father, it will of course, if the mother be unobjectionable, place them in her charge as it may well be expected that she will feel more solicitous for their wefare than a stranger. Indeed, it may often happen in such case, when no serious objection can be urged against the father, that it would be advisable to give to the mother the care of a portion at least of the children, especially if they be daughters of very tender years. In all such cases, the court should take into consideration all of the circumstances of each particular case, and dispose of the children, in such manner as may appear best calculated to secure for them proper care and attention as well as a virtuous education.

We have been referred by the plaintiff's counsel to a case where the court determined that the mother should retain the custody of the children, although she had been living with, and subsequently to a divorce, had married another man. There the court say: "The present case is attended with peculiar and unfortunate circumstances. We cannot avoid our disapprobation of the mother's conduct, although so far as regards her treatment of the children, she is in no fault. They appear to have been well taken care of in all respects. It is to them that our anxiety is principally directed, and it appears to us, that considering their tender age they stand in need of that kind assistance which can be afforded by none so well as a mother. It is on their account, therefore, that, exercising the discretion with which the law has invested us, we think it best at present not to take them from her."

It is unnecessary for us to say whether or not we agree with that court in the propriety of its determination, yet the case serves to show that no certain rule can be laid down for the government of the court in all cases, except that the best interests of the child must be consulted. It was truly

remarked at the bar, that it is not the rights of the mother that we are to enforce, although she files the bill, but it is the interest of the infants that are to be protected.

It was urged against the fitness of the mother to have the care of these children, that she had shown a want of maternal affection and solicitude for their welfare, in not having applied to have them removed from their father's control at the time the divorce was allowed. We think that it is attaching too much importance to that circumstance, which may be satisfactorily accounted for in other ways. We do not think it proves as was supposed, that she is more anxious to obtain the money that may be awarded for their maintenance, than to secure the welfare of the children. She may not have been and probably was not aware at the time, that the court would, under any circumstances, take the children from the father. But admtting that there are some suspicions that the mother was not a judicious selection to have the care of these children, it does not necessarily follow that the decree should be reversed. The court below, may, at any time, on the application of the father, or any other person, on behalf of the infants, or even of its own motion, remove the mother from this trust and appoint some other person. The Court of Chancery may remove all guardians, whether appointed by itself, by the court of Probate, by testament, or even by express Act of the Legislature, whenever it is satisfied that the guardian is abusing his trust, or the interest of the ward require it. Duke of Beaufort v. Berty, 1 Peere Williams, 703; 2 Story's Equity Jurisprudence, § 1339.

We might undoubtedly, if we were satisfied that an improper person had been appointed to act as guardian, reverse so much of the decree as makes that appointment, and either appoint a proper person, here, or remand the cause to the court below, with directions to that court to appoint some other person who is fit. The reversal of that part of the decree which makes the appointment would not necessarily restore the children to the custody of the father; not does the affirmance of this decree deprive the court below of the juris-

diction to remove the mother from the trust, and appoint another in her place, whenever it shall be made to appear to that court that the interests of the wards require it.

We do not think the amount allowed for the maintenance of the children too much. In a case like the present, where the infants have no property of their own, the father is bound for their support; but then he is only bound for a bare maintenance. In determining what is sufficient for a bare maintenance, the court may and should have some regard for the ability of the father. All of these questions may be determined by a reference to a Master, or by the court itself directly, by the examination of witnesses in open court, or it may direct depositions to be taken. Some complaint is made that the court did not give the defendant below time to take depositions, but we think without good reason. As to the direct question in the case, that is, the unfitness of the farther to have the care of the children, he had no right to controvert the case made by the bill without having answered. As to the collateral question, as to the fitness of the mother, or the amount to be allowed for maintenance, the court would have heard any proofs which he chose to produce; but it should not have continued the cause for the purpose of taking depositions without the most satifactory reason being shown by affidavits. In this case the court examined witnesses, and made its own determination, and with that we are well satisfied for the present. It does not appear to us that thirty dollars a year is too much for the support of each of these children. It must be remembered that this allowance is still within the control of the court below, and may be there, at any time, either increased or diminished, extended or limited, as subsequent circumstances may require.

The decree is affirmed with costs.

Decree affirmed.

THOMAS L. WHITAKER et al., plaintiffs in error, v. JOSEPH GAUTIER, defendant in error.

Error to Jo Daviess.

There are four cases in which a forcible entry and detainer may be maintained in this State : 1. Where there has been a wrongful or illegal entry upon the possession of another; 2. Where there has been a forcible entry upon such possession; 3. Where any person may be settled upon the public lands within this State, when the same have not been sold by the General Govern ment ; and 4. Where there has been a wrongful holding over by a tenant after the expiration of the time for which the premises may have been let to him. In the first three classes, before the action can be maintained, there must be an illegal and forcible entry upon the actual, or, as in the case of a settlement upon the public lands, constructive possession of another. In either of the cases, it is not sufficient to charge in the complaint that the complainant's right to the possession only had been invaded by the forcible or illegal entry.

If one has the actual possession with or without title, or such a claim to public lands as is recognized by the statute, he can maintain an action of forcible entry and detainer against any one illegally or forcibly intruding into such possession.

A complaint for a forcible entry and detainer should clearly show the foundation of the right, which is sought to be enforced ; and that the wrongful or illegal entry was made upon the actual or constructive possession of the plaintiff; or the existence of landlord and tenant and a wrongful holding over.

In order to enable one settled upon the public lands to maintain forcible entry and detainer, in the absence of paper title, his possession must extend, according to the custom of the neighborhood, to the number of acres embraced by his claim, not exceeding a quarter section of surveyed, or a half section of unsurveyed land.

Forcible entry and detainer, originally commenced before a justice of the peace of Jo Daviess county by the defendant in error against the plaintiffs in error. The case was taken by appeal to the Jo Daviess circuit court, and there tried before the Hon. Thomas C. Browne and a jury at the October term 1843, when a verdict of guilty was rendered against the defendants below.

The allegations of the complaint are substantially set forth in the opinion of the court.

J. Butterfield, for the plaintiffs in error.

I. The complaint made on oath by Gautier was not sufficient to give the court jurisdiction. It does not state that the complainant was seized, or had possession of the locus in quo at the time of the defendant's entry.

An indictment for forcible entry and detainer must state a seizin in the prosecutor at the time of the entry. 1 Caines, 125.

The indictment must show the prosecutor to be dispossessed of a freehold, or to be disseized of a term of years yet to come. 13 Johns. 341.

A complaint for a forcible entry and detainer must allege that the complainant was seized of the premises, or possessed thereof for a term of years. 2 N. Hamp. 550, and authorities there cited.

The plaintiff must show himself to have been in peaceable possession before the defendant's entry. Possession is evidence of seizin to support the allegation that complainant was seized. 11 Johns. 504.

A person not having possession in fact, cannot maintain forcible entry and detainer. 1 A. K. Marsh. 254–5; 3 do 127-8; 2 U. S. Dig. 436, § 180; 1 Hall's Sup. Ct. R. 240.

In this case the complainant only swears that he was "entitled to possession;" he does not allege seizen or right of property in the premises. The mere right of possession arising from right of property is not sufficient to authorize a recovery for forcible entry and detainer. The plaintiff in such cases must show actual possession either by himself or enant. 1 Porter, 146.

The complaint is the foundation of the action, and must contain sufficient matter to give the Justice jurisdiction, or the whole proceedings will be coram non judice and void. Breese, 264.

It was not necessary that this objection to the complaint should have been made in the Court below. It is a defect of record; it has not been waived by any pleading over. It goes to the jurisdiction, and may be raised by writ of error, as was done in the case in Breese.

II. The court erred in admitting in evidence the certificate of register of the land office, that the complainant had filed in his office proof of right of pre-emption, thereby to establish his right of possession to the premises.

1. The authorities cited on the first point show that the mere right of possession arising from right of property is not sufficient; the certificate therefore did not tend to prove any fact pertinent to the issue.

2. The complaint alleges that the defendant entered and took possession on the 1st March, 1842. The register's certificate does not show when the proof was filed, but alleges the tender of the purchase money on the 16th of June, 1842, more than three months after the entry.

The time of the entry is material, and must be laid to be after the commencement of the complainant's possession. 6 Cowen, 149.

The certificate did not tend to show any right of pre-emption or possession at the time of the entry.

3. The certificate that the complainant had filed with the register proof of pre-emption, and tendered the purchase money, establishes nothing. The mere filing with the register proof of pre-emption confers upon the complainant no right or interest in the land. Filing proof of pre-emption confers no right until it has been passed upon, and the pre-emption allowed, and the land entered and purchase money paid.

The bill of exceptions states that there was no other evidence offered on the trial of the cause of any right or proof of pre-emption except the said certificate.

The certificate did not show that the land was subject to pre-emption, or that the proof was sufficient, or that it had been passed upon or allowed, or that the complainant was entitled to pre-emption of the said land. It merely showed that the complainant had filed proof with the register. Any and all persons have a right to file proof with the register, but it amounts to nothing, until it has been acted on and the pre-emption allowed.

The right of pre-emption is a mere right to enter and pur-

chase the public lands at the minimum price. At Common Law, the title of the public lands remains in the Government until the Patent emanates.

The Laws of this State have authorized actions of trespass, and forcible entry and detainer to be maintained by one person against another for the public lands in two cases only.

1. When a person has received the register's certificate of the entry or purchase of a tract of land, such certificate shall be deemed and taken to be evidence of title, &c. Rev. Stat. 232, § 4.

2. Where a person has settled on the public lands, his possession shall be evidence as extending to the number of acres embraced by his claim, according to the custom of the neighborhood, not exceeding in the whole 320 acres, provided, where the lands have been surveyed, the claim shall not exceed 160 acres, and be ascertained by land marks so plainly made that the same may be designated from other lands contiguous thereto, and the claimant shall reside on or near the same. Act of 1837, cited in 1 Scam. 183 ; Act of 16th Feb. 1839.

E. B. Washburn, for the defendant in error.

In regard to the second error assigned. An objection to the complaint in this case cannot be raised for the first time in this court. No objection made to it in the court below.

The justice of the peace had jurisdiction of the subject matter of the suit. The complaint shows sufficient to give such jurisdiction. All objections to its sufficiency, therefore, should have been made before the justice, or in the circuit court, it is too late to object here.

But the complaint is good, "here and elsewhere."

If it does not show that the complainant was in possession of the locus in quo at the time the defendants entered, it shows that he was entitled to the "peaceable, sole and exclusive possession" of it, and that the defendants "unlawfully and without right" entered and took possession. That is sufficient under our statute.

By the first section of our forcible entry and detainer law, three cases are provided for :

First. A wrongful or illegal entry as contra-distinguished from a forcible or violent one ;

Second. A forcible entry by means of actual violence ; and

Third. That of wrongfully holding over by a tenant. Atkinson v. Lester, 1 Scam. 407.

This case comes under the first head. It is one of those "cases where entry is not given by law."

The opinion of the court was delivered by

Purple, J. The defendant in this court, who was plaintiff below, brought an action of forcible entry and detainer against the plaintiffs in error, before a justice of the peace of Jo Daviess county.

The complainant states, that Gautier, on the first day of March, 1842, was lawfully entitled to the peaceable, sole, and exclusive possession of a certain tract of land containing 160 acres, (describing it,) and that on the same day, and while the said Gautier was so entitled to such possession, the plaintiffs unlawfully, and without any right of possession, entered upon and took possession of a part of the land outside of defendant's fence, and within the surveyed lines of the quarter section, and detained the possession of the said part from the said defendant, and continued to do so ; whereby the said plaintiffs were guilty of a forcible entry and detainer, &c.

Upon the trial of the cause before the justice, and also in the circuit court, there were verdicts and judgments in favor of the plaintiff below.

Among other things, it is assigned for error here, that the complaint is defective, and does not show jurisdiction in the justice before whom the action was instituted. This is the only point presented which it is necessary to decide.

The action of forcible entry and detainer may now be maintained in this State in four cases :

First. Where there has been a wrongful or illegal entry upon the possession of another ;

Second. Where there has been a forcible entry upon such possession ;

Third. Where any person may be settled upon the public lands within this State, when the same have not been sold by the General Government ; in the absence of paper title, for the purposes of this action, his possession will extend, according to the custom of the neighborhood, to the number of acres embraced by his claim, not exceeding 160 acres of surveyed, or 320 acres of unsurveyed land ; and

Fourth. Where there has been a wrongful holding over by a tenant after the expiration of the time for which the premises may have been let to him.

In the three first classes of cases above mentioned we understand, that before this action can be maintained there must be an illegal or forcible entry upon the actual, or, as in the case of a settlement upon public lands, constructive possession of another ; and that it is not sufficient to charge in the complaint, that the complainant's right to the possession only was invaded by the forcible or illegal entry.

If the complaining party has actual possession with or without title, or such a claim to public lands as is recognized by our statutes, he can maintain this action against any one illegally or forcibly intrudiug into such possesion.

In either of the cases mentioned, the complaint should clearly show the foundation of the light which is sought to be enforced, and that the wrongful or illegal entry was made upon such actual or constructive possession of the plaintiff, or, the existence of the relation of landlord and tenant and a wrongful holding over.

This complaint does not come within any of these rules. It only shows that the defendant in error was entitled to the possession, and that the plaintiffs entered forcibly and kept him out.

Neither the justice of the peace nor the circuit court had jurisdiction of the subject matter of the complaint.

The judgment of the circuit court is reversed with costs.

Judgment reversed.

CHARLES BALLANCE, plaintiff in error, v. ALFRED G. CURTENIUS et al., defendants in error.

Error to Peoria.

In order to give a justice of the peace jurisdiction of an action of forcible entry and detainer, the complaint should contain sufficient allegations to bring it within one of the several cases anticipated by the statute.

The refusal of the Circuit Court to permit a complaint in an action of forcible entry and detainer to be amended on motion, even if the Court could grant leave to amend, cannot be assigned for error. At most, it is a matter of discretion, like the amendment of a declaration or other pleading.

FORCIBLE ENTRY AND DETAINER, in the Peoria circuit court, originally commenced before a justice of the peace in that county by the plaintiff in error against the defendants in error. The cause came on to be heard before the Hon. Gustavus P. Koerner, at the May term 1846, when the complaint was dismissed for want of jurisdiction in the justice of the peace.

The defects in the complaint are pointed out by the court in the opinion.

C. Ballance, pro se, referred to the following authorities: Brubaker v. Poage, 1 Monroe, 128; Bromfield v. Reynolds, 4 Bibb, 388; Smith v. Dedman, Ib. 426; Chiles v. Stephens, 3 A. K. Marsh. 347; 1. J. J. Marsh. 44; The People v. Leonard, 11 Johns. 509; The People v. Runkle, 9 do. 147; 1 Pirtle's Dig. 456, 452; 8 Cowen, 226; The People v. Godfrey, 1 Hall's Sup. Ct. R. 240; The People, &c. v. Anthony, 4 Johns. 108; 3 Dana, 67; Smith v. White, 5 do. 381; Moore v. Read, 1 Blackf. 177; 14 Vesey, 136.

E. N. Powell, for the defendants in error.

1. The proceedings under the statutes for forcible entry and detainer being summary and contrary to the course of the common law, must strictly conform to the statute. The complaint is the foundation of the action, must show sufficient on its face to give the justice jurisdiction, or the whole proceedings will be void. Wells v. Hogan, Bre. 264.

2. The scope and design of our Act for forcible entry and detainer is the same with those of England. Where forcible entry and detainer by indictment will lie by the English statutes, a civil action will lie by our Act. Mason v. Finch, 1 Scam. 495.

Therefore a forcible entry must be with strong hand, with unusual weapons, with multitude of people or menace of life or limb. Such force as is implied in every trespass is not sufficient. 1 Rus. on Crimes. 287; 8 Cowen, 232; 5 Carr. & Payne, 201.

Our statute is more comprehensive than the English, and provides for three cases: First, for a wrongful or illegal entry as contradistinguished from a forcible or violent one; secondly, a forcible entry by means of actual force or violence; and thirdly, a wrongful holding over of the tenant. Rev. Stat. 256, § 1; 1 Scam. 409.

Therefore, the complaint must state clearly and specifically under which clause of the statute the complaint is made. This it does not do. If under the first, it should so state; if under the second or third, it should equally be specific. But the defendants are charged with forcibly holding possession. Our Act only provides for a case of a tenant who holds over, and there is nothing in the complaint to show such relation. A person has a right to defend his possession with force; non constat, but the defendants were rightfully defending their lawful possession. 3 Bac. Abr. 253.

If the complaint is made under the second clause in the statute, it must then show a forcible entry by actual violence. 1 Scam. 409 But the charge is for forcibly holding possession. This the defendant had a right to do for anything shown in the complaint. It may have been a wrongful or illegal entry or a forcible one by Armstrong, as between him and the plaintiff, and from anything in the complaint the defendants may have entered peacefully and of right.

3. The complaint does not show that the plaintiff was in the actual possession of the house. Now does it show such force as will constitute a forcible entry? Opening the

door with a key, entering by an open window, enticing the owner out and afterwards shutting the door on him, without other force, are not forcible entries. 10 Mass. 409; 3 Bac. Abr. 252; 1 Rus. on Crimes, 288.

4. The complaint charges that Armstrong "unlawfully and forcibly, by means of a false key, and forcibly removing certain props and bars, &c., and where entry was not given him by law, made entry, &c., into a certain house then and there belonging to him, the said complainant." Now this might be sufficient as between Armstrong and complainant. But the complaint does not allege or show by any fair inference, that the defendants did not make entry or take possession where entry was given them by law. Under the first section of the Act of forcible entry and detainer, it is provided that "if any persons shall make any entry into any lands, tenements or possessions, except in cases where entry is given by law," &c. Now it is necessary to state in the complaint that defendants entered when entry was not given by law, There is no such allegation. It is not sufficient to say that Armstrong entered, for it might well be that he did, and that the defendants entered rightfully, as purchasers under a fi. fa. may enter and take possession, if the premises purchased be vacant. 1 Johns. 43; 13 do. 344; 3 T. R. 296.

At common law, the legal owner of land might enter and take possession with force, being only answerable for the breach of the peace. It was to remedy this that the statutes in England were passed. He may still enter, if he can do so without breach of the peace. And this statute being in derogation of the common law, every show of a legal entry by the defendants must be negatived by the complaint.

5. He who barely agrees to a forcible entry made to his use without his knowledge or privity, is not within the statute, because he did not concur in or promote the force. 3 Bac. Abr. 253; Roscoe, 378—9. Now, apply this principle of the law to this case. We may look in vain for any allegation in the complaint to charge the defendant with any knowledge of Armstrong's taking possession, or that Armstrong ever took possession for them. The bare fact charged, that

Armstrong, after he had forcibly acquired the possession, sometime afterwards transferred the possession to the defendants, is not sufficient to make them liable for the illegal act of Armstrong. And for aught that appears, they may have entered when entry was given by law. The defendants not being charged as parties or privies to the force used by Armstrong, cannot be made liable for his acts by receiving the possession of their own property. And the defendants having obtained the peaceable possession, they have a right to defend that possession by force, and are not liable for an action of forcible entry, or forcible detainer, if they do so. 3 Bac. Abr. 253. There is no allegations in the complaint that the defendants, at the time they took possession, had not a right of entry by law.

6. The description of the property in the complaint is not sufficient. It does not with convenient certainty describe the property so as to enable the defendants to know the special charge they are required to answer, or to enable the justice and sheriff to give the plaintiff possession. It does not say in what town or county the lot and house is situated. The description is wholly insufficient. 3 Bac. Abr. 255.

7. The complaint does not show that the plaintiff had any right to the possession at the time when the defendants entered. He may have had the right of possession at the time Armstrong entered, and for aught that appears, this right may have ceased. 3 Bac. Abr. 256.

8. Our statute provides for three cases only: First, for a wrongful or illegal entry; second, a forcible one by actual force and violence; and third, a wrongful holding over of a tenant. The complaint does not charge the defendants with a wrongful or illegal or a forcible entry, or a wrongful holding over as tenants, but charges them with holding the possession with force. Now, our statute does not provide for a case where the entry may have been peaceable, (and, therefore it is presumed to be lawful,) but a forcible refusal or holding over. In this our act differs from the statutes of Indiana and Kentucky, as these acts provide for a forcible holding over, although the entry may have been peaceable.

The charge, then, being for a forcible holding over, and not being brought within the cases provided for in the statute, the action does not lie, and the complaint is defective.

O. Peters also argued the case in behalf of the defendants in error.

The Opinion of the court was delivered by.

CATON, J.* Ballance commenced a suit of forcible entry and detainer against the defendants before a justice of the peace of Peoria county, which was taken by appeal to the circuit court where on motion of the defendants, the cause was dismissed for want of jurisdiction, apparent on the face of the complaint.

The complaint shows, that one Armstrong, by means of false keys, &c., forcibly entered, where entry was not given by law, into a certain house, (describing it,) and forcibly kept the said complainant out of the possession of said house for some time, when he transferred the possession to the defendants, who have hitherto forcibly held possession, &c. The complaint further states, that Ballance had for years been in the quiet and peaceable possession of the premises, and that the defendants took the possession from Armstrong, with a full knowledge of the illegal manner in which it had been obtained.(a)

The several cases in which an action for forcible entry and detainer may be sustained, have been so repeatedly laid down by the court, and particularly in the case of Whitaker v. Gautier, (ante, 443,) decided at this term, that it is unnecessary here to repeat them. This complaint is manifestly insufficient to bring the case against Curtenius & Griswold, within any of the provisions of the statute. There is no pretence but that they obtained the possession peaceably, nor is it stated but that they were entitled by law to the possession of the premises, at the time they took possession. For aught that appears in this petition, they may have bought the land,

(a) Spurk vs. Frosythe, 40 Ill. R. 541; Clark vs. Baker, 44 Ill. R. 349.

* PURPLE, J. having been of counsel, did not sit in this case.

while Armstrong was in possession, from the Government or some other rightful owner, or even from Ballance himself. There legal right to enter upon and take possession of the house is not denied, nor is the propriety of their conduct even questioned by the complaint. All that is alleged against them is, that they took the possession when Armstrong yielded it up to them, they knowing at the time that he had obtained it wrongfully. Even admitting that they could be made wrong doers by relation, which we are not now prepared to admit, still it should affirmatively appear that they entered without right, and only under the wrong doer. Here it is not pretended, that the defendants knew anything of the forcible entry of Armstrong at the time it was made, or that they claim any benefits under it. This case, then, as before stated, is not brought within any of the provisions of the statute. It is not shown that the defendants entered into these premises when entry was not given by law, or that they made such entry by force, nor does it appear that they held the premises, after the expiration of a tenancy. The court properly decided that the complaint was insufficient to give the justice jurisdiction. It also assigned for error, that the application of the plaintiff to amend his complaint was denied. Even admitting the right of the circuit court to grant such leave, still its refusal cannot be assigned for error. At most, it was a matter of discretion like the amendment of a declaration, or other pleading.

The judgment of the circuit court is affirmed with costs.

Judgment affirmed.

HENRY RHINES, plaintiff in error, v. BENJAMIN T. PHELPS et al., defendants in error.

Error to Cook.

A mortgage of personal property is in the nature of a pledge and conditional sale, to become absolute, and vest the thing mortgaged without redemption, upon condition broken, in the mortgage. Until a forfeiture has thus accrued, the mortgagee has only a lien upon the pledge for the security of his claim against the mortgagor, and would be liable in damages if he were to sell the same, or otherwise convert it to his own use. (*a*)

A mortgagee, with the consent of the mortgagor, may dispose of any portion of the mortgaged property, or the mortgagor might do the same with the mortgagee's permission; but property taken in exchange for mortgaged property cannot become substituted for, and stand in the place of that which had been included in the mortgage.

Where personal property is taken in execution, and claimed and repleived by a third person, although delivered to him upon the execution of the writ, it is so far still considered in the custody of the law, that it cannot be taken from the possession of the plaintiff in replevin, during the pendency of such suit, by any writ or execution against the party as whose property it had been previously seized, unless he had acquired some new title to it subsequent to the original levy: or, unless it manifestly appeared that such suit had been instituted with the fraudulent design to cover up the property and defraud the creditors of the defendant in execution.

All conveyances of goods and chattels, where the possession is permitted to remain with the vendor, are fraudulent per se, and void as to creditors and purchasers, unless the retaining of the possession be consistent with the deed.

An absolute sale of personal property, where the possession remains with the vendor is void as to creditors and purchasers, though authorized by the terms of the bill of sale.

REPLEVIN in the Cook circuit court, brought by the defendants in error against the plaintiff in error, and heard before the Hon. Richard M. Young and a jury, at the November term 1844, when a verdict was rendered in favor of the plaintiffs below.

The pleadings, evidence and instructions asked, appear in the Opinion of the court.

The cause was submitted on the written arguments of counsel, which have been condensed for this Report.

I. N. Arnold, for the plaintiff in error.

1. Can a mortgagee hold property under a mortgage, which is not described in it, but which has, by a verbal

(a) Redemption of--Dupuy vs. Gibson, 36 Ill. R. 197.

agreement, been substituted for that mentioned in the mortgage?

It is unnecessary to cite authority on this point, but see 2 Wend. 596.

It was there decided that liquors and groceries in a store which had pretty much changed since the giving the mortgage, could not be held under it. This case is much stronger than that against the mortgagee. A case cited in 17 Wend. 492, is directly in point. See, also, 4 Metc. 306; 14 Pick. 497; 21 Main. (8 Shepley,) 86; 6 Main. & G. 245.

In the case of Jones v. Richardson, decided by the Supreme court of Massachusetts in 1846, and reported in the December No. of the Law Reporter, all the authorities on this point are reviewed, and it is decided that the mortgagee cannot hold, as against creditors, property acquired subsequently to the date of the mortgage, and this was where the mortgage was for a stock of goods. But in the present case, the mortgage describes a black horse, which the mortgagor sold on his own account, and substituted a bay horse, and yet the mortgagee seeks to hold this bay horse under the mortgage for the black horse. What a door for the perpetration of fraud would be opened by such a construction!

2. The record which was read of the suit between Phelps and Reed in Ogle county, ought not to have been read in evidence. It was a proceeding between different parties, and had no tendency to prove title in the plaintiff. It was res inter alios.

3. The second instruction asked by the defendant was the law, and should have been given. It was this: "If the jury believe from the evidence that the property remained in possession of Warner after the expiration of the time specified in the mortgage, it is fraudulent and void as against a judgment creditor." This si expreesly decided in 2 Wend. 596.

4. The third instruction asked by the defendant was the law, and should have been given. It is this: "If the jury believe that the mortgage was void, and that the title never passed to Phelps, and that Warner was in possession at the

time of the levy by Rhines, the defendants are entitled to recover." If the mortgage is void, and Phelps never had title, was not defendant entitled to recover in this case ?

5. The fifth instruction asked for by defendant was proper, and should have been given. It was this : "If the jury believe from the evidence that the execution of the mortgage and the bringing the suit in Ogle county, were all a part of one fraudulent transaction to cover up Warren's property and keep it from his creditors, the title never passed to Phelps, and the defendant is entitled to recover."

Was not this the law ? Does not fraud vitiate all transactions ? If the whole proceeding was fraudulent to cover up Warren's property and keep it from his creditors, shall it stand ? Rhines was not a party to this suit. It was competent for him to show it all a fraud.

O. Peters, for the defendants in error.

1. The first position assumed by the plaintiff in error is that a mortgagee of personal property cannot hold property under the mortgage, not described in it, but which has, by agreement, been substituted for that described in the mortgage.

This position cannot be sustained, and the authorities do not support it.

As between mortgagor and mortgagee, upon the execution and delivery of the mortgage, the legal title of the property passes to the mortgagee. The following authorities fully establish this: 1 U. S. Dig. 369, § 31 ; Story on Bailm. §§ 286–7, 300 ; 12 Johns. 89–90 ; 2 Story's Eq. Jur. § 1030.

This point being established, it would seem to follow as a necessary consequence, that with the consent and under the direction of the mortgagee, the property can be sold, or exchanged, and the property received in exchange, be held upon the same conditions, and subject to the same defeasance as the property originally conveyed. If this be not so, an owner of property cannot sell it.

The authorities referred to fall very far short of maintaining the doctrine contended for by the plaintiffs.

2. The second point relied upon is, that the circuit court

erred in permitting the record from the circuit court of Ogle county to be read in evidence, it being res inter alios.

The principle, upon which it was contended and decided that this record was competent evidence, is, that the property was in the custody of the law, and was not, therefore, subject to be levied upon.

The action of replevin is a proceeding in rem, and not in personam. The plaintiff gives a bond, and the officer takes the property and delivers it to the plaintiff in replevin. The property is thus put in the custody of the law, and the plaintiff becomes its custodier, and must have it to return in case the judgment goes against him. If it can be levied upon and wrested from him, he may be liable on his replevin bond, and at the same time, by process of law, be disabled from making a return of it.

The bond given by the plaintiff in replevin is not a substitute for the property, but a security that the property shall be forthcoming to abide the order of the court.

This is fully considered by the supreme court of the United States, in the case of Hogan v. Lucas, 10 Peters, 400. The case is not only decisive of this point, but of the whole case, and shows that the levy was void, and gave no rights to the officer (Rhines) making the levy.

3. The third point relied upon by the plaintiff in error is, that the circuit court refused to give the second instruction, and the case of Divver v. McLaughlin, 2 Wend. 600, is relied upon.

The court, by this instruction, is virtually asked to decide that the retaining of the possession by the mortgagor after the time of payment specified in the mortgage, is conclusive evidence of fraud. The case cited does not show this, or in any manner sustain it. There, the fact of the continuing possession after the mortgage had become forfeited, was one of three things, upon which the court decided the mortgage fraudulent, but no intimation is given that this was or itself conclusive of fraud.

4. The point insisted upon fourthly is, that the third instruction asked was correct, and the circuit court erred in refusing to give the instruction.

This was properly refused for several reasons;

It proposed to leave a question of law to the jury to determine. It is a question of aw for the court to decide whether the mortgage was void, and whether the title passed. The jury are to find the facts which evidence the fraud, but the court are to determine whether the facts found constitute a constructive fraud. Whether the title passed by the deed or not, it is to be determined by the construction of the language used in the mortgage, and the court is to determine what is the legal effect of such language. 3 Stark. Ev. 1006–7, side paging and notes, and cases there referred to. If the deed was sufficient to pass the title, (and there is no doubt of this,) no question could properly be submitted to the jury on the subject.

Some part of this instruction might have been given, but it was asked as a whole, and as the party did not choose to modify it he must abide by the decision. It would clearly have been error for the court to have instructed the jury that it was for them to determine whether the mortgage was valid or not.

But the last proposition of the instruction asked was not law. Had the court been asked to instruct the jury, that if, the property was in possession of Warner contrary to the stipulations between the parties, it might have been correct, for though the time of the payment of the mortgage debt had passed, yet the time for this payment and the extension of the time for Warner to have returned possession may have been by parol. The mode of executing a written contract may be altered by parol.

In this case, the "retaining of the possession was consistent with the deed." Thornton v. Davenport, 1 Scam. 298.

5. The plaintiff in error insists, fifthly, that the refusal of the circuit court to give the fifth instruction asked by the defendant below, was erroneous.

Whether the instruction was correct as containing a correct abstract legal proposition, is not very material, because the case does not show any thing to impeach the proceedings in Ogle county. The property had been levied upon as the property of Warner, by a constable of Ogle county; the

Phelpses had replevied it from the constable; this suit was pending, as shown by the record introduced in evidence. Then, suppose the mortgage was fraudulent, the property would be holden by the constable upon his levy, even though the Phelpses had brought their replevin to aid the original fraud. A fraud between the Phelpses and Warner would not defeat the lien of the constable, and the Phelpses by replevying and giving the replevin bond became the keepers of the property for the constable; so that they were entitled to recover by reason of the special property acquired by them thereby. If the transaction was really fraudulent, then the levy by the constable in Ogle county was good, and upon the determination of that case the property must be returned to him. The instruction was, therefore, properly refused, on two grounds; 1st, Because there was no evidence to show that the judgment creditor of Warner, or the constable of Ogle county, participated in the fraud; and 2d, Because the property was in the custody of the law, and the Phelpses were the keepers thereof, under the authority of law and the legal process in the hands of the constable of Ogle county.

The opinion of the court was delivered by

Purple, J.* The defendants in error on the 20th January, 1841, brought an action of replevin against the plaintiff in the Cook county circuit court for one bay horse, and one two horse wagon.

The plaintiff in error, Rhines, who was the defendant below, pleaded that he did not take and detain the property as charged in the declaration, and gave notice, that under the plea he would give in evidence that he was a constable holding an execution in favor of one Charles Walker, against one Merrit Warner; that the property belonged to Warner, and that he took the same by virtue of said execution.

From the bill of exceptions in the case, it appears that Warner being indebted to the defendants in error, on the 9th day of March A. D. 1840, mortgaged to them certain personal property consisting of horses, wagons, &c. The

* Justices Thomas and Denning did not sit in this case.

mortgage was conditioned to be void upon the payment of three hundred dollars at the expiration of six months, and contained a stipulation that the property should remain in the possession of the mortgagor until the expiration of said time. It is further shown that the property in controversy in this suit, was no part of the property described in the mortgage; that Warner purchased the horse of Jacob B. Crist, in the spring of 1840, after the execution of the mortgage, and the wagon of John Davlin of Chicago, in May or June, 1840, that Warner exchanged this horse and wagon, [as he stated,] for a certain horse and wagon mentioned in his mortgage to defendants, and that he sold those he received in exchange on his own account, and that it was agreed verbally between him and the defendants, that this property was in the same manner as that for which it had been exchanged, to be subject to the mortgage.

The mortgage was read in evidence, the plaintiff's counsel objecting and excepting to the same.

The plaintiffs below also read in evidence the record of a replevin suit, commenced in the Ogle county circuit court, on the 28th day of August, A. D. 1840, in which the defendants in error were plaintiffs, and one Lyman Reed defendant; by the proceedings in which it appears that Reed had before that time levied on the same property by virtue of an execution which he held as a constable of said county, against the said Warner, and that the same suit was still pending and undetermined in said court.

To the admission of this evidence the plaintiffs here also objected and excepted.

At the request of the counsel for the plaintiffs below, the court instructed the jury: "That if they should believe from the evidence, that the horse and wagon in question were taken in execution by Reed, a constable of Ogle county, of this State, and were replevied by the plaintiff prior to the defendant's levy, and the said replevin suit was pending in the Ogle circuit court at the time the defendant made his levy in Cook county, that such levy by the defendant was not legal, and they ought to find the issues for the plaintiff."

The defendant below expected to the said instruction.

The court was then requested to instruct the jury on the part of the defendant below : "That if the jury believe, from the evidence, that the property remained in possession of Warner after the expriation of the time specified in the mortgage, it is fraudulent and void against a judgment creditor." " If the jury believe from the evidence, that the execution of the mortgage and the bringing the suit in Ogle county was all a part of one fraudulent transaction, to cover up Warner's property and keep it from his creditors, the title never passed to Phleps, and the defendant is entitled to recover.

The last instruction was refused, the first given modified as follows : " That if the jury believe that Warner retained possession of the property in a manner inconsistent with the mortgage by continuing in possession after six months had expired, it was only prima facie evidence of fraud, but subject to explanation by the plaintiff ; that such retaining possession did not render the mortgage fraudulent per se, but prima facie evidence only of fraud, and subject to explanation by the plaintiff."

To the refusal of the court to give the last instruction, as asked, and also to the modification of the first instruction, the defendant below excepted.

A verdict was found for the plaintiffs below. The defendant then moved for a new trial, which was overruled, and judgment rendered on the verdict; and said defendant excepted to the opinion of the court.

The several rulings and decisions of the court are now assigned for error.

Three questions seem naturally to be presented by this record :

1st. Whether the defendants in this case acquired any title to the property in question by virtue of their mortgage?

2d. Whether the pendency of the action of replevin in Ogle county placed the property beyond the reach of an execution against Warner until the action was determined? and

3rd. Whether the court gave a proper construction to the law relative to sales and mortgages of personal property.

Upon the first point, it is contended by the defendants' counsel, and numerous authorities are cited to sustain the doctrine, that in the case of a mortgage of personal property, when the mortgage is delivered, the legal title to the property passes to the mortgagee ; and that, having so passed, the mortgagee may sell the property himself, or appoint the mortgagor or any other person his agent to make such sale, and in exchange to take other property, which the mortgagee can hold in substitution of the former, subject to the conditions and defeasance in the mortgage. I know of no principle upon which this doctrine can be sustained.

A mortgage of personal property is in the nature of a pledge and conditional sale, to become absolute, and vest the thing mortgaged without redemption, upon condition broken, in the mortgagee. Until a forfeiture has thus accrued, the mortgagee has only a lien upon the pledge for the security of his claim against the mortgagor, and would be liable in damages if he were to sell the same or otherwise convert it to his own use. (*a*) This liability being alone to the mortgagor, doubtless by his consent, he might dispose of any portion of the mortgaged property, or, the mortgagor might do the same with his (the mortgagee's) permission. But that the thing taken in exchange for the mortgaged property can, by the verbal agreement of the parties, become substituted for, and stand in the place of that which had been included in the mortgage is an absurdity. The elementary principle of the law which prohibits, any and every contract from being partly in writing under seal, and partly in parol, forbids it. [*b*]

Under this view of the law, about the correctness of which there cannot be a doubt, the defendants had no title to the property in controversy in this suit by virtue of their mortgage ; consequently, the same was improperly admitted in evidence to the jury.

As to the second point, we are of opinion that in the decision of the court in admitting the record of the replevin suit in Ogle county there was no error.

(a) Ante 428.
(b) Bell vs. Shrieve, 14 Ill. R 462.

If that action had been commenced in good faith, and under an honest conviction that the plaintiff in the same was the owner of, or had the right to the possession of the property, the law would not permit a subsequent execution against the same defendant, Warner, pending the litigation, to remove the property from the possession of such plaintiff, and thereby put it beyond his power to return the property if a return should be awarded, according to the conditions of his replevin bond executed to the sheriff at the commencement of the suit, unless it could be shown that Warner had acquired some title to the same subsequent to the commencement of said suit.

The case of Hogan v. Lucas, 10 Peters, 400, cited by the defendants' counsel, is decisive of this question.

Where personal property is taken in execution, and claimed on a replevin by a third person, although delivered to him upon the execution of the writ, it is so far still considered in the custody of the law, that it cannot be taken from the possession of the plaintiff in replevin, during the pendency of such suit, by any writ or execution against the party as whose property it had previously been seized; unless he had acquired some new title to it subsequent to the original levy; or unless it manifestly appeared that such suit had been instituted with the fraudulent design, to cover up the property and defraud the creditors of the defendant in execution.

With regard to the third point, we are clearly of opinion that the circuit court was mistaken in the law as applicable to such cases. In many of the States the decisions upon this question have been conflicting. In this court, however, the question has been distinctly settled, and we believe upon reason, and the most approved authorities.

In the case of Thornton v. Davenport, 1 Scam. 296, the rule is held to be, that all conveyances of goods and chattels where the possession is permitted to remain with the vendor, are fraudulent per se, and void as to creditors and purchasers, unless the retaining of the possession be consistent with the deed; and that an absolute sale of personal property, where the possession remains with the vendor, is void as to

creditors and purchasers, though authorized by the terms of the bill of sale.(*a*) Apply these principles to the present case, and it will be seen, that whether the plaintiff below was entitled to claim the property under his mortgage, or by exchange or purchase in some other manner, it was error in the court to refuse the instructions called for by the counsel for the plaintiff, more especially so, as there was some evidence that the property remained or was repeatedly in the possession of Warner, after the expiration of the six months mentioned in the mortgage as the time for which he was to retain it. If the defendants claimed it by virtue of the parol agreement made subsequent to the execution of the mortgage, then, as we have before seen, if they permitted it to remain in Warner's possession, the contract would be considered fraudulent and void as to the creditors of Warner. In either event, there was evidence from which the jury might possibly have inferred that there was fraud in the whole transaction including tne mortgage, the subsequent arrangement about the exchange of property, and the institution of the suit in Ogle county; and however slight the circumstances may be, we cannot tell what influence they may have had, if under the instructions, the jury had been permitted to consider them.

The judgment of the circuit court is reversed with costs, and the cause remanded with directions to that court to award a venire de novo.

(a) Powers vs. Green, 14 Ill. R. 389.

THE PEOPLE &c. ex rel. E. B. WASHBURNE, Prosecuting Attorney for the Jo Daviess County Court, v. THOMAS H. CAMPBELL, Auditor, &c.

Application for a Mandamus.

The Legislature has not the power to repeal a law by a joint resolution of the two Houses of the General Assembly, without such resolution having undergone the three several readings prescribed by the 16th section of the 2nd Article of the Constitution, and without its having been submitted to, and received the approval of the Council of reversion.

The Legislature provided by law for the election of a prosecuting Attorney for a particular county, and fixed the salary, but adjourned without filing the office. A joint resolution was subsequently passed, authorizing the Governor to appoint the officer, to hold until a provision by law, "without any compensation from the State." An officer was appointed by the Governor, who served two years, and claimed the salary provided by the law: Held, that whatever might have been the intention of the Governor, at the time he made the appointment, he could not have made it under the law first mentioned and that the officer held his office by virtue of the joint resolution, and, therefore entitled to no compensation from the State by virtue of the law.

THE following statement of facts was submitted by the parties for the opinion of the court:

1. That by an Act passed March 1, 1845, establishing the Jo Daviess county court, provision was also made for the election of a Prosecuting Attorney by the Legislature, and his salary fixed at one hundred dollars per annum, payable quarter yearly out of the State Treasury.

2. That the Legislature failed to elect such an attorney, according to the provisions of this law; but subsequently, and before the end of the session, passed a joint resolution authorizing the Governor to appoint a Prosecuting Attorney, to hold his office until otherwise provided by law, without any compensation from the State.

3. That the Relator, E. B. Washburne, was appointed and commissioned Prosecuting Attorney for the Jo Daviess county court by the Governor of Illinois, on the third day of March, 1845, and has fulfilled and discharged the duties of

that office from the date of his appointment to the present time, and that there has been no other Prosecuting Attorney of said court.

Upon this statement of facts, the Auditor, Thomas H. Campbell, agreed that if the court should be of opinion that the Relator is entitled to the salary of one hundred dollars per annum, as Prosecuting Attorney, under the Act of March 1, 1845, a peremptory mandamus may issue against him, in the first instance, to compel the issuing of a warrant on the Treasury for the amount of such compensation ; but, if otherwise, judgment is to be in favor of the defendant.

J. Butterfield argued for the Relator, and the Auditor submited the case on the agreed statement of facts.

PER CURIAM.* The first question presented involves the power of the Legislature to repeal a law by a joint resolution of the two Houses of the General Assembly, without such resolution having undergone the three several readings prescribed by the 16th section of the 2nd article of the Constitution, and without its having been submitted to, and received the approval of the Council of Revision. We are all of opinion that it has no such power, and that the law in question has not been repealed.

The resolution referred to by the agreement, passed the House of Representatives, March 3rd, 1845, was concurred in by the Senate on the same day of its passage though the House, and is in the following form .

Resolved by the House of Representatives, the Senate concurring herein, That the Governor be, and he is hereby authorized to appoint a Prosecuing Attorney for the Jo Daviess County Court, to hold his office until otherwise provided by law, without any compensation from the State. All his official acts are hereby declared to be as legal and valid as

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*WILSON, C. J. and LOCKWOOD, J. did not sit in this case.

though elected by the Legislature." See House Journal of 1844–5, page 611, and Senate Journal of the same session, page 452.

The Relator was appointed Prosecuting Attorney on the same day of the passage of this joint resolution, and the remaining question is, was he appointed by the Governor, by virtue of the Act of the 1st of March, 1845, and entitled to the one hundred dollars per annum for his services, as provided for by that law; or does he hold his office under the joint resolution of the 3rd of March following, upon condition that he was to receive no compensation for his services from the State.

As to the first branch of the inquiry, we are of opinion, whatever may have been the intention of the Governor at the time he made the appointment, that he could not have made it legally under the Act of the 1st of March, for the reason that the law provided for the election, in the first instance, by the Legislature; the Legislature had not made such selection, and, consequently, no such vacancy in the office had occurred as would, under the Constitution of the State, have authorized him to have exercised such a power. The case of The People, ex rel. Ewing v. Forquer, Secretary of State, is directly in point. Bre. 68.

We are therefore constrained to believe that the Relator held his office of Prosecuting Attorney, if at all, by virtue of an appointment made by the Governor under the joint resolution before referred to, and, as such, is entitled to no compensation for his services from the State under the Act of the 1st of March, 1845.

Application for a mandamus dismissed, at the costs of the Relator.*

Application dismissed.

*The Legislature subsequently made an appropriation in favor of the Relator for the services rendered.

BENJAMIN LOMBARD, appellant, v. SILAS W. CHEEVER et al , appellees.

Appeal from Marshall.

If a party submit to a voluntary nonsuit in the Circuit Court, he cannot complain of the judgment thereon, in the Supreme Court.

The payment of a less sum for a license than that required by law does not authorize it to be issued, and if issued contrary to law, it is a nullity. (*a*)

A payment by one licensed to keep a ferry cannot enure to the benefit of another, to whom an unexpired term is assigned.

Although the Court will not indicate to a party the order of introducing his evidence, yet when testimony is offered of any fact which, in the order of its occurrence, must have been preceded by some other fact without proof of which the evidence offered is wholly insufficient for the purposes for which it was introduced, it should be received only on the assurance of the party offering it, that such other proof will also be made. If it should not be, the Court, on motion of the opposite party, will exclude such testimony, or instruct the jury, that it is insufficient to entitle the plaintiff to a verdict.

It is not the mere license to keep a ferry which invests the persons licensed with the right to seize boats, &c., run at or near such ferry. That right matures only upon his exercising his privilege conferred by the license, by establishing a ferry and putting it into operation for such purpose, doing every act required by law.

REPLEVIN, in the Marshall circuit court, brought by the appellant against the appellees, at the October term 1846, and heard before the Hon. John D. Caton. The plaintiff, on the exclusion of certain evidence, consented that a nonsuit should be entered with leave to move to set it aside, and for a new trial. It was accordingly entered, and afterwards a motion was made to set it aside, and for a new trial, but the motion was overruled, and the plaintiff excepted.

The evidence offered and excluded by the court below is stated in the opinion of the court.

O. Peters, for the appellant.

T. Ford, and L. B. Knowlton, for the appellees.

The opinion of the court was delivered by

THOMAS, J. This case comes before us in such a shape as to close our eyes to the errors alleged to exist in the recorp

(*a*) Ante 96.

and proceedings of the court below. The plaintiff, in that court, (the appellant in this,) chose to submit to a voluntary non-suit, and consequently cannot complain of the judgment thereon, here. Barnes v. Barber, 1 Gilm. 404–5.

Nor does the fact, that the non-suit was taken, with leave to the plaintiff, to move to set it aside, vary the result. That reservation secured to him only the privilege, which without it, he might not have exercised, of seeking in the circuit court, to avert the consequences, either of the erroneous decisions of the court, as to the sufficiency of his evidence to make out his case, or his own hastiness or improvidence in acting with reference to such erroneous decision, in suffering a non-suit.(*a*) But the remedy for the evils growing out of any such error of the court, or improvidence of the plaintiff, could be sought for only in the mode referred to in the court, out of whose judgment such evils grew. The right to seek such remedy expired with the unsuccessful effort made to obtain it. Failing to satisfy the circuit court of his right to have the non-suit set aside, all investigation on that subject is forever closed. Is is not the order of the court overruling the motion to set aside the non-suit that is appealed from; that, like the overruling of a motion for a new trial, where a non-suit has been found by a jury, is but an interlocutory order; but, as in that case, it is the judgement rendered upon the verdict, so in this, it is the judgment upon the non-suit, that is brought by appeal into this court. The fact, then, that the judgment complained of was the result of the plaintiff's own volition, and not in invitum as to him, still remains as an insuperable obstacle in the way of his demanding a revision by this court, of any of the supposed erroneous decisions of the circuit court.

But if the rule on this subject were otherwise, and the judgment of the circuit court could now be considered as before us for review, it then might well be doubted, whether the decision of the court overruling the motion to set aside the non-suit could properly be assigned for error. We are of opinion that it could not, as it was addressed to the sound iscretion of the court, and the statute which allows the

(a) Rankins, vs. Curtenius, 12 Ill. R. 334 ; Brown vs. Malleday, 19 Ill. R. 290.

opinion of the court overruling certain motions addressed to its discretion to be assigned for error, does not embrace this. Rev. Stat. ch. 63, § 23.

But admit that question to be before us, and it must be found of very easy solution. The motion to set aside the non-suit was based solely upon the rejection by the court of certain testimony offered by the plaintiff, and which, admitting its insufficiency of itself to entitle him to a verdict, he nevertheless insists, was legally admissible in evidence. This, we are of opinion, constituted no sufficient ground for allowing the motion. The only question properly arising on that motion was not as to the legal admissibility of the evidence offered, but as to the legal sufficiency of the testimony introduced of itself, or in connection with other testimony proposed to be introduced, to entitle plaintiff to recover. And a court should, in no case, set aside a non-suit, and grant a new trial, where it appears from the whole case, that the plaintiff was not entitled to recover. Campbell v. Bateman, Aik 177 ; Hoyt v. Gilman, 8 Mass. 336 ; Salem Bank v. Gloucester Bank, 17 do. 1.

Such was the character of this case. The testimony heard upon the trial was wholly insufficient to make out the plaintiff's case, and from the record it does not appear, as will be presently shown that other testimony requisite to supply the defects in that introduced, was offered by plaintiff or had an existence.

This view of the subject would dispose of the case without any solution of the question sought to be presented by the assignment of errors, as to the legal admissibility of the evidence offered by the plaintiff on the trial, and at the instance of the defendants rejected by the court ; but as an expression of opinion on that point has been earnestly pressed, and as the result will in no wise be varied by such expression, we will proceed to consider and dispose of it.

For that purpose a reference to the pleadings and the testimony, as well that which was introduced without objection upon the trial, as that which was offered and rejected, is necessary.

The action was replevin for certain water craft on the Illinois river. The declaration, in one count, alleges property in plaintiff, and possession, and unlawful detention by defendants; the other, ownership of property in plaintiff, as having been forfeited to him by the laws of Illinois, and detention by defendants.

The pleas deny the detention of the property by defendants, and the ownership of it by the plaintiff, and claim it as defendants' property. Thus, it will be perceived, that the pleadings involve only the questions of the ownership and detention of the property in dispute.

The first evidence offered by the plaintiff, and on the defendants' objection rejected by the court, was a license issued by the clerk of the County Commissioners' Court of Marshall county to the plaintiff, dated 27th October, 1845, and authorizing him (he having paid one dollar into the treasury of said county,) to keep a ferry across the Illinois river at the town of Henry, until the first Monday in September, 1846. This testimony was wholly unaccompanied by any evidence showing its pertinency to the matters in issue, and as to the purposes for which it was offered, the record is wholly silent. It was, therefore, properly rejected for its irrelevancy.

But the propriety of its rejection need not be placed on that ground only. The law authorizing and regulating the establishment of ferries, empowers the County Commissioners' court of the proper county to issue license for such purpose, under the regulations, restrictions and forfeitures in said law directed and pointed out; and amongst other regulations and restrictions thus prescribed, the proprietor of any ferry about to be established, is required to pay into the county treasury, before the license therefor shall be issued, the amount of the first year's tax which may be assessed on such ferry; and such tax is fixed by the same law at not less than $2, and shall give bond, &c. Gale's Stat. 304–5, §§ 1, 2, and 14. The tax in this case paid by the plaintiff, upon the requisition of the County Commissioners' court, being less than the minimum fixed by law,

and it not appearing that he had given any bond, it follows that the licence to him was unauthorized by law, and was, therefore, a nullity. The fact that one Sampson Rowe, as shown by the record, had owned a license to keep a ferry at the same place before the plaintiff, and had paid three dollars as a tax thereon, and before the expiration of one year from the emanation of his license, had relinquished it on condition that it should be renewed to plaintiff, does not vary the result. The payment by Rowe of the tax on his license cannot enure to the benefit of the plaintiff, as a payment on his. Such is the doctrine of this court as expounded at this term in the case of Munsell v. Temple, (ante, 93.)

The testimony next offered by the plaintiff, and rejected by the court, consisted of a license issued by the Clerk of the County Commissioners' Court of Putnam county to one Marcus D. Stacy, to keep a ferry across the Illinois river, at a certain point therein named, dated March 6th, 1845, and in connection therewith, the said Stacy's deed properly authenticated; transferring all his interest in said ferry to the said plantiff.

The object of the plaintiff in offering this evidence, as explained by the bill of exceptions, was a legitimate one. He claimed to be the proprietor of a ferry, and that the boats replevied by him having been run by the defendants in derogation of his rights as such were forfeited to him. It, consequently became material for him to prove his title to the franchise claimed. In default of doing so, he had no right to inquire into the defendents' acts. Such proof was not made by the mere production of his license. It should have been preceded, or at least accompanied, by proof of the order of the County Commissioners' court granting it. In support of such order, when exhibited, it would be presumed that all the preliminary steps required by law had been taken, but no such presumption exists in favor of the license simply. Then, although a license is a necessary link in the chain of title to a ferry franchise, and that offered by the plaintiff being regular on it face was for such purpose legally admissible, it does not follow that it was erroneously rejected.

The true rule on this subject is, that although the court will not indicate to parties the order of the introduction of their testimony, yet when evidence is offered of any fact, which in the order of its occurrence must have been preceeded by some other fact, without proof of which the evidence offered is wholly insufficient for the purpose for which it is introduced; it should be received only on the assurance of the party offering it, that such other proof will also be made. If it should not be, the court, on motion of the opposing party, will exclude such testimony, or instruct the jury that it is insufficient to entitle plaintiff to a verdict.

Tested by this rule, the testimony offered in this case, was properly rejected, as the proof necessary to make it available for the purposes of its introduction was not made, and for any thing apparent on the record, may not have existed.

The license offered failing to show title to a ferry in Stacy his deed to the plaintiff was necessarily properly rejected.

But again, the rejection of this testimony, even if it had been sufficient to authorize the plaintiff to keep a ferry, would not operate to reverse the judgment. It is not the mere license to keep a ferry which invests the person licensed with the right to seize boats, &c., run at or near such ferry. That right matures only upon his exercising his privilege conferred by the license, by establishing a ferry and putting it into operation for such purpose, doing every act required by law.

Then in every view of the subject, the judgment of the circuit court must be affirmed.

Judgment affirmed.

LEVI WILCOXON, appellant, v. WILLIAM ROBY, appellee.

Appeal from Stephenson.

A. sued B. in an action of debt upon a penal bond executed by the parties, in which they mutually bound themselves that each would desist from all interference with a certain tract of Government land to which both had previously set up a claim, until the merits of their respective claims could be settled and adjusted: Held, that an action was maintainable for the breach of the condition.

A verdict and judgment for damages only, in an action of debt, was held as heretofore, to be erroneous.

Damages cannot be assessed in an action of debt, unless the debt be first found.

After a jury has returned a verdict and been discharged, a defect in the verdict cannot be corrected in the circuit court.

DEBT, in the Stephenson circuit court, brought by the appellee against the appellant, and heard before the Hon. Thomas C. Browne and a jury, when a verdict was rendered for the plaintiff below for $400 damages, and judgment accordingly.

T. Campbell, A. Lincoln, and M. Y. Johnson, for the appellant.

J. B. Thomas, for the appellee.

The Opinion of the court was delivered by

PURPLE, J.* Roby sued Wilcoxon in the circuit court of Stephenson county in an action of debt upon a penal bond executed by him and Wilcoxon, respectively binding themselves each to the other in the penalty of one thousand dollars, conditioned that each would desist from all interference with a certain tract of Government land, to which both had previously set up a claim, until the merits of their respective claims could be settled and adjusted between them.

* THOMAS, J. having been of counsel in this Court, took no part in the decision of this case.

The declaration was upon this bond assigning various breaches of its conditions.

Several pleas and replications appear in the record, most of which we think are defective, either in form or substance ; in consequence of which the record is in much confusion, rendering it difficult to determine what issues were really submitted to the jury.

The case has been submitted without argument or reference to authorities upon any of the points arising upon the pleadings, the counsel for the appellee admitting that there is error in the rendition of the judgment by the circuit court.

Under such circumstances, we deem it improper to express a decided opinion upon the merits of the controversy between the parties. As at present advised, however, we see no reason why an action for a breach of the conditions of this bond may not be sustained.

This is an action of debt ; the trial by the jury. The verdict and judgment of the court are both in damages for the sum of $400. The finding of the jury and the judgment of the court are not responsive to the issues made. There can be no assessment of damages unless the debt be first found. This defect in the verdict could not have been corrected in the circuit court after the jury had delivered their verdict and been discharged The circuit court could enter no proper judgment upon such a verdict.

In cases like the present, the decisions of this court have been uniform, that the error cannot be corrected in this court by the rendition of the proper judgment. Jones v. Lloyd, Breese, 174 ; Jackson v. Haskell, 2 Scam. 565 ; Heyt v. Stapp, 3 do. 95 ; Frazier v. Laughlin, 1 Gilm. 367 ; Mager v. Hutchinson 2 do. 266. (*a*)

The judgment of the circuit court is reversed at the costs of the appellee, and the cause remanded with directions to that court to award a venire de novo.

Judgment reversed.

(a) Hinckley vs. West, 4 Gil. R. 290.

PETER W. BELLINGALL, appellant, v. HANNAH DUNCAN et al., appellees.

Appeal from Jo Daviess County Court.

If a levy is made during the life time of an execution, the property may be sold afterwards; and where it has been returned with an indorsement of a levy on real estate. and the creditor desires a sale, he may, at his election, sue out a venditioni exponas directed to either the sheriff who made the levy, or his successor in office.

A venditioni exponas conveys no new authority on the sheriff. Its only office is to compel him to proceed with a sale, which he already has the power to make.

The Common Law rule is, that the officer who levies an execution, must make sale of the property and receive the money; or, in other words, the officer who commenced the service of the process must complete the execution thereof, and this, whether he continue in office or not. This rule, however, only applies to sales of personal property, as real estate, at Common Law, was not subject to sale on execution.

On a trial in ejectment, a record of a judgment in a proceeding by scire facias to foreclose a mortgage, ordering a sale of the premises, was read in evidence without objection. The judgment did not describe the premises: Held, on objection being made in the appellate court, that the judgment, although technically defective, could not be vitiated in a collateral proceeding, and that the objection could not be raised in that court for the first time.

EJECTMENT, in the Jo Daviess County Court, brought by the appellees against the appellant, and tried before the Hon. Hugh T. Dickey without the intervention of a jury, at the July term 1846, when the case was taken under advisement. Judgment was rendered in favor of the plaintiffs below at the November term following.

S. T. Logan, for the appellant.

A. T. Bledsoe, for the appellees.

The Opinion of the court was delivered by,

Treat, J.* This was an action of ejectment brought by the devisees of Samuel C. Duncan, the appellees, in this court against Peter W. Bellingall, the appellant, to recover the possession of part of lot thirty-six in the town of Galena.

* THOMAS, J. having been of counsel in this case, did not sit. Denning, J. was absent, &c.

On the trial before the Court, the appellees introduced the record of a judgment rendered in the Jo Daviess Circuit Court, on the 15th of July, 1837, in favor of Crow & Tevie, and against the appellant, for $1216· 23 and costs; also, an execution issued thereon, on the 10th of July, 1838, on which the sheriff made this return: "Levied on one house and lot in the town of Galena, as the property of P. W. Bellingall, this 20th of July, 1838 ; offered the above described property for sale at public auction, this 10th of October, 1838 ; no bidders : not satisfied. M. Hallett, Sheriff." The appellees also read in evidence a writ of venditioni exponas, issued on the 4th of November, 1840, describing the property as in the indorsement on the execution, and commanding the sheriff to proceed and sell the same, and on which the sheriff made this return: "Sold the within described property to Duncan & Schermer for two thousand and ten dollars, and paid the within judgment and costs, being $1526·17; and also paid judgment and cost in favor of H. H. Gear, being $378-35, and offered balance, $105. 77 to the defendant, and he refused to recieve it. Alex'r Young, Sheriff." The appellees then proved by parol that the lot levied on and sold was lot thirty six in the town of Galena. They then introduced a deed from the sheriff to Duncan for the premises in question, bearing date the 23d of May, 1842, and which recited an assignment by Schermer to Duncan of his interest in the certificate of purchase. The appellant objected to all of the foregoing testimony.

The appellees next read in evidence, the record of a judgment recovered by Schermer against Bellingall in the Jo Daviess Circuit Court, on the 22d of June, 1841, in a proceeding by scire facias to foreclose a mortgage, for $2134.84, which judgment directed a sale of the mortgaged premises, but omitted to describe them; also, a special execution issued thereon, on the 1st of February, 1842, directing a sale of lot thirty-six in the town of Galena, on which the sheriff made this return : "Satisfied in full by plaintiff purchasing the within described property. March 23d, 1842. Alex'r Young, Sheriff." The appellant objected to the introduction of the execution and return, because no levy appeared to

have been made. The appellees next introduced the sheriff's deed under this sale, bearing date the 23d of May, 1843, conveying the premises to Duncan, and reciting an assignment by Schermer to Duncan of his interest in the certificate of purchase. The appellant objected to the introduction of this deed for the reason, that Schermer had not redeemed the premises from the previous sale. The foregoing was all of the testimony material to be referred to in the decision of this case. The court found the issue in favor of the appellees, and they had judgment accordingly. Bellingall prosecuted an appeal to this court.

Two points are made by the counsel for the appellant: first, the sale by the sheriff on the venditioni exponas was illegal and void; and second, the special execution on the second judgment was unauthorized, the judgment omitting to describe the mortgaged premises.

First. If a levy is made during the lifetime of an execution, the property may be sold afterwards. In the present case the levy was made in due time by one sheriff; the property was sold by his successor in office. Had the latter the right to make the sale? It is clear that he did not derive this right from the venditioni exponas. Such a writ confers on new authority on the sheriff. Its only office is to compel him to proceed with a sale, which he already has the power to make. Dana v. Phillips, 3 Scam. 551. The common law rule is, that the officer who levies an execution must make sale of the property and receive the money; or in other words, the officer who commences the service of the process must complete the execution thereof, and this whether he continue in office or not.(a) 6 Bac. Abr. 161; Elkin v. The People, 3 Scam. 208. The doctrine, however, only related to sales of personal property, for at common law, real estate was not subject to sale on execution. Let us inquire into the reasons on which the rule was founded, and see if they are applicable to sales of land on execution. Where goods are levied on, the possession is transferred from the debtor to the sheriff. The sheriff acquires a special property in them, and may maintain trespass or trover if they are taken from his custody. If the goods are of sufficient value to pay the

(a) As to constables Rev. Stat. 45 p. 331, Sec. 113.

debt, the levy, until disposed of, is a satisfaction of the judgment. If they are lost through the neglect or fraud of the sheriff, the creditor must look to him and not to the debtor for their value. On a sale, the sheriff delivers the possession to the purchaser. It seems highly proper that the officer making the levy should retain the possession of the property and perfect the sale. Unless the goods come into the possession of the new sheriff, he has no control over them, and of course no authority to sell them. There is an essential difference in the case of a levy on real estate. The land remains in the possession of the debtor, not only until the day of sale, but until the time allowed him by law to redeem has expired; and even then the sheriff cannot divest him of the possession, but the purchaser is driven to his action of ejectment to recover it. The common law authorities being confined to sales of personal property, we consider ourselves at perfect liberty to adopt such rule in relation to sales of land on execution, as we may deem best adapted to the circumstances of the county and the interests of its citizens. There seems to be no good reason why the sale should be confined exclusively to the sheriff making the levy; but, on the contrary, there are some cogent reasons why his successor should be permitted to do it. It is wholly immaterial to the debtor which of them is to make the sale. He is equally protected in either case. Much inconvenience may arise if the new sheriff is not allowed to complete the service of the process commenced by his predecessor. The old sheriff may die or remove from the bailiwick before he has sold the land, and if his successor is not allowed to make the sale, the creditor may be greatly delayed and injured in his remedy. In order to give the new sheriff any authority to collect the judgment, he might be compelled to have the levy set aside, and in that way lose the benefit of the lien acquired by the levy. His lien might be defeated for the want of an officer authorized to enforce it. In the case of a levy on personal property, the creditor might have a remedy on the official bond of the sheriff; but in the case of a levy on land, he might have no effectual remedy. We are disposed, therefore, to decide that the new sheriff may sell real estate levied on by his pre-

decessor in office. The sale by either would be valid. Where the execution has been returned with an indorsement of a levy on real estate, and the creditor desires a sale, he may at his election sue out a venditioni exponas, directed to either the sheriff who made the levy, or his successor in office. Where the former sheriff retains the custody of the execution, the vendi should be directed to him; or the creditor may procure the return of the process, and then direct the vendi to the new sheriff. It is the opinion of the court that the sheriff in office when the sale took place, had ample authority to make it, and that his deed vested in the purchaser whatever title the judgment debtor had in the premises at the date of the levy.

Second. In relation to the second question, it is insisted that the evidence fails to show that any judgment was rendered against the premises in dispute. The judgment may be technically defective in not describing the mortgaged premises, but this is, at most, an irregularity which cannot vitiate the judgment in a collateral proceeding.(*a*)It was undoubtedly competent for the appellees to have shown, by the mortgage and scire facias, that the execution properly described the premises mortgaged. If this was the fact, the title under the judgment is valid. No exception was taken to the introduction of the judgment. The execution was objected to, because no levy had been made; and the sheriff's deed was objected to, only for the reason that the mortgagee had not redeemed from a former sale. The appellant did not raise the objections in the court below which he now interposes here. He is not at liberty to make them for the first time in this court. If he had raised these objections on the trial, or even made a general objection to the proceedings, the appellees might have obviated all difficulty, by producing the mortgage and scire facias, showing that the premises mortgaged were correctly described in the execution,

The judgment of the Jo Daviess county court is affirmed, with costs.

Judgment affirmed.

(a) Swiggart vs. Harber, 4 Scam. R. 371.

JAMES W. CORBIN, plaintiff in error, v. DAVID SHEARER, defendant in error.

Error to Massac.

It has been repeatedly decided, that a court is not bound to give mere abstract legal propositions, as instructions to the jury; but it is equally clear, that a judgment will not be reversed because of the giving of such instructions. It is only where the court, in instructing the jury, states the law incorrectly that its opinion can be reversed in the appellate court.

TROVER, originally commenced before the Probate Justice of Massac county by the plaintiff in error against the defendant in error. The defendant appealed to the circuit court of said county, and the cause was heard before the Hon Walter B. Scates and a jury, at the May term 1846, when a verdict was rendered for the defendant.

The cause was submitted in this court upon written briefs and arguments by J. C. Conckling, for the plaintiff in error, and T. G. C. Davis and J. Dougherty, for the defendant in error.

The opinion of the court was delivered by

TREAT, J. This was an action of trover brought by Corbin against Shearer, to recover the value of certain hogs. The cause was tried by a jury, and a verdict returned in favor of Shearer. The plaintiff moved for a new trial, be. cause the verdict was contrary to the evidence, and because the court had misdirected the jury. The motion was denied, and a judgment entered on the verdict. The refusal of the court to grant a new trial is assigned for error. The whole of the testimony is embodied in a bill of exceptions. It has been carefully examined, and is regarded as too uncertain and inconclusive in its character to justify this court in declaring that the verdict was manifestly against the weight of evidence. It is admitted that the instruction given by the court asserts a correct legal principle, but it

is objected to because it was inapplicable to the facts of the case. The law is well settled, that a court is not bound to give mere abstract legal propositions, as instructions to the jury; but the law is equally clear, that a judgment will not be reversed because of the giving of such instructions. Instructions of this character may not aid the jury in the decision of the case; but it does not follow that they will have any improper influence on the jury. It is only when the court, in instructing the jury, states the law incorrectly, that its opinion can be revised in this court. In such case, if it appears that the instruction could have had an influence on the jury prejudicial to the interests of the party excepting to them, the verdict will be set aside, and a new trial ordered.

The judgment of the circuit court is affirmed, with costs.

Judgment affirmed.

David Scott, plaintiff in error, v. Amiel Shepherd et ux. defendants in error.

Error to Peoria.

No rule is better settled, than that a party cannot compel the specific performance of a contract in a court of equity, unless he shows that he himself has specifically performed, or can justly account for the reason of his non-performance.

If a party seeking to enforce a specific performance, wishes to set off against the amount to be paid by him an indebtedness to him from the other party, he should lay the proper foundation for it in his bill, or he cannot be relieved.

Bill for a specific performance, &c., in the Peoria circuit court, brought by the plaintiff in error against the defendants in error, and heard before the Hon. John D. Caton, at the May term 1845, when a decree was rendered, dismissing the bill and directing each party to pay their own costs.

So much of the bill as is material to the determination of this suit appears in the opinion of the court.

H. O. Merriman, for the plaintiff in error.

O. Peters, for the defendants in error.

I. This bill was properly dismissed by the circuit court, because it does not show a case for the relief prayed for.

In a bill for a specific performance, it must show clearly that the party is entitled to the relief sought, and unless it is thus clearly shown the bill will be dismissed.

The objections to the bill in this case are:

1. The original bill charges payment in cash and turns made by purchasing up the debts of Shepherd, but does not show how much in cash, or how much in claims thus purchased; it leaves the whole uncertain, and the defendant could not be apprized of what he had to meet; and

2. The amended bill alleges payment to Shepherd and to others on his account, and specifies claims against Shepherd paid by him, (Scott,) amounting to $93-43. But it does not specify when, how, or in what manner the residue was paid. The bill is too indefinite and uncertain.

II. The verdict finds that an amount less than the purchase money, was paid to Shepherd, and for demands against him purchased by Scott under the agreement. This is also decisive of the whole case, unless the complainant has a right to set off, or treat the indebtedness of Shepherd to him as payment of the purchase money. I cannot find that this question has been distinctly settled.

But there are certain well settled and recognized principles, that would seem to be decisive of it.

A court of equity will not make contracts for parties, but will only enforce that which the parties have themselves made.

A party to entitle himself to relief must have shown himself "ready, desirous, prompt and eager" to perform the contract on his part. He must perform or offer to perform on his part according to the terms of his agreement. Doyle v. Teas, 4 Scam. 204, et seq.

If he agrees to pay the money, or a horse, or notes, he must perform according to his agreement. The vendor may,

and in many cases, does make a sale to pay a particular debt, or from pressing necessity to get cash, and it would not only be unjust, but most oppressive to a party to compel him to receive payment different from the terms of the contract. A debtor may prefer his creditors. But if a creditor can agree to purchase land, and thus turn the indebtedness of the vendor to him in payment, he may, by his own fraud, defeat this right of a debtor to prefer.

Granting relief is in the sound discretion of the court, and the court will not grant relief to a party who has not himself acted fairly. 2 Story's Eq. Jur. 79, § 769; 1 Sug. Vend. 91.

The Opinion of the court was delivered by

KOERNER, J. In December, 1842, Scott, the complainant below and plaintiff here, filed his bill of complaint against the defendant Shepherd and wife, for a specific performance in the circuit court of Peoria county, waiving an answer under oath on the part of defendants.

The defendant answered separately, and upon the coming in of the answers, the complainant filed an amended bill, to which Shepherd answered, and the complainant then replied generally to all the answers.

Upon a final hearing at the May term of the Peoria circuit court, A. D. 1845, the court dismissed the complaint's bill, and ordered that each party pay their own costs. This decision is now assigned for error.

It is unnecessary to set out at large the allegations in the pleadings of the parties. Suffice it to say, that Scott alleged that Shepherd and wife agreed to make him a warranty deed for a certain tract of land, provided he (Scott,) would first pay to Shepherd the sum of two hundred and seventy-five dollars, which might be done by paying out standing debts against Shepherd; that he, (Scott,) did make payments to Shepherd, and also paid outstanding claims, amounting together to more than the purchase money, and that the defendants have refused to make the deed according to agreement. The complainant also alleged the insolvency of the defendant.

These and many other allegations not material to be set out here, being wholly or in part denied by the answers. The court directed the forming of feigned issues, to ascertain the truth of the matter. The jury found most of the issues for the plaintiff, and amongst others, the fact of insolvency. As to the fact of payment by Scott they found specially, that the amount of $208.00 was paid by Scott by special agreement between the parties, to apply on the land contract; that Shepherd is indebted to Scott by special agreement on various other accounts in the sum of forty-five dollars, but that this indebtedness was not to be applied towards the payment for the land.

It does not appear that the court had any other different evidence before it, upon which to found its decree. The verdict of the jury, although not absolutely binding on the Chancellor, was certainly, in the absence of all other testimony, sufficient evidence for him to deny the prayer of the complainant. It showed a non-compliance on his part with the contract as it is stated by himself. The difference in the sum which had actually been paid, by Scott and which he was to have paid, was quite small, yet this does not alter the principle which governs such cases. No rule is better settled than that a party cannot compel the specific performance of a contract in a court of equity, unless he shows that he himself has specifically performed or can justly account for the reason of his non-performance. (*a*) To cite authorities for a proposition so well established would be superfluous. It is said, however, by complainant's counsel, that under the circumstances of the case he is entitled to set off, and to treat the indebtedness of Shepherd to him as payment of the purchase money, and several authorities have been cited in support of this proposition. In 9 Paige, 280, (Sutphen v. Fowler,) I find a case very similar to the present. There Sutphen filed a bill for specific performance, the conveyance of a peice of land against the heir of Fowler. Sutphen had paid down $200.00 of the purchase money, and was to have paid the ballance of 50.00 at a future day to Fowler. At the same time, he paid to Fowler fifty dollars to be applied by Fowler to purchase forty acres adjoining the land pur-

(a) Andrews vs. Sullivan, 2 Gil. R. 334; Stow vs. Russell, 36 Ill. R. 31; Boa d &c vs. Henneberry, 41 Ill. R. 180; Thompson vs. Pruen, 46 Ill. R. 125.

chased. Before the time for the payment of the $50.00 had arrived, and before Fowler had applied the $50.00 received by him to the purchase of said land, Fowler died insolvent. The Chancellor decided that the complainant was clearly entitled to a decree for a specific performance ; that as the estate was insolvent, it was proper that the $50.00 received by Fowler for another purpose, and not applied as intended, should be set off or applied in satisfaction of the same amount which remained due upon this contract.

We are not disposed to deny that under certain circumstances, the principle laid down in the case just adverted to should find its proper application. It seems to comport with a due sense of justice and equity. But in order to apply it, the party must lay a foundation for it in his bill. As before observed, Scott contends in his bill and amended bill that he paid Shepherd in cash and to others for him, and on his request more than the amount of purchase money, specifying particularly what sums he had paid to others and to whom, and not charging that there were other claims which he had on the defendant, not specially to be applied on the purchase money. The proof, therefore, that he had paid $208.00 on the contract, and that the defendant was indebted to him to an amount which added to that sum was more than he was to have paid, did not correspond with the case made by him.

While we regret that for so slight a discrepancy in the proof and the allegations the complainant should have been turned out of court, when from the whole case it appears that the equity was on his side, we cannot without a manifest violation of a stern rule of law, afford him the desired remedy.

The court below was justified in its decision, and the decree must be affirmed with costs.

Decree affirmed.

MARY FINCH, appellant, v. WILLIAM T. BROWN, Clerk of the County Commissioners' Court of Madison County, appellee.

Appeal from Madison.

A. purchased a tax sale in June, 1844, certain tracts of land belonging to B. who died in February, 1846. On the 26h day, of October of the latter year, the widow of B. applied to the Clerk of the County Commissioners' Court for leave to redeem the lands, which was denied· She then applied to the Circuit Court for a mandamus. A dumurrer to her petition was interposed and sustained: Held, that she was not entitled to redeem the lands under the 38th section of the "Act concerning the Public Revenue," approved Feb. 26, 1839, the period of redemption having passed; and further, that the 39th section applied only to lands, owned by femes covert in their own right, of which they were so seized at the time of the sale.

PETITION for a mandamus, &c. in the Madison circuit court at the term 1846, the Hon. Gustavus P. Koerner presiding. There was a demurrer to the petition, which was sustained by the court.

The substance of the petition is stated by the court.

W. Martin, for the appellant, cited 6 Ohio. 204; 13 do. 75–9; revenue act of Feb. 1839.

J. Gillespie, for the appellee.

The opinion of the court was delivered by

TREAT. J.* During the month of June, 1844, two tracts of land were sold under a judgment of the Madison circuit court, for the taxes due thereon for the year 1842. These lands, at the time of the sale, belonged to Joel Finch, who departed this life on the 19th of February, 1846, without having redeemed them. On the 26th of October, 1846, Mary Finch made application to the clerk of the county commissioners' court to redeem the lands, and for that purpose, presented satisfactory proof that she was the widow of

*WILSON, C. J. did not sit in this case.

Joel Finch, and tendered the requisite amount of money. The clerk refused the application. On a petition presenting the foregoing state of facts, she applied to the circuit court for a mandamus commanding the clerk to allow the redemption. The court sustained a demurrer to the petition. That decision is assigned for error.

The lands were sold under the provisions of the "Act concerning the public revenue," approved February 26th, 1839. The 38th section gives to the owner, his heirs or assigns, the right to redeem within two years from the day of sale. The redemption cannot take place under the provisions of this section, because the two years had expired before the application was made. If the petitioner has the right to redeem, it must be by virtue of the 39th section of the same act, which declares that "lands and real estate, which, at the time of the sale, belonged to infants, femes covert, or lunatics, may be redeemed upon the terms specified in the preceeding section, at any time within one year from the time the disabilities of such persone shall cease to exist." The terms "femes covert" in this section must be understood as applying to married women, who, at the time of the sale, were seized of the land in their own right. The petitioner does not come within the provision. She bases her right to redeem solely on the ground, that she is the widow of the former proprietor. She does not claim to have any other interest in the land at the day of sale, than the contingent right of dower, dependent on her surviving her husband. Whether that right was defeated by the sale for taxes is an important question, which we do not feel at liberty now to discuss or decide. It will more appropriately arise when she applies to have her dower assigned under the statute. (*a*)

The judgment of the circuit court is affirmed, with costs.

Judgment affirmed.

(a) Pos 593-Dubois vs. Wolcot, 10 Pet. U. S. R. 1.

JAMES WELCH, administrator of MOSES J. WALLACE, deceased, appellant, v. DAVID WALLACE, appellee.

Appeal from Hancock.

A party appealing from a decision of the probate court, allowing a claim, who neglects to tender a bill of exceptions as required by law, cannot object, in the supreme court for the first time, to the want of jurisdiction in the circuit court by reason of such neglect on his part.

A judgment for costs was rendered against the goods, &c., of an intestate in the hands of an administrator, &c., in the circuit court on an appeal from the decision of the Probate Justice, allowing a claim against the estate of the intestate: Held, that in the absence of proof to the contrary, the presumption was, that the claim was filed in due time, and that the estate was, consequently, liable for the costs of establishing it..

It is erroneous to award execution on a judgment against an estate of one deceased, which is founded on a claim exhibited and allowed against it. The recovery of the judgment only establishes the debt of the creditor. The proper judgment in such a case is, for the amount of the debt and costs, to be paid in the due course of administration.

THIS was a proceeding originally commenced before the Probate Justice of Hancock county, to prove a claim in favor of the appellee against the estate of Moses J. Wallace deceased, which was allowed. The administrator appealed to the circuit court of said county, and a trial was had before the Hon. Norman H. Purple and a jury, at May term 1846, when a verdict was rendered in favor of the claimant for $255.

The court then entered the following judgment:

"Whereupon it is ordered by the court, that the said plaintiff have and recover the sum of $255, the sum so found by the jury aforesaid, together with costs by him in his behalf expended, as well in the court below as in this court, and that he have execution therefor against the goods and chattels and effects in the said administrator's hands, to be administered in the due course of administration," from which the administrator appealed.

The cause was submitted in this court on the written arguments of counsel.

W. A. Minshall, for the plaintiff in error, contended,

1. That the circuit court had not jurisdiction, of the case, because no bill of exceptions to the decision of the Probate Justice was given.

Where the court has no jurisdiction, an agreement of parties cannot give it. Lindsey v. McClelland, 1 Bibb, 262; Bent v. Graves, 3 McCord, 280; Foley v. the People, Bre. 31; 2 U. S. Dig., title "Jurisdiction, 675.

A person being in court does not authorize a judgment to be entered against him, much less against an estate which he may represent, unless he be in court by legal means in a legal manner. Jones v. Kenny, Hardin, 96.

2. A judgment cannot be rendered against an administrator for costs to be paid out of the estate. Rev. code, 1833, 648, § 112; Ibid. 658, § 5, of the supplemental Act.

3. It was error to award execution on the judgment. Burnap v. Dennis, 3 Scam. 483.

O. C. Skinner, O. H. Browning & N. Bushnell, for the defendant in error.

The fourth error questions the power of the court to enter a judgment in such a case. Of this however, there can be no doubt, on reference to the various sections of the law relating to the proceedings in such cases before the court of Probate, appeals, and proceedings in the circuit court. Rev. Code, 1833, 643, § 95; Ibid. 648, §§ 111–14; Ib. 656, § 1; Rev. Stat. 556, § 95, Ibid. 561, §§ 116–19, Ib. 564, § 138; Ib. 428, § 20; Ib. 325, § 66; Ib. 473, § 38.

The second error questions the act of the court in entering judgment against the administrator, as such, for costs.

The law requires that all proceedings should be had in pursuance of the Revised Statutes, 573, § 38. They provide two modes in which the creditor of an intestate may proceed to establish his claim, either by availing himself of the notice to be given by the administrator, in pursuance of the Revised Statutes, 556, § 95, or by giving notice of his claim to the administrator, as specified in said section, "as is now required by law," and which expression is within the spirit

and meaning of the words "was now in force," in the 35th section, on page 473, and which therefore, means as is provided in the laws in force at the time the Revised Statutes went into effect, and which was by serving a notice of such claim on the administrator, or presenting them the account, or filing it with the Probate court; Rev. code, 1833, 648, § 11; and which mode has been provided for in nearly the same terms in the Revised Statutes of 1845, 551, §§ 116, 118. Now, in whichever way the party proceeds to have his claim adjusted, if his claim is filed in the Probate office within the time fixed by the administrator for the adjustment of accounts against the estate, as provided for in the said 95th section, on page 556, of the Revised Statutes, he is entitled to have his costs paid out of the estate. Whether, therefore, the court erred in rendering judgment against the administrator for costs of the claimant in establishing his claim, to be paid in due course of administration depends upon whether this claim was so filed before or after that time; that is, it depends on what the evidence was on that point. If the evidence below showed that the claim was filed before or at that time, the judgment for costs was correct; if the evidence below showed that the claim was filed after that time then the judgment for costs was erroneous. But if the plaintiff in error relied on an error arising on the facts, he should have preserved those facts in a bill of exceptions. As he has not done so, and as the court can see that the facts might have been such as to authorize the judgment for costs, how can the court say there was error in this particular? The costs referred to in the 101st section, page 558, of the Revised Statutes, relates to suits commenced in the regular way after the year has expired, and not to cases filed against the estate in pursuance of the statute within the year.

The third error excepts to the judgment of the court in awarding execution.

This suit was pending in the circuit court at the time the Revised Statutes went into effect. By a provision of those statutes already referred to, (p. 473, § 38,) the proceedings in suits then pending must be conformed to the provisions

of the Revised Statutes, Now, can there be any doubt that, by the Revi sed statutes, the court could have awarded execution in such a case ?

The 95th and the 116th sections of the Revised Statutes, on pages 556 and 561, relate exclusively to proceedings before the Court of Probate, in allowing claims against estates, when presented in one of the two ways already mentioned; and have nothing to do with ordinary suits against administrators. The 95th section assumes that the Probate Justice may, in such a case, enter a judgment and award an execution thereon, and the 119th section is express on the point that the Probate Justice may, in such a case, enter judgment.

Taking these two sections together, they show that the Probate Justice may enter judgment and issue execution thereon; the only limitation on this power to award an execution is, that it shall not be issued for one year from the date of the letters of administration. Had, then, this proceeding before the Probate Court, been under the provisions of the late Revised Code, he could have entered judgment and issued execution thereon, so that he had not issued it too soon. But by the provisions of this code, appeals from the Probate Court are allowed to be prosecuted in the same manner and with the like effect as appeals from ordinary justices of the peace; Rev. Stat. 564, § 138, and 429, § 20; in which cases trials in the circuit courts are to be de novo and on the merits; Rev. Stat 325, § 66; and of course such judgment entered on such trial, as the court of Probate ought, on the same facts to have entered, and the awarding of execution is always a part of the judgment in the circuit court

Of course, if the claimant has thus obtained a judgment and an award of execution, ought not, nor will the court permit him to take out his execution till one year from the date of the letters of administration; and if he should, by any means, obtain such execution within that period, the court would doubtless quash it on motion, as being issued contrary to law. And if the judgment in the circuit court was within the year, that court would doubtless, on motion,

direct the clerk, or perhaps direct it to be entered up as a part of the judgment, that there should be a stay of execution till the year expired. But if, at the time of such judgment, the year had in fact expired, then the right to an immediate execution existed in favor of the claimant, and the court ought to have awarded it without any limitation of time as it did. So that here again, the question of error or no error is a question of fact, and as the facts are not preserved, the court cannot see from the record that the execution was awarded within the year from the date of the letters, how can the court say there was error on this point? Indeed the contrary appears, for this proceeding against the administrator was pending in court nineteen months, and of course, the judgment could not have been within the year from the date of the letters.

That the "execution" referred to in said 95th section relates to cases where claims are filed against the estate, and not to regular suits, is clear from this, (in addition to the fact that the section of which it forms a part relates wholly to the former cases,) that in cases of regular suits, the suits themselves cannot be instituted till after one year from the issuing of the letters, (Rev. Stat. 1845, 558, § 101,) and, of course, no execution could, in such cases, issue within said year, without any provisions to restrain it.

But, if we are mistaken in some of the foregoing particulars, yet, where the judgment is erroneous in part and can be set right without a reversal of the whole, it will be reversed for that part, and be affirmed as to the rest. Thus, a judgment may be reversed as to the damages, and affirmed as to costs; (Cummings v. Prudden, 11 Mass. 206;) or reversed as to costs, and affirmed as to the ballance: (Nelson v. Andrews, 2 do. 164; White v. Garland, 7 do. 463;) and this latter point has been frequently decided in this court. Bailey v. Campbell, 1 Scam. 110; Gibbons v. Johnson, 3 do. 61.

In the absence of anthority, it would seem clear that the same principles must govern in reference to the improper award of an execution, which is an independent part of the

record, and may well be erroneous, while the judgment itself for the debt or damages, as the case may be, remains valid. The authorities to this point, however, seem sufficiently clear. Whiting v. Cochran, 9 Mass. 532; Glover v. Keith, 3 do. 252; Johnson v Harvey, 4 do. 483.

And, for the same reason, when the execution is awarded against the "goods and chattels and credits of the intestate in the hands of the administrator to be administered," (Greenwood v. Spiller, 2 Scam. 502,) it may well be sustained as to the goods and chattels, and quashed as to the credits, while the judgment for the debt can in no wise be affected by an entry subsequent to it in the order of events, and unconnected with any question of merits, or even of form, so far as the entry of the recovery of the claim is concerned.

And in such cases, where a judgment is reversed in part, for a matter of law, and not for error in fact, the plaintiff in error is not entitled to recover costs on error. Nelson v. Andrews, 2 Mass. 164.

Even if we are mistaken in toto, and the entry of this judgment and the award of execution is wrong, both in form and in substance, yet there is no question the defendant in error is entitled to have his claim allowed against the estate and the form in which such allowance should have been made in the circuit court is matter of law only—no question of merits is to be ascertained by further inquiry—and, in accordance with the practice in such cases, this court will either enter up such an order or judgment in the case as the court below ought to have done, or will send back the case, not for a new trial, but with directions to enter up an order or decree in the form to be prescribed by this court. 3 Mass. 352 ; 7 do. 453 ; Baxter v. The People, ante, 368.

The opinion of the court was delivered by

TREAT, J. On the 16th of November, 1844, the Probate Justice of Hancock county allowed a claim in favor of David Wallace against the estate of Moses J. Wallace, for $194.50. Welch, the administrator, prosecuted an appeal to the cir-

cuit court, where the cause was submitted to a jury, and a verdict returned in favor of Wallace for $255. A judgment was then entered, that Wallace recover of Welch, as administrator, the amount of the verdict and costs, and that he have execution therefor "against the goods, chattels, rights, credits and effects in the said administrator's hands to be administered."

Welch has prosecuted an appeal to this court.

The appellant insists in the first place, that the circuit court had no jurisdiction of the case, because no bill of exceptions was taken to the decision of the Probate Justice, as was required by the law in force at the time the decision was made and the appeal taken. It does not lie in his mouth to make this objection. If a bill of exceptions was necessary in order to render the appeal complete, it was his duty to have obtained it. He ought not to be permitted to take advantage of his own wrong. The omission to take a bill of exceptions might have been a sufficient cause for a dismissal of the appeal, but it was for the appellee to urge the objection. He chose to waive his privilege, and the appellant has no cause for complaint.

It is contended that the judgment for costs was erroneous. The 95th section of the 109th chapter of the Revised Statutes, requires the administrator to fix on a term of the Probate court for the settlement of all claims against the estate, and give notice thereof ; and provides, that the estate shall be answerable for costs on all claims presented at or before said term, but not for the costs on those exhibited afterwards. There is nothing in this case which shows that the administrator ever appointed a time for the adjustment of the claims against the estate, or gave any notice to the creditors to present them. In the absence of proof, the presumption is that the demaud in question was exhibited in due time, and that the estate was liable for the costs of establishing it. If the facts of the case relieved the estate from the payment of costs. it was the duty of the adminstrator to have made them known.

It is insisted that the court erred in awarding execution

on the judgment. This position must be sustained. The judgment was clearly erroneous in awarding execution against the estate of the decedent. Under our statute, the proceeds of an estate are to be distributed ratably among the creditors who establish their demands in proper time. The recovery of the judgment only establishes the debt of the creditor. He is not entitled to execution. One creditor is not allowed by obtaining a judgment to absorb the assets to the exclusion of others, who may not be so fortunate as to establish their debt as early. A certain time is to be given the creditors within which to make proof of their claims, and then a dividend of the assets is to be declared, in which all of such creditors are to share. See Greenwood v. Spiller, 2 Scam. 502; Burnap v. Dennis, 3 do. 478; McDowel v. Wright, 4 do. 403, Powel v. Kettelle, 1 Gilm. 491. (*a*)

The judgment of the circuit court will be reversed, with the costs of this appeal, and a judgment will be entered in this court in favor of Wallace and against Welch as administrator, for the amount of the verdict and the costs before the Probate Justice, and in the circuit court, to be paid in the due course of administration.

Judgment reversed.

(a) Church &c. vs. Jewett, 1 Scam. R. 55; Peck vs. Stevens, 5 Gil. R. 127.

ELIZA S. HAILMAN, plaintiff in error, v. NATHANIEL BUCKMASTER, defendant in error.

Error to Madison.

A plaintiff will not be permitted to prosecute a second action to recover the same demand, while the proceedings on the judgment in the first case are stayed by a writ of error operating as a supersedeas, as he has ample security for the payment of such judgments, in case of an affirmance. The common and almost universal practice now is, to apply to the court in which the second action is pending, for an order to stay proinceedgs in the case until there is a determination of the writ of error.

A defendant may plead in abatement to a second suit for the same cause of action, the pendency of a writ of error which operates as a supersedeas, unless the writ of error was sued out subsequent to such suit, when the proper course is to apply for an order to stay proceedings until the writ of error is disposed of. (a)

The law is well settle, that if a woman is sued while sole and marries during the pendency of the suit, she cannot plead the supervenient coverture in abatement.

DEBT, in the Madison Circuit Court, brought by the plaintiff in error against the defendant in error, and heard before the Hon. Gustavus P. Koerner, at the October term 1846, on a demurrer to a plea in abatement. The demurrer was overruled, and a judgment for costs rendered in favor of the defendant below.

The facts and the subject matter of the plea are stated in the opinion of the court.

D. J. Baker, for the plaintiff in error.

1. The plea, to be good, must show the writ of error and supersedeas to have been sued out and allowed prior to the commencement of this suit, that the writ of error has been allowed, and that all the steps and pre-requisites prescribed by statute in such case to have been complied with and taken to make a writ of error a supersedeas. 2 Johns. Cases, 312; Jenkins v. Pepoon, 1 Salk. note a, 322; 1 Strange, 476; 2 T. R. 41; 1 Scam. 531-2; 5 T. R. 78.

Pleas in abatement are required to be drawn with the greatest accuracy and precision. 1 Chitty's Pl. 491.

(a) McJilton vs. Love, 13 Ill. R. 486.

Great accuracy is also necessary in the form of the plea as to the commencement and conclusion which are said to make the plea. 1 do. 476; 3 Saund. 209, c. d. note f.

2. The pendency of a writ of error is no plea allowed by law, but the proper course is to move the court to stay proceedings on terms until the case on writ of error is decided, and especially so when the writ of error is sued out after suit brought on the judgment or against the bail. Com. Dig. 115; 1 Stra. 419; 1 Wils, 120; Willes, 271; 2 T. R. 78—9; 3 do. 436; 5 do. 714, 2 Bos. & Pul. 329.

The judgment in this case should have followed the decision upon the demurrer, and upon overruling the plaintiff's demurrer to the defendant's plea, should not have been for the costs against the defendant, but against the plaintiff. Plaintiff may bring writ of error to reverse his own judgment. 3 Burr. 255; 2 Tidd's Pr. 1134, 1146, 1165; 3 Scam. 321.

The Opinion of the Court was delivered by

Treat, J. An action of debt was pending in the Madison Circuit Court, in which David and Eliza S. Hailman were plaintiffs, and James Semple was defendant. In August, 1838, the writ was enjoined by Semple, who, with Buckmaster as his security, executed a bond to the plaintiffs in the penalty of $6,100, conditioned for the payment of the amount to be found due the plaintiffs. At the October term 1845, the injunction was dissolved, and a judgment entered against Semple for $2402 debt, and $1400 damages. On the 9th of October, 1846, Eliza S. Hailman, the surviving obligee, instituted an action of debt against Buckmaster and declared on the injunction bond. On the 30th of the same month, Semple sued out a writ of error on the judgment rendered in the original case, and obtained a supersedeas thereon. Buckmaster pleaded the pendency of this writ of error in abatement of the action on the bond. The court overruled a special demurrer to the plea, and rendered a judgment that the writ be quashed, and that the plaintiff re-

cover her costs. To reverse that judgment, she prosecutes a writ of error.

As a matter of principle it seems clear, that a plaintiff ought not to be permitted to prosecute a second action to recover the same demand, while the proceedings on the judgment in the first case are stayed by a writ of error operating as a supersedeas. He has ample security for the payment of the judgment in case it is affirmed. The second action is therefore unnecessary, and may possibly be regarded as vexatious. The law will afford the defendant an effectual remedy. The common and now almost universal practice in such cases, is to apply to the court in which the second action is pending, for an order to stay the proceedings in the case, until there is a determination of the writ of error. The court will always grant the application when a proper case is presented. 1 Tidd's Pr. 530; Christie v. Richardson, 3 D. & East, 78; Myer v. Arthur, 1 Stra. 419; Cressy v. Kell, 1 Wils. 120. This practice is a very convenient one, and fully protects the interests of the parties. If the judgment is affirmed, the second action can then proceed; if reversed, the defendant can take advantage of it by plea puis darrein continuance. The defendant may, however, plead the pendency of the writ of error, which operates as a snpersedeas, in abatement of the second action. The cases of Prynn v. Edwards 1 Lord Raym. 47, and Jenkins v. Pepoon, 2 Johns. Cases 342, and the authorities there referred to, show clearly that this may be done. The only question in this case is, can the plea in abatement be insisted on, where the writ of error is sued out subsequent to the bringing of the second action? Upon diligent inquiry I have found no authority for such a plea, but on the contrary, both precedent and authority against it. It is said in the case of Renner v. Marshall, 1 Wheat. 215, that "a subsequent writ may be abated by an allegation of the pendency of a prior suit; but the reverse of the proposition is, in personal actions, never true." Kent, Justice, in delivering the opinion of the court in the case of Jenkins v. Pepoon, says: "The plea does not state, that the writ of error was brought prior to the commencement of the

present suit, which is an essential averment to render a plea of this kind good." The law is well settled, that, if a woman is sued while sole and marries during the pendency of the suit, she cannot plead the supervenient coverture in abatement; and the reason assigned is, that it would be manifestly unreasonable to allow her to defeat by her own act, a suit rightly commenced against her. Gould's Pl. 263. § 87; 1 Chitty's Pl. 484; King v. Jones, 2 Lord Raymond, 1525, The present case is perfectly analagous in principle. The plaintiff had a cause of action against the defendant, and commenced a suit rightfully to enforce it. Semple subsequently sued out a writ of error on the judgment in the original case, and obtained a supersedeas. To permit the defendant to defeat this suit altogether, would be allowing him to take advantage of this subsequent act of his principal. The defendant was mistaken in the proper course to be pursued. Instead of pleading this new matter in abatement, he should have made it the foundation of a motion to stay proceedings until there was a decision of the writ of error. Such an application should have been successful. If necessary, the order may still be obtained.

The judgment of the circuit court is reversed with the costs of this writ of error, and the cause is remanded, with directions to that court to sustain the demurrer to the plea, and enter a judgment of respondeat ouster.

Judgment reversed.

LYMAN TRUMBULL, appellant, v. THOMSON CAMPBELL, appellee.

Appeal from Sangamon.

An action for money had and received lies, whenever one person has received the money of another which, in equity and good conscience, he ought not to retain. In such case, the law will imply a promise to restore it, and provide a remedy to enforce the obligation. (*a*)

The Legislature made an appropriation for certain services to be rendered by the Secretary of State. Having performed, as he alleged, two thirds of the services, he claimed and received, on retiring from office, two thirds of the amount of the appropriation. His successor completed the services, claiming that his predecessor had performed but one third of the services, and brought an action for money had and received against him to recover back the alleged excess : *Held*, that the successor had no right of action against his predecessor to recover the money; that if too much had been received, the State might recover back the excess; and if the former had not received his due proportion, that he had a valid claim against the State therefor.

ASSUMPSIT, for money had and received, brought by the appellee against the appellant, in the Sangamon circuit court. It was submitted to the court upon an agreed case, when a pro forma decision was entered, that the plaintiff recover of the defendant the sum of $200, and costs.

The principle facts are stated by the court. It further appeared that the predecessor in office of the appellant in this case, who left the office under similar circumstances so far as regards the performance of the services spoken of in the Opinion, received an amount similar to that received by the present appellant.

A. Lincoln, for the appellant, relied on the following points and authorities :

No action at law will lie in the case,

1. Because Trumbull being in office when the appropriation was made, the legal right to the whole was instantly vested in him. Jones v. Shore, 3 Peter's Cond. R. 624 ; Buel v. Van Ness, 5 do. 445.

2. Because it involves an apportionment of the appro-

(*a*) Bloomer vs. Denman, 12 Ill. R. 240 ; Hall vs. Carper, 27 Ill. R. 386 ; Carper vs. Hall, 29 Ill. R. 512 ; Alderson vs. Ennor, 45 Ill. R. 142.

priation, which a court of Law is incompetent to make. 1 Story's Eq. Jur. § § 471–2; Robson v. Andrade, 2 Eng. Com. Law R. 432; Waddell v. Morris, 14 Wend. 76.

No action at law will lie in the case by Campbell against Trumbull, because there is no privity between them. 2 Comyn on Cont. 7; 2 Saunders' Pl. & Ev. 675; Chitty on Cont. 184; Tierman v. Jackson, 5 Peters, 580.

S. T. Logan, and A. T. Bledsoe, for the appellee.

The opinion of the court was delivered by

Treat, J. Lyman Trumbull was appointed Secretary of State on the 27th of February, 1841, and continued to hold the office until the 4th of March, 1843, when he was superseded by the appointment of Thompson Campbell. The Legislature, on the 3rd of March, 1843, appropriated "to the Secretary of State, for making index to the Journals of the Senate and House of Representatives and laws, for copying laws, and making marginal notes and index to laws, the sum of six hundred dollars." Laws of 1842–3, page 13. Trumbull, on the 4th of March, 1843, before he went out of office, but after he knew he was to be superseded, claiming to have rendered two thirds of the services for which the appropriation was made, drew an order on the Auditor for two thirds of the amount appropriated; and the Auditor, at the same time, issued a warrant in favor of Trumbull for $400, which was not presented to the Treasurer for payment until after Campbell came into office, but before he had performed any considerable portion of the remaining services. Campbell subsequently performed all of the remaining services, and alleging that Trumbulll had received more than his share of the appropriation, commenced an action of assumpsit to recover of Trumbull the excess, as so much money had and received to his use.

The circuit court, on an agreed case presenting the foregoining state of facts made a pro forma decision that the action was maintainable, and after hearing the evidence, the court found that Trumbull had not rendered more than one

third of the services; and, thereupon, a pro forma judgment was rendered, that Campbell recover of Trumbull $200 and costs. That decision is assigned for error.

The only point in the case is, whether the action as between these parties can be maintained. This question was discussed at the bar with much ability, and some embarrassment has been felt in determining it. The various positions assumed by counsel, and the numerous authorities cited to sustain them, have been attentively considered and investigated. Upon mature deliberation, the court has come to the conclusion that the action cannot be maintained, and I shall proceed briefly to state the reasons on which that conclusion is founded.

The general principle governing the action for money had and received is well understood and defined. The action lies whenever one person has received the money of another, which, in equity and good conscience, he ought not to retain. In such case the law will imply a promise to restore it, and provide a remedy to enforce the obligation. Let us inquire into the circumstances of this case, and ascertain whether Trumbull has obtained the possession of money belonging to Campbell.

The appropriation was make when but a part of the services had been rendered. It embraced as well the services already rendered as those thereafter to be performed. The consideration of the appropriation was the rendering of the services. The performance of them was a condition precedent to the payment of the compensation. The right to demand payment was to be based on the prior fact of performance. The legal right to the money was not vested in the officer on the passage of the law; the right only became perfect when the duties were actually performed. The Auditor was not bound to issue his warrant for the amount of the appropriation until the services were completed. Perhaps he might, in his discretion, make proportionate advances from time to time as the work progressed. Beyond this the Secretary had no valid claim to the appropriation. Assuming the finding of the circuit court to be correct,

Trumbull was only entitled to one third of the appropriation when he went out of office. It follows that the excess was advanced without authority of law. It is clear, if he did not perform the service, that he has not the right conscientiously to retain it. To whom did the money belong when thus paid out? It was not the money of Campbell, for he had not then rendered the services. He had no more right to receive it than Trumbull. It belonged to the State and was improperly paid over by its agent. The moment the warrant was cashed at the Treasury, a right of action accured to the State to recover back the excess, as so much money wrongfully received by an individual having no just claim to it. The right of action still subsists. This seems to be conclusive of the question. If there is a right of action in the State, there can be none in Campbell. The suit to enfore this cause of action must be instituted in the name of the State. The demand is a mere chose in action, not capable of assignment so as to vest the legal interest in the assignee. If Campbell has an equitable claim in this cause of action, he must persue his remedy in the name of the State. To allow him to maintain the action in his own name, would be in effect declaring that the mere right of action was negotiable, so as to vest the legal interest in him. There is a stern and unbending rule of the law which forbids it.

The receipt of the money by Trumbull can in no event prejudice the rights of Campbell. If Campbell has rendered two thirds of the services to cover which the appropriation was made, he has an unquestionable claim on the State to that extent; and the Legislature having appropriated the money to pay for the services, the Auditor may adjust and settle the claim. If the State has advanced to Trumbull more than he had the right to receive, that furnishes no good reason why it shall not pay to Campbell all that he has become entitled to receive by the performance of the services.

It is the opinion of the court, first, that the Secretary of State was not legally entitled to receive the whole amount of the appropriation, until he had performed all of the services for which it was made, but that he might from time to time, in the discretion of the Auditor, receive proportionate

payments for the services actually rendered; second, if Trumbull received more than such proportion, the payment was made without authority of law, and he can be compelled to restore the excess; third, the right of action against Trumbull is in the State, and not in Campbell, the former having received the money before the appointment of the latter; and fourth, if Campbell has not received his due proportion, he has a valid claim on the State for the balance, and compel the Auditor to issue a warrant therefore.

The Judgment of the circuit court is reversed with costs.

Judgment reversed.

HUGH K. COOPER, plaintiff in error, v. ISRAEL W. CROSBY et al. defendants in error.

Error to Sangamon.

The biddings at a Master's sale will be opened, on motion, if it be shown that there has been any injurious mistake, misrepresentation or fraud, and the reported sale will be rejected, or the order of ratification rescinded, and the property will be again sent into market and re-sold. (*a*)

When a sale of mortgaged property has been made, the party having the equity of redemption acquires a legal right to redeem it from such sale in the manner provided by law.

MOTION, in the Sangamon circuit court, set aside a master's sale of mortgaged estate, &c., made by the plaintiff in error, who was complainant in the suit of foreclosure. The foundation of the motion is stated by the court. It was heard at the November term 1846, before the Hon. Samuel H. Treat, when the motion was denied.

A. Lincoln, for the plaintiff in error.

S. T. Logan, for the defendants in error.

The Opinion of the court was delivered by

PURPLE, J.* On the 8th day of July, 1843, Crosby, one of the defendants, executed to Cooper, the plaintiff, a mort-

(*a*) Ayers vs. Baumgarten, 15 Ill. R. 447.

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* Justices THOMAS and DENNING did not sit in this case.

gage upon several lots in the town of Springfield, and afterwards, and subsequent to the recording of his mortgage by Cooper, conveyed his equity of redemption in the same to the defendant, Robbins.

On the 24th March, 1846, Cooper foreclosed his mortgage in chancery in the Sangamon Circuit Court, making Robbins a party to the suit. At this time, as appears by the decree, there was the sum of $608 due upon the mortgage, for the payment of which the mortgaged premises were directed to be sold. The sale took place on the 24th October, 1846, at which Cooper attended and bid in the property for the sum of $269.50. Two days subsequent to this sale, Cooper prepared a notice, which was soon after served on the defendants, that at the next term of the circuit court of said county he would move to set aside the sale. At the November term succeeding the date of the notice he presented his attorneys. Cooper's affidavit shows that his attorney made out a statement of the amount that he was to bid upon each lot, apportioned in such manner as to cover his whole claim with costs; and his, (with their affidavits,) also discloses that they advised him to bid on each lot the amount thus estimated and apportioned. Cooper further states that he was mistaken in the advice or instruction thus given him by his counsel, and that his impression was that he was to purchase in the property at a low price, and not to permit the same to be sold to any other person at a less sum than the estimated price for each lot; that Crosby is insolvent, and he fears that Robbins, who is the assignee of the equity of redemption, will redeem the property from the sale so made, and that he will loose the residue of his debt, unless the sale shall be set aside and he be permitted to increase his bids.

The circuit court overruled the motion, and approved the report of the Master who had made the sale, to reverse which the plaintiff prosecutes this writ of error.

It has been conceded on the argument, that the rule in England relative to opening biddings on a Master'r sale, which was almost a matter of course upon the offer of a reasonable advance on the amount bid, if the motion was made

before the confirmation of the report, owing to the difference in the manner of conducting the sales in the two countries, has not obtained in this.

From an examination of the authorities submitted on the argument, the rule here seems to be, that if it be shown that their has been any injurious mistake, misrepresentations or fraud, the biddings will be opened, the reported sale rejected, or the order of ratification rescinded, and the property again sent in to the market and re-sold. Barbour 's Ch. Pr. 537, 40 ; 5 Munroe, 492 ; 6 Paige, 261 ; 4 Kent 's Com. 191-2 ; 2 Harris & Gill, 346.

In this case there is no pretence that there has been any misrepresentations or fraud, and it is only alleged that Cooper was mistaken in reference to the advice or instructions of counsel, as to the proper course to be pursued by him.

It is difficult to perceive how this misapprehension of his can be considered more or less, than an error in relation to the law bearing upon the case, against which it is plain a court of equity could not relieve him. What fact in relation to the sale, or any matter connected with it, did he mistake? The advice which his counsel gave him, was plain and simple. He could not have misunderstood it without being liable to the imputation of gross negligence; and if he did so, it was a mistake not superinduced by any party or stranger to the transaction, nor even by his professional advisers.

He knew precisely what amount he bid upon each lot, and how much of his debt would be satisfied upon the purchase. He knew, or at least it is not shown that he has since discovered the insolvency of Croswell. It is not pretended that he was in the least deceived, even by himself in this. But probably he did not know that Robbins could redeem by paying the amount bid by him at the sale, and ten per cent. interest thereon. This was a question of mere law, which he was bound to understand, with or without advice. As to the effect of such redemption we express no opinion. That question does not arise.

The error under which he labored then, was, that in bidding less than the amounts which he had been instructed to

offer for the various lots, in law, he was not securing the title to himself at less than their real value, nor his whole debt, if the property should be redeemed. It is clear from his whole statement, that if he had understood the law, he would never have made, or complained of any mistake of facts.

It is urged by the plaintiff's counsel, that Robbins having purchased the lands with a knowledge of the existence of the mortgage, and of the plaintiff's right to prior payment the plaintiff had the superior equity ; and that if the sale is set aside, and he is permitted to purchase the same at a higher price, Robbins will not be injured, he having originally bought subject to the plaintiff's mortgage.

It may be admitted that such was the case before the sale. But when that had once fairly taken place, and all persons interested had had an equal chance of purchasing Robbins acquired the legal right to redeem the land in the manner provided by the law, and there remained no superior equity in the plaintiff to divest him of his right.

We think, too, that we can discover that it would be an unsafe and dangerous precedent under these circumstances to permit this sale to be set aside ; that it might operate as an inducement to purchasers at such sales to bid much less than the real value of the property offered, with a view to speculation, and then if they should suspect that the land was about to be redeemed, apply to the courts under the pretence that they did not understand the law, to permit them to bid a larger sum, and thus seriously prejudice the rights of the defendant and his other creditors ; and we can not well see why any such purchaser may not, with the same propriety as the present plaintiff, come into court and ask relief upon the ground on which this case is presented.

The case of the president &c. of the Ontario Bank v. Lansing, has some of the features of the one now under consideration. In fact, it is difficult to draw a distinction in principle between the two, or show that, in that case as well as this, the mistake was not one of law instead of fact. The plaintiffs there had a judgment, which was a lien upon land,

which was incumbered by a prior mortgage. He agreed to purchase in the land upon the sale made on his execution, and out of the proceeds to pay the mortgage, amounting to $2331.71. He bid $2560.00 for the land, and after the sale took an assignment of the mortgage and bond, which, as collateral security, accompanied it. The defendant claimed to have the bond surrendered, alleging that under the agreement and terms of the sale, the same was paid and satisfied. There were junior judgment creditors, and the purchaser, apprehensive that if compelled to surrender the bond under the contract, his bid for the property would only amount to $218.29, the difference between the amount due on the mortgage and the price at which he had purchased in the land, and that other judgment creditors would have a right to redeem, upon the payment of this sum, and that he would lose the amount advanced upon the mortgage, applied to have the sale set aside, which was done.

It will be remarked, however, that this is a single decision which appears to have been made under the peculiarly embarrassing circumstances in which the party had placed himself, and it would seem in the exercise of somewhat enlarged and liberal equitable principles. No general rule, as applicable to such cases, is laid down, nor a single authority referred to by the court, and we think that but few if any can be found which would sustain it as a principle. In our opinion, the circuit court decided correctly in this case.

The decree or order is therefore affirmed, with costs.

Decree affirmed.

WILLIAM SHAEFFER et al. plaintiffs in error, v. HARRIET WEED et al. defendants in error.

Error to White.

The proceedings to enforce a mechanics' lien is strictly a Chancery proceeding, and must be governed by the rules of pleading applicable to Chancery cases. In Chancery, special replications are no longer allowed, and if filed, can only be treated as general replications.

A widow's dower cannot be affected by the lien created by the statute for the benefit of mechanics, &c.; but she is entitled to dower in all the real estate of which her husband was seized during coverture, unless she has released in it the form prescribed by law, except where a lien is created for the purchase money at the time the husband became seized.

A widow is not a proper party to a proceeding for a mechnics' lien, where her only interest is her dower in the premises.

The term "creditor," as used in the sixty fifth chapter of the Revised Statutes, entitled "Liens," is applied to him who has a lien by contract made under the law; and the term "incumbrancer," to the one who has such lien by mortgage, judgment or otherwise, except under this law.

If a creditor, who has furnished labor and materials, shall not file his bill until after the expiration of six months from the time payment was due to him by the terms of the contract, his lien ceases as against any other such creditor of incumbrancer, by mortgage, judgment, or otherwise, existing at the time of the rendition of his judgment, whether the same were creditors prior, or subsequent to the making of the contract under which he seeks to enforce his lien.

PETITION for a mechanics' lien, &c. in the White circuit court, heard at the September term 1846, before the Hon. William Wilson. The facts are as follow:

The plaintiffs in error furnished materials, and did work on a house for William Weed in his lifetime, but owing to his death the job was left unfinished. Weed, at his death, left Harriet his widow, and William, his son and only heir at law. Administration of his estate was taken out by one Sidney Cave, who very shortly died, and administration de bonis non was taken out by one John Gillison. About seven months after the death of Weed, the plaintiffs filed their petition under the mechanics' lien law, to enforce payment out of the house and land on which it stands, making the widow, heir and administrator de bonis non parties thereto. The

administrator answered, stating that the estate was insolvent; that the widow was entitled to dower; and that the petition had not been filed within six months after the payment became due. To this the plaintiffs filed a long special replication and as a rejoinder to which the administrator simply reiterated that the petition had not been filed in six months, &c. To this rejoinder the plaintiffs demurred, the court overruled the demurrer, and the plaintiffs saying nothing further, gave judgment for the defendant, Gillison, for costs.

A. Lincoln argued for the plaintiffs in error, and A. T. Bledsoe for the defendants in error.

The Opinion of the court was delivered by

CATON, J.* The judgment in this case must be reversed, and the cause remanded for a trial of the issue joined.

As if this were a proceeding at law, a special replication has been filed by the plaintiffs to the answer of the defendant, and to this there is a special rejoinder by the defendant, which was demurred to by the plaintiff, upon which it was supposed that the questions which have been argued were properly presented.

On a former occasion it was determined by this court that this was strictly a Chancery proceeding, and hence it must be governed by the rules of pleading applicable to Chancery cases. In chancery, special replications are no longer allowed, and if filed they can only be treated as general replications. Bryan v. Wash. 2 Gilm. 561. We are, however, not constrained to this course by the general rules of chancery pleading alone, for by the seventh section of the Act under which this suit was brought, it is provided, that the issues shall be formed by the filing of a replication. This could not be the case with a special replication. In the case of Kimball v. Cook, 1 Gilm. 428, which was a case under this statute, this court says: "As in chancery cases no re-

* DENNING, J. did not sit in this case.

joinder can be filed, the replication must of course be general, and hence if the answer sets up new matter, which requires to be admitted or avoided, or otherwise specially replied to, no doubt can be entertained but it must be done by amending the bill and inserting the new matter in the charging part, and then explaining it, as in ordinary cases in Chancery." This case in fact stood upon bill, answer and replication, and the demurrer was filed to a paper, which properly did not belong to the record. In that state of the pleading, the court should have proceeded to the trial of the issue.

Notwithstanding the question which have been argued are not strictly presented by the record, yet as both parties have strougly solicited a decision of them as they must necessarily be involved in the final determination of the case in the court below, they have, therefore been considered by the court as if they were properly presented by the record as was supposed, and the views of the court will be given upon them.

We are clearly of opinion, that the widow's dower cannot be affected by the lien created by this statute. She cannot be divested of her dower in that way. She is entitled to her dower in all the real estate of which her husband was seized during coverture' unless she has released her dower in the form prescribed by law, except where a lien is created for the purchase money, at the time the husband became seized. Whether the suit were commenced before or after the expiration of the six months mentioned in the twenty fourth section of this chapter, the widow,s dower cannot be affected by it. This right the husband can in no possible way incumber, impair or affect, without her consent manifested in the way prescribed by law. (*a*)

It was said that a decree should go against her here, because as to her the bill was taken for confessed. It is true that she has not answered the bill nor was she bound to answer it, for it does not make a case, which, when admitted, authorizes a decree against her. She was not a necessary, or

(*a*) Lisk vs. Smith, 1 Gil. R. 503; Blain vs. Harrison, 11 Ill. R. 387; Gove vs. Carner, 23 Ill. R. 634.

even proper party to the proceedings, and as to her the bill should be dismissed with costs.

Upon the other question argued, Mr. Justice Purple will express the opinion of the majority of the court in which I fully concur.

The judgment of the circuit court must be reversed with costs, and the cause remanded for further proceedings consistently with the Opinion of this court.

The Opinion of a majority of the court was delivered by PURPLE, J. In this case a question has been made, and a difference of opinion exists among the members of the court in relation to the construction to be given to the phrase "any other creditor," as employed in the twenty fourth section of the Act embraced in chapter sixty five, of the Revised Statutes, entitled "Liens." I propose briefly, to state my views upon this subject, which I am instructed to say is the opinion of the majority of the court. The section provides, that "no creditor shall be allowed to enforce the lien created under the provisions of this chapter, as against, or to the prejucice of any other creditor, or incumbrancer, unless suit be instituted to enforce such lien within six months after the last payment for labor or materials, shall have become due and payable."

To obtain a proper uuderstanding of the meaning of this provision, we must look at other portions of the law. The first section of the Act gives to persons contracting with the owner of a tract or lot of land for materials furnished, or labor done under such contract, in erecting or repairing any building upon the lands or lot, a lien upon the land or lot for the value of the labor done or materials furnished, from the date of the contract. In point of time, this lien is indefinite against the owner, and so far as this section is concerned, against all the world.

By the eighteenth section, it is extended against the representatives in interest of a deceased contractor. It is restricted and limited, however' by other provisions of the law, in its operation against some other creditors and incumbrancers.

First. By the eleventh section, which provides that

"upon question arising between different creditors, no preference shall be given to him whose contract was first made." Creditors here can only be supposed to mean such persons as under contracts furnish labor and materials in erecting or repairing buildings upon the land against which the lien is sought to be enforced; and because of their equal equities, they are placed upon an equal footing in regard to their several liens, although the contract of one may have been made before the contract of the others.

Second. If incumbrance exist prior to the contract, by mortgage, judgment, or otherwise, they are not affected by the act; except that, by the 10th section, the contract lien takes precedence of the prior one, to the extent of the improvement made under such contract.

Third. When as by the 24th section, the creditor shall for the period of six months after the time of payment according to the contract shall have passed, neglect to institute suit to enforce his lien, he will not afterwards be permitted to do so to the prejudice of any other creditor or incumbrancer.

If the term "any other creditor," as here employed, means creditors at large, it is the only place in the whole statute where it can possibly be construed in that sense. To me it seems clear, that it can only be construed to refer to a creditor who may have a lien for labor or materials, like the one in the first clause of the section mentioned whose time of payment had not yet exceeded the six months allowed by law, in which to file his petition for a lien; and who, thus situated, as against the petitioning creditor who has slept upon his rights, is entitled to come in, be made a party, and take precedence in payment of his claim. For this reason, and to keep up the distinction which is drawn in other portions of the law, the Legislature have used the term " any other creditor or incumbrancer."

The objection that if the term " creditor" is thus limited in its operation, and applied only to these special lien claimants, that there is no weight or meaning given to the expression, and that the word " incumbrance" would have embraced all that the framers of the law intended, is an objection which operates both ways. If they had designed to include all

creditors of every class and description, the designation of "any other creditor" would have been sufficient for that purpose; and the addition of the word "incumbrance" entirely superfluous. Every incumbrancer would have been one of the creditors thus named. By such construction, the word "incumbrance" would add nothing to the sense or meaning of the law. By the one which I have adopted, all the language has a fixed and definite signification.

This same distinction is taken in, I believe, every other provision of the act, and whenever the term "creditor" is used, it is applied to persons claiming liens under it.

In the third section it is provided, that "when any sum due by such contract shall remain unpaid after the same is payable, the creditor may, upon bill or petition filed in the circuit court, obtain an order," &c. So, also, in the eleventh section which has been before referred to. And in the latter clause of the sixteenth section it is stated: "and when one creditor shall have obtained a verdict or judgment for the amount due, the court may order a sale," &c. Likewise, in the last clause of the seventeenth section, the following language occurs: "And the creditor may cause the right of redemption, or whatever right or estate such owner had in the land at the time of making the contract to be sold," &c. And in the 20th section it is said: "and upon questions arising between previous incumbrancers and creditors, under the provisions of this chapter, the previous incumbrance shall be preferred to the extent of the value of the land, at the time of making the contract," &c.

The provisions in the 22d section is, that "creditors who file bills or petitions under the provisions of this chapter, may contest the validity of incumbrances, as well in regard to amount as to their justice; and any incumbrance, whether by mortgage, judgment or otherwise, charged and shown to be fraudulent in respect to such creditor, or to creditors generally, may be set aside," &c.

The 25th section provides, that "nothing contained in this chapter shall be construed to prevent any creditor from maintaining an action at law upon his contract in like manner as if he had no lien for the security of his debt.

Section 26 makes provisions, that if the claims of all parties are not satisfied by the sale of the premises, any creditor whose claim it not satisfied may have execution against other property of the debtor for the residue. And the 27th section disposes of the costs as between creditors claiming liens, and between such creditors and the person against whom the lien is sought to be enforced, and also establishes the same rule in respect to costs growing out of proceedings against and between incumbrances.

These extracts from and reference to the several provisions of the statute, most manifestly show in what sense the term "creditor," and "incumbrance" have been used by those who made the law. The distinction, in every instance, seems to me to be clear and plain, the creditor being the party having a lieu by contract made under the law, and the incumbrancer one who has such lien by mortgage, judgment or otherwise, except under this Act. Obviously, the Legislature did not intend to prohibit the creditor from enforcing his lien as against the contracting party, because he had permitted more than six months after the time at which payment was to have been made to elapse ; and it is to my mind equally apparent, that it contemplated no such impracticability, or absurdity as to allow upon petition filed by the lien creditor, creditors at large, who had no liens, to come in and make themselves parties to the suit, and thus compel the debtor to adjust and settle all claims and controversies between him and his neighbors, (over which a Court of Chancery would ordinarily have had no jurisdiction,) in one proceeding of this character. But if the creditor, who has furnished the labor or materials, shall not file his bill until after the expiration of six months from the time payment was due to him by the terms of his contract, in that case, his lien ceases as against any other such creditors, or incumbrancer by mortgage, judgment, or otherwise, existing at the time of the rendition of his judgment, whether the same were created prior, or subsequent to the making of the contract under which he seeks to enforce his lien.

Judgment reversed.

JACOB B. MILLER et al., appellants, v. ALEXANDER B. DAVIDSON, appellee.

Appeal from Winnebago.

Where a creditor seeks to satisfy his debt out of some equitable estate of the debtor, which is not liable to a levy and sale under an execution at law, he must exhaust his remedy at law by obtaining judgment and a return of the execution "nulla bona," before he can come into a court of Equity for the purpose of reaching such equitable estate. This is necessary to confer jurisdiction upon that court.

Where a creditor seeks to remove a fraudulent incumbrance out of the way of his execution, he may file his bill as soon as he obtains his judgment. In case of a trust, however, where the object of the bill is to establish the existence of the trust and to remove the fund beyond abuse, the party interested in securing his debt may come into a court of equity in the first instance, not only for the benefit of himself, but of such other creditors as may choose to avail themselves of the decree and prove their claims.

No principle is better settled, than where two or more persons embark in an unlawful transaction, and one gets the advantage of the other, and appropriates more than his proportion of the spoils to himself, the court will not interfere to make him divide with the others.

If a defendant in Chancery demur to the complainant's bill, and his demurrer is overruled, and he decline answering over, he thereby admits all of the allegations of the bill to be true, and he cannot afterwards question the correctness of the decree by denying the truth of those allegations.

The correct practice, on overruling a demurrer in Chancery is, the entry of an order that the defendant answer the bill, and if he neglect so to do, the complainant may have the bill taken pro confesso, and the court will then render the proper decree.

BILL IN CHANCERY, filed by the appellee for the benefit of himself and the creditors of Jacob B. Miller, one of the appellants, in the Winnebago circuit court, and heard before the Hon. Thomas C. Browne, at the August term 1846, upon general and special demurrers to the bill. The several demurrers were overruled and a decree entered against the defendants below, establishing a trust in G. B. Udell, one of said defendants and ordering him to convey the premises in controversy to S. M. Church, in trust, &c. and for costs.

J. Butterfield, for the appellants.

J. Marsh, and A. T. Bledsoe, for the appellee.

1. It is contended, that complainant had no right to come into Equity, because he had not sued and obtained judgment

at law, and had execution returned "no property found." The authorities cited do not apply to the present case. They apply to cases in which complainants come into Equity because they had no remedy at law; and which want of remedy at law is required to be shown by judgment and return of execution "no property found." But we claim under and by virtue of a trust deed. This trust alone is sufficient to give jurisdiction to a court of Equity. And again, as Miller had obtained a discharge in bankruptcy, a suit at law would have been unavailing; it would have been labor and expense to accomplish nothing. The law never requires a man to do a nugatory act.

2. It is said that Miller and Udell obtained a conveyance to the land in question, under and by virtue of an illegal contract. It has been alleged and shown by an abundance of authorities, that the courts of Equity will never lend their aid to afford relief to the parties to an illegal contract. But the parties to the illegal contract in this case are not seeking aid or relief. They set up their own illegal contract as a ground of defence. The defence of the defendants is, that although we are indebted to the complainants, they should not be permitted to take the land in our possession, and to which we hold a title under the patentee, in order to satisfy their debt, because we obtained our title to said land in fraud of an Act of Congress. Can the defendant exempt his property from execution by alleging that he has obtained such property by fraud?

3. The defendants also insist, that it does not appear from the bill that the agreement between Gregory and Miller was in writing, and the Statute of Frauds is set up as a ground of defence.

The Statute of Frauds establishes a rule of evidence and not of pleading. Though the Statute of Frauds should require a contract to be reduced to writing, it is not necessary to aver that this has been done; it is sufficient to prove it by writing. Hence, as the bill is demurred to, this question of evidence does not arise. Gould's Pl. 191, § 43.

The defendants invoke the Statute of Frauds to protect them in their fraudulent gains, as well as to enable them to

perpetrate another fraud. The Statute of Frauds was made for the prevention, and not for, the protection of fraud; and it will never be permitted to cover any fraud on the rights of private individuals. Story's Eq. Pl. § 768. On this great principle, many cases have been taken out of the words of the statute.

Again, the Statute of Frauds does not apply to the present case, because the land in question was purchased with the trust funds. 2 Story's Eq. Jur, §§ 1201, 1210.

The Statute of Frauds must be pleaded; it cannot be taken advantage of by demurrer. Story's Eq. Pl. § 761--8. Kinzie v. Penrose, 2 Scam. 520.

4. Udell cannot set up want of title in Miller, from whom he accepted the trust, in order to enable him to acquire a perfect title in himself. Having accepted the trust, all acts done by him with a view to perfect the title, shall be considered as done for the benefit of the cestuis que trust. 2 Story's Eq. Jur. § 1261; Torrey v. Bank of Orleans, 9 Paige, 663; Sweet v. Jacobs, 6 do. 363--4. In the present case, there was clearly a resulting trust in favor of the creditors of Miller. 2 Story's Eq. Jur. §§ 1201, 1211, 1261, and the authorities in those sections cited.

5. The simple state of facts, that Miller conveyed his right to the land in question for the benefit of his creditors; that he obtained a discharge in bankruptcy; and that he now seeks a re-conveyance of said land to himself, and for his own use, is sufficient to give a court of Equity jurisdiction on the ground of fraud, and authorize it to subject said trust property to claims of the cestuis que trust.

The opinion of the court was delivered by

Caton, J. This bill was filed by Davidson in behalf of himself, and such others of the creditors at large of Jacob B. Miller as might choose to come in under the proceeding, and claim the benefit of the decree against Miller and Udell, The bill states that the complainant is a creditor of Miller to the amount of $436.06, and that Miller owes large sums of money to other persons.

The bill shows that previous to the 10th of August, 1841,

one Gregory had acquired a pre-emption right to a certain quarter section of land under the pre-emption law of 1838, and also previous to the said 10th of August, Gregory sold his claim to the land to Miller; that Miller held the land till the 15th of December of the same year, although he had in fact before that time conveyed it to one Joslin in trust for himself, and that on that day Joslin, by the express direction and request of Miller, conveyed the same by deed to the defendant, Udell, in trust for the creditors of Miller generally, and that Udell accepted the deed and undertook faithfully to execute the trust. All of these conveyances were only of the claim title to the land, which had not yet been sold by the United States. As no one was entitled to a-pre-emption to the land except Gregory, and as he could only obtain that privilege for his own use aud benefit, and upon making affidavit in the strongest terms that it was not for the use and benefit of another, and that he had not agreed to sell the same, &c., in order to enable him to prove up a pre-emption, on the 31st October, 1842, Udell executed a release of the premises to Gregory, and on the same day Gregory gave to Udell his promissory note for $1000, with the understanding that if Gregory, after he should enter the land, should deed the same to Udell, he would give up the note, and if he should refuse to convey, Udell should collect on said note the value of the said claim; and that on or about the same day, Gregory proved up a pre-emption, and on the 19th of October, 1843, paid for and entered the land with money furnished him by Udell, $150 of which he obtained from one Burnap, who was an assignee of Miller of certain choses in action in trust for MIller's creditors, from the trust fund which had been raised by Burnap out of the choses in action thus assigned, and fifty dollars was furnished by Udell for the benefit of Miller's creditors, and at the same time Gregory obtained the Receiver's certificate for the said land. The money furnished by Burnap was the money of the said creditors, and furnished by him at the request of Miller and Udell, expressly for the use and benefit of Miller's creditors, as was also the money furnished by Udell, which was to be

refunded to him, or rather retained by him from the proceeds of the land when it should be sold. On the 10th of November, 1843, Gregory and wife conveyed the land by deed of that date to Udell, expect about two acres and a right of way for a State road across a portion of the lot, whereby Udell became seized of said land in trust for said creditors. After receiving the said conveyance, Udell repeatedly declared that he held the said land in trust as aforesaid. The land is worth one thousand dollars, and it is for the interest of the creditors that the same should be sold. Udell has had frequent opportunities to sell the land at that price, but has, under various pretences, refused to do so. Udell always professed to hold the land in trust, as aforesaid, till about the 18th of May last, since which time he has denied that he holds the land in trust for said creditors, but declares that he holds the same in trust for said Miller, who has during the same time set up similar claims. Sometime in the year 1842, Miller was duly declared a bankrupt under the bankrupt law of the United States and discharged from his debts. Sometime since Udell became seized of the land, he has executed to Miller an agreement to convey the land to him in violation of his obligations as trustee.

This is substantially the case made by the bill, to which a demurrer was overruled by the court and a decree entered establishing the trust, removing the said trustee, and appointing another in his place, and directing the premises to be sold, and the money to be brought into court to be distributed among the creditors of Miller generally. The decree also secures to Udell the fifty dollars advanced by him towards the purchase of the land, as also a reasonable compensation for his services while acting as trustee.

The jurisdiction of the court is questioned, because the complainant Davidson is not a judgment creditor, and has not exhausted his remedy at law. The cases cited in support of this position, we think, have been misapprehended. Where a creditor seeks to satisfy his debt out of some equitable estate of the defendant, which is not liable to a levy and sale under an execution at law, then he must exhaust

his remedy at law by obtaining judgment and getting an execution returned nulla bona, before he can come into a court of Equity for the purpose of reaching the equitable estate of the defendant ; and this is necessary to give the court jurisdiction, for otherwise it does not appear but that the party has a complete remedy at law.(a) That is what may be strictly termed a creditor's bill. There is another sort of creditor's bill very nearly allied to this, yet where the plaintiff is not bound to go quite so far before he comes into this court, and that is where he seeks to remove a fraudulent incumbrance out of the way of his execution. There he may file his bill as soon as he obtains his judgment.

There are some peculiar cases, however, where a party seeks satisfaction of his debts directly, in which he may come into a court of chancery in the first instance, without first obtaining a judgment. Thus, in the case of Russell v. Clark's Ex'rs, 6 Cranch, 87, C. J. Marchall says ; "If a claim is to be satisfied out of a fund, which is accessible only by the aid of a court of chancery, application may be made in the first instance to that court, which will not require that the claim should be first established in a court of Law." Although the jurisdiction of the court in this case might, perhaps, be sustained upon this principle, yet it may be placed upon higher and more unquestionable grounds, and that is, its peculiar right to declare and enforce trusts. This court has jurisdiction of the subject matter in all cases of trusts, and it is abundantly competent, itself, to inquire whether the party claiming to be cestui que trust, be so or not. If it be established that Udell holds this land as trustee for the creditors of Miller, then the complainant, if he be one of those creditors, no matter for what amount, shows himself to be one of the cestuis que trust, and establishes his right to invoke the aid of a court of Equity, to prevent the trustee from abusing the trust. For the purpose of jurisdiction, the amount of his debt against Miller, or his interest in the trust fund is entirely immaterial, as he has a right to complain if he shows himself interested. Davidson does not seek a satisfaction of his debt specifically, but the

a) Greenway vs. Thomas 14 Ill. R. 271 ; Weightman vs. Hatch, 17 Ill. R. 287.

bill is filed by him for the benefit of himself, and such others of Miller's creditors as may chose to come in under the decree, and prove up their debts and claim its benefits. The primary object is to establish the existence of the trust and to remove the fund beyond the reach of abuse. This is one of the most common branches of Equity jurisdiction, and can admit of no sort of doubt.

In this case, the bill was demurred to by the defendants, the demurrer was overruled. and they have declined answering over. In such a case, they admit all the allegations of the bill to be true, and cannot question the correctness of the decree, by denying the truth of the statements of the bill ; 3 Eq. Dig. 71, §7, where it is said : "A demurrer admits the allegations in the bill as against the demurring party only," and refers to Penfold v. Nirme, 5 Sim. 405. See, also, the opinion of Woodworth, J., 4 Cowen, 696. That the bill makes out a trust in Udell for the benefit of Miller's creditors generally, cannot be denied : and it is equally clear that the complainant, Davidson, was a creditor of Miller at the time of the creation of the trust, and, consequently, one of the cestuis qui trust. It was inquired, where is the proof fixing the amount of the complainant's debt, as established in the decree? As between the complainant and the defendants, that was established by the bill, which they have admitted to be true. As between the complainant and the other creditors of Miller, it is not established, for, like them, he will have to prove up his debt before the matter, upon a proper reference, before he will be entitled to his proportion of the fund.

But the principal ground relied upon for the reversal of the decree is, that the title to this land having been obtained from the United States by fraud upon the law, a court of Equity will not soil its hands by interfering with it, but will leave the parties where it finds them ; that it will leave each party to enjoy all that he has been able to obtain in the iniquitous transaction. No principle is better settled, than that where two or more persons embark in an unlawful transaction, and one gets the advantage of the other, and

appropriates more than his proportion of the spoils to himself, the court will not interfere to make him divide with the others. As they commenced with a violation of the law, they cannot in-invoke its aid in any way. The law will not meddle with gains obtained by its own outrage, as between those who have been engaged in trampling it under foot. This, however, is not out of regard to the one who claims immunity from having violated the law, it is because he who complains is equally guilty. In the case of Holman v. Johnson, Cowp. 343, Lord Mansfield says: "The objection that a contract is immoral or illegal, as between plaintiff and defendant, seems at all times very ill in the mouth of the defendant. It is not, however, for his sake that the objection is ever allowed, but it is founded in general principles of policy, and whenever, from the plaintiff's own stating or otherwise, the cause of action appears to arise from the transgression of a positive law of the country, he has no right to be assisted." This is a defence which the guilty is allowed to set up against his associate in guilt, as a sort of punishment for the participation of the latter in the violation of the law. It is the guilty, and not the innocent, which it is the policy of the law to punish.

And now, how is it in this case? Miller, having an interest in this land which is recognized and protected by the laws of this State, conveyed the same to Joslin in trust for himself. Joslin, at the request of Miller, conveyed the same to Udel, in trust for Miller's creditors generally. Udel accepted the trust. Miller then ceased to have any interest in the land, excepting what might remain after the payment of all his debts, and his creditors became the cestuis que trust, who thereby acquired an interest in the trust estate. Here, then, was a trust fund in which the creditors of Miller were interested, and which was tainted with no violation of, or fraud upon the law. It may be conceded, for the purposes of the present inquiry, that Udel and Gregory entered into a conspiracy to practice a fraud upon the law, in obtaining the land from the United States, and still it is far from proving that by this illegal act, he is not only to retain

what he thus inequitiously defrauded the Government of, but shall also be permitted, as a reward for his iniquity, to defraud his cestuis que trust out of the trust estate which he honestly held for them. That, indeed, would be a refinement in fraud which a court of equity was never before called upon to sanction. Had the cestuis que trust participated in the fraud, then the courts would refuse to interfere as between them and their trustee; but that is not pretended, and it seems to me that it would be a monstrous doctrine, that the trustee, by enhancing the value of the trust estate by practicing a fraud upon the law, thereby closed the doors of a court of equity against his cestuis que trust, when he refuses to perform the trust. That would be taking advantage of his own wrong most emphatically.

I take it, that this rule, that the court will not interfere as between the particeps criminis to an illegal transaction, is not to be applied where the court can find an innocent party, in favor of whom the trust may be established; for the courts will seize every opportunity of preventing a guilty party from enjoying the fruits of his iniquity, where they can do it without interfering in favor of one who is a party to the guilt. Such was the principle laid down in the case of Leggett v. Dubois, 5 Paige, 119, where the Chancellor says: "Upon this subject it is only necessary that I should refer to the very able and luminous opinion of the distinguished president of the court of appeals in Virginia, as reported in Hubbard v. Goodwin, 3 Leigh's Rep. 514. The conclusion to which he arrived in that case, and in which opinion I fully concur was, that where, for the purpose of evading the law which prohibits an alien to hold lands, he purchases real estate in the name of a trustee, upon an express and declared, or a secret trust, to be permitted to take and receive the rents and profits, this is such a trust as in reason, and upon the well received principles of equity, as well as upon authority, will pass to the State, to be enforced at its instance and in its favor." Here, then, we see, that although a trust may be created in violation, and clearly in fraud of the law, still the trustee shall not be

permitted to hold the trust estate discharged of the trust, although the cestui que trust is equally guilty with the trustee, and is incapable of holding the trust property, either in law or equity; but the trust shall be established and enure to the benefit of the State to which the estate would have been perfected had the title been taken, directly by the cestui que trust. In the case before us, if Udell has been guilty of the fraud upon the law which he alleges in the defence which he sets up, that he has, it may be that the Government may proceed in the proper court to have the sale set aside; but till that be done, the title is as good as if it had been obtained ever so fairly, and it cannot be permitted to the trustee to allege, that because he has defrauded the Government in obtaining the land, he shall thereby be enabled to defraud his cestui que trust out of the estate confided to him for their benefit. Courts of Equity will take care that trustees, of all others, shall act in the utmost good faith towards their cestuis que trust, and that they shall not be permitted to speculate out of the trust estate in any way, for their own benefit; and if they attempt to do so, the Courts will hold all such speculations to be for the benefit of the trust fund. So soon as Udell consented to act as trustee, he assumed the obligation, that whatever he did with the trust estate, should be for its benefit alone, and he is estopped from claiming any advantage under it. He cannot be permitted to act for himself while he is bound to act for others. Upon these principles, whether he purchased the land with his own funds, or with money belonging to his cestui que trust, the purchase shall, in either case, enure to their benefit. In this case, at least three fourths of the money, in equity, belonged to them, and in the distribution of the proceeds of the sale of the land, the court will refund to him the fifty dollars which he advanced out of his own money. That the court acted judiciously in removing him, and appointing another trustee, no one can doubt, after he had denied the existence of the trust, and had undertaken to convey the land to Miller, who had originally created

the trust, he being placed beyond the reach of his creditors by his discharge under the bankrupt law.

Upon an application of the creditors to the court below, a reference will of course be made to the Master, to give public notice to the creditors to come in, within some reasonable time, and prove up their debts, that the fund may be distributed according to the decree. (*a*)

It may not be improper here to remark, that the correct practice is not to render a decree directly upon overruling a demurrer to a bill in Chancery; but the order should be, that the defendants answer the bill, and if they neglect to do so, the complainant may have the bill taken for confessed, and the Court will proceed to render a decree as in other cases where bills are taken for confessed. (*b*)But the deviation from the correct practice in this case, is but an irregularity which the court here will not notice, particularly as it is not assigned for error. The Court may, in its discretion, render a decree at once upon a bill taken for confessed, especially where a demurrer has been overruled to the bill.

The decree of the Circuit Court is affirmed with costs, and the cause remanded for such further proceedings as may be agreeable to equity in the premises.*

Decree affirmed.

(*a*) Vansyckle vs. Richardson, 13 Ill. R. 174.

(*b*) Roach vs. Chapin, 27 Ill. R. 197 ; But see Grob vs. Castman, 45 Ill. R. 124.

*A petition for a re-hearing was filed by the counsel for the appellants, which was denied.

ABRAHAM G. SWITZER et al., plaintiffs in error, v. RACHAEL SKILES et al., defendants in error.

Error to Winnebago.

The statute regards improvements of settlers upon the public lands as property, the proper subject matter of binding contracts between individuals, and subject to the control and disposition of the law. Their interest may be sold on execution, and the purchaser may maintain an action of ejectment for the possession, and the defendant cannot deny his title. But these rights cannot be enforced as against the United States, or its grantee, and they cease altogether on the alienation of the land by the Government.

It is a familiar rule, that a defendant cannot by demurrer rely on the Statute of Frands, unless it clearly appears upon the face of the bill that the agreement is within the provisions of the Statute. The Statute only establishes a rule of evidence; and does not change the mode of pleading an agreement.

If a party claim the benefit of the provisions of the Statute of Frauds. he must specially insist on it in his answer, or set it up by way of plea. The defence may be waived, and if not interposed in one of these modes, the defendant will be deemed to have renounced the benefit of the statute.

A person who agrees to act for another is not allowed to deal in the business of the agency for his own benefit; rnd if he take a conveyance in his own name of an estate which he agreed to purchase for another, he will, in Equity, be considered as holding the estate in trust for his principal.

A mere agreement to execute a trust in futuro, without compensation, is not obligatory, but when the trust is undertaken and actually eommenced, the trustee is bound to proceed and execute it with the same diligence and good faith, as if he were to receive a liberal reward for his services. The confidence reposed in him ; the actual entering on the duties of the trust, and the injury which may result te the beneficiary, if he do not faithfully fulfil it are regared as a good and suffient consideration.

Where a sale of land is made at public auction, and all persons are at liberty to bid, an agreement among different claimants to different portions of the land with an indiyidual to purchase the whole tract for their benefit, is not such an agreement as is calculated to prevent competion and thereby to render the sale void.

BILL IN CHANCERY for relief &c., in the Winnebago Circuit court, heard before the Hon. Thomas C. Browne, upon a demurrer to the bill, which was sustained and the bill dismissed at the cost of the present plaintiffs in error, who were complainants in the court below

The several causes of demurrer are fully stated and commented on by the court in their opinion.

J. Marsh, and A. T. Bledsoe, for the plaintiffs in error.

J. Butterfield, for the defendants in error.

The opinion of the court was delivered by

TREAT, J. In May, 1844, A. G. & W. N. Switzer, filed their bill in chancery in the Winnebago circuit court, against Skiles and others, alleging in substance, that on the 18th of June, 1841, they recovered a judgment in the Jo Daviess circuit court against the defendant J. B. Miller for $748.62, and on the same day sued out an execution directed to the sheriff of Winnebago county, which was received by the sheriff on the following day, and by him levied on lots eight and ten, in block fifteen, in the town of Rockford; that said Miller was then and had been for several years in the actual possession of said lots, and claiming to be the owner of the same, and on which he had erected a tavern house and several out-buildings; that on the same day, but before the levy, said Miller made and deposited in the recorder's office several mortgages on the lots to the defendant Skiles, Huston, J. H. Miller and Brice, purporting to secure them in the payment of debts amounting to upwards of three thousand dollars; that the mortgages were never delivered to the mortgagees, who all resided out of the State, and were the relatives of J. B. Miller, but were made for the fraudulent purpose of defeating the complainants in the collection of their judgment; that on the 5th of October, 1841, the lots were sold on the complainants' execution and purchased by them for $790.89, the amount of their judgment and costs, and that they have become entitled to a deed, the lots never having been redeemed; that at the time of the sale, the title to the township of land in which the village of Rockford was situated, was in the United States, and so remained until November, 1843; that in October, 1843, after said township was proclaimed for sale, the occupants and claimant of lots in the town of Rockford, (the same having pre-

viously been laid off into town lots,) held a public meeting to select some person to attend the sale, and bid off the tract of land embracing the town, in trust for the owners of the lots; that the meeting was attended and its proceedings approved by the defendants, Haight and Udell, and said Haight was appointed to bid off the land in trust for the several claimants of the lots, he assuring them that he would faithfully execute the trust, and each claimant was to pay his proportion of the purchase money, and expenses, which, it was estimated, would amount to fifty cents per lot; that at the same time it was agreed by all the claimants to the lots, including the defendants Haight and Udell, that a committee should be appointed, and which was then appointed to investigate all conflicting claims to lots, and their decision was to be conclusive between the parties, and Haight agreed that he would abide by the decision of the committee and convey the lots accordingly; that the committee met previous to the sale, and the complainants, and the defendant J. B. Miller, on the behalf of the mortgagees, appeared and submitted their respective claims to the lots, but the committee postponed their decision until after the sale should take place; that the complainants tendered Haight one dollar, the amount to be paid for the lots in question, which he declined to receive for the reason that the conflicting claims were then undetermined, but said he would be governed by the decision of the committee; that on the 3rd of November 1843, Haight, in pursuance of the agreement, purchased the land in his own name, in trust for the respective owners of the lots, and at the time and afterwards admitted that he acted in the capacity of trustee; that soon after the committee decided that Haight should convey the lots in question in trust for the complainants and the mortgagees, after paying $200 to the person of whom Miller purchased the lots and complainants prepared a deed in accordance with the decision and requested Haight to execute it, at the same time offering again to pay him the purchase money and expenses, but he declined executing the deed on the ground that the decision was contrary to law, and because J. B.

Miller had threatened him with a law suit, but agreed that he would make no conveyance to the prejudice of the complainants rights ; that the complainants then offered to indemnify him against all consequences of executing the deed, and he agreed to make no conveyance until a bond of indemnity could be obtained by the complainants who resided in St. Louis, but in violation of the agreement he conveyed the lots to Udell for 'the benefit of J. B. Miller ; that said Miller induced Haight by pecuniary considerations to make the conveyance to Udell and that it is the design of the defendants to secure the title of Miller beyond the reach of his bona fide creditors, he in the mean time, having been discharged from the payment of his debts under the bankrupt law of the United States, without including the property in question in his schedule, that since the conveyance to Udell, Miller has exercised the same acts of ownership over the premises as before, and that on the 17th of April, 1844, Udell advertized the lots for sale for the purpose of carrying out the fraud in transferring the title for a mere nominal consideration to Miller for his own use ; and the complainants pray that the trusts and limitations in the deed from Haight to Udell may be set aside, and that Udell shall sell the lots, and out of the proceeds pay the complainants' debt, and for general relief.

The defendants filed a demurrer to the bill and assigned several special causes of demurrer. The court sustained the demurrer and dismissed the bill ; and the complainants sued out a writ of error.

The first cause of demurrer to the bill is, that Miller had no such interest in the lots as could be sold on execution. This position is incorrect. The interest of defendant in real estate, of which he is in the actual possession, may be sold on execution. The purchaser acquires all the legal interest which the debtor had in the premises, and may maintain ejectment against him to recover the possession. The debtor is estopped to deny the title of the purchaser, and he cannot defeat a recovery by showing title in a third person. It makes no difference to him what may be the rights of the pur-

chaser as against other persons. The purchaser succeeds to all the legal rights of the debtor, and possession is one of those legal rights. A court will not stop to inquire what title the debtor had. The real owner is not prejudiced by the sale, for he can turn upon the purchaser and compel him to surrender the possession. Jackson v. Sternbergh, 1 Johns. Cases, 153; Jackson v. Graham, 3 Caines, 188; Jackson v. Bush, 10 Johns. 233; Jackson v. Scott, 18. do 95.[a] Miller, therefore, cannot raise the objection. The complainants, by their purchase at the sheriff's sale, acquired all the interest which he had in the lots at the date of the levy. He cannot gainsay their title. If they had procured a deed from the sheriff they might have brought ejectment and ousted him of the possession. But under our statute the possession of Miller was liable to sale on the execution. The improvements of settlers on the public lands are regarded by our laws as property, the proper subject matter of binding contracts between individuals, and subject to the control and disposition of the law. In the case of Turney v. Saunders, 4 Scam. 527, the court held that a mechanic who had performed labor and furnished materials in the erection of buildings on the public lands, had a lein on the buildings and improvements of the occupant, which he might enforce by judgment and execution. In the case of French v. Carr, 2 Gilm. 664, it was decided that the claim and improvements of the settler passed to his assignee in bankruptcy. These possessory rights, however, cannot be enforced as against the United States, or its grantee; and they cease altogether on the alienation of the land by the Government. Cook v. Foster, 2 Ibid. 652. In either point of view, the complainants succeeded to the whole interest of Miller in the lots, whatever that interest was. Upon the showing of the bill, the other defendants stand in no better situation than Miller. The bill alleges that the mortgages were made with the fraudulent design of defeating the complainants in the collection of their judgment; and if this allegation be true, the mortgagees can assert no claim as against the complainants. If the defendants Haight and Udell hold the legal estate in

(a) Watkins vs. Holman, 16 Pet. U. S. R. 53; Ante 366.

trust as charged in the bill, they cannot question the right derived by the complainants under the judgment.

The second cause of demurrer is, that the undertaking on the part of Haight was by parol, and therefore void by the Statute of Frauds. It is a sufficient answer to this objection to refer to the familiar rule, that a defendant cannot by demurrer rely on the Statute of Frauds, unless it clearly appears on the face of the bill that the agreement is within the provisions of the statute. The Statute only establishes a rule of evidence, and does not change the mode of pleading an agreement. The bill in this case does not state whether the agreement on the part of Haight was in writting or by parol. If the undertaking was by parol, and he claims the benefit of the provisions of the Statute, he must specially insist on it in his answer, or set it up by way of plea. The defence may be waived, and if not interposed in one of these modes, the defendant will be deemed to have renounced the benefit of the Statute.(*a*) Story's Eq. Pl. § 761, et seq.; Cooper 's Eq. Pl. 256; Cozine v. Graham, 2 Paige, 177. But if the undertaking was by parol, and the provisions of the Statute were expressly relied on, we are inclined to the opinion that the defence would not avail the defendant. He did not profess to act for himself in the purchase of the lots. He undertook to purchase them for the benefit of those who had succeeded to the possessory rights of Miller. This precluded him from acting on his own account in the transaction. A person who agrees to act for another is not allowed to deal in the business of the agency for his own benefit, and if he take a conveyance in his own name of an estate, which he agreed to purchase for another, he will, in equity, be considered as holding the estate in trust for his principal. Van Horne v. Fonda, 5 Johns. Ch. R. 388; Sweet v. Jacocks, 6 Paige, 355. Haight became the agent of the owners of the improvements on the lots, and agreed faithfully to represent their interests. The complainants confided in his assurances and ceased to give any personal attention to the sale of the land. A court of equity will not permit the defendant, after obtaining the title to the property under such circum-

(*a*) But see Browne on S. F. Sec. 510, 511, &c.

stance, to sacrifice and disregard the interests of those for whom he acted, and convert the property to his own use. 1 Story's Eq. Jur. § 223. [a] To allow him to appropriate to his own use the fruits of the purchase, would be permitting him to take advantage of his own wrong, and thereby perpetrate a gross fraud on the complainants. He cannot escape the consequence of such iniquitous conduct by sheltering himself behind the Statute of Frauds, the provisions of which statute were designed to furnish a protection against fraud and not to be set up as a shield and support for fraud.

Another cause of demurrer is, that the agreement on the part of Haight was without consideration, and therefore he is not bound to perform it. He cannot now set up the want of consideration as an execuse for not complying with the terms of his undertaking. This might have been a valid reason for declining to enter on the performance of his agreement in the first instance, but it cannot shield him from responsibility after he has once entered on the execution of the trust. It is sufficient that he undertook to perform the trust and thereby obtained the trust property. A mere agreement to execute a trust in futuro, without compensation, is not obligatory ; but when the trust is undertaken and actually commenced, the trustee is bound to proceed and execute it with the same diligence and good faith, as if he were to receive a a liberal reward for his servies. The confidence reposed in him, the actual entering on the duties of the trnst, and the injury which may result to the beneficiary if he do not faithfully perform it, are regarded as a good and sufficient consideration. 2 Kent's Com. 466 ; Rutgers v. Lucet, 2 Johns. Cases, 92.

Another cause of demurrer is, that the agreement respecting the purchase of the land was contrary to the policy of the law, and therefore void. There is no force in his objection. It is difficult to conceive in what manner the Government was to be prejudiced by the making or the carrying into effect of the agreement. It amounted simply to this : that Haight should attend the sale and purchase the land for the benefit of those having improvements thereon. The sale was at public auction, and, of course, all persons were at liberty to bid. The

(a) Doyle vs. Wiley, 15 Ill. R. 579 ; Perry vs. McHenry, 13 Ill. R. 236.

agreement was not calculated to prevent competition, and in that way lessen the price the Government might obtain. It was a matter of perfect indifference to the Government, whether Haight was to purchase the land on his own account, or as agent or trustee for others.

The foregoing embrace all of the objections taken to the bill which are deemed of sufficient importance to require the special notice of the court. On the whole bill, we are satisfied that the complainants have shown a fair case for the interference of a Court of Equity. In coming to this conclusion, we have not thought it necessary to take into consideration the appointment of the committee, or its proceedings in the transaction. The bill has merits irrespective of these allegations. We understand the agreement between Haight and the claimants of the lots to be substantially this: Haight was to bid on the land in his own name, and if he became the purchaser, he was to hold the legal estate for the benefit of those having the best right to the improvements; and those entitled to the improvements were to contribute their proportion of the purchase money and the expense incident to the purchase. In pursuance of these stipulations, Haight became the purchaser, and acquired the legal title; and he may now be charged as trustee by those who had the possessory right to the lots at the time of the purchase, and who have complied with the terms of the agreement. The complainants have performed the agreement on their part as far as the defendants would permit them. But before and after the purchase, they tendered him the proper proportion of the purchase money and expenses for the lots in controversy.

The complainants are, therefore, in no fault. The principal question to arise in the further progress of this case, will be as to the ownership of the improvements. Miller has no claim to the lots whatever. His interest was divested by the sale under the complainants' judgmeut, by the execution of the mortgages, which, however fraudulent as to creditors, are binding on him, and by his voluntary bankruptcy. It wonld be an act of gross injustice to allow him to receive the benefits of these improvements, to the exclusion of his honest crditors, who, in all probability, furnished

him with the means of erecting them. The contest, therefore, will be between the complainants and the mortgagees. Upon the hearing of the case, the circuit court will probably be required to direct the sale of the lots, and a division of the proceeds among the parties according to their respective equities. If the mortgages are ascertained to be fraudulent and void as against creditors, the debt due the complainants should be first paid, and the surplus should go to the assignee in bankruptcy of Miller, for the benefit of his creditors generally. But, if there was a valid delivery of the mortgages, and they were given to secure the payment of bona fide debts, and filed for record before the levy of the execution, then the amount due the mortgagees must be first paid, and the surplus applied in the liquidation of the complainants' demand.

The decree of the circuit court is reversed, with costs, and the cause is remanded for further proceedings, with leave to the defendants to answer the bill.

Justices CATON and KOERNER dissented.

Decree reversed.

LEVI D. BOONE, plaintiff in error, v. CALEB STONE et al., for the use of Elias B. Paine, defendants in error.

Error to Madison.

To a scire facias to revive a judgment in the names of the plaintiffs, for the use of another, the defendant pleaded, that after judgment in the scire facias mentioned, and before the assignment of the same, as alleged in the said scire facias, the plaintiffs became bankrupts and were duly discharged, &c. To this plea the plaintiffs demurred, and the demurrer was sustained: Held, that the counsel for the beneficial plaintiff, by direct averment, should have replied the assignment to him prior to the bankruptcy of the nominal plaintiffs, in order to have avoided the effect of the plea, and to protect the rights of the beneficial plaintiff.(a)

A declaration, plea or replication will be sustained, rejecting mere surplusage, if the pleading would be substantially good without it.

SCIRE FACIAS, in the Madison circuit court, brought by the nominal plaintiffs below, who are defendants here, for the use of the beneficial plaintiff, against the present plaintiff in

(a) Dazy vs. Mills, 5 Gil. R. 71.

error. Judgment was rendered against the defendant below on a demurrer to one of his pleas. He prosecutes a writ of error, and the several assignments of error will appear in the Opinion of the court.

A. T. Bledsoe, for the plaintiff in error.

E. Keating, H. W. Billings & L. B. Parsons, Jr., for the defendants in error.

The Opinion of the Court was delivered by

PURPLE, J.* In this case, a scire facias was issued from the court below to revive a judgment rendered at the August term, A. D. 1837, in favor of Stone, Manning and Glover, against the plaintiff in error, Levi D. Boone. The scire facias is in the usual form, except that it contains the following allegation: "And, whereas, the said judgment has been assigned and transferred to one Elias B, Paine, and he having besought us to revive said judgment."

Boone pleaded three pleas. First, that the assignment mentioned in the scire facias was never made, as therein stated; Second, that after the judgment in the scire facias mentioned, and before the assignment of the same as alleged in said scire facias, Manning, Glover and Stone, severally become bankrupts, and received their discharges and certificates, as such, under the Act of Congress in such cases made and provided; and Third Nul tiel record, concluding, "and this he is ready to verify. Wherefore he prays judgment," &c.

To the first and second pleas the plaintiffs below demurred and the court sustained the demurrer. To the third they replied, "and the plaintiff doth the like."

The errors assigned are: First, that the court below erred in sustaining the demurrer to the first and second pleas; Second, in giving judgment against defendant when his third plea was not replied to; and Third, in rendering judgment against defendant below, whereas it should have been in his favor.

* Justices THOMAS and DENNING did not sit in this case.

As to the first plea no question has been made upon the argument, that to it, the demurrer was properly sustained. It is conceded, that under that plea and the state of facts presented by it, it would have been immaterial whether such assignment had been made or not, so far as the defendant in the court below was concerned. He could only be compelled to pay the money once, and whether he should pay it upon an execution or judgment, suggesting that it was for the use of a third person or otherwise, would be to him a matter of no moment. This suggestion upon the record is in all cases designed, and permitted, only for the purpose of protecting the equitable interests of the assignee of a chose in action, or judgment, when such assignee is not by law allowed to sue or prosecute in his own name. A defendant can in no case take advantage of, or be in any respect affected or prejudiced by such proceeding. [a]

The real issue and the only material one tendered by the second plea, is, that after the rendition of the judgment, and before the issuing of the writ of scire facias, the plaintiffs below had become bankrupts. I have before shown that the allegation in the scire facias in relation to the assignment of the judgment, is not a material or traversable averment—that it is mere surplusage. This principle of law relative to immaterial averments, extends alike to all the pleadings in the case; and a declaration, plea, or replication will be sustained, rejecting mere surplusage, if the pleading would be substantially good without it. Testing this plea by this rule, and it plainly and clearly presents a full defence to the cause of action set out in the scire facias. Rejecting that portion of it which attempts to traverse the immaterial matter in the scirre facias, to wit: "and before the assignment of the judgment as alleged in said scire facias," and leaving the residue of the same to stand as a plea of the defendant below, and it states in substance and in sufficiently technical language, that after the judgment in the scire facias mentioned was rendered, the plaintiffs in the judgment had become bankrupts, and obtained their discharge and certificates as such. Prima facie, this plea shows that

(a) Triplett vs. Scott, 12 Ill. R. 137.

they have no right to sue upon the judgment, and that the legal legal and equitable interest in the same has passed to their assignees in bankruptcy, in whose name as assignee alone the scire facias could be maintained. 1 Com. Dig. 60 ; 15 East, 622. [*a*] If the counsel for the defendant here had wished to avoid the effect of this plea, by showing an equitable interest in the person for whose use the scire facias was sued out, he should by direct averment have replied the assignment to him prior to the bankruptcy of the plaintiff in the scire facias. To show that such would have been the proper practice, I refer to the case of Wince v. Kelly, 1 Durnford & East, 356. In this manner the issue upon the question would be formed, and if it should appear that there was such assignment, bona fide made before the application and discharge in bankruptcy, the court would protect the equity of the assignee, by permitting him to use the names of the plaintiffs in the judgment to enforce the collection of the same.

The other point made is, that there is no issue, or an improper issue taken upon the plea of nul tiel record. This is purely technical in its character, and whether or not it would, under the circumstances, be considered as sufficient to reverse the judgment, is unnecessary to decide. But, in as much as the cause will be remanded for further proceedings in the circuit court, it may not be improper for the parties to make up a more formal issue on that plea.

The judgment of the circuit court is reversed with costs, and the cause remanded with direction to the circuit court to award a venire de novo.

Judgment reversed.

(a) Campbell vs. Humphries, 2 Scam. R. 478 ; French vs. Carr, 2 Gil. R. 664.

BENJAMIN TURNER, plaintiff in error, v. SAMUEL BERRY, defendant in error.

Error to Morgan.

All whose interests are to be affected by a decree should be made parties to a bill of review to reverse it.

A bill of review should recite, or give the substance of the record of the former suit. It is necessary to state all of the proceedings in the original cause, except the evidence on which the court found the facts on which it proceeded to render a decree. (*a*)

Upon a bill of review, the sufficiency of the evidence to establish the facts as found cannot be controverted. It is not of a misjudging of the facts that a party can complain, but for an improper determination of the law.

A motion for leave to file a supplemental bill, as well as an application to amend a bill, is ordinarily addressed to the discretion of the court, with the excerise of which the appellate court will seldom interfere.

BILL IN CHANCERY, &c. in the Morgan circuit court, filed by the plaintiff in error against the defendant in error, and heard before the Hon. Samuel D. Lockwood, at the October term 1846. The complainant offered to file a supplemental bill setting up additional facts, &c. Which bill was submitted to the inspection of the court, and permission to file it was refused. The cause was then heard and the complainant's bill was dismissed.

The material portions of the bill, and other proceedings in the cause are set forth in the Opinion of the court.

W. Brown, for the plaintiff in error.

M. McConnell, for the defendant in error.

The Opinion of the court was delivered by

CATON, J.* Some question has been made as to the nature and character of this bill, yet I think it admits of no doubt that it is, although very imperfect, a bill of review; at any rate it is nothing else. The bill commences with the statement of the commencement of a suit by Samuel Berry

(a) Gardner vs. Emerson' 40 Ill. R. 296; Ante 2 and notes.

* Justices THOMAS and DENNING did not sit in this case

against Turner and wife, and the heirs at law of Garrison W. Berry, and then recited the decree in that cause, whereby Turner was decreed to pay to the complainant, the interest on $1400, at the rate of 12 per cent. per annum during the natural life of Berry, which said sum of $1400 was purchase money of certain premises sold by Samuel Berry and G. W, Berry, deceased, which money, or the securities therefor, then being in the hands of Turner, as guardian of the heirs of G. W. Berry, who were entitled to the reversionary interest in the fund. The decree then prescribed the time and manner in which the said interest shall be paid to Berry. It then requires Turner to give a bond with one Bacon and John D. Turner, securities, in the penalty of $1400, conditioned for the payment of the said sums of money to Samuel Berry during his natural life. The decree then provides that in case Turner shall fail to give said bond, that Lucian Berry be appointed a receiver of the said fund of $1400 and interest due thereon as aforesaid, to whom the same, or the evidences thereof should be delivered, who should give bond, &c., conditioned for the payment of said interest, due the said Samuel Berry during his natural life, and of the principal to the said heirs or their guardian, at the decease of said Samuel Berry. Turner was decreed to pay one third of the costs, and the estate of Garrison W. Berry two thirds. The bill then states that Turner gave the bond with the security, according to the decree; that shortly after the rendition of the decree, the money was collected, and came into the hands of Turner, as guardian, who has in all respects complied with the decree, by making all of the payments to Samuel Berry as in said decree directed. The bill then complains that Turner is aggrieved by so much of the decree as requires him to pay interest on the $1400 at the rate of 12 per cent. per annum; and states that since the making of the decree, the Legislature has passed a law prohibiting the taking of more than six per cent. interest; and that at the time the decree was made, he did not know that the Legislature would pass such a law. The prayer of the bill is that the court "will open the decree aforesaid, and review

and reverse the same in so far as to relieve your orator from paying more than six per cent. interest upon said sum of $1400," and for general relief.

This bill has all of the peculiar characteristics of a bill of review for error apparent and for newly discovered evidence. For error apparent, because the court was not authorized to make such a decree in the first instance; and for newly discovered evidence, because of the happening of an event since the rendition of the decree which changes the rights of the party. Story's Eq. Pl. § 415, note 3.

As a bill of review, the bill is, however, fatally and substantially defective: first, because all of the parties to the original decree, and whose interests are affected by the original decree, are not parties to his bill. The heirs of Garrison W. Berry should have been parties to this suit, the object of which is to open a decree which adjudicates upon their rights, by determining that they have a reversionary interest in a certain fund, the interest of which they are not to receive during the lifetime of Samuel Berry; and the administrator should have been made a party, because, by the original decree, two thirds of the costs of that suit are directed to be paid out of the estate of Garrison W. Berry. It is not only founded in reason, but well settled by authority, that all whose interests are affected by a decree should be parties to a bill of review to reverse it. Story's Eq. Pl. § 420; Bank of United States v. White, 8 Peters, 262-8. Although, by this bill of review, the court is only asked to reverse the decree in part, yet the other parties whose interests are affected by the original decree might have a right to insist that the whole merits of the original cause should be inquired into.

There is another fatal defect in this bill, and that is, that it does not recite or give the substance of the record of the former suit. In speaking of the form of a bill of review, Mr. Justice Story, in his treatise on Equity Pleading, § 420, says: "In a bill of this nature, it is necessary to state the former bill, and the proceedings thereon; the decree, and the point in which the party exhibiting the bill of review

conceives himself aggrieved by it; and the ground of law, or matter discovered, upon which he seeks to impeach it." From the very nature of the proceeding, it is manifestly necessary to state all of the proceedings in the original cause, except the evidence on which the court found the facts on which it proceeded to render a decree. Upon a bill of review, the sufficiency of the evidence to establish the facts, as found, cannot be controverted. It is not of a misjudging of the facts that a party can complain, but for an improper determination of the law. In the case of Whiting v. The Bank of the United States, 13 Peters, 6, the court says: "In England, the decree always recites the substance of the bill, and answer, and pleadings, and also the facts on which the court founds its decree. But in America, the decree does not ordinarily recite either the bill, or answer, or pleadings, and, generally, not the facts on which the decree is founded. But, with us, the bill, answer, and other pleadings, together with the decree, constitute what is properly considered as the record. And, therefore, in truth, the rule in each conntry is precisely the same in legal effect, although expressed in different language, viz: that the bill of review must be founded on some error apparent upon the bill, answer, and other pleadings, and decree; and that you are not at liberty to go into the evidence at large, in order to establish an objection to the decree founded on the supposed mistake of the court in its own deductions from the evidence." See, also, Grigg v. Gear, decided at the last term of this court, (ante, 2,) and Perry v. Phillips, 17 Vesey, 178.

The bill, then, was properly dismissed, for want of proper parties, and also for not containing sufficient averments to enable the court to determine properly of the propriety of the former decree, and to apply the new facts averred to have arisen. I will not say, however, but this latter difficulty might have been got over by the aid of the defendant's answer, which "refers to the records and proceedings in said case, and adopts them as evidence in this case, and as a part of his answer." Had there been no other difficulty in the way, it is possible that the court might have been authorized

by this to have looked into the original record, yet such looseness of practice and imperfect pleadings ought not to be encouraged.

But even by a bill of review properly framed, or on error, it is by no means clear that the complainant in this cause could get relief. Were not the original decree in the alternative, I should not hesitate to say, after looking into the original record, that there is manifest error. All that the complainant in that record asks, is the interest on the $1400 buring his natural life. To this, we may conclude he was entitled; but he was only entitled to have the money put to the best interest that could be obtained for it, and had no right to insist that he should recover twelve per cent. at all events. Yet such is the decree, with this proviso however, that in case Turner should not give the bond as required by the decree, for the payment of twelve per cent. interest on the $1400, to Samuel Berry during his life, that then the fund should be taken out of his hands, and placed with a trustee appointed by the decree, who should collect the interest and pay it over to Berry. Of the right of the Court to enter up a decree as contained in this alternative provision, no one need doubt, and we can hardly find a warrant for saying, that the Court erred in presenting a proposition to Turner, by complying with which he might retain the fund, although the court might have had no right to force upon him the provisions contained in the proposition. Turner was told by this decree, that if he would pay twelve per cent. interest on this fund, and give a certain bond to secure the payment, he might retain this fund, otherwise he must deliver it over to the trustee. This proposition was voluntarily accepted by Turner, and the bond accordingly given. He chose to do this, rather than give up the fund. Had he taken the other alternative, there can be no doubt, that he never could have complained that the decree was wrong. How, then, shall he make the decree erroneous by choosing to accept and under the other part of the decree, which of course he supposed at the time was more favorable to himself? There would certainly seem to be an

impropriety in that. It would seem as if by accepting the proposition of the decree, he preferred himself to become a borrower of the fund, agreeing to pay the twelve per cent interest, or at least that he was willing to become an insurer for that amount at all events, rather than part with the fund. I am free to admit that the question is not free from embarrassment, especially if the fact be as is alleged in the supplemental bill which the complainant in this cause offered to file, that Turner has been removed as guardian, and the fund finally taken from him by a competent tribunal.

It was urged upon the argument that the Court erred in not allowing the complainant to file this supplemental bill. That as well as an application to amend a bill, is ordinarily addressed to the discretion of the court below, with the exercise of which this court will not interfere, although not universally so. (*a*)

It was insisted upon the argument by the defendant's counsel, that the decree in the original cause was entered by consent. I cannot learn from the record that such was the case. Had it been so, that should have been pleaded to the bill of review, or at least set up and insisted on by the defendant in his answer. That would be a good plea as well to a bill of review as to a writ of error.(*b*)

The decree of the Circuit Court must be affirmed with costs.

Decree affirmed.

(a) Jefferson Co. vs. Ferguson, 13 Ill. R. 35, and notes.
(b) Austin vs. Bainter, 40 Ill. R. 82.

Alexander Ferguson, appellant, v. Charles H. Sutphen, appellee.

Appeal from La Salle.

In Equity, the doctrine is well settled, that a conveyance absolute in its terms may, by parol evidence, be shown to have been designed by the parties as a mortgage.

In Equity, no form which can be given to a particular contract, will preclude the borrower from the introduction of evidence to impeach it on the ground of usury. It is not the form, but the nature and substance of the contract, which must determine whether the instrument be not a mere device to obtain more than legal interest, and colorable only to evade the provisions of the statute. (a)

Where usury is alleged, it may be proved by parol, and as a consequence, the written contracts of the parties may, by the same kind of evidence, be varied and contradicted. Such evidence is competent to show that a contract in the form of an absolute sale, was, in truth, but a security for an usurious loan.

The borrower of money on an usurious contract may tender to the lender, or bring into court for his use, the amount actually advanced with the legal interest, and then file his bill for relief; and the court will relieve him from the payment of the excess, and declare the securities to be void, and when necessary, direct them to be delivered up and cancelled. (b)

It is pureley a matter of discretion with the court whether it will require a complainant to make proof, the defendant being in default.

Where money is paid into court pending a suit in chancery, and the decree does not show to whom it should be paid, the court will, on the requisite proof being made, direct it to be paid to the person who is properly entitled to it.

Where a statute declares a contract to be void, it does not follow that either of the contracting parties can take advantage of it. A statute may so declare, and still but one of the parties be guilty of its violation. Under the laws declaring usurious contracts to be void, the lender is never allowed to take advantage of the statute, because he is the guilty party; but the borrower is permitted to do this, because he is not a particeps criminis. This principle applies to every contract declared to be void by the statute, in the making of which but one of the parties is in pari delicto.

A. and B. applied to C. for a loan of $1100, for the purpose of purchasing public lands, upon which they had made improvements, which were about to be sold by the government. C. agreed to advance the money with the understanding that the lands should be bid off by him to secure him in the payment of the loan, and that they should pay him for the loan and forbearance $330 in each of three following years, and, $1,430, at the end of four years, when C. was to sell and convey the land to them. C. bid off the lands at $1.25 per acre, and the parties entered into a written agreement upon this basis, with the further stipulation that in default of any of the payments being made C. was authorized to declare the contract at an end, and

(a) Cooper vs. Nock, 27 Ill. R. 75.

(b) Farwell vs. Meyer, 35 Ill. R. 42 ; Booker vs. Anderson, 35 Ill. R. 68 ; Taylor vs. Daniels, 37 Ill. R. 331.

should he do so, all previous payments were to be forfeited, and A. and B. thenceforth were to be considered as the tenants at will of C. at an annual rent equal to ten per cent. interest on the $2,400, payable quarter yearly: Held, that the contract was usurious.

Bill in Chancery for relief, &c., in the La Salle circuit court, filed by the appellee against the appellant, and heard before the Hon. John D. Caton, at the March term 1845, when a decree was rendered in favor of the complainant below.

The substance of the bill and the decree, and the testimony in the cause, will appear in the opinion of the court.

J. Butterfield, for the appellant.

In this case there is no dispute about the facts. The bill does not charge Taylor with any fraud, imposition or oppression, or with any violation of his agreement. The complainant does not pretend that the lands are not richly worth the full amount he contracted to pay for them, or that he will suffer any loss or injustice in being compelled to pay the amount he voluntarily stipulated to do. But without any excuse or mitigating circumstance in palliation of this attempt to defraud the heirs of Taylor, he comes here and askes this court to relieve him, not only from the performance of a contract highly beneficial to himself, but to compel the defendants to convey to him eight hundred acres of land for less than one half the amount he contracted to pay.

It is well known that very large sums of money have been invested in the same manner; that Taylor invested his, in the purchase of Government lands at the public sales, where the sales were open to all bidders; that such purchases were made at the request of the occupants of the land, and that the purchasers have in such cases, instead of turning the settlers out of possession, entered into contracts to sell them the lands at a profit exceeding the legal rates of interest. Such purchases and contracts have been highly beneficial to the settlers; it has enabled them to purchase their lands and secure their homes; has promoted the settlement of the country; they have felt grateful to capitalists for

thus investing their money, and out of the thousands of settlers, who have been benefitted and become freeholders, and enriched by the acquisition of their lands in the same manner, not a lisp of complainant has been heard except from the complaint in this cause. Even his co-purchaser, Ballard, scorned to unite in such an odious and unconscionable attempt to avoid his agreement; he assigned his interest in the title bond to Sutphen upon the express condition that Sutphen should perform its covenants. Sutphen himself is the speculator, and by means of the arrangement he made with Taylor, he was enabled to secure to himself eight hundred acres of choice land, a quantity greatly exceeding the wants of any man for cultivation, and at a price which he does not pretend approximates to its value.

He bases his right to the relief sought for in his bill upon two grounds:

1. That Taylor held the title of the land in trust for him; and

2. That the transaction was usurious.

I shall contend and clearly show, that neither of these propositions are true.

I. Taylor purchased the land in question from the Government in his own right, and not as trustee for Suphen and Ballard. The whole transaction shows that it never was the intention or contemplation of the parties that Taylor should purchase, or hold the land in trust; and the complainant, by his own act, is estopped from setting up a trust, express or implied.

1. There was no express trust.

All express trusts must be manifested and proved by some writing, signed by the party who is enabled to declare such trust, or they shall be utterly void and of no effect. Gale's Stat. 316, § 4.

Parol evidence is inadmissible to support an agreement set up in contradiction to a deed where no trust appears upon the face of the deed, nor any evidence or manifestation of it by writing. Parol evidence is inadmissible to show the trust. 1 Johns. Ch. R. 339, 341; 4 East, 576, top page and note.

All parol agreements made between the parties in relation to the said land, are void by the Statute of Frauds. 5 Cowen, 142 ; 5 Johns. Ch. R. 1, 19 ; 4 Johns. 242–4 ; 14 do. 359–60 ; 8 do. 253–4 ; Gale's Stat. 315.

The case in 4 Johns. 242, decides expressly, that all such parol agreements as were made in this case are void. Taylor, after the purchase, held the land absolutely, discharged of all parol agreements, and had a right to sell it to the complainant for what price he pleased without violating any legal agreement.

2. There was no resulting or implied trust, in favor of Sutphen and Ballard in this case.

Resulting trusts are strictly limited to cases where the purchase has been made in the name of one person, and the purchase money paid by another. Where a man employs another by parol as agent to purchase land for him, and the latter buys it accordingly in his own name, and no part of the purchaae money was paid by the principal, Equity will not compel the agent to convey the estate to him. 2 Story's Eq. Jur. § 1201 ; 5 Johns. Ch. R. 19.

If the person who sets up a resulting trust has paid no money, he cannot show by parol proof that the purchase was made for his benefit, or on his account. This would be to overturn the Statute of Frauds, as was ruled by Lord Keeper Henly, in the case of Bartlett v. Pickersgill, 4 East, 577, note ; Hughes v. Moore, 7 Cranch, 176 ; 2 Johns. Ch. R. 408, top page.

"The whole foundation of the trust is the payment of the purchase money, and that must be clearly proved." Ib.

The plaintiff in this case does not pretend to have paid any part of the consideration for the purchase of the land. The defendant purchased the land at the public sales, and paid the money himself without any advance by the plaintiff. There is, then, no pretext for setting up a resulting trust here, and all parol proof for that purpose is inadmissible.

To admit it would be repealing the Statute of Frauds and would endanger the security of real property resting on title deeds, &c. For the trust arises out of the circumstance that the moneys of the real, and not the nominal purchase

formed at the time the consideration of that purchase, and became converted into land.

The plaintiff relies upon the case of Boyd v. McLean, 1 Johns. ch. R. 582, to show that he substantially paid the purchase money. In that case, the plaintiff had entered into articles of agreement with Colden to purchase a lot of land for $1000, to be paid in four years, and went in possession under the agreement to purchase. There was an express agreement on the part of McLean to loan the money to plaintiff to pay Colden the amouut due on the contract, and to take the deed in his own name as security. Colden was consulted and agreed to it. The money was paid by Ross, as the agent of the defendant. The defendant afterwards frequently acknowledged it was a loan, and that he took the deed only as security, and that the plaintiff might have two or three years to redeem, &c. That case differs entirely from the facts in this: There the plaintiff had an interest in the land, under his contract; there was an actual loan, and time given to redeem; it all rested in parol, and no written agreement made stipulating the rights of the parties. There the defendant paid off the plaintiff's debt on a contract, and succeeded to the plaintiff's rights under the contract. He held as trustee under the plaintiff's contract.

In this case the plaintiffs had no interest in the land. It was never understood by the parties, or acknowledged by the defendant, that he loaned the money, or that the plaintiffs had any right to redeem.

3. There can be no resulting trust where the parties have entered into a written agreement, stipulating their rights. 6 Johns. ch. R. 111, 116; 3 Greenl. 399.

These cases decide, that where the rights of the parties are stipulated and adjusted by written instruments, the instruments must speak for themselves, by expression or implication, and no extrinsic collateral evidence can be received, to ingraft other or additional trusts upon the deed by proof of intention, unless upon a ground of fraud. There is no allegation, in this case, of any misrepresentation, fraud or mistake.

Where parties have reduced their contract to writing, the written instrument alone is to be resorted to for the measure of their liability, and the extent of the contract is to be gathered from the writing only, unaffected by parol testimony. Chadwich v. Perkins, 3 Greenl. 399.

Sutphen and Ballard treated with Taylor for this land as purchasers, and cannot now claim that there was a trust. 4 Johns. ch. R. 242–4.

The law never implies a trust, unless the court, upon the consideration of all the circumstances, presumes there was a declaration of trust, either by word or writing, though the plain and direct proof thereof be not extant. The law never implies, the court never presumes a trust, but in case of absolute necessity. 2 Story's Eq. Jur. 438. § 1195, and note.

In this case, so far from there being any evidence to warrant the court in presuming that the declaration of trust was made, the evidence is conclusive to show that it never was contemplated by either party that Taylor should hold these lands in trust.

II. The contract was not usurious.

The substance of the transaction was: Public lands were advertised for sale; plaintiff applied to Taylor for a loan of money to purchase land with; Taylor refused to loan him the money, but proposed to purchase the land himself, and then sell the land to Sutphen and Ballard, on a credit of four years, at an advance in profit that should be equal to thirty per cent. a year.

Taylor purchased the land in his own name, and paid his own money for it, at $1,25 per acre, amounting to	$1,100
A profit, or premium of 30 per cent. on the same, for four years, amounted to	1,320
Amount.	$2,420

and Taylor agreed with Sutphen and Ballard to sell said land, 800 acres, to them for that sum in four years.

This transaction was not usurious:

1. The plaintiff had no interest or equity in the loan. Taylor had the same right as the plaintiff, or any other person, to purchase.

2. Taylor made the purchase in his own name, and paid his own money for it.

3. There was no loan, or borrowing of money.

4 Taylor, having purchased the lands in his own name, and paid his own money for them, held them absolutely as his own.

All parol agreements he may have made with the plaintiff, in relation to the lands, are void by the Statute of Frauds. 5 Cowen, 162; 5 Johns. Ch. R. 19; 4 Johns. 242.

Taylor had a right to sell the land to the plaintiff for whatever sum he pleased.

After Taylor purchased the land, there was no privity of estate or title between the plaintiffs and the land.

5. Because there was an application by the plaintiff for the loan of money, and, although the premium, or profit, which Taylor agreed to sell the land for, was called interest, that does not make it so.

It is the duty of the Court to look, not at the form and words used, but to the substance of the transaction. 14 Eng. Com. Law R. 82; 9 Peters, .449, 450, 452.

6. There are two classes of cases where a loan connected with the purchase of property has been held to be usurious. 1. Where a person applies to another for a loan of money, and he refuses to make the loan unless the person applying for the loan will purchase of him property for an amount greatly exceeding its actual value; such loans are usurious. 1 Johns. Ch. R. 536; 9 Peters, 458. The case at bar does not come within the principle of that case. Hence it is not pretended that the property is worth less than the plaintiff has contracted to pay for it. 2. Where a person for the purpose of converting an usurious loan purchases of the borrower property, and at the same time takes from the borrower an article to re-purchase the property. Delano v. Rood, 1 Gilm. 690; 9 Peters, 419.

In all such cases, there is a privity of estate and title between the borrower of the money and the property he sells, and he agrees to re-purchase. Here there was no privity of title between Sutphen and the land; he never owned the land; he could not re-purchase what he never owned and never

sold. He acknowledged it to be the land of Taylor; treated with Taylor for the purchase of the land from him.

It was not the intention of the Legislature to interfere with individuals in their ordinary transactions of buying and selling, or other arrangements made with the view to convenience or profit. 9 Peters, 419, marginal note.

7. It has been generally understood by lawyers and business men that such a transaction was not usurious. Persons who have money are allowed to embark in speculations of buying any selling, and it never was usury. He bought this land of the Government and sold it to Sutphen. The contract is not on interest; and 120 per cent. is not a large per cent. on such an investment, for there is hazzard in it. That was a much stronger case than this, and was decided not to be usurious. 2 Johns. 242.

8. As to the $100 lent to Sutphen. That was a part of the bargain, a part of the price that Taylor sold his land for. He gave Sutphen $100 and sold him 800 acres of land for $2,420, payable in four years, without interest; there was no interest charged on the $100.

9. But if the Court should consider that the $100 made the contract usurious, it would only affect the contract pro tanto.

III. A deed cannot be impeached, controlled or affected by the Statute of Usury. The Statute of Usury only applies to "any contract or assurance for the payment of money," and not to a deed of bargain and sale. Rev. Stat. 349, § 2, 3; 13 Mass. 443; Ib. 104.

1. A deed is not an assurance for the payment of money. Where the title to real estate is absolutely vested by deed of bargain and sale, it shall not be disturbed by proof that all, or a part of the consideration was usurious. 7 Greenl. 435; 1 Johns. Cases, 161.

The plaintiff in this case, on the allegation that the title of Taylor to the land under his purchase from the United States was upon an usurious consideration, attempts to defeat his title and compel him to convey the land to the plaintiff.

2. The deed not being an "assurance" for the payment of money or other thing, does not come within the Statute of Usury, and this court has no power under that statute to

decree it usurious in the hands of Taylor, or do any thing to impeach or control the title which the defendants have acquired under the deed. The court, in this action, can only adjudicate on the contract or title bond, and cannot divest the defendants of their title to the land.

The Statute of Usury in Virginia and Kentucky and some of the other States extends to conveyances of land ; therefore, the decisions made in those States in impeaching and controlling deeds or conveyances of land are made under authority of their statutes and are not law here. 1 Tucker's Com. 379 ; 2 Dig. Ky. Stat. 1226 ; 1 Caines' Cases, 161 ; 7 Greenl. 435 ; 13 Mass. 104, 443.

IV. There is nothing stated in the bill, nor does the plaintiff make out such a case as gives the court jurisdiction. It is not a bill for specific performance, but a mere bill to relieve the plaintiff from the performance of his contract on the allegation of usury. The plaintiff had an adequate remedy at law when sued on the contract, and there is nothing in the case to show that the plaintiff has not such a remedy. The statute in relation to usury contemplates that it can only be enforced in an action at law, on an assurance for the payment of money. Rev. Stat. 359. The question of usury can only arise upon the pleadings in the case.

V. The case made out by the pleadings and proof bring the case directly within the provision of the Act of Congress of 31st March, 1830, which makes all agreements to pay a premium to the purchaser of public lands, and all bonds and obligations growing out of the same, void, &c., and the only relief the court can give in this cause is to declare the title bond void. 4 Story's Laws, 2188 ; Constitution of U. S. Art. 4, § 3 ; Art. 4 of Ordinance of 1787 ; Prigg v. The Commonwealth of Pennsylvania, 16 Peters, 539 ; 4 Scam. 512.

Where two or more persons enter into a fraudulent transaction, or a transaction in violation of law, a court will give no relief to either of them. 3 Paige, 154 ; 5 Wend. 579 ; 2 Peters' Cond. R. 598, in note 309-10 ; Story on Conflict of Laws, 203 ; 5 Johns. 333 ; 16 do. 486 ; 2 Kent's Com. 467.

VI. The decree in this case is erroneous for not decreeing that the purchase money, or money paid into court should be paid to the defendants. The bill shows that the money was paid into court subject to the order of the court. No relief can be granted in usury cases in Chancery without decreeing, in the first place, the payment of the principal debt with legal interest. 1 Story's Eq. Jur. 300, 301 ; 1 Johns. Ch. R. 367 ; 5 do. 122.

Objections made to the form of the proceeding.

I. Sutphen, as assignee of Ballard, had no right under the said assignmeut to call for a deed until after payment of the whole of the purchase money mentioned in the title bond ; he assigned his interest upon that condition.

II. The heirs of Wm. Taylor were not properly made parties or brought into court so that a decree could be made against them ; there was no affidavit that there were heirs whose names were unknown, or that the complainant did not know the names of the heirs. Gale's Stat. 257, § 5.

III. The depositions upon which the decree was made were taken on the 14th day of January, 1845, before the supplemental bill was filed, making Newton Gannie and eight others parties to this suit. These defendants were heirs and devisees at the time of the commencement of the suit, and depositions taken before they were made parties could not be used against them.

IV. There was no answer put in by the unknown heirs of Taylor, and no order taking the bill pro confesso against them, and still there was a decree against them. Gale's Stat. 141, § § 8, 9.

V. The decree states it was made upon the depositions and the admissions of Ferguson by his counsel. Ferguson's counsel could make no admissions which would authorize a decree against the heirs and other defendants ; as to all the defendants, except Ferguson, there was no proof.

VI. The heirs of James Duncan were not brought into court, but the complainant proceeded to a decree against him after his decease, and after having obtained an order for publication against his heirs.

VII. The decree directs all the defendants to convey to the complainants the land by warranty deed.

VIII. The notices of publication do not state the nature or object of the suit.

S. T. Logan, and A. T. Bledsoe, for the appellee.

I. The law of usury is founded in a sound public policy, and a defence under the statute is not regarded with disfavor by courts of justice. 16 Johns. 374–8; 3 Johns. Ch. R. 399; 20 Johns. 293; 1 Paige, 547.

The law looks at the substance of the transaction; no conceivable device to conceal usury can escape its animadversion. 1 Tuck. Com. 376; Floyer v. Edwards, Cowp. 112; 13 Johns. 45; Lowe v. Waller, Doug. 736; 2 Peters, 537; 4 do. 205, 226; 9 Mass. 47; 6 Peters' Cond. R. 147.

II. If there was a loan of the $1100 in this case, there is no doubt that interest at the rate of 30 per cent. per annum was usury. The controversy turns, then, upon the question, whether or not this was in substance a loan. In contemplation of law, we say, it was very clearly a loan. No possible shift or contrivance can hide its true nature. This is perfectly manifest from the facts of the case.

1. Sutphen was in great need of money. According to the deposition of Hosford, his improvments were worth $1000, and must have cost him a greater sum to make them. According to the deposition of Foster, they were worth $2000, and according to Cook's they were worth $2000, or $2500. He had not the money to secure his pre-emption right. All his improvements were about to be swept away by the approaching land sales. In this extremity, he applied to Taylor to borrow money of him. This is a controlling circumstance. It has been held sufficient to stamp many a transaction with the character of usury. 1 Bro. C. R. 138-51; 3 B. & P., 160; 9 Peters, 455.

2. But in the present case, there was not merely an application for a loan; there was a treaty in regard to a loan. Both parties spoke of it as a loan at the time of the transaction. In such case, if greater gains than legal interest be

secured, the authorities are clear and decisive, that the transaction is usurious. 2 Vesey, 155; 9 Peters, 449, 50, 53, 54, 57; 1 Call, 62; 2 Paige, 273; 20 Eng. Com. Law R. 82; 2 Peters, 536; Cowp. 406; 1 Paige, 547; 2 Stra. 916.

No case can be found in which there was a treaty about a loan, that has not been held to be a loan in substance, however artfully concealed by the form of the contract.

3. As we have seen, wherever there is a treaty in regard to a loan, no matter what form the contract is made to assume, the court will infer that the contract has been made to assume such form by the lender in order to conceal the usury. But we have not left this to inference, we have proved that Sutphen strenuously objected to the contract's being thrown into its present form, and that it was forced upon his necessities by the lender.

4. Taylor declared that he did not want the land. He wanted his money back with 30 per cent. per annum. Now, whatever may be the form of the contract, of a man, at the time of parting with his money, secures the repayment of it with more than legal interest, he is guilty of usury. The contract contains all the essential features of a loan, and the extra legal gains are usurious. Floyer v. Sherard, amb. 19; 3 B. & P. 159–60; 9 Peters, 447-8-50; Ibid. 438; Fonb. Eq. 189, note; 2 Edwards, 267; 1 Eq. Dig. 668, § 129.

5. There are certain stereotyped shifts and devices to which usurers have recourse in order to evade the statute. Where the contract falls into one of these forms, it is held by the authorities to be a suspicious circumstance. It is still more suspicious, when a form adopted by the person advancing the money, is one under which he has been in the habit of reserving illegal gains. 9 Peters, 458.

It is in proof, that Taylor was in the habit of lending money at thirty and forty per cent. interest, and securing its repayment in precisely the same way adopted by him in the present case.

6. Taylor took no part in the purchase of the land. The whole business was conducted under the direction of Sutphen.

7. Sutphen received $100 of the money from Taylor, the payment of which was secured with the rest.

8. Where the intention to secure more than legal interest, is either proved or confessed, it is a clear and settled case. 7 Johns. Ch. R. 77.

It is in proof, that Taylor intended to take 30 per cent. interest; he insisted upon it, Sutphen offered twenty five, but he was inflexible in his determination to have the thirty per cent., and to have it secured in his own way.

9. It is not only proved by two witnesses that such was the treaty, the understanding and final conclusion of the parties, but this also appears from the face of the written agreement itself.

10. In other respects, the terms of this contract are exceedingly hard and oppressive. Out of the necessities of Sutphen, Tayler endeavored to secure and obtain the most enormous gains. This is a badge of usury. 2 Peters, 536.

Here, then, are ten badges of usury, some of which, when taken singly, have been held to be conclusive evidence of an usurious agreement. There is no case in the books, with so many marks of usury, which has been able to pass the ordea of a judicial investigation. The Courts of England, as well as of this country, have repeatedly declared that, "no court can wink so hard" as not see usury in cases which were attended with only some of the circumstances of this case. And besides, we have shown not only by circumstances too strong to be resisted, but by the direct testimony of two witnesses, that a loan was agreed upon, and 30 per cent. interest expressly reserved.

III. It is contended that the contract between Taylor and Sutphen was void by the act of congress.

1. If Sutphen borrowed the money of Taylor, there was no agreement that Taylor should buy at one price and sell at a higher price; for Sutphen was the purchaser, and the only real purchaser in such case.

2. The person who pays the money is the purchaser, and not the person in whose name the purchase is made. And if Sutphen borrowed the money of Taylor, his money was

paid for the land, and he is in reality the purchaser. The title is held by Taylor only as security for the loan. 1 Johns. Ch. R. 582–5 ; 4 East, 576 ; 5 Johns. Ch. R. 1, 19.

3. It does not follow, that because a statute declares a contract to be null and void, that either can take advantage of it. It frequently happens, that although a statute declares a certain contract to be void, yet only one party to the contract is guilty of its violation. This is the case in regard to all those laws which declare usurious contracts to be null and void. The lender cannot set them up, because he is the guilty party ; the borrower may do so, because he is not a particeps criminis. He is regarded as the victim of the lender, and not in pari delicto. 1 Story's Eq. Jur. 301–2 ; Phil. Ev. 1447 ; Holbrook v. Sharpey, 19 Vesey, 13 ; Fonb. Eq. 190 ; Jacques v. Golightly, 2 Bl. 1073 ; Astely v. Reynolds, 1 Stra. 915 ; 2 Tuck. Com. 132 ; 2 Saund. Pl. and Ev. 672 ; Jacques v. Whitbly, 1 H. Bl. 65 ; Williams v. Hedley, 8 East, 378.

This principle applies to every contract declared to be null and void by statute, in the making of which one of the parties is not in pari delicto. 1 Story's Eq. Jur. 301, § 302.

Is Sutphen, then, particeps criminis in regard to the contract in question? If he is not, then he only can take advantage of the act of congress. We say he is not a particeps criminis.

1. If he had paid the money under this contract, the act in question gives him a remedy to recover back the overplus. It allows Taylor to keep what he paid for the land, and gives Sutphen the ballance. This provision is utterly inconsistent with the idea that Sutphen is a guilty party. It is against all law and justice, to give a guilty party relief in Equity.

2. If any doubt could remain, it is removed by the express language of the Statute. It speaks of him, or of persons in his situation, as "the aggrieved party."

3. The act was made for two purposes: first, for the prevention of fraud at sales of public lands ; and secondly, for the benefit of purchasers. If the construction of this

Act contended for by the appellant be correct, it adds nothing to the preceding section which would cover the ground occupied by such a construction. But this section was designed for the benefit of purchasers—of just such purchasers as Sutphen—and all its provisions are directed to that end.

4. All laws, in pari materia, show that it is against the policy of the Government to hold such persons as Sutphen and Ballard as guilty parties. There is a vast number of laws which clearly evince a constant disposition to permit the actual occupant and improver of public lands to buy them at the Government prices. Story's laws, 2188, 2230, 2330.

Pre-emption laws have been made, " as a bonus," to induce persons to settle upon and improve the public lands. 13 Peters, 499.

The object of the law in question was not directed against the actual settler and improver of public lands ; it was aimed at the capitalist, who, like Taylor, has endeavored to speculate in the public lands, or out of the labor of the actual settler. U. S. Laws, Instructions and opinions, Part 2, 270.

5. Sutphen, then, is not a guilty party, under the act of Congress. Taylor is guilty of a violation of that act. Sutphen is not a particeps criminis, in a moral point of view, Taylor is. This, in contemplation of the law, makes a great difference between the parties.

IV. The statute of frauds is set up, but the contract is reduced to writing. The only question is, can this contract be varied by parol on the ground of its being a security, or on the ground of usury, and specific performance be had of it in its varied form? 3 Phil. Ev. 1447 ; 1 Mon. 72-3 ; 7 do. 248, 252 ; 5 Little, 74 ; Skinner v. Miller, Ib. 84 ; 3 J. J. Marsh. 420 ; Ailhite v. Roberts, 4 Dana, 174-5 ; Atkinson v. Scott, 1 Bay, 303 ; Mitchell v. Preston, 5 Day, 100 ; Reading v. Weston, 7 Conn. 412–13 ; 1 Paige, 56 ; 2 do. 206 ; 2 Peters' Cond. R. 324 ; 1 Johns. Ch. R. 594-7 ; 1 Wash. 21 ; 1 Bibb, 333 ; 6 Mon. 154 ; Ib. 546 ; 1 Johns. Ch. R. 582.

V. Sutphen, though a purchaser of Ballard's interest, is entitled to set up usury as to the whole, because he was

originally liable for the whole amount borrowed. 1 Tuck. Com. 381.

The opinion of the court was delivered by

TREAT, J.* On the 29th of January, 1844, Charles H. Sutphen filed a bill in chancery in the La Salle Circuit Court, against Alexander Ferguson, Davis C. Ballard, and the unknown heirs of William Taylor. The bill alleges in substance, that Sutphen and Ballard had made extensive improvements on certain tracts of public land, containing eight hundred acres, which were advertised for sale by the United States; that being destitute of money and unable to buy at the sale, they applied to William Taylor for the loan of sufficient money to purchase the lands and one other tract of eighty acres, and that it was agreed between them and Taylor, that he should loan them $1,100 for the purpose of buying the land, and that the land should be purchased in the name of Taylor to secure him in the payment of the loan; that it was mutually agreed that they should pay Taylor for the loan and forbearance $330 in each of the three following years, and $1,420 at the end of four years; that this agreement was made about one month previous to the sale, and was to be executed at the time of the sale; that on the 30th of October, 1839, in pursuance of the previous arrangement, the land was purchased in the name of Taylor at $1.25 per acre, and a written agreement was then entered into under the hands and seals of the parties; and which agreement is made part of the bill, and is substantially to the effect, that Taylor agrees to sell to Sutphen and Ballard the lands for $2,420, to be paid as before stated, and upon the payment thereof, to convey them the lands so as to vest in them a perfect and unincumbered title, and Sutphen and Ballard covenant to make the payments, and in default of any of the payments being made, Taylor is, at his election, authorized to declare the contract at an end and in the event of his doing so, Sutphen and Ballard are to forfeit absolutely all of the previous payments, and thenceforward become the

*Justices THOMAS and DENNING did not sit in this case.

tenants at will of Taylor at a rent equal to an interest of ten per centum per annum on $2,420, payable quarter yearly; and the bill then alleges that the written agreement was made in pursuance of the original verbal contract, and the purchase was made in the name of Taylor for the benefit of Sutphen and Ballard, subject to the payment of the loan, and that the purchase was so made for the purpose of avoiding the question of usury; that the one thousand and one hundred dollars was advanced as a loan for the purpose of purchasing the land described in the agreement, and one other eighty acre lot; that Taylor had full knowledge of the improvements in the lands, and purchased them in his own name to avoid the appearance of usury, promising and agreeing to convey them to Sutphen and Ballard on the payment of $2,420, it being expressly understood that $1,320 was to be paid by them for the forbearance of $1,100, for the period of four years; that the sum of $330, specified in the agreement as payable annually, was the amount of interest to be paid annually on the loan of $1,100, amounting to thirty per centum per annum; that on the 1st of October, 1840, Ballard, for a valuable consideration, by an instrument in writing (which is made part of the bill,) assigned his interest in the land to Sutphen, and requested Taylor to make the conveyance to Sutphen when the conditions of the written agreement were performed; that on the 26th of December, 1840, Sutphen paid to Taylor on the contract the sum of $330; that Taylor died in 1842, leaving the defendant Ferguson, his executor, but whether he left any heirs complainant is ignorant; that there is now due on the loan and six per cent. interest thereon, deducting the $330 paid, the sum of $989.41, which sum the complainant has deposited with the clerk, subject to the order of the court; that complaint expressly releases Taylor and his representatives from all penalties under the usury laws, and is ready to pay the sum of $1,100 and lawful interest from the time of the loan, deducting the amount already paid to Taylor; and the complainant waives the oaths of the defendants to their answers, and prays for a conveyance of the land, and for general relief.

On the day the bill was filed, the complainant filed an affidavit, stating the non-residence of all the defendants; and a summons was issued against them, which was returned not found. Due notice of the pendency of the suit was given to the defendants: and at the succeeding March term, the bill was taken for confessed, against the defendants. The money brought into court by the complainant was placed in the hands of a receiver, who gave bond to pay it over on the order of the court.

On the 7th of November, 1844, Ferguson was permitted to file his answer, in which he admits that Taylor purchased the lands at the public sale, at $1.25 per acre, but alleges that he purchased with his own funds, and for his own benefit; expressly denies all of the allegations of the bill respecting a loan of money, and any agreement concerning the land prior to the day of sale, but insists if there was any such arrangement, it was contrary to the provisions of an Act of Congress, entitled "An Act for the relief of purchasers of public lands, and for the suppression of fraudulent practices at the public sales of the lands of the United States," approved, March 31st, 1830; admits the execution of the written agreement, but insists that it was made in pursuance of a bona fide sale of the land after the purchase thereof from the Government; denies that the written agreement was made in pursuance of any previous parol contract, but insists if there was any such parol contract before the purchase of the land, it was void by the Statute of Frauds; admits the payment of $330, and alleges that the balance is justly due and unpaid; admits the death of Taylor, and states, that he left the defendant and James Duncan, since deceased, his executors and residuary legatees, and exhibits a copy of the will of Taylor, showing who were his heirs and legatees.

On the coming in of the answer, the complainants obtained an order of publication against the unknown heirs of James Duncan, but no steps were ever taken under the order. On the 15th of January, 1845, the complainant filed a supplemental bill, making Newton Gannic, Nathaniel Forquer, George Porter, Elspit Porter, William Primrose, Elizabeth

Primrose, George Taylor, James Duncan and Mrs. Taylor, the persons described in the will as the heirs and legatees of William Taylor, defendants; and on affidavit of their non-residence, notice of the pendency of the suit was regularly, given, and the bill taken pro confesso against them.

On the 14th of January, 1845, the complainant took the depositions of John I. Cook, Amos Foster, and Abraham P. Hosford. This was all the testimony in the case, except an admission of Ferguson, that Ballard had assigned his interest in the land as alleged in the bill. The witness Cook deposed, that Sutphen and Ballard settled on the lands in question in 1834, and continued to occupy them till after the land sales; their improvements were worth $2.000 at the time of the land sales; that in September, 1839, Sutphen applied to Taylor to borrow $1,100, with which to buy the lands, and Taylor, after ascertaning the character of the improvements, agreed to let him have the money; it took them some time to agree on the terms, as Taylor was loaning money at a greater rate of interest than Sutphen thought he could afford to pay; Taylor said he was loaning money to the settlers to buy their land with at thirty-five and fifty per cent interest, but he would let Sutphen and Ballard have the money at thirty per cent, as they had valuable improvements, and wanted a large amount of money; Sutphen tried to get the money at twenty five per cent, but Taylor said he could do better with his money than to loan it at that rate; Sutphen proposed to take the money and secure Taylor by personal property, or by procuring good men to endorse his paper, but Taylor refused to let the money go in that way, and said that he would have the land bid off in his name, and take that in security in preference to any thing else, and that he would not loan money to purchase lands that were not improved, as the improvements were his chief security; Sutphen, on inquiry, finding money to be scarce, agreed to borrow the money of Taylor; he was to have $1,100 for four years, and was to pay Taylor interest at the rate of thirty per cent, and for the security of the money, he was to bid off the lands in the name of Taylor,

and Taylor was to give a title bond to convey the land on the payment of the money and interest; Taylor said he did not want the land, but his money and the thirty per cent interest; witness was present at the land sales, and the lands described in the written agreement were bid off in the name of Taylor, under the direction of Sutphen; and Taylor paid the purchase money, $1000, into the land office and received the certificates of purchase. Foster testified. that he saw Taylor a day or two previous to the land sales, and Taylor told him that Sutphen had applied to him for $1000, or 1.100, with which to buy ten or eleven lots of land, and that he had agreed to let him have the money at thirty per cent. interest; Taylor said he was to take the certificates in his own name as security, and give Sutphen a bond for a deed, and he would convey the land to Sutphen and Ballard at the end of four years; he said he would not invest his money in land, and did not want the land; in the evening after the sale, Taylor came into the land office and received the certificates, and in addition to the $1000 to pay the lots purchased in his name, he handed Sutphen $100 to buy another lot in his(Sutphen's)name; the written agreement was already drawn, and the $100 was included in the amount specified in it; Taylor was not present at the sale, but the land was bid of under the directon of Sutphen; the improvments were worth $2000, Hosford testified, that he was present at the land sale, and bid off the land in the name of Taylor, at the request of Sutphen; the improvements originally cost $2000, and at the time of the sale were worth at least $1000.

The cause was heard at the March term 1845, and a decree entered, that the defendants convey the lands to the complainant by deed of warranty, so as to vest in him an indefeasible estate in fee simple from all incumbrances, and that each party pay their own costs. An appeal was prosecuted by the defendant Ferguson.

The principal question arising on this record is, whether the contract between the parties was usurious. The law against usury is founded in principles of public policy, prin-

ciples that have been for ages recognized, and almost universally adopted. Without inquiring into the policy or justice of the statutes for the prevention of usury, it is the imperative duty of the judicial tribunals faithfully to execute them. If there is any injustice or impolicy in these enactments, the fault rests with the Legislature, and it must provide the proper corrective, and not the courts. Whenever the injured party invokes the aid of the courts, and presents a case clearly within the statute, there should not be the least hesitation in applying the appropriate remedy. The only effectual mode of discouraging and preventing the practice of usury, is by a rigid enforcement of the provisions of the statute. If a case comes within the mischeif of the statute, it should be held to be within the remedy. And this seems to be the principle on which these statutes have everywhere been construed and administered. The real inquiry in every case is whether there has been a borrowing and lending at a greater rate of interest than the law allows; and this becomes purely a question of fact, to be determined from all the circumstances of the particular case. The law looks at the nature and substance of the transaction, and not to the color or form which the parties in their ingenuity have given it. No imaginable act or contrivance to cover up and comceal the usury, will avail the parties. They will not be permitted successfully to evade the provisions of the statute by any conceivable scheme or expedient. The courts will follow them through all their shifts and devices, and ascertain the true character and design of the transaction. And if upon such investigation, it appears that there was in substance a loan at an illegal rate of interest no matter what form or shape the contract has been made to assume, it will be declared to be usurious, and the proper remedy applied. Floyer v. Edwards, Cowp. 112; Lowe v. Waller, Doug. 736; Duham v. Dey, 13 Johns. 40; The Bank v. Owens, 2 Peters, 527; Loyd v. Scott, 4 do. 205; Scott v. Loyd, 9 do. 418; Dunham v. Gould, 16 Johns. 367; Baker v. Vansemer, 1 Brown's Ch. R. 149; Richards v. Brown, Cowp. 770; Colton v. Dunham, 2 Paige, 267; Morgan v.

Schermerhorn, 1 do. 445; Crippen v. Heermance 9 do. 211; Delano v. Rood, 1 Gilm. 690. Our statute, so far as it has any bearing on this case, is substantially like the statutes under which these decisions have been made. After prescribing the rate of interest, it declares that no "person or corporation shall, directly or indirectly, accept or receive in money, goods, discounts or things in action, or in any other way, any greater sum or greater value, for the loan, forbearance or discount of any money, goods or things in action, than as above described." In the opinion of the court, this case comes clearly within the provisions of the statute, and the principles of the foregoing authorities. All of the facts and circumstances tend irresistibly to the conclusion, that there was in fact a loan of money at an unlawful rate of interest, and that it was so intended and understood by the parties. Stuphen and Ballard were in the occupancy of public lands, on which they had made extensive and valuable improvements. The lands were proclaimed for sale, and being without the means of purchasing them, their improvements were about to be swept away. In this extremity, they made application to Taylor for a loan of money, with which to save their possessions. Taylor was a money lender, and in the habit of loaning money to settlers at an exorbitant rate of interest. In consequence of the extent of their improvements, and the large amount they wished to borrow, he offered to let them have the money at thirty per cent. interest. Sutphen endeavored to procure the money at a les rate, but finding that he could not obtain it elsewhere, and that Taylor was inflexible in his demands, he acceded to the proposal. It was then expressly agreed that Taylor should advance them $1,100, to be returned at the end of four years, and to bear an interest of thirty per cent. per annum. For the purpose of securing Taylor, that the land was hid off in his name, and he was to execute a bond for the conveyance of the land, upon full payment of the amount borrowed and the stipulated interest. This agreement was carried into effect. Sutphen caused the land to be bid off in the name of Taylor, and Taylor paid the purchase money. A written agreement

was then entered into, by which Sutphen and Ballard agreed to pay the gross amount of the money advanced and the illegal interest; and Taylor agreed to convey them the land on full payment being made. These facts appear from the testimony of two credible witnesses familiar with all the circumstances of the case. There is nothing in the case to contradict their statements, or give any different coloring to the transaction. We cannot entertain the slightest doubt but that the contract was usurious. There were all the ingredients which constitute usury. There was a treaty concerning a loan of money, and the negotiation resulted in an agreement for a loan. The amount of the loan was to be repaid with unlawful interest. All this was designed by the parties. The agreement was executed. There was an express understanding on the part of the borrowers to pay to the lender, at all events, the amount of money borrowed and the illegal interest. It is perfectly idle to say that there was a bona fide sale of the land. Taylor disclaimed all idea of purchasing the land for his own benefit; he would only take it as security. The bidding off of the land in his name, and the execution of a written agreement, was only a device to put the contract in the form of a sale, and thereby conceal the usury. It was one of those contrivances to which usurers constantly have recourse, to evade the provisions of the statute. If there was a sale of the land, why was the $100, paid to Sutphen and not included in the purchase money, carried into the written agreement and made to bear an interest of thirty per cent.

The Statute of Frauds is set up by the answer. There is a written contract. The only question is, can this contract be varied by parol, and specific performance be had of it in its varied form. We were referred to the cases of Flint v. Sheldon, 13 Mass. 443, and Hale v. Jewell, 7 Greenl. 435, as establishing the rule, that a deed absolute on its face cannot be impeached by parol proof that the consideration was usurious. It is true, it was so decided in those cases, but the actions were at Law, and the courts place their decisions on the ground, that parol evidence was inadmissible to show

that the deeds were only intended as mortgages. But whatever may be the correct rule at Law on this last question, in Equity the doctrine is firmly settled that a conveyance, absolute in its terms, may by parol evidence be shown to have been designed by the parties as a mortgage. 4 Kent's Com. 242; 2 Story's Eq. Jur. § 1018. On this principle the complainant would be permitted to show that the legal estate was vested in Taylor only for the purpose of securing him in the payment of the money loaned and the interest. But the case stands on higher ground. In Equity, no form which can be given to a particular contract will preclude the borrowers from the introduction of evidence to impeach it on the ground of usury. It is not the form, but the nature and substance of the contract, which must determine whether the instrument be not a mere device to obtain more than legal interest, and colorable only to evade the provisions of the statute. Where usury is alleged, it may be proved by parol, and as a consequence, the written contracts of the parties may by the same kind of evidence be varied and contradicted; such evidence is competent to show that a contract in the form of an absolute sale, was, in truth, but a security for an usurious loan. 3 Phillip's Ev. 1447, note 968; Lindley v. Sharpe, 7 Monroe, 248; Fenwick v. Ratliff, 6 do. 154; Murphy v. Trigg, 1 do. 72. If this were not the rule, the statute might be easily evaded. The transaction might be made to assume the form of a sale, and the lender would thereby be enabled to receive exorbitant gains against the express prohibitions of the statute.

The complainant has pursued the proper course to obtain relief against the illegal contract. The borrower of money on an usurious contract, may tender to the lender; or bring into court for his use, the amount actually advanced with the legal interest, and then file his bill for relief; and the court will relieve him from the payment of the excess, and declare the securities to be void, and when necessary, direct them to be delivered up and cancelled; thus discriminating between the sound and vicious parts of the contract, preserving the former, and repudiating the latter. Rogers v. Rathbone, 1 Johns. Ch. R. 367; Fanning v. Dunham, 5

do. 122; 1 Story's Eq. Jur. § 301. Such a disposition of the contract does ample justice to the parties. The lender is relieved fron the penalties imposed by the statute, and allowed to receive back the money loaned with legal interest. The application of the borrower for relief, under such restrictions, ought not to be regarded with disfavor by the court. Sutphen may set up usury as to the entire contract. Although a purchaser of the interest of Ballard, he was originally liable to pay the whole amount of the loan and interest. Having covenanted to pay the whole, he has the right to be relieved against the payment of all of the illegal interest,

It is insisted that the proceedings against the unknown heirs of Taylor were not in pursuance of the statute. We do not deem it necessary to examine this question. The case as against the heirs of Taylor, as unknown persons, was virtually abandoned on the coming in of the answer of Ferguson. A supplemental bill was then filed, making, "the heirs and devisees of Taylor, defendants," by their respective names; and they were regularly brought before the court by notice of the pendency of the suit, and the bill taken for confessed against them for the want of an answer. This superseded the necessity for any proceeding against them as unknown persons.

It is also insisted that the decree was unauthorized as to the heirs and devisees of Taylor, the proofs having been taken before they were made parties to the suit. Failing to answer the bill and put its allegations in issue, no proof was necessary as to them. It was purely a matter of discretion with the court, whether it would require the complainant to make proof against the defendants in default.

It is further insisted that the decree, as to James Duncan, is erroneous. The answer stated the death of Duncan, and the complainant, thereupon, obtained an order of publication against his heirs, but they were never made parties to the case, nor were any proceedings had under the order. Subsequently, Duncan was made a defendant, as one of the devisees of Taylor, and the suit properly proceeded to a decree against him. There was no proof of the death of Dun-

can, which the complainant was bound to regard. For aught appearing in the case, he is still living. The statement in the answer, of the death of Duncan, was not evidence, the answer not beiug sworn to. Willis v. Henderson, 4 Scam. 13.

The decree is objected to, because it does not direct the money to be paid to the defendants. The court, no doubt, omitted to make any order respecting the money, because it was not satisfied which of the defendants was entitled to receive it. The court has still the entire control of the fund, and will allow it to be withdrawn by the party showing that he is entitled to it. If it belongs to the appellant, he has only to apply to the circuit court, and make satisfactory proof, and obtain an order directing the receiver to pay it over to him.

It is contended by the counsel for the appellant, that the contract between the parties, as shown by the proof, is in direct violation of the Act of Congress referred to in the answer, and that the only relief, if any, which the court can give the complainant is, to declare the written agreement to be void The fourth section of the Act prohibits, under severe penalties, all agreements and acts to prevent persons from bidding on or purchasing land at the public sales. This section does not embrace the present case, for the contract was nor calculated to prevent competition at the sale, and thereby injure and defraud the Government. The fifth section provides, "that if any person or persons shall, before or at the time of the public sale of any of the lands of the United States, enter into any contract, bargain, agreement, or secret understanding, with any other person, or persons, proposing to purchase such land, to pay or give to such purchasers, for such land, a sum of money, or other article of property, over and above the price at which the land may or shall be bid off by such purchasers, every such contract, bargain, agreement, or secret understanding, and every bond, obligation, or writing of any kind whatsoever, founded upon, or growing out of the same, shall be utterly null and void. And any person, or persons, being a party

to such contracts, bargain, agreement, or secret understanding, who shall or may pay to such purchasers any sum of money, or other article of property, as aforesaid, over and above the purchase money of such laud, may sue for and recover such excess from such purchasers in any court having jurisdiction of the same. And if the party aggreived have no legal evidence of such contract, bargain, agreement, or secret understanding, or of the payment of the excess aforesaid, he may, by a bill in Equity, compel such purchasers to make discovery thereof; and if, in such cases, the complainant shall ask for releif, the court in which the bill is pending may proceed to final decree between the parties to the same: provided, every such suit, either in law or equity, shall be commenced within six years next after the sale of said land by the Umited States." Story's Laws, 2187.

If the contract comes within the provisions of this section, we are inclined to the opinion, that the representives of Taylor cannot set up the Act of Congress as a bar to the releif sought by the bill. As the counsel for the complainant truly remarked, it does not follow because a statute declares a certain contract to be void, that either of the contracting parties can take advantage of it. A statute may declare a contract to be void, and still but one of the parties be guilty of its violation. Enactments of this character are often made for the purpose of protecting one class of men from the oppression and impositions of another class of men; and in such cases, the really guilty party is never allowed any relief under the statute, or permitted to set up the statute as a defence to relief sought by the other party. Such is the case with all laws, which declare usurious contracts to be null and void. The lender is never allowed to take advantage of the statute, because he is the guilty party; the borrower may do so, because he is not a particeps criminis. He is regarded as the victim of the usurer, aud not in pari delicto. This principle applies to every contract declared to be void by the statute, in the making of which but one of the parties is in pari delicto. Browning v. Morris, Cowper, 790; Williams v. Headley, 8 East, 378; 1 Story's Eq. Jur.

§ 298 to 305. The object of this section was not to prevent fraudulent practices at the land sales, for they are provided against in the preceeding section. The real design evidently was, to protect men in the condition of the complainant from the exactions of the speculator and morey lender. It was to prevent the latter from taking undue advantage of the situation and necessities of the former. This seems to be the aim of all the provisions of the section. If the purchaser has made payment, he may recover back the excess. He may file a bill in equity and obtain relief. He is discribed as " the aggreived party." The remedies are all directed against the seller of the land, and given to the purchaser. This seems to be conclusive of the view, that Congress only considered the seller as the guilty party. If the purchaser was regarded as a particepts criminis, why allow him relief both at law and in equity ? It is contrary to all precedent to give a guilty party relief in equity. The remedies are given to the purchaser on the ground that he is not in pari delicto. It is the opinion of the court, that the provisions of this section must receive the same construction as laws for the prevention of usury, and if the complainant was not entitled under our statute to the relief claimed by the bill, he would be under the Act of Congress in question.

The decree of the Circuit Court is affirmed with costs.

Decree affirmed.

HENRY M. STOW v. EDGAR M. GREGROY

Agreed Case from Cook.

On a trial in the Circuit Court for the purpose of establishing the amount of rent due from a tenant to his landlord, a person was called to testify, who had served a distress warrant in the case, by levying on the property of the tenant. Objection being made to him, the Court decided that he was incompetent: *Held*, that the Court erred in excluding him.

THIS was a proceeding under the statute to establish the amount due from Gregory to Stow for rent, after the levy of a distress warrant. The case was originally heard before a justice of the peace in Cook County and a jury, when a verdict was rendered in favor of Gregory for $31, he having produced and proved a set-off. Stow appealed to the circuit court, where the case was tried before the Hon. Richard M. Young and a jury. A verdict was then rendered in favor of Gregory for $75. [a] The cause was submitted in this court upon the written arguments of J. B. Thomas, B. S. Morris & J. J. Brown, in behalf of Stow, and of I. N. Arnold, for Gregory.

The opinion of the court was delivered by

CATON, J * Stow issued a distress warrant against Gregory, his tenant, for rent alleged to be due, which was levied upon the property of the tenant, and a trial was had before a justice of the peace, under the statute, to establish the amount of rent due. On the trial, the tenant produced and proved a set-off greater in amount than the rent due, and the jury returned a verdict in favor of the defendant for $31, upon which the justice rendered a judgment. From this, Stow took an appeal, and on the trial in the circuit court, without admitting the correctness of any of the items, the accounts on both sides were permitted to go to the jury without objection, with the un-

(a) See Sketoe vs. Ellis, 14 Ill. R. 75.

*Justices THOMAS and DENNING were not upon the Bench when this case was submitted and decided.

derstanding that the whole should be investigated by the jury, and that they should, under all the circumstances, determine what items on either side had been admitted, or were proved by the evidence. The jury returned a verdict for the defendant for $75. A motion was made for a new trial and overruled, and judgment rendered on the verd ict. On the trial the plaintiff produced one Wesencroft as a witness, who, as the landlord's bailiff, had served the distress warrant, by levying on the property of the tenant. He was objected to by the defendant, and the court held him incompetent, and sustained the objection.

The first error assigned is for excluding this witness from testifying, and the second is for not granting a new trial.

Was Wesencroft a competent witness for the plaintiff? In support of the decision of the court, it is urged by the defendant that the witness was interested in establishing that rent was due, otherwise he was a trespasser in making the distress. That such is his liab ility, there is no doubt, but because he may be sued in trespass, it by no means follows that he is not a competent witness to prove the amount of rent due in a suit between the landlord and tenant. As well might it be said that an officer who levies an executien, on the trial of the right of property on a claim set up by a third person, that he owns the property levied upon, is not a competent witness for the plaintiff in the execution. In such a case, the officer is liable in trespass if he levies upon property which does not belong to the defendant in the execution, yet his competency as a witness for the plaintiff in the execution will not be denied. So, also, in the case of an agent who has taken possession of property alleged to belong to his principal. And yet there can be no doubt, that if one be sued, the other is a competent witness to prove the title of the property. A multitude of familiar instances might be put to illustrate this principle, but it is unnecessary. The judgment in the one case could not be used for or against either party in another suit against the other wrongdoer.

The bailiff, officer or agent, is neither a party, nor privy to the proceeding in which he is called as a witness. If twenty persons are engaged in the commission of a trespass, each may be sued separately; and although nineteen judgments may be rendered against the party aggrieved, yet he may succeed in the twentieth. Although in that proceeding the landlord had established that there was rent due, still the tenant might have sued the bailiff in trespass; and in order to have defended himself, he would have had to have proved that rent was due, and in such suit the judgment in this suit would have been no evidence. So, now, the tenant may sue him, and yet, notwithstanding a judgment has been rendered in favor of the tenant, the bailiff might still go on and prove that rent was due, aud thus defend himself.

As the court erred in excluding Wesencroft from testifying, it is unnecessary to inquire whether the verdict was warranted by the evidence or not.

The judgment of the circuit court is reversed, with costs, and the cause remanded for a new trial.

Judgment reversed.

JOHN McCLUSKEY, plaintiff in error, v. JOHN T. McNEELY, defendant in error.

Error to Morgan.

Between the time of delivering an execution to a deputy of the sheriff and a sale made thereon, the sheriff died. The deputy proceeded with his duty as if the sheriff was still living: *Held*, that the authority of the deputy did not cease with the death of the sheriff. (*a*)

A debtor in an execution should select the property exempt from execution before a levy is made, if notified in time by the officer to make such selection; but if the officer neglect to give the notice before a levy is made, the debtor may make the selection and notify the officer thereof at any reasonable time before the sale takes place. The notice to the officer may either by parol or in writing. (*b*)

If an officer, in making a sale on execution, chooses to give a credit to the purchaser, the sale is good and a satisfaction of the execution to the amount of the sale, especially when done with the concurrence of the plaintiff in the execution.

If a debtor resides in one county and his property in another county is taken in execution, he is entitled to notice to make a selection of the property exempt from execution, equally as if he resided in the county where the execution was levied.

Where it appeared that a debtor had less property than was by law allowed him and it was taken in execution, it was *held* that he was entitled to the whole.

DEBT for the statute penalty for selling property exempt from execution, &c., brought by the defendant in error against the plaintiff in error, a deputy of the sheriff of Morgan county. The case was heard in the circuit court of said county, before the Hon. Samuel L. Lockwood, without the intervention of a jury, when a judgment was rendered in favor of the plaintiff below for three times the value of the property levied upon and sold.

W. Thomas, for the plaintiff in error, insisted,

First. That the notice should have been in writing; that the officer could not act upon the verbal notification; he should have been placed in a position to prove at anytime thereafter in self defence, that such notice had been served;

(a) Zimmerman vs. Philps, 27 Ill. R. 486.

(b) People vs. Palmer, 46 Ill. R. 402,

the defendant had no right to place the officer in a position which would require proof of a notice by witnesses, and thereby expose him to loss for defect of memory in witnesses, or their death or removal ; the defendant was bound to furnish the officers with such a notice as could thereafter be used as evidence of the fact, that a notice was given.

Second. The notice should have been given before the day of sale. It was an unreasonable notice, even if it had been in writing.

Third. The statute under which this action is brought is highly penal, and must therefore be strictly construed. No recovery can be had unless it is made to appear, that the levy and sale is of such character as to divest the defendant in execution of his right of property. In this case it is evident, that no such sale was or could be made the sheriff being dead, there could be no deputy. It is not competent for the legislature to make a sheriff; the constitution has provided otherwise, but if it were the act of 1825, vesting deputy sheriffs with the right and power to act after the death of the principal, is repealed by the act of 1826–7, respecting sheriffs and coroners, which provides, that in case of the death of the sheriff, the coroner shall act. In the cause before the court, the deputy sheriff acted under the aw of 1825. He had no right so to act. His sale divested no right, any more than a sale by any other trespasser. It s further insisted, that in this case, the sale as made amounted to nothing. It was no sale, and therefore no rights divested.

Fourth. In this case, the defendant resided in Scott county and the deputy sheriff could not, in case of disagreement in regard to the kind or value of the property claimed, have the property valued as required by the statute. The statute under which the action was brought cannot be made to apply to the case before the court.

Fifth. The property claimed is not of that description which was designed to be exempt from execution. It was intended by the legislature to exempt sixty dollars' worth of such property as could be used by the defendants in exe-

cution, and not such as would necessarily be consumed or go to waste. Provision had before been made for the benefit of defendant's coming provision and subsistence, and the $60 worth of property could not have been intended to increase the provision before made for the same purpose.

The acts exempting property from sale under execution are, the act of January 17, 1825, Revised Laws, 1833. 367 ; act of February 1, 1840, Laws of 1839–40, 89, Act of February 26, 1841, Laws of 1840–1, 171, and the act concerning sheriffs and coroners of 1827, 374.

W. Brown & R. Yates, for the defendant in error.

In considering the first assignment of error, we refer the court to Rev. Code, 316 ; Ib. 317, § 21 ; Ib. 325, § 66 ; Wilson v. Gale, 4 Wend. 623 ; 2 Dig. N. Y. R. 846, title "Error," 453.

Under the second assignment of error, we make the following points:

1. After a man has acted as a public officer, and subjected himself to penalties for the illegal manner in which he has discharged his official duties, he will not be permitted to deny his official character to avoid responsibility.

2. If property is sold by a public officer, and struck off to the highest bidder, it is a sale, although the money is not paid, unless at the time the officer disregards the bid, and sets up the property again. 1 J. J. Marsh. 12 ; 9 Johns.96.

3. The purchaser at sheriff's sale has a valid title, though no return is made on the execution. Minot's Dig. 230.

4. A sheriff cannot make evidence for himself by stating an excuse in his return. 2 Pirtle's Dig. 396 ; Littell's S. C. 271.

5. Though the return of an officer is conclusive between strangers, yet it is not so in suits in which the officer is a party. Minot's Dig. 298.

6. The notice required by our law, that the defendant claim property levied upon as exempt from execution, need not necessarily be in writing.

7. That where the defendant in execution has not as

much property as the law exempts from execution, and the officer is apprized thereof, the defendant is presumed to claim the exemption provided by the statute without any special notice of such claim. Cook v. Scott. 1 Gilm. 343–4.

The opinion of the court was delivered by

CATON, J.* Upon a judgment in the Morgan circuit court, an execution was issued against McNeely on the 3d of July, 1845, and delivered to the appellant, who was a deputy sheriff of Morgan county, and by him levied upon eight acres of standing corn of the defendant's which was advertised and sold by the plaintiff to one Ray, to whom, by the direction of the agent of the plaintiff in the execution, a credit was given for the purchase money, and the amount for which the corn was sold was indorsed on the execution as so much made. Between the time of the delivery of the execution to the plaintiff and the sale, the sheriff, whose deputy the plaintiff was, died. A short time before the sale took place, the defendant notified the deputy, verbally, that he claimed the corn as exempt from execution under the statute, and forbid the sale. The evidence clearly showed that the defendant had not as much property as the law allows him exempt from execution.

The case was tried by the court without a jury and judgment rendered for three times the value of the property levied upon and sold. This is assigned for error.

Several objections have been urged as reasons why this judgment should not be sustained. None of which we think are tenable.

We will first inquire whether the authority of the deputy under the execution ceased upon the death of the sheriff. By the Law of 1825, it is provided that "the power of the deputy sheriff to act shall not be taken away by the death of the sheriff; but such deputy may do all acts and things which he could have done, had the sheriff remained in full life, until his powers be superseded by the appointment of a

*Justices THOMAS and DENNING did not set in the case.

principal sheriff." It is insisted that this law is repealed, by implication by the law of 1827, which provides that "in case of the death of the sheriff, the coroner shall act as sheriff." We do not think that such is the proper construction of this law. Ever since the passage of this law, the practice has been otherwise, and such a construction would work the greatest inconvenience. There is nothing in the latter Act which is incompatible with the former. Both provisions are incorporated into the ninety ninth chapter of the Revised Statutes, the latter in the eighteenth section, and the former in the twenty sixth section, and this at least amounts to a legislative construction. It is sufficient to say that we cannot agree with counsel in the constitutional question raised. The deputy, then having full power to act, is responsible for the abuse of those powers. But even if he were only an officer de facto, and had not a strict legal right to the office, his acts would still be good as between third persons, and his liability would be the same.

It is objected that the notice of the claim of exemption by the defendant should have been in writing, and before the day of sale. The evidence shows that the defendant was the head of a family and all the property he had in the world was not worth more than twenty two dollars ; and consequently the whole of it was exempt from execution, if suited to his condition in life, as we are convinced that the corn was. Indeed, when we remember that he had a wife and five children to provide for, as the case shows, we cannot doubt that it was not only suited to his condition but necessary for his support. (*a*)

The statute does not require in express terms, that any notice whatever should be given, yet inasmuch as a selection has to be made by the debtor a notice of such selection must necessarily be given to the officer. But that selection and notice may as well be by parol as in writing. If the officer, as it is his dutv to do, notifies the defendant before the levy is made, that he has the executon and is about to levy, the selection should be made before the levy ; and when, as in this case, all of his property is exempt from the execution

(a) Cole vs. Green, 21 Ill. R. 104.

he may of course select and retain the whole. If, however, the officer does not notify the party before the levy, the selection may be made and notice given at any reasonable time before the sale. The notice in this case was given on the same day, and before the sale, and in sufficient time. It does not even appear that the debtor knew of the levy before the day of sale.

It has been urged that the defendant is not liable, because the money was not paid by the purchaser. The sale was notwithstanding good. If the officer chose to give a credit to the purchaser, it is still a satisfaction of the execution to the amount of the sale, especially when done with the concurrence of the plaintiff in the execution, as was the case here. (a)

I confess my inability to perceive why the defendant, who happened to live in another county, was not as much under the protection, and entitled to the benefits of the statute as if he had resided in Morgan county, where the levy was made. That objection cannot prevail. We are not only satisfied with the judgment in this case, but think it is one where the propriety of the law is made most manifestly to appear.

The judgment is affirmed with costs.

Judgment affirmed.

ELIAS ANDERSON, appellant, v. MICHAEL RYAN, appellee.

Appeal from Coles.

In actions of seduction, brought by the parent who has the right to require service of the daughter, it is no longer necessary to prove a loss of service to sustain the action. But where the action is brought by the master, who is not the parent, the loss of service must be proved. (b)

TRESPASS, vi et armis for assault, debauchery and carnal knowledge of the daughter of the appellee, brought by the latter against the appellant in the Coles Circuit Court, and

(a) Hood vs. Moore, 4 Gil. R. 99, and note.
(b) Grable vs. Margrave, 3 Scam. R. 373, and note.

tried before the Hon. William Wilson and a jury, at the May term 1845. The jury returned a verdict in favor of the plaintiff below, and assessed his damages at $656, upon which the Court rendered a judgment.

The instruction of the court below excepted to is embodied in the Opinion of this court.

A. Lincoln, for the appellant, relied on the following points and authorities:

1. The court below, by instructing the jury that they ought to infer a loss of service, withdrew the consideration of the question of the loss of service from the jury, which was contrary to law. Trotter v. Saunders, 3 Dana, 66: Tufts v. Seabury, 11 Pick. 140; 3 U. S. Dig. 571, § § 563–565; United States v. Tillotson, 12 Wheat. 180; Allen v. Kopman, 2 Dana, 221.

2. Although there may be evidence apparently sufficient to sustain the verdict, yet, as the court could not see whether the jury based their verdict as to loss of service on the evidence, or on the misdirection of the court, a new trial should have been granted. Gaines v. Buford, 1 Dana, 481, 502; Gillespie v. Gillespie, 2 Bibb, 89, 93; Wardell v. Hughes, 3 Wend. 418.

U. F. Linder, and A. T. Bledsoe, for the appellee.

The old doctrine has passed away. 5 East, 49: 2 Greenl. Ev. 471-2. It is unnecessary to prove a loss of service; it is sufficient to show that the father had a right to call for the service, although none was actually performed. Hallowell v. Abell, 32 Eng. Com. Law R. 615. It is not necessary to prove any acts of service. 21 Wend. 79, 82; 5 Harr. & Johns. 31; 2 T. R. 169; 11 East, 23; 2 Harr. Dig. 1262-3, § 6, par. 4; Hewitt v. Primm, 32 Eng. Com. Law R.; Clark v. Fitch, 2 Wend. 459; 4 Cowen, 412; 5 do. 106; 10 Johns. 115; 1 Wend. 447; 2 Leigh's N. P. 1463, § 14; 10 Wend. 338; 2 Stark. Ev. 722, note 1; Martin v. Payne, 9 Johns. 387; 22 Eng. Com. Law R. 323; Maunder v. Venn, 1 Mood. & Malk. 323; 7 Carr. & Payne, 528.

The Opinion of the court was delivered by

LOCKWOOD, J.* This was an action of seducti on, commenced by Rayn against Anderson, in which the rintiff had a verdict and judgment for $65.

By a bill of exceptions, it appears that the relation of master and servant was proved, that the daughter lived in her father's family, rendered services, and was four months advanced in pregnancy by the defendant below, when the suit was brought, and that no loss of service in consequence of the seduction was directly proved. In this state of proof the court instructed the jury, "that the law required the plaintiff to prove some loss of service and of the comfort and society of his daughter, but that proof of the slightest loss was sufficient, and if the jury should believe that the daughter of the plaintiff lived with the father and had been pregnant by the defendant for the term of four months before the commencement of the action, they might infer and ought to infer that loss of service." Defendant excepted to the latter clause of the instruction, and after verdict, moved for a new trial, which was overruled.

Whether this instruction was correct, was the only question relied on by the plaintiff in error, to recover the judgment below.

In the case of Hallowell v. Abell, reported in 32 Eng. Com. Law R. 615, on a trial at Nisi Prius, it was held that it is not absolutely essential to prove actual service by the daughter; it is sufficient if she was under the control of her father.

In the case of Maunder v. Venn. 1 Moody & Malkin, 323, and reported in 32 Eng. Com. Law. R. 323, the same doctrine was held. Littledale, Justice, who tried the cause, said "that the proof of any acts of service was unnecessary; it was sufficient that she was living with her father, forming part of his family, and liable to his control and command. The right to the service is sufficient. I remember Lord Alvanly so ruling, and I have always been of the same opinion; if it

* DENNING, J. did not sit in this case.

were otherwise, no action could be maintained for this injury by a father in the higher ranks of life, where no actual services by the daughter are usual."

It cannot, however, be doubted, that formerly the doctrine in actions for seduction brought by the father against the seducer of his daughter was, that the gist of the action consisted in the loss of service. But this doctrine has latterly been so completely frittered away by numerous decisions oth in this country and in England, that hardly a vestige of now remains. It ought not, then, any longer to be considered as law. When therefore, it appears from the proof that the relation of parent and daughter is established, with a right on the part of the parent to require service of the daughter, the law, in order to preserve the form of the action does and will infer that a loss of service did ensue from the seduction. A distinction no doubt exists, where the action is brought by a master who is not the parent. In this case the loss of service must be proved.

The doctrine on which the modern decision is based, is stated with great clearness and force, by Chief Justice Nelson, in delivering the opinion of the Court, in the case of Heart v. Prince, 21 Wend. 81. As this question has never been discussed in this Court, previous to the case at bar, we feel authorized in extracting largely from that opinion, because it furnishes reasons fully justifying the doctrine, in actions of seduction brought by the parent, that loss of service need no longer be proved to sustain the action.

In delivering the opinion in Heart v. Prince, Chief Justice Nelson says: "It is now fully settled both here and in England, (Maunder v. Venn, 1 Mood. & Mal. 323; Peake's N. P. 55, 233; 2 Stark. Ev. 721; 9 Johns. 387; 2 Wend. 459; 7 Carr. & Payne, 528,) that acts of service by the daughter are not necessary; it is enough if the parent has a right to command then, to sustain the action. If it were otherwise, says Littledale, Justice, in Maunder v. Venn, no action could be maintained for this injury in the higher ranks of life, where no actual services by the daughter are usual. After this I do not perceive how we can consistently maintain that

proof of actual loss of service is indispensable to uphold the action. It may be sustained upon the mere right to claim them, or in the language of the cases, upon the supposed services, where none were ever rendered in fact, the ground of it in the supposed case, precludes the possibility of any actual loss." Such is the spirit of more recent cases, as will be seen by a reference to those above cited.

It was conceded by Hallock, serjeant, for the defendant in Revel v. Satterfit, 1 Holt, 450, that in most of these cases the condition of service was regarded as a mere conveyance to the action. It was the form, he said, through which the injury was presented to the Court; and having obtained its admission upon legal principles, it brought along with it all the circumstances of the case.

The ground of the action has often been considered technical, and the loss of serviee spoken of as a fiction, even before the courts ventured to place the action upon the mere right to claim the services; they frequently admitted the most trifling and valueless acts as sufficient. In the case of Clark v. Flich, 2 Wend. 459, there was no proof of actual loss; and Martin v. Payne, 9 Johns. 387, was decided on the ground that none were necessary. The only actual liability of the father that appeared in the former case, was for the expenses of lying in which have never been regarded as the foundation of the suit; they are received in evidence only by way of enhancing the damages. It is apparent from a perusal of the modern cases and elementary writers in England upon this subject, that the old idea of loss of menial services, which lay at the foundation of the action, has gradually given way to more enlightened and refined views of the domestic relations; these are, that the services of the child are not alone regarded as of value to the parent. As one of the fruits of more cultivated times, the value of the society and attentions of a virtuous and innocent daughter is properly appreciated; and the loss sustained by the parent from the corruption of her mind and the defilement of her person, by the guilty seducer, is considered ground for damages, consistent with the first principles of the action. The loss of

these qualities, even in regard to menial services, would necessarily greatly diminish their value.

The action, then, being fully sustained, in my judgment, by proof of the act of seduction in the particular case, all the complicated circumstances that followed come in by way of aggravating the damages. It is not necessary that these all transpire before suit brought; if they are the natural consequences of the guilty act, they are but the incidents which attend and give character to it."

The views presented by Chief Justice Nelson, place the ground of this action upon the elevated consideration of protecting the moral purity of female character. Such an object must meet a cordial response in every uncorrupted heart. This opinion also satisfactorily vindicates the modern doctrine, as more in accordance with the original design of the action for seduction. It has long been considered as a standing reproach to the Common Law, that it furnished no means to punish the seducer of female innocence and virtue, except through the fiction of supposing the daughter was a servant of her parent, and that in consequence of her seduction, the parent had lost some of her services as a menial. It is high time this reproach should be wiped out.

The Courts of Law, both in America and in England, feeling the justice of this reproach, have from time to time been relaxing the rule, that proof of loss of service must be made before the action can be sustained, until, by the decisions above cited, they have entirely rejected the fiction of loss of service as the foundation of the action, and thereby in effect placed the action on its true basis, that is, upon the loss of character and happiness of the unfortunate female, and the consequent injury inflicted on the heart of the parent. This action ought, then, no longer to be considered as a means of recovering damages for the loss of menial services, but as an instrument to punish the perpetator of a flagitious outrage upon the peace and happiness of the family circle.

We are consequently of opinion, that that portion of the instruction excepted to was not erroneous. The judgment is consequently affirmed with costs.

The following separate opinion was delivered by

KOERNER, J. I concur with the majority of the court in the decision of this case, but wish to present briefly my views upon the correctness of the instruction, which is the only point in question, as they do not seem to coincide completely with those expressed in the opinion of the court.

I consider that the loss of service in a case of the seduction is still the just and only legal foundation of the action, and that it is the rule of evidence merely which has undergone a change in the course of time, by the decision of courts, according to a more just and refined feeling of society on this subject, at once so delicate and so painful.

Where a master, in the real sense and meaning of that term, sues in this action, I apprehend that he would still have to prove some loss of service; but where a father sues for the seduction of his daughter, while she actually or constructively resides in his family or where a person who is standing in loco parentis brings the action for seducing a female residing with him, on proof of actual loss of service is necessary ; but the law, from the relation itself, will presume it. The loss of service being in such a case a presumptio juris, it requires no proof, cannot be disproved by the defendant, and must be found to exist by a court or jury. An instruction therefore by the court in a case where the relation of parent and child, and the residence of the latter in the family of the former was clearly established, "that the jury ought to infer loss of service" was not erroneous, but, upon the principles just suggested, manifestly correct.

MURRAY McCONNELL, plaintiff in error, v. ELLEN GREENE, defendant in error.

Error to Morgan.

A sued B. in ejectment, and to sustain his title, introduced a deed from the Auditor of Public Accounts, dated January 23, 1835, for the premises in controversy. The deed recited a sale on the 19th of January, 1833, for the taxes due on the land for 1832. It appeared by an agreement filed in the case that the former owner died in the year 1833, and the defendant proved that he died prior to that year, but the precise day of his death was not stated. The defendant introduced and read in evidence a receipt bearing date February 8, 1841, signed by the Treasurer and countersigned by the Auditor, acknowledging a receipt from the heirs of the former owner of the redemption money on the sale of the Auditor to the plaintiff. The latter objected to its introduction, but the issue was found for the defendant and judgment rendered thereon: Held, that the agreement did not preclude either party from proving in what part of the year he died; that the plaintiff might show that his death was subsequent to the sale, and the defendant that he died prior thereto; that the evidence showed at least, that he was not living on the day of the sale, and, therefore, that a proper basis for the redemption was established: Held, further, that the receipt was compentent evidence of redemption. (a)

EJECTMENT, in the Morgan Circuit Court, brought by the plaintiff in error against the defendant in error, and heard before the Hon. Samuel D. Lockwood upon the plea of not guilty, &c. The court found the issue for the defendant, and rendered judgment accordingly.

The evidence introduced by the parties is stated by the Court.

M. McConnell, pro se.

J. J. Hardin & D. A. Smith, for the defendant in error.

The Opinion of the Court was deliverd by

TREAT, J. This was an action of ejectment commenced in October, 1841, by Murray McConnell against Ellen Greene, for the recovery of a tract of land lying in Scott county. A plea of not guilty was filed by the defendant.

The cause was heard by the court at the July term 1842. An agreement of the parties entered into and filed on the 30th of June, 1842, was read in evidence, stating in substance, that prior to the year 1825, the land in dispute was purchased of the United States by William Ellige, who conveyed the same to William Lacy on the 19th of August, 1830; that Lacy died intestate in the year 1833, leaving the defendant, his widow, and several infant heirs, some of whom are not yet of age; and that the defendant has since remained in the possession of the land. The plaintiff then introduced a deed from the auditor, bearing date the 23d of January, 1835, for the premises in question. The deed recited a sale to McConnell on the 19th of January, 1833, for the sum of $1.39, the amount of the taxes due on the land for the year 1832. The defendant then proved that Lacy died prior to the year 1833; and then read in evidence a receipt bearing date the 8th of February, 1841, signed by the treasurer and countersigned by the auditor, acknowledging the receipt of the sum of $2.78 from the heirs of William Lacy for the redemption of the land from the sale to McConnell. The plaintiff objected to the introduction of this testimony. The court found the issue for the defendant, and judgment was entered accordingly. McConnell has sued out a writ of error. The decision of the court in admitting the evidence offered by the defendant, and in rendeing judgment in her favor are assigned for error.

The sale of the land to McConnell was made under the provisions of "an act to provide for raising a revenue," approved the 19th of February, 1827. See the Revised laws of 1827, page 325. The 4th section of that act requires the auditor, on the first Monday of January and the succeeding days of each year to sell all lands except such as are listed for taxation in the counties in which they lie, for the non-payment of the taxes due thereon for the preceding year; and authorizes him to convey the same, and declares that his deed shall vest a perfect title in the purchaser, unless the land shall be redeemed, or the owner shall show that the taxes had been paid, or that the land

was not subject to taxation. The fifth section allows the owner to redeem within two years from the day of sale, by paying into the State treasury double the amount for which the land was sold; and it further provides that lands belonging at the time of the sale in whole or in part to heirs under age, may be redeemed at any time before the expiration of one year from the time the youngest of them becomes of age; and then proceeds to prescribe the mode of such redemption and the character of the evidence to be exhibited, and requires the proof on which the redemption is founded, to be delivered to the auditor and filed in his office. There is a question of serious importance, whether these provisions were not absolutely repealed by the 18th section of "an act concerning the public revenue," approved February 27, 1833. See the Rev. Laws of 1833, page, 528. A solution of the question is not essential to the decision of this case; and we will proceed to determine it on the assumption that the provisions of the former act continued in force until the execution of the deed to the plaintiff, and the redemption of the land by the heirs of Lacy; for both of these facts transpired after the passage of the second act.

It is insisted that the defendant was excluded by the stipulations, from proving that Lacy died prior to the year 1833. The agreement states generally, that he died during that year. This did not preclude either party from proving in what part of the year he died. The plaintiff had the privilege of showing that he died subsequent to the day of sale, for the purpose of defeating the redemption; and the defendant had the right to show that he died previously in order to sustain the redemption. The evidence showed at least, that he was not living on the day of sale, and therefore established a proper basis for the redemption. But in the absence of any explanation of the agreement, the court would have been fully justified in presuming that he died prior to the day of sale, in order to protect the rights of the minors.

Again, it is contented, that the receipt presented by the defendant was not competent evidence of the redemption.

We think otherwise. The evidence on which the Auditor allows a redemption of land is preserved in his office; and the receipt given by the Treasurer and countersigned by him, furnishes at least prima facie evidence of the fact of the redemption. It pre-supposes a decision of the Auditor allowing it. The presumption is, that he proceeded conformable to the law. Whether his decision is conclusive need not now be determined. If it is not, and his decision in this case was erroneous, the plaintiff might have avoided the effect of the redemption by producing a transcript of the evidence on which it was founded.

If the testimony was properly admitted, it follows that the court decided correctly in rendering judgment for the defendant. The redemption divested whatever title the plaintiff acquired by virtue of the sale for taxes. The dower of the widow was thereby saved. The statute allows an heir having a partial interests in the premises to redeem. The redemption when made is perfect and complete, and extinguishes all the title acquired by the purchaser.

The judgment of the circuit court is affirmed with costs.

Judgment affirmed.

(a) Redemption by tenants in common Laws 1847 p. 166]

ARCHIBALD ALLEN, plaintiff in error, v. NATHANIEL BELCHER, administrator of Otis Reynolds, deceased, defendant in error.

Error to Warren.

The Circuit Court, as an appellate Court, is circumscribed within the same limits as the Court in which the case originated. If the want of jurisdiction be apparent, the Circuit Court must dismiss the cause, and leave the parties to litigate anew their differences in some competent trial. But the parties may, nevertheless, by mutual consent, avoid such consequences, by submitting the case to the Circuit Court to be determined as if originally commenced there. The only inquiry then would be, whether the Court would have had jurisdiction of it as an original action. (a)

A. filed before a Probate Justice a claim against the estate of a deceased person. The administrator claimed and exhibited a set-off of a larger amount, and the Court rendered a judgment in his favor for $1,450. A. appealed to the Circuit Court, where, after several motions were made on either side, the parties agreed that the cause should be tried on its merits. It was then submitted to a jury, when a verdict was rendered for the administrator for $1,500. Judgment was then rendered, with directions to the clerk to certify the proceedings to the Probate Justice, and directing him to award execution, &c: *Held*, that the Circuit Court, by the consent of the parties, had jurisdiction of the cause, but erred in directing the Probate Justice to issue execution.

THIS was a proceeding originally commenced before the Probate Justice of Rock Island county by the plaintiff in error against the defendants in error. Judgment being rendered against the former for $1, 450, he appealed to the circuit court, and afterwards took a change of venue to Warren county, where the cause, by agreement of the parties, was tried on its merits before the Hon. Norman H. Purple and a jury. A verdict was rendered against the present plaintiff in error for $I,500, on which there was judgment, and a special order which is set forth in the Opinion of the court.

The cause was submitted in this court upon the briefs and written arguments of Browning & Bushnell for the plaintiff in error, and of Knox & Drury and T. Ford for the defendant in error.

(a) Ginn vs. Rogers, 4 Gil. R. 131. Randolph Co. vs. Ralls, 18 Ill. R. 29, and note.

The opinion of the court was delivered by.

TREAT, J. On the 6th of June, 1842, Allen filed in the office of the Probate Justice of the Peace for Rock Island county, a claim against the estate of Otis Reynolds, for $182.75. Belcher, the administrator of Reynolds, exhibited by way of set off, an account against Allen and in favor of the estate, for $2,794. The Probate Justice heard the case, and rendered a judgment in favor of the administrator for $1,450. Allen prosecuted an appeal, and at his instance a change of venue was awarded to Warren county. In the latter Court, Allen entered a motion to dismiss the case or take a nonsuit; and Belcher entered a motion for additional security for costs, and another for the dismissal of the appeal. While these motions were pending, the parties agreed that they should be withdrawn and not again be renewed, and that the cause should stand for trial on the merits. The cause was then tried before a jury, and a verdict returned in favor of the administrator for $1,500. Allen entered a motion in arrest of judgment, which the court denied. A judgment was then entered in favor of the administrator for the amount of the verdict and costs, with a further order that a certified copy of the judgment should be transmitted to the Probate Justice of Rock Island county, who, after making a record thereof, should proceed to enforce the collection of the judgment by issuing execution thereon,

Allen brings the record into this court and assigns for error the decisions of the circuit court, denying the motion in arrest of judgment, and directing the judgment to be certified to the Probate Justice that execution might issue thereon.

It is insisted by the plaintiff in error, that Probate Justices are limited in their jurisdiction to cases in which the amount claimed on either side does not exceed one thousand dollars; and consequently, the Probate Justice had no jurisdiction over the present case, and none was acquired by the circuit court, where the cause was pending on appeal. We do not

deem it necessary to discuss the question whether the Probate Justice had jurisdiction. It is very clear that jurisdiction was vested in the circuit court by the stipulations of the parties, if it did not otherwise possess it. It is admitted that a circuit court cannot entertain jurisdiction of a case brought before it by appeal, unless the inferior court had jurisdiction. As an appellate court, its powers are circumscribed within the same limits as the court in which the case originated. Where the want of jurisdiction is apparent, its only duty is to dismiss the case, and leave the parties to litigate anew their differences in some tribunal competent to adjust them. The parties may, nevertheless, by mutual consent, avoid such consequences, by submitting the case to the circuit court to be determined as if originally commenced there. In such case the only inquiry would be, whether the court would have had jurisdiction of it as an original action. If so, it should proceed to hear and determine it as such, without any reference to the previous proceedings, which the parties have thought proper to disregard and abandon. The doctrine that consent cannot confer jurisdiction has no application. Consent cannot invest a court with jurisdiction, where by law it has no authority to adjudicate upon the subject matter of the suit; but where it has jurisdiction over the subject matter, the parties may, by a waiver of their personal privileges, render the jurisdiction complete. This is frequently done by dispensing with process, and other preliminary proceedings, and the right to do it cannot be controverted. The circuit court as a court of original jurisdiction had the right to take cognizance of the subject matter of the present case; and the parties, by waiving their objections to the mode in which it reached there, and assuming that it should be heard on the merits, fully submitted the subject matter and their persons to the jurisdiction of the court. Its jurisdiction over the case was thus made ample and complete, and its adjudications need not the aid of the previous proceedings to be sustained.

The order of the circuit court directing the Probate Jus-

tice to issue execution on the judgment, was unwarrantable and must be reversed.

The judgment of the circuit court in favor of Belcher and against Allen will be affirmed, and the order of the circuit court directing the probate justice to issue execution on the judgment will be reversed, and execution upon the judgment will issue from the circuit court of Warren county. The costs of this writ of error to be paid by Belcher, as administrator of Reynolds.

Judgment affirmed, &c.

MARTIN B. SHELBURN, Executor of David Robinson, deceased, plaintiff in error, v. RICHARD ROBINSON, defendant in error.

Error to Cass.

An executor voluntarily paid over to one of the legatees named in the will, an amount supposed to be equal, or nearly so, to the interest of the legatee. It was subsequently, after a lapse of ten years, alleged by the executor that the legatee had been overpaid, and upon a request and a refusal to refund, the former commenced a suit to recover back the alleged excess: Held, that if the executor was entitled to recover at all, he was, notwithstanding, barred by the Statute of Limitations.

The Statute of Limitations begins to run when a cause of action accrues. In a case where some act is to be done, or condition precedent to be performed by a party to entitle him to his right to sue, and no definite time is fixed at which the act is to be done or condition performed, he must exercise reasonable diligence to do the one, or perform the other, or he will be barred by the Statute.

ATTACHMENT, in the Cass Circuit Court, brought by the appellant against the appellee, and heard at the May term 1846, before the Hon. Samuel D. Lockwood, when a judgment was rendered for the appellee.

The pleadings and agreed state of facts will appear in the opinion of the court.

The cause was submitted for the determination of this court, upon the written arguments of J. J. Hardin & D.

A. Smith, for the appellant, and, W. A. Minshall & R. S. Blackwell, for the appellee.

The opinion of the court was delivered by

PURPLE, J. At the May term, A. D. 1846, of the Cass county circuit court, the appellant sued the appellee in attachment, and caused the same to be levied upon certain lands as the property of the appellee. The declaration was in assumpsit, claiming $500 damages upon the state of facts as agreed to by the parties. The appellee pleaded:

First, non-assumpsit;

Second, non-assumpsit within five years; and

Third, that appellant was not executor.

There was an issue upon all the pleas.

The following state of facts was agreed to by the counsel for the parties respectively:

"That David Robinson departed this life testate, in November, 1833, bequeathing to the defendant one sixteenth of his personal estate after the payment of debts; that said testator resided in Shelby county, Kentucky, at the time of his death; that the plaintiff below and Samuel Hankinson were appointed executors of the will, and their giving bond was dispensed with in the will; that at the May term 1834, of the county court of said county, probate of said will was made by the said executors, and they took the oath of office required by law, and probate of the will was granted them in due form of law.

In the State of Kentucky, on the 25th January, 1836, the plaintiff below, as executor of David Robinson, deceased, voluntarily paid the defendant below, as one of the legatees of the deceased, the sum of $250 cash, and on the same account on the day following, $46.87 1-2 in merchandize, it being supposed at that time that the ultimate interest of the said legatee as aforesaid, would amount to that sum or more.

On the 28th day of January, 1842, the executors made a final settlement of their accounts as such with the commissioners appointed by the county court of Shelby county,

Kentucky, exhibiting various items of charge and credit, not including the aforesaid payment, &c., to the said defendant. Said commissioners reported that there was in the hands of the executors for distribution, the sum of $3377.89. The settlement with its accompanying vouchers was filed, subject to exceptions, at the May term, A. D. 1842, of said court. No exception being filed to the settlement, the same was ordered to be recorded at the June term 1842, of said court.

About one month before the institution of this suit, the plaintiff below applied to the defendant in that court to correct the mistake in the over payment of his legacy as alleged above, and requested him to pay said plaintiff what was due him in the premises, and the defendant refused to accede to the said request."

Admitting that under this state of facts the appellant would in any event be entitled to recover, it is clear that in this case his claim is barred by the Statute of Limitations. More than ten years have been permitted to elapse since this money has been paid to the legatee, and if, under the circumstances, the appellee ever had a right to recover it back in this form of action, no reason whatever is shown in the agreement of the parties, why the mistake was not sooner discovered, and that right asserted. For any thing which appears in the record, the appellant could as well have known the true situation of his testator's estate ten years ago as at the time of his final settlement in the year 1842. The Statute of Limitations begins to run when a cause of action accrues. In a case where some act is to be done, or condition precedent to be performed by a party to entitle him to his right to sue, and no definite time is fixed at which the act is to be done or condition performed, he must exercise reasonable diligence to do the one or perform the other, or he will be barred by the Statute of Limitations; otherwise it would be in his power to defeat the law by his own negligence and wrong.

The judgment of the circuit court is affirmed with costs.

Judgment affirmed.

ARCHIBALD WILLIAMS, appellant, v. THOMAS BRUNTON et al. appellees.

Appeal from Adams.

It is a well established rule, that in an action of ejectment, the landlord may appear and defend the cause in the name of the tenant, or in his own name; and also that where a tenant from negligence or fraud has omitted to appear himself, or to give the landlord the necessary notice, the courts will set aside a judgment by default against the tenant, upon proper affidavit being made by the landlord.

A person claiming to be let in to defend in ejectment, must show that his title is connected to and consistent with the possession of the occupant.

A judgment or a decree may, for some purposes, be considered as an extinction of the original cause of action; for instance, for the purpose of regulating the interest on money to which a party is entitled before final satisfaction of the debt. But it is equally true, that for many other purposes as for the ascertaining of priority of liens for instance, the principle of extinction or merger finds no application.

A judgment or decree, and a subseduent purchase and obtaining of a deed for the land from the Master or sheriff, is regarded as being connected with, and as being in aid of the mortgage's original title. A subsequent title, so obtained, is clearly consistent with the first title.

The statute concerning the action of ejectment does not specially provide for cases of landlords and other persons interested applying to be let in to defend, but refer to cases only where the party, or his assigns, or those claiming under him move to set aside defaults. Where the statute is silent, the practice and rules of the Common Law are applicable.

Under the English practice before the Statute of Geo. I. the landlord who was admitted to defend, had a right to have the judgment against the casual ejector set aside. The statute afterwards provided that, in such cases, courts may stay the execution against the casual ejector. One or the other may now be done, in the discretion of the court.

After one had been permitted, in an action of ejectment, to come in and plead, the plaintiff to join issue on the pleas. The defendant's counsel then moved the court to order the plaintiff to join issue, and the motion was allowed. The plaintiff, in propria persona, declined in court to join issue, and a jury was sworn and a verdict rendered against him: *Held*, that his declining to take issue on pleas which present a full defence to his action, amounted to a discontinuance, and that the correct practice would have been, for the court to have dismissed the case for want of prosecution.

EJECTMENT, in the Adams circuit court, originally brought by the appellant against the appellee, Brunton. Subsequently the other appellee, John P. King, was let in to defend the suit, and pleaded for himself and Brunton. At the Sep-

tember term 1846, the Hon. Norman H. Purple presiding, on motion of the attorneys of King and Brunton, the plaintiff below was ruled to join issue, which he declined doing, whereupon a jury was empaneled and sworn, and a verdict rendered of "not guilty," on which there was judgment. The plaintiff appealed.

A. Williams, pro se, argued orally.

1. The court erred in setting aside the judgment against Brunton, upon the motion of King and allowing him to defend; because

First. There was no privity between them. None but landlords are permitted to defend, and to establish the relation of landlord and tenant; privity, either of contract or title, is indispensable. Jackson v. Chase, 2 Johns. 86; McKircher v. Hawley, 16 do. 289; 1 Caines, 151; 6 Cowen, 594; 17 Johns. 112; 1 Wend. 103; 1 Bibb, 128; 4 do. 87; 4 Johns. 215; 16 do. 291.

Second. If there was privity whilst the mortgage was in force, it ceased upon its foreclosure. The mortgage being thereby extinguished, and the decree of foreclosure substituted in its stead, the only remedy upon it was, to sell the land for the satisfaction of the decree. 3 Scam. 263.

Third. The affidavit upon which the motion was founded, shows no sufficient reason for setting aside the judgment. It neither avers that King had title, nor denies that the plaintiff had title; nor is there any pretence of collusion between the plaintiff and defendant. Good Title v. Bad Title, 4 Taunt. 820.

Fourth. Allowing that King had shown himself entitled to defend, yet the judgment against Brunton ought to have stood. Runnington on Eject. 403; 4 Johns. 495-6.

2. The court erred in trying an issue when none was joined. 2 Tidd's Pr. 727-8, 925, 718; 1 do. 472; 2 Moore, 215; S, C. 4 Eng. Com. Law R. 416; 3 Brod. & Bing. 1; S. C. 7 Eng. Com. Law R. 321; Stephen on Pl. 237-8, 109, 56, 76; Cooper v. Spencer, 1 Stra. 641; Heath v. Walker, 2 do. 1117.

O. H. Browning & N. Bushnell, for the appellees, filed the following written argument:

I. The first ground relied on by the plaintiff in error to reverse the judgment in this case, is, that the defendants brought the case to trial on the general issue pleaded by them, and to which neither the defendants nor the plaintiff had added the similiter; in other words, the want of a similiter is relied on as a ground of error. Now, the omission of a similiter is cured by verdict; it is no objection to bringing a case to trial. 1 Duer's Pr. 449; Morrison v. Hart, Hardin, 150; Rowbone v. Hickman, 1 Stra. 551; 2 Tidd's Pr. 924-5; Jared v. Goodtitle, 1 Blackf, 29 and notes. So where a trial is had without a plea, (Brazzle v. Usher, Bre. 14,) or with an impossible plea, (Commonwealth v. Walker,) (1 Hen. & Munf. 153,) it is cured after verdict.

The cases proceed upon the ground that where there has been a trial in the above cases, the party complaining of the want of a similiter or of a plea, has had the benefit or the opportunity of a full and fair trial just as if in the given case the similiter had been joined or the plea put in. Now, in this case, the same thing appears from the record. The plaintiff was in court in person, and at the very time he is so in court, and in his presence a jury is called and sworn to try the cause. Whether the plaintiff did or did not assent to this, or whether he did or did not offer his evidence to the jury, does not appear from the record; neither does the record show that the plaintiff objected to the calling of the jury, or the trial of the cause, or to the verdict of the jury, or to the judgment being rendered on the verdict. The plaintiff simply declined to add the similiter to the defendants' pleas himself, but he did not object to the similiter being added by the defendants, nor to the trial of the cause without it; and whether he stood by and permitted such proceedings without objection, and thus silently acquiesced in them, or whether he participated in them and thereby actually assented to them, he has not thought best for him to show from the record. In either case, the court will see that the plaintiff has had the same opportunity to have his rights fully

and fairly investigated by the jury, as if the similiter had in fact been added, and if he in fact participated in the trial, there cannot be the shadow of a pretence for the objection made here. Now, the adding the similiter is a mere matter of form, so much so that it is usual for the party filing a pleading which concludes to the country to add the similiter himself. 1 Duer's Pr. 449; Gould's Pl. 315, § 21. And although in such a case the opposite party may strike it out, yet he can do so only to demur, not for the sake of delay or from any cause not required to effect the case for a trial. 2 Tidd's Pr. 718, 726; 14 John. 345. At all events, this is an amendable defect, and if the court are of opinion that the defect requires amendment, we will be allowed time to procure the necessary amendment to sustain the judgment. Nothing is better settled, than that the want of or defect in a similiter is amendable after verdict. Sayer v. Pocock, Cowp. 407; Harvey v. Peake, Burr. 1793; 1 Stra. 551; 2 Saund. 319 and notes; 1 Duer's Pr. 449; Gould's Pl. 315, §§ 20, 21. Even when the want of a similiter was objected to previously and on trial. 1 Chitty's Pl. 631; Wright v. Horton, 2 Eng. Com. Law R. 443. And also after error brought, is indeed not considered as being assignable as error after the judgment; it is considered simply as the same question as that arising after the verdict. Brewer v. Sarpley, 1 Wash. (Virginia R.) 469; Turberville v. Self, 2 do. 91.

The circuit courts, at any future term, may make any proper order to sustain a judgment of a previous term, but not to vacate it. Lampsett v. Whitney, 3 Scam. 170. And this is a proper case for such an order. Vanzandt v. Jones, 3 Dana, 464; Cook v. Burk, 5 Taunt. 164; Snyder v. Snyder, 4 Cowen, 394.

II. That a landlord will be admitted to defend in ejectment, in the place of the tenant in possession, has been already decided by this court. Thompson v. Schuyler, 2 Gilm. 271. This is simply adopting the common law practice into the proceedings under our ejectment law. At common law, the landlord might defend in ejectment jointly with the tenant in possession; or, if through the negligence or

fraud of the tenant in not appearing, judgment by default was entered against the casual ejector, the landlord was permitted to have the judgment set aside, and to defend alone. Adams on Eject. 255, 257; Underhill v. Durham, 1 Salk. 256. This admission of the landlord to defend was a matter of right. Fenwick's case, 1 Salk. 257. And, although the practice in setting aside the judgment by default against the casual ejector was somewhat shaken by the decision in the case of Goodtitle v. Hart, 3 Strange, 830, yet that is the only known decision adverse to such a proceeding. It is certainly contrary to what has been generally considered as law, and is supposed to have given rise to the Statute 11 Geo. 2, Ch. 19, § 13, which is considered, not as introducing a rule of practice, but as a legislative recognition of the law as it stood previous to the decision in Goodtitle v. Hart. Fairclaim v. Shamtitle, 3 Burr. 1290, 1301, per Justice Wilmot; Adams on Eject. 256—7.

The question then is, who is a landlord within the meaning of the rule? We answer, any person "whose title is connected to and consistent with the possession of the occupier;" and when the plaintiff claims an interest in the land inconsistent with the title of such landlord, the latter may be let in to defend. Fairclaim v. Shamtitle, 3 Burr. 1290; Adams on eject. 259—60; Stiles v. Jackson, 1 Wend. 316; Driver v. Lawrence, 2 W. Black. 1259; Buford v. Gaines, 6 J. J. Marsh. 34, 40—2; Norris v. Doncaster, 4 T. R. 122. A mortgagee, whether in possession or out of possession, is a landlord within the rule. Coleman's cases 56; Doe v. Cooker, S. T. R. 645; 1 Powell on Mort. 203, note g; Jackson v. Stiles, 11 Johns. 407. And the same is true of the assignee of a mortgagee, though out of possession. Jackson v. Babcock, 17 Johns. 112.

The question as to who is a landlord, and the principle on which he is let in to defend in ejectment, are most fully discussed in the above case of Fairclaim v. Shamtitle, 3 Burr. 1290, which is, perhaps, the most important case on the subject. The principle, as laid down in that case, and which has been followed by all succeeding cases, is, that when the

interests of the party asking to be made defendant and the tenant in possession do not clash so that they may make inconsistent defences, and their estate or interests are so connected that it is more for the interest of the applicant that the tenant remain in possession than that he be turned out of it by a title adverse to both, then such party is a landlord within the meaning of the rule, and will be let in to defend. The arguments for it are, that it can be no inconvenience to the tenants, prevents collusion between the tenant and third persons, that it is but just to a party whose interest may be materially affected by a proceeding to which he is not a party ; and that it is no answer to say that the landlord can himself in turn bring ejectment and recover possession against the plaintiff in the prior suit, for the reason that there is a great difference betwen being plaintiff or defendant in an action of ejectment. 3 Burr. 195. This case comes clearly within the rule. Brunton and King both claim under Walker. Brunton purchased of Walker and entered iuto possession under him after the mortgage to King was made and recorded, and now holds by title subordinate to the mortgage. From these facts, King, on the perfection of his title under the mortgage, would not, as against either Walker or Brunton, be required to show title in Walker. The relation of the parties would preclude both Walker and Brunton from denying Walker's title. McConnell v. Johnson, 2 Scam. 522, 528 ; Jackson v. Walker, 7 Cowen, 637 ; Jackson v. Hinman, 12 Johns. 292. But if Williams recovers in this suit, King, to avail himself of his mortgage title and to recover in ejectment against Williams, would be required to show title in Walker, a matter which might put him to great inconvenience. This shows his interest in defending Brunton's possession, while their defences cannot clash, for both must rest on the title of Walker. It can work no injustice to Williams, for King can defend only in the place of Brunton, and to the same extent that Brunton might have done, [Jackson v. Stiles, 1 Cowen, 575,] and probably would have done, but from fraudulent motives. And this last principle explains why, in the case of Jackson v. Babcock, 17

Johns. 112, the party applying to defend was prohibited from defending under his prior judgment, which, under the circumstances of the case, the tenant in possession could not have relied on.

But it is said that there is no privity between King, and Brunton, and for that reason King will not be allowed to interfere, and the case of Jackson v. Fuller, 4 Johns. 215, is relied on to sustain this position.

In the first place, that case turns upon the question as to whether the party in possession was entitled to a notice to quit, and that again depends upon whether the parties are technically landlord and tenant. Notice to quit is confined to tenancies in the common legal acceptation of the term. This objection is a covert attempt to fritter away the rule as before laid down, and to narrow down the right of a party to defend in ejectment as landlord to cases where the party is a technical landlord.

Again. It is not necessary to discuss the question how far the relation between King and Brunton comes within either of the four Common law privities, mentioned in the 2 Thomas' Coke, 408, top paging. A "privity of interest," (Jackson v. Babcock, 17 Johns. 112, or " a privity of contract, " (Jackson v. Laughland, 2 do. 75,) is sufficient. No "privity of estate" is necessary. This "privity of interest" seems to be a new privity, or new mode of expression adopted to denote the imperfect connection which is necessary between the parties for the purposes of the case under discussion, and other analogous cases. It is expressly distinguished from the " privity of estate" by the New York statute on this precise subject. 4 Johns. 495, note a. In this case, there is both a privity of interest "and a privity of contract."

As to the privity of interest: Both parties claim under the same title. Their interests are perfectly consistent with each other, the one being subordinate to the other and both making the component parts of one and the same estate. Any outstanding title, destructive of the fee on which rests the interest of Brunton, equally destroys the interest of King,

and hence both have a common interest in defeating such title. King has not only this common interest with Brunton against an outstanding title, but, as we have seen, a peculiar interest in defending Brunton's possession, since thereby in proceeding against Brunton, King will be in a great measure relieved from the necessity of showing paper title in himself. If standing in this relation, where the interests of King and Brunton depend on the same title, where these interests are perfectly consistent with each other, where their defences cannot clash, where an outstanding fee which defeats one destroys both, and were King has such a peculiar interest in defending the possession of Brunton; if under these circumstances, King has not a "privity of contract" with Brunton so as to be entitled to defend that possession, then the rule as before laid down, is little less than a practical fallacy, and the meaning of the term "privity of interest" most incomprehensible. The fact, that, from the relation of the parties, neither King nor Brunton can, the one as against the other, deny Walker's title, seems to us conclusive evidence of such privity.

As to the privity of contract: The affidavit of King's agent proves a privity of contract between King and Brunton in this case. The land in controversy and other lands were subject to King's mortgage. King, by his agent, at the instance of Brunton, from a disposition to favor him, and for no other reason, agreed that he would first sell all the other lands, and would sell this tract only in the event that the other lands did not pay the debt; and Brunton in consideration thereof agreed not to encumber this land nor to permit the same to be incumbered in the meantime, so that King should not be prejudiced by this indulgence. The contract then, extended to this precise case.

Good faith in Brunton and the obligation of the contract required of him, that when, sued he should have immediately notified King's agents or have defended the suit; but, as the affidavit shows, he fraudulently failed to do so. Brunton purchases land incumbered by a prior mortgage—takes possession under the mortgagor's title—then contracts with mortgagee for his

own benefit, to remain in the undisturbed possession of the mortgaged premises. Is not here a "privity of contract" between King and Brunton, and that too, about the very things to be affected by this suit—the mortgage rights of King and the possession of Brunton?

But it is then said that the mortgage is merged in the judgment, and hence King cannot be admitted to defend.

Now admitting the merger for the sake of the argument, it is difficult to perceive how this at all invalidates the position arising out of the "privity of contracts." In whatever light King's claim is to be viewed, he still has a specific lien on the land for a debt. Whether, as a mortgagee in a forfeited mortgage, he is seized of a defeasible legal estate, or whether by the process of strict foreclosure, he is in the act of procuring a legal estate which is indefeasible, or whether by the process of sale on foreclosure, he is in the process of collecting his debt by enabling the officer to convey an indefeasible legal estate to a purchaser in either event; and at whtaever stage of the proceedings, he clearly has a right specifically connected with the land, depending upon the title to the land ; and that again, to some extent on the possession of Brunton under the title derived from their common grantor. This right it is important for him to protect, and concerning it he may lawfully contract. Concerning this right, after the judgment, when it was precisely the same as at present, and as at the time when this application for leave to defend was made, King and Brunton did contract. By the contract, Brunton was bound to protect that right, and preserve it to King unimpaired. He has violated this obligation, and is now fraudulently permitting King's interest to be endangered. Here, then, again is a "privity of contract" about the same interest and the same possession in controversy — the interest of King and the possession of Brunton. It cannot now lie in the mouth of Brunton to say that King has not a sufficient title or interest on which to interfere about the possession. He has admitted its sufficiency by contracting with King concerning this possession as connected with this precise interest; he has received the

benefit of that contract, and is bound by it to defend tha possession as the means of securing King's right. The objection in this case comes from Williams. But it is founded on the want of a sufficient relation between King and Brunteon to authorize King to interfere in Brunton's businesst This is always the principle on which the objection is made whether it comes from the tenant or from the plaintiff in ejectment. But if Brunton, by his own acts and contracts has established or strengthened that relation between himself and King, and thereby precluded himself from making the objection, how can Williams, whose right to object depends on the absence of such relation, and the right of Brunton, make the objection for Brunton or in his stead?

But as to the merger. It may be in some sense true that the mortgage is merged in the judgment. Aldrich v. Sharp, 3 Scam. 261–63. If, as is presumed, it is only meant that by a judgment on a mortgage, the debt is ascertained and fixed, and thereby becomes subject to the legal incidents of a judgment debt, there is no doubt of its correctness. But if it is meant that the mere judgment of its own efficacy, without sale or deed retro-acts upon the mortgage, and disturbs or drowns the lien and estate created by it on the principle of merger, there will be some difficulty in admitting it. The debt is one thing, the mortgage a collateral security for that debt, is another and a very different thing. The debt remains, notwithstanding the amount is ascertained by judgment. The lien and estate created by the mortgage is anterior to and independent of the judgment, and of the suit in which it is rendered. Merger takes place whenever a greater estate and a less meet and coincide in the same person, without any intermediate estates; its effect is to consolidate two estates, and to confound them into one;(2 Thomas' Coke, 248, note K. top paging;) or when a security of a higher nature is substituted for one of an inferior degree, the latter is said to be merged in the former. Mason v. Eakle, Bre. 52. But by a judgment on the mortgage no new estate is created or vested in the mortgagee, no new lien, no additional or higher security is obtained for the debt. Whatever

(a) Ante 487-Chapin vs. Curtenius, 15 Ill. R. 432; Holloway vs. Clark, 27 Ill. R. 483.

lien estate or security exists, exists by virture of the original mortgage. The form of the judgment is a mere ascertainment of the debt to be paid out of the specific property. When the execution issues, it is a specific execution, no levy is necessary, and when the land is sold, it is sold not to satisfy a lien created by the judgment, but that which is created by the act of the parties by the mortgage. Thus the prot ceedings by suit on the mortgage are not to create new lien or seeurties, but to perfect and enforce old ones, and to which no new validity or efficacy is given by the direct operation of the judgment. There is,hence nothing originating in the judgment, in which the mortgage, as an instrumen of conveyance' can merge'

The history and principles of foreclosure further confirm this position. As between the parties the mortgagee is at law the owner of the estate ,(4 Kent. 154–56,) while in Chancery, before foreclosure, he is considered as having simply a chattel interest in the premises. Demarest v. Wynkoop, 3 Johns. Ch. R. 129. At Common Law, while the title of the mortgagee was defeasible on the performance of a condition subsequent by the mortgagor, a failure in the strict performance of the condition operated as a confirmation of the estate. When Courts of Chancery began to interfere in behalf of the mortgagor to relieve him from the consequences of such forfeiture, the mortgagee was necessarily compelled to apply to the Chancery Courts to perfect his security, where, basing himself on his legal title, he insisted by process of strict foreclosure, either that his debt should be paid or his title confirmed. From the nature of this proceeding, it was manifestly impossible that his lien and estate in the mortgaged premises could be merged in any interlocutory decree in the cause, for the cause proceeded upon the ground that the title was in him; it was to operate specifically on the mortgagor's equity of redemption, and bar it in the mortgagee's favor. Any interlocutory decree would only ascertain the debt and fix the time in which the mortgagor might have the privilege of redeeming the estate. If the debt was not paid by the time fixed, th

final decree confirmed the title of the mortagee. If the mortgagor paid the money, the final decree gave him back his pledge, and the estate of the nortgagor was gone. But at all times before the payment of the mortgaged debt the mortagee still owned the land, and the mortgage title would avail him for every purpose of protection. A foreclosure by a decree of sale instead of the practice by strict foreclosure has been very generally adopted in New York and in this State, as the course most beneficial to the parties, though the power of the courts to decree a strict foreclosure has not been questioned. Mills v. Dennis, 3 Johns. Ch. R. 367; Lansing v. Goelet, 9 Cowen, 359; Warner v. Helm, 1 Gilm. 220, 232. But the foreclosure, whether the proceeding is by a strict decree, or by a decree of a sale in chancery, or by judgment at law on scire facias under our statute, looks to the same result, the payment of the mortgage debt or the destruction of the equity of redemption remaining in the mortgagor; in the first case by estopping that equity, and in the two last, by selling and conveying that equity, as well as the interest of the mortgagee, (9 Cowen, 358,) to the purchaser under the judgment or decree. Now, on what principle can a proceeding thus adopted for the mutual benefit of the parties, while it is inchoate, resting merely in judgment or decree, before the property has been sold, or any part of the mortgage debt paid, be construed as depriving the mortgagee of the protection of his mortgage title while the more stringent proceeding for which this milder substitute has been adopted, would undoubtedly secure to him that protection? Accordingly, decisions are not wanting on this point. In the case of Den v. Stockton, 7 Halst. 322, the mortgagee had filed her bill to foreclose, and procured an order of sale, and bid at the sale and accepted the sheriff's deed for the premises. On ejectment brought by the mortgagee, it was objected that the sale was invalid, and that by these proceedings the mortgagee has divested herself of her mortgage title. Drake, Justice, in delivering the opinion of the court, says: "By bidding at the sheriff's sale and accepting a deed, Jane Hart, the mortgagee, acknowledged

no title inconsistent with her own. That act was intended to come in aid of her mortgage and to perfect her title. Such would be the effect if the proceedings are valid, but if they are void it is not perceived how they could take away her right of action on her mortgage. There is nothing in the nature of these proceedings which divests or suspends the legal estate and right of possesion until a sale takes place. By that the estate of both mortgagor and mortgagee are transferred to the purchaser. A mortgagee may bring ejectment pending a bill to foreclose." The court had, in a previous part of the opinion, decided that the order for a sale on fereclosure in that case was a valid order, and hence they expressly determine in that case that a decree of sale in a suit to foreclose a mortgage is not such a proceeding as "divests or suspends the legal estate and right of possession, " in the mortgagee till the sale takes place—then, and then only, is such estate divested—a decision which seems conclusive as to the merger of the legal estate by the mere judgment or decree ordering a sale. See, also, further on this subject, the elaborate argument of Chancellor Jones in the case of Lansing v. Goelet, 9 Cowen, 347, embracing the principle and history of the practice of selling mortgaged premises instead of strict foreclosure, which fully sustains the view above taken. The case of James v. Moray, 2 Cowen, 284–6–7, is strongly pertinent. That was a question as to the merger of a mortgage, aad shows that a mortgage will not be merged in any proceedings which do not constitute a payment of the debt.

But even supposing it true, that in the language of the books, the mortgage in this case is merged in the judgment, what then? So is a simple contract debt merged in a judgment, and so is the judgment merged in a sale. So is the certificate of purchase and the equitable estate evidenced by it, merged in the deed executed after the redemption time expires. Such familiar law needs no illustration. Yet, because all this is true, did any one ever think of contending, that the equitable estate in the given case, is for all purposes annihilated? Each of these previous facts, may in

some sense be said to be merged in the subsequent proceedings; but for the purposes of justice, they are always considered as existing, and aided by the doctrine of relation, are always available to sustain rights acquired under them, on the principle, that where divers acts are made to concur to one definite result, the original act shall be preferred, and to this the other shall have relation. Jackson v. Call, 3 Cowen, 79; Lessee of Boyd v. Longworth, 11 Ohio, 252; Johnson v. Stagg, 2 Johns. 520; Klock Cronkhite, 1 Hill's (N. Y.) R. 107. This doctrine of merger must always be taken sub modo.(a)Merger is never favored at law, still less in Equity. It is a rule of convenience. It will not be permitted to work injustice. It is allowed only for special reasons, to promote the ends of justice, and to subserve the fair intention of the parties. James v. Moray, 2 Cowen, 246, 284–5; Starr v. Ellis, 6 Johns. Ch. R. 393. And even in cases where the doctrine of merger technically applies, persons having interests depending on the estate which is merged, will be left in the same condition in point of benefit, as if no merger had taken place. For the purpose of upholding those interests, the particular estate, though merged, is said to have continuance in point of title, although it is merged in point of law. 2 Thomas' Coke, 451, 452, top paging a principle broad enough to cover this case. We have already sufficiently shown the interest of King in still relying on his mortgage title, and will here leave this branch of the case. But it is said, that in this case, the judgment by default ought not to have been set aside, even if King was admitted to defend, but that the judgment should have been retained as the plaintiff's security.

We have already seen, that at common law, the landlord on being admitted to defend, was entitled to have the judgment against the casual ejector set aside, and particularly where, as in this case, the tenant either from negligence or fraud, omitted to defend or to give the landlord notice of the suit. Adams on Eject. 255, 257. If the practice of permitting the judgment to stand as the plaintiff's security ever prevailed at common law, it was hence not impera-

Kruse vs. Scripps, 11 Ill. R. 104.

tive on the courts; but as the practice of admitting the landlord to defend at all, was introduced for the purposes of justice, so the practice of retaining or setting aside the judgment was moulded to subserve the same purpose. The before mentioned Statute of the 11 Geo. 2, Ch. 19, § 13, Adams on Eject. 256, and also the statute of New York, 4 Johns. 495, note A, which is a substantial copy of the former, provides, that on letting in the landlord to defend, the court may order a stay of execution on the judgment against the casual ejector. This pre-supposes that the judgment may stand. But it is observable that there is in the statute nothing imperative on this subject, nothing directly relating to the question as to whether the judgment shall stand or be set aside, nothing but what is implied from the mere fact that the court may stay the execution. As the above statute of the 11 Geo. 2, was intended principally as a recognition of the common law practice, in allowing landlords to defend, it may also be but a recognition of the practice in this particular. It is hence a useful commentary on the common law, and is another and a forcible argument to show what the common law really was, that Parliament intended to leave the question of the judgment under the statute, as it found it at common law,—to stand or be set aside in the discretion of the court, and as the justice of the case might require. Such has ever been the understanding of the New York courts under their statute. They have never considered the statute of that state as either conferring or taking away their power to set aside the judgment; but have always exercised this power whenever justice required it, on the ground that the common law practice of allowing the judgment to stand arose from the fiction of the action of ejectment and that a mere fiction should not be permitted to work an injury to the right. Jackson v. Stiles, 4 Johns. 493; Jackson v. Harrow, 11 do. 434, Wood v. Wood, 9 do. 257. In all these cases, so far as appears, the question was not whether at common law the court had power to set aside the judgment, but whether that power had been taken away by statute. Under our statute, the

reasons for setting aside the judgment are ten-fold stronger than under the common law action. At common law, the casual ejector, the party against whom the judgment purported to be entered, was, from the fiction of the action a mere cypher; the judgment concluded no one; the tenant or the landlord might bring new ejectment; the unsuccessful party in this suit might, in turn, bring his suit, and so on as often as either party desired it. At common law this right was without limitation, and the courts of chancery never interfered only when repeated verdicts had determined in whom the right really was, and to prevent further suits which could be only vexatious. But under our statute the case is widely different. The defendant is a real party; the suit concludes the right; neither party can bring a new ejectment; even the judgment already entered concludes the rights of the parties, unless set aside in a specified time. If, then, this judgment cannot be set aside on admitting the landlord to defend, the letting him in to defend is a mere mockery. For while thus defending, before he can bring the cause to a trial, the prior judgment, the validity of which he is let in to investigate, by the mere lapse of one or two years, without any fault of his own, is shut down upon the tenant's right under which alone he can defend, and thus the very substratum of his defence is taken from him, and is gone forever. Even in cases arising under our statute, in which the landlord might bring a new ejectment, there is great difficulty in maintaining the action under our statute over that of maintaining it at common law, arising from the fact, that under our statute the plaintiff must show title in himself, instead of in some other and prior party in the chain of title, which was sufficient under the common law fiction of ejectment. This consideration adds additional weight to the argument for setting aside the judgment under our statute, which was used by Lord Mansfield, in the case of Fairclaim v. Shamtitle, for letting in the landlord to defend at all; "that there is a great difference between being plaintiff or defendant in ejectment." Thus, whether the setting aside the judgment is a mere matter of discretion, and

hence not assignable as error, or whether it is an act which this court may review, we still think there is no reasonable ground for denying that the power exists, or that it has been properly exercised in this case.

But it is objected that the affidavit in this case does not exhibit sufficient merits in King or Brunton to authorize the setting aside the judgment by default under our statute. This objection is founded on a misapprehension. The application is not made under the statute, but at common law. The case is not provided for by our statute. Under that, the defendant must apply to have the judgment set aside. Here the applicant is a third party, and the very reason why he is driven to ask that the judgment be set aside as landlord is, that he cannot have it done as defendant. This case then is neither within the letter nor spirit of the law, which could never have been intended to abolish or interfere with this common law right. If the statute is to be looked to to regulate the admission of the landlord to defend, then it must be looked to to determine the mere power to admit, as well as to determine the stage of the proceedings and the facts and conditions on which the admission would be allowed ; and as the statute is fearfully silent on this whole subject, the admission of any landlord to defend under any circumstances, or at any period of the cause, would be erroneous. Such an objection founded on the construction of the statute, which would overturn the decision of this court in the case of Thompson v. Schuyler, 2 Gilm. 271, and destroy such important rights, without any apparent error, ought not to be tolerated a moment.

But even if the application is to be made under the statute, enough is shown to sustain the order setting aside the judgment. The circuit court is authorized to set aside a judgment by default within two years, " if satisfied that justice will be promoted and the rights of the parties more satisfactorily ascertained and established." Rev. Stat. 208, § 31. The form of language employed in this section makes it discretionary in the court whether it will set aside the judgment. The court in which the application is made is to be

satisfied, not the supreme court or any other tribunal. Is not then the act of the court in setting aside a default, the exercise of a discretionary power, and is it subject to review in this court? But this affidavit contains sufficient to satisfy any court, that both Brunton and King had some rights in the premises; that Brunton entered and remained in possession, under paper title, in fee purchased in good faith; that King, claiming a mortgage in fee under the same title by prior right, to which Brunton's was subordinate, was benefitted by Brunton's possession and deeply interested in defending it; that from these facts, King and Brunton, as to their respective interests derived from Walker, and which together completed the fee simple absolute, had a valid right in the premises against all the world, except as against a party who could show a superior and perfect paper title. Now, had Williams such title? The court could not know, for his title had never been investigated or exhibited in court. Could King or his agent know? They were strangers to Williams' title, and could not hence be presumed to know or required to swear as to its character or quality. It must be sufficient that the affidavit discloses facts, from which the court can see that King and Brunton each have interests in the premises, which can be defeated only by him who can exhibit a perfect title; that the record, in connection with the affidavit, shows that Williams obtained his judgment, which is now relied on to defeat those claims, by default, through the fraud of Brunton and without the exhibition of any title whatever? Under these circumstances, could any court in the world doubt for a moment, that in the words of the statute, "the rights of the parties" would be "more satisfactorily ascertained and established" by setting aside the judgment and permitting the parties to submit their respective claims to the ordeal of a fair judicial investigation? There is, hence, in this view of the case, no error in the proceedings. The case of Kelly v. Inman, (3 Scam. 28,) in which the question whether a default should be entered, does not in the least invalidate this conclusion. The applicatian in that case was at a different stage of the proceedings, and under a different

section of the statute. In the affidavit filed in that case, there was neither a general allegation of merits, nor any statement of facts from which merits could be inferred. On the whole subject of merits, the affidavit was wholly silent. That case, then, was by no means analogous to the present in this particular. In this case, the facts from which the merits of Brunton and King are deduced, are clearly stated in the affidavit, and any general allegation of merits founded on those facts would be simply the statement of a conclusion of law which the court can make as well as the party. On the contrary, the case of Kelly v. Inman, strongly confirms the sufficiency of the affidavit in this case; it appearing therefrom that the merits to be shown may consist as well in "an assertion of title in the defendant" as "in the denial of title in the plaintiff." 3 Scam. 31.

The opinion of the court was delivered by

Koerner, J. This was an action of ejectment, originally brought in the Adams circuit court, by the plaintiff against the defendant, Brunton. The declaration was served and filed on May 7th, 1845. The usual rule to plead was entered upon filing the declaration. Afterwards, on the 19th day of September, 1845, a judgment was entered against the defendant, Brunton, by default, and a writ of possession was awarded. Afterwards, on the 25th day of April, 1846, O. H. Browning, as the attorney of the defendant, John P. King, filed his (said Browning's) affidavit and thereupon entered his motion to set aside the aforesaid judgment, and to grant a new trial. The said affidavit is in the words and figures following, to wit: "O. H. Browning, being first duly sworn, deposeth and saith, that he is one of the members of the firm of Browning & Bushnell; that said Browning & Bushnell were attorneys of John P. King to foreclose a mortgage executed to him by John M. Walker for $3,000, dated the 11th day of October, A. D. 1837, and drawing 12 per cent. interest. Said mortgage, among other lands, embraced the S. E. 29, 1 S., 7 W., in Adams county, and was duly executed and acknowledged by said Walker, and recorded

in the Recorder's office of said Adams county, on the 14th day of July, A. D. 1840. Afterwards, to wit, on the first day of April, 1842, said Walker conveyed said quarter section of land to the above named Thomas Brunton. That afterwards to wit, at the April term 1844, of the Adams circuit court, said King foreclosed his aforesaid mortgage for the sum of $3,708.70 and costs of suit, and subsequently sued out execution upon said judgment to cause said land to be sold ; that, after said execution was so sued out, said Brunton called on this affiant, represented to him that he, said Brunton, had purchased said land from said Walker after the execution of the mortgage aforesaid ; had taken possession of it under his said purchase, and made improvements thereon, and feared he would suffer loss by said mortgage, unless this affiant would delay the sale to enable him, said Brunton, to make some arrangement with said Walker. Affiant thereupon informed said Brunton that he would not sell said piece of land until he had disposed of all the other property embraced in such mortgage ; and said Brunton, at the same time agreed that he would neither do, suffer or permit any thing to encumber the title of the said land, but would in good faith, hold the same subject to said mortgage ; affiant thereupon caused said execution to be returned without having said land sold." It then proceeds to state the commencement of this suit and the judgment as before stated ; that Brunton gave no notice to affiant of said suit ; that he had no knowledge of it till after said judgment was entered ; that he believed Brunton kept from him and Mr. Bushnell all knowledge of it designedly, to prevent them applying to defend the same ; that King lives in Georgia ; has never been in Illinois, and does not know the foregoing facts ; that affiant and his partner are the attorneys of King, and authorized to manage and attend to his interests herein ; that said mortgage has not been satisfied, &c. It concludes by praying that judgment be set aside, new trial granted, and that said King might be, as defendant in the place of said Brunton, allowed to defend jointly with him, or to use his name for the purpose of defence. This motion was allowed

by the court, and the said King was allowed to defend the suit, and to plead to the declaration in the name of Brunton, and also in the name of himself; whereupon he pleaded accordingly. The plaintiff excepted to the opinion of the court. Afterwards on the 1st day of October, 1846, it was ordered on defendant's motion, that the plaintiff join issue on said pleas, which the plaintiff in open court declined doing. A jury was then impaneled, who rendered a verdict of not guilty, whereupon judgment was entered against the plaintiff, who has appealed from this judgment to this court.

Two errors are assigned upon this record:

1st. The court erred in setting aside the judgment against the defendant, Brunton, and in granting a new trial, and permitting the said King to defend the action.

2. The court erred in impaneling a jury to try an issue where none was joined, and in entering judgment upon the verdict.

Under the first assignment of error, the appellant's counsel makes the following points:

1. There was no privity between King and Brunton, either of contract or of title.

2. If there was privity while the mortgage was in force, it ceased upon foreclosure, the mortgage having become extinguished and merged in the decree;

3. The affidavit upon which the motion was founded shows no sufficient reason for setting aside the judgment, it neither averring that they had title, nor denying that plaintiff had title, nor making any pretence of collusion between plaintiff and defendant; and

4. Allowing that King had shown himself entitled to defend, yet the judgment against Bruton ought to have stood.

In regard to the first point presented, it is a well established rule, that in an action of ejectment, the landlord may appear and defend the cause in the name of the tenant, or in his own name, and also, that where a tenant, from negligence or fraud, has omitted to appear himself, or to give the landlord the necessary notice the courts will set aside a judgment by default against the tenant, upon proper affidavit

being made by the landlord. This rule of practice, adopted in the English courts at an early period has obtained express legislative sanction, by Statute 11 Geo. 1, Ch. 19, § 13, in that country, and by similar Statutes passed in many States of the Union. It has been expressly recognized by this court, in the case of Thompson v. Schuyler, 2 Gilm. 271. Some difficulty, however, has arisen respecting the meaning of the word "landlord," and as to what persons may be considered as occupying the relation of landlord for the purposes of claiming this right of defence. Lord Mansfield, in the case of Fairclaim v. Shamtitle, (Burr. 1290,) has given a very luminous exposition regarding the proper construction of the word "landlord," which is given in full in Adams on Ejectment, 258. The rule stated more briefly, amounts to this: that a person claiming to be let in to defend in ejectment, must show his title is connected to and consistent with the possession of the occupant. 1 Bibb, 128; 1 Wend. 316.

Now, in the present case, it is manifest that the title of King is connected to and consistent with the title of Brunton. Walker, as appears from the affidavit of O. H. Browning, the attorney of King, on the 11th day of October, 1837, had executed a mortgage, embracing the land in question, to said King, which was recorded on the 14th of July, 1840. Subsequently, on the 1st of April, 1842, Walker conveyed the said land to defendant, Brunton. Both, therefore claim under Walker, the one the legal estate, the other in fact the equity of redemption only. There respective titles, then, are perfectly consistent. After the condition broken, King, the mortgagee, had an undoubted right to enter as against Walker, and also against his assignee, Brunton. In contemplation of law, Brunton was King's tenant at sufferance, or at least sustained towards him the peculiar relation which exists between the mortgagor and mortgagee. King could have succeeded in obtaining possession against Walker or Brunton without difficulty, as neither of them could have disputed his title, while in a controversy with the plaintiff, Williams, or with any other stranger, he would have had to

show title in Walker. He was, then, much interested in occupying the position of defendant.

It would not be difficult to show that, besides a privity in interest between King and Brunton, there existed also a privity of contract between them, but being clear on the firs point, we refrain from enlarging on this last.

There are numerous decisions in support of the doctrine, that a mortgagee in or out of possession may be permitted to defend with the tenant in possession, to a few of which I will refer.

In 11 Johns. 407, Jackson v. Stiles, it was decided that a mortgagee in possession may be let in to defend in an action of ejectment. In 8 T. R. 645, Doe d. Tilyard v. Cooper, a case where it did not appear that the mortgagee had previously received any rents, it was held that a mortgagee may be made defendant with the mortgagor. In Doe d. Pearson, 6 Bing. 613, a mortgagee was not permitted to defend, on the ground that he did not appear to have any interest in the result of that particular suit. In 17 Johns. 112, Jackson d. Clark v. Babcock, it was decided that the assignee of a mortgagee may be let in to defend. I also refer generally to 1 Pow. Mortg. 203, note G., and Adams on Ejectment, 255, 261.

It is said however, that the relation previously existing between King and Brunton ceased, a judgment of foreclosure having been obtained by King. It is true that a judgment or decree may, for some purposes, be considered as an extinction of the original cause of action ; for instance, for the purpose of regulating the interest on money to which a party is entitled before final satisfaction of the debt, as was the case in 3 Scam. 263, to which authority the appellant has directed out attention But it is equally true, that for many other purposes, as for the ascertaining of priority of liens for instance, the principle of extinction or merger finds no application. It is in our opinion a total misapprehension of the doctrine on mortgages, to contend that a mortgagee who, instead of foreclosing strictly, which would at once have given him the indefeasible legal estate, applies for a sale of

the lands so as to have his debt satisfied and no more, the mortgagor being entitled to the surplus, if any, and who obtains a judgment or a decree, should thereby wholly lose the benefits of the title which he had by the mortgage. We consider a judgment or decree, and a subsequent purchase and obtaining of deed for the land from the Master or sheriff, as being connected with and being in aid of his original title. A subsequent title so obtained is clearly consistent with the first title. It is hardly necessary to refer to authorities in support of this proposition. The case cited by the counsel for appellees, Den v. Sockton, 7 Halst. 322, we consider perfectly in point. For the general doctrine of merger, 3 Cowen, 79, 11 Ohio, 252, 2 Johns. 20, 1 Hill's (N. Y.) R. 107, 2 Cowen, 284, may be cited

Passing the next point under the first assignment of error, that the affidavit was insufficient, as it neither avers that King had title or Williams has none, and as it does not pretend to charge collusion between the plaintiff and the defendant Brunton, we are of opinion that the objection is not well founded. Our statute concerning the action of ejectment does not specially provide for cases of landlords and tenants and other persons interested applying to be let in to defend, but speaks of cases only where the party, his assigns, or those claiming under him move to set aside defaults. Where the statute is silent, the practice and rules of the common law are applicable, and lest there should be any doubt upon this point, the first section of the Act, Rev. Stat. ch. 36, (law of 1839,—,) which provides "that the action of ejectment shall be retained, and may be brought in the cases and the manner heretofore accustomed, subject to the provisions hereinafter contained." Of course all the incidents to this action at common law, and the mode of proceeding throughout is retained except where the statute makes an express alteration. The affidavit clearly shows that King had some title, which he was interested to protect; it would be hard, indeed, if any person could be required to swear that he had a title to the land paramount to any other that might be set up. It would have been equally improper

to have required him to state that Williams had none, as he is not presumed, before a legal investigation has settled it, to know a strangers title. The affidavit also shows sufficient facts to induce the belief that Brunton had acted in bad faith, which was sufficient to authorize the court to permit King to come in as a co-defendant. (*a*)

As to the last point made under the first assignment, that the judgment as to Brunton ought to have stood, we deem it also untenable. It appears from an examination of the subject, that under the English practice before the Statute of George I., which has been already adverted to, the landlord who was admitted to defend, had a right to have the judgment against the casual ejector set aside. Ad. Ejcet. 255; 257. The statute afterwards provided that in such cases courts may stay the execution against the casual ejector. We think that one or the other may be done in the discretion of the court. We cannot perceive how, in any view of the case, the plaintiff can be prejudiced, as we have before seen that the co-defendant cannot defend himself under a title inconsistent with that of the original defendant. In fact, he must stand subtantially upon the same title as the latter does. If he succeed against the plaintiff, it is also a victory of the original defendant. The stay of execution must then remain permanent and the judgment can have no force and effect. If the co-defendant fails, the title of the original defendant falls with it, and the judgment equally concludes both.

The decision of the court was correct in another view of the matter. King, being by law a proper defendant, or party, as shown before, and having become identified with Brunton, he had a right, at any time within a year, to have the judgment vacated, upon payment of costs, under the express provision of our Statute. Rev. Stat. Ch. 36, § 31.

The objection under the second assignment of error, however, is well taken. After King had been permitted to plead for Brunton and for himself, the plaintiff fail to join issue on the pleas. The defendant's counsel then moved the court to order the plaintiff to join issue, which motion

(a) Merritt vs. Thompson, 13 Ill. R. 722; Hanson vs. Armstrong, 22 Ill. R. 442 Thompson vs. Schuyler, 2 Gil. R. 271.

was allowed. The plaintiff, in proper person, declined in court to join issue, notwithstanding which a jury was sworn and a verdict rendered against plaintiff. The record, it is true, is silent as to whether the plaintiff took any further action in the case or not. If he had, then the mere omission of adding what is technically called the similiter would be no ground of error. (*a*) It would be his own negligence, of which he could not complain. Waters v. Simpson, 2 Gilm. 570. But it is an irresistable inference from this record, that he did not wish to prosecute his suit any farther. His declining to take issue on pleas which presented a full defence to his action amounts to a discontinuance. The court ought to have dismissed the case for want of prosecution. This is the correct practice, as dictated by the reason of the thing, and laid down in the books. See Stephen on Pl. 108; 1 Tidd, 472; 2 do. 718, 727, 925. For this error, in trying the case by jury, and receiving a verdict against the plaintiff, when he had virtually discontinued his case, the judgment below must be reversed. As it is manifest, however, from the record, what judgment ought to have been rendered below, this court will give such judgment here, without remanding the cause.

The judgment of the circuit court is reversed, with the costs of this appeal and the plaintiff below having failed to prosecute his suit, it is ordered and adjudged that the said suit be dismissed, and that the defendants recover from and of the said plaintiff their costs in this behalf expended in the court below, and have execution thereof.

Judgment reversed.

(a) Gillespie vs. Smith, 29 Ill. R. 427.

NATHANIEL BUCKMASTER, appellant, v. WILLIAM GRUNDY, et al. appellees.

Appeal from Madison.

Where a judgment has been rendered in a Court of Law, and it dose not appear that it was obtained by fraud, or was the result of accident or mistake, a Court of Equity will not go behind such judgment.

Equity will allow one judgment to be set off against another, where there are no means for collecting it of the judgment creditor in the latter.

Interest is not allowable in the case of unliquidated damages arising ex contractu.

Where several persons agree to do certain acts, such as to pay equal proportions of particular expenditures, if one advance more money than his proportion of those expenses, the excess will be regarded as so much money paid for the use of the other parties, and he will be entitled to interest thereon.

A party cannot obtain a decree in Equity for a specific performance of a contract, where he has recovered damages at Law for a breach of the contract.

BILL IN CHANCERY, for reliefs &c., filed in the Madison circuit court, by the appellant against the appellees, and heard before the Hon. Gustavus P. Koerner, at the October term 1846, when a special decree was rendered adjusting the equities of the parties. The complainant in the cause below appealed to this court.

T. Ford, and W. Martin argued for the appellant. D. Prickett, upon the same side, filed a written argument.

J. Gillespie, L. B. Parsons, Jr. & H. W. Billings, for the appellees.

I. The injunction should have been dissolved in the court below, and each party left to his remedy at law, as the complainant elected to make his defence at law, and having failed there he was precluded from going into equity to litigate anew the same matters, unless he could show that the judgment was obtained by fraud, or that gross injustice had been done—not attributable to his own neglect, neither of which has been shown. Abrams v. Camp, 3 Scam. 291; Buckmaster v. Grundy, 1 do. 310.

Chancery will not relieve against a judgment on the ground of its being against equity, unless the defendant was ignorant of the facts of his defence, or they could not have been received in evidence. Duncan v. Lyon, 3 Johns. Ch. R. 356; Lansing v. Eddy, 1 do. 50; 2 Story's Eq. Jur. § 887, 894, 895, 897, and cases cited.

If the complainant had legal off sets, he should have produced them at the trial, and not suffered the defendant to obtain a judgment and then go into a long suit in Chancery, to enjoin and obtain a set off that might have been done at Law.

If Courts of Law and Equity have concurrent jurisdiction and the parties consent to a trial at Law, Equity will not re-try the matter, and they will not only be bound by all the matters tried, but such as might have been acted on. Baker v. Elkins, 1 Johns. Ch. R. 465; Andrews v. Fenton, 1 Ark. 197-9; Elston v. Blanchard, 2 Scam. 421; Lansing v. Eddy, 1 Johns. Ch. R. 50; 2 Barb. & Har. Dig. 24, § 4; Foster v. Wood, 6 Johns. Ch. R. 89; Le Green v. Gouvernour, Ib. 492-5; Cunningham v. Caldwell, Hardin, 136; Weirick v. De Zoya, 2 Gilm. 385.

2. In an action of covenant like the one on which Grundy's judgment was obtained, Buckmaster might, under our statute, have set off his judgment against Grundy, as also any unliquidated damages arising from non-fulfilment of contract by Grundy. Rev. Stat. 416, Pr. § 19; R. L. 1833, 491; Barbour on Set-off, 105; 1 Chitty's Pl. 524, 607; Simpson v. Hart, 14 Johns. 75; Edwards v. Todd, 1 Scam. 463; Nichols v. Ruckels, 3 do. 299; Kaskaskia Bridge Co. v. Shannon, 1 Gilm 25; Duncan v. Lyon, 3 Johns. Ch. R. 350.

3. Buckmaster's bond, to make Grundy a good title to the land, and Grundy's bond to expend $2,500 in improvements, made at the same time, ought to be regarded as dependent covenants, and taken together as a part of the same transaction; and as the land was so incumbered by a mortgage and right of dower as to render it impossible for Buckmaster to have made a good title according to his bond, and as Grundy might lose not only his purchase money, but also al

moneys expended in improvements. Buckmaster's failure to make a good title released Grundy from his bond to expend $2,500. The interest of the parties must be derived from the whole transaction. 11 Pick. 154; 10 do. 250, 302. And in any event, the measure of damages, if any damages are allowed, would be—what advantage or gain it would have been to Buckmaster to have $2,500 more expended than was done, and which the depositions show was nothing.

4. The decree pro confesso as to Grundy, taken in 1834, could not in any case be taken advantage of in this late stage of the case; but, in this instance, it must be presumed to have been opened by consent, or on motion, as no final decree was even entered; the complainant goes on, and makes the administration of Grundy and the heirs new parties, and the Court orders that they be permitted to answer to the merits of the bill.

5. The Court should have given a decree against the complainant for costs.

"Where a party might have defended at Law, he shall pay all costs both at Law and Equity." 3 Barb. & Har Dig. 268, § 84; Ibid. 266, § 61; Ibid. 268, § 84.

The counsel for the appellee would also refer the Court to the following authorities on the point of interest.

1. Interest is not recoverable for unliquidated damages, or on uncertain demands. Anonymous, 1 Johns. 315; Newell v. Griswold, 6 do. 44; Holliday v. Marshall, 7 do. 213; Campbell v. Mesier, 6 Johns. Ch. R. 24; Consequa v. Fanning, 3 do. 602. In the case of Reid v. Rensselær Glass Factory, 3 Cowen, 436, the Court remark "that interest in allowed, 1. Upon a special agreement; 2, Upon an implied promise to pay it; 3, Where money is withheld against the will of the owner; 4, By way of punishment for any illegal conversion or use of another's property; 5. Upon advances of cash, on the authority of Liotard v. Graves," 3 Caines, 234, which is the only case we find sustaining this latter doctrine. Shewel v. Givan, 3 Blackf. 314; Gilpin v. Consequa, 2 Peters' Dig., title "Interest," 531, § 16; Youqua v. Nixon, Ibid. § 18; Evarts v. Nason's Estate, 11 Verm.

128 ; Rev. Stat. chap. 54, title "Interest," § 2. In the case referred to from 3 Cowen, the court in giving their opinion remark, "that there is no subject in the whole range of the English law, on which the authorities are so little in harmony with each other as on that of interest; and the American authorities are scarcely less contradictory. It may now, however, be considered as settled in England, that no interest is recoverable upon money lent, money had and received, or paid, laid out and expended without an express contract for its payment, or proof that the money has actually been used by the defendant, or of special circumstances, from which an agreement to pay interest may be referred." Page 420.

It is further contended that the circumstances of this case do not show any right in Buckmaster to make Grundy his debtor, by the advances of money for the purpose of making improvements on the land.

If, however, Buckmaster has suffered any damage from the failure of Grundy to advance his $2,500, how are those damages to be measured? We contend this to be the true rule. If the expenditure of the $2,500, by Grundy would have enhanced the value of the premises, such enhanced value would be the measure for Buckmaster's damages, he having expended his $2,500. If the further expenditure of $2,500, by Grundy would not have enchanced the value of the premises, then Buckmaster's damages are merely nominal.

The Opinion of the court was delivered by

Caton, J. Buckmaster and Prickett purchased of Thomas Carlin certain lands on the Mississippi river, called Point Ferry, for $4,000, which they secured by notes and mortgage on the premises. Afterwards, and on the 9th of January, 1819, they entered into a contract with William Grundy, the ancestor of the present defendant, by which he was to be let into the purchase upon equal terms with themselves. At that time, Buckmaster gave Grundy a bond, whereby he agreed to convey to Grundy one third of the premises within a given time, and Grundy gave to Buckmaster a bond, binding himself to pay one third of the purchase money of the premises as

the notes should fall due respectively. It was the intention of the parties to lay off a town upon the premises, establish a ferry, &c. In pursuance of this object, they all three entered into a sort of mutual bond on the same day, whereby each bound himself to the other to expend, in erecting good substantial buildings in the town, $2,500. In the same instrument, it was also agreed that each should pay an equal part of all the necessary expenses about the town, ferry and roads. As a bonus for being admitted into this enterprize on equal terms with the proprietors, Grundy gave to Buckmaster $100 in cash, and his note for $300. Grundy soon after went to Kentucky, where he resided, and never paid any further attention to the town. The $300 note was assigned by Buckmaster to Prickett, and by Prickett to one Gaither, who sued Grundy on the note, and obtained judgment in Kentucky for the amount. Grundy then filed a bill in Chancery in Kentucky against Gaither, Buckmaster and others, and obtained a decree perpetually enjoining that judgment, and declaring the two bonds between Buckmaster and him void. That decree contains several other provisions, but as Buckmaster was never served with process in that cause, and never appeared, or in any way submitted to the jurisdiction of that court, we do not think it necessary to take any further notice of it, as Buckmaster was not bound, nor were his rights in any way affected by it. There is nothing now before us which can be influenced in the least by that decree.

In October, 1829, Buckmaster recovered a judgment in the Madison Circuit Court against Grundy, for $1,767.82, on the bond given by Grundy for the payment of his proportion of the purchase money. This judgment still remains unsatisfied, nor can it be made from the estate of Grundy in this State.

In October, 1826, Grundy obtained a judgment against Buckmaster, in the Johnson Circuit Court, for $3,562, on the bond for a deed given by Buckmaster to Grundy. This judgment Grundy was proceeding to collect.

Several other controversies existed between the parties, which have either been settled or disposed of by former de-

crees, of which no complaint is now made, so that it is unnecessary to refer to them here.

For the purpose of settling all these difficulties, and particularly to get relief against the judgment in Johnson county, which is alleged to be unjust, this bill was filed by Buckmaster.

I do not think any sufficient reason is shown for going behind this judgment. It does not appear that the judgment was obtained by fraud, or was the result of accident or mistake, such as will authorize the court to go behind that judgment, and investigate the original cause of action on which that judgment was rendered. (*a*)

The suit was regularly commenced, and the process duly served on the defendant, who employed an attorney, who appeared and defended the action. A trial was had, a verdict obtained, and a judgment rendered, which was afterwards affirmed in this court. There is nothing to show that Buckmaster was deceived in relation to any fact, or that he was surprised by any unforseen circumstance, or that any mistake was made prejudicial to his interest. Although we may be entirely satisfied, from the evidence, that the judgment was wholly unjust, as was most probably the case, yet the public good requires that there should be certainty and stability in the judgments of the courts; and unless they have been obtained by fraud, or some misfortune has intervened, without the negligence or fault of the party complaining, no court can inquire into their correctness in a collateral proceeding. Such was not the case here, and the judgment must be permitted to stand. (*b*)

It would seem hardly to admit of doubt that Buckmaster's judgment against Grundy for $1,767.82 should be set off against Grundy's judgment. The case shows that he has no means of collecting it of the estate of Grundy, and unless this set-off is made, it must be lost. The rules of Equity, require, under such circumstances, at lease, that the set off should be allowed.

Buckmaster claims that he is entitled to large allowances as damages against Grundy for the breach of the bond or agreement by which each of the proprietors bound himself to expend

(a) Wierich vs. Dezova, 2 Gil. R. 385.
(b) Wade vs. Wade, 12 Ill. R. 92, and notes.

$2,500 in buildings, &c., and to bear an equal proportion of the expenses about the town, ferry and roads. Whatever those damages are, most undoubtedly should be allowed. In the court below, an allowance was made for damages on this agreement for $1,415, which the complainant insists was not enough. He also claims that interest should be allowed upon those damages.

This instrument seems to contain two separate contracts, distinct in their nature and objects, although relating to the same subject matter, and between the same parties.

The rule of damages for the breach of the agreement, whereby Grundy bound himself to expend the $2,500, &c., will not be to adopt the amount or any certain portion of it, which Buckmaster has expended in erecting buildings in the town, but rather, how much has he been damnified by reason of not having the buildings erected in the town, which Grundy was bound to build? How much more would Buckmaster have realized from his interest in the premises had those buildings been erected, than he has now? We all know this must have depended upon the exigencies of the times, the caprice of individuals, and the confidence of the public, and particularly of speculators in the town, quite as much as upon the intrinsic value which those buildings would have added to the place. These buildings were not intended for the permanent use of the proprietors, but rather to bring the town into maturity, to improve its appearance and made the property saleable. Although Buckmaster and Prickett expended more than they had agreed to in this kind of improvements, yet this was not sufficient to invite purchasers, and whether an additional expenditure of $2,500 would have accomplished that object, it is impossible ever to know with certainty. Upon this subject, as might well be expected, no two will agree; some supposing that the fulfilment of the agreement on the part of Grundy would have enabled the proprietors to have realized a handsome profit, while others suppose that no reasonable amount of expenditure could ever have brought the town into notice. Upon this subject I am inclined to agree with those who think that this

additional expenditure might have been of most essential service in producing a favorable result to this enterprise. Duckmaster and Prickett in good faith expended the whole $5,000 which they had agreed to lay out there, which was destined for the mutual benefit of all three of the proprietors, while Grundy was away paying no attention to the business in person, nor aiding the enterprise by the expenditure of his money, as he had agreed to do. He was as much bound to endeavor to advance the interests of all, as the others were, and it seems hard indeed, if, after Buckmaster has expended so much time and money, in trying to promote the interests of all, now that the enterprise has entirely failed and all is gone, he shall not only be compelled to lose nearly all of his expenditure, but pay a large amount to Grundy, who, in utter disregard of his solemn agreement, did nothing. The very proposition seems revolting to a sense of justice, and yet I fear that in consequence of this Johnson county judgment, behind which we have no legal warrant for going, we shall be compelled in some measure to do so. On the trial of that cause he should have made his defence, but it is too late now. When we see that Buckmaster and Prickett had in the utmost good faith expended a large amount of money for the benefit of Grundy as well as themselves, and even more than they had agreed to, and Grundy had done nothing as he had agreed, and the enterprise finally failed, we may well listen with incredulity when it is urged that this breach of the contract on the part of Grundy was not instrumental in that failure. Nay we might well be authorized to say, that it was mainly instrumental in producing that important result. Upon the whole, I think the amount allowed by the Circuit Court is quite small enough for the breach of the agreement by Grundy, in not expending the money which he was bound to do. As this, however, is an assessment of unliquidated damages, interest cannot be allowed upon it. It is not for the money paid by Buckmaster for the use of Grundy, but it is only for damage sustained for want of the improvements which Grundy agreed to make.

Under the second agreement in this instrument, the rule

may be different. There each party agrees to pay an equa l proportion of all the necessary expenses about the town, ferry and roads. Under this agreement, I have no doubt if one advanced more money than his proportion in payment of these expenses, that it was so much money advanced for the use of other parties. Over and above the 2,500 which each was bound to expend in erecting buildings, the evidence shows that Buckmaster and Prickett expended a large amouut about the town, ferry and roads, an equal proportion of which each party was bound to pay. The portion which Grundy agreed to pay was not paid by him, but was paid by Buckmaster and Prickett for him and to his use. Upon this according to the rule laid down in 3 Cowen, 393, Buckmaster is entitled to interest on his proportion.

It now remains to be determined what Buckmaster is entitled to recover for money paid for the use of Grundy under this latter branch of the agreement. Upon this subject, also, the evidence is very contradictory. The items properly chargeable to this account are, the timber for a bridge across Wood river, the clearing of a road from that river to the town, the money expended on account of the ferry, the expenses of laying off the town, and in fine, all of the expenses about the town, over and above the $2,500 which each was bound to expend.

The expenses of surveying and laying off the town was about $150 which was paid by Buckmaster alone. This appears from the deposition of Robinson, the surveyor. Buckmaster and Prickett expended at the least, $1,000 in erecting the ferryman's house and other buildings in the town, over and above the $5,000 which they together had agreed to expend there. This, of course, should be brought into this account. Thus far the evidence is very satisfactory, but not so with the other items. One witness thinks that the opening of the road and getting out the timber for the bridge must have cost from $400 to $500. Another thinks that such a bridge as was contemplated, would have cost from $350 to $400. Other witnesses think that the expense of opening the road must have cost from $40 to $50, but ex-

press no opinion about the bridge. I think from the evidence altogether, a fair allowance for the road and bridge will be $400. In relation to the expenses of the ferry, the evidence is still more unsatisfactory. Pinkard says he knows there was a ferry there, and that $500 would go but a very little way in establishing and running a ferry there in 1819. What boats were ever procured by Buckmaster and Prickett for the use of the ferry, is no where satisfactorily shown. Some never saw any there but a skiff; others saw a keelboat or barge used for a ferryboat worth from $300 to $400. It is certain that they had a barge and a flatboat in their service. Judging from the evidence, these were sometimes used for ferrying and sometimes for transporting rock from Alton. Mr. Carlin thinks that $100 should have furnished the ferry with all necessary boats at that time, and if they bought more expensive boats than were necessary for the ferry, Grundy ought not to be charged with such unnecessary expenditures. One hundred dollars, therefore, may be safely set down as the expenses of the ferry. This makes $1,500 advanced by Buckmaster and Prickett for the use of the concern in expenses about the town, ferry and road, and consequently one sixth of that was advanced by Buckmaster for Grundy. In addition to that, Buckmaster alone advanced for the benefit of all $150 for the laying off and surveying of the town. One third of that was advanced for the use of Grundy, making in all $300 advanced by Buckmaster on account of and for the use of Grundy. This advance must have been made as early as the forepart of the year 1825, upon which, therefore, he will be entitled to interest for twenty seven years.

Upon Grundy's judgment against Buckmaster for $3,562, interest must be computed since October, 1830, making principal and interest $7,052.76. To be set off against this, there is the judgment of Buckmaster against Grundy for $1,767.82 with interest since October, 1829, amounting now to $3,641.71, also for damages assessed for the breach of the agreement of 9th January, 1819, without interest, $1,415; also for money advanced, the sum of $300, with interest

thereon, for twenty seven years, making the sum of $786. The aggregate amount to which Buckmaster is thus found to be entitled as against Grundy is $5,842.71 which must be set off against so much of Grundy's judgment and interest, the balance of which he will be allowed to collect.

There is another portion of this decree which must be reversed. Buckmaster is decreed to perform specifically his bond to Grundy for the conveyance of one third of this land. That was manifestly improper. Grundy has already recovered damages for the breach of this agreement, which amounts, with interest, to the sum of $7,052.76; and while he insists upon and gets the benefit of these damages, he cannot at the same time claim to have the condition of the bond specifically executed. (*a*) It is true that Buckmaster in his bill offers to convey the land, but that was done under the suppositions that he could get relief from the judgment in Johnson county. As that cannot be done to the extent prayed for, we must give him such relief as the case which is made in his bill, and sustained by the proof, entitles him to. This portion of the decree must be reversed and a decree entered here consistently with the principles above laid down. Buckmaster must recover his costs in this court and the court below, as was there adjudged, which he may have allowed upon the execution to be issued upon the judgment in the Johnson circuit court for the residue.

Decree reversed.

(a) Ante 29-Dalton vs. Benthey, 15 Ill. R. 442.

JOHN J. CHENOT, appellant, v. CHARLES H. LEFEVRE, appellee.

Appeal from St. Clair.

Before the Statute of Limitations will constitute a bar to an action of *debt*, the defendant must be a resident of the State for sixteen years after the cause of action accrues, and before the suit is brought. Should the defendant remove from the State, and afterwards return again to reside, the time of the absence would not be reckoned as a part of the sixteen years.

In an action of *debt*, a replication to a plea alleging that the defendant did "undertake and promise" is bad.

Where a note is given to a person by a name other than his real name, he may aver in his declaration that the note was given to him by the name specified in the note ; but he must prove to the satisfaction of the jury, that he was the person intended as the payee.

The term "*prescription*," as used in the Code Napoleon, is synonymous with the term "*limitation*" in the English Law.

The law of France in regard to prescription. before it can be given in evidence must be specially pleaded in suits brought in this country upon instruments made and executed in the former.

In an action of *debt*, the jury rendered a verdict of more damages than were claimed, and in the Supreme Court, the parties offered to remit the excess but the Court refused to allow him to do so.

DEBT, in the St. Clair Circuit Court, brought by the appellee against the appellant, and heard before the Hon. Gustavus P. Koerner, and a jury, when a verdict was rendered in favor of the defendant below for $250.68 debt, and 256.77 damages.

The various pleadings, instructions asked and evidence offered in the case at the trial in the Court below, will sufficiently appear in the Opinion of the Court.

L. Trumbull, for the appellant.

W. H. Underwood, for the appellee.

The Opinion of the Court was delivered by

CATON, J. This was an action of debt, brought by the present defendant against the present plaintiff in the Circuit Court of St Clair county. The first count is upon a promissory note, dated at Phalsburg, January 1st, 1828, for twelve

hundred francs, at six per cent. interest payable to the said plaintiff by the name and description of "Mr. Hoffman Lefevre," and executed by the defendant by the name of "Chenot."

The second count is on a note dated at Phalsburg, on the 16th of May, 1830, for the sum of one hundred and thirty seven francs and seventy five centims, payable to the plaintiff by the description of "Mr. Ch. Hoffman son," and executed by the defendant by the name of "Chenot," also bearing interest at six per cent. per annum.

The third count is on a note dated at Phalsburg, January 1st, 1828, for the sum of twelve hundred francs, with interest at six per cent. payable to the plaintiff by the name and description of "Mr. Hoffman Lefevre, and signed by the defendant by the name of "Chenot."

The fourth count is on a note dated at the same place, on the sixteenth May, 1830, for the sum of one hundred and thirty seven francs and seventy five centims, and payable to the said plaintiff by the description of "Mr. Ch. Hoffman son," and executed by the said defendant in the same way as all of the others.

The fifth count is for goods sold and for money paid and money lent, &c.

The defendant filed the general issue and eight special pleas, each applicable to one or more of the counts in the declaration. To each of the special pleas, the plaintiff, by leave of the Court, filed two replications; but in this volume of special pleading, it is only necessary to notice the replications to the fifth, sixth, and ninth pleas, as it is assigned for error that the Court improperly overruled demurrers to those replications. The fifth is a plea of the Statute of Limitations to the third count, and the sixth is a similar plea to the fifth count. The first replications to each of these pleas are alike. These replications state, in substance, that the defendant was out of the State when the cause of action accurued, "and has not during the last sixteen years next before the commencement of this suit lived and continued to live in the State of Illinois."

The thirteenth section of our Statute of Limitations vides: "If any person or persons, against whom there is or shall be any cause of action, as is specified in the preceding sections of this chapter, except real or possessory actions, shall be out of this State at the time of the cause of such action accruing, or any time during which a suit might be sustained on such cause of action, then the person or persons who shall be entitled to such action, shall be at liberty to bring the same against such person or persons, after his, her or their return to this State, and the time of such person's absence shall not be accounted or taken as a part of the time limited by this chapter." This statute is peculiar, and provides that the defendant must reside in the State sixteen years after the cause of action accrues, and before the suit is brought, before the limitation constitutes a bar. It is true that the presumption of law is, that the defendant has resided in this State ever since the cause of action accrued, so that it is sufficient for the defendant to plead, that more than sixteen years have elapsed since the cause of action accrued, and if the plaintiff would avoid this, it is necessary to show in his replication that the defendant has not resided in this State, all together, sixteen years since the cause of action accrued. This, these replications do not show. They merely state that the defendant resided out of the State at the time the cause of action accrued, and has not resided and continued to reside in this State for the last sixteen years before the commencement of the suit, and from aught that appears in these replications, the defendant may have resided more than sixteen years in the State between the accruing of the cause of action and the commencement of the suit. From the peculiar phraseology of this statute, we are of opinion that, although the Statute of Limitations might have commenced running more than sixteen years before the commencement of the suit, yet it might be arrested at any time, and as often as the defendant removed from the State, and would commence running at any time upon his becoming a resident of the State again.(a) The demurrer should have been sustained to these two replications.

(a) Vallandigham vs. Houston, 4 Gil. R. 388.

The second replication to the fifth plea is also bad. It states "that the said defendant did, within sixteen years next before the commencement of this suit, undertake and promise to pay to the said plaintiff the said sum of money," &c. Had the action been assumpsit, this would have been a good replication. The proper replication, of this nature, to a plea of the Statute of Limitations in an action of debt is that "the cause of action did accrue to the said plaintiff within sixteen years next before the commencement of this suit," &c. 1 Chitty's Pl. 614. It is true that none of these defects are pointed out by the special causes assigned in the demurrer, and probably the attention of the court was not called to them; but, still, they are of a substantial character, and are reached by the general demurrer.

The ninth plea is to the four first counts of the declaration, and avers that, by the laws of France, notes, as described in those counts, were void, if they were not stamped, and that these were not stamped. An amended replication was filed to this plea, which gave two good answers to it: first, that, by the laws of France, they were not required to be stamped; and, second, that they were stamped. A demurrer was sustained to this replication, and the plaintiff had leave to amend by making two replications of it, which amendment was made. Demurrer was again filed and overruled by the court, and this is assigned for error. As the two replications which were made from the case are not copied into the record, we cannot say that they were liable to any objection, and they probably were not.

On the trial, the plaintiff offered in evidence two notes, as described in the second and third counts of the declaration, in the French language, and proved a translation. The plaintiff then offered in evidence Art. 1326 of the Code Napoleon, providing for the mode of executing paper of this character, and proved a translation, which it is unnecessary here to recite. He also proved the value of a franc and of seventy five centimes, and that Phalsburg was in the kingdom of France. Here the plaintiff rested his case.

The defendant then offered in evidence, from the Code

Napoleon, which he proved to be the law of France, Art. 2277, with the following translation:

"The interest of money lent, and generally all that becomes payable from year to year, or at shorter times, is prescribed by the lapse of five years."

He also offered in evidence from the same Code, Art. 2224, with the following translation:

"The plea of limitation may be opposed in any state of the case, even before the court of appeals."

All the foregoing laws, together with the notes, are introduced into the bill of exceptions in the French language as well as in the English translation. To the introduction of these laws as evidence the plaintiff objected, and the court sustained the objection.

The plaintiff then proved that the defendant left France in 1830, and came to Illinois between five and six years ago. The witness stated "that he knew Mr. Charles Hoffman Lefevre; that he resided at Phalsburg, in the kingdom of France, and had always resided there" Here the case was closed on both sides.

The defendant requested the court to give two instructions to the jury, the second of which it is only necessary to notice, which is as follows:

"If the jury believe from the evidence, that the notes offered in evidence are payable to a person of a different name from that of the plaintiff, and that there has been no testimony before them showing that the plaintiff was the person intended, they must find for the defendant."

This instruction the court refused to give. In this the court erred. Where a note is given to a person by a name other than his real name, he may aver in the declaration that the note was given to him by the name as specified in the note; but then it is necessary to prove to the satisfaction of the jury, that he was the person intended as the payee. (*a*) That is an allegation that requires to be established by the proof as much as any other material allegation in the declaration, and is not established by the mere fact that the plaintiff has possession of the note. It is probable that

(a) Ante 254.

where the initial of the given name is only given in the note, that the bare possession of the note would be sufficient to entitle him te recover, where there was no suspicion otherwise in the case; but where the name is another than that of the plaintiff, extraneous evidence of the identity must be produced. Chitty on Bills, 625.[a]

The court properly excluded the evidence offered of the law of France, as contained in the 2277th Art. of the Code of Napoleon, providing that the interest of money lent, and generally all that becomes payable from year to year, or at shortest times, is prescribed by the lapse of five years, as well as Art. 2224, providing that the plea of limitation may be offered in any stage of the case, even before the court of Appeals. The terms "prescribe" and "prescription" in French, seem to be synonymous with the English words, to "limit" and "limitation." Prescription is the term used in Louisiana Reports for limitation, and in the translation of Pothier on Obligations, Vol 1,350, in the chapter on limitations, prescription is always used for limitation. This law of France, then, we take it ex vi terminii is a statute of limitation of a peculiar character, and only prevents the recovery of the interest exceeding a certain amount, and then only when specially interposed. Like all other statutes of limitations, it must be specially pleaded, and consequently, a plea presenting this peculiar defence under the French statute should have been framed, even admitting that this defence can be urged at all, of which we are by no means satisfied. The time within which a remedy must be enforced is no part of the contract, but it is to be governed solely by the lex fori. At any rate, a plea setting out the French law, and presenting this partial defence, ought to have been framed, otherwise the plaintiff might have been taken by surprise. With the proper notice, he might have been able to have produced some other portion of the French law, showing his case to have been an exception to this general rule. It was said that no precedent for such a plea can be found. That may be so, and still not be very remakable, for statutes are constantly giving rise to the necessity of new and peculiar pleas.

(a) Peyton vs. Allen, 1 Scam. R. 388.

Indeed, it seems by the law offered in evidence by the defendant that this defence must be interposed by plea even in France, for Article 2224 says, "the plea of limitation may be interposed," &c., and it may be here remarked, that the same word which is translated in Article 2277 "prescribes," in this article is rendered "limitation." It cannot be reasonably understood that this limitation can be interposed in any stage of the proceeding, without notice to the opposite party. The practice under the civil law requires the claim or defence to be set out in writing with much particularity, according to the facts of the case. But be that as it may, the manner of stating a demand or defence must necessarily be governed by the practice of the court or country where the claim is attempted to be enforced or the defence made, and is no part of the contract. (*a*) Under our practice, nothing can be introduced on the trial unless a foundation is laid for it in the pleadings. What may be introduced under the general issue is well understood by all, and with proper attention no surprise can ensue under that plea. In rejecting this evidence the court decided properly.

The jury returned a verdict for more damages than were claimed in the declaration, for which a judgment was rendered. In order to cure this error, the plaintiff has asked leave to remit this excess of damages. This we are not disposed to allow, although we will not say that we have not the power to do it. But even if this were allowed, it would only be done upon the payment of the costs of the appeal.

The judgment of the circuit court is reversed with costs, and the cause remanded for a new trial.

Judgment reversed.

[a] Dowling vs. Stuart, 3 Scam. R. 195.
[b] Bank U. S. vs. Donelly, 8 Pet. U. S. R. 372.

ALONZ PATE, plaintiff in error, v. THE PEOPLE OF THE STATE OF ILLINOIS, defendants in error.

Error to Adams.

On a trial for forgery, a witness was called whose business had been for many years as an officer of a Bank to examine papers with the view of detecting alterations and erasures, and ascertaing spurious from genuine writings and signatures. He was requested to examine the papers in evidence critically, and to state his opinion to the jury, whether there had been alterations and erasures. The counsel for the accused objected, but he was permitted to testify: Held, that from the nature of the business in which he had been engaged, he was a competent witness to express his opinion to the jury.

The general rule upon the subject of proof of handwriting is, that proof is not to be made by the comparison of hands, but by the production of witnesses, who have acquired a knowledge of the general character of the handwriting of the party. The modes of acquiring such knowledge are, either by having seen the party write, or by having seen letters or other documents, which he has, in the course of business, recognized or admitted to be his own. The witness may examine the writing in question and declare his belief, founded on his previous knowledge, concerning its genuineness. Where a witness stated that he had seen the prisoner write, but had never seen him write before the difficulty in question arose, it was held, that the witness did not come within the rule laid down.

When a witness is called to testify in relation to the handwriting of a party, he should first be asked if he is acquainted with such handwriting, and, if he answer in the affirmative, he is then to be asked as to the manner in which he became so acquainted.

Where instructions were asked, which contained correct principals of law as laid down in the elementary works on evidence, were objected to as being mere abstract propositions of law without any application to the facts of the case, and were given, the appellate Court held, that although the Court was not bound to instruct the jury upon such abstract questions of law, still if they were given, it is not ground of error.

It is only when a Court, in declaring the law, states it erroneously, that its opinion can be revised; and then, if it appear that the instructions given could have had any influence upon the jury, their verdict will be set aside.

It is a familiar doctrine of the law, that the jury is bound to acquit one accused of crime, if they entertain any reasonable doubt of his guilt.

In the record of a criminal case, it appeared that the jury were permitted to disperse from time to time, the trial continuing through several days, but it was silent as to the facts whether the separation was with the consent of the prisoner: Held, that the presumption was that they separated with his consent.

A record in a criminal case failed to show that when the jury retired to consider of their verdict they were placed in the charge of a sworn officer; *Held*, that the presumption was that the Court performed its duty in that respect.

In criminal cases, motions for new trials rest entirely in the discretion of the Circuit Court where they are made, and the propriety of their decisions in refusing them cannot be reviewed in the appellate Court. (*a*)

INDICTMENT for forgery, in the Adams Circuit Court, against the present plaintiff in error, at the April term 1845, tried before the Hon. Richard M. Young. The jury found the defendant guilty and fixed the period of his imprisonment in the penitentiary at nine years. Judgment accordingly.

The instruments charged to have been forged are set forth in hæc verba in the opinion of the court, as also the material portions of the evidence, &c.

A. Williams, for the plaintiff in error, stated the points only which were relied on for a reversal of the judgment of the circuit court.

A. Wheat, for the people.

The counsel for the plaintiff in error seem to have abandoned their first assignment, not having urged anything in support of it.

The second is equally untenable. If it be right ever for the jury to be informed of the fact, that the evidence introduced by a party in his own favor was manufactured by himself for the occasion—and of this there can be no doubt—then was it right for the jury in this case to be informed of the erasures and alterations to which Phillips testified. And the only question upon this point is, in what manner should they be informed of it? It is conceded that an inspection of the papers by the jury would be one mode, but it is denied that that is the only mode. When the papers are not brought into court the mode first suggested would be impossible, and it would be the least satisfactory in many cases where they are brought in. Phillips was an expert, and as such, was better able from experience to point out the erasures and alterations than the jury, who are presumed not to have

[a] Ante 368.

made it a business to examine writings with a view of detecting the spurious from the genuine. Besides dimness of eyesight in some of the jury would render the mode resorted to in this case absolutely indispensable.

The objection to Crawford s testimony was properly sustained. It is not sufficient that a witness has barely seen a party write; he must be acquainted with his hand writing, or have some notion of its character from having seen him write, or from a correspondence with him, before he will be permitted to express an opinion relative to it. And if it appear that the witness' knowledge was acquired under such circumstances, as would show that the party had a motive for disguising his handwriting, then he is incompetent. Else a party would be permitted to manufacture testimony for himself. 1 Esp. 14; 2 Stark. Ev. 374; 3 Phillips on Ev. 1322; Doe ex dem. Mudd v. Suckermore, 31 Eng. Com. Law R. 406. Such is the case here. Crawford never saw the plaintiff write until after the papers charged to have been forged by him made their appearance, or under any other circumstances than would show he had the strongest motive for disguising his hand writing. Besides, it appeared from the evidence at the same time, that the plaintiff, from the commencement of the transaction seemed to be impressed with a belief, that in order to make the papers avail him, it was necessary for him to procure testimony, aliunde the papers themselves, that they were not executed by him but by Randall, and that he had actually made sundry attemps to do so.

The instructions asked for by the prosecuting attorney are law. 1 Stark. Ev. 487, 496, 513–14, 523. And they are not mere abstract propositions, but have direct relevancy to the case. But if they were mere abstract propositions of law, the giving them would not be error, for they could not have misled the jury. 5 Ohio, 556, 240; 1 Dana, 156; 9 Cowen, 680.

The counsel for the plaintiff are mistaken in supposing that the court below refused the instructions prayed for by them. The record shows that these instructions were given

with a single qualification as to the meaning of a reasonable doubt, which when taken altogether, is substantially correct and could not have misled the jury.

This court has already decided in the case of McKinney v. The People, 2 Gilm. 540, that unless it affirmatively appear from the record that the jury dispersed without the consent of the prisoner, it would presume such consent ; and also that a sworn officer attended the jury when they retired to consider of their verdict, unless it should in like manner appear from the record that one did not. That case is conclusiv of these two points in this.

At Common Law, a new trial cannot be granted in a case of felony where the proceedings are regular. 1 Chity's Crim. Law, 653 ; The People v. Comstock, 8 Wend. 549. We proceed in criminal cases according to the course of the Common Law, (Rev. Stat. 186, § 188,) and therefore our courts possess no power to grant a new trial in cases of felony. At most, our courts possess but a discretionary power in the matter, and consequently a refusal to grant a new trial in such a case, could not be assigned for error. The 23d section of the Revised Statutes, 416, applies only to civil cases.

O. C. Skinner, upon the same side, cited the following authorities : 1 Phil. Ev. 290, 4 Durn. & East. 497, bottom page ; 8 Vesey, 474, and note ; Ibid. 476, notes : 1 Phil. Ev. 217–18 ; 31 Eng. Com. Law R. 406 ; 2 Pirtle's Dig. 106, §§' 7, 10 ; Wilcox's do. 377 ; Roscoe's Crim. Ev. 96 ; 1 Phillips Ev. 491.

O. H. Browning & N. Bushnell, for the plaintiff in error.

1. We insist that it was error in the court below to permit the jury to disperse after having been sworn, and after evidence had been submitted to them.

By the Criminal Code of this State, all trials for criminal offences are to be conducted according to the course of the Common Law, except when a different mode is pointed out by the Criminal Code. Rev. Laws, 1833, 213, § 178.

By the rules and requirements of the Common Law, the jury must be kept together, in criminal cases, after evidence given upon the issue. 5 Thomas' Coke, 392.

And this rule of the Common Law has not been repealed or modified by our statute. It was therefore improper in the court to permit the jury, in this case, to disperse after evidence had been given and progress made in the trial, which, however. they repeatedly did; and where there has been an improper separation of the jury during the trial, if the verdict is against the prisoner, he is entitled to the benefit of a presumption that the irregularity has been prejudicial to him; and it is incumbent upon the Goverenment to show, and that beyond a reasonable doubt, that the prisoner has suffered no iujury by the departure from the forms ordinarily persued in the administration of justice. State v. Prescott, 7 New Hamp. 292; People v. McKay, 18 Johns. 217.

These irregularities may not have affected the prisoner, but that is not enough. Even if it was probable they had not, mere probability would not suffice. State v. Prescott, 7 New Hamp. 297; Commonwealth v. McCall, Va. Cases, in note in 1 Cowen, 236-7; Brant ex dem. Buckbee v. Fowler, 7 Cowen, 562.

2. The Court erred in permitting the jury to retire to consider of their verdict, without being attended by a sworn officer.

The record is silent upon this subject. It does not show whether the jury was, or not, attended by a sworn officer.

The law is imperative, that when the jury retire to consider of their verdict in any criminal case, a constable, or other officer, shall be sworn to attend them. Rev. Laws, 1833, 214, § 179.

And the court cannot presume, in the absence of any statement upon the subject either that it was done, or that it was dispensed with by the consent of parties.

It is as a general principle, right to presume that the Court has acted correctly in all cases of discretion, unless the contrary appears of record; but even in cases of discretion, no material proceeding which is entirely omitted can

be supplied by intendment. Jones v. The State, 2 Blackf. 479 : Commonwealth v. Doty, 2 Metc. 18 ; Van Doren v. Walker, 2 Caines, 373 ; Fink v. Hall, 8 Johns. 437 ; Beekman v. Wright, 11 Johns. 442, anthorites before cited.

But, here, no discretion is reposed in the court. The law is explicit and imperative, that in all criminal cases an officer shall be sworn to attend the jury. This is admitted to be the law ; but it is insisted that when the record is silent upon the subject, it is to be presumed that the requisitions of the law were complied with, and such is understood to be the doctrine held by the court in the case of McKinney v. The People, and the reason assigned is, that swearing an officer to attend upon the jury constitutes no part of the regular proceedings in the progress of the trial, and need not, therefore, be shown by the record to have been done.

But ought it not to appear of record? The law has devolved upon the court the duty of seeing that in criminal cases, above misdemeanors, the jury shall not retire unless attended by a sworn officer of the court, and the record is intended to preserve the evidence of the acts performed by the court during the progress of the trial that nothing may be left to inference or intendment, but that the regularity and legality of the proceeding may be manifested by the record.

All trials for criminal offences shall be conducted according to the course of the Common Law, and, according to the course of the Commen Law, it was deemed necessary for the record to show, in criminal cases, that the juries were attended, when they retired, by sworn officers. King v. Stone, 6 D. & E. 246, top paging.

It is also said, that when it does not appear from the record that a sworn officer attended the jury, it may be fairly presumed that the defendant consented that they might retire without. This is a presumption which, under our statute, cannot be indulged. The proviso to the section providing for the attendance of a sworn officer is: "That in cases of misdemeanor only, if the prosecutor and the person on trial shall agree, which agreement shall be entered upon

the minutes of the court, to dispense with the attendance of an officer upon the jury, it shall be lawful for the court to carry into effect any such agreement."

Would it not, therefore, be unlawful for the court to give effect to any such agreement where the offence charged was of a higher grade than misdemeanor? And if the court could execute the agreement thus made between the parties, must not the existence of the agreement be shown by the record? The doctrine contended for would involve what, to our minds, seems an absurdity, viz: that in cases of misdemeanor only the court cannot presume an agreement to dispense with the attendance of a sworn officer upon the jury, but that consent, if it was really given by the defendant, must be attested by the record; whilst, in prosecutions for felony, involving consequences of so much greater magnitude to the defendant, consent may be presumed, and life or liberty taken away, by an intendment unauthorized by law and against the fact.

A recognition of a departure from the rules of law in one case might lead to the adoption of another, and, finally, those barriers, which are guaranties for the regular and impartial conducting of criminal cases, might be frittered away, and cause interminable perplexity, and possibly eventuate in gross injustice. It is much easier to require the observance of the mandates of the law, than to determine in what cases, they may safely be dispensed with. Guykowski v. The People, 1 Scam. 480.

The law prohibits juries from retiring in criminal cases, unless attended by a sworn officer. The law prohibits aliens from being jurors. Can a defendant, on trial, dispense with the provisions and requirements of the law in the one case more than in the other? And this court has already decided, that where an alien is called as a juror, and not challenged, and the accused may be considered as tacitly assenting, by not objecting to his serving on the jury, still he cannot be rendered competent to serve by the presumed assent of the accused, because the law has not admitted him to act in such capacity. Ibid.

3. The court erred in permitting the witness, Phillips, to testify as stated in the bill of exceptions.

Papers were placed in his hands which he had never seen before written by a person with whose handwriting he had no previous acquaintance, and he was asked to state, and did state to the jury his opinion whether erasures and alterations had not been made in them since they were written. This was not proof of a fact, but the witness' opinion upon a matter, about which any and every other person was as competent to form an opinion as himself. It was a question which required no peculiar skill in its decision. It was to be determined by inspection, not by skill; by accuracy of vision, not memory or knowledge.

The witnesses who had seen the writings made, and had had the custody of them, had already testified that they were in the same condition as when first written, and it was unwarrantable to permit a witness who had never before seen them, to give the jury his opinion as to appearances which must have been equally palpable to all others as to himself. It was a matter about which the jury might have formed their own opinions, upon the information of their own eyes but the conclusions of others should not have been given to them as evidence by which their judgments were to be controlled. The English courts have very uniformly followed the rule, excluding evidence of writing founded upon a mere comparison of hands by witnesses.

In some of the states, the rule has been so modified as to admit of this mode of proof; but when allowed, the comparison is to be made by the jury, and not by witnesses. Homer v. Wallis, 11 Mass. 312 ; Tilford v. Knott, 2 Johns. Ca. 214. And why? Because it is to be determined by inspection alone, and not by any fact within the knowledge of the witness, or information imparted by him, and that inspection the jury must make for themselves. The office of a witness is to communicate to the jury facts within his knowledge, which are pertinent to the case, and which tend to establish the issue between the parties. Here he does not pretend to state facts, but gives to the jury his vague con-

jectures founded upon the examination of a paper for the first time placed in his hands.

A witness will not be permitted to answer, whether from his knowledge of handwriting he believes the handwriting in question to be a genuine signature, or an imitation. Gurney v. Langlands, 7 Eng. Com. Law R., 118. And this for the same reason, that if that question is to be decided in reference to a paper before the jury, it is to be done by inspection, which they must make for themselves. It was also stated to the jury by this witness, that the papers alleged to be forged were in a genuine, and not a feigned, hand.

It is submitted that this evidence should all have been excluded. Its influence upon the jury, its agency in producing the verdict which was subsequently returned, cannot be estimated by the court. It is enough that the evidence was improper. The admission of illegal evidence is, in general, sufficient ground for a new trial, however immaterial it may appear to the court. Lloyd v. Monpoey, 2 N. & M., 446; Everringham v. Laughton, 2 McCord, 157; Antonie v. Coit, 2 Hall, 40; Commonwealth v. Green, 17 Mass. 515; Craddock v. Craddock, 3 Littell, 78–9.

4. In excluding the evidence of the witness, Crawford.

It is a general rule, that a witness who has seen the party write, although but once, is competent to prove his handwriting. 2 Stark. Ev. 652. And this without any reference at the time at which he saw him write, whether before or after the paper in controversy was made. Johnson v. Daverne, 19 Johns. 136; Tharpee v. Gisburne, 12 Eng. Com Law R. 8.

The proper question is to ask a witness whether he has seen the party write, (without any reference to the time when,) and if he answers affimatively, then whether he believes the paper in dispute to be his hand writing. And whatever degree of weight the witness' testimony may deserve, which is a question exclusively for the jury, it is an established rule, that if he has seen the person write, he will be competent to speak to his handwriting. 1 Phil. Ev. 484, Cowen & Hill's

Ed; Eagleton & Coventry v. Kingston, 8 Vesey, 473; 1 Greenl. Ev. 646, § 577, note 2.

This general rule is admitted by the counsel for the People, but it is insisted that to this general rule there are exceptions, and that the witness, Crawford, falls within the exception. This, it is incumbent upon them to establish, and if they fail, the general rule must prevail.

What, then is the exception, and have they brought themselves within it? The only exception adverted to is the case in 1 Esp. 14. There the witness was asked if he had ever seen the party write. He answered that he had, several times, but a few days before, when the party wrote his signature in his presence for the express purpose of enabling the witness to swear to it. The court decided the witness incompetent, but for what reason? No stress is laid upon the time at which the witness saw the party write. It is not even alluded to. The court placed its decision expressly upon the ground that the party wrote it in the presence of the witness for the avowed purpose of enabling the witness to swear for him.

Crawford had seen Pate write, and the court should have presumed that it was in the ordinary course of business, nothing appearing to the contrary. It was not until after the controversy arose between Pate and Randall, but for aught that appears to the contrary, long before any charge of forgery was made against Pate. To exclude this evidence, then, the court must go the length of saying that, in no case, shall proof be made by a witness who never saw the party write until after the paper in dispute was made, and it is not pretended that any such rule exists.

It is said that the evidence, if admitted, would have been immaterial; that the question was not whether the papers alleged to be forged were in the prisioner's handwriting; that they may have been by his procurement.

To this we answer, that the precise question was as to the prisoner's handwriting. There was no pretence of procurement, or that the papers were written by any other person than the prisoner; and the prosecution had already given

evidence to prove that they were in the defendant's handwriting. It was, therefore, very material for him to prove that they were not.

As, therefore, Crawford's evidence was material, andwas excluded when it should have been admitted, the assignment of error questioning this decision of the court below must be sustained. Goodright ex dem. Stevens v. Moss, 2 Cowp. 295; Coleman v. Allen, 3 J. J. Marsh.

5. In giving instructions on behalf of the prosecution as asked.

By the provisions of our criminal code, juries are declared to be judges of the law, as the fact, in all cases. Rev. Laws, 1833, 214. Now a strict adherence to this rule would deny to the court the right to expound the law to a jury in a criminal case at all. No authority to do so is to be found in our statutes. So, no express authority is to be found in the statute for granting new trials in criminal cases, and it is denied by the attorneys for the People that any such power exists or can be exercised.

Now it is not intended to deny that the court may pronounce the law to the jury. It is granted to be important that the court should do so, as well for the punishment of guilt, as for the vindication of innocence. But when the finding of the jury is most manifesly and flagrantly against law, and the court then declares that it has no power to controle or correct the injustice of the verdict, surely it is a reason why the court should not be permitted to contribute to an erroneous finding. If the court is powerless for good, it should alike be powerless for evil. If the Judge is to be a mute, unthinking statute after the verdict, he should be equally so before.

Admitting, however, the power, the objection is that the instructions are entirely abstract. Ross v. Garrison, 1 Dana, 35; Elting v. U. S. Bank, 6 Peters, Cond. R. 220; Hamilton v. Russell, 1 do. 320; Atkinson v. Lester, 1 Scam. 409; and would apply as well to any other case in which circumstantial evidence has been given as to this case.

The tendency of the instructions was to make an erro-

neous impression upon the jnry, and to mislead them in their views of the case. They assume, or pre-suppose a fact proper for the consideration of the jury. Lightburn v. Cooper, 1 Dana, 273; Bowman v. Bartlett, 3 A. K. Marsh 86. The rule is that the instructions shall be positive and specific, and that nothing be left to intendment. Snyder v. Laframboise, Bre. 268.

6. In modifying the instructions asked by the defendant, as stated in the bill of exceptions.

It is submitted that the instructions of the defendant stated the law correctly, were pertinent to the case, and should have been given as asked. But the court modified them, and told the jury, that before they could acquit the prisoner, they must be satisfied that there was more than a mere probability of his innocence. If there must have been more than a probability of innocence to entitle him to acquittal, less than a probability of guilt would be sufficient to warrant his conviction. This instruction overturns and reverses the rules of law, as heretofore understood, that the accused shall be presumed innocent until his guilt is made manifest, and that if the jury have doubts of his guilt, that he shall have the benefit of those doubts; and substitutes for them the harsh and unreasonable doctrine, that he shall be presumed guilty until he establishes his innocence, and that if there are doubts of his innocence, the prosecution is to have the benefit of such doubts.

This instruction could not fail to impress the jury with a most erroneous conception of their duty, and of the rules by which they were to be governed in arriving at a verdict; and where the judge has erroneously instructed the jury in a matter of law which may have influenced their verdict, the judgment must be reversed. Baylies v. Davis, 1 Pick. 206; Lane v. Crombie, 12 do. 177; Boyden v. Moore, 5 Mass. 369-79. And this, notwithstanding the verdict may appear to be right upon the proof, Gaines v. Buford, 1 Dana, 481; Wardell v. Hughes, 3 Wend. 419.

Points upon the question of a new trial.

At common law, where the jury found the prisoner guilty contrary to the evidence, the court, in many instances, set

aside their verdict, and granted a new trial. 4 Black. Com. 361-2; 2 Hawk. P. C. 623, ch. 47 § 12.

And while the above authorities advert to no distinction between felonies and misdemeanors in reference to new trials, it is certain that, at Common Law, new trials were granted only in cases of misdemeanors. In cases of treason and felony, on a conviction upon insufficient evidence, the usual course was to apply to the Crown for a pardon on the certificate of the Judge who presided at the trial. 2 Russell on Crimes, 589; 13 East. 416, note b; Rex v. Mawbey, 6 T. R. 619, 638.

In this country the law is otherwise. It was once held in New York to be an unsettled question, whether a person who had been acquitted could be re-tried, on account of the misdirection of the judge to the jury. The People v. Mather 4 Wend. 229.

Yet this question was soon after settled by the same court, against the application in the case quoted by the opposite counsel. The People v. Comstock, 8 Wend. 549.

But, long before either of these decisions, it was decided by the same court that the prisoner, convicted of perjury, was entitled to a new trial, where the verdict was against the evidence. The People v. Townsend, 1 Johns. Cases, 104.

And the same doctrine was re-affirmed in the case below, on the ground that the English law on the subject of new trials in cases of treason and felony had never been adopted in that State, and was inapplicable to this country, and would not be tolerated by the spirit of a free people. The People v. Stone, 5 Wend. 39, 42–3.

This decision in the 5th Wend. was made in a case arising previous to their Revised Code, which contains a provision requiring the Judges to sign bills of exceptions in criminal cases, yet the court considered that statute, not at all as conferring the authority on the courts to grant new trials in criminal cases on the merits, but rather as embodying, in the form of a statute, the pre-existing law of the State.

The same might be said of the 187th section of our criminal code, which makes it the duty of the Judge presiding at any criminal trial to sign any bill of exceptions tendered to him on the trial, provided it contains the truth. Even if the

power to grant new trials in criminal cases did not exist in this State anterior to this Act, we may safely affirm that it is conferred by this section. As the only object of any bill of exceptions, taken during the progress of the trial, is to preserve the evidence, and as the only object of preserving the evidence must be to secure the party a verdict and judgment in accordance with it, and the law arising from it, the right to a bill of exceptions would be a barren right, if the defendant could not thereby obtain a review of his case where the jury had, from any cause, mistaken their duty, and rendered a verdict contrary to the law and the facts. Rev. Laws, 1833, 216, § 187; Rev. Stat. 188, § 197.

Yet a bill of exceptions to evidence in cases of treason and felony did not lie at common law. 2 Hawk. P. C. 618, Ch. 46. § 198.

In New York, the courts have uniformly acted on applications for new trials in criminal cases as in ordinary cases, and granted or refused them as the circumstances required. The People v. The Justices of Chenango, 1 Johns. Cases, 179; Same v. Gray, 5 Wend. 289; Same v. Vermilyea, 7 Cowen, 369; Same v. Goodwin, 18 Johns. 187.

And the same is true of the courts in Massachusetts. Commonwealth v. Wait, 5 Mass. 260; Same v. Drew, 4 do. 291; Same v. Snelling, 15 Pick. 321; Same v. Child, 10 do. 252; Same v. Bostwick, 22 do. 397; Same v. Peck 1 Metc. 428.

And it may be affirmed generally of the practice in this country that a new trial will be granted in capital cases, or in case of felonies, for any cause which would be sufficient in a civil action, or on a conviction for a misdemeanor. United States v. Firsts, 3 Dallas, 515; Commonwealth v. Green, 17 Mass. 515; Jones' case, 1 Leigh, 598; State v. Hopkins, 1 Bay, 375; Nomaque v. The People, Bre. 109.

The opinion of the court was delivered by

Treat, J. Alonzo Pate was indicted at the April term, 1845, of the Adams circuit court, for the crime of forgery.

The indictment contained three counts. The first charged the prisoner with the forgery of a receipt for money in these words: "May 13th 1844 I Have Ths day Received of Alonzo Pate fourteen Hundred dollars Being paid on a Track of land as witness my hand and Seal this the 13th of May 1844 George Randall"
James Fawke

The second count charged him with publishing as true and genuine the same forged receipt.

The third count charged him with the forgery of a contract for the conveyance of land, in these words: "South East Quarter of Section 18 in T 1 N R 8 W of the 3rd P N O R. Know all men By These presents that I Geor Randall do hav This day Bargained and Sold My track of land to Alonzo Pate for the Sum of fourteen Hundred and fifty dollars Balence on said land fifty dollers which I do Bind myself to Reliquish my Right and title on the payment of the Ballance" of the money as witness my hand And seal Georg Randall"
James Fawke

Each of the counts alleged that the act was done with the intention to defraud George Randall.

At the same term the prisoner was arraigned and pleaded not guilty. The jury found him guilty, and fixed the period of his imprisonment in the Penitentiary at nine years. During the trial exceptions were taken to decisions of the court, in admitting and excluding evidence, and in giving instructions. The prisoner entered a motion for a new trial on the ground of newly discovered testimony, and because the verdict was contrary to the evidence. This motion the court denied, and a bill of exceptions was taken embodying the whole of the testimony. The court having passed sentence on the prisoner, he sued out a writ of error to this court, and obtained a supersedeas thereon.

The errors relied on for the reversal of the judgment are, first, the court erred in admitting the testimony of Phillips; second, in excluding the testimony of Crawford; third, in giving the instructions asked for by the prosecution; fourth,

in qualifying the instructions asked for by the prisoner; fifth, in allowing the jury to separate without the consent of the prisoner; sixth, in permitting the jury to retire from the bar without being in the charge of a sworn officer; and seventh, in not granting a new trial. These errors will be considered in their proper order.

First. Was the testimony of Phillips properly received? A bare reference to the testimony which he gave, and the object for which it was introduced, will clearly show that there was no valid objection to it. Randall, the prosecuting witness, testified that the receipt and contract described in the indictment were never executed by him, and he proceeded to point out instances wherein the style of writing and spelling differed from his own. For the purpose of contradicting him, the prisoner introduced other papers written and signed by Randall, which corresponded in these particulars with the documents alleged to be forged. The prosecution then had the undoubted right to rebut this testimony and sustain Randall. A legitimate way of doing it was by showing that the papers introduced by the prisoner, and which by the evidence had been traced to his possession previous to the trial, were originally written, as stated, by Randall, but had since been made to resemble the forged writings by alterations and erasures. Philips was placed on the stand for the purpose of examining them critically, and then expressing his opinion to the jury, whether there had been such erasures or alterations. His conclusion was, that erasures had been made in the particular instance pointed out by Randall. It had been the buisness of the witness for many years, as an officer of a bank, to examine papers with the view of detecting alterations and erasures, and ascertaining spurious from genuine writings and signatures. (*a*) He was, therefore, a person skilled in the matters concerning which he was called to give testimony, and such as was competent to express his opinion to the jury. It was insisted on the argument, that the question whether there had been erasures was one to be determined by the jury on an inspec-

(*a*) Jumperts vs. People, 21 Ill. R. 407.

tion of the papers, without the aid of other testimony. It can hardly be supposed that the jurors were as competent to form a correct opinion on this subject as a witness peculiarly qualified by years of practical experience. Erasures might be easily discovered and pointed out by such a witness, which would otherwise escape the observation of men unaccustomed to detecting them. The court was right in allowing the minds of the jury to be enlightened by the opinion of a witness possessing this superior knowledge.

Second. Was the testimony of the witness, Crawford, properly excluded? Crawford was called by the prisoner, and after testifying respecting other matters, stated that he had never seen the prisoner write before the difficulty arose between him and Randall. The counsel for the prisoner then asked the witness to state from his knowledge of the prisoner's hand writing, whether either the receipt or contract alleged to be forged was written by him. The prosecution objected to the question, and the court sustained the objection. The general rule on the subject of the proof of hand writing is well understood, and will be briefly stated. The proof is not to be made by the comparison of hands, but by the production of witnesses, who have acquired a knowledge of the general character of the hand writing of the party. The modes of acquiring this knowledge are, either by having seen him write, or by having seen letters or other documents which the party has, in the course of business, recognized or admitted to be his own. A witness who has thus become acquainted with the hand writing of the party is allowed to examine the writing in question and declare his belief, founded on his previous knowledge, concerning its genuineness. In this case, the witness did not come within the rule. (*a*) No sufficient foundation was laid for the introduction of his opinion. It did not appear that he had such a knowledge of the prisoner's hand writing as would authorize him to speak concerning the genuineness of the writings in question. He did not state that he was acquainted with his hand writing. He had not seen him write, unless that is to be inferred from the

(*a*) Woodford vs. McClanahan, 4 Gil. R. 85.

statement, that he had never seen him write before the happening of a particular contingency. A witness ought first to be asked if he is acquainted with the hand writing of the party. If he answers in the affirmative, he is then to be asked, how he obtained the knowledge. It is only when he professes to have this knowledge, acquired from legitimate sources, that he is permitted to express an opinion. He may have seen the party write and still be unable to distinguish his hand writing.

Third. Did the court err in giving the instructions asked for by the prosecution? These instructions contain correct principles of the law as laid down in the elementary works on evidence. This is not denied by the counsel for the prisoner, but they insist that the instructions were mere abstract propositions of law, having no applicability to the facts of the case, and as such should have been withheld. It has often been decided that courts are not bound to instruct the jury on abstract questions of law, which have no direct bearing on the facts of the case before them; but no case has gone the length of holding that the giving of such instructions is error. It is only when the court in declaring the law states it erroneously, that its opinion can be revised; and then if it appear that the instructions could have had any influence on the jury, their verdict will be set aside.

Fourth. Did the court err in giving the qualification to the instructions called for on the part of the prisoner? It appears from the record, that the court gave all of the instructions demanded by the prisoner, with the single explanation as to the meaning of a reasonable doubt, as follows: "That there should be more than a bare probability of the defendant's innocence: that they should have a reasonable doubt of his guilt, growing out of the unsatisfactory nature of the evidence; such a doubt as would induce a reasonable man to say, I am not satisfied that the defendant is guilty." This instruction, as it reads, is not technically correct, but by inserting the word "possibility" in the place of "probability," it would not be obnoxious to any just exception.(*a*)

(*a*) Jackson vs. People, 18 Ill. R. 272; Miller vs. People, 39 Ill. R. 464.

It is most likely that the court in giving the explanation made use of the former word, and that in copying the instructions into the bill of exceptions, the latter word was by mistake inserted in lieu of it. But proceeding on the ground that the instruction is correctly copied, it is very evident from the whole record that it could not have had the slightest influence on the jury prejudicial to the prisoner. The instructions given, as well at the instance of the prosecution as of the prisoner, assert in emphatic terms the familiar doctrine of the law, that the jury are bound to acquit the defendant if they entertain any reasonable doubt of his guilt. The explanation itself, when all taken together, clearly indicates that the court fully recognized this principle, and did not intend to contravene it; and such we entertain no doubt was the understanding of the jury.

The fifth and sixth assignments of error present questions of the same character, and both will be disposed of together. On these points, it appears from the record that the trial continued through several days, and that the jury were permitted to disperse on each adjournment of the court; but the record is silent as to the fact whether the separation was with the consent of the prisoner, and it fails to show that the jury were in charge of a sworn officer when they retired to consider of their verdict. These questions arose in the case of McKinney v. The People, 2 Gilm. 540, and we there held, that the record need not show what disposition was made of the jury during the progress of the trial, and when they retired to agree on their verdict; that the presumption was that the court performed its duty in such respects, and that if the jury were allowed to disperse without the consent of the prisoner, or to retire from the bar without being in the charge of a sworn officer, it was incumbent on the prisoner, if he objected to such irregularities, to introduce them into the record by a bill of exceptions. The presumption from this record is, that the prisoner consented to the separation of the jury, and that the court performed its duty by requiring a sworn officer to accompany the jury in their retirement.

Seventh. Ought the court to have granted a new trial? Prior to the passage of the act hereafter mentioned, this court repeatedly decided that applications for the continuance of causes, and for new trials, were matters addressed to the sound discretions of the circuit courts, and that their decisions thereon could not be assigned for error. Vickers v. Hill, 1 Scam. 207; Wickersham v. The People, Ib. 128, and the numerons cases referred to in a note to that case. The second section of the Act of the 21st of July, 1837, and which is incorporated in the Revised Statutes, provided that the decisions of the circuit courts in overruling motions for new trials, and for continuances might be assigned for error. Acts of 1837, 109; Rev. Stat. 416. It will be seen, then, that applications for continuances and for new trials are placed on the same footing, both by the adjudications of this court, and the enactments of the Legislature. This court during the present term, in the case of Baxter v. The People, on the direct question whether the circuit court had erred in refusing the defendant a continuance in a criminal case, deliberately decided that the foregoing provision of the statute was solely applicable to civil causes, and had no relation whatever to criminal cases. The reasons for that conclusion are there given, and need not here be recapitulated. The decision is necessarily conclusive of the question presented by this assignment of error. In criminal cases, therefore, motions for new trials still rest entirely in the discretion of the circuit court, where they are made, and the propriety of their decisions in refusing them cannot be reviewed in this court. (*a*)

But if the reverse was the rule, this case would not justify the interposition of the court. The evidence exhibits a strange but flagrant case of forgery, to which the prisoner did not scruple to superadd the crime of perjury; the object of the one, to wrest from an honest citizen the whole of his estate; the design of the other, to visit on the head of an innocent man the ignominy and punishment so fully deserved by himself. The jury returned a righteous verdict, and the court

(*a*) *Contra*—Laws 1857 p. 28-103.

very properly exercised its discretion in refusing to disturb it.

The judgment of the circuit court is affirmed with costs.*

The following dissenting opinion was delivered by

Purple, J. I dissent from the opinion of the court upon one point in this case. It is in reference to the explanation given by the circuit court to the jury as to the meaning of a reasonable doubt. This explanation was, "that there should be more than a bare probability of the defendant's innocence; that they should have a reasonable doubt of his guilt, growing out of the unsatisfactory nature of the evidence, such a doubt as would induce a reasonable man to say, I am not satisfied that the defendant is guilty." If I have rightly apprehended the character of this instruction, the jury are advised that if there is but a probability of the defendant's innocence, he is to be considered guilty.

In my opinion, it was clearly erroneous. If the jury had been told that there should be more than a bare probability of the defendant's guilt instead of "innocence," the instruction with what followed would have been unexceptionable. It may be that such was really the case. But it is not so in the record, and to me it seems a most dangerous practice to presume it.

It is supposed in the opinion of the court, that this portion of the instruction is so qualified and explained by the succeeding paragraph, that taken all together the jury could not have misapprehended the meaning of the court, and that no prejudice could have possibly resulted to the prisoner.

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* A petition for a re-hearing was filed, and denied. One of the points made was, that the Court misapprehended the testimony of Crawford. In the bill of exceptions, as embodied in the transcript of the record, a word had been omitted and was supplied by consent of counsel, and interlined with a pencil. The word was dimly written, and escaped the attention of the Judge who drew up the Opinion. The omission occurred in the following sentence, to wit: "I have seen Pate write. I never saw Pate write before his difficulty with Randall." The word italicised was omitted. The Court, however, in the verbal opinion announced, stated that this fact would not change the decision of the case

I am at a loss to know how they could have understood it. In one sentence they are told, that if they have a reasonable doubt of his guilt, he must be acquitted; and in the next, that there must be more than a bare probability of his innocence. If there is a probability of innocence, every reasonable man must doubt of guilt. If there is but a probability of guilt, the law determines that the accused is innocent.

Which portion of the instruction given in this case was regarded by the jury as the law it is impossible to determine. The verdict was against the paintiff here, and this court cannot know but that the whole turned upon that part of the instruction which was illegal.

For this error only, I think the judgment of the circuit court should be reversed.

WILSON, C. J. said:

I concur in the view expressed by Judge Purple in this case.

Judgment affirmed.

MEMORANDUM.

The present volume contains all the Opinions of the Supreme Court, which have been delivered and not hitherto published. There yet remain five or six cases where Opinions have not been filed, which were decided at the December Term, 1846

INDEX.

ABATEMENT.

See Pleading, 5-7.

ACCESSORY.

See Criminal Law, 7.

ACCOMPLICE.

A person accused of the crime of murder, and jointly indicted with otheres for that offence, was not put upon his trial, but was used by the State's Attorney as a witness on the others, who were convicted and executed. In giving his testimony, he did not, in any way, admit that he participated in the commission of the murder. Neither did it appear in his petition by him filed for a writ of habeas corpus, that he was guilty, or had been convicted of any crime : Held, that he was not in a condition to avail himself of the rights and privileges of an accomplice. *Ex parte* Birch, 134.

ACCORD AND SATISFACTION.

See Pleading, 3.

ACTION.

See money had, &c. 1, 2.

ADMINISTRATOR AND EXECUTOR.

1. An administrator seeking to subject real estate to sale for the payment of the debts of the deceased, may give a general notice by publication of his intention to apply for leave to sell, without naming particular persons as defendants, thestatute having regard to all persons interested, whether defendants or not. *Bowles* v. *Rouse*, 409.
2. The proper county in case of non-residents' dying, leaving lands in this State, is the county where such lands or a part of them lie, and in such county administration is to be granted. *Ib.*

See Costs, 8; Error, 4; Judgment, &c. 8; Statute of Limitations, 1.

ADMISSION.

See Evidence, 14.

AFFIDAVIT.

See Jurisdiction, 2.

AGENT.

1. A person who agrees to act for another is not allowed to deal in the business of the agency for his own benefit; and if he take a conveyance in his own name of an estate which he agreed to purchase for another, he will, in Equity, be considered as holding the estate in trust for his principal. *Switzer* v. *Skiles*, 529.
2. A mere agreement to execute a trust in futuro, without compensation, is not obligatory; but when the trust is undertaken and actually commenced, the trustee is bound to proceed and execute it with the same diligence and good faith, as if he were to receive a liberal reward for his service. The confidence reposed in him, the actual entering on the duties of the trust, and the injury which may result to the beneficiary, if he do not faithfully fulfil it, are regarded as a good and sufficient consideration. *Ib.*

See Evidence, 4.

ALTERATION.

See Recognizance, 2.

AMENDMENT.

See Continuance, 1; Forcible Entry, &c., 7; Verdict, 5.

ANSWER.

See Evidence, 4, 13.

APPEAL.

1. An appeal bond contained the following condition: "That if the said Samual Mason and John Mason should prosecute their appeal with effect, and should pay whatever judgment might be rendered by the Circuit Court upon the dismissal of the said appeal, then the bond to be

void,''&c. Suit was brought thereon, a trial was had, and the Court rendered a judgment in favor of the plaintiff for the debt, and assessed the damages of six cents: Held, that the bond, though not exactly in compliance with the statute by reason of the commission of the words "or trial,' after the word " dismissal," was not void, but might still, to the extent of the obligation, be the foundation of the action: Held, also, that the plaintiff in the Circuit Court, during the pendency of the appeal, might have objected to the bond for informality and have required that it be perfected; and upon a refusal to perfect it, the appeal would have been dismissed. *Young* v. *Mason*; 55.

2. A. recovered a judgment in the Circuit Court against B. and four other defendants, all of whom prayed an appeal. The appeal was granted on condition that they enter into bond with a certain individual as surety. The bond was executed by four of the defendants with the surety required, and the appeal was duly entered in the Supreme Court. A moved to dismiss the appeal because the order of the Court was not complied with: Held, that the appeal was not perfected, and the same was dismissed. *Watson* v. *Thrall*, 69.
3. A judgment was rendered in an action of ejectment in the Circuit Court for the recovery of the tract of land in question, and for damages and costs. An appeal was taken, and the bond recited that the judgment was rendered on a day which was not the day on which it was in fact rendered and that it was for damages and costs. In the appellate Court, a motion was made to dismsss the appeal for the want ot a sufficient bond: Held, that the bond was insufficient by reason of the variance. *Carry* v. *Hinman*, 90.
4. To mere order of the Court granting an appeal to a defendant does not divest the plaintiff of a right to an execution upon the adjourment of Court. The judgment becomes operative from the last day of the term, and continues so until the appeal is perfect by the filing of the bond. The refusal of the Court to stay proceedings on an execution, under such circumstances, cannot be assigned for error, the application being addressed to the sound discertion of the Court. *Branigan* v. *Rose*, 123.
5. A party appealing from the decision of the Probate Court allowing a claim, who neglects to tender a bill of exceptions as required by law, cannot object, in the Supreme Court for the first time, to the want of jurisdiction in the Circuit Court by reason of such neglect on his part. *Welsh* v. *Wallace*, 490.

APPEARANCE.

See Chancery, 6; Evidence 8; Pleading, 8.

APPOINTMENT.

The legislature provided by law for the election of a Prosecuting Attorney for a particular county, and fixed the salary, but adjourned without filling the office. A joint resolution was subsequently passed, authorizing the Governor to appoint the officer, to hold until a further provision by law, "without any compensation from the State." An officer was appointed by the Governor, who served two years, and claimed the salary provided by the law: Held, that whatever might have been the intention of the Governor, at the time he made the appointment, he could not have made it under the law first mentioned, and that the officer held his office by virtue of the joint resolution, and, therefore entitled to no compensation from the State by virtue of the law. *The People* v. *Campbell*, 466.

See Mortgage, 1.

ASSIGNMENT.

A assigned to B. and, B. to C. the amount of a judgment recovered before a justice of the peace, from which an appeal was taken, when judgment was rendered for the defendant. The assignment was as follows: "For a valuable consideration, I hereby assign the within named judgment (which was

described in another assignment on the same paper.) to Loring Show, and guarantee the collection of the same, if well attended to. Dec. 4, 1838. (signed) William Baker." Held, that, the terms "well attended to" clearly referred to the collection of the judgment, and not to the sustaining of it upon the contingency of an appeal. *Show* v. *Baker*, 258.

See Assignor, &c. 1.

ASSIGNOR AND ASSIGNEE.

1. A sued B. in debt upon an appeal bond. At the return term, B. moved to dismiss the suit, and filed a stipulation signed by the parties, setting forth that the suit, had been settled, and that it was to be dismissed at the cost of B. The plaintiff's attorney resisted the motion, and filed an affidavit stating that he and his client had agreed that he should receive a balance of seven dollars, due for professional services, out of the proceeds of the judgment in the suit; that B. had notice of the agreement prior to the execution of the stipulation filed by him, and finally, that the settlement of the suit was made without his knowledge or consent. The Court dismissed the suit: Held that the Court decided correctly. *Chapman* v. *Shattuck*, 49.
2. The doctrine is well settled, that a Court of Law will recognize and protect the rights of the assignee of a chose in action, whether the assignment be permitted to sue in the name of the person having the legal interest, and to control the proceedings. The former owner cannot interfere with the prosecution, except so far as may be necessary to protect himself against the payment of costs. After the debtor has knowledge of the assignment, he is inhibited from doing any act which may prejudice the rights of the assignee. But a case will not come within the principle laid down, unless there be an assignment of the whole cause of action. *Ib.*
3. The equitable assignee of a chose in action may sue upon it in the name of the party having the legal title; but he is bound to indemnify such party against the payment of costs. *Henderson* v. *Welch*, 340.
4. An equitable assignee of a judgment has the right to sue a sheriff in the name of him who has the legal interest therein, to enforce a liability incurred by such sheriff. *Bryant* v. *Dana*, 343.

See Evidence, 14.

ASSUMPIST.

See Money had and received; Money paid.

AVERMENT.

See Pleading, 6, 9, 10, 12, 20, 23.

BAIL.

A. sued B. in asumpsit, a capias ad respondendum was issued, and B. held to bail. Upon a return of the capias ad respondendum of non est inventus, action of debt was commenced upon the bail bond, and after the return day of the summons, the bail surrendered the principal debtor in open Court, who was taken into the custody of the sheriff. The bail pleaded non est factum, and two pleas setting forth the surrender, &c. The latter were demurred to, and the demurrer sustained by the Court: Held, that the demurrer was properly sustained, the statute not authorizing the surrender of the principal after the return day of the process against the bail. *Gear*, v. *Clark*, 64.

BANKRUPT LAW.

The voluntary branch of the Bankrupt Law of the United States, passed August 19, 1841, is constitutional and vailed. *Labor* v. *Wattles*, 225.

See Pleading, 20.

BENEFICIAL PLAINTIFF.

See Assignor, &c. 2-4; Costs, 1, 2; Pleading, 20.

BILL OF EXCEPTIONS.

1. Where a party to a suit in the Circuit Court takes a voluntary nonsuit, he goes out of Court and cannot afterwards file a bill of exceptions. *The People* v. *Brown*, 87.
2. A refusal to grant a motion for a new trial for want of evidence cannot be assigned for error, when the whole evidence is not stated to be contained in the bill of exceptions. *Granger* v. *Warrington*, 299.
4. Motions were made in the Circuit Court to quash two executions, which were denied. Certain papers were copied into the transcript, but no bill of exceptions was taken. The decision of the Circuit Court was assigned for error: Held, that the papers in order to be regarded as evidence, should have been incorporated in a bill of exceptions. *Corey* v. *Russell*, 366.

See Appeal, 5.

BILL OF REVIEW.

See Chancery, 1–4, 6, 14, 15; Judgment, &c. 13.

BOND.

A. B. in an action of debt upon a penal bond executed by the parties, in which they mutually bound themselves that each would desist from all interference with a certain tract of Government land to which both had previously set up a claim, until the merits of their respective claims could be settled and adjusted: Held, that an action was maintainable for the breach of the condition. *Wilcoxon* v. *Roby*, 475.

See Appeal, 1–3; Justice of the Peace, 1, 3.

CHANCERY.

1. Bills of review are in the nature of writs of error, filed in the same Court where the decree in the original cause was entered, calling upon the Court to review and reverse the former decree. They are of two kinds, first, for error of law, and secondly, upon newly discovered evidence. A bill of review may be brought for error of law, which is apparent upon the face of the decree itself, and no question is raised as to the determination of the matter of fact, or the evidence upon which the decree is founded, but it is only upon matters of law rising upon the fact. So it may be brought, by reason of newly discovered evidence, and this evidence must be set forth, and it must be stated, also, that it has arisen since the final decree, or has since come to the knowledge of the party, and that he

was guilty of no neglect in not discovering and producing it before. Furthermore, the evidence must not be cumulative, and must be of an important and decisive character, if not conclusive. *Griggs* v. *Gear*, 2.

2. A party may bring a bill of review for error apparent, as a matter of right, without the leave of the Court; but allowing a bill of review for newly discovered evidence rests in the sound discretion of the Court. *Ib.*

3. An original bill in the nature of a bill of review may be brought for the purpose of impeaching a decree for fraud. It is a matter of right, and may be filed at any time without the leave of Court, and may be brought for fraud in fact or fraud in law. So, a bill partaking of the two-fold character of a bill of review errors apparent and of an original bill in the nature of a bill of review to reverse a decree for fraud, may be filed without the leave of Court. *Ib.* 3.

4. Before filing a bill for a review, the party who seeks to reverse the former decree must have performed it; as, if it be for the delivery of possession of land, he must have done so; or, for the payment of money, he must have paid it. If, however, by complying with the decree, he would extinguish a right, as the execution of an acquittance or the like; or if the party show himself absolutely unable to comply with the decree, as, for instance, where he is required to pay a sum of money, and he is insolvent he may show the facts to the Court and get released from the performance before he files the bill. *Ib.*

5. In chancery, a party will be afforded relief where his appearance in the suit has been entered without authority, and when the solicitor is unable to indemnify the party for the damages which he must sustain by the unauthorized act; and that, too, whether the solicitor act under a misapprehension of his duty, or misunderstanding of his authority, or from a fraudulent intent. *Ib.*

6. After a defendant has demurred to a bill of review, he cannot raise an objection to the right of the complainant to file the Bill. To avail himself of such an objection, he should move the court, on his first appearance, to strike the bill from the files, or to dismiss the suit.

7. A. sold to B. a lot of land, and gave a bond for a deed on the payment of the purchase money, for which the vendee gave a note at twelve months. Three years after the note became due, it was paid, having been merged in a judgment at the suit of the vendor. One year afterwards, the vendee commenced a suit on the bond, obtained a judgment by default, and the damages were assessed. At the term when the default was entered, the vendor tendered a deed to the attorney in the suit, which was not received. The title of the vendor was good, but the land had depreciated in value. Vendor filed a bill in chancery to compel the acceptance of the deed and enjoin the collection of the judgment, but did not bring the deed into Court, nor was a copy filed therewith as an exhibit. At the hearing, the injunction, previously granted by the Master, was dissolved, and the bill dismissed: Held, that by obtaining and collecting the judgment against the vendee, and by not appearing and defending the suit on the bond, and permitting a year to elapse after receiving the purchase money from the vendee before tendering a deed, he had made his election, and considered the contract of sale as still subsisting and, under all circumstances, must abide the judgment against him: Held, also, that he should have brought this deed into Court to be placed within its control and made subject to its order, to have entitled himself to the relief prayed. *Mason* v. *Richards*, 25.

8. After a long period had elapsed, courts will be cautious in enforcing the specific performance of a contract where there is any real doubt about its existence and its terms; and especially when the contract is lost or destroyed, it should be made satisfactorily to appear what were the substantial conditions and covenants which are sought to be enforced. *Rector* v. *Rector*, 105.

9. A. court of chancery is vested with a broad and comprehensive jurisdiction over the persons and property of infants and their parents, who are bound for their maintenance; and will take such action in relation to the charge of their persons on the management of their property, as circumstances may require. *Cowls* v. *Cowls*, 435.

10. The court of chancery may remove all guardians, whether appointed by the court itself, by the court of Probate, by testament, or even by express

Act of the Legislature, whenever it is satisfied that the guardian is abusing his trust, or the interests of the ward require it. *Ib.*

11. In determining the fitness of the person to whom the custody of infants shall be given to act as guardian, the Court of Chancery is not bound down by any particular form of proceeding. It may either be referred to a Master to inquire and report as to who will be a fit person; or that may be inquired of in open Court, or the Court may determine from its own knowledge alone. No certain rule can be laid down for its government, in all cases, except that the best interests of the child must be consulted. *Ib.*
12. If a defendant in Chancery demur to the complainant's bill, and his demurrer be overruled, and he decline answering over, he thereby admits all of the allegations of the bill to be true, and he cannot afterwards question the correctness of the decree by denying the truth of those allegations. *Miller* v. *Davidson*, 518.
13. The correct practice on overruling a demurrer in Chancery is, the entry of an order that the defendant answer the bill, and if he neglect so to do, the complainant may have the bill taken pro confesso, and the Court will then render the proper decree. *Ib.*
14. A bill of review should recite, or give the substance of the record of the former suit. It is necessary to state all of the proceedings in the original cause, except the evidence on which the Court found the facts on which it proceeded to render a decree. *Turner* v. *Berry*, 541.
15. Upon a bill of review, the sufficiency of the evidence to establish the facts as found cannot be controverted. It is not a misjudging of the facts that a party can complain, but for an improper determination of the law. *Ib.*
16. A motion for leave to file a supplemental bill, as well as an application to amend a bill, is ordinarily addressed to the discretion of the Court, with the exercise of which the appellate Court will seldom interfere. *Ib.*
17. It is purely a matter of discretion with the Court whether it will require a complainant to make proof, the defendant being in default. *Ferguson* v. *Sutphen*, 547.
18. Where money is paid into Court pending a suit in Chancery, and the decree does not show to whom it should be paid, the Court will, on the requisite proof being made, direct it to be paid to the person who is properly entitled to it. *Ib.*
19. In Equity, the doctrine is well settled, that a conveyance absolute in its terms may, by parol evidence, be shown to have been designed by the parties as a mortgage. *Ib.*
20. A party cannot obtain a decree in Equity for a specific performance of a contract, where he has recovered damages at Law for a breach of the contract. *Buckmaster* v. *Grundy*, 626.
21. Where a judgment has been rendered in a Court of Law, and it does not appear that it was obtained by fraud, or was the result of accident or mistake, a Court of Equity will not go behind such judgment. *Ib.*
22. Equity will allow one judgment to be set off against another, where there are no means for collecting it of the judgment creditor in the latter. *Ib.*

See Creditor's Bill; Lien, 5.

CHOSE IN ACTION.

See Assignor and Assignee.

COMPLAINANT.

See Forcible Entry, &c., 1, 2, 4, 6, 7.

CONFIDENTIAL COMMUNICATIONS.

See Evidence, 17.

CONSIDERATION.

See Contract, 1, 5; Evidence, 11, 12.

CONSTITUTIONAL LAW.

1. By the Constitution of Illinois, the Governor cannot pardon before conviction. Ex parte Birch, 134.
2. The ninth section of the eighth Article of the Constitution does not exempt a successful defendant in a criminal case from liability for costs. *Carpenter* v. *The People,* 147.
3. The voluntary branch of the Bankrupt Law of the United States, passed August 19, 1841, is constitutional and valid. *Lalor* v. *Wattles*, 225.
4. The Legislature has not the power to repeal a law by a joint resolution of the two Houses of the General Assembly, without such resolution having undergone the three several readings prescribed by the 16th section of the 2d Article of the Constitution, and without its having been submitted to, and received the approval of the Council of Revision. *The People* v. *Campbell*, 466.

CONTINUANCE.

1. If a declaration is defective in substance, and can be reached by a general demurrer, or not being defective in substance, any new matter is introduced in an amendment, showing a new or different cause of action, or extending in any manner the liability of the defendant, he will, as a matter of right be entitled to a continuance. *Hawks* v. *Lands,* 227.
2. Motions for continuance sin criminal cases are addressed solely to the discretion of the Court, and its decisions thereon cannot be assigned for error. *Baxter* v. *The People*, 368.

CONTRACT.

1. As a general rule, where the undertaking upon which a plaintiff relies was either upon an unlawful consideration, or to do an unlawful act, the contract is void; and this, whether the contract be illegal as being against the rules of the Common Law, or the express provisions or general policy of any particular statute. *Munsell* v. *Temple*, 93.
2. After a long period has elapsed, Courts will be cautious in enforcing the specific performance of a contract where there is any real doubt about its existence and its terms; and especially when the contract is lost or destroyed, it should be made satisfactorily to appear what were the substantial conditions and covenants which are sought to be enforced. *Rector* v. *Rector*, 105.
3. There is a distinction between contracts of an executory character, and those which are fully executed by deeds or conveyances. In the latter case, there can be no rescission of the contract unless it has been tainted by actual fraud. *Beebe* v. *Swartwout*, 162.
4. The rules applicable to contracts of marriage do not differ materially from those governing contracts in general. Where there has been an absolute, unqualified refusal to perform a contract of this nature, the law will not require of the injured party either a request or offer of performance. It is enough that there has been a promise and a refusal inconsistent with the promise. *Greenup* v. *Stoker*, 202.
5. The time of performance of a contract in writing may be extended by a subsequent parol agreement, and no new consideration is necessary, where there are mutual acts to be performed by the parties. *Wadsworth* v. *Thompson*, 423.
6. No rule is better settled, than that a party cannot compel the specific performance of a contract in a Court of Equity, unless he show that he himself has specifically performed, or can justly account for the reason of his non-performance. *Scott* v. *Shepherd*, 483.

See Chancery, 7, 8, 20; Mistake, 1; Usury.

COSTS.

1. In a suit brought by one for the use of another, the defendant filed his affidavit showing the insolvency of the person for whose use the suit was brought,

and moved that he be required to give security for costs: Held, that as the nominal plaintiff was a citizen of the State, and liable for the costs, the motion should be denied. *Buckmaster* v. *Beames*, 1.

2. A plaintiff, who brought a suit for the use of another which was removed to the Supreme Court, made a motion in that Court founded on affidavit that the person beneficially interested had removed from the State and was insolvent, that the writ of error be dismissed unless he should give security for costs: Held, that the beneficial plaintiff had the right to prosecute the suit in the name of the nominal plaintiff, but that he would be required to indemnify and protect the latter against the payment of costs. *Ib.* 97.
3. Where a party is required to give security for costs, and presents a bond, if the same is objected to as insufficient, it is incumbent on the party presenting it to satisfy the Court by competent proof that it is sufficient. *Ib.*
4. The general principle upon the subject of cost is, that the party who requires an officer to perform services, for which compensation is allowed, is, in the first instance, liable therefor. In legal contemplation, he pays the costs as they accrue, and it is upon this ground, that the successful party, in a civil action recovers a judgment for his costs. If he has not actually advanced them, he is still responsible to the officer. *Carpenter* v. *The People*, 147.
5. In a criminal case, a successful defendant is not entitled to a judgment against the State for his costs; but he is, nevertheless, liable to pay them to the proper officer, where the costs accrue in the Supreme Court. The ninth section of the eighth Article of the Constitution does not exempt him from liability for costs. *Ib.*
6. A plaintiff in error, in a cause where the People are defendants in error, who succeeds in reversing the judgment against him, is only responsible for the costs made by him in the prosecution of the writ of error. *Sans* v. *The People*, 33.
7. The equitable assignee of a chose in action may sue upon it in the name of the party having the legal title; but he is bound to indemnify such party against the payment of costs. *Henderson* v. *Welch*, 340.
8. A judgment for costs was rendered against the goods, &c., of an intestate in the hands of an administrator, &c., in the Circuit Court on an appeal from the decision of the Probate Justice, allowing a claim against the estate of the intestate: Held, that in the absence of proof to the contrary, the presumption was, that the claim was filed in due time, and that the estate was, consequently, liable for the costs of establishing it. *Welch* v. *Wallace*, 490.

See Error, 4.

COUNTY.

See Fees, &c., 3

COVENANT.

To constitute a breach of the covenant of quiet enjoyment, there must be an union of acts of disturbance and lawful title. The covenantee must exert himself, in some way, to enjoy his possession, or must affirmatively prove that his adversary has a paramount title so that his struggle would be unavailing, before he can sue on the covenant, or obtain redress in a Court of Chancery. *Beebe* v. *Swartwout*, 162.

CREDITOR.

See Lien, 8, 9.

CREDITOR'S BILL.

1. Where a creditor seeks to satisfy his debt out of some equitable estate of the debtor, which is not liable to a levy and sale under an execution at law, he must exhaust his remedy at law by obtaining judgment and a return of the execution "nulla bona," before he can come into a Court of Equity for

the purpose of reaching such equitable estate. This is necessary to confer jurisdiction upon that Court. *Miller* v. *Davidson*, 518.

2. Where a creditor seeks to remove a fraudulent incumbrance out of the way of his execution, he may file his bill as soon as he obtains his judgment. In case of a trust, however, where the object of the bill is to establish the existence of the trust and to remove the fund beyond abuse, the party interested in securing his debt may come into a Court of Equity in the first instance, not only for the benefit of himself, but of such other creditors as may choose to avail themselves of the decree and prove their claims. *Ib.*

CRIMINAL LAW.

1. On the trial of an indictment for receiving stolen goods, the jury found the accused guilty and fixed his term of service in the penitentiary at two years. The Court, upon the rendition of the verdict, sentenced him to two years' imprisonment in the penitentiary: Held, that the verdict, under the statute, was too general, and substantially defective in not stating the value of the goods received, and that judgment pronounced thereon was unauthorized. *Sawyer* v. *The People*, 53.
2. The only mode of preferring an indictment is through the medium of a Grand Jury, and it is their imperative duty to make their presentments in open Court. The indictment being the foundation of all subsequent proceedings in the cause, the record ought to show affirmatively the returning of the indictment into Court by the Grand Jvry. This is a necessary part of the record, and can no more be dispensed with than the verdict of the jury. *Rainey* v. *The People*.
3. In an indictment for resisting an officer, it is not necessary to describe the mode of the opposition. That is properly a matter of evidence. *McQuoid* v. *The People*, 79.
4. An indictment for resisting an officer set forth that the defendant opposed such officer while attempting to serve a summons, which summons was a lawful process: *Held*, that the averment that the process was a lawful one is an averment of jurisdiction in the officer issuing it. *Ib.*
5. In an indictment for resisting an officer, it must be distinctly charged that the person resisted was an officer, and was opposed while acting in such capacity, both of which facts must be proved at the trial. It is not necessary to set out in the indictment, hæc verba, the process under which he is acting. *Ib.*
6. An indictment for obstructing an officer in the execution of process should show that such process was legal. If issued from a Court of limited jurisdiction, for instance, the Court of Probate, it should be made to appear that the Court in issuing it, acted within the sphere of its authority. *Cantrill* v. *The People*, 356.
7. By the Criminal Code of Illinois, the distinction between accessories before the fact and principals is, in fact, abolished. By it, it is declared that such accessories shall be deemed and considered as principals, and punished accordingly, and, therefore, as principals they must be indicted. *Baxter* v. *The People*, 356.
8. It is a familiar doctrine of the law, that the jury is bound to acquit one accused of crime, if they entertain any reasonable doubt of his guilt. *Pate* v. *The People*, 644.
9. In the record of a criminal case, it appeared that the jury were permitted to disperse from time to time, the trial continuing through several days, but it was silent as to the fact whether the separation was with the consent of the prisoner: *Held*, that the presumption was that they separated with his consent. *Ib.*
10. A record in a criminal case failed to show that when the jury retired to consider of their verdict they were placed in the charge of a sworn officer. *Held*, that the presumption was that the Court performed its duty in that respect. *Ib.* 645.
11. In criminal cases, motions for new trials rest entirely in the discretion of the Circuit Courts where they are made, and the propriety of their decisions in refusing them cannot be reviewed in the appellate Court. *Ib.*

DAMAGES.

1. Unliquidated damages arising out of covenants, contracts, or torts totally

disconnected with the subject matter of the plaintiff's claim, are not such claims or demands as constitute the snbject matter of set-off under the statute. *Hawks* v. *Lands*, 227.

2. Damages cannot be assessed in an action of debt, unless the debt be first found. *Wilcoxon* v. *Roby*, 175.
3. In an action of debt, the jury rendered a verdict for more damages than were claimed, and in the Supreme Court, the party offered to remit the excess, but the Court refused to allow him to do so. *Chenot* v. *Lefevre*, 637.

See Chancery, 20; Judgment, &c., 10.

DEBT.

See Damages, 2, 3.

DEBTOR.

See Judgment, &c., 14, 16, 17.

DEED.

1. To render a conveyance operative, a delivery to the grantee is essential though, in many cases, where the deed is supposed to be for the benefit of the grantee, the law will, in the absence of proof to the contrary, presume his assent to the delivery to a stranger. *Ferguson* v. *Miles*, 350.
2. The law is well settled, that for the advancement of a right and the furtherance of justice, and where the rights of the third persons are not to be injuriously affected, a deed will have relation to and take effect from the time the grantee was entitled to receive it. *Ib.*

See Agent, 1 ; Chancery, 7 Evidence, 5, 7, 24.

DEMURRER.

See Pleading.

DEPOSITION

Interrogatories accompanying a commission to take a deposition need not be copied into the deposition. It is sufficient if they were proposed to the witness, answered by him and so referred to, that the Court can see that it was fairly taken. *Hawks* v. *Lands*, 223.

DOWER.

See Lien, 6, 7.

DUE DILIGENCE.

See Promissory note, 1.

EJECTMENT.

1. It is a well established rule, that in an action of ejectment, the landlord may appear and defend the cause in the name of the tenant, or in his own name ; and also, that where a tenant, from negligence or fraud, has omitted to appear himself, or to give the landlord the necessary notice, the Courts will set aside a judgment by default against the tenant, upon proper affidavit being made by the landlord. *Williams* v. *Brunton*, 600.

2. A person claiming to be let in to defend in ejectment, must show that his title is connected to and consistent with the possession of the occupant. *Ib.*
3. The statute concerning the action of ejectment does not specially provide for cases of landlords and other persons interested applying to be let in to defend, but refers to cases only where the party, or his assigns, or those claiming under him move to set aside defaults. Where the statute is silent, the practice and rules of the Common Law are applicable. *Ib.*
4. Under the English practice before the Statute of Geo. I. the landlord, who was admitted to defend, had a right to have the judgment against the casual ejector set aside. The statute afterwards provides that, in such cases, Courts may stay the execution against the casual ejector. One or the other may now be done, in the discretion of the Court. *Ib.*
5. After one had been permitted, in an action of ejectment, to come in and plead, the plaintiff failed to join issue on the pleas. The defendant's counsel then moved the Court to order the plaintiff to join issue, and the motion was allowed. The plaintiff, in in propria persona, declined in Court to join issue, and a jury was sworn and a verdict renderded against him: *Held*, that his declining to take issue on pleas which presented a full defence to his action, amounted to a discontinuance, and that the correct practice would have been, for the Court to have dismissed the case for the want of prosecution. *Ib.*

See Evidence, 5, 6, 7, 22, 57; Improvements; Pleading, 15.

ERROR.

1. A defendant cannot assign for error, in a civil or criminal proceeding, any decision, order or judgment of a Court which is manifestly in his favor. *McQuoid* v. *The People*, 76.
2. The reading of an improper paper by counsel in the argument of a cause cannot be assigned for error. The opposite counsel, in such case, should request the Court to instruct the jury, that nothing that was said or read by counsel in his argument was evidence before them. *Kenyon* v. *Sutherland*, 99.
3. The refusal of the Circuit Court to permit a complaint in an action of forcible entry and detainer to be amended on motion, even if the Court could grant leave to amend, cannot be assigned for error. At most, it is a matter of discretion, like the amendment of a declaration or other pleading. *Ballance* v. *Curtenius*, 449.
4. It is erroneous to award execution on a judgment against an estate of one deceased, which is founded on a claim exhibited and allowed against it. The recovery of the judgment only establishes the debt of the creditor. The proper judgment in such a cause is, for the amount of the debt and costs, to be paid in the due course of administration. 497.

See Instruction, 3.

EVIDENCE.

1. The reading of an improper paper by counsel in the argument of a cause cannot be assigned for error. The opposite counsel, in such a case, should request the Court to instruct the jury, that nothing which was said or read by counsel in his argument was evidence before them. *Kenyon* v. *Sutherland*, 99.
2. The presumption of innocence may be overthrown, and a presumption of guilt may be raised by the misconduct of a party in suppressing or destroying evidence which he ought to produce, or to which the other party is entitled. *Rector* v. *Rector*, 105.
3. The rule is, when a party refuses to produce books and papers, his opponent may give secondary or parol proof of their contents, if they are shown to be in the possession of the opposite party; and if such secondary evidence is imperfect, vague and uncertain as to dates, sums, boundaries, &c., every intendment and presumption shall be against the party who might remove all doubt by producing higher evidence. *Ib.*
4. The general rule is, that the answer of one of the co-defendants in chancery shall not be evidence against another, but to this rule there are exceptions.

When such defendants are partners, or when one has acted as agent of the other in any transaction to which the answer may relate, and the agency or partnership at the time of filing such answer still exists, the answer of the partner will be evidence against his copartner, and that of the agent against his principal, when such copartner or principal claims through or under such agent or partner. *Ib.*

5. Under the Revenue Law of 1839, if the plaintiff produce the judgment against the land, the precept and the sheriff's deed for the primises, and prove that the defendrnt was in the possession thereof at the commencement of the action, a prima facie case is made out. *Lusk* v. *Harber*, 158.
6. Before a defendant in ejectment can go behind a judgment against the land for the taxes due thereon, to show that the preliminary proceedings were irregular, he must establish the following facts, to wit: that he, or the person under whom he claims, had title to the land at the time of the sale, or that the title has been since obtained from the United States or the State. *Ib.*
7. A sheriff's deed for land sold for taxes, based upon a valid judgment and precept, is conicusive against all but the former owner and those claiming through or under him. *Ib.*
8. The record of a judgment, in an action on a judgment, may be used in evidence on the trial, and, when introduced, affords conclusive evidence of the facts stated in it. If, however, a record states that the defendant appeared by attorney, it is conclusive proof that the attorney appeared for him, but only prima facie evidence of his authority to appear. *Welch* v. *Sykes*, 198.
9. If a record of a judgment shows that the defendant appeared by attorney, the plaintiff must reply this fact to the plea, and the defendant may rejoin that the attorney has no authority to enter his appearance. The record affords prima facie evidence of his right to appear. *Ib.*
10. A request to marry, or the refusal, as well as the promise, may be proved by circumstances. *Greenup* v. *Stoker*, 202.
11. A. being about to purchase of B. a certain tract of land, discovered, upon examining the title, that C. had recovered a judgment against B. and another individual, for a large amount which had been partially paid. He refused to purchase, unless C. would release the land from the lien of the judgment, and so informed C. who agreed to release it, and accordingly executed the following instrument: "This is to certify that I, Joseph Scott, administrator of Samuel Scott, deceased, do relinquish all claim, by virtue of a judgment obtained against R. M. Lacroix, to a certain tract of land formerly belonging to Henry Scott, and now belonging to R. M. Lacroix, and about to be traded to Joseph Bennett. Belleville, February 9. Joseph Scott, Administrator." Confiding in C's promise to release, A. purchased and paid $2,000 in cash towards the purchase money, and one half thereof was immediately applied to the judgment aforesaid. About one thousand dollars remaining due on said judgment, C. caused an execution to be issued and levied on said land. On a bill being filed for an injunction, C. in his answer admitted the above facts, but alleged that, by an agreement made between the parties at the time of the execution of the above instrument, A. agreed, as a part of the consideration of the release, to pay towards said judgment, the sum of $500, &c. which he had failed to do. It was objected that the instrument was not a valid release, being without consideration, a seal and parties, &c. *Held*, that the instrument, though not technically a release, not being made for the benefit of any particular person, and not importing upon its face a consideration for want of a seal, still might, without the slightest encroachment upon even a technical rule of law, be averred and proved to have been made for the benefit of some one, and that there was, in fact, a consideration for its execution. *Scott* v. *Bennett*, 243.
12. It is a familiar principle that evidence may be given to explain, but not to vary, add to, or alter a written contract. But if there is doubt and uncertainty, not about what the substance of the contract is, but as to its particular application, it may be explained and properly directed. For instance, a receipt for the payment of money may be explained. The consideration of a note, though expressed to be for value received, may be enquired into; and if made payable to one person, when another was intended, the holder may sue on it in his real name, alleging the mistake and prove it on the trial. *Ib.*
13. An answer to a petition for a mechanic's lien, so far as the same is responsive thereto, is proper evidence for the consideration of the jury. *Garrett* v. *Stevenson*, 261.

14. The rule is well setled, that the admissions of an assignor of a chose in action may be given in evidence against the assignee, if the admissions were against his interest when they were made. *Williams* v. *Judy*, 282.

15. In an action on the case for malicious prosecution, the record of the suit alleged to be malicious was offered to be read in evidence. Objection was made that it contained improper matter to go before the jury, but the objection was overruled, and the record was introduced: Held, that if a transcript contain any matter not pertinent to the issue on trial, the proper course is to apply to the Court for an instruction to the jury to disregard it. *Granger* v. *Warrington*, 299.

16. To exclude evidence from a jury, because of irrelevancy, the irrelevancy must be clear. *Ib.*

17. To entitle communications between individuals to be considered as confidential and privileged, the relation of client and attorney must exist. The party must consult the attorney in a matter in which his private interest is concerned, and make his statements to him with the view to enable the attorney correctly to understand his case, so that he may manage it with greater skill; or if legal advice only is wanted, to enable the attorney the better to counsel him as to his legal rights. *Ib*

18. The law is well settled, that parol evidence may be given of the contents of a lost writing after the fact of the loss has been satisfactorily establshed. *Ib.*

19. A suit was brought in the name of A. for the use of B. against C. and D. C. only was served with process, and the suit being dismissed, judgment was rendered for costs in favor of C. which A. paid. A. sued B. in assumpsit for money paid. On the trial, a fee bill was introduced and an execution against A. for the costs adjudged C. and D. both returned satisfied. A then proved by the sheriff that the costs were paid by A. Judgment was accordingly rendered in his favor; Held, that the evidence clearly established the fact of his having discharged the liability, though the execution did not technically pursue the judgment. *Henderson* v. *Welch*, 340.

20. A levy by a sheriff, or a payment of money to him, may be shown by parol testimony. *Bryant* v. *Dana*, 343.

21. It is a general rule, that a party will not be allowed to give parol evidence of the contents of a paper in the possession of his adversary, unless he has given him or his counsel reasonable notice to produce it on the trial. But if a deed has been recorded, a transcript may be introduced, the party swearing that the original was not in his custody, and was beyond his control; or if a party has voluntarily exhibited his deed in evidence, the instrument is under the control of the Court, and no notice is required to produce it. *Ferguson* v. *Miles*, 358.

22. In an action of ejectment instituted by the purchaser at a sheriff's sale against the defendant in the execution, the defendant cannot controvert the title. The plaintiff is only required to produce the judgment, execution and sheriff's deed. The tenant who goes into possession subsequent to the sale is in no better situation, is estoppped from denying the title of his landlord, and, consequently, the title acquired under the judgment. But if the tenant went into possession before the lien accrued, then the plaintiff, to eject him, must show that the tenancy has expired. It is only when the action is brought against a stranger, that the plaintiff must prove that the judgment debtor had actual possession of the premises, or titled thereto, at the rendition of the judgment, or date of the levy. *Ib*

23. Motions were made in the Circuit Court to quash two executions, which were denied. Certain papers were copied into the transcript, but no bill of exceptions was taken. The decision of the Circuit Court was assigned for error; Held, that the papers, in order to be regarded as evidence, should have been incorporated in a bill of exceptions. *Corey* v *Russell*, 366.

24. Parol evidence may be admitted to show that an absolute deed, whatever may be its convenants, was intended as a mortgage, or mere security for the payment of a debt, and the grantor can have relief in Equity. *Purviance* v. *Holt* 394; *Ferguson* v. *Sutphen*, 547.

25. It is purely a matter of discretion with the Court whether it will require a complainant to make proof, the defendant being in default. *Ferguson* v. *Sutphen*, 547.

26. In actions of seduction brought by the parent who has the right to require service of the daughter, it is no longer necessary to prove a loss of service to sustain the action. But where the action is brought by the master, who is not the parent, the loss of service must be proved. *Anderson* v. *Ryan*, 583.

27. A. sued B. in ejectment, and to sustain his title, introduced a deed from

the Auditor of Public Accounts, dated January 23, 1835, for the premises in controversy. The deed recited a sale on the 19th of January, 1833 for the taxes due on the land for 1832. It appeared by an agreement filed in the case that the former owner died in the year 1833, and the defendant proved that he died prior to that year, but the precise day of his death was not stated. The defendant introduced and read in evidence a receipt bearing date Febuary 8, 1841, signed by the Treasurer and countersigned by the Auditor, acknowledging a receipt, from the heirs of the former owner, of the redemption money on the sale of the Auditor to the plaintiff. The latter objected to its introduction, but the issue was found for the defendant and judgment rendered thereon : Held, that the agreement did not preclude either party from proving in what part of the year he died; that the plaintiff might show that his death was subsequent to the sale, and the defendant that he died prior thereto ; that the evidence showed at least, that he was not living on the day of the sale, and, therefore, that a proper basis for the redemption was established : Held, further, that the receipt was competent evidence of the redemption. *McConnell* v. *Greene*, 590.

28 The law of France in regard to prescription, or limitation as it is called in the English law, before it can be given in evidence, must be specially pleaded in suits brought in this country upon instruments made and executed in the former. *Chenot* v. *Lefevre*, 637.

29. The general rule upon the subject of proof of hand writing is, that proof is not to be made by the comparison of hands, but by the production of witnesses, who have acquired a knowledge of the general character of the handwriting of the party. The modes of acquiring such knowledge are, either by having seen the party write, or by having seen letters or other documents, which he has, in the course of business, recognized or admitted to be his own. The witness may examine the writing in question and declare his belief, founded on his previous knowledge, concerning its genuineness. Where a witness stated that he had seen the prisoner write, but had never seen him write before the difficulty in question arose, it was held, that the witness did not come within the rule laid down. *Pate* v. *The People*, 644.

30. When a witness is called to testify in relation to the handwriting of a party, he should first be asked if he is acquainted with such handwriting, and, if he answer in the affirmative, he is then to be asked as to the manner in which he became so acquainted. *Ib.*

See New Trial, 1; Usury, 2.

EXTENSION.

See Contract, 6; Sale 3.

FERRY.

See License, 3-5.

FEES AND FEE BILL.

1. Upon the filing of a record in the Supreme Court, the clerk has the right to issue a scire facias and file the writ of error, unless expressly directed by the parties not to do so The writ of error is in fact never issued when the record has been filed, but remains on file in the office. The scire facias is the only process which issues. *Longwith* v. *Butler*, 74.

2. The 22d rule of the Supreme Court does not apply to written arguments, nor is the defendant entitled to have the making of his abstract and brief charged against the plaintiff, unless the Court have first decided that the plaintiff's abstract and brief is insufficient, and the plaintiff's counsel have failed to file a satisfactory one. *Ib.*

3. A county is not liable to the clerk of the Circuit Court for his fees accruing on a scire facias upon a recognizance, the State only being entitled to the benefit of the sum recovered. *Edgar Co.* v. *Mayo*, 82.

4. A. sued B. in an action of assumpsit in 1844, but the suit was finally dismissed at the plaintiff's costs. The clerk of the Circuit Court, in taxing the costs,

charged the plaintiff with a jury fee of three dollars. On these facts, the Circuit Court in 1846 decided that it was improperly taxed: Held, that a jury fee is only taxable in such cases as are tried by a jury. *Hoard* v. *Bulkley*, 154.

5. A judgment rendered in the Circuit Court against a surety in a recognizance was reversed in the Supreme Court and not remanded. The clerk of the latter Court issued a fee bill for his costs, and, among other items, a fee was charged for making a copy of the judgment, for the certificate and seal: Held, that as, under the circumstances of the case, it did not follow that the Opinion was to be copied and certified to the Circuit Court, the surety was not bonnd to pay for such copy and certificate, unless he require them to be made. *Sans The* v. *People*, 338.

FORCIBLE ENTRY AND DETAINER.

1. A complaint for forcible entry and detainer contained the following averments, to wit: that the complainant was the owner of the premises in question and had, for more than ten years, been in the actual possession; that put A. and B. into possession as his tenants for a specified rent; that soon after, B. left the country, A. still remaining in possession, who continued his tenant for a long time, paying rent occasionally; that before he left the premises, he and C. called on complainant to obtain permission for A. to transfer his lease to C. and the complainant assenting thereto, C. entered into possession and paid a portion of the rent; that recently, D. claiming to own said premises, bribed C. to attorn to him. and D. then entered and underlet the premises to C; and that said C. and D. hold the premises against the affiant, refuse to pay rent to complainant, and that, by non-payment of rent, he was, by the terms of the lease, entitled to re-enter and possess said premises, and had demanded the same in writing: Held, that the complaint was substantially sufficient; that it was only necessary to aver a demand in general terms, and that the lease provided for a re-entry for non-payment of rent; that the defendants, under the circumstances, were not entitled to six months' notice; and that the collusion between C. and D. avoided their contract of attornment. *Ballance* v. *Fortier*, 291.
2. There are four cases in which a forcible entry and detainer may be maintained in this State: 1. Where there has been a wrongful or illegal entry upon the possesssion of another; 2. Where there has been a forcible entry upon such possession; 3. Where any prrson may be settled upon the publib lands within this State, when the same have not been sold by the General Government: and 4. Where there has been a wrongful holding over by a tenant after the expiration of the time for which the promises may have been let to him. In the first three classes, before the action can be maintained, there must be an illegal and forcible entry upon the actual, or, as in the case of a settlement upon the public lands, constructive possession of another. In either of the cases, it is not sufficient to charge in the complaint that the complainant's right to the possession only had been invaded by the forcible or illegal entry. *Whitaker* v. *Gantier*, 443.
3. If one has the actual possession with or without title, or such a claim to public lands as is recognszed by the statute, he can maintain an action of forcible entry and detainer against any one illegally or forcibly intruding into such possession. *Ib.*
4. A complaint for a forcible entry and detainer shonld clearly show the foundation of the right which is sought to be enforced; and that the wrongful or illegal entry was made upon the actual or constructive possession of the plaintiff; or the existance of landlord and tenant and a wrongful holding over. *Ib.*
5. In order to enable one settled upon the public lands to maintain forcible entry and detainer, in the absence of paper title, his possession must extend, according to the custom of the neighborhood, to the number of acres embraced by his claim, not exceeding a quarter section of surveyed, or a half section of unsurveyed land. *Ib.*
6. In order to give a justice of the peace jurisdiction in an action of forcible entry and detainer, the complaint should contain sufficient allegations to bring it within one of the several cases anticipated by the statute. *Ballance* v. *Curtenius*, 449.
7. The refusal of the circuit court to permit a complaint to be amended on motion, even if the court could grant leave to amend, cannot be assigned for error, &c. *Ib.*

FRAUDULENT SALE.

1. All conveyances of goods and chattels, where the possession is permitted to remain with the vendor, are fraudulent per se, and void as to creditors and purchasers, unless the retaining of the possession be consistent with the deed. *Rhines* v. *Phelps*, 455.
2. An absolute sale of personal property, where the possession remains with the vendor is void as to creditors and purchasers, though authorized by the terms of the bill of sale. *Ib.*

GRAND JURORS AND JURY.

See Criminal Law, 2; Witness, 4.

GROCERY.

See License, 1, 2.

GUARDIAN.

See Chancery, 10, 11.

HABEAS CORPUS.

See Accomplice.

IMPROVEMENTS.

The statute regards improvements of settlers upon the public lands as property, the proper subject matter of binding contracts between individuals, and subject to the control and disposition of the law. Their interest may be sold on execution, and the purchaser may maintain an action of ejectment for the possession, and the defendant cannot deny his title. But these rights cannot be enforced as against the United States, or its grantee, and they cease altogether on the alienation of the land by the Government. *Switzer* v. *Skiles*, 529.

INDICTMENT.

See Criminal Law, 2-6.

INFANT.

1. In the absence of any positive provision of law to the contrary, an infant will not be prejudiced or injured by lapse of time. *Rector* v. *Rector*. 105.
2. Where infants are taken from the custody of the father by a court of chancery, and have no property of their own, the father is bound for their support and in determining what is suffieient for a bare maintenance, the court will have regard to the ability of the father. Such ability may be determined by a reference to a master, or by the court itself directly by the examination of witnesses in open court, or it may direct depositions to be taken. *Cowls* v. *Cowls*, 435.

INSTRUCTION.

1. When there are several counts in a declaration, and a general instruction is asked, which is a correct principle of law and applicable to some of those counts and to the evidence given under them, the giving of such instruction to the jury is not a cause of error. *Greenup* v. *Stoker*, 202.
2. When instructions are so drawn, either by carelessness or design, that

they will be more likely to mislead than instruct a jury, it is the duty of the court to refuse them. *Baxter* v. *The People*, 368.

3. It has been repeatedly decided, that a court is not bound to give mere abstract legal propositions, as instructions to the jury; but it is equally clear, that a judgment will not be reversed because of the giving of such instructions It is only where the court, in instructing the jury, states the law incorrectly that its opinion can be reversed in the appellate court. *Corbin* v. *Shearer*, 482.
4. Where instructions were asked, which contained correct principles of law as laid down in the elementry works on evidence, were objected to as being mere abstract propositions of law without any application to the facts of the case, and were given, the appellate court held that although the court was not bound to instruct the jury upon such abstract questions of law, still if they were given, it is not ground of error. *Pate* v. *The People*, 644.
5. It is only when a court, in declaring the law, states erroneously, that its opinion can be revised; and then, if it appear that the instructions given could have had any influence upon the jury, their verdict will be set aside. *Ib.*

See Error, 2.

INTEREST.

1. Interest is not allowable in the case of unliquidated damages arising ex contractu. *Buckmaster* v. *Grundy*, 626.
2. Where several persons agree to do certain acts, such as to pay equal proportions of particular expenditures, if one advance more money than his proportion of those expenditures, the excess will be regarded as so much money paid for the use of the other parties, and he will be entitled to interest thereon. *Ib.*

See Usury.

INTERROGATORY.

See Deposition.

JUDGMENT, DECREE, AND EXECUTION.

1. A. sued B. and the cause was tried by a jury, who rendered a verdict for A A motion for a new trial was made and overruled, and the following orde entered to wit: "Zebina Sears v. Peter Sears. Assumpsit. This day came the parties by their attorneys, and after argument it is ordered by the Court, that the defendant's motion for a new trial be overruled, and that the plaintiff have judgment and execution against the defendant for two hundred and fifty-six dollars and fifty-eight cents, his damages aforesaid, together with his costs herein." On error being assigned, that the Court erred in awarding execution against the defendant without rendering a judgment on the finding of the jury, it was held that there was a valid judgment on the verdict, and that the judgment was substantially good. *Sears* v. *Sears*, 47.
2. The mere order of the Court granting an appeal to a defendant does not divest the plaintiff of a right to an execution upon the adjournment of Court. The judgment becomes operative from the last day of the term, and continues so until the appeal is perfected by the filing of the bond. The refusal of the Court to stay proceedings on an execution, under such circumstances, cannot be assigned for error, the application being addressed to the sound discretion of the Court. *Branigan* v. *Rose*, 123.
3. A suit was brought on four different writings obligatory which were set forth in as many different counts in the declaration. Issue was joined on all, the cause was submitted to the Court for trial, the Court found the issues joined on the three first counts in favor of the plaintiffs, and assessed their damages accordingly. Held, that the judgment was erroneous, there being no finding on the fourth count of the declaration. *Semple* v. *Hailman*, 131.

4. In a criminal case, a successful defendant is not entitled to a judgment against the State for his costs. *Carpenter* v. *The People*, 147.

5. A. since dead, obtained a judgment and execution against B. and others, which was levied upon certain parcels of land. The land was sold, and the son of A., acting as his agent, purchased the premises, took a certificate of purchase in his own name, and paid no money for the land, but acknowledged satisfaction of the judgment upon record, and paid the costs with money given him by his father for that purpose. C. one of the judgment debtors, the time of redemption having nearly expired, made an arangement with A by which he conveyed to him by a deed, absolute on its face, said lands, and also, for further security, another tract of land. A. with a view of giving C. further time to redeem said land, executed a bond for a deed, conditioned for the payment of the money by a specified time. The only object in view was an extension of the time of redemption by the arrangement aforesaid. The money was not paid as stipulated in the bond, and A. by the consent of C. sold to D. two of the said tracts of land, and D. sold to E. giving the latter bond for a title. E. made improvements to the amount of $1,000. The land was valued at $100. About eighteen months after the recovery of A.'s judgment. another creditor of C. obtained a judgment and execution against him, which was levied on the last mentioned lands, already sold on A.'s execution, and were about to be sold, when E. filed a bill for an injunction against the judgment creditor and the sheriff. Subsequently D. was made a complainant with E. and a decree was rendered against the said complainants, requiring them to pay to the said judgment creditor the sum of $100, to be credited on the judgment, from which decree the complainants appealed: Held, that the decree was erroneous; that the injunction should have been made perpetual; and that A. or his heirs might, at any time, obtain a sheriff's deed upon the certificate, which deed would relate back to the sale and judgment as to the time of acquiring title against subsequent purchasers or encumbrances. *Fell* v. *Price*, 186.

6. Under the Constitution of the United States, and the laws of Congress made in pursuance thereof, judgments in reosonam of the various States are placed on the same footing as domestic judgments, and are to receive the same credit and effect when sought to be enforced in different States, as they by law or usage have in the particular State where rendered. *Welch* v. *Sykes*, 198.

7. A judgment fairly and duly obtained in one State is conclusive between the parties when sued on in another State. But the defendant may show, in bar of an action on such judgment, that the judgment was fraudulently obtained, or that the Court pronouncing it had neither jurisdiction of his person, nor of the subject matter of the action. If he succeed in establishing any one of these defences, the judgment is entitled to no credit, and the plaintiff must rely on his original cause of action. The defendant may admit the existence of the record, and set up by special plea any of these matters of defence in avoidance of the judgment; and the plaintiff may traverse the allegations of the plea, or reply new matter in avoidance. *Ib*.

8. A decree on a petition by an administrator for the sale of lands directed the sale of the whole of the land, or so much thereof as would pay the debts: Held, to be sufficient, and, further, that it was unnecessary that it should state what was the particular interest the deceased had in the land ordered to be sold. *Bowles* v. *Rouse*, 409.

9. Where the action is for debt, and the verdict and judgment are in damages, both are erroneous. *Howell* v. *Barrett*, 433.

10. In an action upon a promissory note executed by five persons, four were served with process. One of them pleaded nil debet, two demurred to the declaration, and the fourth did not appear. The cause was tried upon the plea aforesaid, and the jury returned a verdict against the defendant for $361.50 in damages, and a sepraate judgment was rendered against him. On the next day, the demurrer being over ruled, the clerk assessed the damages against the remaining three at $362.50, and a separate judgment was rendered against them for that amount: Held, that the judgment must be an unit, and that the jury who tried the plea should have assessed the damages as against the other defendants served. *Ib*.

11. The Supreme Court will not render such a judgment as the Circuit Court should have rendered, unless the evidence on which a verdict was founded is before it. *Ib*.

12. Where personal property is taken in execution, and claimed and replevied by a third person, although delivered to him upon the execution of the writ, it is so far still considered in the custody of the law, that it cannot be taken

from the possession of the plaintiff in replevin, during the pendency of such suit, by any writ or execution against the party as whose property it had been previously seized, unless he had acquired some new title to it subsequent to the original levy; or, unless it manifestly appeared that such suit had been instituted with the fraudulent design to cover up the property and defraud the creditors of the defendant in execution. *Rhines* v. *Phelps*, 455.

13. All whose interests are to be affected by a decree should be made parties to a bill of review to reverse it. *Turner* v. *Berry*, 541.
14. A debtor in an execution should select the property exempt from execution before a levy is made, if notified in time by the officer to make such selection; but if the officer neglect to give the notice before a levy is made, the debtor moy make, the selection and notify the officer thereof at any reasonable time by parol or in writihg. *McClusky* v. *McNeely*, 587.
15. If an officer, in making a sale on an execution, choose to give a credit to the purchaser, the sale is good and a satisfaction of the execution to the amount of the sale, especially when done with the concurrence of the plaintiff in the execution. *Ib*
16. If a debtor residee in one county and his property in another county is taken in execution, he is entitled to notice to make a selection of the property exempt from execution, equally as if he resided in the county where the execution was lsvied. *Ib*.
17. Where it appeared that a debtor had less property than was by law allowed him and it was taken in execution, it was held that he was entitled to the whole.
18. A judgment or a decree may, for some purposes, be considered as an extinction of the original cause of action; for instance, for the purpose of regulating the interest on money to which a party is entitled before a final satisfaction of the debt. But it is equally true, that for many other purposes, as for the ascertaining of priority of liens for instance, the principle of extinction or merger finds no application. *Williams* v. *Brunton*, 600.
19. A judgment or decree, and a subsequent purchase and obtaining of a deed for the land from the Master or sheriff, is regarded as being connected with, and as being in aid of the mortagee's original title. A subsequent title, so obtained, is clearly consistent with the first title. *Ib*.
20. Where a judgment has been rendered in a Court of Law, and it does not appear that it was obtained by fraud, or was the result of accident or mistake, a Court of Equity will not go behind such judgment. *Buckmastor* v. *Grundy*, 626.
21. Equity will allow one judgment to be set off against another, where there are no means for collecting it of the judgment creditor in the latter· *Ib*.

See Criminal Law, 1; Recognizance, 8.

JURISDICTION.

.1 Where a judgment has been obtained, there is a strong legal presumption that the Court had jurisdiction, and that it proceeded conformably to the laws of the State in which it was rendered. *Welch* v. *Sykes*, 198-
2. When an instrument in writing, which is the the basis of a suit or action, is lost, to confer jurisdiction upon a Court of Chancery, there must be an affidavit of its loss. This rule, however, only applies in cases where, if the same had not been lost, the remedy of the party wouid have been Law, and not in Chanceryr *Purvianee* v. *Holt*, 394.
3. The Circuit Court, as an appellate Court, is circumscribed within the same limits as the Court in which the case originated. If the want of jurisdiction be apparent, the Circuit Court must dismiss the cause, and leave the parties to litigate anew their differences in some competent tribunal. But the parties may, neverthe.ess, by mutual consent, avoid such consequences, by submitting the case to the circuit court to be determined as if originally commenced there. The only inquiry then would be, whether the Court would have had jurisdiction of it as an original action. *Allen* v. *Belcher*, 594.
4. A filed before a Probate Justice a claim against the estate of a deceased person. The administrator claimed and exhibited a set-off of a larger amount, and the Court rendered a judgment in his favor for $1,450. A. appealed to the Circuit Court, where, after several motions were made on either side,

the parties agreed that the cause should be tried on its merits. It was then submitted to a jury, when a verdict was rendered for the administrator for $1,500. Judgment was then rendered, with direction to the clerk to certify the proceedings to the Probate Justice, and directing him to award execution, &c: Held, that the Circuit Court, by the consent of the parties, had jurisdiction of the cause, but erred in directing the Probate Justice to issue execution. *Ib.*

See Appeal, 5 ; Forcible Entry, &c. 6.

JURORS AND JURY.

1. It is the privilege of a jury to take into consideration, all the circumstances disclosed in the trial of a cause, many of which rarely find their way into the record as presented in an appellate Court. *Jenkins* v. *Brush*, 18.
2. The doctrine laid down by this Court, in the case of *Gwykowski* v. *The People*, 1 Scam. 476, in regard to the disqualification of aliens to set as jurors, is limited to capital cases. *Greenup* v. *Stoker*, 202.
3. If a juror is able to respond to the question, so as to satisfy his own con science, "Is the prisoner guilty or innocent?"—then he is incompetent ; but if, from not being convinced of the existence or non-existence of certain facts, he is unable to determine that question, then he is competent. *Baxter* v. *The People*, 368.
4. During the progress of a trial for murder, one of the jurors, while one of the counsel for the prisoner was addressing the jury, had a chill, and was, by order of the Court, placed upon a pallet, and for a time did not fully comprehend the whole of the argument, being in a drowse, though he had unstood all of the evidence, and all that had been said by council previously. The fact that he was asleep was known to the prisoner, but the attention of no one was called to it: Held, under the circumstances, to be no ground for setting aside the verdict. *Ib.*

JUSTICE OF THE PEACE.

1. A. was duly elected a justice of the peace, and, within twenty days thereafter filed his official bond in compliance with the statute in such cases made and provided, except that the condition thereof omitted to recite the following requirement; "and that he will well and truly perform all and every act and duty enjoined on him by the laws of this State to the best of his skill and abilities." After the expiration of twenty days aforesaid, he filed a new bond with other securities, containing the provision omitted to be stated in the first : Held, that the first bond was insufficient, that the second was not filed within the time required by the statute, and that, therefore, the office became vacant. *The People* v. *Percells*, 59.
2. The clerk of the County Commissioner's Court may decide judicially what shall be the penalty of the justice's bond at any sum between five hundred and one thousand dollars, and also upon the sufficiency of his securities. But the conditions of the bond are fixed by law, and are beyond his discretion or control. *Ib.*

See Forcible entry, &c., 6.

LANDLORD AND TENANT.

See Forcible Entry, &c.; Witness, 6.

LAPSE OF TIME.

See Chancery, 8 ; Infant, 1.

LEADING QUESTIONS.

See Witness, 2, 3.

LEVY.

If a levy be made during the life time of an execution, the property may be sold afterwards; and where it has been returned with an indorsement of a levy on real estate, and the creditor desires a sale, he may, at his election, sue out a venditioni exponas directed either to the sheriff who made the levy, or his successor in office. *Bellingall* v. *Duncan*, 477.

See Evidence, 20; Lien, 4; Sheriff, 1, 2.

LICENSE.

1. A license to keep a grocery was granted by the County Commissioners' Court to A. for $25, for which he gave his note with security. Subsequently the license was changed from A. to B. by the said Court, for which change B. gave his note for $21-38 to the treasurer of the county: *Held*, that the treasurer had no authority to take the note to himself in his official capacity: *Held*, also, that the payment of the license and the filing of the bond required by statute in such cases were conditions precedent to the granting of the license, and that none could be granted for a less sum than twenty-five dollars; and that the note executed by B. was void in law. *Munsell* v. *Temple*, 93.
2. A license to keep a grocery is not transferable. It attaches to the person and cannot be used by others, even with the consent of the Court which granted it. *Ib.*
3. The payment of a less sum for a license than that required by law does not authorize it to be issued, and if issued contrary to law, it is a nullity. *Lombard* v. *Cheever*, 469.
4. A payment by one licensed to keep a ferry cannot enure to the benefit of another, to whom an unexpired term is assigned. *Ib.*
5. It is not the mere license to keep a ferry which invests the persons licensed with the right to seize boats, &c., run at or near such ferry. That right matures only upon his exercising his privilege conferred by the license, by establishing a ferry and putting it into operation for such purpose, doing every act required by law. *Ib.*

LIEN.

1. The true principle upon which a banker's lien must be sustained, if at all, is this: There must be a credit given upon the credit of the securities, either in possession or expectancy. *Russell* v. *Hadduck*, 233.
2. A contract for mechanics' labor was made on the 3d day of March, A. D. 1840, the labor commenced and continued until July 1, 1840. A petition for lien was filed October 27, 1841, in the Peoria City Court, from which the venue was changed to the Tazewell Circuit Court, and there tried at the April term 1846, when a verdict was rendered for the petitioners. The "Act to provide for securing to mechanics and others, liens for the value of labor and materials," by virtue of the 19th section of the 3d Article of the Constitution, became a law, December 10, 1869: *Held*, that, by the terms of tnis law, in force when the contract was made, no limitation in point of time is fixed upon the right of the creditor to enforce the lien created by it, as against the debtor merely; and, therefore, that the right of the petitioners was in no wise affected by their delay to institute legal proceedings to enforce their lien. *Garrett* v. *Stevenson*, 261.
3. A decree on a petition for a mechanics' lien can only affect whatever legal and equitable interest the defendant has in the premises, when such interest is less than a fee simple estate. *Ib.*
4. A levy on execution vests in the officer making it, a special property in the goods seized, for the purpose of a sale for the benefit of the judgment creditor. By such levy, the latter acquires a perfect lien, and his right to proceed further on his judgment, by prosecuting another suit thereon, or suing out another execution, is suspended until the levy is disposed of,

and so far is considered as a satisfaction of the judgment. But it is different with a mere seizure of goods on a writ of attachment. In this case, the attaching creditor merely acquires an imperfect, inchoate lien, which, when followed by a judgment, will have relation to the date of the levy. *Pearl* v. *Wellman*, 311.

5. The proceeding to enforce a mechanics' lien is strictly a Chancery proceeding, and must be governed by the rules of pleading applicable to Chancery cases. In Chancery, special replications are no longer allowed, and if filed, can only be treated as general replications. *Shaeffer* v. *Weed*, 511.
6. A widow's dower cannot be affected by the lien created by the statute for the benefit of mechanics, &c.; But she is entitled to dower in all the real estate of which her husband was seized during coverture, unless she has released it in the form prescribed by law, except where a lien is created for the purchase money at the time the husband became seized. *Ib.*
7. A widow is not a proper party to a proceeding for a mechanics' lien, where her only interest is her dower in the premises. *Ib.*
8. The term "creditor," as used in the sixty-fifth chapter of the Revised Statutes, entitled "Liens," is applied to him who has a lien by contract made under the law; and the term "incumbrancer," to the one who has such lien by mortgage, judgment or otherwise, except under this law. *Ib.*
9. If a creditor, who has furnished labor and materials, shall not file his bill until after the expiration of six months from the time payment was due to him by the terms of the contract, his lien ceases as against any other such creditor or incumbrancer, by mortgage, judgment, or otherwise, existing at the time of the rendition of his judgment, whether the same were creditors prior, or subsequent to the making of the contract under which he seeks to enforce his lien. *Ib.*

See Assignor, &c., 1.

LOST WRITINGS.

See Evidence, 18; Jurisdiction, 2.

MISTAKE.

In a mistake of law, when legal counsel could have been readily procured, the rule that ignorance of the law is always fatal knows of no exceptions in the Civil Law, the source of the doctrine respecting the effect of mistakes in contracts. *Beede* v. *Swartwout*, 162.

See Judgment, &c. 20; Sale, 4.

MONEY HAD AND RECEIVED.

1. An action for money had and received lies, whenever one person has received the money of another which, in equity and good conscience, he ought not to retain. In such case the law will imply a promise to restore it, and provide a remedy to enforce the obligation. *Trumble* v. *Campbell*, 502.
2. The Legislature made an appropriation for certain services to be rendered by the Secretary of State. Having performed, as he alleged. two thirds of the services. he claimed and received, on retiring from office, two thirds of the amount of the appropriation. His sucessor completed the services, claiming that his predecessor had performed but one third of the service, and brought an action for money had and received against him to recover back the alleged excess; Held that the successor had no right of action against his predecessor to recover the money; that if too much had been received. the State might recover back the excess; and if the former had not received his due proportion, that he had a valid claim against the State therefor. *Ib.*

MONEY PAID.

Where several persons agree to do certain acts, such as to pay equal proportions of particular expenditure, if one advance more money than his proportion of

their expenses, the excess will be regarded as so much money paid for the use of the other parties, and he will be entitled to interest thereon. *Buckmaster* v. *Grundy*, 626.

MORTGAGE.

1. At Common Law, a mortghge vested the legal estate in the mortgagee, liable to be defeated upon the performance of the condition. After default, the legal estate became absolute, but the parties might mitigate the rigor of the rule, by stipulating that the mortgagee, after default, might sell, so as to evolve the real value of the land, and have the debt satisfied and no more. Such a power was a common law power, an appointment, and considering the legal estate all the time in the mortgagee, it may be called a power appendant or annexed to the estate. *Longwith* v. *Butler*, 32.
2. A mortgagee, under a mortgage containing a clause to sell, may sell the mortgaged premises and convey a good title to the purchaser. *Ib.*
3. Sales of land by the mortgagee, or trustee. under a power to sell contained in the mortgage. or deed of trust, being much liable to abuse, will be most jelously watched by Courts of Equity, and, upon the slightest proof of unfair conduct, or of a departure from the power, they will instantly be set aside. *Ib.*
4. A mortgage of personal property is in the nature of a pledge and conditioal sale, to become absolute, and vest the thing mortgaged without redemption, upon condition broken, in the mortgagee. Until a forfeiture has thus accrued, the mortgagee has only a lien upon the pledge for the security of his claim against the mortgagor, and would be liable in damages if he were to sell the same, or otherwise convert it to his own use. *Rhines* v. *Phelps*, 455.
5. A mortgagee, with the consent of the mortgagor, may dispose of any portion of the mortgaged property, or the mortgagor might do the same, with the mortgagee's premission; but property taken in exchange for mortgaged property cannot become substituted for, and in the place of that which had been included in the mortgage. *Ib.*
6. When a sale of mortgaged property has been made, the party having the equity of redemption acquires a legal right to redeem it from such sale in the manner provided by law. *Cooper* v. *Crosby*, 506.

See Evidence, 24.

NEW TRIAL.

1. Upon a pla of payment in an action of assumpsit the jury returned a verdict for the defendant, there being mutual accounts between the parties the plaintiff moved for a new trial which motion was overruled, and was assigned for error: Held, on a review of the whole evidence, that the same was competent, and in itself sufficient to establish the fact of payment and being uncontradicted, the motion for a new trial was properly overruled. *Jenkins* v. *Brush*, 18.
2. Where the evidence in an action of crim. con. taken and considered together, was of such a character as to warrant the inference drawn by the jury that a criminal intercourse existed between the parties charged, it was held, that the Court would not, upon an application for a new trial, disturb the verdict of the jury. *Roney* v. *Monaghan*, 85.
3. A Court will not grant a new trial, or reverse a judgment on error, because of the admission of improper, or the rejection of proper testimony, or for want of proper direction, or misdirection of the Judge, who tried the cause. provided the Court can clearly see, by an inspection of the whole record that the merits of the cause, or influenced the verdict of the jury. *Greenup* v. *Stoker*, 202.
4. A refusal to grant a motion for a new trial for want of evidence cannot be assigned as error, when the whole evidence is not stated to be contained in the bill of exceptions. *Granger* v. *Warrington*, 299.
5. In criminal cases, motions for new trials rest entirely in the discertion of the Circuit Courts where they are made, and the propriety of their decisions in refusing them cannot be reviewed in the appellate Court. *Pate* v. *The People*, 645.

NONSUIT.

1. Where a party to a suit in the Circuit Court takes a voluntary nonsuit, he goes out of Court and cannot afterwards file a bill of exceptions. *The People* v. *Browne*, 87.
2. In this State, Courts cannot compel a plaintiff to become nonsuit, but he may, if he so elect, insist upon a verdict.
3. If a party submit to a voluntary nonsuit in the Circuit Court, he cannot complain of the judgment thereon, in the Supreme Court. *Lombard* v. *Chever*, 469.

NOTICE.

1. A. and B. obtained a jugdment in a proceeding to enforce a machanic's lien on certain real estate, the premises were sold to satisfy the same, and they became the purchasers. Subsequently a motion was made to set aside the sale, and notice served on A. only. The motion was heard ex parte, and denied; *Held*, that notice to both judgment creditors was indispensable, and that therefore the Court did not err in denying the motion. *Turney* v. *Saunders*, 239.
2. In a notice of an application for leave to sell real estate, where unknown heirs were interested, the words, "State of Illinois," were not mentioned with the words, "County of Peoria." There was an appearance by the only known heir in the case: *Held*, that the defect was cured by such appearance *Bowles* v. *Rouse*, 409.

See Administrator, &c. 1.

PARDON.

See Constitutional Law, 1.

PARTIES.

Each State of the Union may prescribe the mode of bringing parties before its Courts, and although its regulation, in this respect, can have no extra-territorial operation, they are, nevertheless, binding on its own citizen. *Welch* v. *Sykes*. 198.

See Writ of Error, 2.

1. A. sued B., in assumpsit, a capias ad re spondendum was issued, and B. held to bail. Upon a return to the capais ad satisfactum, of non est inventus, an action of debt was commenced upon the bail bond, and after the return day of the summons, the bail surrendered the principal debtor in open Court, who was taken into the custody of the sheriff. The bail pleaded non est factum, and two pleas setting forth the surrender, &c. The lat-lat were demurred to, and the demurrer sustained by the Court: *Held*, that the demurrer was properly sustained, the statute not authorizing the surrender of the principal after the return day of the process against the bail. *Gear* v. *Clark*, 64.
2. A plea of former acquittal omitted to state that an offence charged in two indictments were one and the same offence: *Held*, on demurrer to the plea, that it was bad, and that the demurrer only admitted the truth of the plea as pleaded. *McQuiod* v. *The People*, 76.
3. Accord and satisfaction must be specially pleaded in an action of trespass, and cannot be given in evidence under the general issue. *Kenyon* v. *Sutherland*, 99.
4. There is a distinction between a plea setting up a matter of defence, which has arisen since the commencement of the action but before plea pleaded, and pleas alleging matters of defence, originating after plea plead. A plea of the former kind is not, properly speaking, a plea of puis darrein continuance. Such a plea differs from a plea in bar in this only, that it cannot

destroy the original cause of action, and cannot be pleaded in bar generally, but must be pleaded to the further maintainance of the suit. *Ib.*

5. The principle on which pleas in abatement of another action pending are sustained is, that the law will not permit a debtor to be harassed and oppressed by two actions to recover the same demand, where the creditor can obtain a complete remedy by one of them. If the same remedy is furnished by the first action, the subsequent one is wholly unnecessary, and is, therefore, regarded as vexatious, and will be abated. But if the remedy by the former action may be partial or ineffectual, the plea in abatement to the latter cannot prevail. *Branigan* v. *Rose*, 123.
6. A plea in abatement, alleging the pendency of a proceeding in attachment ought not of itself to abate a subseqnent suit in personam, an attachment being generally a mere proceeding in rem. If such a plea be interposed, it should show, by a proper averment, that the defendant was personally a party to the proceeding by attachment. *Ib.*
7. Where a demurrer to a plea in abatement was sustained, no judgment was rendered at the time against the defendant, but a judgment was subsequently rendered: *Held* no error, for the defendant was not precluded from answering over after the decision sustaining the demurrer, and that, on his declining to do so, the Court proceeded properly to dispose of the case. *Ib.*
8. If a record of a judgment show that the defendant appeared by attorney, the plaintiff must reply this fact to the plea, and defendant may rejoin that the attorney had no authority to enter his appearance. *Welch* v. *Sykes*, 198.
9. A plea denying the jurisdiction of the Court must, by certain and positive averments, negate every fact from which the jurisdiction may arise. *Ib.*
10. To an action upon an assigned note brought by the assignee against the maker, it was pleaded that the note was given for money won at gaming. The plea contained no averment that the note was assigned after it became due: *Held*, that such an averment was unnecessary, notes for money won at gaming being, by the statute, absolutely void. *Williams* v. *Judy*, 282.
11. A party, who has neglected to join in demurrer, cannot complain that the cause was submitted for trial on other issues properly formed, without any disposition being made of such demurrer. *Granger* v. *Warrington*, 299.
12. A defendant, in order to plead successfully a seizure of his goods on attachment as a ground of defeating a suit upon a judgment rendered in such attachment, should show by his plea, that such goods are specifically bound by law for the satisfaction of that judgment and still held for that purpose, by seizure on execution or otherwise. *Pearl* v. *Wellman*, 311.
13. In an action for debt upon a judgment, among other pleas, one of payment was interposed, to which the plaintiff failed to reply: *Held*, that the defendant was entitled to a judgment on that plea. *Ib.*
14. The Circuit Court may, in their discretion, allow or refuse an application for leave to file additional pleas, and the exercise of that discretion cannot be assigned for error. *Bryant* v. *Dana*, 343.
15. After the expiration of a rule to plead in an action of ejectment, the Circuit Court may, in its discretion, grant an application for leave to plead, and its decision cannot be assigned as error. *Ferguson* v. *Miles*, 358.
16. A defendant may plead in abatement to a second suit for the same cause of action, the pendency of a writ of error which operates as a supersedeas, unless the writ of error was sued out subsequent to such suit, when the proper course is to apply for an order to stay proceedings until the writ of error is disposed of. *Hailman* v. *Buckmaster*, 498.
17. The law is well settled, that if a woman is sued while sole and marries during the pendency of the suit, she cannot plead the supervenient coverture in abatement. *Ib.*
18. It is a familiar rule, that a defendant cannot by demurrer rely on the statute of Frauds, unless it clearly appears upon the face of the bill that the agreement is within the provisions of the Statute. The Statute only establishes a rule of evidence, and does not change the mode of pleading an agreement. *Switzer* v. *Skiles*, 529.
19. If a party claim the benefit of the provisions of the Statue of Frauds, he must specially insist on it in his answer, or set it up by way of plea. The defence may be waived, and if not interposed in one of these modes, the defendant will be deemed to have renounced the benefit of the statute. *Ib.*
20. To a scire facias to revive a judgment in the names of the plaintiffs, for the use of another, the defendant pleaded, that after judgment in the scire facias mentioned and before the assignment of the same, as alleged in the said scire facias, the plaintiffs became bankrupts and were duly discharged, &c. To

this plea the plaintiffs demurred, and the demurrer was sustained: Held, that the counsel for the beneficial plaintiff, by direct averment, should have replied the assignment to him prior to the bankruptcy of the nominal plaintiffs, in order to have avoided the effect of the plea, and to protect the rights of the beneficial plaintiff. *Boone* v. *Stone*, 537.

21. A declaration, plea or replication will be sustained, rejecting mere surplusage, if the pleading would be substantially good without it. *Ib.*
22. In an action of debt, a replication to a plea alleging that the defendant did "undertake and promise" is bad. *Chenot* v. *Lefevre*, 637.
23. Where a note is given to a person by a name other than his real name, he may aver in his declaration that the note was given to him by the name specified in the note; but he must prove to the satisfaction of the jury, that he was the person intended as the payee. *Ib.*
24. The law of France in regard to prescription before it can be given in evidence, must be specially pleaded in suits brought in this country upon instruments made and executed in the former. *Ib.*

PRACTICE.

1. The proper practice in informations in the nature of quo warranto is, for the defendant to plead, instead of answering to the same. *The People* v. *Percells*, 59.
2. The Practice Act has application to civil cases only. Motion for continuances, therefor, in criminal cases are addressed solely to the discretion of the court, and its decisions thereon cannot be assigned for error. *Baxter* v. *The People*, 368.
3. Although the court will not indicate to a party the order of introducing his evidence, yet when testimony is offered of any fact which, in the order of its occurrence, must have been preceded by some other fact without proof of which the evidence offered is wholly insufficient for the purposes for which it was introduced, it should be received only on the assurance of the party offering it, that such other proof will also be made. If it should not be, the court, on motion of the opposite party, will exclude such testimony, or instruct the jury, that it is insufficient to entitle the plaintiff to a verdict. *Lombard* v. *Chever*, 469.
4. On a trial in ejectment, a record of a judgment in a proceeding by scire facias to foreclose a mortgage, ordering a sale of the premises, was read in evidence without objection. The judgment did not describe the premises: Held, on objection being made in the appellate court, that the judgment, although techinally defective, could not be vitiated in a collateral proceeding, and that the objection could not be raised in that court for the first time. *Bellingal* v. *Duncan*, 477.
5. A party appealing from a decision of the Probate Court allowing a claim, who neglects to tender a bill of exceptions as required by law, cannot object in the Supreme Court for the first time, to the want of jurisdiction in the Circuit Court by reason of such neglect on his part. *Welch* v. *Wallace*, 490.
6. A plaintiff will not be permitted to prosecute a second action to recover the same demand, while the proceeding on the judgment in the first case are stayed by a writ of error operating as a supersed as, as he has ample security for the paymnnt of such judgment, in case of an affirmance. The common and almost universal practice now is to apply to the court in which the second action is pending, for an order to stay proceedings in the cese, until there is a determination of the writ of error. *Hailman* v. *Buckmaster*, 498.
7. The correct practice on overruling a demurrer in Chancery is, the entry of an order that the defendant answer the bill, and if he neglect so to do, the complainant may have the bill taken pro confesso, and the court will then render the proper decree. *Miller* v. *Davidson*, 518.

See General Titles.

PRESCRIPTION.

See Evidence, 28; Pleading, 24; Statute of Limitations, 4, 5.

PRESUMPTION.

See Criminal Law, 9, 10; Evidence, [illegible], 3.

PROBATE JUSTICE.

1. A. sued B. before a Probate Justice of the Peace. The summons in the cause concluded: "Given under my hand and seal at my office in Jacksonville, this 27th day of November, 1845. Mat. Stacy, P. J. P. [Seal]" Judgment was rendered against the defendant by default, and he appealed to the Circuit Court, where a motion was made to dismiss the case, because the Probate Justice had not affixed his seal of office to the original summons, but the motion was denied: Held, that the motion was properly denied. *Dunlap* v. *Ennis*, 286.
2. Under the existing law relating to Probate Courts; the powers of the Probate Justice are of a two-fold character; first, he is to preside over the Probate Court, and perform the duties imposed on that Court; and second, he is vested with the jurisdiction of a justice of the peace in civil cases. The statute requiring the Probate Court to keep a seal, when acting in the capacity of Probate Justice merely, he must annex such seal to his process and certificate; but when only exercising the powers of a justice of the peace, he is not required to use the official seal. *Ib.*

See Jurisdiction, 4.

PROMISSORY NOTE.

1. Three promissory notes were executed to B. payable on the first days of September, October and November, which notes, before maturity, were assigned to C. who brought suit on them on the fifth day of the ensuing January, returnable on the first Monday of March, that being the commencement of the first term of the circuit court after their maturity. The Municipal Court was by law required to be held on the first Mondays of November, January and March. At the November term, the Judge gave notice that he should not hold the January term, and acted accordingly. Judgment was obtained on the notes at the November term, the cause having been contested and continued from the March term, when an execution was duly issued, and returned nulla bona. C. then sued B. as assignor of the three notes, and the jury found a verdict in his favor for the note and interest last due only: Held, that due diligence was not used to collect two of the three notes, as suit might have been brought to the November term of the Municipal Court, but as to the third, the suit was duly brought. *Brown* v. *Pease*, 191.
2. A. gave to B. his promissory note for $672.08, payable in two years, and negotiable in the State Bank of Illinois, and secured the same by a mortgage of real estate. The note was assigned to said Bank by the payee, and its paper having depreciated, B. without the assent or concurrence of A. when said note became due, paid the said note in such depreciated paper. B. then brought his bill in Chancery to foreclose the mortgage, and the circuit court rendered a decree in his favor for the amount of the note and interest, and that the mortgaged premises to be sold, &c: Held, that B. only succeeded to the rights of the Bank, and could not, by his voluntary act, have any better right or superior equity; that A. was entitled to discharge his indebtedness in the paper of the Bank, andehat B. could only recover the value of the funds at the time he paid the note. *Wright* v. *Taylor*, 193.
3. If note or bill is taken, before it is due, absolutely in payment and satisfaction of a precedent debt, and in the usual course at business, that is a sufficient consideration to protect the holder against any equities which might exist as between any previous parties to the note or bill. *Russell* v. *Hadduck*, 233.
4. The rule undoubtedly is, that when a party is about to receive a bill or note, if there are any such suspicious circumstances attending the transaction or within the knowledge of the party as would induce a prudent man to inquire into the title of the holder, or the consideration of the paper, he

shall be bound to make such inquiry, or, if he neglect to do so, he shall hold the bill or note subject to any equities which may exist between the previous parties to it. *Ib.*

5. Where a note is given to a person by a name other than his real name, he may aver in his declaration that the note was given to him by the name specified in the note; but he mnst prove to the satisfaction of the jury that he was the person intended as the payee. *Chenot* v. *Lefevre*, 627.

PUIS DARREIN CONTINUANCE.

See Pleading, 4.

QUO WARRANTO.

See Practice, 1.

RECOGNIZANCE.

1. A suit on recognizance is a civil proceeding, in the nature of an action on a penalty, against the accused and his bail, and if the penalty is recovered, it cannot be regarded as a fine imposed by law, as contemplated by the provisions of the one huudred and seventy first section of the Criminal Code. *Edgar Co.* v. *Mayo*, 82.
2. A capias was issued against one indicted, and an order of court indorsed thereon directing the sheriff to take bail in the sum of one hundred dollars. An arrest was made, and a joint and several recognizance for his appearance, with surety under the penalty of fifty dollars, executed and delivered to the sheriff. The sheriff, perceiving that the penalty was not in compliance with the order of court, returned it to the principal, who changed it to the sum of one hundred dollars. A few days after, the sheriff, having the recognizance in his hand, saw the surety, informed him of the alteration, and asked him if he would stand on the bond as it was then, to which he replied in the affirmative, and that he would as soon be his security for one hundred and fifty dollars as for fifty dollars. The principal not appearing as required by recognizance, the same was forfeited and a sci. fa. issued against him and his surety, which was served on the surety and returned nihil as to the principal. The surety pleaded non est factum, and verified the same by affidavit. The facts in regard to the alteration were proved at the trial. The court instructed the jury that "by the alteration, the bond was rendered void, but, in the opinion of the court, the subsequent assent of Sans, (the surety,) cured this defect and rendered him liable :" Held, that the instruction was erroneous, the bond being rendered void by the alteration and a nullity, it could not be made valid by the subsequent assent of the surety. *Sans* v. *The People*, 327.
3. The object of a sci. fa. on a recognizance is, to have execution according to the form, force and effect of the recognizance. Against the issuing of such execution, the party summoned may show for cause, that the principal in the recognizance has complied with its conditions, that the debt is paid, that there is no such record, &c. ; but he cannot be permitted by plea, or otherwise, to change its nature or effect. If the recognizance is joint and and several, and a sci. fa. is issued against the several cognizors in proper form, is served on one or more, and the writ returned "nihil" as to the others, judgment may be rendered against them and each of them according to the conditions of the recognizance. *Ib.*
4. The writ of sci. fa. upon recognizance was given by the Statute of Westminister 2. 13 Edw. 1. and this statute being adopted in this State, a return of two writs "nihil" upon a sci. fa. issued on such instruments, is equivalent to actual service, and will justify the word of execution against those of the cognizors who cannot be personally served with process *Ib.*
5. The doctrine laid down by this Court in the case of McCourtie v. Davis, 2 Gilm. 298, which was a sci. fa. against a garnishee in attachment, is reaffirmed ; but the case of Alley v. The People, 1 Gilm. 109, so far as it conflicts with the doctrine of the present case, is overruled.
6. A recognizance was entered into in the Morgan circuit court, which was subsequently forfeited by reason of the default of the principal to appear as

required. A sci fa. was issued from that Court to Scott county, and there served on three of the sureties. They appeared in Court, and, by their counsel, objecting to its jurisdiction, moved to quash the sci. fa. because it was issued without legal authority and contained no averment that the cause of action accrued in Morgan county: Held, that the Court had full power to issue its process to any county in the State where the defendants, or any of them resides, or might be found: held, also, that the rule is universal, that recognizances must be prosecuted in the Court in which they are taken or acknowledged, or to which they are by law returned; held, further, that where a recognizance is joint and several, sci. fa. upon it is in the nature of a several process against each, eaving for its object the procurement of an execution according to the force and effect of the recognizance. *Crisman* v. *The People*, 351

7. A scire facias upon a recognizance is not the commencement of a suit, within the meaning of the Practice Act prohibiting suits from being brought out of the county where the cognizors may reside; but it is judicial writ to have executed upon a debt of record. *Ib.*

8. A as a principal, and B. and C. as his sureties, entered into a joint and several recognizance to the People for the appearance of A. at Court, &c. A failed to appear, and the recognizance was forfeited. A sci. fa. was issued, and returned served on C. An alias was also issued, returnable at a subsequent term, which was served on B. In each case, there was a return of nihil as to A. Judgment was rendered by default against B. alone, with an order for execution, which was assigned for error: Held, that the recognizance being joint and several, the judgment was properly rendered. *Passfield* v. *The People* 406.

RELATION.

See Deed, Judgment, &c.5.

REDEMPTION.

See Revenue Law ; Sale, 5.

RELEASE.

See Evidence, 11.

REVENUE LAW.

A. purchased at a tax sale in June, 1844, certain tracts of land belonging to B. who died in February, 1846. On the 26th day of October of the latter year the widow of B, applied to the Clerk of the County Commissioner's Court for leave to redeem the lands, which was denied. She then applied to the Circuit Court for a mandamus. A demurrer to her petition was interposed and sustained : Held, that she was not entitled to redeem the lands under the 38th section of the " Act concerning the Public Revenue," approved Feb. 26, 1839, the period of redemption having passed ; and further. that the 39th section applied only to lands owned by femes convert in their own rights, of which they were so seized at the time of the sale. *Finch* v. *Brown*, 488.

SALE.

1. The rule is well established, that every thing done by the parties to a sale calculated to prevent competition, renders such sale void. *Longwith* v. *Butler*, 32.

2. Sale of land by the mortgagee, or trustee, under a power to sell, contained in the mortgage or deed of trust, being much liable to abuse, will be most jealously watched by Courts of Equity, and upon the slightest proof of unfair conduct, or of a departure from the power, they will instantly be set aside. *Ib.*

3. Where goods have been placed by a debtor in the hands of his creditor, as collateral security for the debt, and an extension of the time of payment has been given, the goods cannot be sold by the creditor before the expiration of such extension. *Wadsworth* v. *Thompson*, 423.
4. The biddings at a Master's sale will be opened, on motion, if it be shown that there has been any injurious mistake, misrepresentation or fraud, and the reported sale will be rejected, or the order of ratification rescided, and the property will be again sent into market and re-sold. *Cooper* v. *Crosby*, 506.
5. When a sale of mortgaged property has been made, the party having the equity of redemption acquires a legal right to redeem it from such sale in the manner provided by law. *Ib.*
6. When sale of land is made at public auction, and all persons are at liberty to bid, an agreement among different claimants to different portions of the land with an individual to purchase the whole tract for their benefit, is not such an agreement as is to prevent competition and thereby to render the sale void. *Switzer* v. *Skiles*, 529.
7. If an officer, in making a sale on execution, choose to give a credit to the purchaser, the sale is good and a satisfaction of the execution to the amount of the sale, especially when done with the plaintiff in the execution. *Mc Clusky* v. *Mc Neely*. 578.

See Judgment &c., 15 ; Levy ; Mortgage, 2 ; Sheriff, 2.

SCIRE FACIAS.

See Fees, &c. 1 ; Pleading, 20; Recognizance ; Writ of Error, 1.

SECRETARY FOR STATE.

See Money had, &c.

SECURITY FOR COSTS.

See Costs.

SEDUCTION.

In action of seduction brought by the parent who has the right to service of the daughter, it is no longer necessary to prove a loss of service to sustain the action. But where the action is brought by the master, who is not the parent, the loss of service must be proved. *Anderson* v. *Ryan*, 583.

SET-OFF.

1. Unliquidated damages arising out of covenants, contracts, or torts totally disconnected with the subject matter of the plantiff's claim, are not such claims, or demands as constitute the subject matter of set-off under the statute. *Hawks* v. *Lands*, 227.
2. If a party seeking to enforce a specific performance wishes to set off against the amount to be paid by him an indebtedness to him from the other party, he should lay the proper foundation for it in his bill, or he cannot be relieved. *Scott* v. *Shepherd*, 483.
3. Equity will allow one judgment to be set off against another, where there are no means for collecting it of the judgment creditor in the latter. *Buckmaster* v. *Grundy*, 626.

SHERIFF.

. Where a sheriff returns an execution without having made a levy, his authority is at an end. But if he has made a levy during the life time of the execution, he has the right to sell the property, or receive payment of

the judgment afterwards, notwithstanding he has in the mean time returned the process. *Bryant* v. *Dana*, 343.

2. The Common Law rule is, that the officer who levies an execution, must make sale of the property and receive the money ; or, in other words, the officer who commenced the service of the process must complete the execution thereof, and this, whether he continue in office or not. This rule, however, only applies to sales of personal property, as real estate, at Common Law, was not subject to sale on execution. *Bellingall* v. *Duncan*, 477.
3. Between the time of delivering an execution to a deputy of the sheriff and a sale made thereon, the sheriff died. The deputy proceeded with his duty as if the sheriff was still living: Held, that the authority of the deputy did not cease with the death of the sheriff. *McCluskey* v. *McNeely*, 578.

STATE BANK.

See Promissory Note, 2.

SPECIFIC PERFORMANCE.

See Contract, 2, 6; Chancery, 8, 20 ; Set-Off, 2, 3.

STATUTE OF FRAUDS.

1. It is a familiar rule, that a defendant cannot by demurrer rely on the Statute of Frauds, unless it clearly appears upon the face of the bill that the agreement is within the provisions of the Statute. The Statute only establishes a rule of evidence, and does not change the mode of pleading an agreement. *Switzer* v. *Skiles*, 529.
2. If a party claim the benefit of the provisions of the Statute of Frauds, he must specially insist on it in his answer, or set it up by way of plea. The defence may be waived, and if not interposed in one of these modes, the defendant will be deemed to have renounced the benefit of the Statute. *Ib.*

STATUTE OF LIMITATIONS.

1. An executor voluntarily paid over to one of the legatees named in the will, an amount supposed to be equal, or nearly so, to the interest of the legatee. It was subsequently, after a lapse of ten years, alleged by the executor that the legatee had been overpaid, and upon a request and a refuse to refund, the former commenced a suit to recover back the alleged excess: Held, that if the executor was entitled to recover at all, he was, notwithstanding, barred by the Statute of Limitations. *Shelburne* v. *Robinson*, 597.
2. The Statute of Limitations begins to run when a cause of action accrues. In a case where some act is to be done, or condition precedent to be performed by a party to entitle him to his right to sue, and no definite time is fixed at which the act is to be done or condition performed, he must exercise reasonable diligence to do the one, or perform the other, or he will be barred by the Statute. *Ib.*
3. Before the Statute of Limitations will constitute a bar to an action of debt, the defendant must be a resident of the State for sixteen years after the cause of action accrues, and before the suit is brought. Should the defendant remove from the State, and afterwards return again to reside, the time of the absence would not be reckoned as a part of the sixteen years. *Chenot* v. *Lefevre*, 637.
4. The term "prescription," as used in the Code Napoleon, is synonymous with the term "limitation" in the English Law. *Ib.*
5. The law of France in regard to prescription, before it can be given in evidence, must be specially pleaded in suits brought in this country upon instruments made and executed in the former. *Ib.*

STATUTE OF WILLS.

The provision of the first section of the Act as supplemental to the Statute of Wills, approved March 1, 1833, is not restricted in its application to cases of the death of resident proprietors of real estate, but embraces all classes of persons. *Bowles* v. *Rouse*, 409.

SUNDAY.

1. Courts cannot pronounce a judgment, or do any other act strictly judicial on Sunday, unless expressly authorized by statute so to do. A verdict of a jury, however, may be received on that day. *Baxter* v. *The People*, 368.
2. A jury, in a trial for murder, returned a verdict of guilty into Court, against the accused, and the Court pronounced a judgment thereon on Sunday: Held, that the verdict was properly received, but that the judgment of the Court was absolutely null and void. *Ib.*

SUPERSEDEAS.

See Pleading, 16 ; Practice, 6.

TENDER.

See Usury, 4.

TRESPASS.

See Pleading, 3.

TRUST AND TRUSTEE.

See Agent.

USURY.

1. In Equity, no form which can be given to a particular contract, will preclude the borrower from the introduction of evidence to impeach it on the ground of usury. It is not the form, but the nature and substance of the contract, which must determine whether the instrument be not a mere device to obtain more than legal interest, and colorable only to evade the provisions of the statute. *Ferguson* v. *Sutphen*, 547.
2. Where usury is alleged, it may be proved by parol, and as a consequence, the written cautracts of the parties may, by the same kind of evidence, be varied and contradicted. Such evidence is competent to show that a contract in the form of an absolute sale, was, in truth, but a security for an usurious loan. *Ib.*
3. The borrower of money on an usurious contract may tender to the lender, or bring into Court for his use, the amount actually advanced with the legal interest, and then file his bill for relief; and the Court will relieve him from the payment of the excess, and declare the securities to be void, and when necessary, direct them to be delivered up and cancelled. *Ib.*
4. Where a statute declares a contract to be void, it does not follow that either of the contracting parties can take advantage of it. A statute may so declare, and still but one of the parties be guilty of its violation. Under the laws declaring usurious contracts to be void, the lender is never allowed to take advantage of the statute, because he is the guilty party; but the borrower is permitted to do this, because he is not a particeps criminis. This principle applies to every contract declared to be void by the statute, in making of which but one of the parties is in parl delicto. *Ib.*
5. A. and B. applied to C. for the loan of $1,100, for the purpose of purchasing public lands, upon which they had made improvements, which were about

to be sold by the Government. C. agreed to advance the money with the understanding that the lands should be bid off by him to secure him in the payment of the loan, and that they should pay him for the loan and forbearance $330 in each of the three following years, and $1,430 at the end of four years, when C. was to sell and convey the land to them. C. bid off the lands at $1.25 per acre, and the parties entered into a written agreement upon this basis, with the further stipulation that in default of any of the payments being made, C. was authorized to declare the contract at an end, and should he do so, all previous payments were to be forfeited, and A. and B. thenceforth were to be considered as the tenants at will of C. at an annual rent equal to ten per cent. interest on the $5,400, payable quarter yearly: Held, that the contract was usurious. *Ib.*

VENDITIONI EXPONAS.

A venditioni exponas conveys no new authority on the sheriff. Its only office is to compel him to proceed with the sale, which he already has the power to make. *Bellingall* v. *Duncan*, 477.

VENUE.

A party, who has obtained a change of venue, taken several steps in the cause, consented to a continuance, and at a subsequent term, submitted the cause for trial without objection, cannot obtain an order of dismissal, for the reason that the original papers in the cause had not been transmitted by the clerk from the county where the suit was commenced. Application for a rule upon the clerk of the Court to send the original papers should be made at the first term after obtaining a change of venue. *Granger* v. *Warrington*, 299.

VERDICT.

1. On the trial of an indictment for receiving stolen goods, the jury found the accused guilty and fixed his tern of service in the penitentiary at two years. The Court, upon the rendition of the verdict, sentenced him to two years' imprisonment in the penitentiary: Held, that the verdict, under the statute, was too general, and substantially defective in not stating the value of the goods received, and that the judgment pronounced thereon was unauthorized. *Sawyer* v. *The People*, 53.
2. During the progress of the trial for murder, one of the jurors, while one of the counsel for the prisoner was addressing the jury, had a chill, and was, by order of the Court, placed upon a pallet, and for a time did not fully comprehend the whole of the argument, being in a drowse, though he had understood all of the evidence, and all that had been said by counsel previously. The fact that he was asleep was known to the prisoner, but the attention of no one was called to it: Held, under the circumstances, to be no ground for settidg aside the verdict. *Baxter* v. *The People*, 368.
3. A jury, in a trial for murder, returned a verdict of guilty into Court, against the accused, and the Court pronounced a judgment thereon on Sunday: Held, that the verdict was properly received, but that the judgment of the Court was absolutely null and void. *Ib.*
4. Where the action is in debt, and the verdict and judgment are in damages, both are erroneous. *Howell* v. *Barrett*, 433; *Wilcoxon* v. *Roby*, 475.
5. After a jury has returned a verdict and been discharged, a defect in the verdict cannot be corrected in the Circuit Court. *Ib.* 475.
6. In an action of debt, the jury returned a verdict for more damages than were claimed, and in the Supreme Court, the party offered to remit the excess, but the Court refused to allow him to do so. *Chenot* v. *Lefevre*, 637.

See New Trial, 2; Nonsuit, 2.

WITNESS.

1. Although, as a general rule, it is not licensable, on account of the multiplicity of irrelevant and improper issues which would thereby be prevented, to attact the general character of an impeaching witness, yet it is proper and highly important for the purposes of justice that a Court or jury trying a cause should know whether such, as well as any other witness, is incapacitated from giving testimony on account of mental alienation, without regard to the causes by which it may have been produced. *Rector* v. *Rector*, 105.
2. The rule of the Common Law, which prohibits the party calling a witness proposing to him such questions as will indicate the answer which is desired to be obtained. has not, in practice, usually been considered so strict and imperative as to divest the Court of reasonable discretion in permitting questions to be asked and answered, which may be leading in their character, and especially so, when the same is only introductory to the more material matters directly in issue. *Greenup* v. *Stoker*, 202.
3. On the trial of an action for a breach of promise to marry, a witness, introduced by the plaintiff, was asked the following question: "Did he court her?" The question was objected to by counsel for the defendant, but the objection was overruled: Held, that it was neither objectionable in form, nor in substance; that it was an inquiry about a mere of fact, which could be answered by a person of common observation. *Ib.*
4. Grand jurors are competent witnesses to prove facts which came to their knowledge while acting in such capacity. *Granger* v. *Warrington*. 299.
5. A person, who had assisted in the arrest of one accused of murder, and for whose arrest rewards had been offered by the State and sundry individuals, on being called upon to testify, stated these facts, as also, that he had received the rewards from the State, but not from the individuals, and did not expect to receive anything from them: Held, that he was a competent witness. *Baxter* v. *The People*. 368.
6. On a trial in the Circuit Conrt for the purpose of establishing the amount of rent dne from a tenant to his landlord, a person was called to testify, who had served a distress warrant in the case, by levying on the property of the tenant. Objection being made to him, the court decided that he was competent: Held, that the court erred in excluding him. *Stow* v. *Gregory*, 675.
7. On a trial for forgery, a witness was called whose business had been for many years as an officer of a bank to examine papers with the view of detecting alterations and erasures, and ascertaining spurious from genuine writings and signatures. He was requested to examine the papers in evidence critically, and to state his opinion to the jury, whether there had been alterations and erasures. The counsel for the accused objected, but he was permitted to testify: Held, that from the nature of the business in which he had been engaged, he was competent witness to express his opinion to the jury. *Pate* v. *The People*, 644.
8. The general rule upon the subject of proof of handwriting is, that proof is not to be made by the comparison of hands, but by the production of witnesses who have acquired a knowledge of the general character of the handwriting of the party. The modes of acquiring such knowledge are, either by having seen the party write, or by having seen letters or other documents, which he has, in the course of business, recognized or admitted to be his own. The witness may examine the writing in question and declare his belief, founded on his previous knowledge concerning its genuineness. Where a witness stated that he had seen the prisoner write, but had never seen him write before the difficulty in question arose, it was held, that the witness did not come within the rule laid down. *Ib.*
9. When a witness is called to testify in relation to the handwriting of a party, he should first be asked if he is acquainted wfth such handwriting, and, if he answer in the affirmative, he is then to be asked as to the manner in which he became so acquainted. *Ib.*

WRIT OF ERROR.

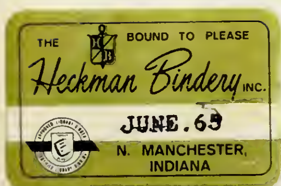
1. A writ of error was prosecnted against three defendants, and the scire facias was returned served on one of them only, and non est inventus as to the two others. A rule was obtained upon the defendants served to join in error, and he moved to have the rule vacated: Held, that before the plain-

tiffs would be entitled to the rule, they must bring all of the defendants into court, either by the service of the scire facias, or a publication against such as were non-residents, or could not be found. *State Bank* v. *Wilson*, 89.
2. A cause must be heard as between all of the parties to a writ of error. *Ib.*
3. A writ of error must be prosecuted by a natural or artificial person, against whom a judgment for costs can be rendered, should the judgment of the Circuit Court be affirmed. *Bowles* v. *Rowe*, 408.

See Fees, &c. 1.

WRIT OF INQUIRY.

1. In an action of assumpsit, the defendant failing to plead, a default was entered together with an interlocutory judgment, requiring the sheriff to summon a jury to assess the plaintiff's damages, &c. A writ of inquiry was issued and on the same day returned into court with the following indorsement thereon: "We, the jury summoned in this cause, after being duly sworn, do assess the plaintiff's damages at $148.96," which return was signed by all the jury, and judgment was rendered for the plaintiff for the amount assessed by the jury. The sheriff made no return upon the writ, and the plaintiff appearing in the Supreme Court, on affidavit filed, had leave to apply to the Circuit Court to permit the sheriff to make the proper return upon the writ, and the cause was continued. The Circuit Court allowed the sheriff to make his return, and the same was entered of record in that court, a transcript of which was filed in the Supreme Court. Held, that the Circuit Court did not err in permiting the return to be made; that the counsel for the appellant being in court when the continuance was granted, it was sufficient notice to him of the application to be made to the Circuit Court; and that the appellant should have moved, in the latter court, to quash the writ of inquiry, if he should deem it insufficient. *Moore* v. *Purple*, 149.
2. A writ of inquiry may be executed before the sheriff at any place withtn his bailwick, and a want of notice to the defendant, on executing the writ, cannot be assigned for error; nor can the insufficiency of the writ, the proper practice being to move the court below to quash it. *Ib.*



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