REPORTS

OF

CASES

ARGUED AND DETERMINED

IN

THE SUPREME COURT

OF THE

STATE OF ILLINOIS.

VOLUME IV.

By CHARLES GILMAN,

COUNSELOR AT LAW.

VOLUME IX.

By WM. H. UNDERWOOD,

WITH NOTES.

ST. LOUIS:

PUBLISHED BY W. J. GILBERT.

CHICAGO: E. B. MYERS.

1870.

BELLEVILLE, ILL.:

KIMBALL & TAYLOR, PRINTERS,

ADVOCATE PRINTING HOUSE.

MEMORANDUM.

This volume completes the publication of the decisions of the Supreme Court of the State of Illinois, under its present organization. The term of office of the present incumbents will expire on the first Monday in December, next, by virtue of the provisions of the new Constitution, and on the same day, the term of the three Supreme Judges, soon to be elected by the people, will commence.

THE REPORTER.

Quincy, August, 1848.

JUSTICES

OF THE

SUPREME COURT OF THE STATE OF ILLINOIS,

DURING THE PERIOD OF THESE REPORTS.

			Date of present commission.
WILLIAM WILSON, (1)	CHIEF JUSTICE.		Jan. 19, 1825.
SAMUEL D. LOCKWOOD,	ASSOCIATE JUSTICE.		" " "
THOMAS C. BROWNE, (2)	"	"	" " "
SAMUEL H. TREAT, (3)	"	"	Feb. 1841.
JOHN DEAN CATON, (4)	"	"	" 18, 1845.
GUSTAVUS P. KOERNER,	"	"	Dec. 21, 1846.
NORMAN H. PURPLE,	"	"	" " "
WILLIAM A. DENNING,	"	"	Jan. 19, 1847.
JESSE B. THOMAS,	"	"	" 27, "

ATTORNEY GENERAL,
DAVID B. CAMPBELL.

REPORTER,
CHARLES GILMAN.

CLERK,
RIGDON B. SLOCUMB.

(1) Chief Justice Wilson received his first appointment, August 7, 1819, and has been Chief Justice from the date of his present commission.

(2) Justice Browne received his first appointment Oct. 9, 1818.

(3) Justice Treat took his seat upon the Bench, Feb. 22, 1831, under the Act of Feb. 10th, 1841, re-organizing the Judiciary, and increasing the number of Justices from four to nine.

(4) Justice Caton was first appointed by the Governor, August 20, 1842, and afterwards, May 2, 1843; Justice Koerner, April 2, 1845; Justice Purple, Aug. 8, 1845; and Justice Thomas, Aug. 6, 1843.

CIRCUITS OF THE JUSTICES.

1st Circuit,	- - - - -	Justice LOCKWOOD.
2nd do	- - - - -	" KOERNER.
3rd do	- - - - -	" DENNING.
4th do	- - - -	Chief Justice WILSON.
5th do	- - - - -	Justice PURPLE.
6th do	- - - - -	" BROWNE.
7th do	- - - - -	" THOMAS.
8th do	- - - - -	" TREAT.
9th do	- - - - -	" CATON.

TABLE

OF THE CASES REPORTED.

DECISIONS

OF

THE SUPREME COURT

OF THE

STATE OF ILLINOIS,

DELIVERED

AT THE DECEMBER TERM, 1847,

AT SPRINGFIELD.

PETER H. JOHNSON *et al.*, appellants, *v.* NEWMAN L. BARBER, appellee.

Appeal from Kane.

Where an appeal was prayed by the defendants in a suit in the Circuit Court and allowed on the "condition that *they* file their bonds," &c. the appeal bond being executed by one only, the appeal was, in the Supreme Court, dismissed on motion.

TRESPASS ON THE CASE, brought by the appellee in the Kane Circuit Court against the appellants. The cause was heard before the Hon. John D. Caton and a jury, at the April term, 1847, when a verdict of guilty was rendered against the defendants below for $489. Judgment by the Court thereon.

An appeal being prayed, it was allowed by the Conrt "on condition that they file their bonds in ninety days in the

penal sum of six hundred and fifty dollars, with Jacob Johnson as their security, conditioned as the law directs." On the 9th of June, 1847, within the time fixed by the Court, a bond was filed in the Clerk's office, executed by Peter H. Johnson and Jacob Johnson, in the penal sum of $1000. The appeal, was entered in this Court.

W. D. BARRY, and A. T. BLEDSOE, for the appellees, moved the Court to dismiss the appeal, for the following reasons, to wit:

1. The order of the Circuit Court granting the appeal, has not been complied with;

2. Because there has been no appeal bond filed, as required by the Circuit Court at the time of granting the appeal;

3. Because one of the defendants in the Circuit Court (John B. Johnson), did not join in the appeal bond; and

4. Because the appeal bond is, in other respects, wholly insufficient.

L. TRUMBULL, for the appellants, entered a cross motion for leave to amend the appeal bond, which was refused.

PER CURIAM. The motion to dismiss the appeal must be sustained. The record shows that the appeal was prayed by the "defendants," and not by any one of them. The order of the Circuit Court required that *they* file a bond, but Peter H. Johnson only has executed it. The order has not been complied with, and as has before been decided by this Court in the cases of Carson *v.* Merle, 3 Scam. 168, Ryder *v.* Stevenson, *ib.* 539, and Watson *v.* Thrall, 3 Gilm. 69, the appeal must be dismissed with costs.(*a*)

Appeal dismissed.

(*a*) But see Willenborg *v.* Murphy, 40 Ill. R. 46.

GEORGE C. BESTOR, plaintiff in error, *v.* ISAAC WALKER *et al.*, defendants in error.

Error to Peoria.

In order to render the assignor of a promissory note liable, the assignee must not only institute and prosecute his suit to judgment at the earliest practicable time, but he must enforce that judgment by execution as soon as he can by ordinary diligence. He will, however, be excused from suing out execution, when such process would prove wholly unavailing. If a suit were necessary at the maturity of the note, but insolvency should intervene between the commencement thereof and judgment, that fact should be alleged in the declaration, to excuse from the issuing of execution.

The assignee of a promissory note should use due diligence to collect the amount of it from the maker in the county of the maker's residence, if such residence is known to him. If, however, such place of residence is wholly unknown to the assignee, he may elect to consider as the place of the maker's residence, the county where the note was executed, if he be found there for purposes of the service of process upon him, returnable to the first term of Court held in such county after the maturity of the note; or perhaps to a subsequent term, if, in the mean time, diligent but unsuccessful effort has been made to ascertain his place of residence.

The assignee of a promissory note must not only institute a suit against the maker at the first term, but he must also obtain a judgment at that term, and if he does not thus obtain a judgment, it must not be the result of his negligence.

In an action brought by the assignee of a note against the assignor, it is not necessary to prove its execution by the maker.

ASSUMPSIT, in the Peoria Circuit Court, brought by the defendants in error against the plaintiff in error as assignor of a promissory note. The cause was heard before the Hon. John D. Caton and a jury, at the May term 1845, when a verdict was rendered in favor of the plaintiffs for $249. Upon this verdict judgment was entered.

The material facts in the case, as proved in the Court below, and the pleadings and instructions given by that Court, are set forth in the Opinion.

O. PETERS, for the plaintiff in error.

I. In a suit by an endorsee of a promissory note against the indorser, the note is not admissable in evidence without proof of the handwriting of the maker.

The maker of the note stands to the other parties, like the acceptor of a bill of exchange to drawer and indorser. And in a suit by the holder of a bill against the acceptor, the handwriting of the indorser must be proved. Robinson v. Yarrow, 3 Eng. Com. Law R. 173; Smith v. Chester, 1 Term Rep. 656. This rule of the common law is not altered by our statutes.

The fourteenth section of the Practice Act (Rev. Stat. 415), only provides that the execution of the instrument shall not be denied, when the action is brought *upon the instrument.*

Here, the action is not brought upon the instrument, *i. e.* the note, but upon the *indorsment:* if defendant does not deny the *indorsment* under oath, he cannot, by reason of this statute, put it in issue. Nor does the 59th section (Rev. Stat. 421), apply. That only applies to actions upon notes, &c., when brought by the assignee.

II. The instructions of the Circuit Court to the jury were erroneous.

The first and third instructions are substantially alike, viz. that to charge an indorser, it is not necessary that the execution should be sent into any county, except where the judgment was rendered. The proposition is stated in broad terms, and without restriction or limitation.

In many cases, the original process is sent, and may rightfully be sent, into a foreign county, and served on the make of the note resident there. In all these cases, an indorser would be charged on return of the execution *nulla bona*, though the maker were worth his thousands.

The undertaking of an indorser is conditional, viz. that he will pay the note if the maker does not; provided the indorsee uses due diligence.

Our statute determines and defines what due diligence is, viz. the prosecution of a suit against the maker, unless he be insolvent, so that the suit would be unavailing. Rev. Stat. 385, §7.

Would it be a good declaration in a suit by indorsee against indorser, to allege that the defendant (indorser) re-

sided out of the county of the plaintiff, where the cause of action accrued, and that he (indorser) had no property in the county of the plaintiff. This would hardly be contended, and yet if these instructions be correct, such a declaration would be good. For diligence implies something more than the recovery of a judgment. The remedy must be pursued by execution.

Diligence is a mixed question of law and fact. It is put in issue by plea. Campbell *v.* Hobson, 1 A. K. Marsh. 229.

The indorsee must be as diligent as a man ordinarily is in his own business. Young *v.* Crosby, 3 Bibb, 227. Is proof that the maker has no property in the county, *conclusive evidence* of insolvency, so as to *preclude* the indorser from showing the insolvency?

III. The Court erred in overruling the motion for a new trial.

The evidence shows that too much time elapsed between the rendition of the judgment, and the suing out of execution.

Execution was delayed eighty-four days, and no good excuse is shown for the delay.

In Kentucky, a delay of three months is an absolute discharge of the indorser. Trimble *v.* Webb, 1 Monroe, 103; Johnson *v.* Lewis, 1 Dana, 184.

Is permitting eighty-four days to elapse, using such diligence as a prudent man would use ordinarily in his own business?

So, if the maker remove from the Circuit where the holder lives, it will not excuse him for not using diligence. Spratt *v.* McKinney, 1 Bibb, 595; Smallwood *v.* Woods, *Ibid.* 546; Hogan *v.* Vance, 2 do. 34–5; Thomas *v.* Taylor, 2 J. J. Marsh. 216; Saunders *v.* O'Briant, 2 Scam. 370; Bledsoe *v.* Graves, 4 do. 384–5.

Mr. Powell testified that he thought it might be best for all parties to delay suing out execution. He was the attorney and agent of the plaintiffs below, and he must judge at his peril.

By the law merchant, and under the statute of Anne, dili-

gence consists in making a demand and giving notice. This could not ordinarily be dispensed with, even though the acceptor of the bill, or maker of the note be insolvent. Bailey on Bills, 196; Smith *v.* Becket, 13 East, 187; Hodges *v.* Galt, 8 Pick. 251; 3 Kent's Com. 100.

Absolute insolvency, or absconding from the State only, will excuse institution of suit, and pursuing the remedy by execution.

As the attorneys of the plaintiffs knew the residence of Law to be in Adams county, they should have sued out execution and sent it there.

As the event has shown that Law had property there, as well as in other counties, he should have been pursued there and the money would have been made.

IV. The second instruction, that if the plaintiffs below did not know that Law had property, the jury would find for them, is so palpably erroneous, as hardly to need argument to show it.

This is probably the first time it has been adjudged that ignorance, and that too not improbably willful ignorance, excused a party from the fulfillment of his contract, and released him from his legal obligations.

Non-resident plaintiffs rarely know whether the makers of notes residing here, have property or not; and yet if this instruction be correct, it will excuse them from the diligence required by the statute to charge indorsers.

V. The Circuit Court erred in excluding the evidence offered by the defendant below.

The title deeds. Evidence that Law had title deeds to land and good titles, was competent inasmuch as the question comes up collaterally. It was such evidence as would authorize the jury to infer that Law was not insolvent.

So, that Law dealt in good titles, was competent, as it would be to show a merchant's credit that he had title to his stock of goods.

So, also, it was proper to show that he inherited lands from his ancestor. Bestor could not control and procure the deeds of the ancestor.

So, the evidence showing that Law sold lands to Mr. Pommey was competent, because it shows that he had funds, out of which he could have paid the judgment.

Reputation was also proper, as to Law's property. A reputation that a man has wealth, is all that can, in most cases, be proved. Inventories of his property could not be produced. His apparent condition, his reputation as to property, was a fact proper for the consideration of the jury.

Finally, it was abundantly shown that Law had most ample means of paying the judgment against him. A prudent man would have sought it out. An ordinarily vigilant man would have found it. And there is no excuse for the plaintiffs below, in not having obtained satisfaction of their execution.

E. N. Powell for the defendants in error, relied upon the following points and authorities:

1. The declaration in this case contains three counts, besides the common counts. The first count shows due diligence by suit against the maker at the first term of Court after the note became due, and execution issued to Peoria county, and returned by the sheriff, *nulla bona*. The second avers the insolvency of the maker at the time the note became due, and at the time the suit was brought against the assignor. The third count is the same as the first, except that two executions were issued, one to Peoria, and the other to Knox county, and the return of *nulla bona* on both.

2. The evidence, as contained in the bill of exceptions, fully sustains the verdict of the jury, and the jury having passed upon the evidence, the Court will not disturb their verdict, unless it most manifestly appears that the jury have misconceived the evidence, and that their finding is flagrantly against the weight of evidence. Smith *v.* Shultz, 1 Scam. 490; Lowry *v.* Orr, 1 Gilm. 70, and cases cited by counsel; Johnson *v.* Moulton, 1 Scam. 532.

3. Due diligence by the institution and prosecution of a suit against the maker, is shown by the return of an execution, *nulla bona*, issued upon a judgment against the maker at the first term of the Court after the note matured. The return of *nulla*

bona, to an execution issued upon a judgment rendered upon an assigned note, is evidence of the insolvency of the maker. Cowles *v.* Litchfield, 2 Scam. 356; Raplee *v.* Morgan, *Ibid.* 561.

4. The first instruction given, was correct. The assignee of a note is not bound to issue execution to any other county than the one where the judgment was obtained, unless it be shown that he knew of property in some other county, liable to execution. He is only bound to issue execution to the county where the suit was commenced. Cowles *v.* Litchfield, 2 Scam. 356; Saunders *v.* O'Briant, *Ibid.* 369.

Without the assignee having knowledge of property in some other county than the one where he brought his suit, surely it cannot be required of him that he shall issue executions into every county in the State, and prove the same returned *nulla bona*, in order to charge the assignor. The return of *nulla bona* is sufficient.

5. The assignee has done all that is required of him, if he has used all the means in his power, in the county where he sues. Saunders *v.* O'Briant, 2 Scam. 369. And if diligent search for property was made in the county where suit was instituted, that is sufficient.

6. When an execution is issued to a sheriff, on a judgment rendered upon an assigned note, he becomes the sworn agent of the assignor and assignee, and his return of *nulla bona* to such execution is conclusive evidence that the maker had no property liable to execution within his county, and *prima facie* evidence of none in the State, and unless the fact of the maker having property be brought home to the assignee, he is not bound to search for property out of the county where judgment is rendered. 2 Scam. 356, 369, before cited.

7. A sufficient excuse is given for not issuing execution at an earlier day, as it is very clearly shown that the maker of the note had no property in the county, between the rendition of the judgment and the issuing of execution.

8. The evidence to the jury was sufficient to warrant their finding under the second count, as the insolvency of the

maker is pretty clearly made out, and the jury having passed upon the whole of the evidence, and not being misled by the instructions given by the Court, their verdict ought not to be disturbed.

The Opinion of the Court was delivered by

THOMAS, J.* This case brings before us for revision, a judgment of the Circuit Court of Peoria county, in favor of defendants in error as indorsees, against plaintiff in error as indorser of a promissory note.

The plaintiff in error, claiming a reversal of that judgment for errors alleged to exist in the opinions of the Court below, on questions made during the progress of the trial, in his assignment of errors, now assumes that the Court erred

I. In its instructions to the jury;

II. In permitting the note to be read in evidence to the jury;

III. In permitting improper evidence to be given to the jury;

IV. In overruling the motion for a new trial;—and

V. In excluding evidence offered by the defendant below.

For the proper understanding and investigation of the questions presented by this assignment of errors, reference to the pleadings and evidence of the parties here becomes necessary: I proceed to make it.

The plaintiffs below base their right of recovery, as well upon the ground of diligence by suit on their part against the maker, as upon that of his insolvency.

The first and third counts of their declaration, exhibit the alleged proceedings relied upon by them, as constituting diligence sufficient to charge the indorser. The following are the material allegations in those counts, viz:

First count. 1. The execution on the 15th of Sept. 1841, at Peoria county, by one Edmund Law, of his promissory note for $200, to the defendant (Bestor), payable on the 25th Dec. 1842, with interest at 6 per cent. per annum.

*PURPLE, J., having been of counsel in this case, took no part in the decision.

2. The assignment of said note, by indorsement thereon in writing, by said defendant to one Isaac Underhill, and by said Underhill to plaintiff.

3. The institution and prosecution of a suit on said note, by plaintiffs, against said Law, to the first term of the Circuit Court of said county of Peoria, held after said note became due, to-wit, at the May term, A. D. 1843.

4. The recovery of a judgment in said suit, by plaintiffs, against said Law, during said term, to-wit: on the 7th of June, 1843, for the sum of $232.77 damages, and $7.18¾ costs.

5. The issuing of a *fi. fa.* on said judgment, on the 30th day of August, A. D. 1843, directed to the sheriff of said county of Peoria for execution, that it came to the hands of said sheriff on the same day, and on the 27th Nov. 1843, was returned by him, *nulla bona* and unsatisfied.

In addition to the allegations of the first count, the third count avers

1. The issuing of an *alias fi. fa.* on said judgment on the 11th day of April, 1844, directed to the sheriff of the aforesaid county of Peoria for execution; its delivery to said sheriff on the 17th day of said month of April, and its return by him, July 8th, 1844, *nulla bona* and unsatisfied.

2. The issuing of a *pluries fi. fa.* on the 12th of August, 1844, directed to the sheriff of Knox county for execution; its reception by said sheriff of Knox county on the 15th of said month of August; and its return by him, November 9th, 1844, *nulla bona* and unsatisfied.

The second count avers the insolvency of said Law, and his inability to pay said note or any part of it when it became due and payable, and from thence to the commencement of the suit against him; and that the institution and prosecution of a suit against him, at and during such time, would have been wholly unavailing, &c.

The fourth and only remaining count is the common money count.

The defendant, by his plea of the general issue, put the plaintiffs upon proof of their several allegations; the jury impanneled to try the issue, found for the plaintiffs, assessed

their damages at $249, and the Court, overruling defendant's motion for a new trial, rendered jndgment on the verdict. The defendant excepted to the opinion of the Court, and as has been already shown, now assigns it for error.

We are thus called upon to determine as to the sufficiency of the plaintiffs' proof to sustain their allegations, and charge the defendant as their indorser. This is the principal inquiry presented by the record, involving as it does, the plaintiffs' right of recovery in any event, and its solution will dispose of every other qnestion in the case, except that of the admissibility of a portion of the plaintiffs' evidence, arising upon the first assignment of errors. It therefore, first demands investigation.

First, then, as to the sufficiency of the proof to show such diligence by suit on the part of the indorsees against the maker as to charge the indorser. If proof of the allegations of the first and third counts will suffice for that purpose, there can be no doubt of the plaintiffs' right of recovery on that ground. Those allegations are in all respects, not only substantially, but literally proved. The execution and indorsement of the note; suit thereon by plaintiffs against the maker; judgment in such suit; executions on such judgment, and sheriff's returns on such executions, are all shown by plaintiffs' evidence (as embodied in the bill of exceptions), precisely in dates, amounts and every other particular, as alleged by them, consequently as the defendant by pleading to those counts admits their legal sufficiency to subject him to plaintiffs' suit, it would seem to be a work of supererogation to proceed with further inquiry on this branch of the subject. But the course taken on argument forbids that the investigation should close here. And moreover, there is perhaps some doubt whether there is not such a defect in the first and third counts as might be fatal on error (were they the only counts in the declaration, or the other counts unsustained by proof), in this, that they show so long a time to have intervened between the judgment and the first execution issued thereon. In this respect, the plaintiffs' allegations certainly do not show due diligence. For the purpose of reaching the indorser, the holder, is re-

quired not only to institute and prosecute his suit to judgment at the earliest practicable time, but also to enforce that judgment by execution, as soon as by ordinary diligence he can. It is true that he will be excused from suing out any execution at all, when such process would prove wholly unavailing, precisely as for the same reason he would be excused from commencing suit. But in such case, where the pecuniary responsibility of the maker of the note when it matures, renders suit against him necessary for the purpose of preserving the guaranty of the indorser, but his subsequent insolvency, when judgment is rendered, would render every attempt to collect the money of him wholly unavailing, that fact should be alleged in the declaration to excuse from the issuing of execution, just as it should be to excuse from suing, if it had existed when the note became due. If in any such case it appear from the declaration, that the time intervening between the judgment and the execution be so great as to show clearly that the delay in the emanation of such process is the result of the plaintiffs' negligence, and the declaration contains no matter of excuse for such neglect, the declaration must the held bad on demurrer.(*a*) Such is perhaps the character of the case under consideration. But be this as it may, there is not and cannot be, any valid objection to the second count, and that, too, is fully sustained by proof if the unavailability of suit against Law (the maker of the note), in Peoria county is sufficient to charge the indorser. It is fully proved that the said Law had no property whatever in that county, either when the note became due, or at any subsequent time. Consequently the plaintiffs were excused, so far as that county was concerned, not only from suing out execution on their judgment before they did so, but also from commencing their suit. But it remains to be determined whether the institution and prosecution of a suit against the maker in that county, or the fact that such proceedings would have been wholly unavailing there, would operate under the circumstances of the case to fix liability upon the indorser, or whether he is discharged by the neglect of the plaintiffs, either to institute and prosecute suit

(*a*) Hamiln *v.* Reynolds, 22 Ill. R. 211; Rives *v.* Kumler, 27 Ill. R. 292; Sherman *v.* Smith, 20 Ill. R. 352.

in, or send execution to some other county or counties. The defendant proves that Law had property in other counties out of which the money might probably have been made, and insists that the plaintiffs should have sought to reach such property by execution before proceeding against him.

This proposition involves an inquiry, for the solution of which we can gather but little aid from former adjudications.

The law fixes liability upon the indorser, when suit has been instituted and prosecuted against the maker and yielded no return, or when such proceedings being had, would yield nothing; and numerous decisions hold the return of *nulla bona* on execution against the maker, evidence of his insolvency; but the law is silent as to the place at which suit should be commenced, or the maker's insolvency exist for such purpose; and judicial construction has not yet settled that matter with any degree of accuracy. In the case of Saunders *v.* O'Briant, 2 Scam. 369, this Court say that "due deligence does not consist in merely instituting suit against the maker and prosecuting it to judgment. In order to show this diligence, it is clearly the duty of the assignee to prove *that within the county where the suit was commenced*, he had used all the means that the law had furnished him with, to collect the money." But whether the county where the maker in that case was sued, was also the county of his residence, does not appear. We feel called upon to define somewhat more specifically, the correlative rights and liabilities growing out of the relation of indorser and indorsee under our statute. In doing so, our endeavor shall be, to hold these parties to a strict performance of their respective undertakings;—diligence on the part of the indorsee, such as would characterize the course of every reasonable man seeking to protect his own interest, where no ulterior recourse upon any one else than the maker of the note remained to him, contingent upon his failure to collect the money from that quarter; on the part of the indorser, liability to pay the debt guarantied by him, and which his assignee's diligence could not secure from the maker. Nothing short

of this would, in our estimation, preserve the integrity of the contract.

But there must be some local bounds within which the diligence of the indorsee is to be exercised, or the maker's insolvency to exist. Where are those bounds? Are they co-extensive with the State, or circumscribed by the limits of some particular county? Not the former certainly, otherwise, before resort could be had to the indorser, suit would necessarily have to be commenced in, or execution sent to, every county in the State. No such burthen rests upon the indorsee; but diligence or excuse for the want of it in some one county will ordinarily suffice. What county should that be? We feel no hesitancy in replying, the county of the maker's residence, if it be known to the endorsee. It is there, more than any where else, that he is presumed to own property, and if diligence by suit is used against him, or would prove anavailing there, liability is thereby fixed upon the indorser, without any necessity on the part of the indorsee to seek elsewhere, with an execution for his property; although if the maker has property elsewhere out of which the money could be made, and that fact be known to the indorsee, it would be otherwise. In such case, good faith on the part of the assignee would require an effort on his part to make such property available for the payment of his debt, before instituting suit against his assignor.

If, however, the residence of the maker be wholly unknown to the indorsee, he may elect to consider as the place of the maker's residence, the county where the note was executed, if he be found there for the purposes of the service of process upon him, returnable to the first term of Court held in said county, after the maturity of the note; or perhaps to a subsequent term, if in the meantime diligent but unsuccessful effort has been made to ascertain his place of residence. In such case the same results, as it regards their effect upon the rights of the one party, and the liability of the other, would follow as if the proceedings by suit had been had against the maker, or his insolvency established in the county of his residence.

It may be proper here to remark, that in any case, the law requires diligence not only in instituting, but also in prosecuting suit. It is, therefore, not sufficient that suit be commenced in the first term of the proper Court, but judgment must also be rendered at that term, or if not, such result must not grow out of the plaintiff's negligence. He must do everything in his power to entitle him to judgment, as by filing his declaration and copy of the note sued on, &c., or he will be held guilty of *laches*. And so in order to charge the indorser on the ground of the maker's insolvency, it should appear, not simply that his liabilities exceed his means of paying, in which case he would be virtually insolvent, if payment of all his debts should be pressed; but in the language of the statute, that the institution of suit against him, would be wholly unavailing.(*a*)

Testing the case under consideration by the principles above stated, the plaintiffs were clearly entitled to recover. It was proved upon the trial, that Law, the maker of the note, lived in Adams county in 1842, and for a year or two before the trial, which was in October, A. D. 1845, in Knox county; but whether he lived in Adams county, or where he lived on the 25th December, 1842, when the note matured, or afterwards, either when suit was commenced, or judgment rendered, does not appear; nor is there anything to show that the plaintiffs knew. But the note was executed in Peoria county, and on the 4th of January, A. D. 1843, ten days after it become due, suit was commenced upon it, to the next term of the Circuit Court, holden in that county, and sent to Adams county for service, for the reasons, as E. N. Powell, the plaintiffs' attorney swears, that he and his partner, Mr. Bryan, had understood that the said Law lived in said county of Adams; but said summons was returned by the sheriff of said county of Adams not served, thus justifying the impression that said Law did not live there, and afterwards, on the 21st of March, 1843, a second writ in the same suit, and returnable to the same term of Court, was issued, and put into the hands of the sheriff of the aforesaid county of Peoria, and by him served upon said Law. Judg-

(*a*) Bank &c. *v.* Tyler, 4 Pet. U. S. R. 366; Camden *v.* Doremus, 3 How. U. S. R. 515.

ment in said suit was rendered at said term of Court, and executions sued out thereon (as has already been intimated), strictly as alleged in the third count of the declaration in this case, and it is shown by the testimony of the aforesaid Powell, that the reason why execution was not sued out immediately upon the rendition of the judgment, was, that no property could on diligent search be found, belonging to said Law, in said county of Peoria, and that it was desirable to send execution when issued, to the county where said Law lived, but that it was not known to said witness, nor his partner, Mr. Bryan, where he did live, and further, that when they learned that said Law resided in Knox county, they caused the third execution to be sent there. On that execution, as has been stated, nothing was made, and the sheriff's return of *nulla bona* on it, established the said Law's insolvency in that county, as by similar proceedings it had been established in Peoria county. Nor can we, in the absence of all proof showing that the plaintiffs were apprised of the said Law's residence in the aforesaid county of Knox before the date of the *pluries fi. fa.* sent thither, hold them guilty of *laches* in not having it issued to that county at an earlier day, notwithstanding it appears from the evidence, that such proceedings might probably have resulted in making the whole, or a part of the money out of said Law's property. From this view of the subject it results, that the Circuit Court did not err in overruling the defendant's motion for a new trial, for the alleged reason, that the verdict was against the law and the evidence.

It is equally conclusive that the opinion of the Court rejecting the testimony offered by the defendant, and objected to by plaintiff, was right; and that in the instructions given to the jury there was no such error, as to entitle the defendant to a new trial in the Court below, or a reversal of judgment here.

The testimony referred to as offered by the defendant and on plaintiff's motion rejected by the Court, was, "that in 1843, said Law exhibited to the witness (Joshua J. Moore,) title deeds to many tracts of land in the Military Tract; that Law was not a man who dealt in lands to which he had not a good

title; that he inherited from his father large quantities of land in the Military Tract; that two years ago (before October, 1845), Mr. Pommey purchased two quarter sections of Law, and Law gave him good titles therefor; and that Law had the reputation of having much property." Now, saying nothing of the mode of proof sought to be made here of the said Law's title to real estate, the testimony was properly rejected because such property was, if it existed and was owned by said Law at all, out of Peoria county, and the plaintiffs are not shown to have known any thing about it.

The instructions complained of, as given to the jury at the plaintiff's request, are as follows, to-wit:

"1. That it was not necessary for plaintiffs to issue an execution against Law into any county but Peoria, upon plaintiffs' judgment, but it was sufficient diligence to charge the indorser, if plaintiffs made diligent search and could find no property to levy on in Peoria county."

"2. That if the jury believe from the evidence that Law had property, yet if the plaintiffs did not know it, the defendant would be liable as indorser."

"3. That it was not necessary for the plaintiffs to search for property of Law out of the county of Peoria."

Each of these instructions would have been, by a slight modification, more strictly conformable to the principles hereinbefore laid down. The first should perhaps have been so framed as to exclude any conclusion that the plaintiffs need not have issued their execution to the county in which Law resided, if it had appeared from the evidence that he did not reside in Peoria county, and plaintiffs knew where he did reside; or to such county, if any, as Law had property in, if known to the plaintiffs. The question as to the existence of facts rendering the issuing of an execution to some other county than Peoria necessary, (on the assumption of the non-existence of which this instruction seems to have been based,) would thus have been submitted to the jury; but as from the evidence they would have been not only authorized, but required to find that such facts did not exist. The Court, in assuming that they did

not, and instructing the jury accordingly, cannot be said to have erred to the prejudice of the defendant so as to vitiate the judgment.

The second instruction, if intended to apply to the county of Peoria, was clearly wrong, as that being the county for the institution and prosecution of a suit, nothing would excuse the want of diligence in that respect there, except the said Law's entire destitution of property subject to execution. The fact of his having property in that county, would consequently interpose a fatal obstacle in the way of plaintiff's recovery, if they had relied not upon their efforts to subject such property to the payment of their debt by legal coercion, but upon their ignorance of its existence. The whole case, however, forbids the idea that this instruction was so intended by the Court or understood by the jury, as the said Law had no property in Peoria county, but had elsewhere. The instruction therefore applied to Law's property in other counties, and so far as it was concerned, the plaintiffs had their recourse upon the defendant, without seeking it if they did not know of it, as it is proved they did not.

The third instruction, like the first, was based upon an assumption warranted by the facts, but which, strictly speaking, might probably have been left to the finding of the jury, to-wit: that Peoria county was the place of the said Law's residence, or else that the plaintiffs did not know where he resided.

If in this or either of the other instructions there is any error it is such that the defendant cannot in any wise be prejudiced thereby, and consequently it will not affect the validity of the judgment against him.

The only question remaining to be disposed of is that involved in the second error assigned by the defendant, to-wit: that the Court erred in permitting the note to be read in evidence to the jury.

The objection made to the introduction of this evidence, upon the trial in the Circuit Court, was based upon the ground, that the execution of the note by Law (the maker), was not proved, and the defendant by his counsel now insists

that such preliminary proof was necessary to the admissibility of the evidence.

In this view of the subject, we do not concur. We cannot perceive that because the maker of the note stands to the other parties like the acceptor of a bill of exchange to drawer or indorser, and in a suit by the holder of a bill against the acceptor, the handwriting of the indorser must be proved, it therefore follows, as he assumes, that in an action by the holder against indorser, the handwriting of the maker, or acceptor should be proved. Such a conclusion is a *non sequitur* from the premises. Between the two cases there is no analogy. But as the maker of an indorsed note does stand like the acceptor of a bill, so in a suit against the maker by the indorsee, proof of the handwriting of the indorser would be necessary in this State, as it would under the *lex mercatoria* in a suit by indorsee against acceptor, were it not that such proof is expressly dispensed with by statutory provision except it be required by plea verified by affidavit. Rev. Stat. Ch. 83, § 59.

But there is no rule of law, and never has been, requiring the indorsee of a note in a suit against the indorser of it to prove the execution of it by the maker. The indorser having negotiated and put it into circulation, exhibits a degree of assurance without a parallel, when he demands proof of its genuineness of the man to whom he has indorsed it. Neither reason nor law sanctions such a proceeding.(*a*)

The judgment of the Circuit Court is affirmed with cost.*

Judgment affirmed.

(*a*) Bestor *v.* Phelps, 17 Ill. R. 592.

* This case was argued and decided at the December term, 1846, but the Opinion was not filed until the present term.

THE COUNTY OF SCHUYLER, plaintiff in error, *v.* THE COUNTY OF MERCER, defendant in error.

Error to Mercer.

All actions, whether local or transitory, against a county, must be commenced and prosecuted to final judgment and execution in the Circuit Court of the county against which the action is brought; and all actions, local or transitory, whereon a county is plaintiff, must be commenced and prosecuted to final judgment in the county in which the defendant therein resides.

At Common Law, counties have no right to sue, nor can they be sued. Their right depends on statutory enactment, and where they sue, or are sued, the provisions of the statute must be complied with. (*a*)

The word "may" means "must" or "shall," in cases where the public interest and rights are concerned, and where the public or third person have a claim, *de jure*, that the power should be exercised.

A law, which, in general terms, speaks of plaintiffs and defendants, applies to persons only, and States, counties, and municipal corporations are not affected by its provision s unless expressly named and brought within them.

DEBT, in the Mercer Circuit Court, brought by the defendant in error against the plaintiff in error. The defendant was defaulted at the May term, 1845, and a writ of inquiry of damages awarded. At the September term, 1845, the Hon. Thomas C. Browne presiding, the jury returned a verdict in favor of the plaintiff for the sum of $112.89, and the Court rendered a judgment accordingly.

R. S. BLACKWELL, for the plaintiff in error.

The Court below had no jurisdiction.

1. Because there is no averment in the declaration, that the cause of action accrued, or was specifically made payable in the county of Mercer, where the plaintiff resided, and where this suit was instituted. Rev. Stat. 413, § 2; Clark *v.* Harkness, 1 Scam. 56; Key *v.* Collins, *ib.* 403; Wakefield *v.* Goudy, 3 do. 133; Brown *v.* Bodwell, 4 do. 302; Clark *v.* Clark, 1 Gilm. 33.

2. Because by statute it is provided that "all actions, local or transitory, against any county, *may* be commenced, &c.

(*a*) Suits in U. S. Courts *v.* Counties—Cowles *v.* Mercer Co., 7 Wal. U. S. R. 118.

in the Circuit Court of the county against which the action is brought," &c. Laws of 1827, 109, § 6; R. L. 140, § 6; Rev. Stat. 132, § 18.

This statute, we insist, is *compulsory* and not permissive. All actions against counties *must* be commenced, &c., in the Circuit Court of the county against which the action is brought. In statutes of a public nature and relating to public rights and duties, the word *may* means *shall*. Cro. Jac. 134; Cro. Eliz. 655; King *v.* Barlow, 2 Salk. 609; Malcom *v.* Rogers, 5 Cowen, 188; Miner *v.* Mec. Bank, &c., 1 Peters, 46.

3. The declaration is insufficient. Salem *v.* Andover, 3 Mass., 436; Bath *v.* Freeport, 5 do. 326–7; Laws of 1841, 190–1.

4. The verdict and judgment are erroneous for not distinguishing between the debt and damages. Williams *v.* Bank of Illinois, 1 Gilm. 671; Mager *v.* Hutchinson, 2 do. 270.

5. The Court had no power to award an execution against the County of Schuyler, the only way of enforcing a judgment against a county being by *mandamus*, or attachment. Rev. Stat. 133, § 20.

A. Williams, for the defendant in error.

It is insisted by the counsel for the plaintiff, that the Court below had no jurisdiction of the parties, because it is not averred that the cause of action accrued in the county of the plaintiff below. It is stated that the pauper became chargeable as such in the county of Mercer, to that county; that the County Commissioners of Mercer county notified the County Commissioners of the county of Schuyler, of that fact, and requested them to remove said pauper; that they neglected to do so; that thirty days next preceding said pauper so becoming chargeable to the county of Mercer, she was a resident of the county of Schuyler. From this it appears conclusively, that the cause of action did accrue in the county of Mercer, but it is insisted that the formal averment should have been made that the cause of action accrued

in the county of Mercer, and that the county of Mercer resided in the county of Mercer. This is required by no principle of reason, or rule of positive or technical law.

But it is said that the county of Schuyler could only be sued in that county, and this is founded upon the notion that the provision that counties *may* be sued in the Circuit Court of the county sued, means, *ex vi termini* "*shall* be sued there, and not elsewhere." The word "may" when used in statutes should be construed as permissive, or imperative, according to the intention of the legislature, in each case where it is so used. In its grammatical construction, it is permissive, and not imperative, and there is nothing to show that in this case it was intended to be imperative. It is not the provision by which counties are subjected to suit. Counties are subjected to suit by other provisions in as general and extensive terms as individuals, Courts being established and clothed with jurisdiction to try cases between counties as well as individuals.

The Practice Act is enacted for the guidance of the Court in the exercise of its jurisdiction. It is provided in this Act, in terms that include counties as well as individuals, that when the cause of action accrues in the county of the plaintiff, suit may be commenced in that county. There is nothing in the words, or spirit of this provision to exclude from its operation cases in which counties are parties.

The Opinion of the Court was delivered by

PURPLE, J.* On the 21st day of October, A. D. 1843, the defendant sued the plaintiff in an action of *debt* in the Circuit Court of Mercer county to recover a sum of money, which, as the declaration alleges, the defendant had expended in maintaining a pauper, who at the commencement of thirty days immediately preceding the time she became chargeable as a pauper to the county of Mercer, was a resident of the county of Schuyler; which last mentioned county thereby became liable, upon notice having been given to remove said pauper, for such maintenance.

*WILSON, C. J., and Justices KOERNER and DENNING did not sit in this case

No appearance was entered by the plaintiff; a judgment by default was rendered; a writ of inquiry of damages awarded, which was executed in vacation; returned, and judgment entered against the county of Schuyler upon the verdict of the jury of inquest for $112.89 and costs.

The plaintiff seeks to reverse this judgment.

Only one point made in the case (being decisive of the question), will be noticed.

The Circuit Court of Mercer county (the process having been issued to, and served in the county of Schuyler), had no jurisdiction of the case. This will be manifest from an examination of the Act of the General Assembly, entitled, "*An Act to incorporate counties*," approved January 3d, 1827. Rev. Laws, 1833, 139.

The first section makes all counties then existing, or thereafter to be established, bodies corporate or politic, and authorizes them to sue, and renders them liable to be sued in their respective county names.

The sixth section provides, that "all actions, local or transitory against any county, *may* be commenced and prosecuted to final judgment and execution in the Circuit Court of the county against which the action is brought. Any action local or transitory in which any county shall be plaintiff *may* be commenced and prosecuted to final judgment in the county in which the defendant in such action resides."

Independent of some special statute, counties have no common law right to sue, nor are they liable to be sued. This statute confers this right, and imposes such liability. The same Act prescribes the method of the service of process, and establishes the forum of trial, both in cases where the county is plaintiff and defendant.

It is evident that unless some other statute has prescribed a different rule, counties can only bring their suits in the Courts, and in the manner allowed by this Act. The word "*may*," as used in the sixth section, means *shall*. When a county sues, the term applies in an imperative, and not in a permissive sense. Such was the manifest intention of the Legislature.

The rule is, that "the word *may* means *must* or *shall* only, in cases where the public interest and rights are concerned, and when the public, or third persons have a claim, *de jure*, that the power should be exercised." Malcom v. Rogers, 5 Cowen, 188.(*a*) Thus, where a statute says that a sheriff *may* take bail, it has been construed to mean that he *shall* do so. And where it is provided that a plaintiff *may* assign breaches in his declaration, he *must* so assign them or fail in his action; because of the right *de jure*, of the defendant, that they should be so assigned. Such is understood to be the rule, and the illustrations given are deemed sufficient to show its practical operation.

The Act of Dec. 30th, 1828, entitled, "*An Act to amend an Act concerning Courts of law*," approved January 29th, 1827 (Rev. Laws, 1833, 145), authorizing process in certain cases to issue against defendants residing in foreign counties, and which Act, by the Revised Statutes of 1845, is incorporated into the general Practice Act, and has not, at least so far as this case is concerned, any bearing upon the question. Ordinarily a law, which, in general terms, speaks of plaintiffs and defendants, applies to persons only; and States, counties and municipal corporations are not affected by its provisions, unless expressly named and brought within them.

The judgment of the Circuit Court of Mercer county is reversed.

Judgment reversed.

(*a*) Burns v. Henderson, 20 Ill. R. 265; Wheeler v. Chicago, 24 Ill. R. 107; Board &c. v. Young, 31 Ill. R. 197; County &c. v. Steele 31 Ill. R. 544; C. & A. R. R. Co. v. Howard, 38 Ill R. 417; Supervisor &c. v. U. S. 4 Wal. U. S. R. 435; Sedg. Con. Law 438.

TIMOTHY LADD, appellant, *v.* DAMON GRISWOLD *et al.*, appellees.

Agreed Case from Scott.

The general rule, in relation to the administration of the assets of deceased and insolvent partners, is well established. If there is partnership property, and separate property of a partner, the partnership debts are to be paid out of the proceeds of the joint estate; and the individual debts are to be paid out of the proceeds of the separate estate. The joint creditors have no claim on the fund arising from the separate estate, until the individual debts are satisfied; and on the other hand, the separate creditors can only seek payment out of the surplus of the partnership effects, after the satisfaction of the joint liabilities.

Where one partner sells his entire interest in the business to his co-partner, the purchaser takes the property, discharged from the lien of his co-partner, to have the partnership debts paid therefrom; and the creditors' equity being subordinate to the lien of the partner, the property is wholly freed from the claims of the joint creditor.

It is a doctrine of Equity, that a creditor, who has two funds to which he may resort for payment, shall be required to exhaust the one in which he has an exclusive interest, before he goes upon the fund to which another creditor can only resort. (*a*)

In bankruptcy, where there is no joint estate, and there is no solvent partner, joint creditors are permitted to prove against the bankrupt's estate *pari passu* with the separate creditor, and this principle applies equally in the case of a deceased or insolvent partner. The joint creditors may participate equally with private creditors, in the estate of the deceased partner.

It is now the settled principle in Equity, that all partnership contracts are to be considered as joint and several; and on this principle, the joint creditors may proceed at Law against the survivor, and in Equity against the estate of the deceased partner.

AGREED CASE from Scott. The controversy originated in the Probate Court of Scott county, in regard to the allowance of a claim against an estate. The claim being allowed by the Probate Court, and a special order being entered, directing that joint and separate debts be paid *pro rata*, an appeal was taken to the Circuit Court of that county. The decision of the Probate Court was there affirmed, and a further appeal was taken to this Court.

The principal facts are stated in the Opinion of the Court.

(*a*) Iglehardt *v.* Crane, 42 Ill. R. 261.

D. A. SMITH, for the appellant, filed the following argument:

In this case I only deem it necessary, and propose to bespeak the Court's attentive consideration of the facts agreed, and the following authorities to be found in the Supreme Court Library. In my examination of them; it has been my purpose to quote all that may have a bearing in favor of either view of the case, so that it may be fully illustrated. McCulloh *v.* Dashiell's Admr., 1 Harris & Gill, 96; Wilder *v.* Keeler, 3 Paige 167; Egberts *v.* Wood, *ib.* 518; Payne *v.* Matthews, 6 do. 19; Allen *v.* Wells, 22 Pick. 454, 455; Toller on Executors, 455, note 1; 2 Kent's Com. 415, 420, and notes; 3 do. 63 to 66, and notes; See Chap. 85, and Acts 21, 22, Appendix to the Revised Statutes. I am persuaded that the statutory provisions referred to, will settle any doubts as to the jurisdiction of the Probate Justice in making such order as we insist should have been made.

In cases involving the deaths, and insolvency of the estate of partners, the whole current of authorities, excepting the Pennsylvania cases, strictly and inflexibly inhibits individual creditors from laying their hands upon partnership effects (the agreed case assumes that there are "partnership effects, and debts to a large amount unadjusted"), until after the full payment of partnership debts. This is on the principle that partnership effects are a trust fund for the payment of partnership debts. If this is an unyielding principle in favor of partnership creditors, I submit that if they can so exclusively appropriate partnership effects, and come in for an additional *pro rata* with individual creditors, out of individual effects, then the principle of reciprocity and trust as laid down in Kent's Commentaries are overthrown, and the maxim that equality in equity is violated by allowing to partnership creditors more than their fair and equal proportions of the effects of insolvent estates.

R. Swallow's estate is insolvent, the doubts and queries of appellee's counsel to the contrary notwithstanding, and no suit can be maintained against it by creditors except at their costs, and "persons entitled shall receive their proportions of said estate" which, according to my construction, are to

be ascertained with reference to the laws of the land as applicable to rights of parties respectively. The Court of Probate is a Court of record, having jurisdiction to render judgment and decrees touching the settlement of estates. 'Tis matter of obvious convenience to allow to that Court the most comprehensive jurisdiction in the summary and equitable settlement of estates, on the broadest principles of equity, rather than put parties to the delay and expense of suits in Chancery in the Circuit Courts for the settlement of estates.

The suggestion, that the provision of our statute classifying demands, and putting all demands of the fourth class on the same footing, &c., varies or destroys the principles upon which I rely in this case, cannot be entitled to very grave consideration, when it is apparent to the Court, from the examination of authorities referred to (2 Kent's Com. 415 to 420, and notes), that principles exactly analogous to that in our statutes have obtained in Maryland, New York, &c., and especially in the Roman Civil Law, where debts are all put upon equal footing; and yet the equitable principles for which I am contending, have been distinctly, and for ages recognized.

W. Brown and R. Yates, for the appellees, filed the following argument:

The appellees having on hand, cash for disbursement in payment of demands of the fourth class, the Probate Court ordered them to pay the same, at the rate of twenty-five cents to the dollar, on the whole of said demands of the fourth class, and that in said disbursement, they should put demands on individual and partnership account, on equal and identical footing. To reverse this order, appellant, a separate creditor, prosecutes this appeal.

It is contended, that the Probate Court should have turned partnership creditors upon the partnership property, and that it should not have permitted them to come upon the separate estate, until after the full payment of the separate debts. If

such would be the rule in Equity (independent of our Statute of Wills), in a proper case, it is respectfully contended, notwithstanding the confidence of the counsel for the appellant, that it has no application to the facts agreed upon. There can be no marshalling of assets in this cause, because there is but one fund, and that a separate one. You cannot marshall a single fund. Story on Partn. § 363.

By the terms of the dissolution, the whole of the property of C. & R. Swallow became the individual property of C. Swallow, wholly free from the claims of the joint creditors.

Justice Story, in his work on Partnership, says: "It may be added, that upon the dissolution, it is competent for the partners, in cases of a voluntary dissolution, to agree, that the joint property of the partnership shall belong to one of them, and if this agreement be *bona fide*, and for a valuable consideration, it will transfer the whole property to such partner, wholly free from the claims of the joint creditors." § 358.

"While partnership is going on, creditors have no equity, strictly speaking, against the effects of the partnership. Neither have they any lien on the partnership effects for their debts." §§ 358, 97, note 1; 326, note 1. Hence, they may sell aud transfer the same to one of the partners, or a third person, free from the claims of creditors of the firm.

"And this is equally true, although the whole or a part of the consideration of the transfer is, that the partner taking the property, shall pay the whole or a particular part of the debts of the partnership; for that will not aid the creditors. The reason is, that, in such a case the retiring partner, who so transfers his share, has no lien on the property, for the discharge of those debts; for, by his voluntary transfer thereof, he has parted with it, and trusted to the personal security, and personal contract of the other partner. Even, if he had, the lien would not pass to those creditors by operation of law, so as to become available in their favor." See section 359, and numerous authorities in note 3.

Subject, however, to these exceptions, it may be generally stated, that when the partners themselves have a lien upon

the partnership effects for the discharge of all the debts and obligations thereof (as they have in all cases where they have not parted with it), that lien may, in many cases, be made available for the benefit of the creditors. But then the equities of the creditors are to be worked out through the medium of that of the partners. They have, indeed, no lien, but (as has been said) they have something approaching to a lien, of which, with the assent of partners entitled to the lien, they may avail themselves in a Court of Equity against the partnership." § 360.

Applying these principles to the facts agreed upon, and it will appear that the effects of C. & R. Swallow, by the act of the partners, had been converted into the individual and separate estate of Chester; that the partners had parted with their lien upon the partnership effects for the discharge of debts due from the firm, and consequently they have no equities through the medium of which joint creditors can work out their equities.

Again, the same author adds: "Still another inquiry may remain in cases where the estate of the deceased partner is not sufficient to pay all his separate debts and all the joint debts, and that is whether the debtors are to be paid *pari passu* out of the assets of the deceased, or either is entitled to a preference. Rule is as in bankruptcy, &c." "But when there is no joint estate, the case may seem to be involved in more nicety and difficulty; since, under such circumstances, the creditors would seem, as their contract is several as well as joint, to be entitled upon general principles to claim *pari passu*, with the separate creditors." §§ 363, 380. Of the like import is the case of McCulloh *v.* Dashiell, 1 Harris & Gill, 105. The agreed case shows that the partnership effects, upon dissolution, became the property of Chester Swallow; consequently there was no joint estate, and the Court of Probate adjudged correctly in ordering the joint and separate debts to be paid *pari passu*.

Again, the author says: "Be this doctrine as it may, it seems certain that the joint creditors cannot be compelled, in case of the death of one partner, and the bankruptcy of the survi-

vors, to resort to the estate of the deceased partner for payment, for the benefit of the fund in bankruptcy in aid of creditors, who are creditors of the survivors and not of the old partnership." § 364.

In the case at bar, in opposition to what the author says is certain, the creditors of the surviving partner, and not of the old partnership, are asking the reversal of the case, for the express purpose of compelling the joint creditors to resort to the estate (if any there should be), of the deceased partner for payment, in aid of said creditors of said survivors.

Chester Swallow having covenanted to pay the partnership debts, the joint creditors were entitled to the benefit of said covenant, and rightfully were paid *pari passu* with other creditors upon the settlement of his estate. Paine *v.* Matthews, 6 Paige, 21.

The appellant having elected to take a *pro rata* out of the estate of Chester Swallow enlarged by all the effects of C. & R. Swallow, it would be inequitable to permit him to turn the joint creditors off from the estate of R. until he should have paid the full amount of his debt. He that seeks equity must do equity. Story on Part. § 384.

Upon the death of Chester Swallow, July 1, 1843, the right of action in favor of the partnership creditors was against Ransom alone. "And it is now held that a partnership contract, upon the death of a partner, is in equity to be considered joint and several, and to be treated as the several debt of each partner." 3 Kent's Com. 64.

Such being the rights of the partnership creditors as against Ransom on the 1st of July, 1843, can it be that the demands of the appellant, which had no existence until July, 1844, and March, 1845, can so marshall a single fund as to overreach the rights of said partnership debtors? There being no partnership effects, the natural and legal remedy of the joint creditors was against said Ransom. They might have sued him and made their debt out of his separate estate even before said causes of action originated; and because they indulged said R. until his death, it is contended that they must be postponed until the demands of the appellants are paid. So to postpone

them would be inequitable, and so to do would conflict with the opinion of Chief Justice Marshall, in the case of Tucker *v.* Oxley, 2 Peters' Cond. R. 183, where he holds the following language: "It is a debt, which, by suit against both the partners, might have been recovered against either of them, and either might have been compelled to pay the whole. Although due from the company, yet it is also due from each member of the company; and the claim of the creditors for its satisfaction extended, previous to the act of bankruptcy, to the whole property of each member of the firm, as well as to the joint property of the firm. It would certainly be impairing that claim to apply, by operation of law, the whole particular fund to other creditors, who at the time of the bankruptcy had not a better legal claim on that fund than the Tuckers, without allowing them to participate in it. The Court, therefore, would be much inclined to consider the creditors of a partnership as having a right, under the general description of creditors of the bankrupt, to prove their debts before the commissioner." We would respectfully ask, if the description of the creditors embraced in the fourth class of claims against insolvent estates under our statute, and who are to be paid *pari passu*, is not equally broad, and would not equally with the Bankrupt Act include partnership creditors. The words are, "all other debts and demands of whatsoever kind, without regard to quality or dignity shall constitute the fourth class;" "and when the estate is insufficient to pay the whole of the demands, such demands in any one class shall be paid *pro rata*, whether the same be due by judgment, writing obligatory or otherwise." Statute of Wills, §§ 115, 120. We would beg to know if a partnership debt is no demand, nay, if it is not a legal demand against the estate of a surviving partner. If so, the statute is imperative, and says that it shall be paid *pari passu* with all other debts and demands of the fourth class; and the Probate Court did not err in ordering it so to be done. The remarks made in 6 Paige, 21, in reference to the New York Statute of Wills, are applicable to ours. "The principle adopted by the Revised Statute is, that equality among creditors is equity, in relation to the distri-

bution of the estate of an insolvent decedent, except in cases where creditors had proceeded to judgment against decedent before his death. And the statute is express, that no preference shall be given in the payment of one debt over another debt of this class," to-wit, the fourth.

Chief Justice Marshall, in the above cause, at page 185, remarks:

"Again. It is undoubtedly unjust that the Tuckers, having a claim on H. & T. Moore, and being able to obtain payment from H. Moore, should satisfy that claim entirely out of the separate estate of T. Moore, to the exclusion of other creditors who had no resort to Henry; and it is probable that a Court of Chancery might restrain this use of his legal rights within equitable limits. But suppose H. Moore also to be a bankrupt, or to be insolvent and unable to pay the debt, would it not be equally unjust to apply the estate of each individual to the discharge of the several debts, to the entire exclusion of creditors, who previous to the bankruptcy, had a legal and equitable right to satisfaction out of the separate property of each." In the case at bar the joint debtors had such legal and equitable right against Ransom, and it would be inequitable (there being no partnership effects), to appropriate the estate of Ransom to the payment of separate debts to their exclusion.

When the dissolution of the firm of C. & R. Swallow took place, and by the terms thereof, the partnership effects became the separate property of Chester, and he, Chester, did take them as such separate property, the joint creditors from that time had no fund to look to, but the separate estate of the partners respectively; and it strikes me to be against law, reason and justice, that they should be able, as they clearly are, according to the authorities extracted above (Story on Partn. §§ 358, 359, and authorities in note 3, 360), to convert the partnership effects into separate property; and that, then, the separate creditors, whose debts thereafter accrue, can come in and sweep the separate estates to the exclusion of the partnership creditors, and yet, this must be done, if the appellant succeeds in his efforts to reverse the

judgment of the Probate Court. This is a stronger case to let in joint creditors upon separate estate, than that stated in Wilder *v.* Keeler, 3 Paige, 173.

Independent of the foregoing principles, under the peculiar circumstances of this case, the partnership effects having become separate property, and having in the life time of C. S. been appropriated indiscriminately to joint and several debts, and since his death having been divided *pro rata* amongst joint and separate creditors (the appellant with a full knowledge of all the facts, taking on such *pro rata* distribution a large proportion thereof), it is right, that the principle of our statute, that among creditors of the fourth class "equality is equity," by which the Probate Justice was guided in making the order appealed from, should prevail in the settlement of Ransom's estate, and that the order of the Probate Court should be affirmed.

We understand that our Statute of Wills, above referred to, prescribes a different rule for the distribution of an insolvent estate, when there are joint and separate creditors, from that contended for by the appellant, as the Equity rule. At any rate the Probate Court must be governed by the statute, and if the facts in this case so overrule the rule of decision prescribed by the statute, as to create equities in favor of the appellant, which would warrant the marshalling of assets (the authorities above extracted to the contrary notwithstanding), then he must seek relief by bill in Chancery. Such was the opinion of Chief Justice Marshall in Tucker *v.* Oxley, 5 Cranch, 35; S. C. 2 Peter's Cond. R. 183. Such was the opinion of the Court in the case of McCulloh *v.* Dashiell, 1 Harris & Gill, 95, where it is said: "At law the joint creditors may pursue both the joint and separate estate, unless restrained by a Court of Equity." The same doctrine is asserted by Justice Story in his Commentaries on Equity, Vol. 1, 625. He there says: "The separate creditors of each partner are entitled to be paid out of the separate effects of their debtor, before the partnership creditors can claim anything; which can only be accomplished by the aid of a Court

of Equity, for at law a joint creditor may proceed directly against the separate estate."

The authority cited from 6 Paige, 19, to show that the Surrogate (and by analogy, our Probate Court), has power to adjust equitable claims, according to the rules of marshalling assets, does not sustain the position. That case simply decides that the Surrogate upon settlement would have power to *liquidate* and ascertain the amount of an unsettled, equitable claim, and that when so ascertained, it should be paid *pro rata* along with other creditors. This may be true, yet it does not shake the above position, that to marshall assets betwixt joint and separate creditors, application must be made to a Court of Equity.

Aside, however, from the question of jurisdiction in the Probate Court, we respectfully contend that according to the authorities cited, the facts in this case take it out of the operation of the general Equity rule, by which the appellant seeks to have it decided, and the judgment below reversed.

To fortify the positions assumed still further, we cite Toller's Law of Executors, 455, note 1. "In Pennsylvania, when a surviving partner dies indebted to partnership and separate creditors, and leaving in the hands of his administrator joint property and also separate property, his whole estate, that is to say his whole separate property, and his whole interest in the joint property, is to be divided among all his creditors (joint and separate), of equal degree, equally *pro rata*." Bell's Ex'r, *v.* Newman's Adm'r, 5 Sarg. & Rawle, 78. The case of Allen *v.* Wells, 22 Pick. 454–5, decided in 1839, holds the following language: "The learned American Commentator on Equity Jurisprudence, in noticing some of the late decisions, remarks: 'that if the true doctrine be that avowed by Sir William Grant in the case of Devaynes *v.* Noble, 1 Merivale, 529, and, afterwards affirmed by Lord Brougham, in 2 Russell & Mylne, 494, that a partnership contract is several as well as joint, then there seems no good ground to make any difference between joint and several creditors as to payment out of joint or separate debts.'" 1 Story's Eq. Jur. 626, and notes.

Chancellor Kent agrees with Sir Wm. Grant and Lord Brougham in the opinion, that a partnership contract is several as well as joint. In the 3d volume of his Commentaries, page 64, he holds the following language: "And it is now held, that a partnership contract upon the death of a partner is in equity to be considered joint and several, and to be treated as the several debt of each partner." (*a*) If, then, Grant, Brougham and Kent have, in this particular, avowed the true doctrine, "then, (Story being judge), there seems to be no ground to make any difference whatsoever in any case between joint and several creditors, as to the payment out of joint or separate assets."

We are inclined to think, that for the purpose of sustaining the judgment of the Probate Court, upon the agreed case, it may be supposed, that Grant, Brougham and Kent did speak the law, as above set forth, and that the Probate Court, in saying with Story (such being the law), that there was no ground for making any difference between joint and separate creditors, did not err, and that his judgment should be affirmed.

We are informed, that in the settlement of the estate of the late George Forquer (against whose estate were separate and partnership creditors), it was, after mature deliberation, considerered, that the partnership and separate creditors should be paid *pro rata*, and his estate was so settled accordingly, in the Probate Court.

We will simply add, that one of the most experienced Lawyers of the State, and the only one with whom we have conversed, as to the construction of the 115th and 120th sections of our Statute of Wills, concurs with us in the opinion, that under our statute, the Probate Court must order joint and separate debts to be paid *pro rata*, and that if the creditors should think that their equities require a different mode of paying out the assets, they must seek relief by Bill in Equity.

It would seem, according to the agreed case, that the estate of Ransom Swallow is adequate to the payment of all its debts joint and several, and if so, why reverse the case?

(*a*) Conley *v.* Good, Beecher's Breese R. 135.

The Opinion of the Court was delivered by

TREAT, J. Chester and Ransom Swallow, were merchants and partners in business under the style of C. & R. Swallow. The partnership was dissolved by mutual consent, Chester Swallow taking all the effects of the firm, and agreeing to discharge all of its liabilities. Subsequently, Chester Swallow borrowed of D. Perrin, $1600, and made his promissory note therefor, with Ransom Swallow and Timothy Ladd as sureties. Chester Swallow died insolvent in July, 1843, leaving this note and many of the partnership debts unpaid. Ladd paid on the note, $865 in July, 1844, and the balance of $934 in March, 1845; the aggregate of which sums was allowed by the Probate Court as a claim against the estate of Chester Swallow, and on which allowance, Ladd received a dividend of eighteen cents to the dollar. Ransom Swallow died insolvent in February, 1845, and Ladd exhibited a claim against his estate for $742, for contribution as cosurety on the Perrin note. The Probate Court allowed the claim, but made an order that it be paid *pro rata* with the debts due from the late firm of C. & R. Swallow. From this last order, Ladd appealed to the Circuit Court, and the Court affirming the decision of the Probate Justice, he has removed the case into this Court.

It is conceded, that at Law, the individual debts of Ransom Swallow, and the partnership debts of C. & R. Swallow are placed on the same footing, and are to paid *pari passu* out of the assets; but it is contended, that in Equity, the rule is different, and the individual creditors are entitled to a priority in payment. The general rule by which Courts of Equity are governed in the administration of the assets of deceased and insolvent partners, seems to be well established. If there is partnership property and the separate property of a partner, the partnership debts are to be paid out of the proceeds of the joint estate, and the individual debts are to be paid out of the proceeds of the separate estate. The joint and individual debts are to be kept distinct, and the assets derived from the two estates are to be marshalled

accordingly. The joint creditors have no claim on the fund arising from the separate estate until the individual debts are satisfied; and on the other hand, the separate creditors can only seek payment out of the surplus of the partnership effects after the satisfaction of the joint liabilities. Such is unquestionably the rule in Equity, where there is a joint and a separate estate to be distributed among joint and individual creditors. 1 Story's Eq. Jur. § 675; 3 Kent's Com. 64; Story on Partn. § 363; Wilder *v.* Keeler, 3 Paige, 167; McCulloh *v.* Dashiell, 1 Harris & Gill, 96.(*a*) It may, however, be necessary to look into the foundation and extent of this equitable rule, and see if it is applicable to the present case. In the case of a partnership, there is a community of interest and responsibility. Each partner has a concurrent title to the whole of the partnership property, and he is individually liable for all of the partnership obligations. He has the specific right to have the joint property faithfully applied to the payment of the joint debts; and after the debts are satisfied, he is entitled to a share of the surplus. These rights and liabilities continue in most cases after a dissolution of the partnership. In the case of a dissolution by the death of one of the partners, the surviving partner succeeds to the management and control of the affairs of the partnership; but the personal representatives of the deceased partner are still responsible for the debts, and entitled to participate in the surplus; and they may compel the survivor to make such a disposition of the partnership effects, as will relieve them from responsibility, and enable them to receive their portion of the surplus.(*b*) While the partnership is progressing, the joint creditors have strictly no equity against the partnership effects. They have only a cause of action against the partners, on which they may obtain judgment, and then satisfy the judgment out of the joint property, or out of the private property of the partners. The right in equity of the joint creditors to seek payment out of the partnership effects to the exclusion of the separate creditors of deceased or insolvent partners, results solely from the right of the partners or their repre-

(*a*) Pahlman *v.* Graves, 26 Ill. R. 405; Stevens *v.* Ayres, 38 Ill. R. 418.
(*b*) Miller *v.* Jones, 39 Ill. R. 54.

sentatives, to have the joint estate thus applied. The rule is for the benefit and protection of the partners themselves. The equity of the creditor is of a dependent and subordinate character, and is to be worked out and enforced through the medium of the equities of the partner. 1 Story's Eq. Jur. § 676; Story on Partn. §§ 360, 361. The partners may part with their right to have the joint property applied to the payment of the joint demands; and when they do so, the equity of the creditor is at an end. This is done, where one partner sells out his entire interest in the concern to his co-partner. In such case, the purchasing partner takes the property fully discharged from the lien of his co-partner; and the equity of the creditors being subordinate to the lien of the partners, the property is wholly freed from the claims of the joint creditors. What before was joint property, now becomes the separate property of one of the partners. There is no longer any joint fund for the payment of the debts, to which the joint creditors may resort through the equities of the partners. On the other hand, the right in equity of the separate creditors to seek payment out of the private estate of the partners, in exclusion of the joint creditors, has its foundation on the ground that it would be giving the latter an undue advantage to permit them to absorb the joint estate, and then divide the private estate with the separate creditors. It is a doctrine of Equity, that a creditor who has two funds to which he may resort for payment, shall be required to exhaust the one in which he has an exclusive interest, before he goes upon the fund to which another creditor can only resort.(a)

In the present case, there are no partnership effects. The assets consist wholly of the private estate of Ransom Swallow. By the terms of the dissolution, the whole of the partnership effects was transferred to Chester Swallow, and thereby became his separate property, fully discharged of the lien of Ransom Swallow. The latter voluntarily parted with his lien, and relied altogether on the obligation of his co-partner, to discharge the liabilities of the firm. There

(a) Wise v. Shepherd, 13 Ill. R. 47, and notes.

was consequently no equity of the partners remaining, through the medium of which, the joint creditors could assert any specific claim agninst the property previously belonging to the partnership.

The question now arises, does the equitable rule before stated apply to cases like the present, where there is no joint estate? On this subject Mr. Justice Story says: "Where there is no joint estate, the case may seem to be involved in more nicety and difficulty; since, under such circumstances, the creditors would seem, as their contract is several as well as joint, to be entitled, upon general principles, to claim *pari passu* with the separate creditors.(*a*) However, it cannot be positively affirmed, that such is the settled doctrine in equity, in cases of deceased partners. On the contrary, there seems to be some conflict of opinion upon the point. In bankruptcy, where there is no joint estate, and there is no solvent partner, joint creditors are permitted to prove against the bankrupt's estate *pari passu* with the separate creditors." Story on Partn. § 363. The rule established in the administration of bankrupt estates, may, with equal propriety, be adopted in the case of deceased partners. There is no difference in point of principle between the two cases. If there is no joint fund to which the joint creditors can resort, and no solvent partner from whom payment can be enforced, they should be allowed to participate equally with the private creditors, in the estate of the deceased partner. The partner, while living, is individually liable for the joint demands, and upon his death, that liability extends to his personal representatives, and may be enforced against them. It is now the settled doctrine in Equity that all partnership contracts are to be considered as joint and several; and on this principle the joint creditors may proceed at Law against the survivor, and in Equity, against the estate of the deceased partner. 1 Story's Eq. Jur. § 676; Story on Partn. § 362.(*b*) The joint creditors having the right to charge the estate of the deceased partner, as upon a several contract, and having no joint estate to which he may resort, and no

(*a*) People v. Lott, 36 Ill. R. 448.

(*b*) Nelson v. Hill, 5 How. U. S. R. 127.

recourse upon a solvent partner, it would seem to be highly inequitable to restrict him to the surplus of the private estate remaining after the satisfaction of the separate creditors. The Circuit Court decided correctly. No opinion is expressed on the question, whether the Probate Court may exercise equitable jurisdiction in ordering the distribution of assets. The judgment of the Circuit Court is affirmed with costs.*

Judgment affirmed.

* This case was argued and decided at the December Term, 1846, but the Opinion was not filed until the present term.

DARIUS PRATHER, appellant, *v.* GEORGE VINEYARD, appellee.

Appeal from Fulton.

A demurrer to pleas, which purport to answer the whole declaration, will not be carried back and sustained to the declaration, if it contain some good counts.

An agreement by two persons for the use and benefit of a third, upon which such third person may maintain an action against the party promising, is not such an undertaking to pay the debt of another as will bring it within the Statute of Frauds. (a)

Evidence tending to prove issues made by the pleadings, is proper to go to the jury.

If a written instrument is neither set out in the pleadings by its tenor, nor described by its legal import, but is merely brought forward to sustain an allegation not referring to it expressly in any way whatever, a variance will not be fatal, if the substance of what is alleged be proved.

ASSUMPSIT, in the Fulton Circuit Court, brought by the appellee against the appellant, and heard before the Hon. Norman H. Purple and a jury, at the March term, 1847, when a verdict was rendered for the plaintiff below for one hundred and fifteen dollars.

The substance of the pleadings and evidence will appear in the Opinion of the Court.

(a) Eddy *v.* Roberts, 17 Ill. R. 508, and notes.

W. A. MINSHALL, for the appellant, assigned the following errors:

1. The Court erred in sustaining the demurrer of plaintiff to the fourth and fifth pleas of defendant, and in refusing to sustain the same demurrer to the first, second, and third counts of the plaintiff's declaration.

2. Also, in overruling defendant's objection to the paper purporting to be a receipt for certain notes, dated October 27th, 1842, and permitting the same to be read in evidence.

3. Also, in refusing defendant's motion to exclude the parol evidence of plaintiff, offered as proof of the original indebtedness of Reason Prather to the plaintiff, when it appeared that better evidence was attainable.

4. Also, in giving the instructions asked by plaintiff, and objected to by the defendant.

5. In refusing instructions asked for by defendant.

6. Also, in qualifying and giving as qualified by the Court, the second instruction asked by defendant and in refusing to give the same without such qualification.

7. Also, in refusing the defendant's motion for a new trial.

8. Also, in refusing defendant's motion in arrest of judgment.

9. And in giving judgment for the said George Vineyard, when by the law of the land judgment should have been given for the said Darius Prather.

For going back to the declaration, see Doyle *v.* Knapp, 3 Scam. 338; Berry *v.* Savage, 2 do. 261; Stephen's Pl. 120, 145, 146.

As to the consideration necessary to support the action, see 1 Saunders, 211, note *b*; Saund. Pl. & Ev. 51; Stephens' N. P. 240; James *v.* Harvey, Yelv. 50; 2 Verm. 45; S. P. Cross *v.* Rogers, Strange, 592; recognized and acted on in Price *v.* Easton, 4 B. and Ald. 433; Buller's N. P. 134; Thorn *v.* Deas, 4 Johns. 99, 102; Powell *v.* Brown, 3 do. 100; Burnet *v.* Briscoe, 4 do. 237; Bailey *v.* Freeman, *ib.* 280, 284.

See Hard's case, 1 Salk, 23; Miner *v.* Schulthorp, 2 Campb. 215; Saunders on Pl. & Ev. 545–46; 1 Saund. 211, note 2;

Wheaton's Selw. 35, 36; 1 Saund. Pl. & Ev. 137; Com. Dig. action of *Assumpsit*, Letter H. 3; Jones *v.* Ashburnham, 4 East, 455. The promise must be co-extensive with the consideration. Raven *v.* Hughes, note *a.* cited in Mitchin *v.* Huston, in 7 T. R. 348, 352; 1 Stephens' N. P. 284. On a guaranty or promise to pay the debt of another, the declaration must be special. The common counts will not suffice. Saund. on Pl. & Ev. 546; 3 T. R. 24; 4 Johns, 382–384; Conly *v.* Cottle, Bre. 286; 1 Strange 592; 2 do. 933; Charter *v.* Beckett, 7 T. R. 201. In this case it was held, that the parol promise to pay the debt of another, and do some other thing, was void by the Statute of Frauds for the whole. The two acts cannot be separated.

If the case made in the declaration is not a collateral undertaking, but original, it must spring out of a new transaction, or move to the party promising on some fresh and substantive ground of a personal concern to the defendant, upon a sufficient legal consideration. Roberts on Frauds, 232. And the counts are equally faulty, in not setting forth a sufficient consideration for such a promise.

If the undertaking was voluntary, and to be done without compensation, the principle applies, that when one party entrusts the performance of a business to another who undertakes to do it gratuitously and wholly omits to do it, the party undertaking is responsible for a misfeasance but not for a non-feasance even though special damage is averred. Thorn *v.* Deas, 4 Johns. 96, 102.

If the consideration be passed at the time of the promise, the act done, which is the consideration, must be stated to have been done upon the request of the party promising. Livingston *v.* Rogers, 1 Caines, 586; Parker *v.* Crain, 6 Wend. 647; 1 Saund. 264, note 1; Comstock *v.* Smith, 7 Johns. 88, 89; Francisco *v.* Wright, 2 Gilm. 691.

If the depositing of the notes with Darius Prather is the act relied on to create an implied assumpsit, by legal implication that assumpsit would be to Reason Prather, and not to Vineyard, and Vineyard cannot maintain the action on the principle, that when the party to whom the promise to be per-

formed is not concerned in its meritorious cause, he cannot bring the action. There is no privity between them, nor is there in this case between Vineyard, the plaintiff below, and Darius Prather, the defendant there. Pine *v.* Morris, Bull. N. P. 134.

To maintain the second error assigned, he cited the following authorities: Connelly *v.* Collett, Bre. 286; Stickney *v.* Cassell, 1 Gilm. 420, 421; Churchill *v.* Wilkins, Durnford & East 447. Defendant also moved to exclude the evidence.

The contract declared on and set out in the declaration is in the alternative. The proof, if it shows any case, is one different, and in this the allegation and the proof are different.

A. Williams, and H. M. Wead, for the appellee.

The plaintiff's attorney has misapprehended the nature of the undertaking for which the suit was brought. It was not a promise to answer for the debt or default of another, but an undertaking to collect certain notes delivered to him for that purpose, and to pay the money when collected to the defendant. This view of the case disposes of all the objections that the promise should be evidenced by writing expressing the consideration of the writing.

It is contended that the plaintiff's undertaking was without consideration and consequently void. The true rule applicable to cases like this is, that a mere promise to do a thing for another without consideration, without entering upon its performance is a *nudum pactum*, and void; but if the person making the promise enter upon its performance, he is bound to execute it faithfully, and may be sued for failing to do so. It is then a misfeasance and not merely, non-feasance. Story on Bailments, §§ 170, 180. So in this case, the plaintiff having entered upon the performance of the trust by receiving and receipting for the notes, was bound to execute it.

It is again insisted, that the promise of the plaintiff to pay the money when collected, to the defendant, being made to his defendant's debtor, and not to him in person, the defendant therefore could not maintain an action on it. The rule established by the American and modern English cases is, that

the party, for whose benefit a contract is made, may sue on it in his own name. Schermerhorn *v.* Vanderheyden, 1 Johns. 139.

Without noticing in detail the many objections made to the ruling of the Court in giving and refusing instructions, it is enough to say, that the law was as fairly stated to the jury as it was possible to do through the medium of the instructions prepared by the attorneys in the case.

The affidavit discloses no sufficient ground for granting a new trial.

The opinion of the Court was delivered by

PURPLE, J.* This was an action of *assumpsit*, commenced in the Fulton Circuit Court by the appellee against the appellant.

The declaration contains three special counts, and the common count for money had and received.

The first count charges that one Reason Prather, being indebted to plaintiff below (who is appellee in this Court), in the sum of one hundred and fifty dollars, for the purpose of paying the same, deposited in the hands of the defendant below (appellant in this Court), certain notes, describing them, for collection; and that appellant promised to collect said notes within a reasonable time and pay over the prooceeds to appellee, *or* return said notes to said appellee on demand. And the count contains an averment that such reasonable time had elapsed, and that the said notes, and the proceeds of the same had been demanded; that the money had not been collected nor paid to appellee, nor the notes returned, and that his debt remained unpaid.

The second count states in substance, that Reason Prather was indebted to appellee in the sum of one hundred and fifty dollars, and being so indebted, placed in the hands of appellant certain notes, describing them, and that appellant, in consideration of the premises, promised the appellee to col-

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

lect the notes and pay over the same to him in a reasonable time; that a reasonable time has elapsed, and the notes had not been collected and the money paid to the appellee, although they might have been by the exercise of due diligence; and that Reason Prather had not paid the said debt of $150.

The third count alleges the indebtedness of Reason Prather, as in the first and second counts, and that the notes were placed by Reason Prather in the hands of appellant, in part payment of said indebtedness; and that appellant, in consideration of the premises, promised the appellee to collect the same, and pay the money to the appellee on demand; that appellant did collect the money, but refused to pay it to appellee.

The appellant pleaded,

1st, *non assumpsit;*

2nd, that the promise was to pay the debt of a third person, and, that there was no note or memorandum in writing, signed by the party to be charged. Replication, that there was a sufficient note or memorandum, &c.; concluding to the country, upon which issue was joined;

3rd, that the notes were deposited in the hands of appellant without any contract for their collection, and were afterwards returned to Reason Prather at his request. Replication, that there was a contract between appellant and appellee at the time the notes were deposited with appellant in relation to their collection, concluding to the country, upon which issue was joined;

4th, that appellant returned the notes to Reason Prather, who collected them; and

5th, that it was not in appellant's power to collect the notes.

A general demurrer to the fourth, and a special demurrer to the fifth plea, stating for cause of demurrer that said fifth plea amounted only to the genenal issue, was interposed, which was sustained by the Court, and the appellant abided by his demurrer. The cause was tried by a jury. The appellee offered in evidence, and read to the jury a receipt, in the words following:

"Received of R. Prather, a forty-five dollar note on Enoch Stewart One for thirty dollars One on Gabriel & Abraham Hollingsworth for ten dollars Charles Richardson ten Calvin Joins thirty dollars left in the hands of Darius Prather for collection of which I agree to pay George Vineyard when collected given under my hand October 27th 1842.

DARIUS PRATHER."

To the introduction of this receipt in evidence, appellant objected, and excepted to the opinion of the Court.

The evidence on the part of the appellee then showed, that appellant admitted that Reason Prather, at the time the receipt was given, was indebted to appellee in the sum of one hundred and fifty dollars upon a promissory note which was not produced at the trial. And the counsel for the appellant objected to the admission of any evidence of such indebtedness, unless the note was produced, which objection was overruled, and an exception taken to the opinion of the Court.

The appellee's evidence further showed that the notes, or the money due upon them, had been demanded of appellant before the commencement of the suit. It further appeared from conversation between the parties, which occurred at the time the demand was made, that appellant had returned the notes to Reason Prather, who had collected some or all of them; and that appellant contended at this time, that he was not bound to collect the notes, unless he received a power of attorney from Reason Prather to do so; and in another conversation with one of the appellee's witnesses, in which appellant admitted that he was to collect the money due on the notes and pay the same over to the appellee; he further stated that the original contract was between him and Reason Prather, and that there never was any contract between him and appellee about the notes; and, that he was acting only as the agent of Reason Prather, and for the purpose of obliging him.

Numerous instructions were asked by the counsel on either side, some of which were given and others refused. As applicable to the case made by the evidence, the Court perceive no substantial legal objection to the instructions; but as the

decision must turn upon another question, we deem it unimportant to notice them particularly, or to express any definite opinion as as to the propriety of their being given or withheld.

The jury returned a verdict in favor of the appellee. The appellant moved for a new trial and in arrest of judgment, which motions were overruled, and appellant excepted.

The ruling of the Circuit Court in sustaining the demurrer to the fourth and fifth pleas of the appellant was unquestionably correct; and this demurrer could not, as is contended by the appellant's counsel here, have been carried back and sustained to the declaration, for the reason that the first, third and fourth counts thereof set forth, each, a good cause of action against the appellant.

The Court is of opinion also, that the evidence of the appellee was sufficient to warrant the verdict of the jury, provided the same had been applicable to the counts of the declaration, or either of them last above mentioned. But upon examination, it will be found that such is not the case. The declaration makes one case and the evidence another. The allegations and the proof do not substantially correspond.

The allegation in the first count is in the alternative, that appellant promised to collect the notes, or return them on demand, The evidence is that he promised to collect only and pay over. This is a fatal variance. 1 Phil. Ev. 206; 2 do. 509, note 401.

The third count alleges that Reason Prather deposited the notes with appellant in payment of his indebtedness to appellee; in consideration of which, he, appellant, promised appellee to collect the same and pay the money to appellee; and that he did collect the same, but refused to pay the money to appellee. The fourth is for money had and received. To support these two last counts there is no evidence whatever.

The second count is considered defective, for the reason that it is not stated that the notes were deposited with appellant for the use, or to be collected for the appellee.

For these obvious reasons a new trial should have been granted.

The Statute of Frauds, which has been pleaded and set up

in this action, is entirely inapplicable to the case made by the evidence. If the notes were left with the appellant by Reason Prather to be collected to pay a debt due to the appellee, and the appellant undertook the collection of the same, and promised to pay over the money when collected to appellee, this is no undertaking to pay the debt of a third party within the spirit and letter of the Statute of Frauds; but it is an agreement by two persons for the use and benefit of a third, upon which such third person may maintain an action against the party promising, without proof of any written memorandum or consideration moving between the promissor and the party for whose benefit the contract has been made. It is a trust, which having once undertaken to execute, and entered upon the performance of the same, although voluntarily and without consideration other than such as the law implies, he is bound in law and equity to complete.

We do not perceive that the evidence objected to was improperly admitted. It tended to prove the issues which had been made.

The receipt signed by appellant describes a portion of the same notes described in the declaration as having been placed in his hands for collection. The suit is not brought upon the instrument itself, nor does the declaration purport to set it out or describe it. It is introduced in the same manner as the testimony of a witness might be, as evidence of the promise made by the appellant to collect and pay the money claimed in the declaration. If an instrument is neither set out in the pleadings by its tenor, nor described by its legal import, but is merely brought forward to sustain an allegation, not referring to it expressly in any way whatever, a variance will not be fatal if the substance of what is alleged be proved. 2 Phil. Ev.C. & H. notes 528; 1 Starkie's Ev. 432.(*a*) It was also competent for the appellee to prove the indebtedness of Reason Prather to him by the admission of the appellant. The suit was not upon the note which had been given for this indebtedness. The promise to collect and pay the money, and not the indebtedness of Reason Prather, was the gist of the action.

(*a*) Rumleigh *v.* Cook, 13 Ill. R. 670, and notes.

The general rule, that the best evidence must be given of which the nature of the thing is capable, has its exceptions. "To prove a plaintiff's demand satisfied, the defendant may give evidence of an admission by the plaintiff to that effect, though it should appear that the plaintiff also signed a receipt; and it may be said that the receipt would be more satisfactory proof." 1 Phil. Ev., 220.

"The acknowledgment of a defendant that he entered upon premises under an executory contract of purchase from the plaintiff, may be proved without producing the written agreement; and such acknowledgment will have the effect of preventing the defendant from contesting the plaintiff's title,"

"In an action against a sheriff for the misfeasance of his deputy, the admission of the sheriff is sufficient evidence of the deputation, without producing the deputation or warrant under which he acted." 2 Phil. Ev., C. & H. notes, 556–7.

This is not an attempt to prove the contents of a written instrument by verbal testimony, but an offer merely to prove a fact, which existed as well before as after the note has been given; that Reason Prather was indebted to the appellee. As between Reason Prather and the appellee, the note would be the best evidence of this fact. But as between the appellant, who was a stranger to the contract, and the appellee, the note, if produced, would be but an acknowledgment of Reason Prather that he was indebted to appellee in that amount; and it would be a most unreasonable rule of law, which would not regard the admission of a party to a suit as high authority in law, and as conclusive in its effects in evidence against the party making it, as the written declaration or statemene of a third person.

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*.

Judgment reversed.

JAMES RIGGIN *et al.*, plaintiffs in error, *v.* THOMAS MULLIGAN, defendant in error.

Error to Madison.

If a judgment creditor takes out an execution within one year from the rendition of his judgment, his judgment will be a lien on the debtor's land for the period of seven years. After this period, it ceases to be a lien as against *bona fide* purchasers, or subsequent incumbrancers by mortgage, judgment or otherwise.

A. conveyed to B. certain land in fee simple, and subsequently B. conveyed the same to C. Prior to the conveyance by A. his creditor had recovered a judgment against him and issued execution thereon immediately. Several executions were issued and returned, and one of them was levied upon the premises in question about four years after the judgment was recovered and subsequently to the purchase by C. After a lapse of more than eleven years from the rendition of judgment, a *venditioni exponas* was issued, when C. sued out an injunction against the creditor and the sheriff holding the execution, to prevent a sale of the land. The injunction was made perpetual by the Circuit Court and its decree was affirmed by the Supreme Court.

BILL IN CHANCERY for an injunction, &c., in the Madison Circuit Court, filed by the defendant in error against the plaintiffs in error, James Riggin, a judgment creditor, and Andrew Miller, sheriff of said county. The cause came on to be heard before the Hon. Gustavus P. Koerner, at the August term, 1847, upon a demurrer to the bill, which was overruled, and the injunction issued by order of the Master in Chancery, was made perpetual.

The substance of the bill will be found in the Opinion of Court.

W. H. UNDERWOOD, for the plaintiffs in error.

1. Where an execution has been levied on land in its life time and returned, a *venditioni exponas* may issue either to the officer levying the same, or to his successor in office, who may sell the property levied upon. Bellingall *v.* Duncan, 3 Gilm. 481. And although no continuance roll had been kept. Lampsett *v.* Dickinson, 2 Scam. 440–1.

2. An execution levied, preserves the judgment in life as to the property levied upon. 2 U. S. Dig. 349, § 780; *Ib.* 354, § 887.

3. Mulligan purchased while the judgment was in full force, of record and with constructive notice. A *bona fide* purchaser is one without notice of a prior claim or incumbrance. Robinson *v.* Rowan, 2 Scam. 501; R. L. 370, § 1. A person with full knowledge of an unsatisfied judgment, and with knowledge that the judgment debtor has little other property, and not enough to satisfy the same, is not a *bona fide* purchaser, although he purchases after the judgment lien expires. 5 Paige 493.

4. A writ of injunction releases all irregularities. 2 U. S. Dig. 322, § 190.

5. The judgment debtor and the grantor of Mulligan, having made warranty deeds, should have been made parties. Scott *v.* Bennett, 1 Gilm. 646–7–8.

J. Gillespie, for the defendant in error.

The Opinion of the Court was delivered by

Purple, J. On the 12th day of February, A. D. 1845, Mulligan filed his bill in Chancery against Riggin and Miller, alleging that on the 8th day of April, 1834, one Robert Whiteside conveyed by deed, in fee simple, to one Jacob Swiggart, the S. W. qr. 16, T. 3 N., R. 9 W. in Madison county, and that said Swiggart on the 10th day of September, A. D. 1836, conveyed the same land by a similar deed to Mulligan. Both were warranty deeds, as per exhibits. That Mulligan has had possession of the premises ever since, and that he had no knowledge that any other person had any claim or lien on the premises up to about the first day of January, A. D. 1845. That on the 31st day of May, 1833, Riggin recovered a judgment against Robert Whiteside for $77.85 debt and damages, besides costs, in Madison Circuit Court. That on the 14th day of June, A. D. 1833, a *fi. fa.* issued on said judgment, which was returned on the 22d day of April, 1834, by the sheriff of said county by order of said Riggin. That on the 22d day of April, A. D. 1834, an *alias fi. fa.* was issued which was afterwards, on the 8th day of May, 1837, returned by the sheriff of said county indorsed:

"Levied this execution 14th day of May, 1834, on the following described lands, as the property of the within defendant, to wit: one hundred and ten acres, a part of the S. W. qr. of S. No. 4 N., R. 9 W. the north and east part of said quarter in the county of Madison.

N. BUCKMASTER, S. M. C.

This execution is suspended at the suggestion of the parties interested, there being doubt respecting the rights of the defendants to the property levied on."

That afterwards, on the 7th day of June, 1837, a *pluries fi. fa.* was issued and returned by the sheriff of said county; that on the 9th day of June, 1837, he levied said excution on the said S. W. qr. of S. 16, T. 3 N., R. 9 W., &c. And that on the 31st day of December, 1844, more than eleven years after the rendition of said judgment, said Riggin caused a *venditioni exponas* to be issued to the present sheriff of said county, commanding him to sell said last described land, and that defendant Miller, plaintiff as aforesaid, had advertised said land for sale to satisfy said judgment, &c. The bill prays for an injunction restraining said defendants from proceeding on said judgment against said land, and for general relief. Upon this bill an injunction was ordered by the Master in Chancery. Afterwards, on the 5th day of November, A. D. 1846, the defendants filed a demurrer to said bill and for causes of demurrer set down that there was no equity in said bill, nor were proper parties made thereto, to wit: the heirs or legal representatives of the said judgment debtor, if he was deceased, and thereupon moved to dissolve the injunction. And afterwards, at the same term of said Court, said demurrer was overruled, and the injunction afterwards, on the 19th day of August, 1847, made perpetual and a decree for costs rendered against both of said plaintiffs in error. The plaintiffs in error now assign for error,

1. The Court below erred in overruling their demurrer to the complainants' bill of complaint.
2. In rendering of the decree aforesaid.
3. In not dissolving the injunction and dismissing the bill.

One point to be determined in this case is whether, as

against a *bona fide* purchaser under the statute of this State, the lien of a judgment creditor continues in force for a longer period than seven years; when such creditor neglects to sell the incumbered property within that time, though the purchase may have been made after the rendition of the judgment and with notice of its existence.

The statute reads as follows: "That all and singular the goods and chattels, lands, tenements, and real estate of every person against whom any judgment has been or hereafter shall be obtained in any Court of Record, either at Law or in Equity, for any debt, damages, costs or other sum of money, shall be liable to be sold upon execution to be issued upon such judgment; and the said judgment shall be a lien on such lands, tenements and real estate, from the last day of the term of the Court in which the same may be rendered, for the period of seven years; *provided*, that execution be issued at any time within one year on such judgment, and from and after the said seven years, the same shall cease to be a lien on any real estate, as against *bona fide* purchasers, or subsequent incumbrancers by mortgage, judgment or otherwise." R. L. 1833, 370.

The question of the construction of this statute has never before been presented to this Court, and being one of importance as regards the rights and interests of the citizens, has been carefully considered. The judgment of the Court has been assisted in its conclusions by reference to the decisions of other Courts upon statutes similar to ours.

The statute of Ohio, as against the debtor, makes the lien of a judgment indefinite in point of time. It is however provided, that "if execution shall not be sued out within five years from the date of any judgment that now is or may hereafter be rendered in any Court within this State, or if five years shall have intervened between the date of the first execution issued on any such judgment obtained as aforesaid, and the same of suing out another execution thereon, such judgment shall become dormant, and shall cease to operate as a lien on the estate of the judgment debtor." R. L. Ohio, 671, §101. The 102d section of the same Act provides that

any such judgment may be revived by action of debt or *scire facias.*

Under this law it has been held, in the case of Norton *v.* Bacon, Curtis and others, that when a purchase had been made *bona fide*, after the lien of a judgment creditor attached, and the creditor had permitted (after having sued out several executions), five years to elapse between the time of issuing his executions, the lien of his judgment against the land was lost. That when revived, so far as the judgment debtor was concerned, the lien of the revived judgment existed in all its original force; but that it did not follow that the rights of others, acquired or subsisting under the dormancy of the judgment, were subordinate to the revived lien. 5 Ohio, 511.

The Act of New York upon the same subject reads thus: "all judgments hereafter to be rendered, shall cease to be a lien on any real estate as against *bona fide* purchasers or subsequent incumbrancers by mortgage, judgment or otherwise, from and after ten years from the time the same shall be docketed."

The Supreme Court of the State of New York, in the case Little *v.* Harvey, reported in 9 Wend. 157, put a construction upon their statute.

The plaintiff (it being an Ejectment suit), claimed under a deed made on a sheriff's sale, under a judgment in his favor against one Davis Hopkins, under whom also the defendant claimed. The plaintiff's judgment was docketed on the 18th Feb. 1818. Execution was issued and delivered to the sheriff on the 13th day of May, 1828, which was tested on the 5th of February preceding. The sale was stayed by Judge's order until the 6th of Sept. 1828 when the premises were sold and bought by the plaintiff, and a deed executed to him by the sheriff on the 15th Dec. 1829. The defendant introduced a mortgage dated the 19th day of April, 1828 and the record of a regular foreclosure and title in himself under the same.

The plaintiff offered to prove that the defendant took his mortgage with a full knowledge of plaintiff's judgment.

The evidence was excluded by the Court. This decision was sustained by the Supreme Court, who, in delivering an opinion in the case, hold the doctrine, that all purchasers are to be regarded *bona fide*, except those who purchase with fraudulent intent; and that it is wholly immaterial about the knowledge of the former judgment or incumbrance.

In the case of Tufts' Administrators *v.* Tufts, 18 Wend. 611, under a similar law, the Court held that subsequent judgment creditors and purchasers, whose rights accrued between the rendition of the judgment, and the expiration of ten years, were protected by the statute.

We are unable to point out any distinction in principle between the cases before mentioned, and the one under consideration. Stripped of its unnecessary verbiage, the plain reading of our statute is: If a judgment creditor takes out his execution within one year from the rendition of his judgment, his judgment shall be a lien on his debtor's land for the period of seven years. After this period it shall cease to be a lien, as against *bona fide* purchasers, or subsequent incumbrancers by mortgage, judgment or otherwise. This view of the law is believed to be reasonable and just. Any other construction would operate as a serious embarrassment upon the transfer of real estate, and contravene the manifest intention of the Legislature. It would enable a creditor to lay by, for an indefinite extent of time, neglecting to enforce payment of his demand against his debtor, until he shall have become insolvent; when by due diligence his money might have easily been made, without detriment to the rights or interests of other creditors; and, until, on account of such insolvency, a purchaser would be remediless upon his covenants of warranty or otherwise.

In such a case as this, we think justice and the law unite in postponing the judgment creditor, and allowing the purchaser of this land to hold it discharged of the judgment lien.

One cause of demurrer to the bill filed in this cause in the Court below, and which is insisted on here, is the want of proper parties; and it is contended, that the heirs and legal representa-

tives of Robert Whiteside, the judgment debtor, should have been parties to the suit. Admitting that he was dead, and that there would be a legal presumption arising that he had heirs and legal representatives (nothing of which appears by the record), we cannot comprehend how they conld be necessary parties to this proceeding, or have any interest in the result. The decree made here neither discharges nor enforces the judgment against them. In no event can it be evidence for or against them. They have no interest in the subject matter concerning which a decree is sought. They can only be compelled to pay the judgment. If it has been paid or any part of it, they can resist its collection when it is attempted to be enforced against them. The defendant in error only asks that Riggin shall not be permitted to subject his land to the payment of this stale judgment.

Under the circumstances it was improper that Miller, the sheriff, should have been charged with costs; but this was doubtless a clerical mistake in preparing the decree.

So far as the decree of the Circuit Court awards costs against the plaintiff in error, Miller, the same is reversed; in all other respects, it is affirmed at the costs of the plaintiff, Riggin, both in this Court and in the Court below.

Decree affirmed.

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 mortgagee foreclosed his mortgage by *scire facias* against the mortgagors, and afterwards filed a bill in Chancery against them and a subsequent purchaser, who pleaded the foreclosure in bar of the proceeding in Chancery: *Held*, that the proceedings by *sci. fa.* and in Chancery were concurrent remedies; that the mortgagor must elect which of them he would pursue, and that when he has made an election, he must abide by it.

Under the statutory proceedings to foreclose a mortgage by *sci. fa.* the judgment is *in rem*, and only binds the mortgaged premises. A purchaser under such judgment acquires all the right in the mortgaged premises which the mortgagor had at the time of the execution of the mortgage. Subsequent purchasers or incumbrancers must redeem as in case of an ordinary sale on execution.

Where a bill in Chancery avers a fact, which, if presented by a special replication to the plea thereto (were such practice allowable), would remove the bar, then such fact must be met by an answer. The plea should present the legal bar alone, leaving unnoticed any matter in the bill which meets that bar, and the answer comes in as a rejoinder to such matter as stands for a special replication to the plea.

BILL IN CHANCERY, in the Schuyler Circuit Court, to foreclose a mortgage, &c. by the plaintiffs in error against Thomas Wilson and wife, and Hart Fellows.

The latter pleaded in bar, that the mortgagees had already foreclosed their mortgage by *scire facias*, and that the same was fully satisfied by a sale of the mortgaged premises to them. At the August special term, 1846, the Hon. Norman H. Purple presiding, the plea was adjudged good and the bill dismissed with costs.

W. A. MINSHALL, for the plaintiffs in error, relied on the following points and authorities for a reversal of the decree of the Circuit Court: Marine Ins. Co. *v.* Hodgson, 2 Peters' Cond. R. 518; Montgomery *v.* Brown, 2 Gilm. 585; Saunders *v.* Jennings, 2 J. J. Marsh. 513; 2 Story's Eq. Jur. 173, § 887; *Ibid.* 252, 256; James *v.* Morey, 2 Cowen, 320; 3 Atkins, 303, 558; 1 Smith's Ch. Pr. 227; 6 Vesey, 536, 599; Jackson *v.* Delancey, 13 Johns. 535.

A plea to the relief only must give the discovery asked. 1 Smith's Ch. Pr. 218; King *v.* Hemming, 9 Sim. 59; Beames' Eq. Pl. 33, 34; 6 Maddock's Ch. R. 61; Story's Eq. Pl. 644.

Scire facias is only authorized against the mortgagor, his heirs and administrators. Rev. Stat. 304.

A foreclosure to correct a mistake after a *scire facias*, is allowed. Willis *v.* Henderson, 4 Scam. 14.

Also, where a Court of Equity obtains jurisdiction, it will retain the case till the parties are put into possession under the decree. Aldrich *v.* Sharp, 3 Scam. 261.

R. S. Blackwell, for the defendant in error, relied upon the following points and authorities:

1. The proceeding by *scire facias* at Law, to foreclose a mortgage, is a concurrent remedy with a bill in Chancery. The mortgagee has an election to proceed at Law by *sci. fa.*, or in Equity by bill; but having made an election of the *sci. fa.*, he is bound by it; and if the remedy be inadequate, or the proceedings on the *sci. fa.* erroneous, he must abide by the result of his election. It is an established maxim of jurisprudence, that in all cases of concurrent jurisdiction, that Court which first obtains jurisdiction of the subject matter of the controversy, must determine it exclusively, and all other Courts will refuse relief. Smith *v.* McIvers, 9 Wheaton, 532; Hawley *v.* Mancius, 7 Johns. Ch. R. 182; Taylor *v.* Porter, 1 Dana, 425; Keith *v.* Humphries, 1 Marsh. 13; Simpson *v.* Hart, 1 Johns. Ch. R. 91; Abrams *v.* Camp, 3 Scam. 290.

2. The proceedings at Law on a *sci. fa.* to foreclose a mortgage are *in rem*, and it is a well settled principle in such proceedings, that all persons who could have asserted a right to the property, become parties to the proceedings; and all judgments founded on such proceedings, whether they relate to real or personal property, are held valid and binding, as being *res judicatæ*, in every other country, in respect to all matters of right, title, transfer and disposition of the property against which the judgment was rendered. 1 Kent's Com. 119, note *c.* and cases there cited.

3. The statute provides that the mortgagor, or, if he be dead, then his heirs, executors or administrators shall be made parties to the *scire facias;* and further provides, that the mortgagor, his heirs, executors, administrators or grantee, may redeem the land from the sale which takes place under this proceeding in twelve months, and that the judgment creditors of the mortgagor may redeem from said sale within fifteen months, in the same manner prescribed for the redemption of lands sold at sheriffs' sales under ordinary judgments and executions. We insist that, upon the true construction of this statute, if the mortgagor, his heirs, grantees, or judgment creditors, do not redeem within the time and in the manner pointed out in this statute, that their and each of their equities of redemption are as effectually barred and foreclosed as if they were made parties to a bill of foreclosure in Chancery and neglected to redeem according to the terms of the decree. Rev. Stat. 304–5, §§ 23, 24; Biggerstaff *v.* Loveland, 8 Ohio, 44–9.

The Opinion of the Court was delivered by

CATON, J.* The State Bank filed this bill in the Schuyler Circuit Court against Wilson and wife and Fellows, to foreclose a mortgage, executed by Wilson and wife on the 29th day of October, 1835, which was duly acknowledged and recorded on the same day, which, the bill avers, still remains unpaid and unsatisfied and charges Fellows as a subsequent purchaser with notice, who, the bill also avers, was in possession of the mortgaged premises, and prays a foreclosure of the mortgage and the delivery up of all deeds, &c., in possession of the defendants, relating to the mortgaged premises, and for general relief. This bill was filed on the 25th of January, 1845; on the first day of September, 1845, the bill was taken for confessed, as to all of the defendants, and on the same day, on the application of Fellows, the default was set aside and he was permitted to file a plea, which states that

*WILSON, C. J. and Justices KOERNER and DENNING did not sit in this case.

the complainant had previously foreclosed the same mortgage by *sci. fa.*, obtained judgment for the amount due, which still remains unreversed, &c., issued a special execution, upon which the premises were sold on the 8th of February, 1840, and bid in by the Bank for the amount of the judgment, whereby the same became satisfied.

This plea, upon a hearing, was held to be sufficient by the Court, and a bar to the relief sought by the bill, which was accordingly dismissed. In determining the sufficiency of this plea, it is necessary that we should inquire into the effect of a foreclosure by *scire facias* under our statute, which provides that if default be made in the payment of any sum of money secured by mortgage on lands and tenements duly executed and recorded, and if the payment be by instalments, and the last instalment shall have become due, it shall be lawful for the mortgagee, his executors or administrators, to sue out a writ of *scire facias* from the clerk's office of the Circuit Court of the county in which the said mortgaged premises may be situated, or any part thereof, directed to the sheriff or other proper officer of such county, requiring him to make known to the mortgagor, or if he be dead to his heirs, executors or administrators, to show cause if any they have, why judgment should not be rendered for such sum of money as may be due by virtue of said mortgage, and upon the appearance of the party named as defendant in said writ of *scire facias*, the Court may proceed to judgment as in other cases; but if said *scire facias* be returned *nihil* or that the defendant be not found, an *alias scire facias* may be issued; and if it be returned as aforesaid, or if the defendant appear and plead or make default, the Court may proceed to give judgment, with costs, for such sum as may be due by said mortgage, or appear to be due by the pleadings, or after the defence, if any be made; and also that said mortgaged premises be sold to satisfy such judgment, and may award or direct a special writ of *fieri facias* for that purpose to the county or counties in which such mortgaged premises may be situate, and on which the like proceedings may be had, as in other cases of execution levied upon real estate; provided, however,

that the judgment aforesaid shall create no lien on any other lands or tenements than the mortgaged premises, nor shall any other real or personal property of the mortgagor be liable to satisfy the same; but nothing herein contained shall be so construed, as to affect any collateral security given by the mortgagor for the payment of the same sum of money, or any part thereof, secured by the mortgage deed. Rev. Stat. 304, § 23.

This statute prescribes a mode of foreclosing a mortgage in the Courts of Law, and the judgment rendered must have the effect of a judgment at law, against the mortgaged premises alone. The judgment rendered in this proceeding is *in rem*, and can affect nothing but the property described in the mortgage. It creates no new lien upon the mortgaged premises, but is merely a means of making available the lien which was created by the execution and recording of the mortgage. The purchaser under the judgment acquires all the right in the mortgaged premises, which the mortgagor had at the time of the execution of the mortgage, entirely unaffected by the title or lien of purchasers or incumbrancers subsequent to the recording of the mortgage or with notice, who, in order to save themselves, must redeem as in case of an ordinary sale on execution at law.(*a*) With this view of the law, it seems impossible to discover any legitimate object which the complainant may have had in filing this bill. He says in argument, his object is to quiet his own title acquired under the sale upon that execution and to prevent Fellows from asserting his pretended claim under his subsequent purchase; but if there has been no redemption, from the sale under the *sci. fa.*, then Fellows is entirely cut off, and if there has been a redemption, then the Bank has received the full amount of money due, and certainly cannot complain. There are several conclusive answers why the complainant cannot maintain this bill for the purpose of removing a shadow cast upon the title acquired under the *scire facias* proceeding, by the pretended title of Fellows. In the first place, the bill is not framed with that view, nor does it allude to the former foreclosure, much less claim a title under it, which may be injured

(*a*) Chickering *v.* Failes, 26 Ill. R. 516; Kruse *v.* Scripps, 11 Ill. R. 104; Matteson *v.* Thomas, 41 Ill. R. 114.

by the assertion of Fellows' title; nor does the plea show any such title in the complainant. Again, the complainant if he has title acquired under the former proceedings, has the means of contesting the pretended title of Fellows in a suit at Law as safely and completely as it possibly could be done in a Court of Equity, by bringing Ejectment against Fellows, who as the bill shows, is in possession of the premises.

It is unnecessary to inquire whether the mortgage became merged in the judgment on the *scire facias* or not, for according to our view of the law, the title, if any was acquired under that proceeding, relates back to the execution of the mortgage and is conclusive against all purchasers or incumbrancers subsequent to the recording of the mortgage. The mortgage is as completely satisfied by the foreclosure under our statute, as it would have been by a foreclosure in Chancery. They are concurrent remedies, either of which the party may elect; but after he has pursued one, till he has obtained satisfaction of his debt, he ought not to be permitted to harass the party with the other. Had he foreclosed his mortgage by bill in the first place, and obtained a satisfaction of his debt by a sale of the premises, it will hardly be insisted that he could file another bill for a strict foreclosure, or could forclose the mortgage again by *scire facias* and yet, in such a case, either of those courses might be pursued with the same propriety that this can in the present instance.

The ground for relief set up in this bill, is a subsisting and unsatisfied mortgage, which is now due to the complainant, while the plea shows that the mortgage has been satisfied to the full amount by a sale of the mortgaged premises, under a legal and regular proceeding, and it makes no difference whether the complainant or a third person became the purchaser; nor, as before remarked, does it appear whether the premises have been redeemed from that sale or not. The complainant has either obtained the money due by a redemption, or has acquired all the title of the defendant, Wilson, and paramount to that of Fellows.

It was objected on the argument, that there should have

been an answer in support of the plea; but this was not necessary nor even proper. Where the bill does not charge any specific fact inconsistent with the plea, negativing and avoiding, as it were, the plea by anticipation, but alleges simply the ground of the plaintiff's equity, and the facts which entitle him to relief, and the plea sets up matter which, admitting the truth of the bill, shows that the complainant is not entitled to any portion of the relief sought by the bill, then the plea is a complete bar to all of the equity of the bill, and it should not be supported by an answer. An answer in such a case would be improper, as it would overrule the plea. Story's Eq. Pl. §§ 680, 681.

The true rule on this subject undoubtedly is, that where the bill avers any fact, which, if presented by a special replication to the plea (were that allowable), would remove the bar, then such fact must be met by an answer. The plea should present the legal bar alone, leaving unnoticed any matter in the bill which meets that bar, and the answer comes in to perform the office of a rejoinder to such matter in the bill as stands for a special replication to the plea. Had the bill went on and shown that by reason of some defect, omission, or mistake, the former foreclosure had been entirely unavailing, then there would have been allegations, which might have anticipated and defeated the bar set up by the plea. In such a case an answer would have been required. Such was the case of Willis *v.* Henderson, 4 Scam. 13, where the bill showed that a mortgage had been given, and that by mistake other lands were described in it than those intended by the parties to be mortgaged; that before the mistake was discovered, the mortgage was foreclosed by a *scire facias*, and the lands bid in by the plaintiff for the amount due on the mortgage. The bill prayed that the mistake might be corrected, and the mortgage then foreclosed, which was done.

The plea in this, showing an entire satisfaction of the complainants' mortgage, is a complete bar to all the equity of the bill, and was properly held to be sufficient; and it remaining unanswered in any way, the bill was necessarily dismissed.

The decree of the Circuit Court is affirmed with costs.

Decree affirmed.

ABRAHAM BADGLEY, plaintiff in error, *v.* ELI HEALD, defendant in error.

Error to St. Clair.

In a suit commenced before a justice of the peace, the plaintiff cannot recover a larger sum than is indorsed upon the summons as the claim or demand.

A contract to labor six months for eight dollars a month is an entire contract, and to entitle the party to recover for his services, he must fully perform on his part unless released by his employer, or compelled to leave his employment for some justifiable cause. (*a*)

THIS was an action commenced before a justice of the peace of St. Clair county by the defendant in error against the plaintiff in error. A judgment was there rendered in favor of the plaintiff for $14.37. The defendant appealed to the Circuit Court of said county, and the cause was tried before the Hon. Gustavus P. Koerner and a jury, at the November term, 1847. A verdict was rendered for the plaintiff for $15.46.

Other facts material to the decision of the case will be found in the Opinion of the Court.

The cause was argued in this Court *ex parte*, by W. H. Underwood, for the plaintiff in error.

1. The Court below erred in rendering a judgment for more than the amount claimed and indorsed upon the summons, there being no interest on an indebtedness of this nature. Dowling *v.* Stewart, 3 Scam. 195; Chenot *v.* Lefevre, 3 Gilm. 643.

2. The Court below erred in refusing to grant Badgley a new trial. The evidence showed that Heald contracted with Badgley to work for him six months, with the privilege of quitting only at the end of the first month, and left Badgley's employment at the end of three months against his consent, and without any excuse. That he cannot recover in such a case, see Cutler's Adm'r. *v.* Powell, 6 Term R. 163; McMillan *v.* Vanderlip, 12 Johns. 167; Lantry *v.* Parkes, 8

(*a*) Schoonover *v.* Christy, 20 Ill. R. 426; Swanzey *v.* Moore, 22 Ill. R. 63; Angel *v.* Hanna, 22 Ill. R. 429; Holmes *v.* Stummel, 24 Ill. R. 370; Hausel *v.* Emkson, 28 Ill. R. 258.

Cowen, 63; Thayer *v.* Wadsworth, 13 Pick. 349; Winn *v.* Southgate, 17 Verm. 358; Ripley *v.* Chipman, 13 do. 268; Morford *v.* Mastin, 6 Monroe, 614; De Camp *v.* Stephens, 4 Blackf. 24; Eldridge *v.* Rowe, 2 Gilm. 98; Possey *v.* Garth, 7 Missouri, 96. To tolerate a recovery in a case like this, would be to impair and destroy the obligation of contracts, which are regarded as sacred by the Constitution of the United States and this State. It would encourage men to disregard their contracts, and occasion damages, which no one but the party injured could fully appreciate or ascertain.

3. The suit was brought before the term expired, and therefore prematurely. Crocker *v.* Goodsell, 1 Scam. 107.

4. An accord and satisfaction was also fully established.

The Opinion of the Court was delivered by

Caton, J.* Heald sued Badgley before a justice of the peace of St. Clair county for work and labor. The demand indorsed on the back of the summons and entered in the justice's docket, was fifteen dollars, and the plaintiff there obtained judgment before the justice for fourteen dollars and thirty-seven cents. Badgley appealed to the Circuit Court, where it was tried by a jury, who rendered a verdict for the plaintiff below, for fifteen dollars and forty-six cents. A motion was made for a new trial, which was overruled by the Court and a judgment rendered for the amount of the verdict.

Two questions are presented for our consideration: *First*, whether a verdict and judgment can be sustained which exceeds the amount demanded on the back of the summons, and *second*, whether the verdict is sustained by the evidence.

The evidence as set forth in the bill of exception shows that the plaintiff below worked for the defendant about three months; that he left the defendant's service about the 23d of July last; that at the time he left, the defendant was confined to his house by sickness. A witness swore that when Heald left Badgley's service, he told witness that he was

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

going to quit working for Badgley; that he was going to Pennsylvania, and should go whether he got one cent from Badgley or not. He desired witness to inform Badgley of it, which he did. Another witness testified, that after Heald quit work, he was at Badgley's house where he saw Badgley pay Heald eight dollars, who did not claim any more, and both parties seemed satisfied, and shook hands. The witness heard Badgley say at the same time that he would pay no more, unless he was compelled to do so by law.

Another witness testified that shortly before Heald commenced work, he heard a conversation between the parties, in which they said that Heald was to work for Badgley six months at eight dollars per month; "and at the end of the first month, either party might let the other off." The witness did not hear all of the conversation between the parties at that time, having gone into the house and left them talking, but that after he returned both parties told him that the agreement was as above stated.

The first question presented is settled by the case of Dowling *v.* Stewart, 3 Scam., 193, where this Court held that the statement of a claim made by a plaintiff, indorsed on the back of the warrant and entered on the justice's docket, concludes him, and that it is error in the Court to render judgment for more.(*a*) The excess, in the present case, is forty-six cents, and, although it is small, yet it is not so small that the maxim *de minimis non curat lex*, will apply. But the verdict in this case cannot be sustained by the evidence. By the contract between the parties, Heald was to work for Badgley six months at eight dollars per month, with the right to either party to terminate it at the end of the first month. This was an entire contract, as much so as if the agreement had been to work the six months for forty-eight dollars, with the privilege to either party to put an end to the contract at the end of the first month, when Heald should receive eight dollars. As the agreement was not terminated at the end of the first month, it was then the same as if it had never contained such a provision. The evidence clearly shows, that Heald abandoned the service of Badgley before the completion of the contract,

(*a*) Eaton *v.* Sales, 11 Ill. R. 620; C. B. & Q. R. R. Co. *v.* Minard, 20 Ill. R. 10; McNutt *v.* Dixon, 42 Ill. R. 499.

and without the consent of Badgley, or any justifiable cause. Nor can it be said that Badgley subsequently consented to the rescinding of the contract by the payment of the eight dollars, even were that admissible; for although Badgley did pay Heald eight dollars, yet he did it under a protestation that he was not bound to pay it, for he said "he would not pay him, plaintiff, any more unless he was compelled to pay it by law." It is manifest from this, that what he paid at that time he intended as a gratuity, or did it to buy his peace, under a protest against further liability. It clearly appeared that this work was done under an entire contract which the plaintiff below refused, without any excuse, to fulfil; and the law, as laid down by this and various other Courts, determines that he is entitled to no compensation.

The case of Lantry *v.* Parks, 8 Cowen, 63, is precisely like this. There the plaintiff had agreed to work for the defendant one year, at ten dollars per month. He worked ten and a half months and then left the defendant's service, saying he would work no more till he ascertained whether he could collect his wages. It was there held that the agreement was entire, and that the plaintiff could collect nothing till he had performed his part of it. The same rule is unequivocally held in the cases of McMillan *v.* Vanderlip, 12 Johns. 165; Jennings *v.* Camp, 13 do., 24; Spain *v.* Arnott, 2 Stark., 256; De Camp *v.* Stevens, 4 Blackf. 24; Ripley *v.* Chipman, 13 Verm., 268; Morford *v.* Mastin, 6 Monroe, 609; Thayer *v.* Wadsworth, 19 Pick. 349. Numerous other cases might be cited in support of this law, but it is unnecessary. Nor is there any hardship in this rule, as it might at first appear. It is reciprocal, for if the employer turn off the servant before the expiration of the time agreed upon, without any just cause, the latter may recover the full amount agreed upon, as if he had worked out his whole time. Posey *v.* Grath, 7 Missouri, 64.

But this is not an open question in this Court. It was the only question involved in the case of Eldridge *v.* Rowe, 2 Gilm. 98, where this Court reversed the judgment of the Circuit Court for overruling a motion for a new trial, where the

evidence showed that the party had quit the service of his employer before the expiration of the time which he had agreed to serve, although in that case the evidence showed that Eldridge had made to Rowe three propositions; *first*, that Rowe should work out his time; or *second*, got some other man to work out his time for him; or *third*, that he, Eldridge, would pay Rowe thirty dollars for what he had done and let him quit, and that Rowe should let him know on that day which he would do. Within the time allowed, Rowe sent word to Eldridge that he was not going to work for him any more, and yet this Court held that this evidence was not sufficient to authorize the jury to find that Rowe had accepted the third proposition, to quit work and accept thirty dollars for what he had done. And the jury found that the original agreement had been rescinded by mutual consent, and a new agreement substituted, which finding was approved by the Circuit Court, and yet the judgment was reversed because there was no evidence to sustain the verdict. That is certainly a much stronger case than the one before us.

The judgment is reversed with costs, and the cause remanded.

Judgment reversed.

DE MARQUIS MISNER *et al.*, appellants, *v.* ELIHU GRANGER, appellee.

Appeal from Cook.

It is a well established rule of the Common Law, that a purchaser takes property at his own risk, unless he exacts a special warranty, where there has been no fraud on the part of the vendor. To this rule, however, there are exceptions. There is an implied warranty on the part of the vendor that he has a good title to the property he sells, and where a quantity is sold by a sample, that the bulk is of as good a quality. So, also, in the case of executory contracts for the sale of personal property, in the absence of an express stipulation to that effect, the law implies that it shall be of a fair, merchantable quality and condition; and this rule holds whether there be a sample exhibited, or there is an opportunity for inspection. But, in such case, there is no implied warranty as to fineness or particular degree of quality of the article sold.

Where the manufacturer sells his own goods or wares, and nothing is said of the quality, there is an implied warranty that they are of a fair, ordinary quality according to their appearance. There is, however, a qualification to this rule, as where the article is of such a character that ordinary skill cannot ordinarily produce a good article, but success depends in a great measure on chance. Sometimes, also, the law will imply a warranty even of an extraordinary quality in the article sold, as where an article is furnished for a given, specific purpose, and not for the ordinary and general use to which such articles are applied.

In an action of *assumpsit* upon a promissory note, it was alleged in the pleas that it was given for the price of a threshing machine, bought by the defendant of the plaintiff, of which the following was the note or memorandum of the sale: "Chicago, July 12, 1843. Mr. De Marquis Misner bought of E. Granger, one threshing machine at one hundred and eighty dollars, for which he has paid forty four $44. The remaining $136, he is to give his and his brother Fletcher Misner's note. The said note is to be delivered at the time of the delivery of the machine, say about the 22d inst. The machine is to be in readiness for use at that time. Elihu Granger." It was further alleged that Granger was a machinist and carrying on that business; also, that he was a machinist, and carrying on a foundry. All the pleadings averred that, upon trial, the machine would not answer the intended purpose, &c. None of them, however, averred that Granger was the manufacturer of the machine: *Held*, that the pleas were defective for not averring a warranty, or that the party undertook and promised that the article was of the given quality.

ASSUMPSIT, in the Cook Circuit Court, brought by the appellee against the appellants, and heard before the Hon. Jesse B. Thomas, at the November term, 1847, on demurrer

to pleas, which was sustained. The defendants excepted to the decision, and pleaded the general issue, when a judgment was rendered by the Court for the amount of the note sued, with interest. The defendants then appealed.

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

N. B. JUDD, for the appellants.

1. The contract of sale, as set up in the several pleas, shows an agreement by the vendor that the machine should be in readiness for use at the time of its delivery.

If that agreement on the part of the vendor was not complied with, the damages resulting from such non-compliance, is a proper matter to be deducted from the price when a suit is brought for it. Edwards *v.* Todd, 1 Scam. 42; Nichols *v.* Ruckels, 3 do. 228; Hawks *v.* Lands, 3 Gilm. 227. Each of the pleas shows a breach of that agreement, and the defendants were entitled to damages under them.

2. No particular form of words is necessary to constitute a warranty; any representation as to any material fact which is relied upon by the parties will amount to a warranty.

On the sale of a manufactured article designed and intended for a particular purpose or use, a representation at the time of the sale, or a covenant in the bill of sale that the machine is in readiness for use, amounts to, and is, a warranty that the machine is reasonably fit to use in the business, and for the purposes for which it was intended and sold.

The machine, it is alleged in the plea, was purchased for a particular purpose.

There was a representation and agreement by the vendor that the article sold was in readiness for use.

Each of the pleas alleges that such was not the fact, and shows wherein the defects consisted, one of them alleging that the material and workmanship were both so bad that the machine entirely failed to be in readiness for use.

The defendants were not bound to call the agreement or representations a warranty; they were only bound to plead the

facts, and it is for the Court to say whether the facts constitute a warranty.

The pleas then show an express warranty and a breach of it, and were, therefore, a good defence.

3. On the sale of manufactured articles, there is an implied warranty that the article sold is reasonably fit for the purpose for which it was sold and intended to be used. Gray *v.* Cox, 4 B. & C. 108; Jones *v.* Bright, 5 Bing. 533; Brown *v.* Eddington, 2 M. & G. 279.

The pleas show that this was a manufactured article and sold for a particular purpose. The agreement also shows that the vendor was the manufacturer. The bargain is made on 12th July, and the vendor agrees to have the machine in readiness for use, and deliver it on the 22d of July.

The facts pleaded bring this cause within the rule laid down in Gray *v.* Cox, and Jones *v.* Bright.

The pleas show a breach of the implied warranty that the article sold should be reasonably fit for the purposes for which it was sold.

4. The demurrer extends back and reaches the first error in pleading. The first error was in the first count of the plaintiff's declaration. In that count there is no averment as to where the cause of action accrued. It may be said that by pleading the general issue, the party is estopped from going back to the declaration. In the case of the Auburn & Owasco Canal Co. *v.* Leith, decided in the Supreme Court of New York, and reported in the Sept. No. of the Law Reporter, 1847, the whole question is discussed and the various *dicta* on that subject overruled; and it is *held*, that by demurring to a special plea, the count to which it is an answer is reached, notwithstanding the general issue may have been pleaded.

I. N. Arnold, for the appellee.

Were defendants' pleas good?

The defendants' plea sets forth a bill of sale of threshing machine from Granger to Misner, which was the consideration of the note; but they do not allege either an express nor

implied warranty, nor fraud, nor that Granger was the manufacturer of the machine, nor a return of property, or offer to return it.

It is necessary to allege and prove either fraud or express warranty. Towell *v.* Gatewood, 2 Scam. 25.

A bill of sale of tobacco, describing it as good, first rate tobacco, is no warranty, neither is the sale of a threshing machine a warranty that the machine sold is a good one. This case is conclusive on the point of express warranty. *Ib.*

Cash *v.* Giles, 14 Eng. Com. Law R. 372, is a case which not only settles the principle, but is in relation to same subject matter. The action was *assumpsit* to recover the price of a threshing machine. The Opinion is short, and is therefore quoted: "If defendant meant to insist that this threshing machine was not a good one and suitable to its intended purpose, it was his duty either to have immediately returned it, or to have given immediate notice to plaintiff to take it away. Now, instead of this, he keeps it for several years. I am clearly of opinion that as he has done so, he has waived all objections to its goodness, and is bound to pay for it."

In this case, defendants do not aver in their pleas either a return, or offer to return the machine.

In Gray *v.* Cox, 4 B. & C. 108, cited by the appellants, it was held, that the vendor was not liable, because there was neither an express warranty nor fraud. The article sold was coffee at market price, which turned out to be a poor article.

In the case of Jones *v.* Bright, 5 Bing. 533, the *narr.* averred fraud, and there was an express warranty. The vendor was a manufacturer. In this case, it was not averred that he was. In fact he was the mere seller.

It is no great presumption to suppose that the vendee knew what a threshing machine was, and whether the machine bought was a threshing machine or not.

The general doctrine, that the seller is answerable only for an express warranty and fraud, is clearly laid down in 2 Kent's Com. 478.

The case of Hart *v.* Wright, 17 Wend. 267, and Waring *v.* Mason, 18 do. 425, strongly and ably sustain the rule of *caveat emptor.*

The Opinion of the Court was delivered by

CATON, J. The subject of implied warranties on the sale of chattels has perplexed the Common Law Courts for a long time, and has been a source of many apparently contradictory decisions. The universal doctrine of the Civil Law is, that there is an implied warranty of the vendor, that the article sold is what it appears to be, and is sold for sound and of a merchantable quality;—in other words, the seller takes the risk of all defects which are not disclosed at the time of the sale.

In the case of Stuart *v.* Wilkins, Douglas, 20, Lord Mansfield held that the vendor of a horse was not responsible for any defects, unless he was guilty of a fraud or had made an express warranty. Before that time it is said by Grose, J., in Parkinson *v.* Lee, 2 East, 314, it was a current opinion, that a sound price given for a horse was tantamount to a warranty of soundness. The rule laid down by Lord Mansfield in 1778, has since been followed with great uniformity, not only by the Courts in England, but in most of the United States, where the Common Law prevails, although it appears occasionally to have been departed from in the case of a sale of slaves; and, in South Carolina, was applied for a time to sales of other property.

It may now safely be asserted as the well established rule of the Common Law, that the purchaser takes the property at his own risk, unless he exacts a special warranty, where there has been no fraud on the part of the seller. 2 Black. Com. 451; Seixis *v.* Woods, 2 Caines, 48; Swett *v.* Colgate, 1 Wend. 185; Conner *v.* Henderson, 15 Mass. 319; Hart *v.* Wright, 17 Wend. 267; Holden *v.* Dakin, 4 Johns. 421; Davis *v.* Meeker, 5 do. 354; Cunningham *v.* Speer, 13 do. 392; Thompson *v.* Ashton, 14 do. 316; Hoyt *v.* Boyle, 5 Gill & Johns. 110.

To these decisions many might be added from different States, but it is unnecessary. The law seems to be so well settled that we do not feel ourselves at liberty to inquire whether the rule of the Civil Law, or of the Common Law is the best adapted to promote the ends of justice and the good

order of society. It is probably more important that the rule which is to govern, should be definitely settled, and well known, than that either particular one should be adopted.

Like most other general rules, this has its exceptions, which appear to be pretty well settled, and are sustained by good reason.

The Common Law has always held, that there is an implied warranty on the part of the vendor that he is conveying a good title to the vendee in the sale of personal property.(*a*) Where a quantity is sold by sample, the law implies a warranty that the bulk is of as good a quality as the sample. Sands & Camp *v.* Taylor, 5 Johns. 395; Andrew *v.* Kneelan, 6 Cowen, 354; Bradford *v.* Manly, 13 Mass. 139; Gallagher *v.* Waring, 9 Wend. 20; Oneida Manufacturing Society *v.* Lawrence, 4 Cowen, 440.

So, also, in the case of executory contracts for the sale of personal property, the law implies as a part of the contract, in the absence of any express stipulation to that effect, that the property shall be of a fair merchantable quality and condition (Long *v.* Fidgeon, 1 Eng. Com. L. R. 327),(*b*) and it seems to be the same where the purchase is made without sample, or an opportunity of inspection, although, if there is no specific agreement as to the quality, no warranty is implied as to the fineness or particular degree of quality of the article sold. Gallagher *v.* Waring, 9 Wend. 28. In such cases it would seem manifestly unjust to say *caveat emptor*, when the purchaser has no opportunity of looking out for himself. If there is no fraud, and he takes the article on inspection, or with an opportunity to inspect it, he ought not to complain. In speaking of the general rule on the subject of warranties in the sale of chattels, Mr. Justice Cowen, in the case of Hart *v.* Wright, 17 Wend. 272, after stating the general rule of *caveat emptor*, says: "There are certainly exceptions but they depend on peculiar circumstances. One is the sale of provisions to be used as food for mankind. This rests on a regard to the public health (Von Brocklin *v.* Fonda, 12 Johns. 468), and I am not aware of any other case in this State, wherein a warranty of quality is engrafted on a sound

(*a*) Stow *v.* Baker, 3 Gil. R. 260, and notes.

(*b*) Babcock *v.* Trice, 18 Ill. R. 421, and notes.

price alone." I am aware that Mr. Senator Tracy, in the review of this very case, in 18 Wend. 458, in the Court of Errors, has opposed with all the force of his luminous mind this proposition, but he produces but two authorities against it (Dyer, 75, and Emerson *v.* Brighton, 10 Mass. 197), and finds himself under the necessity of joining Lord Redesdale in discrediting Blackstone, as authority generally, who has laid down the same principle. 3 Black. Com. 166. Notwithstanding the apprehensions which Mr. Tracy entertained from the progressive principle of the present age, we think the exception is founded in reason, supported by authority and required by considerations of public policy.

Again, generally, where a manufacturer sells his goods or wares, and nothing is said about the quality, he is held to warrant them to be of a fair ordinary quality, according to their appearance; as, if a manufacturer sell an axe and upon trial, it prove to be so hard as to be unfit for use, there the vendor is responsible for the defect.(*a.*) To this there may be qualifications, as where the article is of such a character that ordinary skill cannot ordinarily produce a good article, but success depends in a great manner upon chance.

Sometimes, also, the law will imply a warranty even of an extraordinary quality in the article sold, as where an article is furnished for a given, specific purpose, and not for the ordinary and general use to which such articles are applied.

In Jones *v.* Bright, 15 Eng. Com. Law R. 529, the bargain was this: A third person, who introduced the plaintiff to the defendants, said: "Mr. Jones is in want of copper for sheathing a vessel;" and one of the defendants answered: "We will supply him well." The Court says: "As there was no subsequent communication, that constituted a contract, and amounted to a warranty." And the Court in that case lays down this rule: "If a man sells generally, he undertakes that the article sold, is fit for some purpose; if he sells it for a particular purpose, he undertakes that it is fit for that particular purpose." In this case, the defendants were the manufacturers of the copper, which was selected by the plaintiff's shipwright. The declaration averred a warranty

(*a*) Archdale *v.* Moore, 19 Ill. R. 569.

of the copper which proved to be defective, and the plaintiff recovered.

In Brown *v.* Eglington, 40 Eng. Com. Law R. 371, the plaintiff had applied to the defendant for a crane rope to hoist pipes of wine. The defendant sent his foreman to examine the crane, and take an admeasurement for the rope, and then procured one Dunn to manufacture it, which proved defective, the plaintiff was allowed to recover on the ground of an implied warranty. In this case the Court say, that the defendant should be considered the manufacturer of the rope, although he employed another to make it. In Gray *v.* Cox, 10 Eng. Com. Law R. 283, the defendants were copper merchants, not manufacturers, and the Court was divided in opinion whether the law would imply a warranty from a sound price. The circumstances of this case were in all respects like those in the case of Jones *v.* Bright, except that the vendors were not the manufacturers of the copper.

I remember a case, which is not now before me, where the plaintiff applied to the defendant, who was a shipwright, to purchase a vessel for the purpose of transporting a particular kind of goods which required an unusually tight vessel, and the defendant sold him a barge, which was then nearly finished laying at his wharf, for that particular trade. I think the defendant had previously furnished the plaintiff with vessels for the same trade. On the first voyage the barge leaked so much as to damage the cargo, and the defendant was made to answer in damages on an implied warranty, that the vessel was fit for that particular trade. There the defendant was the builder of the barge.

To apply these principles to these pleas. They aver that the note, for which the suit is brought, was given for the balance of the price of a threshing machine, bought by D. Misner of the appellee, of which the following is the agreement or note of the sale:

Chicago, July 12, 1843.

Mr. De Marquis Misner bought of E. Granger one threshing machine, at one hundred and eighty dollars, for which he has paid forty four $44. The remaining $136 he is to give

his and his brother Fletcher Misner's note. The said note is to be delivered at the time of the delivery of the machine, say about the 22d inst. The machine is to be in readiness for use at that time.

(Signed) ELIHU GRANGER."

One of the pleas avers that Granger was a machinist, and carrying on said business in Chicago; and the second and third special pleas aver that he was a machinist and carrying on a foundry in Chicago. They all aver that the machine was received and the note given before it was tested, and that, upon trial, it would not answer the purpose for which it was intended and purchased. Some of the pleas set out particularly the parts that failed. One of the pleas concludes with a failure of the consideration of the note, and the others set out special damages and offer to set them off, &c.

A special demurrer was filed to these pleas assigning, 1st, no averment of express or implied warranty or fraud; 2d, no proper breach; 3d, it is not averred that Granger manufactured the machine, and the pleas are argumentative.

The demurrer was sustained to these three pleas, which presents the only question that we think it necessary to examine.

It is insisted that these pleas show an implied warranty of this threshing machine by Granger, 1st, because it is a manufactured article; 2d, because Granger was the manufacturer of the machine; and 3d, that it was furnished for a particular, special purpose.

The first proposition is true in fact, but I find no satisfactory authority showing that the conclusion drawn from it is law. In order to make out the implied warranty, it requires also that the second of the above propositions, that is that Granger was the manufacturer of the machine, should be shown. This neither of the pleas avers. One of the pleas says that he was a "machinist and carried on said business in Chicago." This is far from being an averment that his business was making threshing machines, or that he made this machine. The truth probably is, that there are but very few machinists who make threshing machines. In order to make out Granger a

manufacturer of threshing machines, we should have to reverse the rule of presumptions and intendments and raise them in favor instead of against the pleading. The same may be said of the other two pleas in this respect. They are alike, and say, "the said plaintiff being a machinist and carrying on a foundry in Chicago." We understand that there is only a portion of a threshing machine that is cast at a foundry.

Admitting that the general vendor, who is not the manufacturer of an article which he sells for a particular purpose, impliedly warrants it to answer that purpose—which we are not now prepared to say is the law—these pleas do not show such a case. They do not show that this machine was sold for any other purpose than that to which threshing machines are ordinarily and generally applied. It is not like the case of the rope which was sold for the express purpose of raising pipes of wine; or of the vessel which was sold for the purpose of transporting a particular kind of goods, where warranties were implied that they were fit for those particular uses.

For ought that appears from these pleas, Granger was a mere dealer in and not a manufacturer of the article; entirely ignorant of the defects complained of, and that it was received by Misner after an inspection of it, when he had as good a chance to judge of its quality as Granger had. In such case the Common Law says, "look out for yourself."

But these pleas are defective in form. Instead of pleading the evidence in the case from which the party supposed the law would imply a warranty, he should have averred the warranty at once, or at least that the party undertook and promised that the article was of the given quality, and not have contented himself with setting forth the evidence by which he intended to prove the warranty. Mr. Gould, in his work on Pleading, page 59, § 19, says: "there is indeed no such thing as an implied promise in pleading, or rather, the fact of its being implied appears only in evidence, and never upon the record." Were it otherwise, pleadings would soon become as voluminous as depositions. As well might a plaintiff declare on an account for goods sold, &c. and omit the averment of a promise to pay by the defendant. Ordi-

narily that is but an implied promise, and yet it would hardly be contended that a declaration would be good without averring a promise to pay. In all of the cases of implied warranty which I have examined, the pleadings show directly, either that the party warranted, or that he undertook and promised that the article was of the particular quality.(*a*)

The demurrer was properly sustained, and the judgment of the Circuit Court is affirmed with costs.

Judgment affirmed.

(*a*) Beers *v.* Williams, 16 Ill. R. 69.

LORING PICKERING, appellant, *v.* EDWARD F. PULSIFER, *et al.*, appellees.

Appeal from Putnam.

In an action of *assumpsit* upon a promissory note, against *Loring Pickering*, the declaration averred that the defendant made the note. To support the declaration, a note signed "*L. Pickering*" was introduced on the trial, which was objected to for variance, but it was read in evidence. No other testimony was offered, nor was there any averment in the declaration that the defendant, by the name of *L. Pickering*, made the note: *Held*, that it was not a substantial variance.

A judgment, which exceeds the *ad damnum* of the declaration, is erroneous. The Supreme Court, in such case, will not allow a *remittitur*, but will remand the cause to the Circuit Court to give the party an opportunity to move for leave there to amend his declaration.

ASSUMPSIT, in the Putnam Circuit Court, brought by the appellees against the appellant. The cause was tried by the Hon. John D. Caton, without the intervention of a jury, when a judgment was rendered in favor of the plaintiffs below for the sum of $202.86. The damages laid in the declararation were $191.69.

The evidence in the case is stated in the Opinion of the Court.

O. PETERS, for the appellant.

1. When the judgment is for a greater amount than the *ad damnum* of the declaration, the judgment must be re-

versed; and a *remittitur* cannot be entered for the surplus after judgment rendered, nor after error brought. 2 U. S. Dig. 3, Pl. 61.

In 3 Harris & Johns. there is a very full and masterly discussion of this subject, and the law is shown to be, that after error brought, and even after judgment rendered, and before error brought, a *remittitur* cannot be entered so as to save the error; but the judgment must be reversed notwithstanding the *remittitur*.

2. There was a variance between the proofs offered and the allegations of the declaration. The plaintiff declared against "*Loring Pickering;*" the note offered in evidence purports to be executed by "*L. Pickering.*" This is a fatal variance. It is a description of the note and the person, and it is not aided by the money counts; for these counts are against Loring Pickering, and the evidence offered under the counts, only prove that L. Pickering was indebted. 3 Peters' Dig. 259, Pl. 353; 2 Greenl. Ev. § 12; Nelson *v.* Swan, 13 Johns. 486. In the last case, proof was offered of the identity of the person. Bryden *v.* Hastings, 17 Pick. 200; Stevens *v.* Stebbins, 3 Scam. 25.

The Court cannot know that "L." means "Loring" rather than "Lovell," or "Lucifer." Peyton *v.* Tappan, 1 Scam. 388; Longley *v.* Norvell, *ib.* 389.

Our statute, requiring parties to deny under oath the execution of instruments, does not apply to cases like this. This has been expressly decided by this Court.

The instrument produced is not the one declared on, the contract attempted to be proved is not the one described in the declaration. Defendant need not deny the contract or instrument declared on, but may require them to produce it as the plaintiffs have described it.

The case in 2 Gilm. 377, does not militate against this case.

H. O. Merriman, for the appellee.

In this case, there is no sufficient assignment of errors to raise the question of the excess of damages above the *ad damnum* of the declaration. It should be specifically assigned, or this Court will not review it. 2 Tidd's Pr. 1169.

There was no motion in arrest of judgment in the Court below, nor any proceeding that could have brought the record in review before the Court below, and this Court ought not to notice errors in the record, which might have been taken advantage of in the Court below, and while the record was in a position that an amendment could be allowed, when from the record, it appears that the Court below could not have reviewed the record. Such errors should be considered as waived. Beakman *v.* Frost, 18 Johns. 558; Bank of Utica *v.* Smeeds, 3 Cowen, 684; Bell *v.* Bruen, 1 Howard's (U. S.) R. 187; Alexander *v.* Hayden, 2 Missouri, 211; Stephens *v.* Sweeney, 2 Gilm. 377. The statute evinces an intention of the Legislature, that exceptions shall not be made here when suffered to pass unnoticed below. Rev. Stat. 416, §§ 22, 23, &c.

This error could not have been before the Court on the motion for a new trial, as the only ground of the motion, as stated in the bill of exceptions, was "because the finding of the Court was against law and evidence." This only calls in review the evidence and law arising thereon, before the Court. The party should have been put to his motion for a *venire facias de novo*, because the finding was not responsive to the issue. A motion for a new trial being, strictly speaking, for matter not on the record.

As to the supposed variance, see Linn *v.* Buckingham, 1 Scam. 451; Greathouse *v.* Kipp, 3 do. 371. These cases are conclusive on the subject of variance.

This Court can render such a judgment as the Court below should have rendered.

The opinion of the Court was delivered by

PURPLE, J*. The declaration in this case was in *assumpsit* upon a promissory note, executed by appellant, payable to James Packingham, and by him assigned to appellees. The count upon the note contains no averment that appellant,

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

by the name of "L. Pickering," made the note. The damages claimed are $191.69. Plea *non assumpsit*. The cause was submitted to the Court for trial. The Court found the issue for the appellees, and assessed their damages at $202.86.

From the bill of exceptions, it appears that the appellees on the trial in the Circuit Court, offered in evidence the following note:

"$185.69. For value received, I promise to pay James Packingham or order, the sum of one hundred and eighty-five dollars and sixty-nine cents, on demand with interest.

L. PICKERING."

indorsed, " James Packingham."

Appellant objected to the introduction of the note. The Court overruled the objection, and the appellant excepted.

After the damages had been assessed by the Court, the appellant moved for a new trial, because the finding of the Court was against law and and evidence, which motion was overruled, and appellant excepted.

The errors relied on are, the admission of the note in evidence; the overruling the motion for a new trial; and the rendition of judgment upon the finding of the Court against the appellant.

One point made on the argument is, that there is a variance between the note declared on and the one offered in evidence by the plaintiff. The Court is of opinion that there is no substantial variance. We may admit that strictly and technically the defendant "Loring Pickering," and "L. Pickering," may not necessarily be the same person. Yet, on the other hand, they may be the same; and if it shall in any manner appear, either by proof or by implication of law, that "Loring Pickering" did make the note, then it cannot be denied that the allegation and the evidence correspond. "Loring Pickering" is sued. He appears and pleads *non assumpsit*. The note is produced, signed "L. Pickering," and he does not, under our statute, verify his plea by affidavit; and consequently, as we think, does not "deny on the trial" the execution of the note by himself.

Upon this precise point, we have been able to find but little authority.

In Chitty on Bills, 560, it is said that when a promissory note was signed for Bowes, Hodgsons, Key & Co.," and they were sued, and one of them was declared against by the name of Thomas Key, whose real name was John Key, it was held to be no misnomer, it being proved that the real partner had been sued and served with process, and cites 16 East, 110.

On p. 626–7, of Chitty on Bills, it is held, that it will not be necessary to prove that the defendants were of the christian names stated in the declaration.

In a case entitled Hodenpyl *v.* Vingerhoed, and another, tried before Abbott, C. J., 3 July, 1818, the action was on a note drawn to the plaintiff and subscribed by the firm of "Vingerhoed & Christian." The declaration stated several Christian names of each defendant. A witness swore that he knew the firm of "Vingerhoed & Christian," and that there were two persons of those surnames in the firm; but that he did not know their christian names; and that in a conversation with Vingerhoed, he admitted that the note was subscribed by him in the name of the firm. This was held sufficient to establish the action against both defendants. Chitty on Bills, 626, note.

In an action on a promissory note against the maker, the declaration alleged that the note was made by "John C.," and the note offered in evidence was signed "J. C." Held that this was not a variance. Cantley *v.* Hopkins, 5 Stew. & Port. 58, cited in 3 U. S. Dig. 148, No. 274. The case of Vance *v.* Funk, 2 Scam. 263 affirms the same doctrine.

These authorities appear to be in point, and none have been found or referred to, which, when this precise question has been raised, are in conflict with them.

Although the decision of this question was not absolutely necessary to the determination of this case, yet, as it and similar ones must frequently arise in practice upon the Circuit, it was considered important that it should be settled.

The judgment of this case however must be reversed, for the reason that the finding and judgment of the Court exceeds the

damages claimed in the declaration. This is matter of substance, it being apparent from the record that the Court could not legally render such a judgment. Although this Court have not held that they have not the power to allow a *remittitur* to be entered here, yet it has heretofore declined to adopt the practice. Chenot *v.* Lefevre, 3 Gilm. 643.(*a*)

The proper judgment cannot be entered here, unless the Court indirectly do that which it has refused to do directly; that is, unless it should enter up a judgment for the amount claimed in the declaration, which would virtually amount to a *remittitur* by the appellees. From the evidence presented in the record the proper judgment, so far as the amount is concerned, was entered by the Circuit Court. But this was unwarranted by the declaration. Before the proper judgment can be entered, the appellees must apply to the Circuit Court for leave to amend their declaration; or if the cause is tried there without such amendment, and the damages assessed shall exceed the *ad damnum* in the declaration, they must remit the excess in that Court.(*b*)

The judgment of the Circuit Court is reversed at costs of appellees, and the cause remanded to that Court for further proceedings.*

Judgment reversed.

(*a*) Dowling *v.* Stuart, 3 Scam. R. 195; Fornier *v.* Faggott, 3 Scam. R. 350; but see U. S. Bank *v.* Ashley, 2 Pet. U. S. R. 329; Schneider *v.* Seeley, 40 Ill. R. 259.

(*b*) Stephens *v.* Sweeney, 2 Gil. R. 377; Pierson *v.* Finney, 37 Ill. R. 30.

*Justices THOMAS and KOERNER concurred in the reversal, but not, in all respects, in the Opinion of the Court.

SAMUEL WOODFORD, plaintiff in error, *v.* ELIJAH MCCLENAHAN, JUN., defendant in error.

Error to Stark.

In an action of *assumpsit* upon a promissory note given for a clock, written evidence of a warranty was offered, signed by one claiming to be the agent of the owners, thus: "W. H. Haywood, for Bishop Higley & Co." The plaintiff objected to the evidence, when the defendant called a witness, who testified that he had purchased a clock, given a note and received a similar warranty from a person of the name aforesaid; that he never saw him write his name but once, and from his knowledge of the handwriting, thus acquired, he believed it to be his handwriting; and that he stated to witness at the time that he was selling clocks for that firm. The instrument was then read to the jury, the plaintiff still objecting: *Held*, that the evidence was proper to go to the jury.

Private writings may be proved, *first*, by a witness who has seen letters or documents purporting to be in the handwriting of the party, and, afterwards, has personally communicated with him respecting them, or has acted upon them, the party having known and acquiesced in such acts; and *second*, by one who has seen the party write, although he has seen him write but once.

It is a well settled principle of law, that an agent, while acting within the legitimate sphere of his authority, can bind his principal, and do whatever is necessary to carry out and perfect the business of the agency. So, where one sold, as the agent of others, a clock, received a note for the payment,—which note was received and negotiated by them,—and gave a written warranty, it was held, that, nothing appearing to the contrary, his acts were within the scope of his authority.

Assumpsit, in the Stark Circuit Court, originally brought by the appellant against the appellee, before a justice of the peace, where the cause was tried by a jury, who found for the defendant. The plaintiff appealed to the Circuit Court, and at the October term, 1845, the Hon. John D. Caton presiding, the cause was again submitted to a jury with a similar result.

The evidence is fully stated in the Opinion of the Court.

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

J. MANNING, for the plaintiff in error.

It is sufficiently well settled, that a witness, having seen a person write once, may be called to give his opinion as to

the handwriting of that person; but this pre-supposes that he knows this person to be the same person whose handwriting is to be proved; that is, in all such cases, there is a question of identity. This identity, it is necessary to prove. 1 Greenl. Ev. 644, § 575, and cases there cited. Now, in this case, there was no evidence of this identity. The witness had seen a man, who called himself Haywood, write once. And there is no evidence that this person, who called himself Haywood, was the person whose handwriting it was proposed to prove.

There is no legal evidence as to the name. The declarations of Haywood, admitting he was an agent of Bishop Higley & Co. at another time than the time when the contract was made with McClenahan, were not evidence against the plaintiff. So the proper evidence is this: The witness saw a man write his name W. H. Haywood, and thereupon, it is attempted to charge the plaintiff with the acts and contracts of a person who signs his name W. H. Haywood.

This evidence is insufficient to warrant the introduction of this writing in evidence. For this error in permitting this writing to be read to the jury without further proof of the agency and handwriting of Haywood, the case should be reversed.

C. K. Harvey, for the defendant in error.

The only questions in this case are, 1. Is there sufficient evidence of the handwriting of the agent Haywood? 2. Is there evidence of Haywood's agency?

The bill of exceptions does not profess to contain all the evidence, but the handwriting was proved by a witness (Wall) who had seen Haywood write. This is sufficient. 1 Greenl. Ev. 646, § 577.

This is evidence of Haywood's agency. It was proved that Haywood sold to Wall a clock, as the agent of Bishop Higley & Co., and gave a warranty like the one given to the defendant; that at the time he (Haywood) was peddling or selling clocks for Bishop Highley & Co., and that about this time the defendant bought the clock in controversy.

A power to sell includes a power to warrant. Story's Agency, 59; Hunter *v.* Jameson, 6 Iredell, 252.

The possession of the clock was sufficient evidence of a power to sell, even if there had been no direct evidence (Story's Agency, 84, § 93), even where the agent swore he had no such power. Andrew *v.* Kneeland, 6 Cowan, 354; 2 Greenl. Ev. 48.

The note given on the sale of the clock and the guaranty given at the same time, constitute one contract. Bishop Higley & Co. cannot repudiate a part of this contract and affirm the residue. They cannot affirm the note and repudiate the guaranty. Story on Agency, 245, § 250; also, page 252.

The Opinion of the Court was delivered by

Denning, J. This was a suit originally instituted before a justice of the peace of Stark county by Samuel Woodford, assignee of Bishop Higley & Co., against Elijah McClenahan on a sealed instrument. The case was tried by a jury in the justice's court, who gave a verdict for the defendant, from which Woodford took an appeal to the Circuit Court of said county.

At the October term of the Stark Circuit Court, 1845, the case was again submitted to a jury, and they returned a verdict in favor of the defendant, upon which judgment was entered, and the plaintiff brings the case to this Court by writ of error.

The bill of exceptions herein shows, that upon the trial of the cause, the plaintiff, to maintain the issue on his part, read in evidence to the jury a note, as follows:

"$30. On or before the 25th day of December 1842, I promise to pay Bishop Higley & Co. or bearer thirty dollars without defalcation or discount for value received with — per cent interest, witness my hand and seal this 4th day of August 1841 Stark County Illinois.

Elijah McClenahan. Seal."

on which was the following indorsement, to-wit, "We assign the within note to Samuel Woodford for value recd Nov. 20th 1842.

Bishop Higley & Co."

There was a further indorsement of a credit of six dollars and fifty cents on the note, and upon this evidence the plaintiff rested his case.

The defendant then offered to read in evidence to the jury an instrument of writing, purporting to be a warranty, signed by W. H. Haywood for Bishop Higley & Co., as follows, to-wit: "This certifies that I this day sold a clock to Elijah McClenahan which I insure to run, and keep good for twelve months with proper care, in default thereof I agree to make it by repairing, or put another in its place witness my hand and seal this 4th day of August 1841 Stark County Illinois.

W. H. Haywood for
Bishop Higley & Co."

To the reading of which, as evidence to the jury, the plaintiff objected. The defendant then proved that Dexter Wall, a witness sworn on the trial, that he bought a clock of Bishop Higley & Co., by W. H. Haywood, or a man who went by that name, about the same time that the defendant bought the clock in controversy; and that he (witness) gave a note like the one sued on, and that Haywood gave him a warranty like the one above set forth; that witness saw Haywood write the warranty he received; that he saw him write but that one time; that, from the knowledge of the handwriting of Haywood, he thought that the signature thereto was the handwriting of Haywood; that Haywood stated to witness at the time, that he was selling or peddling clocks for Bishop Higley & Co. The plaintiff again objected to the introduction of the warranty as evidence before the jury, but the Court overruled the objection, and the instrument was read to the jury. To the decision of the Court in overruling of the objection, the plaintiff excepted.

There was some other testimony tending to show that the clock did not keep correct time, &c. But the bill of exceptions does not profess to contain all the evidence in the case.

There are several errors assigned, but we deem it unnecessary to notice but two of them, as they embrace all the others.

It is contended, *first*, that the Court erred in permitting the instrument purporting to be a warranty, to be read as evidence to the jury without further proof of the handwriting of Hay-

wood who executed it. Wall, a witness called by the defendant, testified that he had purchased a clock from W. H. Haywood, as the agent of Bishop Higley & Co., and gave a note similar to the one given by McClenahan, and received from Haywood a warranty of the clock, of the same nature of the one received by McClenahan; that he saw Haywood write the last named warranty, but had never seen him but the one time, and, from his knowledge of Haywood's handwriting, he thought the signature to the warranty proposed to be read in evidence, was the handwriting of Haywood. At the time Haywood executed and delivered the warranty to the witness, he could have had no motive to disguise his handwriting; he was acting in the ordinary course of his business.

The law points out two modes of proving private writings in order to enable parties to use them as evidence. First, when a witness has seen letters or documents purporting to be the handwriting of the party, and having afterwards personally communicated with him respecting them; or acted upon them as his, the party having known, and acquiesced in such acts, it is sufficient to enable the witness to give evidence in relation to the handwriting of the party, to the instrument sought to be used as evidence.(*a*)

The other mode is by a witness who has seen the party write, and if the witness has seen the party write but once, he is competent to prove his handwriting. Mr. Greenleaf in his work on Evidence, vol. 1, page 646, § 577, observes: "There are two modes of acquiring this knowledge of the handwriting of another, either of which is universally admitted to be sufficient, to anable a witness to testify to its genuineness. The first is from having seen him write. It is held sufficient for this purpose, that the witness, has seen him write but once, and then only his name." It has been also held that a witness, who had seen the defendant write his name "Mr. Sapio," was competent to prove the signature to a bill signed "L. P. Sapio." Lewis *v.* Sapio, 1 Mood. & Malk. 39. It has been held in New York, that a witness who had seen a person (S. Wheeler) put the initials of his name to a paper which was at the trial in witness' possession, was

(*a*) Pate *v.* People, 3 Gil. R. 660.

competent to testify as to the signature of such person made in the same way, in attesting a will. 5 Johns. 144; 3 Wend. 102. Many other cases might be cited in support of the same point.

In the case under consideration, it was proven by Wall, that he had seen Haywood write, and he was, therefore, a competent witness to proof the handwriting of Haywood, and we think that his handwriting to the warranty given to McClenahan, was sufficiently proven by said witness to authorize it to be read to the jury.

It is contended by the plaintiff's counsel in the second place, that Haywood's authority to bind Bishop Higley & Co. is not sufficiently proven, and that, therefore, the warranty should have been excluded from the jury. It is a principle of law, well settled, that an agent while acting within the legitimate sphere of his agency, can bind his principal, and may do everything which is necessary to carry out and perfect the business of the agency. It is then necessary to inquire whether or not Haywood was the agent of Bishop Higley & Co. The evidence shows that Haywood sold clocks in the name of Bishop Higley & Co.; that for those clocks he took notes payable to them, and that in the case under consideration, they ratified and confirmed the acts of Haywood by taking possession of the note against the defendant, and assigning it to the plaintiff, which, we think, is sufficient evidence of his agency. Story on Agency, 252, § 259. Haywood was allowed by Bishop Higley & Co. to assume the right of disposing of these clocks in the ordinary course of trade, and in their names, and strangers could only look to the acts of the parties, and were not bound by any private understanding that may have existed between them in relation to the extent of the agent's authority. We are not advised how far the agent's authority extended in this case, but we are satisfied that Haywood was the agent of Bishop Higley & Co. in the vending and selling of clocks, and that, as such agent, he had the power to warrant the clocks to run and keep good unless he was expressly prohibited from so doing by his principal. Mr. Story upon this subject re-

marks (Story's Agency 59, § 59), that, "upon the same ground, an agent, who is employed to procure a note or bill to be discounted, may, unless expressly restricted, indorse it in the name of his emyloyer, and bind him by that indorsement; for he may well be deemed as incidentally clothed with this authority, as a means to effectuate the discount. So, a servant, entrusted to sell a horse is clothed by implication (unless expressly forbidden), to make a warranty on the sale, &c." And again, at page 91, he remarks: "upon a similar ground of incidental authority by operation of law, an authority to buy or sell goods includes the authority to execute the proper vouchers therefor; an authority "to do the needful" in respect to the fulfilment of an award carries the incidental power to prepare a release, if required by the award; an authority to superintend the building of a meeting-house, to procure an architect, and to borrow money, if necessary, includes an authority to make the necessary contracts for the building of the meeting-house; an authority to sell a horse includes a power to warrant him; a power to sell goods includes a power to warrant them." &c. It is, then not shown in this case that Haywood was prohibited from warranting the clock; he did make the warranty in question; and Bishop Higley & Co. have ratified the act by accepting the note given for the clock warranted, and consequently are bound by it. Hence, there was sufficient evidence of Haywood's authority to make the warranty, and the Court decided properly in permitting it to be read to the jury.

We are unable to see anything in the errors that have been assigned in this cause which would require its reversal. The judgment of the Court below is therefore affirmed with costs.

Judgment affirmed.

HOSEA B. THROOP *et al.*, appellants, v. REUBEN R. SHERWOOD, appellee.

Appeal from Lake.

It is a well settled principle, that while a contract continues executory, the plaintiff must declare specially; but when it has been fully performed on his part, and nothing remains to be done under it but the payment of the compensation in money by the defendant, which is nothing more than the law will imply against him, the plaintiff may declare specially on the original contract, or generally in *indebitatus assumpsit*, at his election.

In an action upon an account stated, the original form or evidence of the debt is unimportant, for the stating of the account changes the character of the cause of action, and is in the nature of a new undertaking. The action is founded, not upon the original contract, but upon the promise to pay the balance ascertained.

ASSUMPSIT, in the Lake Circuit Court, brought by the appellee against the appellants, and heard before the Hon. Jesse B. Thomas and a jury, at the August special term, 1847, when a verdict and judgment were rendered in favor of the plaintiff below for $255.

The case was submitted in this Court upon the written arguments of counsel.

The facts will appear in the arguments and the Opinion of the Court.

I. N. ARNOLD, for the appellants.

This was an action of *assumpsit* for work and labor, &c., the declaration being on the common counts only, a special count having been demurred to and demurrer sustained. The plea was *non-assumpsit*. The evidence showed that Sherwood, the plaintiff, built a bridge over Fox river. The work was done under a written contract executed by Thomas, Macomber and Throop, three of the defendants, but not by Brink, one of the defendants. The contract was so far modified by parol as to require the bridge to be longer, and to add more ties, but in other respects made the same. The bridge was finished in November, 1846, when, on giving an

indemnifying bond, all the money was to become due, except $200, to be paid in November, 1847. There was a clause in the written contract requiring the plaintiff to warrant the bridge, to remain a good bridge three years, &c. To do this, the plaintiff was to give a bond, &c. The defendants were all elected a bridge committee, and agreed to act as such. Only the three persons above named signed the contract, under which the work was done. The action is not on the contract, but for work, labor, &c. The evidence showed that Thomas and Macomber, two of the defendants, accepted the bridge, but that Throop and Brink did not. The defendant introduced the written contract in evidence to show that the work was done under it, and that only three of the defendants signed it. There was a judgment against all of the defendants for $255. A motion for a new trial was made and overruled, and exceptions taken. The appellants assign the following errors:

The motion for a new trial ought to have been granted.

First. Because, to enable the plaintiff to recover under the common counts, he must show an acceptance of the work by all the contracting parties. He fails to do this as to Brink and Throop. They never accepted the bridge, but always objected. 1 Chitty's Pl. 50; 3 Gilm. 419; Tolman *v.* Spaulding, 3 Scam. 14; Wells *v.* Reynolds, *ib.* 191.

Second. The work was done under a written contract, executed by Throop, Macomber and Thomas. The money earned became their debt. Brink was not personally interested, and therefore he can only be rendered liable by an undertaking in writing under the Statute of Frauds. 2 Selwyn N. P. 58; 6 Pick. 509; 2 Term R. 80; Robertson *v.* March, 3 Scam. 200.

Third. There is no evidence of any promise or personal undertaking on the part of Brink, nothing to show any personal liability on his part. Whatever directions Brink gave, was as a committee man. 1 Chitty's Pl. 44.

Fourth. The work being done under a written contract, which remained in full force, the declaration should have been on it, and the party could only recover under it. 10

Mass. 287; 18 Johns. 269, 451; 2 Greenl. Ev. 78, 79, 80, §§ 103, 104; 2 Gilm. 92.

For these reasons the Court ought to have granted a new trial.

B. S. Morris and J. J. Brown, for the appellees.

The appellants' attorney has stated the pleadings correctly, but not the substance of the evidence; therefore it is necessary to re-state it.

He says: "The evidence shows that Sherwood built a bridge over Fox River;" and we say it further shows that it was built "for Throop, Thomas, Macomber and Brink (all the appellants), at their request," at the price of "$790;" and when built "they settled with him for it, and struck a balance in his favor of $257 due then, and $200 more, payable 1st November, 1847, then next.

The appellants next say: The work was done under a written contract executed by three only, and not by Brink." This is not strictly true, for the evidence shows all four of them were appointed a committee at a public meeting of the people, to carry into effect the object of the meeting; they were all present and accepted of their appointment, and all of them made the agreement with Sherwood to build "for them" the bridge, upon the terms and plan named, which were afterwards reduced to writing and was signed by three of them only, who were then present. Brink not being present then, did not sign it, but his name was inserted in the body of the writing, and he afterwards accepted it and acted with the others under it. The work was commenced under it, when by a parol agreement of all (including Brink) the parties, the plan was changed, and the bridge was so built and finished under this parol change, in November, 1846, when a settlement was made by Sherwood with Brink and the other three. A balance was struck in favor of Sherwood of $257, then due, and $200 more 1st November, 1847. For these sums, the committee (including Brink) made their two notes, and put them in Throop's hands to be delivered to Sherwood when he should sign, and get his securities to sign

a bond payable to said committee, warranting the bridge to stand three years, &c. Sherwood signed the bond, and so did his securities, and presented it to Throop and demanded the notes. Throop refused to let him have them, saying the condition of the bond did not please him. Thomas said the bond was all right; he took it and said Throop should accept it; the other two wrote. Macomber and Brink wrote the bond and were satisfied with it. Throop still refusing, Sherwood sued all. Such is the attitude in which these appellants appear by the evidence, by the conduct of the defendant, Throop. The only objection to giving up the notes and paying over the money, was the simple fact that the condition of Sherwood's bond did not please him. We would remark here that Sherwood was not required by any written or parol agreement to execute any bond and security. He did this merely to oblige them, and to obviate any objection made to an amicable settlement of the matter.

Such being the substance of the evidence, the appellants contend that they ought to have a new trial; because,

I. "To enable Sherwood to recover on the common counts he must show an acceptance by all the contracting parties." "This," he says, "is not done." Acceptance of what? The bridge, undoubtedly. If a contract made by four of the committee, superintending the work to completion by them, settled for by them and notes made for it by all of them after the work is done, and admitted by three of them to have been accepted by all of them, and part payment made by all of them, and agreed by all when Sherwood's bond was given to them, the notes should be given up to him, is not conclusive evidence of an acceptance of the bridge, we would like gentlemen to give us a sample of what is required. To say the least, the above facts were sufficient for the jury to infer acceptance. There is no doubt we must show them jointly liable.

But it is not necessary to prove an express assent; jury may infer from his knowledge of the plaintiff's accounts, and his silent acquiescence. 2 Greenl. Ev. § 108.

So if he adopt the contract. *Ib.* § 114.

So, evidence under the count on an account stated, is only necessary to show a demand assented to. *Ib.* §126.

So, if the agreement be performed, and there be an actual accounting and a promise, express or implied, to pay, it is sufficient. Need not prove items, for the action is not founded on these, but upon the defendant's consent to the balance struck. 2 Greenl. Ev. § 127; 22 Wend. 576; 7 Cranch, 299; 6 Wend. 649.

The second, third, fourth and fifth reasons assigned for reversing this judgment, are not well taken.

1. Because the work was not done under and in pursuance of the writing signed by the three appellants;

2. And if it was so done, and Brink recognized or adopted the joint contract of the committee, and that his name was inserted in the body of the writing as one of the committee by his assent, and that he treated the contract as binding upon him, then he is jointly liable with the others for the work done under it;

3. Or, if it is true the written stipulations were changed by agreement with Brink and the other three, and the work was done under this new agreement, then they were all four jointly liable;

4. Or, if the jury believed (as they did) that all four of them employed Sherwood to build the bridge, and on settlement with them a balance was struck against all of them by their consent, then they are all jointly liable. See 2 Greenl. Ev. §§ 127, 126; 10 Johns. 36; 6 Wend. 649; 14 Johns. 330; 3 Monroe, 405; 4 do. 536; 13 Wend. 276; 5 Gill & Johns. 239; 14 Wend. 476; 9 Pick. 298.

Indebitatus assumpsit will lie (on a special agreement), on the performance of the contract. 1 Wheat. Selw. 73, and notes.

It lies where a special contract has been performed. 7 Peters, 541; 11 Wend. 474; 3 Monroe, 405.

The original form or evidence of debt is of no importance under the count on an account stated; for the stating of the account alters the nature of the debt, and is in the nature of a new promise or undertaking. 2 Greenl. Ev. §§ 127, 104, 126.

A committee appointed at a meeting to carry into effect the object of that meeting, are responsible to the workmen for the labor performed by them. 6 Wend. 649.

The Opinion of the Court was delivered by

TREAT, J. This action was commenced in the McHenry Circuit Court by Sherwood, the appellee, against Thomas, Macomber, Throop and Brink, the appellants.

The declaration was in *assumpsit* for work and labor done, and upon an account stated. Plea, *non-assumpsit*, verdict for the appellee, $256. The Court overruled an application for a new trial, and rendered judgment on the verdict.

The refusal of the Circuit Court to grant a new trial is assigned for error. The testimony is somewhat voluminous but, in the opinion of this Court, establishes this state of facts: At a meeting of citizens of McHenry county, the appellants were appointed a committee to contract for and superintend the construction of a bridge across Fox river, and they agreed to act as such. They employed Sherwood to erect the bridge for $790, of which amount $590 was to be paid by November, 1846, and the balance in one year thereafter, and Sherwood was to finish the bridge by November, 1846, and warrant it to stand for three years. The agreement was reduced to writing, and signed by Sherwood and all of the appellants but Brink. His name was inserted in the contract as one of the contracting parties, but he was not present at its execution, and never signed it. He, however, acted with the other appellants in making the original agreement, and in superintending the work up to its completion. The bridge was commenced under the written contract, but, by the parol agreement of the parties, the plan was changed in several particulars. On the completion of the bridge in November, 1846, a settlement took place between the parties, and there was found to be then due Sherwood $256, and to become due in one year thereafter $200, for which amounts notes were signed by the appellants, and placed in the hands of Throop, to be delivered to Sherwood when he should execute a bond

warranting the bridge to stand for three years. The bond was then drawn and the sureties agreed on. This bond, signed by Sherwood and the sureties, was tendered to Throop and the notes demanded; but he refused to accept the bond and deliver the notes, on the ground that the bond did not contain the proper condition.

It is insisted that the appellee should have declared on the written contract, and that he cannot recover on the general counts. It is a well settled principle, that while a contract continues executory, the plaintiff must declare specially, but when it has been fully performed on his part, and nothing remains to be done under it but the payment of the compensation in money, by the defendant, which is nothing more than the law will imply against him, the plaintiff may declare specially on the original contract, or generally in *indebitatus assumpsit*, at his election. Bank of Columbia *v.* Patterson's adm'rs, 7 Cranch, 199; Canal Company *v.* Knapp, 9 Peters, 541; 2 Greenl. Ev. 104. In this case, the appellee had fully completed the contract to the satisfaction of the appellants. The only thing remaining to be done, was the payment by them of the stipulated price, and that was to be paid in money. The appellee was therefore at liberty to declare specially on the contract, or generally, using the common counts.(*a*)

It is contended that Brink is not liable jointly with the other appellants. This would be the case if the action had been brought on the special contract, and perhaps the appellee could not make him liable on the common count, for work and labor done. But the appellee was clearly entitled to recover against all of the appellants, upon an account stated, without reference to the question, who were responsible under the original contract. In an action upon an account stated, the original form or evidence of the debt is unimportant, for the stating of the account changes the character of the cause of action, and is in the nature of a new undertaking. The action is founded, not upon the original contract, but upon the promise to pay the balance ascertained. 2 Greenl. Ev. § 127; Holmes *v.* D'Camp, 1 Johns. 34; Fos-

(*a*) Tunnison *v.* Field, 21 Ill. R. 108; Elder *v.* Hood, 38 Ill. R. 536.

ter *v.* Allanson, 2 Term Rep. 479. It satisfactorily appears from the evidence that all of the appellants accepted the bridge, and undertook to pay the balance ascertained to be due, to the appellee. It may be said that the undertaking was a conditional one, but the condition was in good faith complied with by the appellee, and the appellants had no right to repudiate their promise.

The judgment of the Circuit Court is affirmed with costs.

Judgment affirmed.

ARCHIBALD HOOD, appellant, *v.* WILLIAM MOORE *et al.*, appellees.

Appeal from Washington.

A sheriff purchased of a defendant in an execution which he held in his hands for collection, certain property, and undertook to satisfy the judgment out of his own funds: *Held*, that this arrangement did not discharge the judgment, it not having been made by the direction or consent of the plaintiff in such execution. (*a*)

A sheriff is the agent of the law in the performance of his official duties, and not of the parties interested. He must follow the direction of his precept, that being his only authority. Any private arrangement between him and a debtor, without the sanction of the creditor, is illegal and not binding on the latter; and where a debtor enters into such an arrangement with a sheriff, and has parted with his property, his only remedy is against the sheriff to recover the value of the property so received by him.

BILL IN CHANCERY for an injunction, &c. in the Washington Circuit Court, filed by the appellant against William Moore, James Smith, John H. McElhanan and John N. Vernor. The case was heard on bill, answers, replications and depositions at the May term, 1847, before the Hon. Gustavus P. Koerner, when the bill was dismissed and the injunction, previously granted, dissolved.

It was alleged, that Moore recovered a judgment against the complainant in the Circuit Court aforesaid in 1842, for $545.52, and costs, upon which execution was issued in December of that year, and levied in the month of March

(*a*) Thorpe *v.* Wheeler, 23 Ill. R. 544.

1843, upon the lands of the complainant, to wit: The west half of the south east quarter, and the west half of the north east quarter of section twenty-seven (27), and the east half of the south west quarter of section twenty-six (26), all in township one (1) south, and range four (4) west. During the month next ensuing, a second execution was issued and levied upon the same lands, and in the month of January and February of the next year, a third execution was issued and levied thereon, and likewise in September of the same year, a fourth execution, when the lands were sold to James Smith for $200, who credited the same on the said judgment without paying anything to the sheriff therefor.

In January, 1845, a fifth execution was issued and subsequently levied on other lands of the complainant, to wit: The north west quarter, the south west quarter, the south east quarter of the north west quarter, the south west quarter, of the north east quarter, and the north east quarter of the south west quarter, all in section twenty-two (22), in township three (3) south, and range three (3) west, which were also sold to the said Smith for $100.

In May, of the same year, a sixth execution was issued, and in August following, levied upon still other lands of the complainant, to wit: The north east quarter of the south west quarter, and the north west quarter of the south west quarter of section thirty (30), and the north half of the north west quarter of section twenty-six (26), the west half of the north east quarter of section twenty (20), and the south east quarter of the south east quarter of section twenty-seven (27), in township three (3) south, and range four (4) west.

A seventh execution was afterwards issued and placed in the hands of John N. Vernor, the sheriff of said county, and this execution is sought to be enjoined.

The bill charged that Smith had acted throughout the proceedings as the agent of Moore; that no money passed on either of said sales to said sheriff; that on the 11th April, 1845, Hood paid and satisfied said judgment, while the sheriff had the execution, issued January 23, 1845, in his hands; that the sheriff at the time of giving the receipt was acting

under the direction of Smith, agent as aforesaid, and was by him authorized and empowered to receive payment, &c., and that, at the time of payment, Hood was ignorant that any sale of his property had taken place; that since the sale Smith had caused the sheriff's successor, Vernor, to execute a deed to him for the lands first sold, and that he claims and intends to demand a deed for the lands afterwards sold. The bill then prayed for an injunction against the execution issued, that the sales might be set aside, and for general relief.

Smith answered the bill, admitting the recovery of judgment by Moore and the issuing of executions and of sales as alleged in plaintiff's bill, but denied that he gave any order to the sheriff to return any of the executions; alleged that Moore resided in South Carolina; and that he, Smith, has been Moore's agent throughout the proceedings of the case; admits that no money passed from him to the sheriff on said sales; that he caused the last execution to issue, &c., and says that he does not admit or believe that Hood paid the judgment as alleged by him; does not know that the sheriff executed said receipt, or while he had the execution in his hands; denies that he ever gave the sheriff any authority to give said receipt, or any authority in reference to said claim; insists that Hood knew of, and permitted said sales of said land; admits that he has received a deed for the land sold at the first sheriff's sale, and intended to claim a deed for the land sold at the second sale; alleged that he believed there was some kind of an understanding between Hood and McElhanan, that McElhanan should take property from Hood and redeem said lands or settle said debt for him, but denies that he, Smith, was a party to said arrangement, if any such there was; that he, Smith, purchased the land in good faith and accounted to Moore for the amount by him bid, and the only amount of money ever paid by said McElhanan on said execution was $26.34.

The bill was taken for confessed as to Moore and Vernor.

McElhanan answered the bill, admitting whatever Smith ad-

mitted, and denied what he denied; denied further, that he received the amount set out in his receipt or any other amount; but states that in the year 1843, he bought land of Hood, and in 1844, sold the land to B. D. Hunter, and that he, McElhanan, gave receipts to complainant covering the whole amount of the judgment; and the amount of the receipts was to be in part payment of the said lands, and the deed to be made to Hunter, but Smith knew nothing of the receipts until 1845, when Smith gave him, McElhanan, notice in writing of his intention to apply to the Judge of said Circuit Court, for a rule against him to show cause, &c., why he had not paid over the money he had collected, &c. After said notice he went to complainant, took back the three receipts, and gave the one receipt in question, with the agreement that he was to sell the remaining lands levied upon, and redeem the same for complainant.

The following is the substance of the depositions taken in the case:

Robert T. Harris, for the complainant, testified, that he was deputy sheriff for McElhanan, from September, 1844, to September, 1845; that McElhanan told him, witness, after his return from the south, that Smith had agreed to wait with him, until he, McElhanan, had returned from the south with horses, and also, that he intended to make witness acquainted with the arrangement before he started south, so that witness would not have gone on with the execution against Hood, but entirely forgot it; that Smith told witness that a man had been at his mother's, and left word, that he, Smith, had better attach McElhanan's horses before he left with them; that Smith said he still believed McElhanan would settle the demand when he returned home if he had good luck. Harris also proved the handwriting of McElhanan to a letter to Mr. Bond, one of complainant's attorneys, in relation to this case. In this letter, McElhanan said: "I understand that they are trying to make it out all fraud between Hood and myself. I received full payment from Hood as my receipt will show. I sold the pay I received from Hood for horses.

Smith agreed to wait till I returned from the south, and it was to be applied to the executions. This was a contract between Smith and myself.

JOHN H. MCELHANAN."

On cross-examination Harris stated that when he went with an execution to complainant, he asked witness if McElhanan had not informed him of the arrangement made with McElhanan, and then produced McElhanan's receipts, as many as three, for about the amount due; that the receipts were of different dates; that McElhanan told witness he got horses from complainant, and gave those receipts against the execution, and when he returned from the south he would then pay off those executions. On re-examination he stated, that complainant told him in the conversation before referred to, that he had paid off the judgment. The handwriting of McElhanan was proved by another witness.

Gabriel S. Jones testified, that McElhanan told him that complainant had paid him the full amount of the said execution, and he had given him a receipt; that he, McElhanan, had seen Smith, and Smith was satisfied and agreed to wait till he, McElhanan, came back from the south to pay the money over to him, Smith. He also proved the handwriting of McElhanan to the receipt in question, mentioned in the bill.

Robert Walker also testified to the handwriting of McElhanan to the receipt; that before McElhanan went south, he said that Smith had agreed to wait upon him for the money till he could make it out of horses; that at various times, he told witness that complainant had made payments for which he had given receipts and afterwards, that he had paid him in full, and that he, McElhanan, had taken up the small receipts and given a receipt in full. On cross-examination, he stated that McElhanan went south in the fall of 1844; that he never heard McElhanan say he got horses of complainant; that he got horses from Hunter, but does not know on what account; thinks it was just before McElhanan went south, that he stated the judgment had been settled.

T. H. Calloway testified, that McElhanan told him that

complainant had paid the execution in horses with Smith's assent, to be accounted for on his return from the south; that he could not say whether it was Smith's assent to the receipt, or his assent to await McElhanan's return from the south; and that this occurred before McElhanan went south.

The following is the substance of the defendant's depositions.

James Burns testified, that he had heard complainant say In the presence of S. Goodner, that he had McElhanan's receipt in full, and had paid him off and let him have some horses; that he did not recollect with what he said he had paid him off, only the horses; said that he had let him have some horses; that his understanding was, that McElhanan was to pay of Smith, the agent of Moore, with the sale of the horses in complainant's place; that the horses were not sold on execution at public sale, and did not know what became of them, or whether the horses were levied on or not. On cross-examination he stated, that he understood from complainant in the conversation, that he had paid off the execution to McElhanan as sheriff, that he complained of their selling his land after he had paid the judgment.

Salem Goodner stated that complainant remarked that he had been treated very wrong by McElhanan; that he had paid every dollar of that execution off; that he had let him have horses and property; that McElhanan promised to redeem the lands sold; that he understood the property was taken by private arrangement, and McElhanan was to pay off the execution; that he, Goodner, was a security on the bond of McElhanan as sheriff. Exception to the deposition of Goodner on the ground of interest was taken, which was overruled.

The appellant assigned for error:

1. The Court erred in overruling the exception to the deposition of Salem Goodner;

2. In dissolving the injunction and dismissing the bill;

3. In not setting aside the sale of the land by the sheriff; and

4. In not making the injunction perpetual.

W. H. UNDERWOOD, for the appellant.

1. An execution authorizes the officers to take the property of the defendant therein to satisfy the same. The word levy means to take under a *fi. fa.* After personal property is taken, the judgment is discharged until the same is disposed of and found insufficient, and the judgment creditor cannot proceed against other property, even if the officer squanders the property levied on. Gregory *v.* Stark, 3 Scam. 612; Hoyt *v.* Hudson, 12 Johns. 207; Ladd *v.* Blunt, 4 Mass. 403. When the defendant in execution has turned out to the officer his personal property, he does all the law requires of him, and if the officer converts or disposes of the same contrary to law, the plaintiff in execution has his remedy against the officer. Armstrong *v.* Garrow, 6 Cowen, 467.

The cases cited by the attorney for appellee are where the officer took promissory notes, or effects not liable to execution, and therefore cannot be regarded as properly turned out by the judgment debtor, and which the officer had no right to take on execution.(*a*)

2. The answer of McElhanan, that he took land in discharge of the execution, is impeached by his own confessions. by his receipt and by Goodner and Burns, the witnesses of Smith.

3. The answer of Smith does not pretend to deny positively the payment of the judgment to the sheriff, nor the giving of the receipt. This only threw the *onus* on complainant of proving the payment of the money by the one witness. Clark's Ex'rs. *v.* Van Riemsdyck, 3 Cowen, 325–6; 4 Bibb, 357; 6 Har. & Johns. 292; 3 Barb. & Har. Dig. 386, §§ 22, 27, 43; *ib.* 388, §§ 5, 8. The receipt established this fact, and is not outweighed by the loose and unsatisfactory testimony of Smith's witnesses, contradicted as it is by the fact that Smith was about proceeding against the sheriff, for failing to pay over the money collected, and by his remark that he believed the sheriff would pay over the same on his return from the south.

(*a*) Van Ness *v.* Hyatt, 13 Pet. U. S. R. 294.

L. TRUMBULL, for the defendants in error.

A sheriff has no right to receive anything except money, gold and silver coin, in payment of an execution, and if he do so, and return the execution satisfied, the plaintiff is not bound by his acts, but may have the satisfaction set aside and a new execution awarded. Nor can a sheriff settle an execution, so as to bind plaintiff therein, by taking from the defendant a promissory note, and agreeing himself to pay plaintiff, nor by having a credit entered upon his note to defendant. Bank of Orange Co. *v.* Wakeman, 1 Cowen, 46; Mumford *v.* Armstrong, 4 do. 553; Armstrong *v.* Garrow, 6 do. 465; Griffin *v.* Thompson, 2 Howard's (U. S.) R. 244; Callett *v.* Alexander, 4 Howard's (Miss.) R. 404; Planter's Bank *v.* Scott, 5 do. 246.

The Opinion of the Court was delivered by

TREAT, J. The principal question in this case is, whether the amount due on the judgment was paid to the sheriff, as asserted by the complainant in his bill, and acknowledged by the sheriff in his receipt. The charge of payment is denied by both Smith and the sheriff in their answers. The latter alleges that he purchased lands of the complainant, and gave the receipt against the execution in part payment. It is apparent from the whole case that no money really passed to the sheriff; but that, in point of fact, the sheriff purchased property of the complainant, and in consideration thereof, undertook to satisfy the judgment out of his own funds. It is not shown that this arrangement was made by the direction of Smith or with his consent. Did it operate as a legal discharge of the judgment? We unhesitatingly say that it did not. A creditor has the right to require payment of his judgment in the lawful money of the country. The force and operation of an execution is to make the money out of the property of the debtor. The writ is directed to the sheriff as the agent of the law, and not as the agent of the parties; and his powers and duties under it are plain and specific. He is commanded to make the amount

of the judgment in money, and pay it over to the plaintiff. The writ is his only authority, and he is bound to execute it in the due course of law. If the money is not voluntarily paid, he must proceed and make it by the seizure and sale of the defendant's property. Any private arrangement made between the officer and the debtor, without the sanction of the creditor, is illegal, and not binding on the latter.(*a*)

A reference to a few authorities will show that such is the law. In the case of Griffin *v.* Thompson, 2 Howard's (U. S.) R. 244, where the marshal indorsed on the execution that he had received payment in bank notes, the Court refused a motion of the defendant to have satisfaction entered on the judgment, and also refused to quash a second execution issued on the judgment. In the case of the Bank of Orange County *v.* Wakeman, 1 Cowen 46, it was decided that the sheriff's taking a negotiable note for the amount of an execution in his hands, would not operate as a payment of the judgment, even though he had returned the execution satisfied, and the note was afterwards paid by the defendant to a third person, to whom it had been transferred. In Armstrong *v.* Garrow, 6 Cowen 465, where the sheriff took a promissory note in satisfaction of a *ca. sa.*, and discharged the defendant, it was held that the creditor might take out a new execution, or sue the sheriff for an escape. In Codwise *v.* Field, 9 Johns. 263, where the officer was indebted to the defendant, and gave him a receipt in full of the execution, agreeing with the defendant to pay the plaintiff, the Court decided that there was no satisfaction of the judgment. In this case, the creditor was at full liberty to charge the sheriff with the amount due on the judgment, or to disregard the receipt which had been given and procure another execution.(*a*)

It is insisted that the sales on the executions should be set aside, on the ground that several tracts of land were sold *en masse*. There is no evidence in the record that such was the fact. It is not even so charged in the bill. The defendants were not called on to answer or explain such an allegation. The presumption is, if we may presume anything

(*a*) But see Kimball *v.* Couchman, 15 Ill. R. 138; Dibble *v.* Briggs, 28 Ill. R. 48; Trumbull *v.* Nicholson, 27 Ill. R. 138.

favorable to this officer, that the sheriff performed his duty by exposing the lands for sale in separate parcels.

There is no occasion to determine whether the witness, Goodner, was incompetent on the score of interest, for laying his testimony entirely out of view, the complainant would not be entitled to the relief sought.

This may be a case of much hardship on the complainant, but he has no just cause to complain of the judgment creditor, to whose agent no wrong can be imputed. His remedy is against the sheriff to recover the value of the property received by him.(*a*)

The decree of the Circuit Court is affirmed with the costs of this writ of error.

Decree affirmed.

(*a*) But officer may, with plaintiff 's consent, sell on credit, McClusky *v.* McNeely, 3 Gil. R. 578.

MICHAEL CONNELLY *et al.*, appellants, *v.* ROBERT PIERSON, appellee.

Appeal from Jo Daviess Co. Court.

An indorsement of a partial payment on a note, made by the holder without the privity of the maker, is not, of itself and uncorroborated, sufficient evidence of payment to repel a defence created by the Statute of Limitations.

An indorsement upon a promissory note is competent evidence of payment against the payee, but he cannot introduce such evidence for the purpose of sustaining his interest.

DEBT, in the Jo Daviess County Court, brought by the appellee against the appellants, and heard before the Hon. Hugh T. Dickey and a jury, at the April special term, 1847, when a verdict was rendered for the plaintiff below for $94.38 debt, and $100.62 damages. The defendants entered a motion for a new trial and in arrest of judgment, which was overruled and judgment entered upon the verdict.

O. C. PRATT, for the appellants.

The evidence was not sufficient to warrant a verdict against the defendants below. 1 Cowen & Hill's Notes, p. 154; Rose-

boom *v.* Billington, 17 Johns. 182; Whitney *v.* Bigelow, 4 Pick. 110; Carter *v.* Gregory, 8 do. 165, 169.

C. S. HEMPSTEAD and E. B. WASHBURNE, for the appellee.

The Court below properly refused to grant a new trial. There was no objection to the evidence (which was the note sued on and the indorsement thereon) going to the jury. It was too late to object after verdict. Harmon *v.* Thornton, 2 Scam. 355.

The indorsement on the note took the case out of the Statute of Limitations. An indorsement of part payment, upon a promissory note, everything appearing fair, is admissible in evidence to the jury to take it out of the Statute, and will control, unless the defendant impeach in some way. 2 Cowen & Hill's Notes, 156; McCord, 418; 1 Greenleaf's Ev. § 121.

The Opinion of the Court was delivered by

TREAT, J*. This was an action of *debt*, commenced in May, 1846, by Robert Pierson against Michael and James Connelly. The declaration was on a promissory note, bearing date the 2d of June, 1829, and payable in six months. Plea that the cause of action did not accrue within sixteen years next before the commencement of the suit. Replication, that the cause of action did accrue within the sixteen years. On the trial before a jury, the plaintiff read in evidence a note like the one described in the declaration, on the back of which was an indorsement acknowledging the receipt of ten dollars, on the 17th of June, 1833, as a payment on the note. This was all of the evidence. The jury returned a verdict for the plaintiff for the amount of the note and interest. The Court overruled an application for a new trial, and rendered judgment on the verdict. The Connellys prosecute an appeal.

More than sixteen years having intervened between the maturity of the note and the commencement of the suit, the

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

cause of action was apparently barred by the Statute of Limitations. The plaintiff attempted to take the case out of the operation of the Statute, by proof that the makers had made a partial payment on the note within the sixteen years. The only question therefore is, did the indorsement, of itself, afford sufficient evidence of such payment. As against the payee, the indorsement would unquestionably be competent evidence of payment, on the principle that the admissions of a party may be used against him; but when introduced by him for the purpose of sustaining his interest, it would seem to be obnoxious to the objection, that the declaration of a party cannot be admitted in his favor. There is no difference between the declaration of the payee that he had received a partial payment on the note, and his written acknowledgment of such payment. The indorsement is the *ex parte* act of the payee, and is favorable to his interest; for if sustained, he thereby avoids the defence, and recovers a demand, which, without the indorsement, would clearly be barred by the lapse of time. The evidence therefore proceeds from an interested source. A rule that the mere indorsement should authorize the presumption that the payment was actually made, and at the time stated, would be inconvenient in its operation, and mischievous in its tendency. It would furnish the strongest inducements to the payee to fabricate testimony in his favor, which could not without great difficulty, if at all, be explained away by the maker. The payment is an affirmative act, much more easily established by the creditor than disproved by the debtor. In the opinion of the Court, an indorsement of a partial payment on a note, made by the holder without the privity of the maker, is not, of itself and uncorroborated, sufficient evidence of payment to repel the defence created by the Statute of Limitations. It was thus expressly decided in the cases of Roseboom *v.* Billington, 17 Johns. 182, and Whitney *v.* Bigelow, 4 Pick. 110.

The County Court erred in not granting a new trial. The judgment is reversed with costs, and the cause is remanded..

Judgment reversed.

JAMES HOLLIDAY, plaintiff in error, *v.* THE PEOPLE OF THE STATE OF ILLINOIS, defendants in error.

Error to St. Clair.

In a criminal prosecution, a motion for a new trial on the ground that the verdict was contrary to the evidence, is addressed to the discretion of the Circuit Court, and its decision thereon cannot be reviewed by the Supreme Court. (*a*)

If an indictment contains one good count, the verdict of the jury will be sustained.

On a change of venue in a criminal case, the transcript sent to the county where the case was to be tried, showed the finding of the indictment, and contained a copy thereof, as also all the proceedings. On an appeal to the Supreme Court, the record sent up, stated that the original indictment was received with the transcript. The clerk of the Circuit Court omitted to append a certificate to the transcript, that the paper transmitted therewith was the original indictment: *Held*, that this omission ought not to vitiate the proceedings.

A was indicted for procuring an abortion. He appeared, and was put upon his trial. When the jury returned into Court, he was called, but failed to answer, and the verdict was received in his absence. It found him guilty, and fixed the time of his imprisonment in the penitentiary at one month. During the same term, he appeared and entered a motion to set aside the verdict, because it was contrary to the evidence, and because it was received in his absence: *Held*, that the offence of which he was convicted, was a misdemeanor only, and that it was not erroneous to receive the verdict in his absence.

According to the principles of the Common Law, in all capital cases, the verdict must be received in open Court, and in the presence of the prisoner. The rule, however, did not apply to cases of inferior misdemeanor.

INDICTMENT, in the Perry Circuit Court, against the plaintiff in error, charging him with having administered medicine to procure an abortion.

The venue was changed to St. Clair county, where a trial was had at the May term, 1846, before the Hon. Gustavus P. Koerner and a jury, when a verdict of guilty was rendered against the accused. The jury fixed the term of his imprisonment in the penitentiary at one month, and the Court, in addition, imposed a fine of $100.

The verdict was returned into Court by the jury, in the absence of the prisoner.

(*a*) Contra Laws of 1857, p. 28.

L. TRUMBULL, for the plaintiff in error, relied upon the following points and authorities:

I. The indictment should have been quashed. Archbold, 412. The third and fourth counts do not give the name of the liquid. The fifth count does not state that the defendant acted wilfully and maliciously. Criminal Code § 46.

II. The verdict was improperly received in the absence of the defendant. 1 Ch. Crim. Law, 636; Nomaque *v.* The People, Bre. 109; The People *v.* Perkins, 1 Wend. 91.

III. The motion for a new trial should have been granted. The only witness to prove the administering or taking of any liquid or substance was the prosecutrix, and she swore that she never took the substance (admitting it to have been noxious), and the cinnamon drops were proved to be harmless by all the witnesses.

IV. The motion in arrest of judgment should have been sustained.

1. Because the record does not show that the original indictment was ever transmitted from Perry to St. Clair county. No reference being made to it in the record transmitted from Perry and the statement of the clerk in St. Clair county, that the original indictment was filed in his office, is no evidence of the fact, as he had no official means of knowing the original indictment, the clerk of Perry county not having put any mark upon it. Wight *v.* Kirkpatrick, 4 Scam. 339.

2. Because if there is one defective count in the indictment, a general verdict in a case where the jury affix the penalty cannot be sustained, otherwise, where the court affixes the punishment, and can apply the evidence to the proper count, and apportion the punishment accordingly. 1 Ch. Crim. Law, 249; 1 Salk. 384; 2 Strange, 845; 19 Eng. Com. Law, R. 423.

In this case, it is only the second count, if any, that is good, and there was no evidence that the substance charged in that count was ever taken.

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

The Opinion of the Court was delivered by

TREAT, J. At the September term, 1844, of the Perry Circuit Court, an indictment, containing five counts, was presented against James Holliday for administering poison to procure abortion. He appeared at the next term and made a motion to quash the indictment, which was sustained as to the first count, and overruled as to the other counts. He then pleaded not guilty and obtained a continuance. At the succeeding term, on his application, the venue was changed to the county of St. Clair. In the Circuit Court of the latter county, at the May term, 1846, he appeared and was put on his trial. When the jury returned into Court, he was called but failed to answer, and the verdict was received in his absence. It found him guilty, and fixed the period of his imprisonment in the penitentiary at one month. During the same term, he appeared and entered a motion to set aside the verdict, because it was contrary to the evidence, and because it was received in his absence. The Court overruled this motion, and a motion in arrest of judgment, and pronounced sentence on the prisoner pursuant to the verdict. He prosecutes a writ of error.

The application for a new trial, on the ground that the verdict was contrary to the evidence, was addressed to the sound discretion of the Circuit Court, and its decision thereon cannot be reviewed by this Court. Baxter *v.* The People, 3 Gilm. 368; Pate *v.* The People, *ib.* 644.

The motion in arrest of judgment was properly refused. It is conceded that the indictment contains one good count, and that on the authority of the case of Townsend *v.* The People, 3 Scam. 326, is sufficient to uphold the verdict.(*a*)

The transcript sent from the Perry Circuit Court showed the finding of the indictment, and contained a copy thereof, and of all the proceedings had in the cause. The record from the St. Clair Circuit Court states, that the original indictment was received with the transcript. The mere omission of the clerk of the former Court to append a certificate to the transcript, that the paper transmitted therewith was the original indictment,

(*a*) Clifton *v.* U. S., 4 How. U. S. R. 250.

ought not to vitiate the proceedings, especially as this objection was not made in the Circuit Court. Granger *v.* Warrington, 3 Gilm. 299.

Was the verdict properly received in the absence of the prisoner? According to the principles of the Common Law, in all capital cases, the verdict must be received in open Court, and in the presence of the prisoner. 2 Hawkins' P. C., Ch. 47, § 2; 4 Thomas' Coke, 392; The People *v.* Perkins, 1 Wend. 91. Mr. Chitty says: "The verdict, whatever may be its effect, must in all cases of felony and treason be delivered in the presence of the defendant, in open Court, and cannot be either privily given, or promulgated while he is absent. And in all cases where the jury are commanded 'to look on him,' as in larceny, and all accusations subjecting him to any species of mutilation, or loss of limb, the same rule applies, without exception.(*a*) In all trials for inferior misdemeanors, however, a privy verdict may be given, and there is no occasion for the presence of the defendant." 1 Chitty's Crim. Law, 636. We recognize the validity and propriety of the rule in capital cases, without determining whether it extends to cases of felony. It is manifest that the present case does not come within the rule, as laid down by Chitty, but is clearly within the exception stated by him. The offence charged in the indictment is a misdemeanor only. It was but a misdemeanor at the Common Law. A recent British statute has declared it to be a felony. Archbold's Crim. Pl. 413.

The judgment of the Circuit Court is affirmed with costs.

Judgment affirmed.

(*a*) Perry *v.* People, 14 Ill. R. 500.

WILLIAM C. BOILVIN *et al.*, plaintiffs in error, *v.* ALBERT G. EDWARDS *et. al.*, defendants in error.

Error to Peoria.

An action of *assumpsit* was commenced in Jo Daviess county, and process directed to the sheriff thereof, which was returned *non est inventus*. A second summons was issued to Peoria county, and there served on the defendants. The declaration contained no averment respecting the residence of the parties, or the place where the cause of action arose, or was made payable. One of the defendants appeared and pleaded the general issue, but, at a subsequent term, obtained leave to withdraw his plea. A default was then entered against both defendants: *Held*, that the Court had no jurisdiction of the case, the declaration containing no averment that the cause of action arose in Jo Daviess county, and that the plaintiffs resided there at the commencement of the suit, or that the contract on which the action was founded, was specifically made payable there. (*a*)

ASSUMPSIT, in the Jo Daviess Circuit Court, brought by the defendants in error against the plaintiffs in error. Judgment by default was rendered against the defendants below, at the June term, 1846, the Hon. Thomas C. Browne presiding, for the snm of $1630.74.

The proceedings in the cause, and other material facts, are sufficiently stated in the Opinion of the Court.

The case was submitted upon the written arguments of the counsel, from which their points and authorities have been extracted.

H. O. MERRIMAN, for the plaintiffs in error.

It is contended, and the law is well settled, that without the proper averments to give the Court jurisdiction over all parties against whom the suit is brought, the judgment is void, and will be reversed on error.

The Court had no power to order the writ to be sent to Peoria county, and the same having been served there, neither of the defendants below were compelled to pay any attention to the proceedings, the whole being void.

(*a*) But see Casley *v.* Davis, 13 Ill. R. 192, and notes.

It is contended that the plea is an appearance. But the plea filed by W. C. Boilvin cannot give jurisdiction over the defendant, N. Boilvin.

It is also contended that the assertion of the clerk, "that the parties by their attorneys appeared," &c., was an appearance. This Court has decided that such an appearance is understood to be an appearance only of those who have previously appeared. 6 Pick. 232; 2 Gilm. 47.

Again, it is not contended that the Court had any jurisdiction over N. Boilvin; but the judgment being against both, and a unit, it must be reversed. Smith *v.* Byrd, 2 Gilm. 412.

The Court below allowed the plea and appearance to be withdrawn. From that time it was the same as if no appearance had been entered; and upon the evidence offered, the Court below ought, as it did,—the plea not having been authorized—to put the party in the same situation as if no appearance had been made. This rests in the discretion of the Court, and no objection seems to have been made by the defendants in error, and it cannot be objected to here.

The plaintiffs in error then moved the Court to dismiss the whole proceeding, but the Court overruled the motion.

Again, the judgment is not rendered by *nil dicit*, as is the case when the defendants are in Court, but by default, being solemnly called, &c.

It cannot be said, whatever force may be given to the appearance of Wm. C. Boilvin, it would be considered a voluntary appearance, and made after the service of the writ on N. Boilvin; it was not in the power of the former to give the Court jurisdiction over N. Boilvin, and he was "not found" in Jo Daviess county.

E. B. Washburne, for the defendants in error.

The Circuit Court of Jo Daviess county had jurisdiction of the subject matter.

The defendants were served with process in Peoria county by the sheriff of said county, August 4, 1842. They, therefore, had notice that the suit was pending against them.

A plea was filed, October 28, 1842, and on the first day of November, 1842, the cause was continued "by the agreement of the parties by their attorneys."

On the ninth day of June, 1846, the defendant, W. C. Boilvin, moved the Court to withdraw his plea and appearance, which was granted, and the plea was withdrawn. The appearance was not withdrawn.

After the verdict, the defendants move to set aside the default, and dismiss the suit upon the affidavit of W. C. Boilvin, that the attorney who appeared in the cause was not authorized to do so. The affidavit is not sufficient; it does not show that the attorney is irresponsible and unable to respond to the defendants in any damages they might recover against him for appearing without authority. Neither does it show that the judgment is unjust, or that the defendants have any defence to the action.

The appearance of an attorney without authority, is good. Bre. 258.

After a defendant has appeared and pleaded in a suit, it is too late to object to the jurisdiction of the Court over his person, where it has jurisdiction of the subject matter of the suit. 4 Scam. 569.

The jurisdiction of a Court is admitted by appearing and pleading in chief. 4 Scam. 279. This is a case in point.

Irregularity of process, whether the process be void or voidable, is cured by appearance without objection. 1 Scam. 250.

After appearance, it is too late to complain of irregularity. 3 Scam. 48.

The motion was to set aside the default and dismiss the suit. A motion to set aside the default is addressed to the sound discretion of the Court, and cannot be assigned for error. 1 Scam. 143.

There was no motion interposed in arrest of judgment.

The Opinion of the Court was delivered by

TREAT, J. This suit was comenced in the Jo Daviess Circuit Court, by Edwards, Rasin, and Cabanne against W.

C. & N. Boilvin. The declaration was in *indebitatus assumpsit*, without any averment respecting the residence of the parties, or the place where the cause of action arose, or was made payable. Process was directed to the sheriff of Jo Daviess county, and was by him returned not found. A summons was then sent to Peoria county, and was there served on both of the defendants. W. C. Boilvin filed a plea of *non assumpsit*, to which the plaintiffs at once added a *similiter*. Three days afterwards, this entry was made in the record: "By agreement of the parties by their attorneys, it is ordered by the Court, that this cause be continued at the costs of the plaintiffs." At a subsequent term, W. C. Boilvin obtained leave to withdraw his plea. The default of both defendants was then entered, and a jury assessed the plaintiffs' damages at $1630.74, for which amount judgment was rendered.

The Bolivins prosecute a writ of error to reverse the judgment.

The only point in the case is one of jurisdiction. As a general rule, under our statute, original process cannot issue to any other county than the one in which the suit is commenced. The present case is not within any of the exceptions of the rule, as laid down in the case of Key *v.* Collins, 1 Scam. 403, and confirmed by repeated decisions of this Court. This is not a case where the suit is brought in the county in which one of several defendants resides, so as to authorize the sending of process to a foreign county, to bring in the other defendants. Here, the process was directed to a foreign county, against all of the defendants. To justify the issuing of such process to Peoria county, the plaintiffs should have averred in their declaration, either, that the cause of action arose in the county of Jo Daviess, and that they resided there at the commencement of the suit, or that the contract on which the action was founded, was by its terms, specifically made payable in the latter county.

In the absence of both of these allegations, there is nothing to sustain the jurisdiction, unless the defendants voluntarily submitted their persons to the jurisdiction of the Court.

That unquestionably was done by W. C. Boilvin. He pleaded to the merits of the action, and thus conferred jurisdiction as far as he was concerned. It is insisted, that the entry on the record shows that his co-defendant entered his appearance and thereby invested the Court with complete jurisdiction over the case. This position is untenable. The order does not show a personal appearance of the parties, but an agreement of the attorneys on record to continue the case. The attorney for the defence professed to appear for one defendant only. If he had been retained by the other defendant, he would in all probability have included him in the plea. The stipulation must be understood as made on behalf of the parties to the issue. If N. Boilvin had not been served with process, it would hardly be pretended that this entry of the clerk would afford any evidence of his appearance to the action. Why should it be evidence of an appearance in this case, when, without an actual appearance by him, the Court had no jurisdiction over his person. The jurisdiction of the Court in such a case ought clearly to appear on the face of the record, and not be left to inference or conjecture.

The judgment of the Circuit Court is reversed with costs.

Judgment reversed.

JUSTUS VAIRIN, *et al.*, plaintiffs in error, *v.* FRANCIS H. EDMONSON, defendant in error.

Error to Sangamon.

Against the prosecution of a writ of error, it was pleaded that the plaintiffs, at the time of suing out their writ, were bankrupts, and previous to that time had been so declared, under and by virtue of the Act of Congress, approved August 19, 1841, entitled "*An Act to establish a uniform system of Bankruptcy,*" &c. and that all their property, &c. had become vested in the assignee by the operation of law, by virtue of a decree of the United States' District Court in and for the State of Louisiana, whereby they were declared bankrupts and said assignee was appointed, &c.: *Held*, that the plea was bad, because there was no averment therein as to the time when they were declared bankrupts, so that the Court could determine whether the cause of action, upon which the writ was prosecuted, accrued before or after the decree of bankruptcy: *Held*, further, that the averments as to the place where, and of the Court which rendered the decree, were not sufficiently explicit: *Held*, also, that it was not necessary to state in the plea, the name of the assignee.

THIS case was heard in this Court upon several pleas in bar of the writ of error, and on demurrer to the same. The material facts are stated in the Opinion of the Court sustaining the demurrer.

S. T. LOGAN, for the plaintiff in error, demurred to the pleas in bar, and assigned the following as special causes of demurrer, to-wit:

To the *first* plea.

1. The defendant does not state in his said plea when the plaintiffs in error were declared bankrupts;

2. The said plea does not state that said plaintiffs in error were declared bankrupts at any time subsequent to the rendition of the judgment in the Court below, or even to the bringing of the suit in the Court below.

3. The said plea does not allege that the rights of the plaintiffs in error to prosecute this writ of error existed at the time that plaintiffs were declared bankrupts, and vested

in the assignee in bankruptcy by showing any facts from which such vesting results;

4. It is not alleged that any assignee of the effects of the plaintiffs in error has ever been appointed, or who said assignee was, or whether he accepted the office;

5. It is not shown when, or where plaintiffs were declared bankrupts; and

6. The act of any Court declaring plaintiffs bankrupts is matter of record, yet the allegation is not verified by the record, nor is any profert of the record made.

To the third and fourth pleas, the same causes apply. Further, defendant does not verify his pleas of release by the record of the Court below, or make any profert thereof.

J. C. CONKLING, for defendant in error.

The first plea is, bankruptcy of plaintiffs in error before suing out the writ of error.

The party in interest at the time of suing out the writ of error, must become the plaintiff in error. 2 Saunders, 46, note (6); Graham's Pr. 938.

If plaintiff in error release his interest in the subject matter of the suit before bringing his writ of error, he cannot maintain his action. 2 Bac. Abr. *Error, L.*

He can only bring error who is to derive advantage from the reversal of the judgment. 2 Bac. Abr. *Error, B.*

The second, third and fourth pleas state, that Vairin & Co. have no interest in the suit in error, but it is brought in their name by the garnishees who have released errors by appearing in the Court below. R. L. 492, § 23.

Garnishees being the parties in interest before this Court, cannot assign error in the proceedings between plaintiff below and original debtor. Wallace *v.* Blanchard, 3 New Hamp. 398; 3 Scam. 21; 9 Mass. 503; 2 Bac. Abr. title *Error, B.* 460.

Proceedings against original debtor are entirely distinct from the proceedings against garnishees. 3 New Hamp. 398; 2 Bac. Abr. *Error, M.* (1).

The Opinion of the Court was delivered by

Denning, J. The record in this cause shows that Francis H. Edmonson, the plaintiff below, on the 17th day of March, 1842, sued out from the Sangamon Circuit Court, a writ of attachment against Justus Vairin and James T. Kelley, defendants, who were partners, trading and doing business under the name, style and firm of Justus Vairin & Co., New Orleans, and procured a summons to be issued in the same cause against Opdycke, Tinsley & Co. as garnishees of the said Vairin & Co.; that at the July term of the said Circuit Court, 1842, judgment was rendered by default against the said Vairin & Co., and in favor of the said Francis H. Edmonson, for the sum of two thousand, seven hundred and ninety-nine dollars, and thirty-one cents; that at the same term, Opdycke, Tinsley & Co., as such garnishees, filed their answer to the interrogatories propounded to them by the plaintiff, admitting their indebtedness to Vairin & Co. in the sum of one thousand, one hundred and forty-seven dollars, and seventy-four cents, for which judgment was rendered in favor of the said plaintiff.

The defendants below, on the 3d day of February, 1846, sued out from this Court a writ of error to remove the case to this Court for the purpose of correcting alleged error in the record. The plaintiff below interposes four pleas, intended as pleas in bar of the writ of error, to which pleas there was a general demurrer with the assignment of special causes. The second, third and fourth pleas are substantially the same, and allege that Opdycke, Tinsley & Co. are the real persons who prosecute this writ of error, and that by appearing in the Court below as garnishees, and acknowledging their indebtedness to Vairin & Co., have thereby released all errors in the proceedings of this cause. This position we think cannot be maintained. Their answer is not the result of their own voluntary act. They are required by the provisions of our statute to answer all such interrogatories as may be propounded to them by the plaintiff below touching their indebtedness to the defendants, or suffer judgment by default, and

in so answering, they waive nothing. But in another point of view it will be observed, from the assignment of errors herein, that they are not complaining of errors committed to their prejudice. It is Vairin & Co. who prosecute this writ of error, and who allege that errors have arisen in the proceedings and rendition of judgment against them, which they wish to revise and correct in this Court. We are, therefore, of opinion that the second, third, and fourth pleas are no bar to the writ of error.

The first plea, after giving the title of the case, is as follows, viz: "And said defendant in error comes and defends, &c., and says, that said plaintiffs in error ought not to have or maintain their writ against him, because he says, that, at the time of bringing their writ of error, said Justus Vairin, and James T. Kelley, who compose said firm, of Justus Vairin & Co., the plaintiffs in error were bankrupts, and previous to that time, to wit: February 3d, 1846, when writ of error was brought, had been declared bankrupts, under and by virtue of the law of Congress, approved August 19th, 1841, entitled "*An Act to establish a uniform system of bankruptcy in the United States;*" and that at the said last mentioned date, all the property and rights of property, and pecuniary interests whatsoever, and causes of action of said plaintiffs in error, had become vested in the assignee of said bankrupt by operation of said law, and by virtue of the decree of the United States District Court in and for the State of Louisiana, whereby said plaintiffs in error were declared bankrupts, and said assignee was appointed. And this the said defendant in error is ready to verify: Wherefore he prays that said plaintiffs in error may be barred of their writ of error."

We are of opinion, that this plea is a good plea in bar of the writ of error, if properly pleaded, though defective in form. It will be observed on an examination, that it no where states *when* the plaintiffs in error where declared bankrupts. The plea alleges that the writ of error was sued out from this Court on the 3d day of February, 1846, and that previous to that time, the plaintiffs in error were declared bankrupts, but

how long previous, we are left entirely ignorant. From any thing that appears in this plea, the cause of action upon which this writ of error is prosecuted, may have arisen subsequent to the time when the plaintiffs in error were declared bankrupts, and if so, they certainly would have the right to prosecute this writ of error; and hence it should be shown, that the debt or cause of action herein subsisted at the time of the said plaintiffs' bankruptcy, for it would have passed to the assignee, and the plaintiffs in error would have had no further interest or control in the matter. Again, we think the averment in the plea, of the place when, of the Court by whom the plaintiffs are alleged to have been declared bankrupts, are not sufficiently explicit. The plea should have been verified by the record, as the question which it attempts to raise must be determined alone by the record.

It is alleged as a ground of demurrer to this plea, that it does not set forth the name of the assignee of the plaintiffs in error. We do not think it necessary that it should. By a reference to the third section of the law of Congress in relation to bankruptcy, approved August 19th, 1841, it will be found, that whenever a person is declared a bankrupt within the law, all property, rights of property, &c., are divested from him by the mere operation of said law, without any other assignment or conveyance whatever; and when once so divested, we apprehend that the bankrupt can exercise no further control in the settlement or disposition of his estate in any manner whatever. The plea is bad, though the Court on proper application, might grant leave to amend it. The demurrer is sustained to all the pleas.(*a*)

Demurrer sustained.

(*a*) See Griswold *v.* Whipple, 11 Ill. R. 590.

OLIVER C. VANLANDINGHAM, plaintiff in error, *v.* EVAN HUSTON, defendant in error.

Error to White.

If a party be out of the State so that process cannot be served on him, the Statute of Limitations ceases to run for the time being; and in such case, it is not necessary, in order to produce this result, that the party should remove absolutely; nor, on the other hand, is it sufficient in order to allow the Statute to operate, that his residence should be within the State, while temporarily absent. Every absence from the State, whether there exists in the debtor the *animus revertendi* or not, prevents the service of process, and therefore suspends the operation of the Statute.

ASSUMPSIT, originally brought in the Gallatin Circuit Court by the defendant in error against the plaintiff in error, whence the venue was changed to the White Circuit Court. The cause was there tried at the April term, 1847, before the Hon. William Wilson and a jury, when a verdict was rendered for the plaintiff below for $1270.

The state of the pleadings and instructions asked on the trial in the Court below will appear in the Opinion of this Court.

J. C. CONKLING, and H. EDDY, for the plaintiff in error.

The mere temporary absence of the defendant from the State does not come within the meaning of the Statute of Limitations. Chenot *v.* Lefevre. 3 Gilm. 639.

This Court will reverse judgments of the Circuit Court for refusing correct instructions, although none of the testimony is included in the Bill of Exceptions. Kitchell *v.* Bratton, 1 Scam. 303. Also, for giving erroneous instructions. Humphreys *v.* Collier, 1 Scam. 51; Peyton *v.* Bowell, 1 Blackf. 244.

S. T. LOGAN, for the defendant in error.

The Opinion of the Court was delivered by

KOERNER, J. This suit was originally commenced by Huston, the defendant in error, in the Gallatin Circuit Court to the June term, 1846, but was taken by change of venue to White county,

where it was tried in the Circuit Court of said county, at the April term, 1847.

The declaration in the case contained the common counts in *assumpsit*, the plaintiff Huston claiming compensation for work and labor done, services performed, &c. To this declaration Vanlandingham pleaded the general issue, and payment, and also filed a plea to the effect that he had not undertaken and promised within five years, next before the commencement of the suit. To this last plea, Huston replied, that defendant had undertaken and promised within five years, &c., and also that defendant had been without the jurisdiction of the Court for a period of four years within five years, and before that time. Upon these pleadings it would seem from the record, issues were formed and the parties went to trial. The jury found a verdict in favor of Huston, the plaintiff below, for $1270.00. A motion for a new trial was made for the reason, amongst others, that the Court gave improper, and refused to give proper instructions. The motion was overruled and judgment was rendered upon said verdict.

We are not called upon by anything appearing in the record, to decide upon the correctness or incorrectness of these pleadings. The errors assigned relate to the instructions only, and our inquiry is therefore confined to them.

The following instructions asked by the defendant's counsel, were refused by the Court:

1. That if the jury believe the cause of action in this suit, or any item of the account sued on, accrued and became chargeable five years before the issuing of this writ, the Statute of Limitation will run and bar the action or the item of longer standing than five years;

2. An occasional absence in another State on business, less than an absolute removal and settlement in such other State, will not take the case out of the Statute of Limitations; and

3. That if the jury believed the said defendant's residence and that of his family was in this State, though he was occasionally absent for a year or two attending to his farm

or business in Louisiana, or elsewhere, would not take the case out of the Statute.

It is at all times a difficult matter to decide upon the correctness of the decisions of the Circuit Court in regard to instructions, when no portion of the evidence, as is the case here, is preserved in the bill of exceptions. Instructions containing legal propositions are sometimes, and properly too, refused, on account of their being totally inapplicable to the evidence in the case. Sometimes strong reasons do appear by an examination of the whole testimony, why a cause should not be reversed, although a Court have misdirected a jury. In the present case, however, we do not deem it necessary to place the affirmance of the judgment below on the absence of the testimony, or even a portion of it, in the bill of exceptions. Cases may and do frequently arise where independent of the testimony in the case, the Court may be able to decide on instructions from the balance of the record.

The first instruction certainly contains the law as far as it goes, but the Court decided correctly in declining to give it, because it does not go far enough. It must be recollected that in this case several issues had been formed. The Statute of Limitation was set up by the defendant, which the plaintiff sought to avoid in two ways; first, by showing a subsequent promise, and secondly, by alleging an interruption of the operation of the Statute by showing that the defendant was out of the jurisdiction of the Court for a part of the time. Now in such a case, the party asking instructions must either confine them (if they are of partial application only), in terms to the particular issue to which they are intended to apply, or must modify them in such a manner as will make the jury aware, that it is only in the event that other issues are not found against him, they can base their verdict, if supported by facts, on the law, as asked in his favor by him. The Court may of its own volition add a proper instruction, calculated to modify the instruction so as to secure the object sought to be obtained, without endangering the rights of the adverse party; but there is no compulsion for it to do so, more particularly since the passage of the law concerning instructions. Laws of 1846–7, 63.

If, in the present case there had been proof of a subsequent promise, or of an interruption of the operation of the Statute, the jury could not be instructed to find for the defendant merely upon the ground, that the cause of action had been proved to have originally accrued more than five years before the commencement of this action.

The second and third instructions were also correctly refused, as they do not contain the law as this Court understands it. Our Statute is peculiar in its terms.

The being out of the State, so that process cannot be served upon the party, prevents the Statute from running, and it is not necessary that there should be an absolute removal, as assumed in the second instruction; nor is it sufficient in order to allow the Statute to operate, that the residence of the defendant should be here, while he was absent for one or two years from the State, as assumed in the third instruction. Under our Statute, the inability of the creditor to have personal service on his debtor seems to be made the sole ground for arresting the Statute. Every absence from the State, no matter whether there exists in the debtor the *animus revertendi* or not, prevents the serving of the process. This is the construction of the Statute as laid down by this Court in the case of Chenot *v.* Lefevre, 3 Gilm. 638, and we see no reason why we should not adhere to it.

The following instruction the Court gave for the plaintiff: "If the jury believe from the evidence that the defendant has been absent out of the State a sufficient length of time to take the case out of the Statute of Limitation, they will not regard the plea of the Statute of Limitation, but find for the plaintiff such accounts, as he may have proved under the other pleas."

From what we have said concerning the refusal of the instruction, it necessarily follows, that we deem the instruction given correct in substance, though certainly somewhat exceptionable in phraseology. It was therefore properly given. There is no error in the record.

Judgment below affirmed, the plaintiff in error to pay the costs.

Judgment affirmed.

ELISHA RIGGS, plaintiff in error, *v.* GEORGE SAVAGE, defendant in error.

Error to Warren.

Under the 30th section of the 36th chapter of the Revised Statutes, the party against whom a verdict is rendered may, on application to the Court and payment of costs and damages within one year after the rendition of the first judgment, have a new trial as a matter of right, without showing cause. The Court may, also, within one year after the rendition of a second judgment, on application of the party and on being satisfied that justice will be promoted, award another trial. The second application, however, is addressed to the discretion of the Court, and its refusal to grant it cannot be assigned for error. (*a*)

In the action of *ejectment*, as in other civil cases, the party against whom a verdict is rendered, is entitled to a new trial if sufficient legal cause exists, such as a misdirection on the part of the Court, or a finding of the jury unsupported by the evidence. The decisions of the Circuit Court refusing new trials in such cases may be reviewed in the Supreme Court. (*b*)

EJECTMENT, in the Warren Circuit Court, brought by the plaintiff in error against the defendant in error. At the June term, 1846, the Hon. Norman H. Purple, presiding, the plaintiff entered a motion to vacate a judgment previously rendered and grant a new trial, founded on the opinion of this Court, delivered at the December term, 1845, reported in 2 Gilm. 400. The motion was overruled by the Court, and the case was again brought into this Court by writ of error.

W. A. MINSHALL, for the plaintiff in error, cited the 30th section of the Ejectment Act, and the case of Riggs *v.* Savage, 2 Gilm. 400.

A. WILLIAMS, for the defendant in error.

The Opinion of the Court was delivered by

TREAT, J.* This was an action of *ejectment* commenced by Riggs against Savage. A trial was had on the 8th of June, 1844, which resulted in a verdict and judgment for

(*a*) Contra Laws of 1849 p. 132; Laflin *v.* Herrington, 17 Ill. R. 399.
(*b*) Emmons *v.* Bishop, 14 Ill. R. 153.

*WILSON, C. J. and Justices KOERNER and DENNING did not sit in this case.

Savage. On the 8th of June, 1846, Riggs moved the Court to vacate the judgment and grant a new trial, under the latter clause of the 30th section of the 36th chapter of the Revised Statutes. The motion was denied, and a bill of exceptions was taken, embodying the evidence on which the application was founded. That decision is assigned for error.

The section before referred to reads as follows: "The Court in which such judgment shall be rendered, at any time within one year thereafter, upon the application of the party against whom the same was rendered, his heirs or assigns, and, upon payment of all costs and damages recovered thereby, shall vacate such judgment, and grant a new trial in such cause; and the Court, upon subsequent application made within one year after the rendering of the second judgment in said cause, if satisfied that justice will thereby be promoted, and the rights of the parties more satisfactorily ascertained and established, may vacate the judgment, and grant another new trial; but no more than two new trials shall be granted under this section."

By the former part of this section, the unsuccessful party, if he makes the application and pays the costs and damages within one year after the rendition of the first judgment, is entitled to another trial as a matter of right without showing cause. In the action of *ejectment*, as in other civil cases, the party against whom a verdict is returned, is also entitled to a new trial, if sufficient legal cause exists, such as a misdirection on the part of the Court, or a finding of the jury unsupported by the evidence. The decisions of the Circuit Court, refusing new trials in such cases, may be reviewed in this Court. But the application allowed by the latter part of the section stands upon a different footing. The Court is authorized, within one year from the rendition of the second judgment, to vacate such judgment and award a new trial, if satisfied that justice will be promoted, and the rights of the parties more satisfactorily ascertained and established. This second application is addressed to the sound descretion of the Court, and its decision thereon cannot be assigned for error. It is not demandable as a matter of course on the

payment of the costs and damages, as in the case of the application to vacate the first judgment, nor as a matter of strict legal right, as in the case of the ordinary motion for a new trial, founded on an erroneous ruling of the Court, or an unauthorized finding of the jury. In this view of the case, it will not be necessary to look into the evidence presented to the Circuit Court.

The judgment is affirmed with costs.

Judgment affirmed.

JOHNSON GINN *et al.*, appellants, *v.* CHARLES ROGERS, appellee.

Appeal from Jo Daviess Co. Court.

The Jo Daviess County Court has not original jurisdiction in cases of forcible entry and detainer, nor has the Circuit Court, their jurisdiction being co-extensive. They can only obtain it by way of an appeal from the judgment of a justice of the peace, in whom, originally, it is exclusively vested. (*a*)

Consent of parties cannot confer jurisdiction upon a Court in which the law has not vested it.

FORCIBLE ENTRY AND DETAINER, originally brought by the appellee before a justice of the peace of Jo Daviess county. The case was submitted to a jury, but they could not agree upon a verdict, and the counsel of the parties, by mutual agreement, transferred the case to the Jo Daviess County Court. A motion was made, on affidavit being filed, to dismiss the suit, which was overruled.

At the November term, 1846, the Hon. Hugh T. Dickey presiding, the cause was submitted to a jury, who returned a verdict of "guilty" against the defendants below, upon which verdict the Court rendered a judgment for possession of the premises in controversy. The defendants appealed to this Court.

(*a*) Beesman *v.* Peoria, 16 Ill. R. 484; McCoy *v.* Allen, 36 Ill. R. 429.

O. C. PRATT, for the appellants, relied on the following points and authorities for the reversal of the judgment:

I. The County Court erred in refusing to dismiss this cause on the motion made by the defendant, Ginn, on the affidavit filed therewith.

1. Because it appeared from the affidavit that Ginn never consented that this cause should be removed to the County Court, and that his co-defendant was his son, and an infant;

2. Because it appeared that this cause came into that Court, not by appeal, but by the consent of the attorneys in the justices' court;

3. Because the defendant, Ginn, objected and dissented to the Court's exercising jurisdiction over his person; and

4. Because Ginn had a right to dissent to the agreement made by his attorney before the justice; for even if he had made such an agreement in person, he could not be bound by it, so that the Court could exercise jurisdiction over his person until he voluntarily consented in that Court to enter his appearance. But he swears that he never authorized the removal of the cause to the County Court, and his affidavit is a part of the record. 7 Com. Dig. 209, marg. page; 2 Wilson, 371.

II. The County Court has only appellate jurisdiction, and erred in entertaining original cognisance of this cause. The action of Forcible Entry and Detainer is a summary remedy, given by statute, to recover the possession of lands and tenements. Exclusive original jurisdiction is conferred upon justices of the peace by the terms of the Act itself. In summary proceedings under a statute, the provisions of the statute must be strictly complied with. Day *v.* Cushman, 1 Scam. 475. Besides, the phraseology of the 95th section of the Revised Statutes, title, "justices," is precisely similar, and this Court has held, that under that statute justices of the peace have exclusive original jurisdiction of assaults, affrays, &c. Carpenter *v.* The People, 4 Scam. 198.

III. As the County Court could obtain jurisdiction by appeal only, that Court erred in entertaining this cause,

when no judgment was rendered by the Court below by the justice. Miller *v.* Adams, 4 Scam. 196; Pentecost *v.* Magahee, *ib.* 327; Sweet *v.* Overseers of Clinton, 3 Johns. 23; Peters *v.* Parsons, 18 do. 140; Breeze *v.* Williams, 20 do. 280; People *v.* Schoharie Common Pleas, 2 Wend. 260. There was nothing to appeal from, and by statute, no appeal can be had, except "in case either party shall be aggrieved by the verdict of the jury or the decision of the justice."

IV. The transcript of the justice shows that no judgment was rendered before the justice, and it is only by his return that jurisdiction can be shown; and his return is conclusive. Rawson *v.* Adams, 17 Johns. 130; Starr *v.* Trustees of Rochester, 6 Wend. 564; Birdsall *v.* Phillips, 17 do. 466.

V. The cause did not come into the County Court by appeal, there being nothing to appeal from, and no appeal even in form being taken, the only inquiry then, is, whether the County Court had jurisdiction of it as an original action. Did its adjudication need the aid of any previous proceedings to be sustained. Allen *v.* Belcher, Adm'r. 3 Gilm. 596.

VI. The whole of the proceedings are void, being *coram non judice*. The County Court could hold cognisance of the cause only in the manner provided by law; and the defect is not cured though the parties appeared and proceeded to trial without any objections, and though the Court in fact heard, tried and gave judgment. Latham *v.* Edgerton, 9 Cowen, 227; *Ex parte* Shethar, 4 do. 540; Trader *v.* McKee, 1 Scam. 558; Coffin, Ex'r, *v.* Tracy, 3 Caines, 128.

VII. It makes no difference whether the Court be one of limited or general jurisdiction, it cannot hold cognisance of a cause without having gained jurisdiction of the persons of the defendants in the manner required by law. Bigelow *v.* Stearns, 19 Johns. 39; Evans *v.*Pierce, 2 Scam. 469; 9 Cowen, 227; 2 Tyler, 218; Bre. 32, 142; 1 Bibb, 262; Hardin, 96.

VIII. The objection being to the jurisdiction, it may be made at any stage of the proceedings. 2 Tyler, 218.

IX. The County Court had no jurisdiction of the persons of the defendants.

S. T. Logan, for the appellee.

The Opinion of the Court was delivered by

Purple, J.* The appellee in this case brought an action of Forcible Entry and Detainer against the appellants, before a justice of the peace of Jo Daviess county. A jury was summoned to try the cause who disagreed and were discharged.

The attorneys who represented the respective parties before the justice, then entered into a written stipulation that the cause should be removed to the County Court, and there tried in the same manner as though a judgment had been rendered by the justice, and an appeal taken therefrom; and that no objection should be taken in that, or any other Court to which the said suit might be removed, on account of the manner of its removal into the County Court.

Pursuant to this agreement, the justice sent up the transcript of the proceedings before him, together with the agreement, to the County Court. The appellants appeared and moved to dismiss the proceeding, alleging, that the Court had no jurisdiction of the subject matter of the suit. This motion was overruled, and a trial was had before a jury, who found a verdict for the appellee. The appellants moved in arrest of judgment which was also overruled and judgment rendered on the verdict.

The only question in the case is, whether the County Court had jurisdiction of the subject matter of the suit, under the circumstances before related.

The jurisdiction of this Court, by the law creating it, is co-extensive with that of the Circuit Court within the county of Jo Daviess. Neither of them have any original jurisdiction in cases of Forcibly Entry and Detainer, and can only obtain jurisdiction by way of appeal from the judgment of a justice, in

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

whom, originally, it is exclusively vested. Rev. Stat. chap. 43, 256. This case was not removed into the County Court by appeal.

If the persons acting in the capacity of attorneys before the justice of the peace had competent authority, as attorneys, to bind their principals by a contract made during the progress of the trial (a question which the Court does not now decide), to the same extent that the principals might bind themselves; still, this cause would only have been pending in the County Court by the consent of parties, and would have occupied the same position, so far as jurisdiction is concerned, as though no proceedings had ever been instituted before the justice. With respect to this action of Forcible Entry and Detainer, it is an appellate Court only. Consent of parties cannot confer jurisdiction. The proceedings in this case, in the County Court, are *coram non judice.*

The judgment of the County Court of Jo Daviess county is reversed, at the costs of the appellee, both in this Court and in the Court below.

Judgment reversed.

(*a*) Burgwin v. Babcock, 11 Ill. R. 30; Favorite v. Lord, 35 Ill. R. 142; Lemen v. Stevenson, 36 Ill. R. 52.

TIMOTHY HINCKLEY, *et. al.*, appellants, *v.* BENJAMIN J. WEST, appellee.

Appeal from St. Clair.

Demands to be set off must be mutual, and exist between the parties to the record. (*a*)

In an action of *debt*, the jury returned the following verdict, to-wit: "We find the issues for the plaintiff, and assess his damages at one hundred and fifty-four dollars." The Court rendered a judgment that the plaintiff recover the penalty in the bond sued on for his debt, to be discharged on the payment of the damages found by the jury, and the costs: *Held*, that the amount of the debt was a fact which the party had the right to have found by the jury, and, therefore, that the amendment of the Court was erroneous.

DEBT, in the St. Clair Circuit Court, brought by the appellee against the appellants and heard before the Hon. Gustavus P. Koerner and jury, at the October term, 1846, when a verdict was rendered for the plaintiff for $154, in the form stated in the Opinion of the Court. The pleadings, &c., will also be there found, so far as was material to the determination of the case.

W. H. UNDERWOOD, for the appellants.

I. The declaration was manifestly defective in not alleging that the liabilities extinguished by West existed at the time of the making of the bond sued upon. The contract of Sargent, the security, must be strictly construed and not extended by implication. Reynolds *v.* Hall, 1 Scam. 36. West would be liable for debts contracted by the firm of T. Hinckley & Co. after the bond was made and the firm dissolved unless the creditors of the firm had notice of the dissolution. Story on Partnership, 247, § 160; Gow on do. 248.

II. The declaration has no breach that Snyder and his representatives failed to perform the condition or to pay the penalty. 2 Chitty's Pl. 94; 1 do. 365, 370.

The demurrer to second plea, and replication to fourth plea opened the whole record and should have been extended

to the declaration and sustained. Gould's Pl. 474–5, §§ 36, 37, 38; Buckmaster *v.* Grundy, 1 Scam. 312.

III. The verdict should have found the debt. A failure is error. Frazier *v.* Laughlin, 1 Gilm. 347; Mager *v.* Hutchinson, 2 do. 266; Wilcoxon *v.* Roby, 3 do. 476.

L. TRUMBULL, for the appellee.

The Opinion of the Court was delivered by

TREAT, J. This was an action of *debt* commenced in the St. Clair Circuit Court by B. J. West, the appellee, against Hinckley and Sargent, the appellants.

The declaration was on a writing obligatory executed on the third of June, 1839, by the appellants and A. W. Snyder, since deceased, in the penalty of $6000; which after reciting that Hinckley had purchased of the appellee all his interest as a partner in the firm of T. Hinckley & Co., was conditioned to keep harmless and indemnify the appellee from all liability for any debts contracted by Hinckley on account of the firm.

The second breach alleged the recovery by Henry West of a judgment against the appellee, Hinckley and one Pensoneau on the 21st of April, 1842, for $136.37 debt, and $8.18 costs, on demand contracted by Hinckley and existing against the firm of T. Hinckley & Co. at the date of the writing obligatory, and averred the payment of the judgment by the appellee on the 23rd of March, 1846.

Several other breaches were assigned, but as they were withdrawn on the trial, it will not be necessary to notice them, or the numerous issues of law and fact founded on them.

Issues of fact were formed on several pleas applicable to the second breach, such as *non est factum*, payment and denial of liability on the part of the appellants. The Court sustained a demurrer to a plea alleging in substance, that prior to the commencement of the action, the appellee had collected and received $1000 from debts due the firm of T. Hinckley & Co. at the date of the writing obligatory, and which amount the appellants offered to set off against the damages claimed by the appellee.

The cause was submitted to a jury, and a verdict returned as follows: "We find the issues for the plaintiff, and assess his damages at one hundred and fifty-four dollars."

The Court overruled motions for a new trial and in arrest of judgment, and rendered a judgment that the appellee recover of the appellant the sum of $6000 for his debt, to be discharged on the payment of the damages found by the jury, and the costs.

Various errors are assigned, only two of which need be noticed. One of them is as to the validity of the plea of set off. The plea is clearly bad. It seeks, in an action against two, to set off a debt due and owing from the plaintiff to one of the defendants and a third person not a party to the suit. This is not allowable. Demands to be set off must be mutual, and exist between the parties to the record. Grigg *v.* Phillips, Bre. 107; Barbour on Set Off, 75; Wolfe *v.* Washburne, 6 Cowen, 261. If the appellee has received money belonging to Hinckley and his co-partner, Pensoneau, they must join in the action to recover it. Sargent has no legal interest in the demand, and cannot therefore avail himself of the benefit of it. It is insisted that the demurrer should have been carried back and sustained to the declaration. The declaration has been examined and, in the opinion of the Court, is not obnoxious to a general demurrer.

The decision of the Court refusing to arrest the judgment is assigned for error. The decision was erroneous. The case of Frazier *v.* Laughlin, 1 Gilm. 347, is expressly in point.(*a*) The verdict was not broad enough. It did not find the amount of the debt. That is a fact which a party has the right to have found by a jury. The Court had no authority to amend the verdict by adding the amount of the penalty of the bond as the debt. We reverse the judgment with much reluctance for if this error had not intervened, we should without hesitation affirm it.

The judgment of the Circuit Court is reversed with costs, and the cause is remanded for further proceedings.

Judgment reversed.

(*a*) See notes to this case, 1 Gil. R. 359.

THE PEOPLE OF THE STATE OF ILLINOIS, *ex. rel.* ISAAC COOPER *v.* THE PUBLIC OFFICERS OF GALLATIN COUNTY.

Motion to dismiss appeal.

The usual and correct practice on a motion to dismiss an appeal is, to base the motion upon a certified copy of the record of the judgment, &c. of the Circuit Court appealed from; or a certificate of the clerk that an appeal had been allowed and perfected. If the Clerk should refuse to perform his duty in these particulars on request and an offer to pay the usual fees therefor, the Supreme Court will dismiss the appeal upon motion and affidavit of the facts being filed.

MOTION to dismiss an appeal from the Gallatin Circuit Court, taken by the Public Officers of Gallatin county, on the hearing of an application for a *mandamus*, &c., before the Hon. William A. Denning, Associate Justice of the Supreme Court and presiding Judge of the said Circuit Court.

The motion was founded upon the following affidavits, which were read to the Court:

Affidavit of Harbin H. M. Butt.

"State of Illinois, } Sct.
Gallatin County. } Before me the undersigned, an acting justice of the peace, in and for said County, this day personally appeared, Harbin H. M. Butt, who being duly sworn, deposes and says, that on the second day of December instant, he made a formal demand of Daniel P. Wilbanks, Clerk of the Circuit Court of said county of Gallatin, for a certified copy of the record of the suit, People *ex relatione* Isaac Cooper, for a *mandamus* against the County Commissioners of said county, the Clerk of the Circuit Court thereof, and the other public officers of the said county, to remove their records to Shawneetown, the elected county seat under the late law dividing the said county of Gallatin, and wherein the said officers prayed an appeal from the decision of His Honor, Judge Denning, which the said Daniel

P. Wilbanks refused to make out, although the money was tendered to said Daniel for the same.

(signed)

"Subscribed and sworn to before me, this 3d Dec'r, 1847, at Shawneetown. } HARBIN H. M. BUTT."

J. W. NORTON, J. P."

Affidavit of Lloyd T. Posey.

"State of Illinois, Gallatin County. } Sct. Before me the undersigned, an acting justice of the peace, in and for said county, this day appeared Lloyd T. Posey, who being duly sworn, deposes and says, that on or about the 23d day of November, 1847, he, as an attorney, requested Daniel P. Wilbanks, clerk of the Gallatin Circuit Court, to make out a certified copy of the record, in the case of The People, *ex relatione* Isaac Cooper *v.* certain public officers of said county, and wherein the said officers had prayed an appeal from the judgment of His Honor, Judge Denning, to the Supreme Court of Illinois, and at the same time this deponent offered to pay said clerk his usual fees for doing the same, but received for answer from said clerk, that this deponent could not get such certified copy of said record, because he (this deponent) had no right to demand and have the same; and that he (said clerk) would not make out the same until the 1st day of December, and would then forward it on to Springfield.

This deponent states that he is a practicing lawyer, and was one of the attorneys who attended to the prosecution of said case in the said Circuit Court, and that he applied to the said clerk for the said record, for the purpose of dismissing said appeal on behalf of the said appellee, in case the appellants should not file the said record and assign errors thereon in the said Supreme Court, on or before the third day of the next term thereof, to be commenced and holden on Monday, the 6th instant, but was not able so to do by reason of the said clerk fraudulently and wickedly

withholding the said record in order, as this deponent verily believes, to defeat a speedy hearing of said cause in the said Supreme Court.

(signed)

"Subscribed and sworn to before me this 4th day of December, 1847. } LLOYD T. POSEY."

J. W. NORTON, J. P."

The motion was argued on behalf of the People by H. EDDY and S. T. LOGAN, and resisted by M. BRAYMAN and O. PETERS, for the officers.

The Opinion of the Court was delivered by

WILSON, C. J. The Court has considered the motion of the counsel for the plaintiff to dismiss the appeal taken in this case by the defendants, and are satisfied that the motion must prevail, and the appeal be dismissed. The usual and correct practice is, to base a motion of this kind upon a certified copy of the record of the judgment, &c. of the Circuit Court appealed from, or a certificate of the clerk that an appeal has been allowed and perfected, whereby the judgment of the Court below has been suspended. But the affidavit shows that this course could not be adopted in this case, because the clerk of the Circuit Court was one of the defendants below, and upon an application of the counsel for the plaintiff to him for a certified copy of the record, he refused to give it. The counsel was therefore forced to resort to affidavits, as the only means by which he could show that an appeal had been taken and by which he could obtain its dismissal. The sufficiency of these affidavits, however, is objected to, and it is true that the names of all the defendants are not stated, and that, in other respects, they are not so full or specific as they might have been, and as would be required by the Court in ordinary cases, but under the circumstances of this case we consider them sufficiently so. If there is no such case as is alleged, or if no appeal has been taken, no injury can be done to the defendants, nor have they any ground to object to the motion.

The refusal of the clerk to furnish a copy of the record upon the application of plaintiff's counsel, and his offer to pay for the same, deprived him of the necessary information to make a more specific statement of the case, and was a palpable and gross violation of the official duty of the clerk, and one which, we are constrained to say, justly subjects him to the severe animadversion of the Circuit Court, if not to removal from office. If a clerk shall be permitted to refuse to furnish a certified copy of a record at his discretion, the privilege which the law guaranties to each party to have the decision of the Circuit Court reviewed in this Court, will be wrested from him by the unwarrantable assumption of authority by this officer. He was one of the parties in this case, and to defeat the operation of a judgment against himself and others, he has violated his official duty, and set at naught the plain and positive requirements of the law. Such conduct in an officer of the law, and of the Court, cannot for a moment be tolerated, or suffered to pass, without the expression of our disapprobation and censure.

As the names of all the defendants are not disclosed by the affidavits, we cannot render judgment for costs against them, but we dismiss the appeal without costs.

Appeal dismissed.

ZEPHANIAH B. JOB *et al.*, appellants, *v.* ALBERT TEBBETTS, appellee.

Appeal from Madison.

In taking proof of the execution of a deed by the testimony of a subscribing witness, the bare statement by the certifying officer that such person was "known" to said officer, is neither a literal nor substantial compliance with the requisitions of the statute; nor is the statement of the person testifying as to the execution of the deed, the proof of a "credible witness" required by the statute, that such person is a subscribing witness to the deed.

It is not necessary to state in the certificate of proof of a deed by a competent and credible witness, as required by the statute, that such witness is "competent and credible." The law presumes that the officer complied with the directions of the statute by examining a competent and credible witness, but this presumption, however, may be rebutted by proof to the contrary.

Where, in taking proof of the handwriting of grantors to a deed, the witness stated that he, as agent of the Illinois Land Company, had frequently seen, and well knew all the signatures of the grantors named in the deed as trustees, and of the subscribing witness as secretary of the same Company, in connection with the transactions of said Company, it was *held* to be sufficient to show, either that he had seen them write, or had seen documents with their names subscribed thereunto, and recognized by them as genuine in the course of business transactions.

Proof that the grantor in a deed, and the subscribing witnesses are deceased, or cannot be had, must be made, preliminary to the examination of a witness to prove their handwriting. In the absence of anything to the contrary, it will be presumed that such proof was made.

It is not necessary to state in the certificate of proof of a deed by the testimony of a subscribing witness, that he subscribed his name as such in the presence and at the request of the grantor. The proof made by the witness, which is required to be stated in the certificate has reference to the execution of the deed by the grantor, and not to the subscription of the name of the subscribing witness thereto as such.

The description of land in a deed offered in evidence, was thus: "A certain tract of land situate in Madison county, in the State of Illinois, to-wit: The south fractional half of section No. 33, T. 5 N. of R. No. 9, west of the 4th principal meridian." The declaration in ejectment described the land in the same manner, except as to the meridian, which was called the third principal meridian. It was objected that there was a variance between the declaration and proof: *Held*, that the words in the deed, "the 4th principal meridian," were surplusage, Madison County being south of that meridian, and there being no such land as that described as being west of it.

EJECTMENT, in the Madison Circuit Court, brought by the appellee against the appellants.

The proceedings in the case in the Circuit Court, are fully stated in the Opinion of the Court.

J. Gillespie and L. Trumbull, for the appellants.

H. W. Billings and L. B. Parsons, Jr., for the appellee.

1. A certificate of acknowledgment substantially complying with the statute as to the facts to be embodied therein, is sufficient. Vance *v.* Schuyler, 1 Gilm. 163; Livingston *v.* Kettelle, *ib.* 118.

2. The form of a certificate is immaterial, provided the directions of the law are substantially complied with. Jackson *v.* Gumaer, 2 Cowen, 567; Nants *v.* Bailey, 3 Dana, 111; Talbot *v.* Simpson, Peters' C. C. R. 190; Brown *v.* Farrow, Ohio Cond. R. 509.

3. What shall be satisfactory evidence that the person offering himself as a subscribing witness, is left to the descretion of the officer. Jackson *v.* Vickray, 1 Wend. 412; Same *v.* Harrow, 11 Johns. 435. As to the correct meaning of "competent and credible witness," as used in the 20th section of the 24th chapter of the Revised Statutes, see Losee *v.* Losee, 2 Hill's (N. Y.) R. 612.

4. Wherever there is a subscribing witness to the execution of a deed, it is not necessary to produce the witness on the trial, unless he is within the reach of the process of the Court. Wiley *v.* Bean, 1 Gilm. 305.

5. To prove the handwriting of a person, any witness may be called who has, by sufficient means, acquired such a knowledge of the general character of the handwriting of the party as will enable him to swear to his belief that the handwriting in question, is the handwriting of that person. 2 Stark. Ev. 372–3. Such knowledge may be derived from having seen the person write, or from authentic papers received in the course of business. Tilford *v.* Knott, 2 Johns. Ca. 214; 1 Greenl. Ev. 646, § 577; Jackson *v.* Phillips, 9 Cowen, 112; Furber *v.* Hilliard, 2 New Hamp. 481; 3 Phillips' Ev. 1325.

6. If, in the description of an estate in a deed, there are

particulars sufficiently ascertained to designate the thing intended to be granted, the addition of circumstances, false or mistaken, will not frustrate the deed. Jackson *v.* Clark, 7 Johns. 222; Same *v.* Root, 18 do. 78–9; Same *v.* Marsh, 6 Cowen, 283–4.

7. The governing consideration in all cases upon the construction of deeds, is to give effect to the intention of the parties, if the words they employ will admit of it. Jackson *v.* Loomis, 18 Johns. 84; Same *v.* Same, 19 do. 450–51; Worthington *v.* Hylyer, 4 Mass. 196; Hall *v.* Fuller, 7 Verm. 105; Gates *v.* Lewis, *ib.* 513. "*Falsa demonstratio non nocet*," when the thing itself is certainly described. 4 Kent's Com. 467.

8. The meaning of a deed and what are the boundaries, are questions of construction for the Court; where the land lies, is a question for the jury. Hurley v. Morgan, 1 Dev. & Batt. 425; 2 U. S. Dig. 45, § 465.

9. Where an ambiguity as to the location and boundaries of land exist on the face of the deed, the Court may allow evidence *dehors* the grant to go to the jury, and this is a proper matter for their consideration. Baker *v.* Talbot, 6 Monroe; Dorsey *v.* Hammond, 1 Har. & Johns. 201; Davis *v.* Batty, *ib.* 281; Thompson *v.* Brown, *ib.* 337.

10. Where parol evidence is illegally admitted to explain the description of land granted in a deed, it is no cause for reversal, if, from the language in the deed, the Court can fix the boundaries without the aid of such evidence. Letcher *v.* Norton, 4 Scam. 579.

The Opinion of the Court was delivered by

THOMAS, J. This was an action of *ejectment* brought by plaintiff below, for the recovery of the south fractional half of section 33, in township 5 north, range 9 west of the third principal meridian.

The plaintiffs offered in evidence among other things,

1st. A deed from John W. Leavitt, Charles F. Moulton, Daniel Low, David H. Nevins, John N. Gossler, Joseph L.

Joseph, Samuel S. Lewis, Amos Binney, James C. Dunn, Lemuel Lamb, Joseph Swift, Charles Atwater, and James B. Danforth, to Lemuel Lamb and Thomas Dunlap; which was objected to on account of the insufficiency of the proofs and acknowledgments, but the objection was overruled, to which defendant excepted.

Plaintiff also offered a deed from said Lamb and Dunlap to David H. Nevins and John Alstyne, which was objected to on account of the insufficiency of the acknowledgment thereto, and proof thereof, but the same was overruled, to which the defendants excepted.

Plaintiff then offered a deed from Henry Winsor, assignee of the estate of Samuel S. Lewis to Albert Tebbetts, which was objected to on account of a misdescription of the land; whereupon plaintiff offered a witness to prove that he knew the south half of fractional section 33, township 5 north, range 9 west, in Madison county, Illinois, and that was the land in question, and that it was west of the third principal meridian, and that there were no lands in Madison county west of the fourth principal meridian. To the introduction of this proof defendants objected, but the testimony was allowed and the witness swore as above stated, to which defendants objected.

The plaintiff offered another deed from Henry Winsor to Albert Tebbetts, which was objected to, and the objection sustained, to which the plaintiff excepted. The jury found 11-13 ths of the land in question to be in the plaintiff, and the defendants moved the Court for a new trial, which was overruled and judgment accordingly, and defendants excepted.

The parties bring the cause into this Court, in the shape of an agreed case, upon portions of the record. It is admitted that plaintiff would have failed in making out his title, if either of the deeds above set forth, offered by the plaintiff, objected to by defendants, and allowed to be read to the jury, had been excluded by the Court, or if the testimony of the said witness to identify the land in question had been excluded, unless the Supreme Court should be of the opinion that the second deed from Winsor to Tebbetts, and rejected by the Court, was improperly rejected, in which event, the judg-

ment below is not to be reversed on account of any defect in the deed from Winsor to Tebbetts admitted by the Court.

I. The first mentioned deed purports to have been executed by all the several grantors named in it, in proper person, except Charles F. Moulton, in whose name it appears to have been executed by David H. Nevins, as attorney in fact. The name of F. Taylor is subscribed to said deed as a subscribing witness, and that of J. Tillson Jr. also as to the signature of J. C. Dunn.

There are attached to the said deed eight several certificates of proof of the execution thereof by one or more of the several grantors named in it. The defendants admitting the sufficiency of one of said certificates (to-wit, the fifth in the order in which they were taken), to prove the execution of the said deed by the grantor Dunn, denies that the signature of the remaining grantors, or any of them, are shown by any of the remaining certificates to have been legally proved.

1st. The insufficiency of the first certificate is admitted by the plaintiff as showing only an acknowledgment of the professed agent of Charles F. Moulton, of his execution of the deed in the nome of the said Moulton, without the exhibition of any evidence of his authority to represent him in that behalf.

2nd. The second certificate is in the words and figures following, to-wit:

"State of New York, }
King's County. } Be it remembered, that on the 25th day of August, in the year of our Lord eighteen hundred and thirty-eight, personally appeared before me, Fredrick Taylor to me known, who being by me duly sworn did depose and say, that he resides in the city of Philadelphia, and that the within named individuals, that is to say John W. Leavitt, Lemuel Lamb and Charles Atwater, David H. Nevins to him known, as the attorney of Charles F. Moulton, Daniel Low, David H. Nevins, John H. Gossler, Joseph L. Joseph, Samuel S. Lewis, Amos Binney, Joseph Swift, and James B. Danforth known to him to be the same persons whose signatures are annexed to the within instrument severally and respectivly signed

their names to said instrument, and duly acknowledged the execution thereof, for the uses and purposes therein expressed, and that he became a subscribing witness to said execution."

"In testimony whereof, &c.

[L. S.] (signed) JOHN SMALLEY,
Notary Public."

The law prescribing the mode of authenticating deeds by the testimony of subscribing witnesses is as follows: "And on taking proof of any deed, or instrument of writing, by the testimony of any subscribing witness, the judge or officer shall ascertain that the person who offers to prove the same, is a subscribing witness either from his own knowledge or from the testimony of a credible witness, and if it shall appear from the testimony of such subscribing witness, that the person, whose name appears subscribed to such deed or writing is the real person who executed the same, and that the witness subscribed his name as such, in his presence and at his request, the judge or officer shall grant a certificate stating that the person testifying as subscribing witness, was personally known to him to be the person whose name appears subscribed to said deed, as a witness of the execution thereof, or that he was proved to be such by a credible witness, naming him, and stating the proof made by him," &c. Revised Statutes, ch. XXIV, § 20.

The certificate under consideration is wholly defective, in this, that it contains no statement of the identity of the person testifying as to the execution of the said deed, with him whose name is thereunto subscribed as a witness, either upon the knowledge of the officer taking the proof, or the testimony of a credible witness. The bare statement that such person was known to said officer, is neither a literal, nor substantial compliance with the requisition of the statute in that behalf. Nor is the statement of the person testifying as to the execution of the deed, the proof of a credible witness, required by the statute, that such person is a subscribing witness to the deed.

3d. The third certificate shows the proof of the execu-

tion of the aforesaid deed by James C. Dunn, one of the grantors named in it, by the testimony of John Tilson Jr. as a subscribing witness of the execution of said deed by the said Dunn, but the necessity of its examination is superseded by the admission of the defendant's counsel that the fifth certificate, showing the same proof by the same witness, is sufficient.

The remaining certificates are intended to show proof by persons other than the subscribing witnesses to said deed, of its execution by one or more of the grantors named therein. The view taken of one of said certificates, viz: the sixth, which has reference to the execution of the said deed by all of the grantors named in it, except Charles F. Moulton, will render the expression of an opinion as to the sufficiency of any of the others unnecessary.

6th. That certificate is as follows, to wit:

"State of Illinois, } ss.
Adams County. } Be it remembered, that on this 21st day of October, A. D. 1846, came before me, John Tillson Jr., to me personally known, and who being by me sworn, did depose and say, that he was personally acquainted with John W. Leavitt, Daniel Low, David H. Nevins, Lemuel Lamb, John N. Gossler, Amos Binney, Joseph L. Joseph, Samuel S. Lewis, James C. Dunn, Joseph Swift, Charles Atwater, James B. Danforth, and Frederick Taylor, whose names appear subscribed to the foregoing deed, as grantors and attesting witness. That neither of said individuals now reside, or ever have resided in the State of Illinois, but that all of whom, as deponent verily believes, who are not dead, except Frederick Taylor whose residence, if in the United States, is unknown to his acquaintances, now reside either in the State of Massachusetts, Connecticut, New York, or Pennsylvania. That said deponent well knew their signatures. That all of said named individuals, except Frederick Taylor, were the trustees of the Illinois Land Company, of which deponent was the agent, and said Taylor the Secretary: and in connection with the transactions of which company, said deponent had frequently seen, and well knew all the signatures of the said in-

dividuals; that said deponent verily believed each and all the names of said individuals were thereunto subscribed by themselves."

"In testimony whereof, &c.

[L. s.] (signed) PETER LOTT, Clerk,
By GEORGE W. LEECH, deputy."

The provision of law in pursuance of which this proof was taken, is found in the conclusion of sec. 20, chap. XXIV. of the Rev. Stat. of 1845, on page 107, and is in the following words, to wit: "And where any grantor or person, executing such deed or writing, and the subscribing witnesses are deceased, or cannot be had, the judge or officer as aforesaid, may take proof of the handwriting of such deceased party, and subscribing witness or witnesses (if any), and the examination of a competent and credible witness, who shall state on oath or affirmation, that he personally knew the person whose handwriting he is called to prove, and well knew his signature (stating his means of knowledge), and that he believes the name of such person subscribed to such deed or writing as party or witness (as the case may be), was thereto subscribed by such person; and when the handwriting of the grantor or person, executing such deed or writing, and of one subscribing witness (if any there be), shall have been proved as aforesaid, the judge or officer shall grant a certificate thereof stating the proof aforesaid."

It is objected, *first*, that the officer taking the proof of the handwriting of the grantors named in the deed under consideration, does not in this certificate state that John Tilson Jr., the person by whom such proof was made, was a competent and credible witness; and *second*, that the said Tilson's means of knowledge of the handwriting of the person named as grantors in and subscribing witness to said deed, as stated in said certificate, were wholly insufficient to entitle him to prove by the statement of his belief, "that the names of such persons subscribed to said deed," as grantors and witness, "were thereto subscribed by such persons."

The first of these objections is manifestly untenable. Although the law authorizes the officer to take the evidence

of "competent and credible witnesses" only in proof of the execution of deeds, and to state the proof made by such witnesses in his certificate, yet it does not require him to certify that any such witnesses are "competent and credible." The law is in that respect directory to the officer, and it will be presumed that he has obeyed its behests. That presumption, it is true, may be rebutted by proof that the witness proving a deed in any case, was not competent nor credible, and the validity of the proof made by him be thus destroyed; until then it will suffice.

The second objection is also considered by a majority of the Court, as inoperative to impair the validity of the certificate.

The statement of the witness that he, as agent of the Illinois Land Company, had frequently seen, and well knew all the signatures of the grantors named in said deed as trustees, and of the subscribing witness as secretary of the same company, in connection with the transactions of said company, is deemed sufficient to show either that he had seen such persons write, or had seen documents with their names subscribed thereto, and recognized by them as genuine, in the course of business transactions.

In holding this certificate sufficient we are not to be understood as dispensing with the proof necessary to lay the foundation for receiving proof of a deed by any other than a subscribing witness thereto, when, as in this case, it appears that the deed was attested by a subscribing witness.

Such foundation can only be laid by satisfactory proof, in the language of the law, "that the grantor or person executing such deed or writing, and the subscribing witnesses are deceased, or cannot be had," (Rev. Stat. ch. XXIV, § 20;) and the requisition of the law in that behalf is not complied with, by a statement of the officer in his certificate of the proof made by the witness, that he swore to the death or absence of the grantor and subscribing witness.(*a*).

That proof is to be made to the Court preliminary to offering the proof of the deed for adjudication, and must be made by matter *aliunde* the certificate. In the absence of

(*a*) But see Job *v.* Tebbetts, 5 Gil. R. 376.

anything showing that it was not so, it will be presumed that this requisite preliminary proof was in this case made.

II. The certificate of the proof of the execution of the second deed offered in evidence by the plaintiff, is in the words and figures following, to wit:

"State of Pennsylvania, }
City and County of Philadelphia. }

On the 9th day of September, A. D. 1842, personally came before me, Frederick Taylor, a subscribing witness to the within indenture, with whom I am personally acquainted, who, being by me duly sworn did depose and say, that he resides in the said city; that he knew Thomas Dunlap, and Lemuel Lamb, the persons described in, and who executed the within indenture; that they acknowledged they executed the same for the uses, purposes and considerations therein mentioned, and that the said Frederick Taylor subscribed his name as a witness thereto."

"In testimony whereof, &c."

[Seal.] (signed)

"Edward Hurst, Not. Pub."

The objections to this certificate urged by the defendants' counsel, are *first*, that it does not state that the officer taking the proof of the deed, "ascertained" before granting his certificate, that the person who offered to prove the said deed, was a subscribing witness, either from his own knowledge, or from the testimony of "a credible witness" as required by law, and *second*, that it does not state "that it appeared from the testimony of such subscribing witness, that the said witness subscribed his name as such, in the presence and at the request" of the grantor named in the deed.

I consider the first of these objections entirely groundless. The officer in his certificate describes the witness who proved the deed as "Frederick Taylor, a subscribing witness to the within indenture, with whom I am personally acquainted;" and that I consider as amounting virtually to a statement that the officer, of his own knowledge, knew the said Frederick Taylor to be a subscribing witness to said deed.

As to the other objection, it is the opinion of a majority of the Court that it, also, is unsound. It is considered that although it must "appear from the testimony of a subscribing witness, that he had subscribed his name as such in the presence, and at the request of the grantor, before the officer can grant his certificate, that nevertheless, that fact need not be stated in the certificate; that "the proof made by the witness," which the law requires should be stated in the certificate, has reference to the execution of the deed by the grantors, and not the subscription of the name of the subscribing witness thereto as such.

In this view of the subject, the Court did not err in admitting said second deed. The objection to the plaintiff's third deed, being the first offered by him in evidence, from Henry Winsor to him, is two-fold, viz:

1st. That it misdescribes the land sued for; and

2d. That it was not sufficiently proved to have been executed by the grantor named in it.

1st. The description of the land, as found in the deed, is "a certain tract of land situate in Madison county, in the State of Illinois, to-wit: the south fractional half of section No. 33, T. 5 N. of R. No. 9 west of the 4th principal meridian." The description in the plaintiff's declaration is in all respects the same, except as to the meridian west of which the land is described as lying, that named in the said declaration being the 3d principal meridian. The variance in this respect between the allegation of the declaration, and the deed offered in evidence to support it, should operate to render the latter inadmissible for irrelevancy, unless the words "of the 4th principal meridian," used in it, may be rejected as surplusage. It is assumed by the plaintiff's counsel that they may be. He insists that the description of the land as being in a certain section, township and range west, and Madison county, gave to it a certain and definite locality in that county, without reference to the particular meridian west of the range in which it was situated, lay; that the law would intend that such meridian was that nearest said county on the east; and hence the deduction is drawn by him, that

any reference to the meridian being unnecessary for perfecting the description of the land, should, therefore, if inconsistent with the description made without it, be rejected as surplusage.

The premises assumed by him are undoubtedly correct, but the conclusion drawn therefrom is not necessarily so. It may be premised as well of the county as of the meridian, that the latter being described, no description of the former is necessary, and then by the same process of reasoning, if the two were contradictory of each other, it might be rejected.

But the necessity of the rejection of either of these terms of description, where both are used, can in no case exist if they be compatible with each other. In such case they add to, rather than diminish the certainty of the description in so far, as they express what in case of omission to define the meridian, the law implies. But where the terms are inconsistent and contradictory of one another, and the use of both destroys the certainty of description found in the use of either one or the other, if both be used, must be rejected, or the deed be inoperative. As in this case, if the land described as being in Madison county, had been also described as being not in T. 5, but in T. 4 N. of R. 9 west of the 4th principal meridian, its locality would have been fixed in Hancock county, and thus inconsistency between the two terms of description used, would have resulted, rendering the rejection of one or the other necessary to give effect to the deed.

In such case the description by the meridian as being a relative mete or bound fixed by law for purposes of the description of land, and free from the liability to change to which county lines are constantly subjected, would be retained in preference to that by the county. But in this instance no such conflict arises. The fourth principal meridian, it is true, does not extend as far south as Madison county, and therefore no lands lying in that county are properly described as lying west of that meridian; but it is on the other hand equally true that there is no such tract of land in the State of Illinois as section No. 33, in township No. 5 north of range No. nine west of the fourth principal meridian. The reference

to that meridian is consequently as unmeaning as if made to a meridian having no existence in the State, as the tenth for instance, and its effect is inoperative to disturb the certainty of the description existing without it, and, upon the maxim of *utile per inutile non vitiatur*, must be rejected as surplusage. Thus the description being left as if no meridian had been referred to, corresponds with that in the declaration, as the law fixes the third principal meridian as that west of which the land being in range nine, and in Madison county, necessarily must be.

Had the reference to the fourth principal meridian indicated a tract of land lying in the State of Illinois, but out of the county of Madison, and thus rendered the description uncertain, parol evidence would have been as well inadmissible, as inadequate, either to relieve from such uncertainty, or to indicate which of the contradictory terms of description should be rejected. But the parol evidence heard upon the trial in explanation of the meaning and operation of the deed in question, although uncalled for and improper, was nevertheless without effect upon the result. It amounted to no more than the Court already judicially knew, that no lands in Madison county lay west of the fourth principal meridian. Its introduction, consequently, did not prejudice the defendants.(*a*)

2nd. Of the sufficiency of the authentication of this deed there can be no doubt. The acknowledgment of the grantor is made before a justice of the peace of the county of Suffolk, in the State of Massachusetts, and his certificate is accompanied by that of the "clerk of a Court of record, to-wit, of the Court of Common Pleas within and for said county and State, under his hand and the seal of said Court," that the said "deed was executed and acknowledged in conformity with the laws of such State," as required by the statute in such case made and provided. Rev. Stat. XXIV, § 16.

There being no error in the opinion of the Circuit Court in admitting any of the several deeds referred to in evidence, its judgment is affirmed with costs.

Judgment affirmed.

(*a*) Miller *v.* Beeler, 25 Ill. R. 168; 1 Greenl. Ev. 301, note 2; 19 Johns. R. 449.

ALEXANDER YOUNG, Sheriff, &c. plaintiff in error, *v.* BENJAMIN H. CAMPBELL *et al.*, defendants in error.

Motion to dismiss a Writ of Error.

Where a party in interest in a bond taken from the defendants in an attachment suit, usually called a forthcoming bond, caused a suit thereon to be brought in the name of the sheriff to whom the bond was executed, without his knowledge or consent, and afterwards sued out a writ of error in his name, the Supreme Court ordered that the writ be dismissed unless indemnity was given to the sheriff against all costs that might accrue on the writ of error, by a day stated.

MOTION to dismiss a writ of error. In this case, Alexander Young, named as plaintiff in error in the above suit, filed the following affidavit:

"State of Illinois, }
Jo Daviess County. } Alexander Young being duly sworn, states that he was formerly sheriff of Jo Daviess county and is the plaintiff in error in the suit which he understands is now pending in the Supreme Court of Illinois, entitled Alexander Young, sheriff, &c. *v.* Benjamin H. Campbell and William Hempstead, impleaded, &c., which writ is taken up from the Circuit Court of Jo Daviess county. That he never authorized or instructed the said suit to be brought, and never knew that there was such a suit brought or pending in the Circuit Court of Jo Daviess county until after judgment for costs was rendered against him in the said Circuit Court. That upon an inspection of the papers in the cause he finds that it was a suit brought in his name in the Circuit Court of said county, on the 8th day of October, A. D. 1846, by Messrs. Pratt & Higgins, attorneys at law, founded, as it appears by the declaration filed on that day, on a certain writing obligatory given by the defendants to this affiant, while he was acting as sheriff of Jo Daviess county, and to his successors in office, said bond bearing date, August 7th, 1843.

This affiant further states, that he has not been sheriff of Jo Daviess county since some time in April or May, A. D. 1845, having at that time resigned the said office of Sheriff.

He further states that at the time the said suit was brought in the Circuit Court of Jo Daviess county and long before, he was a resident of Jo Daviess county, living but a short distance from Galena; and he was in the habit of almost daily visiting Galena, and that he frequently and repeatedly saw the attorneys of the plaintiffs about the time the suit was brought, and for many months before, and he would willingly and cheerfully, at any time, upon request, have assigned the said writing obligatory to the original plaintiff in the attachment suit (Hugh F. Laird), who is now living and residing but a few miles from Galena, but no application has ever been made to him by any person whatsoever, to assign the said bond.

He states, also, that Mr. Pratt was employed in the said original suit of attachment of Laird *v.* Thayer, for the plaintiff long before its final determination and when judgment was finally rendered. He has recently learned, very much to his surprise, that Mr. Pratt has taken the case up to the Supreme Court of the State, which has been done without his knowledge and against his wishes, and he therefore asks that the case be dismissed.

He adds in conclusion, that having long been out of office, and there being a sheriff of Jo Daviess county, duly elected and qualified, when this suit, now pending in the Supreme Court, was brought in the Circuit Court; and having no interest whatsoever in the matter, he cannot comprehend by what right, or under what necessity, his name has been used in the circumstances of this case, without his authority or knowledge, and contrary to his wishes.

(signed)

ALEX'R YOUNG."

"Sworn to and subscribed before me, this 18th day of December, A. D. 1847, as witness my hand and the seal of the Circuit Court of Jo Daviess county, Illinois.

Attest,

[Seal] WM. H. BRADLEY, Clerk."

The original writ in this case commanded the defendants to

answer "Alexander Young, sheriff, &c." The declaration commenced in these words: "Alexander Young, sheriff, &c. who sues for the use of———." The defendants demurred to the declaration, and the demurrer was sustained by the Court below. The plaintiff, by his attorney, excepted, and electing to abide by the demurrer, the defendants moved for judgment thereon, when a judgment was rendered against the plaintiffs for costs.

A writ of error was sued out as aforesaid. The motion in this Court was argued *ex parte* by

C. GILMAN, for the plaintiff in error, who contended that the writ should be dismissed, *first*, because it was sued out without his knowledge and consent, and *secondly*, because the statute did not authorize a suit upon such an instrument.

He contended that the case was not to be regarded in the same light as a suit upon a replevin bond. In the latter case, on condition broken, "the sheriff, or plaintiff, in *the name of the sheriff to his own use*," may bring suit. Rev. Stat. ch. 88, § 7, p. 434. In cases like the present, the sheriff is required to return the bond to the Court in which suit is brought, on the first day of the term to which the attachment is returnable. He is then to assign the bond to the plaintiff in the attachment, &c, when the latter "may bring a suit in his own name thereupon." The plaintiff may object to the sufficiency of the bond, and if he does not, the sheriff is no longer interested, and suit can only be brought in the name of the plaintiff. Rev. Stat. ch. 9, §§ 9, 10.

Admitting, however, for the sake of argument, that a suit may be brought in the name of the sheriff, as is allowed in cases of replevin bonds, indemnity must then be given, if required. But this suit not being commenced for the use of any person, is within the control of the plaintiff in error, and he may have it dismissed on his own motion.

At a subsequent day of the term, the Court caused the following order to be entered.

ORDERED, that the writ of error be dismissed unless the plaintiff in error be indemnified by the giving of security for all the costs that may accrue on this writ of error. The bond for costs to be approved by the clerk of this Court, and filed on or before the first day of June next.(*a*)

Rule nisi.

(*a*) Buckmaster *v.* Beams, 3 Gil. R. 97.

MATTHIAS HULICK, plaintiff in error, *v.* IRA SCOVIL, defendant in error.

Error to Peoria.

Testimony, if relevant, may be properly received, although in itself insufficient to show good ground of recovery or defence, and a party, by not objecting to its reception when offered, does not compromit any right afterwards to ask for its exclusion on account of such insufficiency.

Intrusion and trespass, under the statute, are distinguishable in this: the former implies an unlawful possession of lands, while the latter may amount to a mere entry upon land without retaining possession, but doing some damage.

An Auditor's deed is not a Patent; there is a manifest distinction between them. The latter conveys the title of the Government, and is under the hand of the chief executive officer and the great seal of State. The former simply passes the owner's title, and is executed by the Auditor, or other proper officer, under his own hand and seal.

An Auditor's deed, so far as delivery and acceptance are concerned, stands on the same footing as any other deed between individuals.

In an action of ejectment brought by A against B the latter read in evidence to the jury an Auditor's deed to C of the premises in controversy, founded upon a sale for taxes, &c. due thereon, in order to establish an outstanding title. It further appeared in evidence that the attorney of B, a witness in the case, applied for and obtained the deed from the Auditor at the instance of his client; that neither he nor his client were authorized by C to obtain it, and that the deed was never delivered to or accepted by C; that the witness had heard there was such a person as C but did not know him; and that when the deed was made by the Auditor, the witness took it, and that it still remained in his or his client's possession. He further stated that B claimed under C and this was the only evidence offered for the purpose of connecting himself with the title alleged to pass by the deed: *Held*, that there was no delivery and acceptance of the deed.

A deed can only take effect at and from its delivery, if at all, and delivery and acceptance must be mutual and concurrent acts. Proof of an acceptance subsequent to the delivery is not sufficient to give validity to the deed. The presumption that a party will accept a deed because he is to be benefitted thereby, is never carried so far as to consider him as having accepted it.

EJECTMENT, originally brought by the plaintiff in error against the defendant in error in the Fulton Circuit Court,

but subsequently removed into the Peoria Circuit Court, where it was heard before the Hon. John D. Caton, without the intervention of a jury, by the agreement of the parties. The Court found the issue for the defendant and rendered judgment accordingly.

The evidence is stated in the Opinion of the Court.

E. N. POWELL, for the plaintiff in error.

1. Delivery is essential to the validity of a deed. Yet a delivery in some instances may be to a third person for the use and benefit of the grantee. Church *v.* Gilman, 15 Wend. 656; Ferguson *v.* Miles, 3 Gilm. 358. But when the delivery is made to a third person, it must appear that it was for the use of the grantee.

But a deed procured by a mere volunteer, without authority of the grantee, is void. Ferguson *v.* Miles, *ibid.* 358.

In this case, it clearly appears from the testimony that there was no delivery to the grantee or acceptance by him, or to a third person for his use and benefit, and there can be no delivery without an acceptance. Jackson *v.* Phipps, 12 Johns. 418; Herbert *v.* Herbert, Bre. 282; Church *v.* Gilman, 15 Wend. 656; Jackson *v.* Richards, 6 Cowen, 617; Bryan *v.* Wash, 2 Gilm. 557.

2. But it will be contended on the other side that the Auditor's deed is a *Patent*, and therefore it needs no formal delivery, but, so soon as it is executed, that it at once becomes valid without delivery to or acceptance by the grantee; and the case of Graves *v.* Bruen, 1 Gilm. 167, will be cited in support of this position.

I can see nothing in that case to call for such a decision, and am, therefore, led to conclude that it was nothing but a "*judicial flourish.*" The recording of a deed adds nothing to its validity; the recording of a deed is merely to give notice.

The case in 15 Wend. 656, was a deed emanating directly from the State of Connecticut, and the Supreme Court of New York placed the deed precisely upon the same grounds as a deed from an individual.

Again, the Supreme Court of the United States, in the case of Boardman *v.* The Lessees of Read, 6 Peters, 342, say:

"Titles acquired under sales for taxes depend upon different principles, and these are the titles to which some of the authorities cited in the argument refer. Where an individual claims land under a tax sale, he must show that the substantial requisites of the law have been observed; but this is never necessary when the claim rests on a *Patent* from the Commonwealth."

Now it seems to me, that if the Auditor's deed is to be assimilated to a Patent, that then it inevitably follows that the deed of the sheriff for lands sold for taxes, or upon an execution at law, would be a Patent. The Auditor is the officer appointed by the State to execute the deed; it is called a *deed* in the Act authorizing him to make it; the sheriff is also the officer appointed by the same authority to execute a deed, and his deed is as much a Patent as the deed of the Auditor. It is true there may be a little more dignity in the office of Auditor in consequence of his proximity to the fountain of power, still his deed is under his own private seal, and not like Patents, issuing direct from the State, under the great seal.

3. I am also advised that the defendant's counsel will rely upon the case of Doe, &c. *v.* Knight, 12 Eng. Com. Law R. 351.

By a careful examination of that case, it will be found that it does not run counter to the authorities above cited. In that case the Court decided that the deed had been sufficiently delivered, because the grantor had parted with the custody of the deed, and had delivered it to a third person for the use and benefit of the grantee.

Delivery of some kind is deemed necessary, by all the authorities. Now compare the facts in the case above cited with the case now before the Court. Here by a bill of exceptions it appears that no delivery to the grantee, or to any person for his use, was ever made. The fact of authority in Elliott to procure the deed is expressly negatived, and there can be no presumption of authority, or that the deed was for the benefit of the grantee. If anything is to be presumed, it is that Wolcott had abandoned his purchase by

never taking out his deed, or that he had received his redemption money from the owner of the land.

W. Elliott, Jr., for the defendant in error, filed the following brief:

It is contended by plaintiff that the deed of the Auditor was erroneously admitted in evidence in the Circuit Court, because it was not delivered to the grantee in *propria persona*. An Auditor's deed is a Patent for land from the State. Patents or deeds from the United States, or a State, are sufficiently delivered when signed by the proper officer and filed in his office, and vest the title of the land in the patentee without further delivery. Graves *v.* Bruen, 1 Gilm. 167; Rhinehart *v.* Schuyler, 2 do. 473.

But admitting that Patents are to be subject to the same rules as other deeds, this deed was delivered. Wolcott had prior to its issuance, purchased the land conveyed of the State for taxes; the Auditor, in accordance with his duty, had executed a deed to the purchaser, and delivered the same to an attorney of this Court for the benefit of the grantee, whose acceptance of the same in behalf of the grantee was sufficient to vest the title to the land in the grantee. A delivery may be made to a stranger for and in behalf of the grantee and to his use, although he may be entirely ignorant of the conveyance. Bryan *v.* Wash, 2 Gilm. 557; Hatch *v.* Hatch, 9 Mass. 307.

O. H. Browning and N. Bushnell, for the defendant in error, argued:

I. The statement of the defendant that he claimed title to the premises in controversy, under the grantee in the tax deed were properly received in evidence. The declarations of a person in possession of land which qualify or give character to such possession, are always admissible in evidence as a part of the *res gestæ*. 1 Greenl. Ev. § 109.

II. The plaintiff in ejectment must recover on the strength of his own title. It is sufficient for the defendant to show title out of the plaintiff, whether in himself or in a

third person. Adams' Eject. 275; Bloom *v.* Burdick, 1 Hill's (N. Y.) R. 130. The only exception is, where it appears affirmatively that the defendant is a mere trespasser or intruder without color or claim of title; in that case he cannot set up an outstanding title in a third person. Jackson *v.* Harder, 4 Johns. 202; Same *v.* Rowland, 6 Wend. 671; Same *v.* Moore, 16 Johns. 197; Same *v.* Schamber, 7 Cowen, 187, 643; Same *v.* Stambury, 9 Wend. 201. In the present case the defendant is in possession, claiming title. There is no evidence to show that this claim is fraudulent or colorable; nothing to explain the origin or to qualify the character of this possession. The possession alone, unexplained, is *prima facie* evidence of title, sufficient to protect the defendant against the whole world except the rightful owner.

III. There was a sufficient delivery and acceptance of the tax deed. A deed may be delivered by words or acts, or by words alone. It may be delivered to the grantee, or to his agent, or to a stranger to his use. If delivered to a stranger, whether or not the grantee is informed of the execution of the deed and formally accepts it, is immaterial. If thus delivered by the grantor to a stranger for the purpose of conveying title and for the use of the grantee, this is a valid delivery; and if the grant is beneficial to the grantee, his acceptance will be presumed. The exercise of volition on his part is not required; this acceptance is a conclusion of law, antecedent to all information on the subject; an inference founded upon the reasonable presumption that every man will accept of an act done for his benefit. Whether the deed has been delivered, depends upon the fact whether the grantor has placed it beyond his own control, whether any act remains to be done by him. If it is denied that the deed has been accepted, it is for the party making the denial to disprove the presumption arising from the beneficial nature of the grant. This must be done by evidence, not merely negative, showing that the grantee is ignorant of the deed, but affirmative and positive, bringing home to the party a knowledge of the deed, and a disaffirmance of it.

Till such disaffirmance is shown, the presumption of acceptance must continue. For as this acceptance is implied by law for the benefit of the grantee, through his inability to accept in fact from his ignorance of the grant, the mere continuance of this ignorance and consequent inability cannot rebut the original presumption. Such is the plain conclusion to be drawn from a careful analysis of the numerous authorities on the subject. Verplank *v.* Sterry, 12 Johns. 576; Souverbye *v.* Arden, 1 Johns. Ch. R. 240; Cook's adm'r. *v.* Hendricks, 4 Munroe, 502; Inlow *v.* Commonwealth, 6 do. 74; Bryan *v.* Wash, 2 Gilm. 557; Shelton's Case, Cro. Eliz. 7; 4 Cruise's Dig. 28; Shep. Touch. 57–8; 4 Com. Dig. title *Fait*, A 3, 273; Taw *v.* Bury, 2 Dyer, 167 *b;* Church *v.* Gilman, 15 Wend. 656; Jackson *v.* Richards, 6 Cowen, 617; Wankford *v.* Wankford, 1 Salk. 299, 301; Ferguson *v.* Miles, 3 Gilm. 358; Cro. Eliz. 54; Wheelwright v. Wheelwright, 2 Mass. 447; Doe v. Knight, 12 Eng. Com. Law R. 351; Maynard v. Maynard, 10 Mass. 456; Harrison v. Phillips' Acad., 12 do. 456; Scrugham v. Wook, 15 Wend. 545; Herbert v. Herbert, Bre. 278; Clark v. Ray, 1 Har. & Johns. 318; Fay v. Richardson, 7 Pick. 91; Hatch v. Hatch, 9 Mass. 307; Hedge v. Drew, 12 Pick. 141.

O. Peters, also for the defendant in error, contended there was no necessity for any delivery of the deed of the Auditor of State to E. Wolcott, in order to show title out of the plaintiff.

This Court has solemnly decided that a deed from the Auditor, predicated upon a sale of land for taxes, is a Patent, and has the same force and effect as any other Patent from the Government of the State or United States, by its proper officers. On this point he cited Graves v. Bruen, 1 Gilm, 167; Rhinehart v. Schuyler, 2 do. 473. He further contended that a Patent took effect from the time of its execution. When the proper officer has duly executed the Patent, his functions and power over the subject matter of it, ceases, and the right of him for whose benefit it was made, begins.

The Auditor has his duty to perform, viz: to make the Patent; here his duty ends, and his power ceases, and the rights of the patentee become vested and fixed. In grants of land to purchasers from the United States, Patents often remain for years in the public land office. Would any one seriously contend, that the Patent is inoperative so long as it remains in the office? that the patentee in such case, has acquired no title described in the patent? and according to the decisions of this Court, is not the Auditor's deed, which has been termed (perhaps not inappropriately) a "tax patent," to have all the force and effect, and accompanied by all the incidents of any other Patent, emanating from the Government? This must be so, or this Court must recede from the ground it has heretofore occupied, and overturn the rules it has established, and the decisions it has pronounced. The effect to be given to a Patent, and when it is to take effect, is well stated, and forcibly illustrated in the case of Marbury *v.* Madison, 1 Cranch. 137.

In the case at bar, the owner of the land was in default in his duty to the Government, by not paying the taxes assessed upon it; by operation of law, the land is condemned for this non-payment of its dues to the Government. The Auditor, in pursuance of law, offers it for sale, and it is sold at public auction in conformity to law. The time for the redemption expires, and the Auditor executes a deed to the purchaser, Wolcott. This is all the Auditor had to do. The Government lost all control over the subject *instanter*, upon the performance of this official act, the execution of the Patent by the Auditor. Had the deed, by any casualty, been immediately destroyed, it would not have divested Wolcott of his title to the land. The conclusion, then, will follow, that the defendant having shown that the deed (the Patent), to Wolcott had been made by the Auditor, the title is shown to be out of the plaintiff, and the inquiry whether it was delivered or not, is rendered unimportant and immaterial.

It also follows, that the proof of the declarations of defendant as proved by Mr. Elliott, is immaterial, inasmuch as the Patent shows that the title is out of the plaintiff, and is rendered effectual,

and fully sustains the defence, irrespective of any declarations of defendant.

A. Williams, for the plaintiff in error, in conclusion.

A mere intruder connot set up an outstanding title in a third person. Perryman's Lessees *v.* Callison, 1 Term. R. 515; Jackson *v.* Harder, 4 Johns. 202–211; Williams *v.* Clayton, 1 Scam. 503, 505–6; Sands *v.* Codwise, 4 Johns. 597.

A tax deed is not a Patent. They depend upon entirely different principles. Boardman *v.* The Lessee of Read, 6 Peters, 342; Doty *v.* Peasley, 2 Bibb, 15; Shortridge *v.* Catlett, 1 A. K. Marsh. 587.

A delivery and acceptance of a deed is absolutely essential to its operation. Herbert *v.* Herbert, Bre. 282; Ferguson *v.* Miles, 3 Gilm. 363; Bryan *v.* Wash, 2 do. 557.

In all the reported cases at the time of the decision upon the operation of the deed, the grantee was claiming under it.

In this case the grantee knows nothing of the existence of the deed. It was, as the evidence shows, surreptitiously procured by the defendant for the purpose of defeating this action, and has remained in his hands ever since. The plaintiff proved title in himself to the land. The defendant seeks to defeat that title, not by showing paramount title in himself, but by proving that he—without any authority so to do—procured the Auditor, in 1842, to make out and deliver to him a tax deed for the land reciting, that it was sold in 1832 to E. Wolcott, without any proof that the land had ever been sold for taxes. This Court has decided that such deed, when offered in evidence by the owner thereof, without any evidence showing the circumstances under which it was executed, was evidence that it was rightly made; but they can scarcely be prepared, when it is shown to have been surreptitiously obtained, to decide that it is, without any other proof that the land had been sold, &c. It cannot be allowed to a defendant in this way to create a title in a third person without his knowledge and consent, and then to use it to prevent the owner of the land from recovering it.

The Opinion of the Court was delivered by

THOMAS, J.* The plaintiff in error brought his action of *ejectment* in the Circuit Court of Fulton county, to evict defendant from the possession of a certain tract of land lying in that county. The case went by change of venue into the Peoria Circuit Court, where it was, by the agreement of parties, tried by the Court without the intervention of a jury.

The plaintiff, claiming under the General Government, exhibited a chain of title, commencing with the patentee and terminating in himself, every link of which was perfect. The defendant relied upon showing title out of plaintiff, under and by virtue of a sale for taxes in pursuance of law. For that purpose he read in evidence to the Court a deed of the Auditor of Public Accounts of the State of Illinois, reciting an exposure of the tract of land in question to public sale on the 14th day of January, A. D. 1832, in conformity to law, for the sum of $2.62, the amount of tax for the year 1831, with interest and costs chargeable to said tract of land; the purchase of said land by one E. Wolcott for the said sum of $2.62, and the payment of the purchase money by the said Wolcott, and conveying said land to him in fee simple.

The plaintiff thereupon called William Elliott, Jr., the defendant's attorney, and proved by him that he went to the Auditor's office, at the instance of the said defendant, and procured the Auditor to execute the said deed; that the said Wolcott, the grantee in said deed, never authorized him or his client to get said deed executed, and that said deed never was delivered to nor accepted by said E. Wolcott; that witness had heard there was such a person as E. Wolcott, but did not know him, and that when said deed was made by the Auditor, witness took it and it has ever since been in his or his client's possession. The said witness stated that the defendant claimed under the said grantee, which was the only evidence offered by the defendant connecting himself with the title alleged to pass by said deed to the said grantee. This statement

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

of the witness, he was permitted to make, the plaintiff's objection to the contrary notwithstanding.

Upon this state of facts the plaintiff moved the Court to exclude the said deed from the consideration of the Court, upon the ground that it never had been delivered to nor accepted by the grantee named in it. The Court overruled the motion, found the issue for the defendant, and rendered judgment accordingly.

These several opinions of the Court admitting the evidence objected to by plaintiff, in refusing to exclude the deed, and in rendering judgment, were excepted to by the plaintiff, and are now assigned for error.

The only matter in controversy here, as it was in the Court below, is as to the validity of the title on which the defence is based. The result of that controversy depends mainly on the question of delivery, of the deed to, and acceptance by the grantee. Before considering it, however, it becomes necessary to dispose of several questions of minor importance, but in their nature preliminary, involving on the one hand the plaintiff's right to raise the question of the delivery and acceptance of the deed, under the assignment of errors; and on the other, the defendant's right to set up an outstanding title in a stranger, in bar of plaintiff's recovery.

The defendant's attorney insists, *arguendo*, that the plaintiff having permitted the deed to go in evidence to the Court without objection, should not now be allowed to deny that it was operative to vest title in the grantee; but this view of the subject is incorrect. The question is not as to the legal admissibility of the deed in evidence, irrespective of any extraneous matter, but of its sufficiency taken in connection with the circumstances accompanying its delivery, to subserve the purposes for which it was offered. Testimony, if relevant, may be properly received, although in itself insufficient to show good ground of recovery or defence as the case may be, where its deficiency may be supplied by other proof.(*a*) As for instance, a sheriff's deed, which, to show title, must be accompanied by evidence of a judgment and execution; or the ordinary case of one of a series of deeds, relied

(*a*) Williams *v.* Clayton, 1 Scam. R. 502; Greenup *v.* Stoker, 2 Gil. R. 689.

upon to show title. In such case it is not necessary to exhibit the entire chain of evidence at a single view, but from the very nature of the case it must be extended progressively. The question is not as to the sufficiency of the link offered and its associate links to complete the chain, or endue it with the necessary strength for its intended purposes, but simply to its adaptation to the composition of the proposed chain. Nor will the Court undertake so to control a party endeavoring to make out his chain of title, as to require that each link be the regular sequence of that next preceding it in the order of the evidence. When, however, the whole evidence on the subject has been heard, if the Court consider it insufficient, they may, on the application of the party against whom it was offered, either exclude it, or instruct the jury that it is insufficient to maintain the action or defence as the case may be.

Tested by this rule, the deed was admissible in evidence and could not properly have been rejected if it had been objected to. It was pertinent to the matter in issue, and if not sufficient in itself to make out the defence based upon it, might have been followed by other evidence making it so. The plaintiff, therefore, in permitting it to be read in evidence without objection, did not compromit any right afterwards to ask for its exclusion, on account of its impotency to show title out of the plaintiff, whether it appeared intrinsically or from matter *aliunde*.

And now as to the defendant's right to defend his possession in the manner attempted by him, which is denied by the plaintiff's counsel. Is he, as is contended, a mere intruder upon the land, connecting himself in no way with the alleged outstanding title of Wolcott? And if so, can he properly interpose that title as a bar to plaintiff's recovery?

Of the insufficiency of the defendant's evidence to connect him with Wolcott's title, I have no doubt; and in coming to this conclusion I by no means controvert the rule of evidence relied upon by his counsel, but simply deny its applicability to the question under consideration. The rule, as laid down by Greenleaf, is, that "declarations of a person in pos-

session of land in *disparagement of the title of the declarant* are admissible as original evidence. Possession is *prima facie* evidence of a fee simple, and the declaration of the possessor, that he is tenant to another, it is said, makes most strongly against his own interest, and therefore is admissible." And he adds: "But no reason is perceived why every declaration accompanying the act of possession, whether in disparagement of declarant's title, or otherwise qualifying his possession, if made in good faith, should not be received as part of the *res gestæ*, leaving its effect to be governed by other rules of evidence."(*a*). 1 Greenl. Ev. § 109.

The proof in the case at bar was not of any declaration of the defendant, but consisted simply of a statement of the witness that the defendant claimed under the grantee in the deed. But if the statement of the witness be considered as showing the defendant's declaration, it is still obnoxious to the fatal objection, that such declaration in no way "qualifies his possession" or "disparages his title," as it does not show how he claims, whether as purchaser or tenant. And again the circumstances negative the idea of "good faith" on the part of the defendant in making any such claim, and show a desire rather to fortify his possession than to weaken his title.

It results that defendant is in possession without color or claim of title, but whether as an intruder or trespasser (about which there was some controversy between the counsel), is perhaps immaterial, and indeed the characters would seem to be the same. Intrusion is, at the Common Law, one of the modes of *ouster* of the freehold, and is defined to be "an entry by a stranger after a particular estate of freehold is determined before him in reversion or remainder, as when a tenant for life dieth seized of certain lands and tenements, and a stranger cometh thereon, after such death of the tenant, and before any entry of him in reversion or remainder." 3 Ch. Bl. 169. Trespass is an entry on another's ground without lawful authority, and doing some damage however inconsiderable to his real property. *Ib.* 209. This broad distinction does not exist under our statute dispensing with livery of seizin, but the only distinction apparent to my

(*a*) Ricard *v.* Williams, 7 Wheat. U. S. R. 59.

mind between an intrusion and a trespass is, that the former implies an unlawful possession of lands, while the latter may amount to a mere entry upon land without retaining possession, but doing some damage.

But the error in the Court in admitting this evidence, would not necessarily operate to render the judgment of the Circuit Court reversible, unless it should appear, that in the absence of any evidence connecting the defendant with the alleged outstanding title in Wolcott, he could not lawfully use it as a shield to protect his possession from invasion by the plaintiff. Would such result follow? The plaintiff's attorney, as has been shown, insists it would, and in support of that position cites several authorities. That, however, principally relied upon, is the case of Jackson *v.* Harder, 4 Johns. 211.

On examination of that case, it will be found not to warrant the conclusion educed from it, to-wit: that in no case can a person in possession of land, protect such possession by proof of outstanding title in a stranger, without connecting himself with such title. The facts of the case show that one Baker had entered and held under the plaintiff, and that the defendant succeeded to the said Baker's possession, but in what way does not appear. The Court say, "it is not stated or alleged, that he entered under any pretence or color of title, and the natural and just inference seems to be, that he entered upon the possession, which Baker had left, as an intruder without title. In that case, the possession of the plaintiff was sufficient to entitle him to recover, and the entry of the defendant must be considered as a trespass, according to the decision in the case of Jackson *v.* Hazen, 2 Johns. 22. The defendant is either such an intruder, or he entered under Baker, and in either case he is precluded from questioning the plaintiff's right of possession." "But the defendant set up and offered to show an outstanding title subsisting in some third person, &c. The first question which presents itself here, is, whether a mere intruder can be permitted to protect this intrusion under an outstanding title in a stranger. I think not. The rule has never been carried that far, and

it would be a violation of just principle to apply it to the case of a trespasser, who enters upon another's possession, without pretence of title." That case, then, "hath this extent no more;" that where a person dispossessed of land by the intrusion of another, without any pretence of title, seeks to recover his possession by the eviction of the intruder, the latter may not protect his unlawful possession by showing outstanding title in a third person.

But the doctrine is otherwise, where, as in the case at bar, a person is found in the peaceable possession of land, and another, not showing himself ever to have been in the prior possession of such land, seeks to evict him by ejectment. In such case, it would be in palpable violation of the well settled doctrine that a plaintiff in ejectment can only recover upon the strength of his own title, and not upon the weakness of his adversary's, to refuse the defendant the privilege of destroying the plaintiff's claim to recovery, by showing title out of him. But the doctrine, "*melior est conditio possidentis*" prevails, and neither law nor reason, requires the possessor to show that he is entitled to retain his possession, before he is at liberty to show that the plaintiff has no right to take it from him. The law imposes no such condition precedent upon his right thus to assail his adversary's title. Tillinghast's Adams, 319, *et in notis;* Bloom *v.* Burdick, 1 Hill's (N. Y.) R. 143; 6 Verm. 395; Colman *v.* Talbot, 2 Bibb, 129; Jackson *v.* Harrington, 9 Cowen, 86; Colston *v.* McVay, 1 A. K. Marsh. 250; Thomas *v.* Head, *ib.* 450; Voorhies *v.* Bridgeford, 3 do. 26; Foster *v.* Joice, 3 Wash. C. C. R. 498. In Jackson *v.* Rowland, 6 Wend. 666, it is even said that where the title of the landlord has expired, the tenant may show an outstanding title against him; and by SPENCER J., in Jackson *v.* Morse, 16 Johns. 197, that in ejectment against a person who has forcibly entered upon and taken possession of land, it seems that the defendant is not precluded from setting up a title in himself or a third person in bar of the action.

But although we hold, that it was unnecessary for the defendant in order to entitle him to show title out of the

plaintiff, and in a stranger, to connect himself with such outstanding title, it nevertheless yet remains to be seen whether his omission in this case to connect himself with the title, alleged to pass by the Auditor's deed to Wolcott, does not render said deed inoperative for that purpose. That question, however, properly belongs to the investigation of another branch of the subject, to which I now proceed.

The plaintiff, insisting that delivery of the deed in question to, and its acceptance by the grantee named therein, or some one properly authorized to receive it for him, was essential to its validity, denies that there ever was any such delivery, or acceptance.

The defendant meets this objection by assuming, *first*, that the deed having been made by the Auditor, is to be considered as a Patent from the State, and that, therefore, no delivery of it was necessary, to vest title in the grantee; but that it was operative for that purpose, when it was issued. And *secondly*, if the document should be held to be, not a Patent, but a deed, that its delivery to the witness Elliott was a sufficient delivery to the grantee, and that his acceptance of it, as it is beneficial to him, is to be presumed.

The authority relied upon by defendant's counsel in support of the first of these positions is found in Graves *v.* Bruen, 1 Gilm. 172, and Rhinehart *v.* Schuyler, 2 do. 523. The former case holds that the registry laws do not apply to Patents issued by the State or United States, and therefore by analogy, not to those in consummation of tax sales, made by authority of the State; the latter holds the same doctrine, as applicable to proof of the execution of Auditor's deeds, under tax sales. Neither case settles that delivery of a tax deed is not, as in the case of any other deed, essential to its validity.

The cases cited by plaintiff's counsel to disrobe this "tax patent," as he facetiously styles it, of its assumed dignity, are Doty *v.* Beasly, 2 Bibb, 15, and Shortridge *v.* Catlett, 1 A. K. Marsh. 587, holding a register's deed under a tax sale void, for

want of a seal, and Boardmen *v.* The Lessees of Read, 6 Peters, 342, deciding that titles acquired under sales for taxes, depend upon different principles from those governing when the claim rests on a Patent from the Government. Another authority, in itself decisive of this question, is found in Church *v.* Gilman, 15 Wend. 658, where the only question was, as to the delivery of a deed, executed by the treasurer of the State of Connecticut, upon a sale of the land by the State. Chief Justice Savage commences his opinion by saying, "the pleadings all concede, what could not be denied, that delivery is essential to the validity of a deed."

The deed in that case had certainly higher claims to rank as a Patent, than a tax deed has, and yet no such claim was made for it. A Patent conveys the title of the Government, and is under the hand of the chief executive officer, and the great seal of State; while a tax deed simply passes the owner's title, and is executed by the Auditor, or other proper officer, under his own hand and seal. This distinction is everywhere preserved in our legislation on these subjects. See R. L. of 1827, 326, § 4, as to tax deeds; Rev. Stat. 501, ch. XCVIII, as to Patents for school lands, and Rev. Stat. 590, Act No. XXVIII, as to both Patents and tax deeds.

The provisions of this last mentioned Act alone fully illustrate the distinction between these different muniments of title. Sec. 1 provides for the assessment of canal lots, and lands which had been sold upon a credit for purposes of taxation, and the lien for said tax is thereby expressly limited "to the actual interest which has been paid for by the purchaser or purchasers, together with the improvements thereon," and is not to "extend to the interest of the State in said lots or lands." Sec. 2 directs the sale of said lots and lands for taxes in arrears, with the same limitations, "the fee simple of said property still remaining in the State." Sec. 3 declares the operation of deeds *eo nomine*, made by virtue of any such sale, &c. And Sec. 5, authorizing the purchaser at tax sale to continue the payments in arrear to the State, from

the original purchaser, entitles him upon completing such payment, if the lands still remain unredeemed from the tax sale, to a Patent for such lands or lots, &c.

Having determined that an Auditor's deed is not a Patent, and that so far as delivery and acceptance are concerned, it stands on the same footing as any other deed between individuals, I come now to consider of the alleged defect in the execution of the deed under consideration in the case at bar, in that respect.

The solution of this question depends not upon the settlement of any conflict of authorities. There is no such conflict, but the authorities relied upon are, with a few exceptions, the same on both sides. Our only task, therefore, is, examining all the authorities on the subject within our reach, to eliminate from them the true doctrine as applicable to this case, and to dispose of it accordingly.

This investigation reaching back to a remote period in the history of English jurisprudence, and traversing the entire field of subsequent English and American adjudications on the subject, to their termination in very recent cases, exhibits as its result, doctrine remarkable for its uniformity and consistency throughout. It shows principles, which long since expounded, and recognised and sanctioned by the Courts ever since, pervade to a greater or less extent, every case upon the subject, only modified by, and controling results according to the peculiar circumstances of each case.

The principles are:

I. In every deed there must necessarily be a grantor, a grantee, and a thing granted (4 Cruise, 12); that delivery by the grantor and acceptance by the grantee, are essential to the validity of a deed; that a deed takes effect only from its delivery, and there can be no delivery without acceptance either express or implied, delivery and acceptance being necessarily simultaneous and correlative acts. Richards *v.* Jackson, 6 Cowen, 617; Church *v.* Gilman, 15 Wend. 658. Other authorities cited *post.*

II. Delivery may be made, *first*, to the party himself, or

any other by his appointment; or to any one authorized to receive it; or *second*, to a stranger for and in behalf, and to the use of him to whom it is made, without authority, under certain circumstances. 2 Roll. 24 *l*, 42; Touchstone, 57. See *post*.

III. In case of delivery to a stranger, without authority from the grantee to accept, the acceptance of the grantee at the time of delivery will be presumed, under the following concurring circumstances, viz: 1. That the deed be upon its face beneficial to the grantee; 2. That the grantor part entirely with all control over the deed; 3. That the grantor (except in case of an escrow), accompany delivery by a declaration, intention or intimation, that the deed is delivered for and in behalf, and to the use of the grantee; 4. That the grantee has eventually accepted the deed and claimed under it. 4 Cruise, 34; Touchstone, 57; and other authorities, *post*.

Testing the case at bar by these principles, and the Auditor's deed was inoperative to vest title in the grantee. As the defendant wholly failed to connect himself by proof with the title claimed for Wolcott, it follows (and here I resume the consideration of the consequences of such failure on his part, postponed at a former point in this Opinion), that delivery to or acceptance by him or his attorney, was a delivery to a stranger unauthorized to accept, and as such the delivery was not accompanied or followed by all of the concomitant circumstances necessary to its validity. It is true that the deed is apparently beneficial in its operation to the grantee; and that the grantor parted with all control over it, but he did not in delivering it declare or intimate that he did so "for and in behalf, and to the use of the grantee, named in it," nor was his intention to do so necessarily inferable from the circumstances attending the delivery. Such intention would have been sufficiently shown by evidence of a presentation to the Auditor by the witness Elliott, of the treasurer's receipt to Wolcott, when applying for the deed, as required by law in such cases. R. L. 1827, p. 326, § 4. But this does not appear from the evidence to have been

made. The presumption is rather that when the deed was called for, the Auditor finding on inspection of his books that the land had been sold to Wolcott, and remained unredeemed, made the deed without inquiring for whose use it was intended; that it was in fact procured by the witness at the request of his client, the defendant, he positively states; that it was intended for the defendant's use and benefit as a means of preventing his dispossession of the premises by the plaintiff, is manifest from the fact that it has been kept in the possession either of the said witness or defendant; and that the grantee (Wolcott) never has accepted it, nor so far as the record shows, been notified of its existence.

But admit that the intention of the grantor to deliver the deed "for and in behalf and to the use of the grantee" is to be presumed, it must nevertheless still be held inoperative for want of acceptance by the grantee, either express or implied. While he never has actually accepted it, nothing on his part appears to have been done tantamount to an acceptance by implication. He has neither assented to it nor claimed under it, and so far as the record shows, knows nothing of its existence. Neither he nor any one claiming under him, now seeks its affirmance, but a stranger procuring its delivery to himself, now asks the Court to usurp the prerogative of the grantee, by a recognition of an act wholly unauthorized by him, as his act. And this, too, not for the grantee's but for his own benefit; not to establish title in the grantee, that he may be let into possession of the land, but to show title out of the plaintiff, that he may be kept out of the possession.

This feature of the case at bar distinguishes it from all the cases in which the grantee's acceptance of a deed delivered to an unauthorized person, has been presumed; and is fatal to the defendant's claim to such presumption in favor of the deed relied upon by him. The ground on which he bases that presumption, viz: that the deed upon its face is apparently beneficial to the grantee, does not warrant it. From the fact that the grantee will probably be benefitted by accepting the deed, it may reasonably be presumed that he will do so when it shall be offered to

him, or he become apprised of its existence; but until then, it certainly cannot be presumed that he has done so. No case has ever gone so far as that. But in every case in which the grantee's acceptance of a deed delivered to a stranger without authority to receive it has been presumed, the following concurrent facts have appeared with the apparently beneficial operation of the deed towards the grantee, viz: 1. That the grantee has actually accepted the deed, or sought to become its beneficiary before the occurrence of the litigation involving the question of his acceptance; 2. That the grantee or some one claiming under his title has been a party to such litigation, for the purpose of establishing such title. And moreover the deeds held good in many of the cases, were voluntary deeds by parents settling property upon their minor children, and the benignity of construction given to them has originated to no inconsiderable extent, in the favor with which transactions of that character, when not in fraud of creditors, are always viewed.

To sustain the position here assumed, I will now proceed briefly and succinctly to examine all the principal cases involving the question under consideration, as well those affirming, as others denying the validity of titles sought to be established under the circumstances supposed. The authorities cited by defendant's counsel first claim our attention.

Bryan *v.* Wash, 2 Gilm. 557. The grantor made a deed of lands to his granddaughter, sole and a minor. The deed was placed in the father's hands for the granddaughter's use, and after her marriage, her husband obtained possession of said deed, which had been recorded. The bill was filed in the name of the grantor by the father, as his agent against the grantee and her husband and their mortgagees, praying a restoration of the deed to the father, and that the record of it be annulled, &c. The defence rested upon the grantee's title. *Held*, that the delivery was to the father as the natural guardian of the grantee, and was operative to vest the estate in her presently. The Court base their opinion in part upon the principle heretofore adverted to; that "the law presumes much more in favor of the delivery of

deeds in case of voluntary settlements, especially when made to infants, than it does in ordinary cases of bargain and sale."

Souverbye *v.* Arden, 1 Johns. Ch. R. 240, like the case last cited, grew out of a voluntary settlement, for the benefit of a minor daughter. The deed was executed to trustees in trust for the daughter, and handed to her by her father, the grantor, at the time of its execution. It afterwards came again into his possession, and was delivered by him into the hands of one of the trustees for the daughter's benefit. The bill was filed after the marriage of the daughter, by herself and husband, against the grantor and the trustees, to compel a conveyance to the complainants. *Held*, that the deed "was duly executed in December, 1805, the time that it was handed to the *cestui que use*, so as to pass the estate, and that it was not, and could not be defeated by any subsequent acts or declarations of the grantor.

Verplank *v.* Sterry, 12 Johns. 546, grew out of the same transaction with the case of Souverbye *v.* Arden last cited, and is in all respects like it, the *cestui que use* in the two cases being sisters.

Church *v.* Gilman, 15 Wend. 656. On the 3rd of October, 1834, the defendant having purchased a tract of land from the State of Connecticut, and fully paid for it, employed L. Ward, Jr., of Rochester, to prepare a deed therefor, and transmit it to the Treasurer of said State for execution. The Treasurer, on the 10th of April, 1835, signed, sealed and acknowledged the deed, and delivered it to one S. P. Beers, of Hartford, for transmission to Ward for the use of the defendant, the grantee named in the said deed. On the 15th of the said month of April, Beers transmitted it to Ward for personal delivery to the defendant, and on the 20th of May, 1835, the deed was delivered to and accepted by the defendant. On the 22nd of May (two years after its reception by the defendant), he conveyed the land described in it to plaintiff, and this action was brought for breach of the covenant of seizin contained in his deed to plaintiff. The Court asserting the principle that "where the delivery is absolute, the assent of the grantee is presumed, from the fact that the con-

veyance is beneficial to him," say, nevertheless, that, "in this case it is not necessary to presume assent, for it is alleged that the deed was drawn by defendant's agent, and executed at his solicitation.

Doe, *ex dem.* Garnons *v.* Knight, 12 Eng. Com. Law R. 351, was the case apparently most confidently relied upon by the defendant's counsel; and it must be confessed that although there is nothing in the facts of the case to distinguish it in principle from other cases involving the same questions, yet, from the very broad terms in which the law is laid down by the Court, it would seem at first blush to carry the doctrine of the presumption of acceptance by the grantee, further than it has in any other case been carried. A close examination of the case, however, will show that this is not so. One Wynne being largely indebted to the plaintiff's lessor, signed and sealed a mortgage to him, and at the same time placing it upon the table and putting his finger upon the seal, said, "I deliver this as my act and deed," all of which was done in the presence of his niece. She signed as a witness and he took it away. He afterwards handed a paper to his sister supposed to be the same, saying, "here, Bess, take this and keep it, it belongs to Mr. Garnons." He afterwards resumed its possession and again returned it to his sister, saying, "here, put this by." After the mortgagor's death the deed was delivered to and accepted by the mortgagee, who brought this action to recover possession of the mortgaged premises. The Court affirming this title, say; "Can there be any question but that delivery to a third person for the use of the party in whose favor a deed is made, where the grantor parts with all control over the deed, makes the deed effectual from the instant of such delivery?" And then, by way of response, quote the language of Lord Ellenborough, in Stirling *v.* Vaughan, 11 East, 623, that "the law will presume, if nothing appear to the contrary, that a man will accept what is his for his benefit." But the proof does not sustain the position. Their presumption in the supposed case is that there has been an acceptance; Lord Ellenborough's that there will be.

But, moreover, the case in East bore no analogy to that in which it was cited. It involved no question of the delivery of a deed, but was brought upon a policy of insurance, effected for "the benefit of all interested in the capture." The Crown was interested in the capture, but the prize master effecting the insurance had no special authority from the Government to represent its interest in that behalf, and the question being raised as to the effect of the contract, his Lordship uses the language above quoted, adding, "and hence it is for the benefit of the Crown to preserve the prize."

Again, the Court say: "And 2 Roll. Abr. (K) 24, pl. 7; Taw *v.* Bury, Dyer, 161, *b;* 1 Anders. 4, and Alford *v.* Lea, 2 Leon. Cro. Eliz. 54, and 3 Coke, 27, are clear authorities that on a delivery to a stranger, for the use and on the behalf of the grantee, the deed will operate *instanter*, and its operation will not be postponed till it is delivered over to or accepted by the grantee." If they mean by this language to assert the doctrine, that a deed operates from the time of its delivery to a stranger having no authority to receive it, to vest title in the grantee, althought he never has accepted nor claimed under such deed, their decision is *obiter dictum*, as the mortgagee in the case under consideration by them had accepted the deed, and was in that case seeking its enforcement. And moreover, such doctrine is not sustained even by their own authorities, as I will presently show. Although if they intend simply to decide what the case requires, that when Garnons did accept the deed, his acceptance when made, by implication related back to the delivery of it to the mortgagor's sister for his use, then their position is amply sustained by authority. The passage relied upon in Roll. Abr. is this: "If a man make an obligation to I, and deliver it to B, if I get the obligation, he shall have action upon it, for it shall be intended that B took the deed for him as his servant."

In Taw *v.* Bury, an executor sued upon a bond. The defendant pleaded that he caused the bond to be written, sealed and delivered to C to deliver to the testator as defendant's deed; that C offered to deliver it to the testator,

as defendant's deed, and the testator refused to receive it; whereupon C left it with the testator as a schedule and not as defendant's deed, and so *non est factum.*" Held, on demurrer, that first by the delivery of it to C the deed was good, and was in law the defendant's deed before any delivery over to the testator, and the testator's refusal could not undo it as defendant's deed from the beginning." The case involved no question of testator's acceptance, or if it did, then the attempt of his personal representative to establish its validity, the testator having been in the actual possession of it, must have been held a virtual acceptance. Had the defendant sued upon the deed, the testator's refusal to accept would have enabled him to defeat a recovery, as numerous authorities show. The only inquiry was, was it the obligor's deed, not whether the obligor had accepted it.

The case of Alford *v.* Lea, decided upon the strength of Taw's case contains nothing worthy of stating here.

In the great case of Butler *v.* Baker, 3 Co. 26 *b*, the only case cited in Garnons *v.* Knight remaining for examination, Lord Coke says: "If A make an obligation to B and deliver it to C to the use of B, this is the deed of A presently; but if C offer it to B then B may refuse it *in pais*, and thereby the obligation will lose its force." This case directly controverts the position which it is cited to sustain, as it shows that the deed although operative as the grantor's deed presently, is not to be considered as the grantee's until his acceptance. The same principle is stated by Paston J., Year Book, 3 H. 627, A. and cited 13 Viner, 23, (K) pl. 12, A. The Court in citing this case in Coke say very properly that the result might have been otherwise, if the question had been as in Taw's case, on the obligor's plea of *non est factum*, simply whether it was his deed. Ferguson *v.* Miles, 3 Gilm. 363, and Maynard *v.* Maynard, 10 Mass. 456, also cited by defendant's counsel, will be noticed hereafter.

Cooke's adm'rs. *v.* Hendricks, 4 Munroe, 500, seems to rest upon principles entirely different from those controling the case at bar. There the obligor, in a bond for the conveyance of land, seeking a specific performance of the contract by

compelling the obligee to accept a deed for the land, rather than to enforce a judgment by default, obtained by him against the obligor for breach of the said covenant to convey, tendered the obligee a deed, which was refused. The obligor thereupon filed his bill praying a perpetual injunction of the judgment, and a decree compelling acceptance of the deed, and accompanied his bill by a deed to be delivered under the decree of the Court. It occurs to me that the true question in that case was, whether in Equity the complainant could be considered as having performed his covenant, or its equivalent in tendering his deed, to entitle him to the relief sought by him. The Court held after the death of complainant, that a delivery of the deed to the defendant under a decree of the Court, and acceptance by him, would pass the title to him.

The only remaining case cited by defendant's counsel, that of Inlow &c. *v.* Commonwealth, 6 Monroe, 74, grew out of two voluntary deeds made by the father, the one giving and conveying most of his property to his two sons, and the other (subsequently executed), conveying all of his property to one of said sons. The controversy was as to the ownership of certain slaves, all being claimed in behalf of one of the sons and a moiety in behalf of the other, and Inlow, one of the parties being the guardian of both. The question was as to the validity of the first deed, which was held good, but the whole case is so inapposite to that at bar, that I deem a critical examination of it as being here uncalled for. Such examination would result in showing it depends not upon the questions involved in the case at bar, but upon the doctrine peculiar to voluntary settlements, that if they are fairly made are always binding in Equity upon the grantor, unless it appear clearly that he never parted nor intended to part with the possession of the deed; and unless other circumstances besides his retaining its possession show that it was not intended to be absolute. The cases settling that doctrine, not already examined, need only be referred to without a criticul examination; they are Barlow *v.* Heneage, Pre. Cha. 211; Clavering *v.* Clavering, *ib.* 235; Lady Hudson's case, 1 Bro. Parl. Cas. 122, cited by Lord Keeper Wright, in Clavering *v.* Clavering;

Johnson *v.* Smith, 1 Ver. 314; Boughton *v.* Boughton, 1 Atk. 625; Villers *v.* Beaumont, 1 Vern. 100; Bale *v.* Newton, *ib.* 464.

But there are other cases still demanding examination. Belden *v.* Carter, 4 Day, 66. The grantor having signed and acknowledged a deed delivered to a third person, with directions if he never called for it to deliver it to the grantee, his daughter, after his death. It was done accordingly, and the grantee and her husband, being sued in ejectment by the plaintiffs as heirs of the grantor, successfully defended their possession by means of the deed. Hatch *v.* Hatch, 9 Mass. 207, and Ruggles *v.* Lawson, 13 Johns. 285, present facts entirely similar, and also the same results. In both cases the question involved was as to the validity of deeds executed by the father of the grantees respectively, and delivered to third persons, to be kept until the grantor's death in each case, and then to be delivered to grantees (in the latter case if the grantor should die without making a will). The deeds were in both cases delivered to the grantees in pursuance of directions and accepted by them. Their titles were in both cases controverted, in proceedings to which they were respectively parties.

In Wheelwright *v.* Wheelwright, 2 Mass. 447, the facts of the case were similar to those of the last two cases cited. The grantees, however, were minors when the deed was executed, and delivered to a third person, for delivery to the grantees upon the grantor's death. In a proceeding for partition between the grantee after his acceptance of the deed and the devisees of the grantor, it was decided that the deed, whether delivered to the third person as a trustee for the use of the grantees, or as an escrow, was valid.

In Hedge *v.* Drew, 12 Pick. 141, delivery of a deed to the register of deeds by the grantor for the use of the grantee to be recorded, and the grantee's subsequent assent to the same, was held equivalent to an actual delivery to the grantee.

In Ward *v.* Lewis, 4 Pick. 518, possession of two parts of a deed of trust, made for the benefit of creditors, the one

by one of the trustees, the other by the creditors was considered a strong circumstance to show acceptance of the deed by the trustees and the creditors.

Powers *v.* Russell, 13 Pick. 77. *Per Curiam:* "Had it appeared when the deed was sent to the registry that it was done for the grantee's use; if it had been said that he might call and take it, and he had called for it and taken it accordingly, this might have made the delivery to the register of deeds for the use of the grantees a good delivery.

Buffum *v.* Green, 5 New Hamp. 71. A delivery of a deed to a third person for the use of a grantee is sufficient if he afterwards assent, and the thing granted shall be said to vest in him from the time of such delivery.

Ward *v.* Ross, 1 Stew. 136. When a deed on its face purports to have been delivered and is in the hands of the party claiming under it, proof of the signing and sealing is *prima facie* evidence of the delivery.

Canning *v.* Pinckham, 1 New Hamp. 357. "Possession of the deed by the grantee is presumptive evidence of a delivery by the grantor." "All that it is incumbent on the grantee" (where delivery has been to a stranger), "in order to perfect the delivery, is that he accept or assent to what has been done by the grantor before the latter revokes his intention to convey." And holding the deed in that case valid, they advert to the circumstance as influencing them in their conclusion that this delivery to, was afterwards ratified by the grantees; as they received the deed from those with whom it was deposited, placed it upon record, and have since conveyed the land, &c."

In Clark *v.* Ray, 1 Har. and Johns. 323, possession of a deed by the grantee was held to be evidence of its delivery to, and acceptance by him.

Hughes *v.* Easten, 4 J. J. Marsh, 572, adjudges that simply proving that a deed was signed, attested and left on the table in the absence of the donor, could not show a delivery, but if it were afterwards in possession of the party entitled to the benefit of it, that might be *prima facie* evidence of a delivery.

The cases remaining for examination are those in which deeds have been held inoperative for want of acceptance by grantee. Fay *v.* Richardson, 7 Pick. 91. A bond was signed and sealed, but not delivered to the obligee. It, however, was afterwards delivered to the obligee, by a person having no authority to do so. *Held*, that the obligee could not maintain any action on the instrument.

Jackson *v.* Leek, 12 Wend. 107. It was adjudged in this case, that a deed of land takes effect only from its delivery; and that although signed, sealed and acknowledged, yet if not actually delivered by the grantor during his life, no title passes by it. And so say this Court in Herbert *v.* Herbert, Bre. 282. There A being largely indebted to B executed a deed conveying a tract of land to him, the said B, and procured the recording of it, all in the absence, and without the knowledge of the grantee. The grantor afterwards died, and the deed was found among his papers. The grantee instituted this suit to recover possession of the land described in the deed. His effort was unsuccessful. The Court *held* that it was most manifest that there had been no delivery of the deed so as to pass the title; that any possession of the deed derived by the grantee after his grantor's death, could not amount to its acceptance by the grantee, there having been no delivery during the life time of the grantor. They say "it is essential to the legal operation of a deed, that the grantee assents to receive it, and that there can be no delivery without acceptance. Indeed a delivery of a deed, which is essential to its execution and operation, necessarily imports that there should be a recipient. Now in this case it would be idle to contend that there was a delivery and reception, when the grantor died before the grantee knew of the existence of the deed, and he could not therefore receive that of the existence of which he had no knowledge, nor could there have been a delivery to him without such acceptance."

Jackson *v.* Phipps, 12 Johns. 418. A being indebted to B, it was agreed between them, that the former should execute to the latter a deed of land to secure such indebted-

ness. The deed was sometime afterwards executed by the debtor, and by his procurement recorded; neither the grantee nor any one in his behalf being present, or receiving the deed. The deed, after the grantee's death, came into the hands of the defendant, his son and heir, who relied upon it to defend his possession of the premises in this action which was brought to evict him. The deed was held void for want of grantee's assent to receive it.

In Jackson *v.* Dunlap, 1 Johns. Ca. 114, it was also held, "that it is essential to the legal operation of a deed that the grantee assents to receive it, and that there can be no delivery without an acceptance;" and in Jackson *v.* Richards, 6 Cowen, 620, that a deed duly executed and recorded, but never delivered to nor accepted by the grantee, is void.

In Ferguson *v.* Miles, 3 Gilm. 363, one D. B. Hill purchased the land in question, on the 8th August, 1843, on an execution in his favor, against one Morton, and on the 11th of November, 1844, the sheriff executed a deed therefor to the plaintiff, as assignee of the said Hill. On the 29th April, 1841, the land had been purchased by the said Morton at tax sale. On the 11th May, 1843, the sheriff executed a deed to said Morton in consummation of said tax sale, at the instance of the said Hill, and delivered it to him, without the surrender of the certificate of purchase, and afterwards received the certificate and made another deed to Morton. This Court held the first deed, that of the 11th May, "invalid for want of a delivery, as having been procured by Hill in his own wrong, and without the assent of Morton;" the evidence showing "that the deed was never accepted by Morton, nor any one authorized to act for him; and that a ratification of the delivery to Hill did not appear from the subsequent conduct of Morton."

In Jackson *v.* Bodle, 20 Johns. 188, the Court refuses to permit assignees in a deed of trust, after a lapse of twenty years, for the first time, to assent to the trust and take under a deed. They say "it is necessary to the validity of a deed, that there be a grantee willing to accept it. It is a contract, a

parting with the property by the grantor, and an acceptance thereof by the grantee," &c.

In Maynard *v.* Maynard, 10 Mass. 462, M. signed and sealed a deed conveying land to his son, and left it with the scrivener to get it recorded, which was done, and the deed at the grantor's request still retained in the scrivener's hands until the death of the son, when the father reclaimed and canceled it, the son having known nothing of the transaction. *Held*, that the father was still entitled to the land, as against the heirs of his son, the conveyance never having been perfected by a delivery of the deed.

Lloyd's lessee *v.* Giddings, 7 Ohio, 418, is very much like the case at bar, in this, that after the plaintiff had made out his title, the defendant undertook to show an outstanding title in a third person in order to defeat a recovery. For that purpose he offered to read in evidence a quitclaim deed from plaintiff's lessor, to one Simon Perkins. Plaintiff objected, but his objections were overruled and deed read, and then, as here, the controversy was as to the validity of the alleged outstanding title. To defeat it, the deposition of Perkins, the grantee named in it, was read, showing that he had received the deed to enable him to convey it to the defendant, Giddings, in consummation of a previous contract between said defendant and plaintiff's lessor, for the purchase of it, should he be found entitled to it, and for no other purpose. The jury found for defendant, and plaintiff moved the Supreme Court for a new trial. The Court, under these circumstances, hold the grantee named in the deed, not to be the owner of the land, but merely the owner's agent. They say, "the acceptance of a deed is absolutely necessary to vest the grantee with title under it. No man can be compelled to take a conveyance against his consent," &c. And again: "If it is possible to lay hold of any principle of law, or of any adjudged case of authority, to prevent this deed from operating to defeat the title of the plaintiff, that we ought to do so. And I believe enough has been said to authorize us to come to the conclusion, that the deed to Simon Perkins was not, under the circumstances, effectual to convey the

title to him, that it could not be used for the purpose of showing an outstanding title in a third person, and that accordingly there must be a new trial."

In Elsey *v.* Metcalf, 1 Denin, 626, the plaintiff claimed under a deed to himself from L. Whitcomb and wife, duly acknowledged and recorded. It was proved by a brother of the grantor that the aforesaid deed was sent to the witness, by the grantor, in a letter received by said witness at the Post Office; retained several days in his possession, and then deposited in the clerk's office by him for record. The letter was not produced, nor did it appear for what purpose the deed was sent to the witness. The deed was held void for want of delivery.

The other cases involving, to any extent, the question under consideration, will be found to settle no doctrine variant from that found in the many cases already examined. I will content myself with a simple reference to them. They are Frisbie *v.* McCarty, 1 Stew. & Porter. 56; Carr *v.* Hoixie, 5 Mason, 60; Alexander *v.* Bland, Cook, 43; Fairbanks *v.* Metcalf, 8 Mass. 230; Harrison *v.* Phillips' Academy, 12 do. 456; Jackson *v.* Bard, 4 Johns. 230; Hood *v.* Brown, 2 Ham. 268; McCarty *v.* McConnel, 1 Rep. Com. Ct. 190; Jackson *v.* Schoonmaker, 2 Johns. 230; Halleck *v.* Bush, 2 Root, 26.

This review of authorities exhibits the peculiar features distinguishing that class of cases in which the acceptance by the grantors of deeds, delivered to persons not authorized to receive them, has been presumed, from that in which such presumption has been denied, and varying their results. It demonstrates that between the case at bar and the former class of cases, there is no such verisimilitude of facts, as to justify its claims to be ranked with them; while its family resemblance to all the cases of the latter class, is so striking and exact as to require its recognition as one of their connections. And it shows that in every case belonging to the former class, it has appeared that the grantee has actually assented to, or accepted the deed, and that he, or some one claiming under him, has been a party to the proceeding,

questioning its validity, and on the other hand, that the history of every case destitute of those features or either of them, is found recorded among the annals of the latter, and more unfortunate class.(a)

On this result I base the conclusion, that the true question in all such cases is, and always has been, not whether there has been an acceptance simply and without reference to time, but whether there has been an acceptance cotemporaneously with the delivery. As has been shown, a deed can only take effect at and from its delivery, if at all, and consequently delivery and acceptance must be mutual and concurrent acts. Hence, proof of an acceptance subsequent to the delivery is not sufficient to give validity to the deed, and therefore in such cases, judicial construction has sometimes been invoked to extend such subsequent acceptance, by relation back to the date of the delivery. But although the Courts in some cases speak of the beneficial character of the deed, as justifying the presumption of the grantee's acceptance of it, that is, nevertheless, but one of a series of circumstances concurring to form the basis of such presumption. The presumption that a party will accept, because he is to be benefited thereby, although deduced from the strongest passion of the human heart, is never carried so far as to consider him as having accepted. It is in itself in but an embryo state until it finds confirmation in an actual acceptance.

But admit this conclusion to be incorrect, and that where the grantor has parted with all control over a deed, upon its face apparently beneficial to the grantee; the grantee's acceptance of such deed will therefore be presumed, although the delivery was made to one not authorized to accept it, and nothing shows any affirmative act on the part of the grantee, nor even any knowledge of the existence of the deed, still this presumption would never be entertained, in the absence of all proof of the existence of the grantee at the time of the delivery. Nor could any presumption be legally drawn from proof of that he was alive at some former period, to supply the defect of proof in that respect, although for other purposes, as to prosecute a suit in his name for instance, it might

(a) Herbert v. Herbert, Beecher's Breese R. 355.

be. Legal presumptions must have their foundations in facts. That no conclusion, however legitimately deducible from the premises, can possess the attributes of truth and certainty, if the premises themselves be assumed, is a principle of law as well as logic. A grantee is one of the necessary constituents of a deed; dispense with proof of it, and you may, by a parity of reasoning, presume also the existence of the remaining constituents, a grantor and a thing granted, and thus base title wholly on presumption.

In the case at bar, there was no proof that Wolcott was alive when the deed was delivered, and therefore his assent to an acceptance of it cannot be presumed. But admit that the proof that he was alive when the land was purchased, may justify the presumption, that he was so ten years afterwards when the deed was made, still he may have died since, or even if that assumption be untrue in fact, and he is yet alive, he certainly will die, and may do so, without an acceptance of the deed, or even any knowledge of its existence. The result in either case would be the same; a title resting at best on suppositious and very doubtful grounds, would be made available to defeat one sustained by the strongest muniments; a possession acquired without color or claim of title, would have thrown around it fortications impregnable by any living assailant; and the solemn adjudication of the Court, if not founded on a false assumption of facts, would rest for affirmation or defeasance, upon the affirmative action of the grantee, if alive, either in accepting or rejecting the deed, or upon his dying without any action in the premises. No authority can be found in the annals of jurisprudence for doctrine so replete with injustice. This Court will not be the first to furnish it.

The judgment of the Circuit Court of Peoria county is reversed with costs, and the cause remanded for further proceedings not inconsistent with this opinion.

Purple, J. said:

I dissent from the Opinion of the Court in this case, upon one point arising in the cause. I understand the law to be, that when a deed has once been delivered to the grantee, or to a stranger,

and the grantor has relinquished all control over it, on account of the beneficial nature of the grant, it will be presumed to have been delivered for the benefit of the grantee, and that he will accept it, unless it appears affirmatively that he has refused to do so.

KOERNER, J. also dissenting:

It is very well settled that where a grantee is ignorant of the grant to him, and does not assent at the time, when the deed is delivered to a stranger, he will be presumed to have assented at the time, when the delivery took place, if he shows by subsequent acts, his willingness to take under the deed. It seems to me that his assent might be also inferred from acts previous to the delivery. In the present case, the grantee had purchased the land including in the Auditor's deed, had paid the purchase money down, and taken a certificate of purchase by which he was entitled and promised to receive a deed in due time. By these acts he sufficiently manifested, that he would, at a subsequent time, accept of the deed. There is no evidence that he changed his mind.

But independent of the peculiar facts of this case, I am inclined to the opinion, that when the grantor delivers a deed beneficial to the grantee, so as to deprive himself of all control over it, the acceptance of the grantee will be presumed, although the deed is delivered to a stranger. I cannot fully concur with the views expressed in the Opinion of the majority of the Court, and therefore dissent from the decision.

Judgment reversed.

EDWARD A. BEDELL, plaintiff in error, *v.* NATHANIEL E. JANNEY *et al.*, defendants in error.

Error to McDonough.

As a general rule, a demand should be made for money collected by one person for another, before bringing a suit. The collector, it is presumed, after deducting a reasonable compensation, will transmit the money by the earliest safe opportunity. But where so long a time has elapsed since its collection as to rebut such presumption, he may be considered as having appropriated it to his own use, and a demand is not required.

Interest is recoverable on money collected by one person for another, who has neglected to pay it over in a reasonable time.

Testimony may be introduced, not manifestly applicable to the matter in controversy, if its applicability appears to be susceptible to proof by evidence *aliunde*. If no evidence be introduced, tending in any way to show its applicability, the Court should, on motion of the party against whom it was offered, exclude it from the jury, or instruct them to disregard it. But if there be such additional evidence, it is the peculiar province of the jury to judge of its sufficiency to subserve its intended purposes.

The Statute of Limitations makes two classes of cases, arising *ex contractu*: 1. All actions for arrearages of rent due on a parol demise, and all actions of account, and upon the case, except as well such actions as concern the trade of merchandise between merchant and merchant, their factors or agents, as certain actions of that form arising *ex delicto*; 2. Every action of debt or covenant for rent or arrearages of rent, founded upon any lease under seal, and any action of debt or covenant, founded upon any single or penal bill, promissory note or writing obligatory, for the direct payment of money or the delivery of property, or the performance of covenants, or upon any award under the hands and seals of arbitrators for the payment of money only. Actions of the first class must be commenced within five years next after the cause of such actions have accrued, and not after, and actions of the second class within sixteen years.

The true construction of the first section of the Statute of Limitations, in its operation upon actions *ex contractu*, is, that it bars the action of *assumpsit* in all cases, except such as concern the trade of merchandise between merchant and merchant, &c. in five years; but the action of *debt* is not barred in any case, in that time, except for arrearages of rent due on parol demise.

The action of *debt* lies wherever *imdebitatus assumpsit* will lie, and is a concurrent remedy therewith. Justices of the peace have jurisdiction over both actions, and where the Statute of Limitations is interposed as a defence on trials before those officers, the Statute in prescribing the form of the summons not distinguishing the form of action, the law will presume that to be the particular form which is best calculated to advance the plaintiff's remedy.

The doctrine is well settled, that where technical terms are used in a statute, the Courts will intend that the legislature used them in their technical sense; also, where a term or word, which had a well known common law meaning, is used in a statute, such term or word shall be understood, in the construction of the statute, in the same sense as at the Common Law.

The term "actions of account" has long been understood to comprehend, as well the action of *assumpsit* upon contracts express or impled, as actions *ex delicto*, and to this extent it is used in the first section of the Statute of Limitations. (*a*)

It is a well established doctrine in construing Statutes of Limitations, that cases within the reason but not within the words of the statute, are not barred, but may be considered as omitted cases, which the legislature have not deemed proper to limit.

THE defendants in error sued the plaintiff in error before a justice of the peace, in Hancock county, in March, 1845, for money collected by the latter for them, and which he had neglected to pay over. Judgment was rendered against Bedell, who appealed to the Circuit Court of that county, and the case was subsequently taken by change of venue into McDonough Circuit Court. It was there tried before the Hon. Norman H. Purple and a jury, when a verdict and judgment were rendered in favor of the plaintiffs below, for $63 debt, and $28.03½ damages.

The evidence on the trial, instructions of the Court, &c., are set forth in the Opinion of the Court.

W. A. MINSHALL, for the plaintiff in error, cited Rev. Stat. 348–9, §§ 1, 4.

The statute is to be liberally expounded. See 3 Peters, 270; 3 Peters' Cond. R. 51–2; *ib.* 39; 2 Peters' (U. S.) Dig. 714, §§ 4–8; Statute of Repose, §§ 11, 19, 28; *ib.* page 717; Williams *v.* Williams, 5 Ohio, 280. A petition and summons held within the Statute in Kentucky, though not named. Banks *v.* Coyle, 2 A. K. Marsh. 564; Robins *v.* Harvey, 5 Conn. cited in 2 U. S. Dig. 800, § 155; Head's Executors, *v.* ———, 5 J. J. Marsh. 262; Clark *v.* Schwing, 1 Dana, 334–5.

In this case, the action will not lie till after a demand or something equivalent. 24 Wend. 203.

Interest is not recoverable till after a demand. 15 Pick. 500; 12 do. 449; 4 Blackf. 81.

(*a*) But see opinion of this Court, *post* 206.

R. S. Blackwell, for the defendants in error.

I. That debt upon simple contract is not barred by our Statute of Limitations is apparent :

1st. From the express words of the statute (Rev. Stat. 348–9, §§ 1, 4); where the words of a statute are plain and unambiguous, there is no necessity of resorting to technical rules of construction; but the legislative will, as expressed, must be obeyed. The People *v.* Canal Commissioners, 3 Scam. 161; Wilkinson *v.* Leland, 2 Peters, 662; Clay *v.* Hopkins, 3 A. K. Marsh. 489; Holbrook *v.* Holbrook, 1 Pick. 250; Ellis *v.* Paige, *ib.* 45.

Equitable construction will not be tolerated. Monson *v.* Chester, 22 Pick. 387.

When technical words are used in a statute, the Courts will intend that the legislature used them in their technical sense. Merchants' Bank *v.* Cook, 4 Pick. 411; United States *v.* Magill, 1 Wash. C. C. R. 463; 3 do. 209.

Another rule is, that where a statute makes use of a word, which had a well known Common Law meaning, the word in the statute shall be understood in the same sense it was at Common Law. Mayo *v.* Wilson, 1 New Hamp. 55–6.

A statute applicable in its terms to particular actions, cannot be applied by construction to other actions standing on the same reason. Jacob *v.* United States, 1 Brock. 523–4.

And these rules of construction should be adhered to for these reasons: 1. because the statute is in derogation of the Common Law; and 2. because the effects of the statute are highly penal in their character.

2. From a comparison of all the statutes enacted by the legislature upon this subject. Laws of 1819, 141, § 8; Laws of 1827, 284, §§ 1, 4; Rev. Stat. 348, §§ 1, 4.

In a revision, where the phraseology of a former statute is changed, this is evidence of an intent to change its operation. Ellis *v.* Paige, 1 Pick. 45; S. P. 155.

3. By a recurrence to other omitted cases in this statute, which are equally within the reason, but which the words of

the statute include, to wit: 1. debt on bills of exchange; 2. on foreign judgments; 3. on justices' judgments; and 4. actions on the case between merchants, &c.

4. By a comparison of our statute with that of 21 Jac. 1, 2 Harr. Dig. 1455; 2 Bouv. Law Dic., refers to the statutes of Alabama, Delaware, Kentucky, Massachusetts, New Jersey (part of which is like section 4), Pennsylvania, Rhode Island, South Carolina, Vermont, and Virginia.

5. By express adjudication in Ohio, on a statute similar to ours. Tupper *v.* Tupper, 1 Ohio Cond. R. 615; Hazlet *v.* Critchfield, 6 do. 485.

6. Because in other States, it has been held, that cases within the reason, but not within the words of the statute, are not barred, but may be considered as omitted cases, which the legislature have not deemed proper to limit. Pease *v.* Howard, 14 Johns. 419; Jordon *v.* Robinson, 15 Maine (3 Shepley), 167; Bass *v.* Bass, 6 Pick. 362; Keith *v.* Estill, 9 Porter, 669; Pennington *v.* Castleman, 6 Miss. 277; Smith *v.* Lockwood, 7 Wend. 241.

II. That the justice had jurisdiction of the action of debt, see Rev. Stat, 316 § 17, clause 9.

The debt lies upon simple contracts, and is a concurrent remedy with *assumpsit*, see United States *v.* Colt, 1 Peters' C. R. 145; Smith *v.* Lowell, 8 Pick. 178.

That the Court will elect that form of action which is most beneficial to the plaintiff, and calculated to advance his remedy, see Rev. Stat. 317, § 21; Stewart *v.* Dowling, 3 Scam. 93; U. S. Bank *v.* Dallum, 4 Dana, 574; Lovett *v.* Cowman, 6 Hill's (N. Y.) R. 225; Burton *v.* Waples, 3 Harr. 75; 10 Johns. 104; 5 Wend. 272; 12 Ohio, 131; Austin *v.* Hayden, 6 Ohio Cond. R. 158–61, &c.

III. That a demand was unnecessary in this case before bringing suit, see Hawley *v.* Sage, 15 Conn. 52; Estis *v.* Stokes, 2 Richardson, 133; 10 Mass. 244; 6 New Hamp. 441.

IV. As to the want of indorsement on back of the summons of the amount claimed. The objection comes too late

after defendant has appeared and pleaded to the action. Swift *v.* Woods, 5 Blackf. 97.

V. On the question of interest, see Rev. Stat. 295, § 2; Pease *v.* Barber, 3 Caines, 265–6.

The Opinion of the Court was delivered by

THOMAS, J.* This action was commenced on the 10th day of March, A. D. 1845, before a justice of the peace of Hancock county, by the defendant in error against the plaintiff in error. The demand sued on, was for money alleged to have been collected by the defendant for the plaintiff's use, upon a note due to the latter, and by them placed in the hands of the former for collection. The summons was in the form prescribed by the statute. Rev. Stat. Ch. LIX, § 21.

The case was taken by appeal into the Circuit Court of the aforesaid county of Hancock, and thence on change of venue to the McDonough Circuit Court, where a trial was had by the jury.

The defendant, on going into trial, notified the plaintiffs' attorney that he should set up and rely upon the Statute of Limitations, and accordingly he did insist that the plaintiffs' action and claim were barred in law.

The testimony introduced by the plaintiffs in support of their claim consisted of the following items, viz:

1. A letter from defendant to plaintiffs (admitted on the trial to be in the defendant's handwriting), dated December 30, 1838, acknowledging the receipt of a letter from the plaintiffs, enclosing a note on Montague and Depp, and stating in substance, that they having failed to pay the money as they had promised to do, and Mr. Depp having left the State, he had put the note in suit, and presumed that it would be collected soon, when he promised to inform them, &c.

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

2. A transcript from the docket of Samuel Steele, a justice of the peace of Hancock county, showing the commencement of a suit before said justice on the sixth day of January, 1839, in the name of the plaintiffs, against Montague and Depp, upon a promissory note executed by them to said plaintiffs, service of process on the defendant, Montague, and the rendition of judgment in said suit in favor of the plaintiffs against said defendant Montague, for the sum of $62.26 debt, with their costs, &c. The issuing of execution on said judgment, and its return by defendant (E. A. Bedell), without any official return; and that a renewed execution had been issued and delivered to said Bedell, and not returned;

3. The receipt of the defendant to J. Cole, C. H. C. for sixty-three dollars, the full amount of a judgment and interest against John Montague before Samuel Steele, dated December 18, 1839, the signature of the defendant to said receipt being admitted on the trial; and

4. The oral statement of one J. Cole (who was sworn as a witness on the trial), that he, the said witness, in the year 1839, was a constable of Hancock county; that as such constable he received for collection, an execution issued by Samuel Steele, in favor of the plaintiffs, and against one John Montague; that he collected the same, and paid the money over to the defendant as the agent of the plaintiffs on the collection of the same in the year 1839, and that the amount of said payment was about $63.

The defendants objected to each of the foregoing items of evidence, when they were respectively offered by the plaintiff (except the last, which was introduced without objection), but the Court overruled his objections, and admitted the evidence.

This being all the evidence in the cause, the defendant asked the Court to give the following instructions to the jury, viz:

1st. "That if they believed from the evidence, that the plaintiffs' demand and cause of action accrued more than five years next before the commencement of this suit, the

plaintiff could not recover, unless the defendant, within five years next before the commencement of this suit, had in some manner admitted the same to be unpaid;"

2nd. "That if the jury believed from the evidence, that the plaintiffs in the year 1838, sent to the defendant from St. Louis, a claim in their favor for collection, and plaintiffs had not called on the said defendant, or in some way made demand for the money before the commencement of this suit, they cannot in this action recover;"

3rd. "That they should not take into their consideration any evidence before them, which did not apply to the demand sued on;" which said third instruction the Court gave, adding thereto as modification, "that the Court was not advised, that any evidence inapplicable to the plaintiffs' claim sued on had been given, but of this the jury would judge."

The first and second instructions the Court refused to give, but gave the following in lieu of them, viz:

1st. "That the action of *assumpsit* was barred by the Statute of Limitations in five years after the cause of action accrued; but this suit having been commenced before a justice of the peace, that upon the claim, either debt or assumpsit would lie; that to an action of debt on such a claim, our statute had interposed no limitation, and that consequently in an action upon such claim, the limitation in the opinion of this Court remained as at Common Law, and the claim would only be barred by the lapse of twenty years from the time such cause of action accrued; that the action of debt being the most beneficial form of action for the plaintiff, they had a right to treat it as such."

2nd. "That if the plaintiffs had intrusted the defendant with the collection of money for their use, that ordinarily, before this action could be maintained, a demand should be made for the money so collected; but in this case if from the lapse of time, or any other circumstances appearing in the cause, they were satisfied that the defendant had col-

lected money belonging to the plaintiffs, and had converted the same to his own use, no demand for the same would be necessary; and further, that if they believed from the evidence, that money, had been so collected, and appropriated, and there had been an unreasonable or vexations delay of payment of the same, the plaintiffs were entitled to recover interest on the amount so collected, deducting a reasonable compensation for defendant's services in collecting the same.

The jury rendered a verdict in favor of the plaintiffs for $63 debt, and $28.03½ damages, with costs, &c.

The defendant moved for a new trial on the following grounds, to wit: 1st. that the verdict was against the evidence; 2nd. that the verdict was against the law; 3rd. that the Court erred in not giving the instructions asked for by the defendant; 4th. in giving the instructions that were given; 5th. in giving instructions as qualified; and 6th. in admitting improper testimony. The Court overruled said motion, and rendered judgment on the verdict.

The defendant excepted during the progress of the trial, to the several opinions of the Court: 1st. in admitting the evidence objected to by him; 2nd. in refusing the instructions asked for by him; 3rd. in giving the instructions that were given; 4th. in refusing a new trial; and now prosecuting his writ of error assigns them for error.

The assignment of error resolves itself into two propositions, to wit: *first*, that the plaintiffs' case was not made out by legal and sufficient proof; and *second*, that the demand sued on was barred by the lapse of time, by virtue of the Statute of Limitations.

I. The first of these proposition involves inquiries, 1st, as to the admissibility of plaintiffs' evidence; and 2nd, as to its sufficiency.

Both of these inquiries must be answered affirmatively. The plaintiffs' allegations were, that they had placed a demand due them in the hands of the defendant for collection;

and that he had received the money on that demand, and appropriated it to his own use. The testimony corresponded with, and fully sustained these allegations.

It consisted of the defendant's admissions in writing, of his reception of the plaintiffs' demand for collection; of his receipt of money shown by parol evidence to have been collected thereon; and of a transcript from a justice's docket, showing the institution of a suit before such justice on said demand, and the proceedings thereon, to their termination in the execution on which the money was eventually collected, and paid over to defendant, and oral testimony explanatory of the documentary. It was, consequently, properly adjudged admissible, both upon the grounds of its relevancy and its competency. It proved everything alleged by the plaintiffs, and was therefore properly held sufficient to entitle them to a recovery.

Nor is this result varied by the fact that the commencement of the plaintiffs' suit was not preceded by a demand of payment from the defendant. The doctrine contained in the instructions of the Circuit Court on this point is undoubtedly correct. A person is entitled to money collected for him by another so soon as received by the latter, and good faith on the part of the collector demands its immediate payment by him; but nevertheless, he is ordinarily not subjected to suit for his failure or omission to make such payment, until after demand therefor has been made of him.(*a*)

As a general rule in such cases, it may be presumed that payment has been delayed by reason of the want of safe and convenient means of transmission, or of some other good and sufficient cause, and that the recipient of the money, still considering himself as entitled to no more than enough reasonably to compensate him for his services in collecting it, will pay it over on demand. But, where so long a time has elapsed since the collection of the money, as to rebut any such presumption in favor of the collector, he may well be considered as having appropriated it to his own use, and then, neither law nor reason requires that before he can be sued for his non-feasance, he should be re-

(*a*) Tinkham *v.* Heyworth, 31 Ill. R. 519.

quested to do what his conduct sufficiently indicates his determination not to do.

The circumstances of the case at bar establish for it peculiar claims to exemption from the operation of the general rule referred to, as regulating the liabilities of collectors. The defendant had been so long the recipient of the plaintiffs' money without accounting to them for it, or being called upon by them to do so, that when, at length, they endeavored to collect it from him by suit, he claimed that time had absolved him from his liability; that the Statute of Limitations had afforded the privilege of a repose, not to be disturbed by having obtruded upon him this outlawed claim of his employers. The Court might, therefore, well submit it to the jury to say whether there had not been such an appropriation by the defendant of the plaintiffs' money to his own use as to deprive him of the right to a demand of payment, before the commencement of proceedings against him for its legal coercion. And well might the jury respond affirmatively to that proposition, and say, as by their verdict they did say, that there had been so unreasonable and vaxatious a delay of payment, on the part of the defendant, as to entitle the plaintiffs to recover not only the amount collected by the defendant for their use (after deducting therefrom a reasonable compensation for his services), but also interest thereon.

This view of the subject is fully sustained by authority, so far as the right to commence suit without a previous demand is concerned. Hawley *v.* Sage, 15 Conn. 52; Estes *v.* Stokes, 2 Richardson, 133; 10 Mass. 244; 6 N. Hamp. 541.

The right to a recovery of interest in such cases as the jury found the case at bar to be, is expressly given by our Statute. Rev. Stat. Ch. LIV. § 1. Upon this question of interest see, also, the case of Pease *v.* Barber, 3 Caines, 265–6.

The alleged error of the Court below, in giving the third instruction requested by the defendant, not as asked for by him, but as qualified by the Court, may here properly be disposed of.

The exigency seldom happens in practice, rendering such an instruction proper, either as asked for by the defendant or as given by the Court. The relevancy of testimony being indispensable to its admissibility, that question is usually settled by the Court in admitting the evidence, when objected to, and is not left for the ulterior examination of either the Court or jury. But this is not necessarily so in all cases.

Testimony may be offered not manifestly applicable to the matter in controversy, but should not therefore be rejected, if its applicability appeared to be susceptible of proof by evidence *aliunde*. If it were otherwise, no case depending upon the coincidence of a series of independent facts could ever be made out by proof. Isolated from the others, each fact in such case might appear wholly inapplicable; combined, their application would be manifest; and yet they must necessarily be introduced in evidence singly.

The question of the relevancy of such evidence, therefore, remains to be considered in connection with the suppletory and correlative evidence introduced. If no testimony be introduced tending in any way to show its applicability, the Court should, on motion of the party against whom it was offered, exclude it from the jury or instruct them to disregard it. But if there be additional evidence tending to show the relevancy of that in aid of which it was offered, it becomes the peculiar province of the jury to judge of its sufficiency to subserve its intended purposes.

An illustration of this rule is found in the case at bar. The plaintiffs, to make out their case, proved among other things the defendant's acknowledgment in writing that he had received the sum of $63 of one J. Cole, a constable of Hancock county, in full of the amount of a judgment and interest against John Montague, before Samuel Steele, but that alone did not show his reception of the plaintiffs' money. It is true that the plaintiffs had recovered a judgment before a justice by the name of Samuel Steele, against a defendant of the name of John Montague, for the sum of $63, and that between that judgment, and that on which the defendant received the money, there was in these par-

ticulars the most striking resemblance, and yet the proof of their identity was incomplete. The judgment on which the money was collected might have been, for anything appearing in the receipt, in favor of the defendant himself or any other person than the plaintiffs. Additional evidence was consequently necessary to show that the judgment referred to in the receipt was the plaintiffs' judgment. The constable from whom the money was received, was accordingly called as a witness, and examined as to that point. The sufficiency of his evidence for the purposes for which it was intended, was properly left by the Court to be determined by the jury. And, indeed, the instructions as asked for, implied what the qualification by the Court expressed, that the jury were to judge of the applicability of the evidence ; else, how could they disregard such as was inapplicable? The Court was not called upon to indicate the evidence to be disregarded by the jury, but they were to determine that matter for themselves.

II. The second proposition involves considerations which, although they throw around the case at bar a degree of interest denied to it by the insignificance of the amount in controversy, are nevertheless less interesting and comprehensive in their character, than those embraced in the instruction of the Court below, and discussed by the counsel on both sides in the argument at bar. It presents for settlement a question of the construction of our Statute of Limitations, but not to the extent contemplated by the instruction and arguments referred to.

The statute makes two classes of cases arising *ex contractu*, the first enumerated in the first section, and embracing "all actions for arrearages of rent due on a parol demise, and all actions of account, and upon the case, except," as well "such actions as concern the trade of merchandise between merchant and merchant, their factors or agents," as certain actions of that form arising *ex delicto*. Actions of this class are required to "be commenced within five years next after the cause of such actions shall have accrued, and not after."

The second class is defined in the fourth section, and

comprises "every action of debt or covenant, for rent or arrearages of rent provided upon any lease under seal, and every action of debt or covenant, founded upon any single or penal bill, promissory note or writing obligatory, for the direct payment of money or the delivery of property, or the performance of covenants, or upon any award under the hands and seals of arbitrators for the payment of money only." The lapse of sixteen years is required to bar any of the actions belonging to this class.

The plaintiff's demand was more than five, but less than sixteen years old; the inquiry consequently arises upon the record whether that demand in manner and form as it was sought to be enforced, comes within the first mentioned class? If so, it was barred by the lapse of time, but otherwise not. If it does not belong to that class, it is bootless to inquire whether it belongs to the other, or not, as in either event it will avail the defendant nothing. His defence to an action barred only after the expiration of sixteen years, had not, when the suit was commenced, and has not yet matured; the result, consequently is, as it affects that defence, the same whether the action would have been barred in sixteen years or never.

The defendant's counsel insists that the case at bar is one of a class of cases expressly named in the first section, and that consequently the plaintiffs' demand has been worn away by the lapse of time. His position is, that the term "actions of account," as used in that section, and "actions on accounts" are equivalent terms, and consequently that every action, of whatsoever form or nature it may be, founded upon an account, must by the requisitions of that provision of law be brought within five years, and not after. But that position is wholly indefensible by authority.

The doctrine is well settled that where technical terms are used in a statute, the Courts will intend that the Legislature used them in their technical sense. Merchants Bank *v.* Cook, 4 Pick. 411; 1 Wash. C. C. R. 463; 3 do. 209.

And again, that where a term or word which had a well known common law meaning is used in a statute, such word

or term shall be understood, in the construction of the statute, in the same sense as at the Common Law. Mayo *v.* Wilson, 1 New Hamp. 555–6. Tested by these rules, the doctrine contended for by the defendant's counsel stands condemned. The term under consideration, to wit, "actions of account," is "a technical term" and has "a well known common law meaning." It indicates a form of action, as well known, although not so frequently adopted in practice, as the action of *debt* or *assumpsit*. It was the action used at the Common Law to coerce a settlement of accounts of partners, bailiffs, and receivers, before Auditors appointed for that purpose by the Court, upon rendering the pecuniary or interlocutory judgment *quod computet*. For the same purpose it was long since engrafted on our jurisprudence, and is undoubtedly the form of action, and the only one referred to *eo nomine* in the first section.

But although the term, the meaning of which has been considered, is not sufficiently comprehensive to embrace every form of action that may be maintained upon an account, there nevertheless is another term used in the same section, which, by the rules of construction already referred to, clearly does include within its meaning, at least one such action. It is "the action on the case."

However circumscribed the limits of that action originally may have been, it has long been universally understood to comprehend as well the action of *assumpsit*, upon contracts express or implied, as actions *ex delicto*.(a) This general term indicating a class of cases, being used in the first section, without any thing to restrict its operation to any of the particular actions, confederating to make up that class, it must be understood as being operative upon all of them. Such is the uniform rule of construction in all such cases. But the intention of the legislature here to use the term under consideration in its broadest and most general sense, is apparent from the fact of their exempting from the operation of the limitation prescribed by them upon the right of commencing "actions on the case; such actions as concern the trade of merchandise between merchant and merchant, their factors

(a) See Carter *v.* White, 32 Ill. R. 509.

and agents." If the law was intended to operate only upon actions arising *ex delicto*, why specially except from its operation these actions *ex contractu?* The exception in this, as in many other cases, proves the rule. But this is not an open question. It was expressly settled by this Court in the case of White *v.* Hight, 1 Scam. 205, that the term, "the action on the case," as used in the first section of the Act of 1827, of which the first section of the present law is a mere transcript, does include the action of *assumpsit*.

Nor is this construction controverted by the plaintiffs' counsel. He expressly admits that the action of *assumpsit* is, in all cases, barred in five years when the provision of law under consideration is relied upon for that purpose, but denies that the action of *debt*, on demands like the plaintiffs' is thus barred, and insists that the action in the case at bar, is *debt* and not *assumpsit*.

Both of his positions are combatted by the defendant's counsel. In addition to the doctrine contended for by him already considered, he maintains that the action of *debt* on open account comes within the spirit and meaning of the first section, if not expressly named therein, and is therefore to be considered as one of the actions barred by that provision of law; that the intention of the legislature was to bar demands of that nature, and not particular actions for their recovery. But this position is likewise untenable in law. By the eighth section of the Act regulating Practice in the Supreme and Circuit Courts of this State, and for other purposes, approved March 22, 1819 (Laws 1819, 141, § 8), "actions of *debt* grounded upon any lending or contract without specialty," were specifically barred in five years. They have been omitted in the subsequent laws in *pari materia*, and there the intention of the legislature to change the law affecting that class of actions, is manifest. Ellis *v.* Paige, 1 Pick. 45; Laws of 1827, 284, §§ 1, 4; Rev. Stat. ch. LXVI, § 1.

In Jacobs *v.* United States, Brock. 523–4, it is held that a statute applicable in its terms to particular actions, cannot be applied by construction, to other actions based upon the same reasons.(*a*)

(*a*) Hazel *v.* Shelby, 11 Ill. R. 9; Kirkham *v.* Hamilton, 6 Pet. U. S. R. 20.

In Ohio it has been decided, that actions not specifically enumerated in their Statute of Limitations are not thereby barred. Tappan *v.* Tappan, 1 Ohio Cond. R. 615; Hazlet *v.* Critchfield, 6 do. 485.

And by numerous adjudications in other States, the doctrine is well established in the construction of Statutes of Limitations, that cases within the reason, but not within the words of the statute are not barred, but may be considered as omitted cases, which the legislature have not deemed proper to limit. Pease *v.* Howard, 14 Johns. 479; Jordan *v.* Robinson, 15 Maine (3 Shepley), 167; Bass *v.* Bass, 6 Pick. 362; Keith *v.* Estill, 9 Porter, 669; Pennington *v.* Castleman, 6 Mo. 257; Smith *v.* Lockwood, 7 Wend. 241. And in England it has been held, that the action of *debt* given by the statute of Westm. 2, C. 11, against sheriffs, and by the I. Rich. 2, C. 12, against wardens of the fleet, being founded in *mala facio*, and also given by statute, is not within the Statute of Limitations of 21 Jac. 1, C. 16, which speaks of debts arising by lending on contract. 2 Bac. Abr. 526; Saund. 34; Sid. 305, 191.

Nor is this doctrine at war with that so frequently held in the books, that the statute is to be liberally expounded. That liberality of exposition is found, not in extending the statute to cases not clearly within its provisions, but in refusing to withdraw from its operation, such as it manifestly does embrace. The correctness of this view of the subject will appear from an examination of the cases cited by the defendant's counsel. 3 Peters, 270; 3 Conn. 51–2; *ib.* 39; 2 Peters' Dig. 714, §§ 4–8, 19, 28.

It follows, that the true construction of the first section of our Statute of Limitations in its operation upon actions *ex contractu* is, that it bars the action of *assumpsit*, in all cases except "such as concern the trade of merchandise between merchant and merchant, &c." in five years; but the action of *debt* in no case, except "for arrearages for rent due on parol demise."

The legislature, in the imposition of restrictions upon the rights of creditors, in this behalf certainly have exhibited

some degree of fastidiousness, denying to them the privilege of maintaining a particular form of action for the recovery of their demands after the lapse of five years, but leaving other concurrent actions for the same purpose in unimpaired force and vigor for sixteen years, if not longer. Were it our province to condemn or amend such legislation, we should certainly say, that if there be any reason for this preference of one form of action to another of the same results and no more, we cannot perceive it; and consequently we would abolish the distinction. But such is not our privilege. We have but to expound and administer the law as it is; not to declare it, or make what should be.

The only question remaining to be determined is, whether the case at bar is *debt* or *assumpsit*.

We have not those unerring *criteria* to guide us in the solution of this question, that are found in the form of the process and pleadings in actions commenced and prosecuted in Courts of record. The distinctive features of the two forms of action under consideration, there so apparent, are obliterated by the legislation regulating practice before justices of the peace. Justices have jurisdiction of both actions, and a common form of summons is prescribed for both. Rev. Stat. Ch. LIX, §§ 17, 21. Debt lies upon simple contracts wherever *indebitatus assumpsit* will lie, and is a concurrent remedy therewith. United States *v.* Colt, 1 Peters' C. C. R. 145; Smith *v.* Lowell, 8 Pick. 178. And there are no written pleadings in justices' courts.

The result is, that the case at bar, like every other suit brought before a justice of the peace upon a "demand on which *debt* or *assumpsit* would lie," occupies ground in all respects common to both those forms of action, and presents no feature peculiarly characteristic of either. Other than the ordinary means of distinguishing them must consequently be resorted to. What shall that be? I know of none better nor more appropriate than that adopted by the Circuit Court in its instruction to the jury, viz: to leave "it to the plaintiffs to elect that form" of action most beneficial to themselves and best

calculated to advance their remedy. The law raises the presumption that such was the form of action intended to be commenced by them, for a man will always be presumed to do what it is his interest to do. But moreover, to have treated the action as *assumpsit* and not *debt*, would have been to injure the plaintiffs without materially benefitting the defendant. It would, by compelling the plaintiffs to take a nonsuit, have delayed their remedy, and subjected them to the payment of the costs of the proceeding improvidently commenced by them, in a form of action barred by the lapse of time; but it would have left them the privilege of suing in another form of action to which no such defence could be successfully interposed.

But the rule is sanctioned as well by authority as reason. U. S. Bank *v.* Dallam, 4 Dana, 574; Lovett *v.* Couman, 6 Hill's (N. Y.) R. 225; Benton *v.* Waples, 3 Harr. 75; 10 Johns. 104; 5 Wend. 275; 12 Ohio, 131; Austin *v.* Hayden, 6 Ohio Cond. R. 158.

It follows that the plaintiffs having elected to treat their action as debt, they were not precluded from maintaining it although the demand on which it was founded was of more than five years' standing.

This view of the subject, as hereinbefore intimated, disposes of the whole case, without the necessity on our part of examining the question involved in the instruction of the Court, and discussed with so much of earnestness and ability by the counsel, whether the action of debt on an account, other than for "rent or arrearages of rent founded upon any lease under seal," is barred by section four of the Statute of Limitations, in sixteen years?(*a*) As has been said, the record presents no such question. Any settlement of it by us, therefore, being uncalled for, would be but an abstraction, and like all other *obiter dicta*, operative not to settle the law of the case before us, but perhaps to unsettle it in reference to other cases; affecting in no wise the result of the case at bar (for as has been shown, that must be the same whether debt on the plaintiffs' demand would have been barred after sixteen years, or as a *casus omissus*, never), but tending, should

(*a*) White *v.* Haight, 1 Scam. R. 204.

we hold that there is no such bar, to disturb the fancied security of persons resting quietly under the supposed shelter of this "statute of repose." Therefore, whatever may be our views on this question, we consider it our duty to refrain from their expression here, leaving it for settlement whenever a case shall arise demanding its adjudication.

The judgment of the Circuit Court is affirmed with costs.

Judgment affirmed.

SALOME ENOS *et al.*, plaintiffs in error, *v.* CHARLES W. HUNTER, defendant in error.

Error to Sangamon.

A Court of Chancery will entertain a bill for relief when the defendant is found within its jurisdiction, and the relief sought can be obtained by acting directly upon the person, whether the subject matter of the bill be within its control or not. Of this character are cases for a specific performance of a contract for the conveyance of, or relating to land beyond the jurisdiction of the Court, where the Court will compel a conveyance in accordance with the mode and form prescribed by the laws of the country in which the land is situated; and should it be necessary in order to carry out such a decree, the defendant may be prevented by a *ne exeat* from leaving its jurisdiction, *pendente lite*. This is the rule of the Common Law, and the statute has not changed it. (*a*)

A Court of Chancery will not entertain a bill where the relief sought renders it necessary that it should act upon the specific thing, unless the subject matter of the litigation is within its jurisdiction. Where land is to be affected by the decree, as in cases of petitions for partition, admeasurement of dower, foreclosure of mortgages, or the enforcement of a mechanic's lien under the statute, the Court must be able to control it directly, or it has no jurisdiction of the case. This, also, is the rule of the Common Law, which the statute has not changed.

The rule of law is, that a wife cannot be allowed to testify to the declarations or confessions made by the husband, either during his life time, or after his decease.

As a general rule, the policy of the law requires that everything which may affect the title to real estate, shall be in writing. A resulting trust, however, may sometimes be proved by parol.

BILL IN CHANCERY, &c., in the Sangamon Circuit Court, filed by the defendant in error against the plaintiffs in error, to compel the execution of an alleged trust. The substance

(*a*) Cooley *v.* Scarlett, 38 Ill. R. 319.

of the bill and the proceedings thereon are stated by the Court. A decree for a conveyance, &c., was entered against the defendants below at the July term, 1839.

A. T. Bledsoe and A. Williams argued for the plaintiffs in error.

J. T. Stuart and B. S. Edwards, for the defendant in error.

Where the decree will affect the land directly, in such case the suit must be brought in the county in which the land is situated; but where the decree is to affect only the person, then it may be brought wherever the person is found. In this case the bill prays that defendant be required to convey lands, and the decree rendered in pursuance of such prayer does not affect the land, but the person. 2 Story's Eq. Jur. 47, 48; Guerrant *v.* Fowler, 1 Henning & Munf. 4; Dunn *v.* McMillen, 1 Bibb, 409; Austin's heirs *v.* Bodley, 4 Munroe, 434; Meade *v.* Merritt, 2 Paige, 403; Mitchell *v.* Bunch, 2 do. 614; Parish *v.* Oldham, 3 J. J. Marsh. 591. When the Court obviously has no jurisdiction, the objection never comes too late; but where the jurisdiction is doubtful, and defendant does not demur, it is too late on the final hearing. 1 McCord's Ch. R. 242.

In relation to the second error assigned, the record no where shows that Salome Enos, who testified, was the wife of Paschal P. Enos, deceased.

The Opinion of the Court was delivered by

Caton, J. This bill was filed in the Sangamon Circuit Court to compel the execution of an alleged trust by the conveyance of lands lying in Madison county, the alleged trustees all residing in Sangamon county. The bill states that in 1820, the complainant, being indebted to one Schloller in a large sum of money, conveyed the premises in question to one Hempstead, in trust to secure the same; that in 1821 the complainant paid off that debt, and the objects of the trust being accomplished, Hempstead was willing and agreed to re-convey the land to the complainant; that for

the convenience of the complainant, for reasons stated in the bill, he wished the title of the land vested in some other person in trust for him; and having confidence in Paschal P. Enos, he prevailed on him to accept said trust, which he agreed to do; that in pursuance of said agreement, Hempstead and wife conveyed to Enos in 1821 the said premises, for which he paid no consideration to Hempstead or to the complainant; and that at that time, Enos agreed to convey to the complainant upon request; that owing to the lands having depreciated in value, and Enos having removed to Sangamon county, complainant neglected to get a conveyance of the lands to himself till after the death of Enos. The deed from Hempstead to Enos is made an exhibit.

The heirs at law of said Enos, who were minors, and the administratrix of his estate are made defendants, and the bill concludes with a prayer for a conveyance of the land to the complainant.

The record does not show when the bill was filed, but the summons was issued on the 21st of February, 1838, and was returned served on all of the defendants. On the same day an amended bill was filed stating that one of the defendants, Pascal P. Enos, had arrived at full age since the filing of the original bill.

On the 20th of October, 1838, the bill was taken as confessed as to Pascal P. Enos, and at the same time a guardian *ad litem* was appointed for the infants. The administratrix answered, admitting in general terms the truth of the bill, and the guardian *ad litem* filed the usual answer for his wards, denying all knowledge of the truth of the allegations of the bill, and calling for the necessary proof.

On the 19th of July, 1839, the order taking the bill as confessed as to P. P. Enos was set aside, and on the same day the bill was again taken as confessed as to him, as appears from the final decree. No replication appears to have been filed.

On the 19th of July, 1839, a decree was entered, directing the administratrix and Pascal P. Enos to convey all of their right, title and interest in the premises to the complainant,

and appointing a commissioner to convey the like interest of the infants.

On the 2d of March another order was entered, reciting that the conveyances directed to be made by the former decree had not been made, and appointing another commissioner to make all of the conveyances.

There are several important questions presented by this record, which will be considered in their order.

In the first place, it is insisted that the Circuit Court of Sangamon county had not jurisdiction in this case, inasmuch as the land, a conveyance of which was sought, is situate in another county, and consequently beyond its control. We will first inquire, whether the Court would have had jurisdiction, independently of our statute, and then see whether any change is made by our law.

Where the relief sought could be effected by acting directly upon the person of the defendant, the Court of Chancery has never hesitated to entertain the bill where the defendant is found within its jurisdiction, whether the subject matter of the controversy be within its control or not. Of this character are those cases where the Courts have compelled specific performances of contracts for the conveyance of, or relating to land which is situate beyond its jurisdiction. And in such case the Court will compel a conveyance to be executed, in such manner and form as may be prescribed by the laws of the country where the land is situate. And, if need be, in order to effect this, they will prevent the defendant from leaving the jurisdiction of the Court, *pendente lite*, by a writ of *ne exeat.*

A remarkable instance of the exercise of this jurisdiction, is to be found in the case of Penn *v.* Lord Baltimore, 1 Vesey Sen'r. 444, where Lord Hardwick held, that the Court of Chancery in England had jurisdiction to enforce the specific performance of an agreement between the proprietaries of Pennsylvania and Maryland, relating to the boundaries of those colonies, and decreed accordingly. Many other cases of a similar character are to be met with in the English Chancery Reports.(*a*)

(*a*) Massie *v.* Watts, 6 Cranch U. S. R. 148; Watkins *v.* Holman, 16 Pet. U. S. R. 57.

Similar cases are frequently to be found in the United States. In Dunn *v.* McMillen, 1 Bibb, 409, it was determined, that the Court having obtained jurisdiction of the person of the defendant, it could decree a conveyance of land lying beyond its jurisdiction, and upon similar principles, in Dicken *v.* King, 3 J. J. Marsh. 591, and Cates *v.* the heirs of Laflas, 4 Monroe, 434, it was held that the Courts within whose jurisdiction the land was situate, could not for that reason take cognizance of the cause, where the defendants resided in another jurisdiction, where they had a right to be sued.

Chancellor Taylor, in Guerrant *v.* Fowler, 1 Hen. & Munf. 4, held that the Court had jurisdiction to set aside and cancel a deed for fraud, which had been executed in that State, for land lying in Kentucky; and the Court in that case refers to the case of Farley *v.* Shippen, Wythe's Chancery Decisions, 135, where the same Court decreed a performance of an agreement for the conveyance of land situate in North Carolina.

Chancellor Walworth says, in Mead *v.* Merritt, 2 Paige, 404: "and it [the Court of Chancery] may in the same manner compel him to execute a conveyance, or a release in such form as may be necessary, to transfer the legal title of the property, according to the laws of the country where the same is situated, or which will be sufficient in law to bar an action in any foreign tribunal."

These cases all go upon the ground that the relief sought is purely of a personal nature, and that the cause of action is transitory, and follows and attaches to the defendant wherever he may be found. The cause of action arising out of a contract for the sale of land is as much transitory, where the purchaser seeks to have it performed specifically, as where he sues at law to recover damages for the non-performance. The Court can grant the necessary relief by coercing the person of the defendant, no matter where the land may be situated. The fact that the land is beyond the control of the Court, makes no difference in relation to the extent of the relief which the Court may give, except that probably the Court would not compel the defendant to deliver possession to the complainant, after the execution of the deed, which

it might do, if the premises were within its own jurisdiction.

That, however, is not essential to the substantial part of the relief sought, and is matter of discretion with the Court rather than of strict right to the party. The inability to give the party possessionwill not prevent the Court from securing to him the legal title which the party may convey as well in one place as in another.

In Chancery, however, there are local actions as well as at Common Law. Where, in order to grant the relief sought, the Court must act upon the specific thing, then it will not entertain the suit, unless the subject matter of the litigation is within its jurisdiction. If land is be affected by the decree, then the Court must be able to control it directly, or else it has not jurisdiction; as where an application is made for a partition, or for an admeasurement of dower, a foreclosure of mortgage, or to enforce a mechanic's lien under our statute. It is manifest, that unless the Court can reach the premises directly, it cannot afford the relief sought, and consequently will not entertain jurisdiction.

Such, then, being the jurisdiction of the Court independently of our statute, it remains to be seen whether that has changed it.

By the second section of the twenty-first chapter of the Revised Statutes (which is a transcript of the law of 1833), under which this suit was commenced, it is provided that "the mode of commencing suits in Equity, shall be by filing a bill setting forth the nature of the complaint, with the clerk of the Circuit Court of the county, within whose jurisdiction the defendants, or a major part of them, if inhabitants of this State, reside; or if the suit may affect real estate in the county, where the same, or a greater part thereof shall be situate. If the defendants are all non-residents, then, with the clerk of the Circuit Court of any county. Bills for injunctions to stay proceedings at law, shall be filed in the office of the Circuit Court of the county in which the record of the proceedings shall be."(*a*)

Unless the suit may affect real estate, it must be commenced in the county of the defendants, or of a major part of

(*a*) Akin *v.* Lloyd, 28 Ill. R. 331.

them, as was done in this case, although the land lies in another county and beyond the jurisdiction of the Court. Manifestly, the meaning of the word *affect*, as used in the statute, is to act upon, which indeed is its ordinary signification, and we have already seen, that in compelling a conveyance of real estate, we do not affect or act upon the premises, but upon the person of the defendant alone. We are not to presume, except where the language of the statute manifestly requires it, that the Legislature intended to change the ancient rule by which the Court was governed in relation to its jurisdiction. In this statute, it has used apt and proper words to express that rule, and we entertain no doubt that jurisdiction in this case was properly acquired.

The next objection is, that the witness, upon whose testimony this decree was rendered, was incompetent to prove the declaration of Paschal P. Enos, for the reason that she was his widow. The rule of law undoubtedly is, that the wife cannot be allowed to testify to the declarations or confessions made by the husband, either during his lifetime, or after his death; else that confidence which ought always to exist between husband and wife, would be necessarily impaired, if not utterly destroyed. The lips of each must be ever sealed in the Courts of Justice, in relation to what may have passed between them, except perhaps, sometimes in cases of complaints of one against the other. The law regards the relation of husband and wife of too sacred a character, to allow communications that have passed between them to be divulged. 1 Greenl. Ev. 407, §§ 336–7.(*a*) But in this record we have sought in vain for the evidence to show that the witness was the widow of Paschal P. Enos. We may, indeed, suspect so from the fact that her name is the same with Salome Enos, who is made defendant in, and has answered the bill as executrix of Paschal P. Enos, and that the deposition was taken at the house of said defendant, as the magistrate certifies in the caption of the deposition, but this is not sufficient to authorize us to say that she is the widow of Enos. As before remarked, we may suspect so, but it is not proved. It is a matter easily proved if true, and we cannot supply the

(*a*) Stein v. Bowman, 13 Pet. U. S. R. 221.

want of proof by conjecture. We cannot, therefore, say that the witness was incompetent.

It remains to be seen, whether the proof sustains the case made by the bill, and warrants the decree rendered by the Court.

As it would make no difference in our decision, from the view which we feel constrained to take of the evidence, I am directed by a majority of the Court not to express any opinion whether the agreement which is alleged in the bill to have been made between the complainant and Paschal P. Enos, by which the alleged trust was created, is within our Statute of Frauds or not, and consequently it is unnecessary to say whether the Court would take notice of the statute in favor of an infant, where it is not insisted on by plea or answer.(*a*) I shall, therefore, proceed to dispose of the case as if the alleged trust might be proved by parol, like a resulting trust. As a general rule, the policy of the law requires that everything which may affect title to real estate, shall be in writing; that nothing shall be left to the frailty of human memory, or as a temptation to perjury; and wherever this policy of the law has been broken in upon, and parol evidence admitted, the Courts have been ever careful to examine into every circumstance which may affect the probability of the alleged claim—as the lapse of time, the means of knowledge and circumstances of the witnesses—and will not grant the relief sought, where the claim has been allowed to lie dormant for an unreasonable length of time, or where the evidence is not very clear in support of the alleged right; especially where no claim has been set up during the lifetime of the trustee, but is raked up and charged against the heirs, who may not be supposed to know any thing about it, or be able to defend it as their ancestor might have done.

In relation to resulting trusts,(*b*) so late as 1815, Chancellor Kent, in the case of Boyd *v.* McLane, 1 Johns. Ch. R. 582, thought it necessary to go into a full examination of all the authorities to prove that parol evidence was competent to establish such a trust against the express provisions of the deed; and although the books on that point had been contradictory, yet

(*a*) Thornton *v.* Hrs. of Henry, 2 Scam. 221, and notes.
(*b*) Rev. Stat. 1845, p. 251. sec. 4.

he came to the conclusion that such a trust might be proved by parol evidence; but then, he says: "The cases uniformly show that the Courts have been deeply impressed with the danger of this kind of proof, as tending to perjury and the insecurity of paper title. And they have required the payment by the *cestui que trust* to be clearly proved. In the case of Leach *v.* Leach, Sir Wm. Grant did not deem the unassisted oath of a single witness to the mere naked declaration of the trustee admitting the trust as sufficient, and there were no corroborating circumstances in the case. He thought the evidence too uncertain and dangerous to be depended upon." In the case of Boyd *v.* McLane, the complainant had been in the possession of the premises from the time of the purchase till the commencement of the suit, a period of five years. The fact that the purchase was made with the complainant's money, was positively proved by three witnesses, in addition to which, the confessions of the defendant to the same fact was proved by a number of other witnesses. This overwhelming mass of evidence was held to be sufficient to overcome the sworn answer of the defendant, supported in part by one witness.

This case sufficiently admonishes us of the care with which we shonld examine the evidence, when it is sought to affect by parol the title to real estate; and certainly that we ought not to overturn a long established legal title on mere suspicion.

What, then, is the nature of the evidence relied upon to support this claim? There is the deposition of but one witness taken, and in answer to a directly leading interrogatory, she says: I have heard Mr. Enos in his lifetime says that a tract of land was conveyed to him trust for Mr. Charles W. Hunter, but did not at that time, nor until since his death, know that it was conveyed to him by Hempstead and wife;" and the answer to the next question shows that she did not learn from him, nor did she know during his lifetime what land it was; nor did she know at the time her deposition was taken, except from a receipt for taxes which she had paid on the land, which really amounts to no knowledge at all.

Now the mere statement of this evidence shows, that it comes immeasureably short of sustaining the material allegations of this bill. Although the deed from Hempstead to Enos is made an exhibit by the bill, yet even its execution was not proved on the hearing, so far as the record shows, for it must be borne in mind that the answer of Salome Enos,(*a*) who was unnecessarily made a defendant in the bill, is not evidence against the other defendants. But even if the execution of this deed had been proved, there is no evidence showing upon what consideration it was made, or contradicting the express declaration which it contains, that a valuables consideration was was paid for the land by Enos.

The most that can be claimed for the testimony of the witness is, that Enos held some land in trust for the complainant, but whether it was this land, or some other, we are left entirely in the dark. From this evidence, the complainant might as well have claimed any other land of which Enos died seized as this. This is far from being that clear and satisfactory evidence which the law requires to set aside a long standing legal title, even the muniment of which the complainant never had till after the death of Enos, but which always remained with him till that time, as appears by the testimony of the witness.

The lapse of time, too, is another circumstance in connection with this claim, which is entitled to very great consideration, and which, if it be not conclusive of itself, still admonishes us that we should be very careful and disturb not this legal title without the most satisfactory proof.

Here the conveyance was made to Enos in 1821, and we hear of no pretense of claim by the complainant or any one else, until seventeen years after, and two years after the death of the grantee, who, from aught that appears up to the time of his death, enjoyed the undisputed possession of the premises as his own, and paid the taxes upon the land. If this be not a stale claim, it is not probable that we shall meet with one soon.

The decree of the Circuit Court is reversed with costs and the cause remanded.

Decree reversed.

(*a*) *Quere:* Had she no dower in the land?

JAMES BRUCE, appellant, *v.* ROBERT SCHUYLER *et al.*, appellees.

Appeal from Adams.

If there be two affirmative statutes, or two affirmative sections in the same statute upon the same subject, the rule of construction is, that the one does not repeal the other if both may consist together.

The provisions of a statute should receive such an interpretation, if the words and subject matter will admit of it, that the existing rights of the public, or of individuals be not impaired.

The doctrine of repeal by implication is not favored by the law, and is never resorted to except where the repugnance or opposition is too clear and plain to be reconciled. The rule of law is, that all laws *in pari materia* are to be construed together, that no clause, sentence or word of any law shall be superfluous or insignificant. (*a*)

The Revenue Act of 1833, by repealing the fourth section of the Act 1827 in express terms, or by its general repealing clause, did not, by implication, repeal the twenty-fifth section of the same Act. A deed, therefore, made by the Auditor subsequent to the passage of the Act of 1833, for land sold by him for taxes under the laws of 1827 and 1829, is valid.

Courts ought not to declare a law unconstitutional, unless its repugnance to the Constitution is direct and clear. (*b*)

Any Act which changes the expressed intention of the parties to a contract, or such as results from their stipulations, impairs its validity. It is immaterial as to the extent or manner of the change, whether it be ever so minute, or relates to its construction, its evidence, or the time or manner of its performance. In fine, every conceivable change of a contract impairs its validity and renders it null and void. This constitutional provision extends to and embraces both contracts executed and executory, and as well those entered into by a State, as those made by individuals.

The obligation of a contract is that which obliges a party to perform his contract, or repair the injury done by a failure to perform. The remedy may be modified by the legislature, but not entirely abolished, and in substituting one mode for another, a reasonable remedy must be provided. An Act, therefore, that extinguishes all existing remedy so as to leave no redress, and no means of enforcing a contract would, by operating *in presenti*, impair its obligation.

It is a well settled principle, that the repeal of a law, in which a contract consists, is an infringement of the Constitution. A legislative grant is a contract of this description.

No rule of interpretation is better settled, than that no statute shall be allowed a retrospective operation, unless the will of the legislature to that effect is declared in terms so plain and positive as to admit of no doubt. (*c*)

The Statute of Limitations, passed on the 17th day of January, 1835, and which took effect on the first day of June of the same year, is not a bar to a recovery, unless the party has been in possession for seven years subsequent to the time it went into effect.

(*a*) Hume *v.* Gossett, 43 Ill, R. 299.

(*b*) People *v.* Auditor, 30 Ill. R. 438.

(*c*) Marsh *v.* Chestnut, 14 Ill. R. 226; Conway *v.* Cable, 37 Ill. R. 82.

EJECTMENT, in the Adams Circuit Court, brought by the appellees against the appellant, and heard before the Hon. Jesse B. Thomas and a jury, at the September term, 1843.

At the trial the plaintiffs offered in evidence a deed from the Auditor, of the premises in controversy, to Stephen B. Munn, assignee of Zophar Case, dated Nov. 8, 1833, founded upon a sale, on the 12th of January, 1833, for the taxes of 1832, without any evidence to support said deed. They also deduced title from Munn to them. Thereupon the parties agreed, that the jury should find a verdict for the plaintiffs, subject to the opinion of the Court upon the sufficiency of the title adduced and if the Court should be of opinion that it was sufficient, then, whether seven years' possession of the premises by the defendant next preceding the commencement of the suit under title, &c. would be a bar to the suit.

Judgment was entered in favor of the plaintiffs, and the defendant appealed to this Court.

N. BUSHNELL, for the appellees.

In January, 1833, the land in controversy was sold by the Auditor for the tax of 1832, under the revenue law of 1827, and the amendatory Acts of 1829 and 1831, and in November, 1833, the Auditor executed to the purchaser a deed in the form prescribed by the Act of 1827. This act, after classifying the taxable lands and providing for the listing of non-resident lands for taxes, for the rate of taxation and the mode of making out and advertising the delinquent lands for sale, by the fourth section provides, that on the first Monday of January annually, at the State House at the Seat of Government, "the Auditor shall proceed to sell all the lands advertised as aforesaid," or so much thereof as may be sufficient to pay the tax, interest and costs on each tract, and that "the Auditor certify to the treasurer the amount of all sales; and upon receiving the purchase money, the treasurer shall give the purchaser a receipt for the same; and on presenting such receipt to the Auditor, the purchaser shall be entitled to receive at his option either a certificate of such purchase, or a deed" in the form given in that section purporting to be executed by the Auditor.

The twenty-fifth section provides that at "all sales of land for taxes whether by the Auditor or sheriff, the officer selling shall, previous to the sale, designate in what part of the tract the part sold shall be located, and shall give his certificate or make his deed accordingly." The revenue law passed Feb. 27th, 1833, provides that the sales for taxes shall be thereafter made by the clerks of the counties in which the lands are situated, at their respective county seats; and by the 18th section it is provided, that "the third, fourth, fifth and twenty-seventh sections" of the Act of 1827, "and all other Acts and parts of Acts as come within the purview of this Act, be and the same are hereby repealed." It is now insisted that by this repeal of the fourth section of the Act of 1827, the power of the Auditor to execute deeds on sales made by him while that section was in force, has been taken away; and that the Auditor's deed given in evidence in this case, having been executed since the repeal, is void. This we deny. On the contrary, we insist that the authority of the Auditor to execute deeds on sales made under this law, existed independent of an express provision of the statute to that effect; that the repeal of this power, whether express or implied, was not within the spirit, object or letter of the Act of 1833; that it was not within the meaning and intention of the legislature; and that, if intended, it was unconstitutional.

I. The Auditor being authorized by the fourth section to sell lands for taxes, and having executed the power while that section was in force, would have been authorized to execute deeds to the purchaser without any express provision upon the subject. That such had always been the understanding of the legislature, a reference to the prior revenue laws will clearly demonstrate. By the Revenue Act of 1819, the first after the organization of the State Government, it was made the duty of the sheriff of the county in which the Seat of Government was situated, to sell non-resident lands for taxes; and of the sheriffs of the several counties to sell the delinquent lands of residents; and the sheriffs selling, were required to give each purchaser "a certificate of the sale

made to him," which should vest the title in the purchaser. Laws of 1819, 314, §§ 6, 9, 10. By the law of 1820–1, the Auditor was substituted in the place of the sheriff to sell the delinquent lands of non-residents, and was authorized to do "all such acts and things in relation to advertising and selling the lands" as were required of the sheriff at the Seat of Government, by the law of 1819. Laws of 1820–1, 182, § 1. By the law of 1822–3, the Auditor was directed to sell delinquent non-resident lands, and to give a deed to the purchaser which should vest in him the title; and while the sheriffs were required to sell delinquent resident lands situated in their respective counties, no provision was made for giving to the purchaser either a "deed" or "a certificate of sale," although the law of 1819, authorizing the sheriff to execute such certificates, was thereby repealed. Laws of 1822–3, 204, § § 7, 13, 30. The law of 1824–5, prohibits the sale of resident lands by the sheriffs, but requires the sheriffs to be furnished with a list of the taxable lands both of residents and non-residents, and to collect the taxes and report to the Auditor, who is directed to "advertise and sell" all the delinquent lands on such list in the same manner as the property of non-residents. Laws of 1824–5, 173, §§ 2, 5, 8. And by the fourteenth and seventeenth sections, the Auditor was also directed at every sale "to offer for sale" all lands that had been or might thereafter be struck off to the State. So again, by the law of 1827, the Auditor was required to sell certain lands for taxes. Laws of 1826, 92, § 8. But in neither of the three last cases did the statutes make any provision for securing to the purchaser a deed, a certificate of sale, or any other evidence of his purchase. Thus, by virtue of these statutes, delinquent lands were to be sold, at one time by the Auditor, at another by the sheriff; at one sale "a certificate of sale," at another "a deed" was to be executed to the purchaser; and at still a third, the Auditor or sheriff was authorized to execute neither a certificate or deed, except as the power to sell. Of the seven cases enumerated in these statutes for the sale of delinquent lands, in two only is the power to execute any form of conveyance expressly given; in all the others it

has always been the understanding of the legislature, we have must be supplied, if at all, by implication from the power to sell; while in all the sales provided for, the language of the statute as to what shall be sold is substantially the same, showing a clear intention on the part of the legislature that in each case the land, and not merely an interest in it, be sold and the title vested in the purchaser. Even in those two cases in which a deed or certificate of sale was expressly authorized, no form was provided for either of them. This was left to the discretion of the officer selling. To remedy this inconvenience was passed the law of 1826, having for its sole object to provide the form of the deeds to be thereafter executed by the Auditor, whether on prior or future sales. Laws of 1826, 18, § 1. This statute contains no new grant of power to the Auditor. It does not purport to confer on him the authority to execute deeds on past sales. On the contrary, it clearly recognizes the power, and simply prescribes the mode of its execution. It also further proves, if further proof were required, that on prior sales, it was in all cases the land and the title to it that was sold; for this deed, when executed in the form prescribed, is, without any distinction of past or future sales, declared "to vest the title in the purchaser."

In this state of things was passed the law of 1827, the Act under consideration. This was a mere revision of the revenue system, collecting into one Act the various provisions of six statutes, embodying all of the principles and the useful details of prior legislation on the subject, with such other details as experience suggested. The fourth section confers upon the Auditor the power to sell, and upon the purchaser the right to a deed in the prescribed form. By the twenty-fifth section the power to execute deeds is given in express terms. Strike out this latter section and would not the authority of the Auditor to execute deeds still remain? Would not the right of the purchaser to receive a deed, as established by the fourth section, impose on the Auditor a correlative duty, and imply the power to make it? Would not this power be also as forcibly implied from the power to sell? That such

already seen. That it is also the law seems hardly doubtful. The idea of a sale of land in this State includes within it, as a matter of law, the idea of a conveyance. This is not only the usual, it is the necessary mode of effecting a sale. With us there are no charters of feoffment deriving their efficacy from the livery of seizin; no transmission of title by mere acts *in pais;* but only by deed, by some mode of conveyance deriving its effect from our local statutes, and containing apt terms to pass the title. The recording law, the Statute of Frauds and of conveyances, the whole system of State legislation on the subject of land titles, point to and establish the conclusion that titles to land can be affected only by evidence in writing. It is the "deed or other conveyance in writing, signed and sealed by the party making it," which, by the law of 1827, of the same session which authorized the sale in this case, is declared to be "sufficient for the selling of any lands, tenements or hereditaments in this State," so as "to vest the title in the purchaser." Laws of 1827, 95, § 1. A sale of lands without a conveyance in some form is, therefore, legally impossible. It not only cannot be proved, it cannot exist. A lost deed and a sale by it may be established by sufficient evidence, but in a case where no deed has ever existed, there can be neither sale nor proof.

Thus take from the Auditor the power to execute deeds, and the power to sell is nugatory. It is nugatory as a matter of law. It would be equally so as a matter of fact. No person would purchase lands at tax sales unless he could obtain a title; and the very object of the statute would be defeated by the inability of the Auditor to sell, which the statute authorizes and requires him to do.

But it is said that this is a summary statute and that such statutes must be construed strictly. The principle of strict construction can have no application here. It relates either to the subject matter of the statute, or to the acts of the officer under it. By the former no right can be affected, unless it falls within the clear intention of the statute; by the latter it can be affected only in the precise mode pointed out, for one mode being prescribed, all others are forbidden. But here,

as to the right to be affected, there is no dispute. It is the clear intention of the statute, that the delinquent lands be sold and the title vested in the purchaser. The mode of proceeding preliminary to the sale is prescribed, and must be strictly pursued. But what evidence is the Auditor to furnish the purchaser of his purchase and title? Is it to be a certificate, a contract, or a deed? And what are to be the terms of each? On this point, the law by the supposition is silent; and according to the argument we are answering, it can be neither. For this goes not to one, but to every case of implied power. The same principle of construction, which denies to the Auditor the implied power to make a deed, equally denies to him the implied power to make a valid certificate or contract; it equally denies to him the power to insert terms not expressly contained in the statute, and where the statute is silent as to the terms, the certificate, the contract or the deed must also be silent; no terms, however appropriate to the power to sell, can find a lodgment there. And must the sale be therefore merely verbal? And what shall be the terms of this verbal sale? Here, again, passing over the impossibility of such a sale, the stipulations to be implied from the power to sell, again encounter this narrow principle, and discover to us that we have abandoned the plain and legitimate construction of the statute, for a solecism and an absurdity.

The statute authorizes the Auditor to sell. The argument concedes the power and denies to him every condition under which it can be exercised, keeping "the word of promise to the ear" only "to break it to the hope." It is a general principle that the grant of a power, whether to governments, to individuals, or to corporations, carries with it all of the usual ordinary and necessary means to effectuate the beneficial exercise of the power. Story on Agency, §§ 58–9. Ventriss *v.* Smith, 10 Peters, 161; Wilson *v.* Troup, 2 Cowen, 199, 233; Jackson *v.* Hartwell, 8 Johns. 424; Pittstown *v.* Plattsburgh, 18 do. 407, 418; McCulloch *v.* The State of Maryland, 4 Peters' Cond. R. 466; Pomfret *v.* Rickfort, 1 Saund. 323, and note 6; Fenn *v.* Harrison, 3 Term R. 757. Why should a principle, applicable to all other cases

of constitutional and statute law, be denied to this law? In what respect can the execution of a deed, the usual and appropriate method of executing a power to sell, be said to violate a statute on the principle of strict construction, which, while it makes it the duty of the Auditor to sell, neither prohibits that mode nor prescribes any other. This case is even much stronger, for the question here is not merely as to the execution of an implied power, convenient and proper to carry an express power into effect, but it is as to the power of the Auditor to do an act embraced within, and constituting a part of the principle act to be done. We submit, then, that no express authority to the Auditor, to make deeds under the law of 1827 was necessary. It would be implied by the fourth section from the right of the purchaser to receive a deed. It would be more strongly implied from the power to sell, not merely as a convenient incident to that power, but as a component part of the sale itself. How, then, can the repeal of the fourth section, relating to the deed, affect a power previously conferred and existing as full and perfect without it as with it. See Nance *v.* Howard, Bre. 183, 185.

II. But we need not rely on this implied power. The power of the Auditor to execute deeds is expressly conferred by the 25th section, and that section the Act of 1833 did not repeal. There can be no doubt that by the 25th section, if standing alone, unaided by the 4th, the power of the Auditor to make deeds in all cases would have been ample. The question then is, are the fourth and twenty-fifth sections so connected and dependent on each other, that the repeal of the former also repeals the power expressly conferred by the latter. Here, the gentleman's doctrine of strict construction comes to our aid. By this the words of the statute must be looked to and strictly pursued. That which is expressed in the statute must supercede that which is merely implied. As an express covenant in a deed takes away all implied ones (Vanderkarr *v.* Vanderkarr, 11 Johns. 122; Grannis *v.* Cark, 8 Cowen, 36; Kent *v.* Welch, 7 Johns. 258); so the power of the Auditor implied in the fourth section is merged

and lost in the express grant contained in the twenty-fifth. Thus, on the gentleman's own principles, the power of the Auditor to make deeds cannot be derived from the fourth section; 1st, because, as we have seen, any implied power under such a statute is denied, and 2nd, because, if it could be implied from that section, the implication is destroyed by the twenty-fifth. This power, then, exists wholly independent of the fourth section; and by no logic can the repeal of that section destroy it.

But assuming that it can be deduced from each of these sections, is it still taken away by the repeal of the fourth? The law of 1833 simply changes the place of future sales, and the officer who is to sell the delinquent lands. For the Auditor it substitutes the county clerks, for the Seat of Government, the several county seats. This was the principal, we may say the only object of the law. It was merely a change of convenience. No new principles were adopted; few changes were made even in the details of former statutes. The statute of 1827, itself a revising law, with the supplemental Acts of 1829 and 1831 were all retained, with the exception of such sections as conflicted with this change in the sale, and there, with the law of 1833, thereafter formed the revenue system. The fourth section of the law of 1827 was repealed, as directing the sales to be made by a different officer and at a different place; but, as many lands had been sold by the Auditor for which the purchasers had received no deeds, the twenty-fifth section authorizing the Auditor to execute the deeds was retained. Guarded language in the repeal of the fourth section was unnecessary. As the power of the Auditor to make future sales was taken away, no new rights could be acquired under his acts. In only remained to secure and perfect old ones; and what reason could exist for preserving an inferential power to execute deeds under the fourth section, when this power was retained in express terms in the twenty-fifth section?

It could not have been the intention of the legislature to deprive purchasers at previous sales, of the benefit of their purchases, by taking away the power of the Auditor to execute

deeds. The whole history of the State legislation on the subject matter, repels the idea. It discovers a constant solicitude on the part of the successive legislatures to give confidence to the public in the validity of tax titles, as the only means of securing the collection of the revenue; a feeling in which the legislature of 1833 fully participated, as is evident from the eighth, tenth and eleventh sections of the law which make the deed *prima facie* evidence of title, secure the purchaser 100 per cent. on redemptions in two years; and guard most carefully against fraudulent redemptions by minor heirs.

To deduce the repeal of the twenty-fifth section from the repeal of the fourth, would, therefore, violate every principle laid down for the construction of statutes. It violates the law which relates to repeals by implication; it violates the clear intention of the legislature; it is at war with all previous legislation on the subject matter; it is not required by the spirit and object of the law of 1833; it subverts the rights of third persons, and renders that part of an existing law, the twenty-fifth section of that Act, which makes it the duty of the Auditor to execute deeds on sales made by him, entirely nugatory.

We need only refer to a few cases on the construction of statutes — their application to this case is plain. In the construction of statutes, all statutes in *pari materia* are to be taken as one statute (1 Kent's Com. 463–4; 6 Bac. Abr. tit. *Statute*, Letter I, No. 3; The Earl of Allsbury *v.* ——— ———, Doug. 30; Nance *v.* Howard, Bre. 183, 185); and this, whether the statutes are repealed or unrepealed (Church *v.* Crocker, 3 Mass. 21–2; 6 Bac. Abr. *Statute*, I, 2); and each part should be construed with the other and the whole be taken together and so construed that no clause, sentence or word should be superfluous or insignificant. The Mayor of Baltimore *v.* Howard, 6 Har. & Johns. 383, 388, 392–3; Pennington *v.* Coxe, 1 Peters' Cond. R. 346, 348. The ends contemplated should be considered (Comyn's Dig. title, *Parliament*, R. 10 B); and the statute so construed that no man, who is innocent, be punished or endamaged (6

Bac. Abr. *Statute*, Letter I, 10); or the existing rights of the public or individuals be infringed. Wales *v.* Stetson, 2 Mass. 143, 146; Dash *v.* Van Kleeck, 7 Johns. 486, 495–6, 499, 501–2, 508; United States *v.* Fisher, 1 Peters' Cond. R. 421. The intention of the legislature must be looked to. This is the polar star in the construction of statutes and must be followed even where it may seem contrary to the letter. 6 Bac. Abr. *Statute*, I, No. 5; Church *v.* Crocker, 3 Mass. 21–2; Holland *v.* Pearce, 8 do. 418; Somerset *v.* Dighton, 12 do. 393. This intention is sometimes to be collected from the cause or necessity of making a statute, or from the situation of the country at the time of its passage, or from the general system of legislation on the same subject. At other times it may be collected from other circumstances. In whichever of these ways it can be discovered, it should be followed with reason and discretion in the construction of the statute, though contrary to the letter. Jackson *v.* Collins, 3 Cowen, 89; 6 Bac. Abr. I, 5; Preston *v.* Browder. 3 Peters' Cond. R. 508; 5 Comyns' Dig. title, *Parliament*, R. 10 B; Holbrook *v.* Holbrook, 1 Pick. 250, 254; Beall *v.* Harwood, 2 Har. & Johns. 171. Thus, in delivering the opinion of the Court in the case of Mendon *v.* The county of Worcester, 10 Pick. 243, Shaw, Chief Justice, says: "That the statute cannot have a literal construction consistent with the intention of the legislature, we think quite manifest. But we think the statute must have a reasonable construction with reference to the obvious purposes intended to be accomplished, the known rights intended to be secured, a just regard to other and previous legislative enactments for which the present is intended as a substitute." See, also, Commonwealth *v.* Cambridge, 20 Pick. 267, 271. So repeals by implication are disfavored. A latter Act will not repeal a former by implication, unless the repugnancy is plain. It has ever been confined to repealing as little of a prior statute as possible. Though seemingly repugnant, they will, if possible, receive such a construction that both may stand (Snell *v.* Bridgewater, 24 Pick. 297–8; Goddard *v.* Boston, 20 do. 408, 410; Loker *v.* Brookline, 13 do. 348; Canal Company

v. Railroad Company, 1 Gill. & Johns. 152, 154); particularly in a case where the spirit and character of the legislature on the same subject, rebuts the idea that a repeal was intended. Pease *v.* Whitney, 5 Mass. 379, 382–3; McCartee *v.* Orphan Asylum, 9 Cowen, 507.

III. But if it should be admitted that the Act of the 27th of February, 1833, standing by itself repeals the authority of the Auditor to execute deeds, of sales under the law of 1827, we then insist that by another law of the same session, the power is still reserved. By the eighteenth section of the law of the 27th of February, 1833, the fourth section of the Act of 1827 is repealed; but while this repealing Act was on its passage, a general revising Act was also before the legislature. This revising law passed on the 2nd of March, 1833, three days subsequent to the revenue law. It contained a revision of all the laws in force at the commencement of the session. The first section enumerates the laws to be retained, and directs them to be published with the general laws of the session, and gives to the whole the title of the "Revised Laws of Illinois." The numbers 146, 148 and 149, in the enumeration, embrace the revenue laws of 1827, 1829 and 1831, excepting the fourth section of the law of 1827, and certain other sections having no relevancy to this case. At the close of the enumeration, the second section of the law provides, that "all Acts and parts of Acts of a general and public nature, passed by any General Assembly heretofore held, and not enumerated in the foregoing section, are hereby repealed: *Provided*, that no proceedings commenced or rights acquired under any of the Acts hereby repealed, shall be in anywise impeded or impaired by the repeal thereof." Revised Laws of 1833, 434, No's. 146, 148 and 149, and §§ 2, 3. These two laws having been passed at the same session, relating to the same subject matter, and looking to the revision of the same revenue system, must be construed as one law. This will give to the proviso in the revising law the same effect as if it had been specifically contained in the revenue law. By the Common Law, every Act of Parliament related back to and took effect from the first day of the session, unless oth-

erwise provided. 1 Kent's Com. 456; Sattles *v.* Holmes, 4 T. R. 660. The Act of 33 Geo. 3, chap. 13, modified the Common Law in this respect, and requires the time of the royal assent to be indorsed on every Act, and from that time it takes effect as a law. Comyn's Dig. title *Parliament*, R. 1. This places an Act of the English Parliament on the same footing with an Act of our Legislature, which unless otherwise provided, takes effect from the time of its passage. But this doctrine of relation of a statute to the first day of the session, except for the purpose of going into effect, is in no respect affected by the Act of Geo. 3rd. For the purpose of construction, every Act still relates to the first day, so that two Acts passed at different times in the same session, will, by relation to the first day, be considered, in contemplation of law, and for the purpose of ascertaining and giving effect to the intention of the legislature, as having passed at the same time. It is considered that the passage of one Act before the other is purely accidental; that the two bills were probably before the legislature at the same time; and that each bill was passed with reference to the other, and in expectation of its passage. Nares & Pepys *v.* Rowles, 14 East, 510. In this country it has been frequently decided, that all acts passed upon the same subject at the same session of the legislature, are to be considered as one law. The State *v.* Noah, 3 Iredell, 506; The State *v.* Backley, 2 Blackf. 249; Kinney *v.* Beverly, 2 Hen. & Munf. 342–3, per Justus Roane. The reason assigned is, that both Acts were probably before the legislature at the same time, and must have had a necessary relation to each other; and that to adopt a different principle of construction would defeat the obvious intention of the legislature. 2 Hen. & Munf, 343; 14 East, 510.

In this case, we are not left to probabilities. The journals show that both of these laws were progressing, for most of the session, in both houses and at the same time.

The subject of the revenue law of 1833 was introduced into the House as early as the sixth of December, 1832. The bill itself was introduced into the House on the 17th of that month, and from that time it was before the House in its va-

rious stages till the 27th of February, 1833, when it passed the Council of Revision. House Journal, 1832–3, pages 39, 40, 116, 121, 237, 251–2, 348–9, 362, 370, 446, 475–7, 571–2, 625, 665, 674, 682, 695. The bill was reported from the House to the Senate on the 19th of February, 1833, and from thence to the 27th of February it was before the Senate in its various stages. Senate Journal, 1832–3, pages 470, 500, 510, 570, 576, 586.

The subject of the "Revised Laws" was introduced into the House on the 12th, and into the Senate on the 26th of December, 1832, at which time, by a joint resolution of both Houses, the whole subject was referred to the judiciary committees of both houses, and from thence to the final passage of the bill, on the 2nd of March, the subject was before both branches of the legislature in its various stages of progression. House Journal, 1832–3, pages 90, 194, 207, 213, 319–20, 724, 738, 741, 743, 745; Senate Journal, pages 159, 160, 406, 411, 592–3, 637, 638. In contemplation of this revision, and in reference to the passage and publication of the Revised Code, both of these bills are frequently alluded to in the journals, and their progress through the legislature, noted under the title of "Revised Laws," or the "Revised Code." As to the "Revised Laws," see House Journal of 1832–3, pages 351, 382, 536, 606, 735; Senate Journal, pages 261, 296, 500, 568, 628. As to the "Revised Code," see House Journal, pages 502, 507, 508; Senate Journal, pages 402, 430.

The following considerations further enforce the construction now contended for:

1. By the repeal of the fifth section of the revenue law of 1827, the right of redemption from tax sales, both in adults and in minors, is taken away. No saving of their rights anywhere exists in statute, unless it is contained in this proviso in the revising law. Will the Courts give these statutes such a construction as will thus annihilate the most meritorious interests connected with tax titles?—and especially, those belonging to minors, who cannot protect their own interests, and who are always particular favorites in Courts?

2. The legislature, by leaving unrepealed the twelfth sec-

tion of the revenue law of 1829, required the Auditor to make out duplicate deeds to those who had lost or might lose deeds executed to them under the revenue law of 1827. Can any reason be assigned why the legislature should wish to leave unaffected the rights of those who had lost their deeds, and to legislate away the rights of those who never had them? Revised Statutes of 1833, 526, § 12.

3. The legislature, in making the revision, recognize the existence of tax certificates of sale as valid and useful papers, and the subject matter of contracts, and authorizes the Auditor to take acknowledgments of the assignment of these certificates. If, henceforth, these papers were to be regarded as nullities; if tax deeds and titles could no longer be proved under them if they were thereafter, as the opposite party insists, to become valueless, why was their existence and value thus recognized, and all traces of them not stricken from the statute? Revised Laws of 1833, 138, § 2.

4. The law of 1827 was itself a revising law. All the previous revenue laws were by the forty-third section therof repealed, with a proviso, that "no forfeitures incurred or rights accrued under any of the laws hereby repealed shall be affected by such repeal." Laws of 1827, 338, § 43. By the revising law of 1833, this forty-third section is repealed, and with it the rights therein reserved, except as they are saved by the proviso to this revising law. That is according to the construction we are resisting, the legislature intended by the laws of the 27th of February and of the 2nd of March, 1833, to make no saving of rights acquired under the laws and parts of laws repealed by the former law, while by the latter they were careful to reserve rights acquired under similar laws which were repealed in 1827! Why the legislature should have desired to molest rights acquired under the revenue laws previous to 1827, and not to protect rights acquired under similar laws between that time and 1833, it would be difficult to explain, particularly as during the latter period the legislature first set the example of legislating with a special view to the security of tax purchasers; an example which, as we have already seen, the legislature of 1833 followed to

the fullest extent, and which from that time has characterized all the State legislation on the subject matter.

5. The revenue laws of 1827, 1829, and 1831, with the law to be passed in 1833, were to form one law, or one system of revenue laws. It was hence necessary in passing each of the two laws of 1833, the revenue law and the revising law, to compare the one with the other in their progress through the committees and the houses, and to vote on their passage with reference to this comparison. Not only was this necessary to the proper adjustment of the several parts of a system of laws, but from the nature of the case it is impossible that it could have been otherwise. What difference, then, can it make in which law or in what part of the laws the saving of rights is contained?—for having ascertained the intention of the legislature, the Courts will effectuate that intention whether it is ascertained from the language of the laws, from the circumstances under which they were passed, or from the object and spirit of the legislation on the subject matter. And how can the Courts separate in giving their construction and effect to statutes relating to the same subject, which were before the legislature at the same time, and which, from their nature and history, the legislature must have joined on their passage?

6. If the fourth section of the law of 1827 was repealed on the 27th of February, 1833, by the revenue law, it was also again repealed on the 2nd of March by the revising law, which was before the legislature at the time of the first repeal. Not being enumerated in the revising law to be published, but expressly excepted out of the publication, it falls within the "Acts and parts of Acts" which were thereby repealed. The legislature, by this repeal of that section on the 2nd of March, acted on it as an existing law and capable of being repealed, while the proviso inserted with a full knowledge of the former Act saving all rights acquired under the laws "thereby repealed," manifests a clear intention in no respect in that session of revisal, to impede or impair rights acquired under the repealed section. So palpable is this, so certain the conclusion in which it results, that if the leg-

islature have power thus to reserve rights; if the intention of the legislature is to govern the reservation; if this intent is to be arrived at in this, as in other cases, by the nature, history and object of the law, by the acts of the legislature as explained by their language, and their language as explained by their acts, it is vain to deny the existence of the reservation here. To conclude otherwise, we must first overturn all the well established principles governing the construction of statutes or we must deny the existence of the legislative intent which is so manifest in the statutes that "the wayfaring man may read and understand."

7. If rights acquired under the laws and parts of laws repealed by the revenue Act of 1833, are not reserved by the proviso of the revising Act, it is an anomaly in the legislation of the State on the subject matter. Our revenue laws have been revised four times since the organization of the State Government, and all laws repealed conflicting with the laws as revised, to wit, in 1827, 1833, 1838–9 and 1844–5. In every revisal, all rights acquired under the repealed laws, have been most amply and carefully preserved, unless the revision of 1833 is an exception. Laws of 1827, 338, § 43; Laws of 1838–9, 23, § 63; Revised Laws of 1845, 453, § 109; pages 465, 466; page 470, § 4, and page 473, § 38.

8. If it was necessary to sustain rights acquired under the repealed sections of the revenue laws of 1827, it might be justly urged that the omission to reserve rights in the repealing section, was through inadvertence, and that as soon as discovered, the defect was cured by the passage of the law of March 2nd, reserving them. We then bring the case within the familiar principle, that where an Act is passed to correct an omission in a former statute of the same session, it relates back to the passage of the first law, and the two must be taken together as if they were one and the same Act, and the first read as containing in itself in words the amendment supplied by the last. New Law Library, vol. 1, No. 2, pages 8 and 9; 2 Dwarr. Stat. 685; 7 Johns. 497; 3 Peters' Cond. R. 511–12.

The reservation of rights in the revising law is, in terms,

ample for the purpose. In constructing such provisos particularly in revising statutes, the Courts will construe them liberally in order to give effect to the intention of the legislature. Sweet v. Strickland, 23 Maine (10 Shepley), 235, 237; The People v. Livingston, 6 Wend. 526, 529–30.

IV. But if we are thus far mistaken, if the fourth and twenty-fifth sections of the Act of 1827 were absolutely repealed without any reservation of rights, we still insist that the power of the Auditor to execute deeds on prior sales was not thereby destroyed. This would be giving a retrospective operation to the repealing clause, which the Courts will never do except on the most urgent necessity, and in obedience to the clearest expressions of the legislative intention. Thus a statute passed during the pendency of a suit, is not to be construed to affect the suit even as to the mode of proceeding unless such is the manifest intention of the legislature. Hastings v. Lane, 15 Maine (3 Shepley), 134. Even in a case where the statute on which the right of the party in the suit is founded, is absolutely repealed by the subsequent law. Couch v. Jeffries, 4 Burr. 2460. In Kentucky, where after the commencement of the suit, the occupying claimant law was absolutely repealed and a new law substituted giving new rights, the repeal was held not to relate to past transactions, and judgment was entered under the repealed law. Fischer v. Cockerill, 5 Monroe, 129, 135, 137–8; McMicken v. The Mayor, &c. of Baltimore, 2 Har. & Johns. 41, 46. Where there is an absolute repeal of the Statute of Limitations without any reservation of rights, such repeal will not affect a case on which suit has been commenced. This will not be considered the intention of the legislature, if any other construction will avoid it. Woat v. Winnock, 3 New Hamp. 473, 483–4; Bre. App. 29. So a law repealing another by implication, still leaves the other in force as to suits commenced previous to the repeal. The Courts in construing repealing clauses will, as in other cases, go against the letter of the clause to prevent giving it a retrospective effect. Call v. Hager, 8 Mass. 423, 426, 430; Ogden v. Blackledge, 1 Peter's Cond. R. 411; Dash v. Van Kleek, 7 Johns. 477; Osborne v. Huger, 1 Bay, 179.

The answer made to this is, that the cases referred to do not relate to absolute repeals. If a law is in fact repealed, it would seem to make no difference as to the effect of the repeal, by what form of language it is done, whether in express terms or by necessary implication. But aside from this, the objection is founded on a misapprehension of the cases, as an examination of them will show. In the construction of the absolute repealing clause, we find the Courts always applying the same principle of construction, as in the construction of any other part of the law; the end of which is to ascertain and give effect to the intention of the legislature in the use of the repealing clause. Fischer *v.* Cockerill, 5 Monroe, 129; Whitman *v.* Hapgood, 10 Mass. 437; Call *v.* Hagar, 8 do. 423; Thayer *v.* Seavey, 2 Fairf. 185; Couch *v.* Jeffries, 4 Burr. 2460; Rex *v.* Justices of London, 3 do. 1456; McMicken *v.* The Mayor of Baltimore, 2 Harr. & Johns. 41; Woat *v.* Winnock, 3 New Hamp. 483–4. In a late English case it is broadly laid down, that wherever a retro-active effect has been given to a repealing clause, it turned upon some peculiar wording of the statute. Hitchcock *v.* Way, 33 Eng. Com. Law R. 249.

The cases where retro-active effect has been given to the repealing clause, may be reduced to the following:

1. Where the right to be affected, though a vested right, is not reserved by any constitutional provision, and the law manifests a clear intention to affect, modify or bar that right. Rex *v.* The Justices of London, 3 Burr. 1456; Potter *v.* Sturdevant, 4 Greenl. 158; Thayer *v.* Seavey, 2 Fairf. 185.

2. When the right is saved by the repealing law, but the remedy to enforce it is modified or limited in time, but left available and substantial. The People *v.* Livingston, 6 Wend. 526; Commonwealth *v.* Commissioners &c. 6 Pick. 508; Butler *v.* Palmer, 1 Hill's (N. Y.) R. 324.

3. Where the repealing law acts upon special jurisdictions or criminal prosecutions, and takes away the jurisdiction of the Court. Commonwealth *v.* Marshall, 11 Pick. 351; Same *v.* Kimball, 21 do. 371; 6 do. 508; 6 Wend. 529–30; Springfield *v.* Hampden Commissioners, 6 Pick. 501.

4. Where a law imposes a penalty, the repeal of the law is ordinarily construed as a repeal of the penalty. 1 Kent's Com. 465; Yeaton *v.* United States, 2 Peters' Cond. R. 256; Oriental Bank *v.* Freese, 18 Maine (6 Shepley), 109; The Commonwealth *v.* Welch, 2 Dana, 330.

5. Where some peculiar privilege is conferred by statute, it may be taken away by statute. 6 Pick. 508; 6 Wend. 530–31; Maggs *v.* Hunt, 12 Moore, 357.

V. We come then to the question, whether the legislature has the power to repeal the law of 1827, so as to destroy the right of the purchaser at tax sale, or so as to take away all remedy for a deed? And, whether, if the power exists, the Courts will give the repealing law such a construction.

A grant by a State is a contract within the meaning of the Constitution of the United States. 3 Story on Const. § 1385; Ferrett *v.* Taylor, 3 Peters' Cond. R. 295; Fletcher *v.* Peck, 2 do. 308, 321, 322; Pawlett *v.* Clark, 3 do. 418; Green *v.* Biddle, 5 do. 369; New Jersey *v.* Wilson, 2 do. 457; Dartmouth College *v.* Woodward, 4 do. 526, 539, 548, 555. So a replevin bond under the statute of Kentucky (Lapsley *v.* Brashears, 4 Litt. 53); and a judgment *ex delicto*, 7 Johns. 490, per Chief Justice Spencer, are contracts within the protection of the Constitution. So a certificate of purchase under the revenue law of 1827, the law now under consideration, is, by a former decision of this Court, a contract between the State and the purchaser, and the rights of the purchaser must be determined by the law as it stood at the time of the sale. Garrett *v.* Wiggins, 1 Scam. 335. Contracts, whether executed or executory, are within the same protection of the Constitution. 3 Story on Const. § 1385.

The obligation of a contract is that which obliges a person to perform his contract, or to repair the injury done by a failure to perform. This obligation consists partly in conscience and partly in the remedy. The perfection of the legal obligation consists in the remedy. Blair *v.* Williams, 4 Littell, 36–39, 41–42; Lapsley *v.* Brashears, 4 do. 53, 55, 59. The distinction so often heard in Courts between the law of the contract and the law of the remedy no where exists in the

Constitution. That instrument prohibits all legislation which impairs the obligation of contract. It leaves the remedy to be altered or modified to suit the public will and convenience, provided the alteration does not substantially impair the value or benefit of a contract, or of a right vested under it. If that effect is produced, it is immaterial whether it is done by acting on the remedy or directly on the contract. Bronson *v.* Kinzie, 1 Howard's (U. S.) R. 311, 316–17; Greene *v.* Biddle, 5 Peters' Cond. R. 369, 373–4. For the legal obligation of a contract consists in the remedy, not in the Court which administers it, nor in the particular mode in which it may be administered. There is no such thing as a vested right in a particular remedy. The State legislatures are competent to make such changes in the remedies provided to enforce contracts as they may think proper, so that a substantial remedy is left. 3 Story on Const. §§ 1375, 1379; 4 Litt. 42, 56; Commonwealth *v.* Commissioners, &c. 6 Pick. 508; The People *v.* Livingston, 6 Wend. 526; The People *v.* Tibbetts, 4 Cowen, 384. But abolishing all remedy impairs the obligation of the contract. It was the protection of this right as connected with this remedy which the Constitution was intended to protect. 3 Story on Const. 1379; Bronson *v.* Kinzie, 1 How. (U. S.) R. 317, 319–20. "If," say the Court, in deciding the case of Call *v.* Hager, 8 Mass. 423, 430, "the legislature were to undertake to make a law preventing all remedy upon a contract lawfully made and binding on the party to it, there is no question but that such legislature would by such act exceed its legitimate powers; the law would impair the obligation of the contract and be a void act of legislation." Even the case of Butler *v.* Palmer, 1 Hill's (N. Y.) R. 328, which evades the constitutional question and sustains the repealing law as being a reasonable limitation law, admits that if the repeal had been peremptory and had in terms taken away all remedy, it would have been unconstitutional. See, also, Nichols *v.* Bertram, 3 Pick. 342, 343. The legislature cannot, by express words in a subsequent statute, repeal rights vested under a contract. Rights of action and other executory rights are vested within the

meaning of this rule. Butler *v.* Palmer, 1 Hill's (N. Y.) R. 325, 335; Fletcher *v.* Peck, 2 Peters' Cond. R. 308; Cochran *v.* Van Scorley, 20 Wend. 381, *et seq;* Beadlestone *v.* Sprague, 6 Johns. 101; The People *v.* Livingston, 6 Wend. 531; Varrick *v.* Briggs, 6 Paige, 332. On this principle, the repeal of a statute in which the contract consists is unconstitutional. New Jersey *v.* Wilson, 2 Peters' Cond. R. 537. Even where the power of the legislature to divest vested rights is undoubted, a statute will never be construed as doing this, where it is susceptible of any other construction. Exceptions will be made against the plain letter of the law. The People *v.* Livingston, 6 Wend. 530–31; Couch *v.* Jeffries, 4 Burr. 2462; Sayres *v.* Wisner, 8 Wend. 661; Fischer *v.* Cockerill, 5 Monroe, 135, 137–8; Dash *v.* Van Kleek, 7 Johns. 477; Call *v.* Hager, 8 Mass. 426, 430; The People *v.* Supervisors, &c. 10 Wend. 363. "Where rights are infringed," says Chief Justice Marshall in the case of The United States *v.* Fisher, 1 Peters' Cond. R. 425, "where fundamental principles are overthrown, where the general system of the laws is departed from, the legislative intention must be expressed with irresistible clearness to induce a Court of justice to suppose a design to effect such objects." Somerset *v.* Dighton, 12 Mass. 383, 385.

But it is said that in this case the remedy is not by the repealing law abolished, that it is merely changed, and that, if the purchaser is entitled to a deed, his remedy since the repeal is by suit against the Auditor under the law of 1829, providing for suits against the Auditor, where the State is interested. Revised Laws, 1833, page 593.

The answer to this is obvious. 1. The statute referred to relates to suits involving moneyed claims only, as is proved by its whole tenor; to controversies in which the State is directly interested, either as debtor or creditor. 2. If the statute can be so construed as to embrace a case like the present, it in no legal sense saves the remedy. According to this statute the right of the purchaser to a deed, once established in Court, must be referred to the legislature, by which the action of the Court may be confirmed or annulled. Till sanc-

tioned by the legislature, both the right of the purchaser and the remedy are suspended. Before the repeal, if the Auditor refused to execute a deed, there was a perfect remedy by the writ of mandamus. This was a remedy administered by a Court of Justice, in the regular course of law, and on well established principles; not the mockery of a remedy to be administered by legislative discretion! When the Constitution speaks of the obligation of a contract, it includes some known means, acknowledged by the municipal law, to enforce it. 3 Story on Const. § 1375; Johnson *v.* McIntosh, 5 Peters' Cond. R. 539.

VI. But it is said that if the purchaser, as to his right to a deed and to the title thereby conveyed, is within the protection of the Constitution, still the deed having been executed after the repeal of the law authorizing it, cannot have the effect in evidence given to it by the repealed law as proof of the pre-requisites; that questions of evidence relate exclusively to the law of the remedy, and that in this case a substantial remedy is left, the purchaser being simply remitted to the old mode of proving the pre-requisites by evidence *aliunde* the deed. To this there are two answers: 1. The ninth section of the law of 1829, supplemental to the Act of 1827, and which provided that "the deed from the Auditor of Public Accounts shall be evidence of the regularity and legality of the sale, until the contrary shall be made appear," was not repealed by the revenue Act of 1833. It was repealed neither in express terms nor by necessary implication. On the contrary, it was by the revising law directed to be published, and was published in the Revised Code of 1833 as a part of the revenue system. Revised Code of 1833, 525, 434, No. 148. It was not repealed till the session of 1838–9 and then only as to cases coming within the purview of the revenue law of that year. It was hence in full force in November, 1833, when the deed in this case was executed, and that ground, for denying it the statutory effect in evidence, is taken away.

2. The argument assumes that the effect of the deed as evidence belongs exclusively to the law of the remedy. This

we have seen can make no difference, if the obligation of a contract, or the value of a right vested under a contract is thereby substantially impaired. But waiving this, we deny the assumption on which the argument is based. By the law which is the basis and the evidence of the contract between the State and the purchaser, the latter is entitled to a deed having a double effect, one as vesting title, and the other as *prima facie* evidence of its validity. The purchaser contracts for the one effect of the deed as well as for the other. If the effect of the deed as vesting title is a material part of the contract, the numerous trials in our Courts irresistibly prove that its effect, as evidence of the pre-requisite, is equally material; and any principle which will authorize the State to refuse performance of this stipulation, will justify it in repudiating the contract altogether. In no just sense can it be said that this effect of the deed as evidence is mere remedy, even as the latter, and the power of the legislature over it is understood by the opposite counsel. In their view, and in this we agree with them, the mere remedy is an incident to a contract and only an incident. The contract being once made, the law of the remedy attaches itself to the contract simply as a mode; it forms no portion of it (3 Story on Const. § 1379); and it is for the reason that the remedy forms no part of the contract, that they insist upon the absolute power of the legislature, over it, uncontrolled by the Constitution. But here the effect of the deed as evidence is a part of an express contract. It is a proposition made by the legislature *in hæc verba*, and responded to and accepted by the purchaser. Upon the faith of the contract the purchaser bids at the sale, and pays his money into the State treasury. The Government has, year after year, for many years, enjoyed the benefit of the contract, and been provided for and sustained by these sales; and for the State now to repudiate the contract, or for the Courts to refuse to execute it for the benefit of the honest purchaser, in all its parts would cast an indelible stigma upon the public faith, and deservedly render the name of the State a by-word and a reproach.

But we are not left to rely on State honor, or upon the

mere sacredness of this vested right. It is a right secured to the purchaser by the Constitution, which protects the evidence of a contract as perfectly as it does the contract itself. 3 Story on Const. §§ 1379, 1393 ; Garrett *v.* Wiggins, 1 Scam. 335 ; Fletcher *v.* Peck, 2 Peters' Cond. R. 311, 319, 320 ; Van Rensellaer *v.* Livingston, 12 Wend. 491. Every party to a contract has a vested right in the evidence of it, independent of all constitutional provisions. It is on this principle that requiring particular evidence to sustain certain contracts, have never been so construed as to defeat contracts made before the passage of the statute, and proved according to the law as it existed at the time they were entered into. Hilmore *v.* Shuter, Bac. Abr. *Statue*, letter C ; 12 Wend. 491 ; 7 Johns. 488 ; Williams *v.* Pritchard, 4 T. R. 2. The Massachusetts statute of 1805, chapter 30, after stating what should be evidence of an advancement to a child or grandchild, repeals all prior laws falling within its purview. It was held that a deed made prior to the repealing law and which by the existing law would have been evidence of an advancement, would have that effect as evidence notwithstanding the repeal of the law. Whitman *v.* Hapgood, 10 Mass. 437. So it is laid down in New York, that where a deed is acknowledged and recorded in pursuance of an existing law which declares the record evidence, the right to the record is a vested right ; and a law declaring that it is not evidence would not only impair a vested right, but would impair and destroy the foundation of the contract between the parties who sell and purchase the land on the faith of the title as it appears of record. Jackson *v.* How, 19 Johns. 83 ; Jackson *v.* Eaton, 20 do. 480.

VII. It is further insisted, that the action is barred by the limitation law of 1839, which was passed on the 19th of January, and limited to take effect on the first day of June of that year.(*a*) This suit was commenced within seven years after the Act went into operation, and cannot be barred without so construing the Act as to give it a retrospective operation ; an effect which cannot be given to it, as this Court has already decided. Rhinehart *v.* Schuyler, 2 Gilm. 528.

(*a*) Post. 276.

This construction of our statute is sustained by all the authorities, that, in the construction of statutes, no statute is to have a retrospect beyond the time of its commencement. Bac. Abr. *Statute*, Letter C; Sayre *v.* Wisner, 8 Wend. 661; Ward *v.* Kittz, 12 do. 137; The People *v.* The Supervisors of Columbia Co., 10 do. 363; Dash *v.* Van Kleeck, 7 Johns. 495, 503.

While this is admitted to be the general rule, the present is claimed as an exception. It is said that as the defendant took possession of the land between the passage of the law and the time fixed for its going into operation, the law may commence acting on the possession, as soon as passed or as soon as the possession was taken after its passage. But this precise point, and upon the same state of facts, was also decided in the above case of Rhinehart *v.* Schuyler, that the time was to be computed from the time the law went into operation. This was also the point ruled in the case of The People *v.* The Supervisors of Columbia Co., as to the construction of the Revised Statutes of New York, which were passed at one time, to take effect at a future period. "The Revised Statutes," say the Court, "apply the limitation to actions or causes of action accruing or existing subsequent to their taking effect. They apply to existing demands, as if they had accrued at the time when the statute commenced its operation." The same point has been frequently decided to the same effect. Thus, a statute passed the 24th of February, 1818, and limited to take effect from and after the 1st day of June, 1818, is to be considered as if it had been enacted on the last day, and went into immediate operation. Medford *v.* Learned, 16 Mass. 215; Paddon *v.* Bartlett, 3 English Common Law R, 252; Weatherford *v.* Weatherford, 8 Porter, 171. A statute passed in February, 1819, to take effect on the 1st of July, then next, and absolutely repealing a former Act by words *in presenti*, was not considered as repealing the former Act till the time limited by the latter, to go into operation. Spaulding *v.* Alford, 1 Pick. 35; Commonwealth *v.* Kimball, 21 do 375; Pennington *v.* Cox, 1 Peters' Cond. R. 346–7.

A. WILLIAMS, for the appellant.

The lands claimed in these several suits are in the Military Bounty Land District, and were granted by the Congress of the United States, for military bounties to the regular soldiers in the late war between the United States and Great Britain. In 1818, when the people of the Illinois Territory applied for admission into the Union as a State, Congress, in furtherance of the liberal policy which dictated these grants, required as a condition of the admission, that these lands, belonging, as they did, to non-residents, should not be taxed at all for three years, and that, after that time they should be taxed no higher than lands belonging to the inhabitants of the State. These conditions were agreed to by the Convention which formed the Constitution. The Constitution itself, provided, that property should be taxed by valuation, so that every person should pay a tax in proportion to the value of his property. These provisions were intended to protect non-resident land proprietors against the abuse of irresponsible power, by requiring that the inhabitants of the State should be subjected to the same exactions that might be imposed upon such non-residents, and also to protect particular classes of persons and species of property from unequal taxation, and they are amply sufficient for these purposes if observed in good faith. Their obvious import is, that all property should be subjected alike to the same common burdens, and should be construed to mean that for State revenue, all the property in the State should be taxed according to its value, and that for county, town, or city revenue, all the property in the same county, town, or city, should be taxed in like manner. 5 Dana, 31; 9 do. 516.

Chancellor Kent, in his Commentaries, Vol. 2, p. 330, says: "Every person is entitled to be protected in the enjoyment of his property, not only from invasions of it by individuals, but from all unequal and undue assessments on the part of Government. It is not sufficient that no tax or imposition can be imposed upon the citizens, but by their representatives in the legislature. The citizens are entitled to require that the legislature itself shall cause all public taxation to be fair and equal, in pro-

portion to the value of property, so that no one class of individuals, and no one species of property may be unequally or unduly assessed."

Speaking of the oppressions practiced in New York by the assessment of taxes upon the waste and unproductive lands of non-residents, he says: "The unreclaimed lands, which the owner finds it impossible to cultivate, or even to sell, without great sacrifice, and which produce no revenue, are assessed, not only for such charges as may be deemed directly beneficial to the land, such as making and repairing roads and bridges, but for all the wants and purposes of the inhabitants. The lands are made auxiliary to the maintenance of the poor, and the destruction of wild animals; and the inhabitants of each town have been left to judge, in their discretion, of the extent of their wants. Such a power vested in the inhabitants of each town, of raising money for their own use, on the property of others, has produced, in many instances, very great abuses and injustice. It has corrupted the morals of the people, and lead to the plunder of the property of non-resident land holders," * * *. "The Ordinance of Congress, of July 13th, 1787, passed for the Government of the North-Western Territory, anticipated this propensity to abuse of power, and undertook to guard against it, by the provision, that in no case should any legislature within that Territory, tax the lands of non-resident proprietors, higher than those of residents. There is a similar provision in the Constitution of Missouri, and one still broader in that of the State of Illinois."

Thus restricted in 1823, the legislature commenced a system of taxation, which was continued with slight modifications until 1839; whereby the whole amonnt of the State taxes was imposed upon these non-resident lands, and the inhabitants of the State were exempt from paying any part of the State revenue. At this time and for many years after, these lands were situated far beyond the limits of any organized county, in the exclusive occupancy of "the aborigines, who claimed and exercised the native right of roaming *ad libitum* over the wide spread prairies of this fertile, and now

highly cultivated portion of the State." 2 Gilm. 512. Thus, a legislature chosen by the inhabitants of the State, accountable only to them, legislating for their exclusive benefit, determine how much State revenue shall be raised, and to what purposes it shall be appropriated, and then require these non-residents to pay the whole of it. This as a refinement upon the principle of division of labor, the benefit to the inhabitants of the State, and the burden to the non-residents. Governors, Legislatures, Judges, Auditors, Treasurers, and supernumeraries, made, applied, expounded and executed laws for the benefit of the people of the State, fixed their compensation, and then required it to be paid exclusively by these non-residents, because they owned these wild lands in the occupation of the "aborigines." The only law passed during this period, having the semblance of benefit to non-residents, was an Act to prevent trespasses by cutting timber, and they were expressly excluded from all participation in its advantages. It was further provided, that if these non-residents failed to pay these very reasonable exactions, the Auditor should advertise, sell and convey their lands, and that the deed so made, should vest in the purchaser, a good and perfect title, and by an Act passed in 1829, it was enacted that such deed should be evidence of the regularity and legality of the sale.

Under the operation of this system of legislation, nearly every acre of these non-resident lands, amounting in value according to legislative valuation, to eight millions of dollars, was confiscated whilst they were yet in the occupancy of the "aborigines."

This Court has decided that all the Acts included in this system are constitutional, and that the Act of 1829 establishes a new rule of evidence, in contravention of the Common Law rule, and makes the Auditor's deed *per se* evidence of title. They have not, however, decided that the change was a wise one, and ought to continue any longer than it should please the legislature to continue it; on the contrary, they have frequently recognized and approved the Common Law rule. In Hill *v.* Leonard, 4 Scam. 142, they say

it is "founded on reason and authority." They recognize the power of the legislature to establish this new rule, and their duty to enforce it whilst it existed, but the Act of 1829, which established this rule, is now repealed, and the question is, whether the rule established by it, continues to be obligatory upon the Court. It is contended on the other side, that it does, and the Court is asked to be on the "alert," to find reasons for continuing this new rule. They contend that our title has been divested, and the only evidence which they offer in support of this pretension, is an Auditor's deed purporting to convey the lands for one two hundredth part of their value. If the old rules of evidence sanctioned by reason and authority, are to prevail, this evidence is not sufficient. It is a rule of universal application, that penal statutes, statutes in derogation of the Common Law, and statutes authorizing summary proceedings, whereby a person may be deprived of his property, should be construed strictly and should never be extended by construction or implication, beyond the case actually provided for. Fairfax's devisee *v.* Hunter's lessee, 2 Peters' Cond. R. 630–1; Young *v.* The Commonwealth, 4 Bin. 116; Stewart *v.* Hamilton, 2 Hen. & Munf. 545; Kinney *v.* Beverly, *ib.* 342–3; Asbury *v.* Calloway, 1 Wash. 74; Mayor of Alexandria *v.* Chapman, 4 Hen. & Munf. 276; Raplee *v.* Morgan, 2 Scam. 563; *Ex parte* Robert B. Randolph, 2 Brock. 457; Murphy's Adm'r. *v.* The Bank, 5 Alabama, 422; Adm'r. of Alexander *v.* The Bank, *ib.* 465; Sharp *v.* Speir, 4 Hill, 84; Myers *v.* Foster, 6 Cowen, 569; Melody *v.* Read, 4 Mass. 473; The United States *v.* Wiltberger, 4 Peters' Cond. R. 596; Smith *v.* Sproaner, 3 Pick. 230; Vanvalkenberg *v.* Torrey, 7 Cowen, 255.

And it is incumbent upon the person claiming title under such statutes, to show that they have been strictly pursued; he must prove that every requirement, having the semblance of benefit to the person whose title is to be divested by such statutes, has been strictly pursued. Atkins *v.* Kinman, 20 Wend. 249; Bloom *v.* Burdick, 1 Hill, 130, 141–2; Waldron *v.* McCown, *ib.* 114; Caskey *v.* The State, 6 Alabama, 194;

Jackson *v.* Esty, 7 Wend. 148; Martin *v.* Avery, 8 Alabama, 430; Curry *v.* The Bank, &c. 8 Porter, 372; Allums *v.* Hawley, *ib.* 585; Monk *v.* Jenkins, 2 Hill's Ch. R. 12; Gilbert *v.* The Turnpike Company, 3 Johns. Cases, 108; Andover & Medford Turnpike, &c. *v.* Gould, 6 Mass. 44; Levy Court *v.*——, 4 Har. & Johns. 231; Williams *v.* Peyton's lessee, 4 Peters' Cond. R. 395; Thatcher *v.* Powell, 5 do. 32; Gaines *v.* Stiles, 14 Peters, 328; 2 Ohio R. 333; Smith *v.* Hileman, 1 Scam. 325; Day *v.* Eaton, *ib.* 476; Fitch *v.* Pinckard, 3 do. 78; Hill *v.* Leonard, *ib.* 142; Rex *v.* Croke, 1 Cowper, 26; Davidson *v.* Gill, 1 East, 64; Blossom *v.* Camron, 14 Mass. 177; Libby *v.* Burkham, 15 do. 147–8.

But this Court has (erroneously as it is conceived), decided that all this is overturned by the new rule of evidence, established by the revision Act of 1829, and the question now recurs, whether that new rule of evidence continues in force after the Act upon which alone it depends is repealed. The rule of evidence depends upon the law in force at the time the evidence is offered in Court, and every question respecting its admission must be determined by the law then in force. The Act of 1829 being now undeniably repealed, it is difficult to conceive upon what principle it can be looked to in deciding the present question. The legislature had as much power to abolish that new rule of evidence as it had to change the old common law rule by its establishment, unless it was protected from change by the purchase of the land at the tax sale, and this can hardly be seriously contended for. The right acquired by that contract, and which is protected by the Constitution, was to hold the land, provided the sale was made in conformity with the law; but the purchaser acquires no vested right in the rule of evidence by which the fact that the land was sold in conformity with the law was to be shown. See Rev. Stat. 455, § 2; *Ibid.* 463, 437, §§ 38, 39, 40; *Ibid.* 78, § 4; *Ibid.* 232–3, §§ 3, 4, 9; *Ibid* 337, § 1; Garrett *v.* Wiggins, 1 Scam. 338; 3 Story on Const. §§ 1375, 1377, 1378, 1379, 1385, 1393; Sturgis *v.* Crowninshield, 4 Peters' Cond. R. 421; Saterlee *v.* Mathewson, 2 Peters, 280; Jackson *v.* Lamphire, 3 do. 280; Watson *v.* Mercer, 8 do. 108; Lewis *v.* Foster, 1 New Hamp. 61.

The Act which authorized the Auditor to make tax deeds was repealed without any saving clause, before the deeds in these cases were executed by him. See Acts of 1827, 328, §§ 4, 28; Acts 1833, 534, § 18. The legislature had power to make this repeal, and its effect is to take all power and jurisdiction from the Auditor. It acted upon his authority and not upon the right acquired by the purchaser at the sale, and consequently these deeds are void for want of authority in the Auditor to make them.

In Rex *v.* The Justices, &c. 3 Burr. 1456, Miller, an imprisoned insolvent, had been compelled to assign his property, and had done everything necessary to entitle him to his discharge as early as September 26, 1761, and then urged his discharge, but the Court of Quarter Sessions adjourned from time to time till after the 19th of November, 1761, at which time the bankrupt Act, under which the proceedings were had, was repealed. Lord Mansfield, delivering the opinion of the Court, held that no jurisdiction remained in the Court of Quarter Sessions after the repeal of the Act, and that they could not consequently grant the certificate of discharge.

In The Bank of Hamilton *v.* Dudley's lessee, 2 Peters, 520, proceedings in the Court of Common Pleas in the State of Ohio, by an administrator to obtain an order to sell real estate for the payment of debts, at the May term, 1804, an order was made for that purpose, but the order being defectively entered by the clerk, the Court, at the August term of 1805 (the Act under which the proceedings were had, having been repealed between the times of the first and second entries), made an order *nunc pro tunc* directing the sale of the lands. It was held by the Supreme Courts of Ohio and of the United States, that this second order was *coram non judice*, and that the sale made under it was absolutely void.

In Springfield *v.* The Hampden Commissioners, &c. 6 Pick. 501. The inhabitants of Springfield applied to the Com'rs of Highways, by petition to finish a highway which had been duly laid out through that town, and to certify the expenses thereof to the Court of Sessions, in order that the same might be paid, according to the provisions of an Act of Assembly of 1825, out of the county treasury. The commissioners refused

to proceed as proposed by said petition, and the inhabitants then applied to the Supreme Court for a mandamus against the commissioners to compel them to proceed, and at the September term of 1826 an alternative mandamus was awarded. At the next succeeding term, the commissioners answered, showing cause, &c. At the September term, 1827, the case was partially heard, and continued *nisi* by consent, the argument in writing. So it remained until the March term, 1828, previous to which time, and since the continuance *nisi*, the Act under which the commisioners acted had been repealed. It was held, that no power or authority remained with the commissioners in relation to the subject matter of these proceedings; and the Court lay down this general rule, that where a special tribunal is created by statute, upon the repeal of the statute without any saving clause of proceedings commenced and pending before it, its whole power and authority cease, and that it cannot proceed to finish proceedings so commenced, and that the principle is applicable to special jurisdiction conferred on Courts of general jurisdiction. It is also held, that there is no such thing as a vested right in a particular remedy.

In all these cases the repeal acted upon the power and jurisdiction of the tribunal, and they fully sustain the general principle asserted in the first, that no proceedings can be pursued under a repealed statute, though commenced before the repeal, and this too, in civil cases where individuals have acquired rights under the proceedings so commenced.

Some of the following cases go further, and much further, than is necessary to make out the defence in this case. They not only destroy the jurisdiction of the tribunal, but seem to impair rights secured by contract. In Thayer *v.* Seavey, 2 Fairf. 284, certain persons were on the 20th day of November, 1829, arrested on an execution, for a debt due to the plaintiff. On the 21st day of the same month, prior to the 21st day of January, 1834, an action of debt was commenced by the plaintiff against the keeper of the jail, for permitting the escape. Under the laws in force at the time of the escape, and of the commencement of the suit, the plaintiff was entitled to recover of

the keeper in an action of debt the whole amount of the execution. On the 21st day of January, 1834, the legislature of Maine passed an Act providing that no action should thereafter be maintained to recover damages for an escape of any debtor committed on execution, except a special action on the case. *Held*, that this Act was constitutional and constituted a complete bar to the further prosecution of the suit. And the principle is broadly asserted that the legislature may modify remedies at pleasure, and that in cases of repeal, it is not a question of intention but of dry law.

In Potter *v.* Sturtevant's adm'r, 4 Greenl. 154, Drinkwater gave bond as administrator of Prince. Suit was brought on this bond for the benefit of the children of Prince, against Drinkwater, adm'r. At the time this bond was given, the law then in force authorized a recovery of the whole amount of the penalty in case of default in an action of debt; but in 1821, before suit was commenced, all laws on the subject were repealed. The repealing Act had a saving clause, in these words: "Saving also to all persons, all rights of action in virtue of the Acts hereby repealed; and all actions and causes of action, commended in virtue of, or founded on said Acts, or any of them, in the same manner as though this Act or any Acts revising and virtually repealing said former Acts had never been passed." *Held*, that this case was not within the last member of the proviso, and that the first member only saved the right of action, but did not hinder the legislature from reducing the amount of the recovery, or otherwise modifying the remedy.

In the Oriental Bank *v.* Freese, 18 Maine (6 Shepley), 109, S. W. & J. Freese being arrested under an execution in favor of the plaintiff, for $86.95 debt, and $8.70 costs, gave a bond for the prison limits to the plaintiff, with R. W. Freese as security, dated 18th June, 1838. Suit was brought on said bond. At the date of the bond the plaintiff was entitled, in case of default, under the laws then in force to recover the full amount of the execution. In 1839 the Legislature passed an Act providing that, in such cases, no more should be recovered than the damages actually sustained. *Held*, that

the Act applied to and governed this case; that it was constitutional, and that it did not deprive the plaintiff of any vested right; that it, in effect, provides that a different description of evidence shall be received, &c. It also recites and approves the following passage from the opinion of Chief Justice Marshall, in the case of Ogden *v.* Saunders: "In prescribing the evidence which shall be received in its Courts and the effect of that evidence, the State exercises its acknowledged powers. It is likewise in the exercise of its legitimate powers, when it is regulating the remedy and mode of proceeding in its Courts."

In The People *v.* Livingston, 6 Wend. 526, certain lands, where sold on the 26th day of August, 1829, under execution. At the time of the sale the plaintiff in this case, as a judgment creditor of the defendant, had a right to redeem the land sold, within fifteen months from the sale. The Act authorizing the redemption was repealed December 31, 1829. The repealing Act made new and different provisions as to the manner of redeeming, requiring proof not required by the repealed Act. The repealing Act had this proviso: "The repeal of any statutory provision by this act shall not affect any act done, or right accrued or established, or any proceeding, suit, or prosecution, had or commenced in any civil case previous to the time when such repeal shall take effect; but every such act, right and proceeding, shall remain as valid and effectual as if the provision so repealed had remained in force." The plaintiff appealed to redeem within the fifteen months, and did all required by the repeal Act; but as application was made after the repeal, *held*, that he had no right to redeem under its provisions, but that he must, as to proof, &c., conform to the requirements of the new Act; *Held*, also, that the effect of the proviso was, that every suit, right, &c., remained in force notwithstanding the repeal of the Act which supported them; but their future proceedings must be governed by the new statute.

In Coles *v.* The County of Madison, Bre. 115, Coles being subject to a penalty under a statute of 1819, an action of debt was brought for its recovery. The case was tried Septem-

ber, 1824, and verdict against the defendant for the penalty. A motion was made for a new trial, and continued under advisement till September, 1825. In January, 1825, the legislature passed an Act releasing all penalties incurred under the Act of 1819. *Held*, that the Act was constitutional, and prevented the Court from entering judgment upon the verdict. See, also, 2 Peters' Cond. R. and note at the end of the case.

Pope *v.* Lewis, 4 Ala. 487, was a *qui tam*, when brought, to recover a penalty to which the defendant was subjected under a statute then in force. Before the trial the statute was repealed; *Held*, that no judgment could be given under the statute after its repeal. The effect of an absolute repeal is to put an end to the Act there repealed, as to all penalties and forfeitures created by it and not ascertained by judgment as completely as if it had never existed.

Saterlee *v.* Mathewson, 2 Peters, 380, was an action of ejectment, in which the plaintiff recovered, on the ground that the defendant was his tenant. Upon writ or error from the judgment, the Supreme Court of Pennsylvania held that the facts in the case did not constitute the relation of landlord and tenant, reversed the judgment and awarded a *venire de novo*. Before it came on again for trial, the legislature passed an Act declaring that such facts should constitute said relation: *Held*, that the Act was constitutional and governed this case.

In Jackson *v.* Lamphire, 3 Peters, 280: "It is within the undoubted power of State legislatures to pass recording Acts, by which the elder grantor shall be postponed to a younger, if the prior deed is not recorded within the limited time; and the power is the same whether the deed is dated before or after the passage of the recording Act." "Cases may occur where the provisions of a law on those subjects may be so unreasonable as to amount to a denial of a right, and call for the interposition of a Court. See, also, Green *v.* Biddle, 5 Peters' Cond. R.; Varick *v.* Briggs, 6 Paige; Buller *v.* Palmer, 1 Hill.

In Watson *v.* Mercer, 8 Peters, 108. Husband and wife

conveyed certain lands in Pennsylvania belonging to the wife. The deed was not so acknowledged as to give it effect under the laws of that State. After the death of the wife, her heirs recovered the lands in an action of ejectment against the grantee. The legislature then passed an Act to cure all defective acknowledgments of the kind, and declaring that they should have the same efficacy as if they had been originally in proper form. In an action brought after the passage of this Act for the same land, by the grantee against the heirs, it was held that the Act was constitutional and rendered the deed valid, and that the grantee was entitled to recover.

In Lewis *v.* Foster, 1 New Hamp., judgment was recovered for a penalty under an Act of 1796. After judgment this Act was repealed. Upon review of the case, held, that the repeal took away the plaintiff's right of action.

In Butler *v.* Palmer, 1 Hill, certain lands were sold by the Master in Chancery. At the time of sale, Morehouse had a right to redeem the land within fifteen months, under an Act of the legislature. The Act was afterwards, within the fifteen months, repealed. After the repeal, but before the expiration the fifteen months, Morehouse applied to redeem, and did every thing required by the Act in force at the time of sale; *Held*, that the repealing Act was constitutional, and that it took away the right of redemption. It was laid down as a general rule, that when a statute is repealed, it must considered the same as if it had never existed; except with reference to such parts as are saved by the repealing statute.

But for the inclination there is to sustain every pretence of claim under a tax title, I should consider it work of supererogation to cite authorities upon a point so clear upon principle. It is a principle of universal law, applicable to every species of agency, whether created by statute or by individuals, that the principal may at any time revoke the authority of the agent, and that after an unconditional revocation the agent has no authority to do a single act for the principal, not even in completing transactions commenced by him whilst his authority existed. What he did in pursuance of his authority, whilst it continued, is bind-

ing upon his principal, and he, and not his agent, is bound to consummate all inchoate rights acquired by any person through the acts of the agent. A contrary doctrine, whether applicable to officers or private attorneys, would be monstrous in its consequences.

O. H. Browning, for the appellees.

I propose to examine a single question. Was that part of the fourth section of the law of 1827, which entitled purchasers of lands at tax sales to receive deeds from the Auditor, repealed by the law of 1833 ?

The revenue law of 1827 conferred upon the Auditor of Public Accounts power and authority, to make deeds to the purchasers of lands at tax sales, and prescribed the form of the deed.

Has that power been taken away, or does it still exist, and may it yet be exercised by the Auditor in cases where lands were lawfully sold by him for taxes, and deeds not yet executed by him to the purchaser?

The solution of this question depends upon the construction which the Court may give to the revenue law of 1833.

It is contended on the one hand, that the Act of 1833 stript the Auditor of the power, which he before possessed to make deeds to purchasers, and that all deeds executed by him since that time, are null and void.

On the other hand it is insisted, that the Act of 1833 was not intended to, and has not in fact, at all affected the authority of the Auditor to execute deeds for lands before that time sold by him for taxes, but that he now has the same right by law, to make deeds to such purchasers that he had before the passage of the Act of 1833.

I. In the construction of one part of the statute, every other part ought to be taken into consideration. 6 Bac. Abr. 380, And if there be two affirmative statutes upon the same subject, the one does not repeal the other, if both may consist together, and we ought to seek for such a construction as will reconcile them together. Warder *v.* Arrell, 2 Wash. Va. R. 296.

The provisions of any statute ought to receive such reasonable construction, if the words and subject matter will admit of it, as that of the existing rights of the public, or of individuals be not infringed. 6 Bac. Abr. 391. And if the literal expressions of the law would lead to absurd, unjust, or inconvenient consequences, such a construction should be given as to avoid such consequences, if, from the whole purview of the law, and giving effect to the words used, it may fairly be done. 6 Bac. Abr. 380, 382.

Apply these principles to the case under consideration. The laws of 1827 and 1833 are both affirmative statutes upon the same subject, and so far as we insist they are still in force, perfectly consistent with each other; and may both, as far as contended for, have full effect and operation given to them without any sort of incongruity or conflict.

At the time of the passage of the Act of 1833, there were hundreds of individuals who had existing rights, under the law of 1827, to receive from the Auditor, deeds for lands before that time purchased by them at the tax sales. The construction for which we contend, preserves these rights unimpaired, and enforces them, without in the slightest degree interfering with, or impeding the full, perfect and entire operation of the law of 1833; whilst the opposite construction not only infringes, but absolutely extinguishes and destroys them.

After purchases have been made, and money paid under the existing laws of the State, with the guaranty which those laws gave, that deeds should be executed as evidence of such purchases, would it not be both absurd and unjust to adopt such a construction of the law as would enable the State to retain the money, while at the same time she wrested from the purchaser the benefit of his purchase? And would it not be as unjust to the character and good faith of the State, as to the injured citizen? Yet it is insisted that such a construction should be made; and this without any known, or assignable reason on the part of the legislature, for the enactment of such law, other than the mere wantonness of power.

If, from a view of the whole law, or from other cases in

pari materia, the evident intention is different from the literal import of the terms employed to express it in a particular part of the law, that intention should prevail, for that, in fact, is the will of the legislature. 6 Bac. Abr. 380. Whenever the intention of the makers of a statute can be discovered, it ought to be followed with reason and discretion in the construction of the statute, although such construction seem contrary to the letter of the statute. 6 Bac. Abr. 384. And that a law is the best expositor of itself; that every part of an Act is to be taken into view for the purpose of discovering the mind of the legislature; and that the details of one part may contain regulations restricting the extent of general expressions used in another part of the same Act; are among those plain rules laid down by common sense for the exposition of statutes, which have been uniformly acknowledged. Pennington v. Coxe, 1 Peters' Cond. R. 346.

Now, let this law of 1833 become its own expositor. What was the object of the law, and what the purpose and intention of the legislature in its enactment? Before 1833, the lands of non-resident delinquent tax payers were advertised by the Auditor, and sold by the Auditor at the Seat of Government, and the only object of this law was, to transfer the sales from the Seat of Government, to the county seats of the counties where the lands lay, and to substitute the county clerks for the Auditor in making the sales. To accomplish this, some new provisions of law were necessary, and some parts of the existing law were to be repealed; and after the power to make sales had been transferred to the clerks, and all proper provision made for their guidance, four sections of the old law were repealed. What were these sections, and why were they repealed?

The third section, which is the first in order of those repealed, required the Auditor to make out from his books the non-resident delinquent land list, and advertise the same for sale. This duty was devolved upon the county clerks of the several counties by the law of 1833, and the third section of the law of 1827, being inconsistent with it, was therefore repealed.

The fourth section required the Auditor, on the first Mon-

day in January, to proceed to sell at the State House at the Seat of Government, the lands so advertised. This section also contained the form of the deed to be given by the Auditor to purchasers. By the law of 1833, the sales were required to be made by the county clerks, assisted by the sheriffs, and so much of the fourth section of the law of 1827 as required the same duty to be performed by the Auditor, was within the purview of the new law, and, therefore, it was repealed, so far as related to the sales, but I trust to show no farther.

The fifth section contained the provisions for redeeming lands which had been sold. A new mode of redemption was provided, and, therefore, it was repealed.

The twenty-seventh section related to lands struck off to the State, and directed the disposition to be made of them. By the provisions of the new law, new regulations were introduced upon this subject, and, therefore, the twenty-seventh section was repealed. But in all this, nothing can be found indicating an intention on the part of the legislature to take from the Auditor the power to make deeds for lands which had, before that time, been sold by him in conformity with existing laws.

The language of the repealing clause is: "The third, fourth, fifth, and twenty-seventh sections, and all other Acts, and parts of Acts, within the purview of this Act, shall be, and are hereby repealed." And we contend that the manifest intention, and only intention of the legislature was, to repeal so much, and no more, of the enumerated sections, and of all other parts of the law, as came within the purview of the new Act. The reasons for the repeal of these sections, have already been exhibited, but none of those reasons apply to the form of the deed, or to the power of the Auditor to execute deeds for past sales; for neither the one, nor the other was in conflict with the new law, nor within the purview of any of its provisions.

The provision of an Act repealing all Acts, or parts of Acts, coming within its purview, should be understood as repealing all Acts in relation to all cases which are provided

for by the repealing Act; and that the provisions of no Act are thereby repealed in relation to cases not provided for by it. Payne *v.* Conner & Adams, 3 Bibb, 181. And the literal interpretation of an Act is not, certainly, in all cases, the interpretation which either reason or law requires to be given to it; for it is not the words of an Act, but the will of the legislature, which constitutes the law; and although words are the most common, they are not the only signs of the legislative will. The context, the subject matter, the effects and consequences, and the reason and spirit of the law, are often called in to aid in ascertaining the intention of the legislature. No language is indeed so perfect, as to afford words to express every idea, upon all subjects, with perspicuity and precision; and even when words are not wanting, those that are most happily adapted to the purpose in view, do not always occur to the mind of the legislature. Hence it is, that words are employed which sometimes go beyond the legislative will, and sometimes fall short of it. Mason *v.* Rogers, 4 Litt. 377.

We have endeavored to show that the subject matter, the effects and conseqences, and the spirit and reason of the law, are all in favor of upholding the power of the Auditor to execute deeds for lands sold by him anterior to the passage of the Act of 1833, and we are fortified in this position by the examination of one other section of the law, in addition to those which have already been commented upon.

When the sales had been transferred from the Seat of Government to the county seats, and when the clerks had been substituted as the officers to make the sales, instead of the Auditor, it became necessary to clothe them with power to execute deeds to purchasers.

This is done by the sixth section, which provides, among other things, that the clerks shall execute deeds of conveyance to all persons who become purchasers of land, at the sales made by them, "which deed shall be as near as practicable, after the form, as is now required to be given by the Auditor in similar cases;" showing as clearly as language can show it, that at the very moment of passing the Act of 1833, they

recognized the power of the Auditor, as existing in full force, and unimpaired by that Act, to execute deeds under and in conformity with the law of 1827.

II. But we wish to place this question upon another ground, which we conceive to be invulnerable—the contemporaneous construction of the Act, the long acquiescence of the entire community in that construction, and the uniform practice of the government under it.

A long established construction of a statute, by the officers to whom its execution is entrusted, ought to have the force of a judicial determination. Such has always been the deference paid by Courts to such an exposition of statute or constitutional law. Boyden *v.* Brookline, 8 Verm. 286 ; Schoff *v.* Bloomfield, *ib.* 478.

A contemporaneous is generally the best construction of a statute. It gives the sense of a community, of the terms made use of by a legislature. If there is ambiguity in the language, the understanding and application of it, when the statute first comes into operation, sanctioned by long acquiescence on the part of the legislature, and judicial tribunals, is the strongest evidence that it has been rightly explained in practice. A construction under such circumstances becomes established law. Packard *v.* Richardson, 17 Mass. 143 ; Rogers *v.* Goodwin, 2 do. 477.

In the case of Stuart *v.* Laird, 1 Cond. 317, a question arose as to the right and power of the Judges of the Supreme Court, to discharge the duties of Circuit Judges. In disposing of the case, the Court say: "To this objection, which is of recent date, it is sufficient to observe, that practice and acquiescence under it for a period of several years, afford an irresistible answer, and have indeed, fixed the construction. It is a contemporary interpretation of the most forcible nature. This practical exposition, is too strong and obstinate, to be shaken or controlled."

In Ohio a question arose, as to whether a deed was properly authenticated, and whether the certificate of authentication was in conformity to the provisions of the law existing at the date of the authentication. The Court say: "It is

now too late to require a strict adherence to the law. A different practice has prevailed since the first establishment of the Territorial Government, which cannot be corrected without incalculable mischief, and if it had been the opinion of the Court, when they were considering and deciding this case, that the words of the statute ought to be literally copied, and that such should have been the course from the beginning, they would have resorted the maxim *communis error facit jus*, rather than encounter the consequences of shaking the title to an indefinite portion of the State. No law can require the correction of an error in its construction, which has long existed, and has been generally acquiesced in. Lord Coke says, not even *magna charta*. Brown *v.* Farran, 3 Ham. 157.

Fourteen years, wanting a few weeks, have now elapsed since these passage of the Act of 1833, which contains the repealing clause. Throughout all this period, the Auditor has continued to execute deeds, in conformity with the law of 1827, to purchasers under that law; and the entire community, without once questioning his power, has acquiesced in his acts. The legislatures, year after year, have been silent spectators of his exercise of this authority, without interposing an objection. Time and again, these deeds have been before the Circuit Courts, and from thence to the Court of last resort, and adjudicated upon in cases involving immense estate, with lawyers of distinguished ability, and of fixed, unwavering, unconquerable hostility to tax titles, combatting their validity, and in all this time, with every possible incentive to a severe scrutiny of the law, it has never once been urged that the Auditor, in issuing those deeds, had transcended his authority, or that the law under which he acted, no longer had an existence. The objection is now brought forward for the first time. We ask, then, after this long and continued exercise of the power by the officer whose duty it was to execute the law; and after an acquiescence in his acts by every department of the Government, by the entire community, by the bench and the bar, for the period of fourteen years, without a doubt as to the existence of the power

ever having been suggested, whether we are not entitled to demand that this cotemporaneous construction, thus sanctioned, shall have the force of a judicial determination, and whether the question shall not be considered as no longer open to discussion.

The Opinion of the Court was delivered by

WILSON, C. J.* This was an action of *ejectment*, and upon the trial of the case in the Court below, the counsel made an agreement by which two questions were made for the decision of the Court, the adjudication upon which was to settle the case.

The first question was as to the legality and sufficiency of the deed offered in evidence, and relied upon by the plaintiff to prove title in him to the land sued for. This was an Auditor's deed of land sold by him for taxes, under the revenue laws of 1827 and 1829. The sale in this case was made before, but the deed was not executed until after the revenue law of 1833 was passed and took effect.

The second question for the decision of the Court was, whether the possession of the land in controversy and payment of taxes as required by law by the defendant, for seven years previous to the commencement of this action, constituted a bar to the title of the plaintiff. The defendant's possession commenced seven years before this action was instituted, but the limitation law had not been in operation seven years prior to that period.

Upon this agreement the Court decided that the Auditor's deed was evidence of title in the plaintiff; and second, that his title was not barred by the Statute of Limitations. To these decisions the defendant, by his counsel, excepted, and assigns for error, *first*, that the Court erred in rendering judgment for the plaintiff; and *second*, that the Court

*The cases of Bruce *v.* Schuyler, Bruen *v.* Graves, and Bean *v.* McNutt, were argued together and decided at the December term, 1846, but the Opinions were not filed until the present term. There was a vacancy upon the Bench at the time of the argument, occasioned by the resignation of the Hon. Walter B. Scates.

erred in deciding that the plaintiff's right of recovery was not barred by the Statute of Limitations.

The first position assumed by the counsel for the appellant in the argument of this case is, that the revenue law of 1827, under which the land in controversy was sold and conveyed by the Auditor, for the tax due thereon, was unconstitutional; *first*, because it infringes the twentieth section of the eighth article, the eighth section of the eighth article and the first section of the fourth article of the Constitution; and *second*, because it infringes the Ordinance.

This is, undoubtedly, a grave and important question, and had the revenue law been one of recent date, and were there no adjudications upon its constitutionality, we might pause in affirming the legality of all its provisions. But it does not present itself in this attitude. The length of time this law has been in operation (for all the provisions objected to are nearly as old as the Constitution itself), the cotemporaneous construction it received, and the acquiescence therein, and also the adjudications of this Court in accordance with that construction and acquiescence, and in confirmation of its constitutionality, must, we think, be regarded as having settled the constitutionality of the law, with reference to both the Constitution and the Ordinance.

That the Court cannot regard the question raised by the counsel in relation to the opposition to the revenue law to the Constitution or the Ordinance, as proper for re-adjudication upon its merits, will be manifest upon a slight notice of the character of the contemporaneous and judicial construction which this law has received.

All the provisions of the revenuo law that are conplained of, and that can be regarded as at all of a questionable character, are coeval with the earliest legislation, under the Constitution, and their enactment was participated in by a number of the framers of that instrument. They continued in uninterrupted operation until the question of its constitutionality was brought before the Supreme Court in the case of Rhinehart *v.* Schuyler, in 1843 (2 Gilm. 473), and by it sustained. Prior to this time, this law had received the un-

equivocal sanction of the legislature, by revisions and modifications of its details on numerous occasions, and that of the Courts, by adjudications upon questions growing out of its operations, and upon titles acquired under it. In short, it has been either directly sanctioned or acquiesced in by all the departments of Government, and by its officers, with the concurrence of the entire community, without a doubt or question, for about twenty years. Such a cotemporaneous construction of a statute, or constitutional law, thus approved and sanctioned, has always been regarded by the Courts as equivalent to a positive law.

In the case of Boyder *v.* Brooklin, and Goff *v.* Bloomfield, the Court decided that a long established construction of a statute by the officers to whom its execution is entrusted, ought to have the force of a judicial determination. 8 Verm. 286, 478.

It has also been decided that a cotemporaneous is generally the best construction of a law. It gives the sense of a community of the terms made use of by the legislature. 17 Mass. 143 ; 2 do. 477, And after the Judges of the Supreme Court of the United States had held Circuit Courts for little more than half the period that this law has been acquiesced in, under a law of Congress, they unanimously, I believe, determined that it was too late to inquire into the constitutionality of the law; that practice and acquiescence under it for such a length of time had fixed its construction.

The present is a stronger case of cotemporaneous construction than any of these, and one fully jusifying a resort to the maxim of *communis error facit jus.* But we are not under the necessity of relying upon general principles, or the analogy of adjudged cases, to sustain the constitutionality of the revenue law. It has received a judicial affirmation of the highest character of which it is capable. The case of Rhinehart *v.* Schuyler was brought before this Court for the purpose of settling this question. It was argued before the Court under its old organization, and again re-argued before it as at present organized, by eminent counsel, and with great ability, and after mature deliberation the Court, on both

occasions, affirmed the constitutionality of the law. We repeat, therefore, that the repeated ratification of the constitutionality of the law by the several departments of the Government; the long practice under it by its officers, with the acquiescence and approval of the entire community, followed up as it has been by a solemn adjudication of the Supreme Court, corresponding with the sense and approbation of the Government and people thus indicated, must be regarded as having definitely settled this question. From these considerations, we are disposed to adhere to the law as already settled, even though we might regard some of its provisions of a doubtful character, if recently enacted. But among the most valuable attributes of a written Constitution, are certainty and uniformity; without these, it can afford neither confidence nor security. It will change with the individual opinions of the Judges, as they may succeed each other on the bench. The prior decisions will furnish no guide for the future, and all will be uncertainty and doubt.

Much has been said here and elsewhere against the policy of the revenue law, particularly as to the manner of valuing, classing, and selling land liable to taxation. It may not be improper, therefore, to remark, that if any apology was necessary for the manner of assessing land, as prescribed by the law, it may be found in the situation of the country at the time it was adopted. A large portion of it was uninhabited, except by the aborigines, which precluded the possibility of valuation by actual entry upon and inspection of the land by individuals. A classification and a corresponding valuation of the land, therefore, was the only mode that could be adopted by the legislature to raise a revenue for the support of government. This system was uniform and bore alike upon residents and non-residents, and the same may be said with respect to every part of it. A summary method of proceeding for the purpose of collecting its revenue is a practice common to all governments, and is forced upon them by the natural principle of self-preservation; for without revenue no government can continue to exist, and a resort to prompt and stringent means is generally found necessary to insure its

collection. The protection of the person and property of the citizen, and also the property of the non-resident, imposes upon each of them as high an obligation to contribute their pecuniary assessment for its support, as it does upon the citizen to defend it with his arms, and when this duty is not voluntarily performed it ought to be enforced by the law; and when a resort to a sale of land for the purpose of collecting the tax due thereon, is forced upon the government, it would seem to be the interest of the owner of the land, as well as the government, to inspire confidence in titles thus acquired, to make it sell for the best price. It is the want of confidence in these titles that contributes so largely to the sacrifice often incurred by individuals, as to have occasioned the remark in a spirit of condemnation, that on these occasions acres are sold for cents. This is doubtless often true, and will continue to be so, so long as there exists a want of confidence in titles to land sold for taxes. While, therefore, the Court should subject the acts of officers under this law to a severe scrutiny, they should not, because of the supposed hardship, seek for pretexts to set aside sales under it. It is doubtless the duty of the Government to adopt such a system as will be best calculated to give notice to the land owner when the tax thereon is due and must be paid, and after a sale for taxes the same policy should be adopted to notify him that the land has been sold, and also of the time within which it may be redeemed. And if this law is fairly complied with, neither the law that requires the sales, the Courts that adjudicate upon it agreeably to its spirit, and in accordance with the rules of interpretation applicable to the subject, should be held responsible for the consequences resulting from negligence or wilful omission of duty on the part of tax payers.

The next ground assumed by the counsel for the defendant, is, that the deed of the Auditor relied upon by the plaintiff, to prove title in him to the land in controversy, was not sufficient for that purpose, upon the assumption, that the law authorizing the Auditor to make deeds to land sold for taxes, was repealed before this one was made, which consequently rendered it void. This is a question of considerable magnitude, on account of the great

number of titles said to be depending upon its determination if for no other reason, but it is not without considerable interest, independent of this fact.

The record shows that the sale of the land in controversy, was made on the 12th day of January, 1833, and the deed therefor executed on the 8th day of November, 1833. At the time the sale was made, it is admitted that the statute authorized the Auditor to execute deeds to land sold by him for taxes; but before this deed was made, several sections of this statute were repealed, and to ascertain whether the authority of the Auditor to make deeds in pursuance of sales made by him prior to the repeal of these sections, was thereby taken from him, it will be necessary to notice the several provisions of the statute under which the sale was made, and also those of the repealing statute.

Up to 1827, the legislature had repeatedly changed the mode of selling the land of delinquent tax payers; sometimes requiring the sale to be made at the Seat of Government, by the Auditor, at another time by the sheriffs and clerks, in the respective counties in which the land lay; and according to some of the statutes upon this subject, the authority of the officer selling, to convey, by deed to the purchaser, could only be inferred from his authority to sell. The Act of 1827 required the delinquent lands to be sold at the Seat of Government. The Act of 1829 declared the effect of the Auditor's deed, and otherwise modified the revenue law, and required the sheriffs and clerks to sell delinquent lands in their respective counties, in place of selling them at the Seat of Government by the Auditor as heretofore, and in order to effect this change, they repealed the 3d, 4th, 5th, and 27th sections of the Act of 1827, "and all other sections of this law, and all other Acts and parts of Acts, coming within said Act of 1833."

These repealed sections of the Act of 1827 related to the effect of the deed to be given, the redemption of land sold, and the disposition of that remaining unsold, and the 4th section prescribed the form of the deed which the Auditor

was required to make to the purchaser. It is also to be observed, that the 25th section of the Act of 1827 declared that "the Auditor shall make a deed to the purchaser, &c.," and that this section is not named as one of those repealed.

The question then arises, has the Act of 1833, by a repeal of the 4th section of the Act of 1827, or by the repealing clause, taken from the Auditor the authority to make a deed, after the repealing Act went into operation, to delinquent lands sold by him prior to that time.

It will be perceived, that both the 4th and 25th sections of the Act of 1827 required the Auditor to make a deed to the purchaser, and if the repeal of the one section can be regarded as the repeal of the other, it must be by implication, and this position, I think, cannot be sustained, because there is no conflict between them, nor between the 25th section and any part of the Act of 1833. The rule of construction on this subject is, that if there be two affirmative statutes, or two affirmative sections in the same statute, upon the same subject, the one does not repeal the other, if both consist together, and we ought to seek for such a construction as will reconcile them together. 2 Wash. Va. R. 296.

This rule is directly applicable to this case. Here are two affirmative sections of the same statute, upon the same subject, but they are not opposed to each other. The 4th section of the Act of 1827 is repealed by the act of 1833, because the duties enjoined upon the Auditor by that section are, by the Act of 1833, required thenceforth to be performed by the sheriffs, &c. But many sales had been made by the Auditor prior to the passage of that Act, where no deeds had been made by him up to that time, and the 25th section was, therefore, left unrepealed for the purpose of continuing in him the authority conferred by it, in order to carry into execution the contracts of sale previously made, by the execution of deeds agreeably to the terms thereof, and the requisitions of the law. Many rights to deed had been acquired under the Acts of 1827 and 1829, which would have been defeated by abolishing the power of the Auditor

with reference to them. It would also have violated a well settled rule of construction, that the provisions of any statute ought to receive such an interpretation, if the words and subject matter will admit of it, as that the existing rights of the public, or of individuals, be not impaired. 6. Bac. Abr. 391.

Several changes were made in the revenue law by the Act of 1833, but the principal one contemplated by the legislature was to change the place of selling, and the officer required to sell the land of delinquent tax payers, and to effect this change, it was unnecessary to interfere with the power of the Auditor in reference to previous sales and conveyances made by him, nor have they done so. All the provisions of the Act of 1833, in reference to the manner of selling and conveying delinquent lands, and the officers upon whom this duty is devolved, are prospective in their operation, and are always so understood in all cases, where, by the terms of the Act, any discretion is allowed to the Court. It is also worthy of remark, that in declaring what shall be the duty of the clerks and sheriffs, the language of the law is that "they shall execute all deeds of conveyance to all persons who shall become purchasers of land, at the sales make by them, which deeds shall be as near as practicable, after the form as is now required to be given by the Auditor in similar cases," thus, recognizing, at the moment of passing the Act of 1833, the existing form of the Auditor to make conveyances under the Act of 1827.

The doctrine of repeal by implication is not favored by the law, and is never resorted to, except when the repugnance or opposition is too clear and plain to be reconciled. The rule of law is, that all laws in *pari materia* are to be construed together, that no clause, sentence or word of any law, shall be superfluous or insignificant. Such a construction, therefore as would abrogate the power of the Auditor to comply with the terms of sale, would be in direct conflict with this rule, and leave the 25th section of the Act of 1827 inoperative and void. Indeed, it would be contrary to every rule of construction, subversive of the right of third

persons, and also in opposition to the clear will of the legislature, for it is laid down as a general rule, that in considering the extent of a power, the intention of the parties must be the guide. When, therefore, it is borne in mind that the repeal of the 25th section is not necessary to effect the objects contemplated by the Act of 1833, and is not within its purview, and as the legislature did not repeal it in terms as they have the other sections of the Act of 1827, is not the legal and reasonable inference irresistible, that they did not intend to repeal it, and thereby do a wanton act of injustice to purchasers? And this opinion is strengthened by the solicitude manifested in all their legislation to inspire confidence in, and render valid titles to land sold for taxes. It would be unjust, then, without better grounds, to impute to them an act of deceit and fraud, for, to induce the purchase of land by a promise to convey, and after the receipt of the purchase money refuse to make a title, and leave the purchaser without remedy, would be nothing less.

This question has been presented in another light, which it may be proper to notice, as it affords a conclusive argument in favor of the authority to convey.

It is not questioned that the Act of 1827 conferred upon the Auditor ample power to sell the land in question, and although this is a summary proceeding, and the Courts will scrutinize the acts and proceedings under it, yet I can see no reason why the same rules of construction that are applicable to other Acts, for the purpose of ascertaining the will of the legislature, should not be applied to such as this, for the same object; nor is there any reason to forbid the application of the rule in this, more than any other case, that every grant of power necessarily carries with it all the usual ordinary and necessary means for the exercise of that power; and if so, the authority expressly granted to the Auditor to sell, also carried with it by implication, the authority to convey; otherwise the authority to sell would be a useless and nugatory power, a mere mockery on the part of the State to delude and cheat those who should confide in her good faith. The conclusion, therefore, that the authority to convey

was implied in the authority to sell delinquent land, is fully sustained by authority. 10 Peters, 161; 18 Johns. 418; 2 Cowen, 199, 233–5.

Upon the same grounds of cotemporaneous construction and acquiescence therein that we affirm the constitutionality of the revenue law, the authority of the Auditor to make conveyances after the passage of the Act of 1833 of land sold by him before that time, under the Acts of 1827 and 1829, must also be sustained. It is true that there has been no direct judicial affirmation of this authority, as there was of the constitutionality of the revenue law; but there has been a long and continued exercise of this power by the officer to whom its execution was intrusted by the law, and that exercise of power has been acquiesced in, alike by those interested, as by the whole community. It has also received at least the indirect sanction of the Courts, by a recognition of the legality and sufficiency of deeds thus made, in all cases, and in every form in which they have been drawn in question. What has been said, therefore, as to the consequence and legal effect of the cotemporaneous construction which the law has received, is also applicable to the power of the Auditor to make conveyances like the present.

But there is a constitutional ground upon which this question may be placed that, I think, is conclusive. I admit that a Court ought not to declare a law unconstitutional, unless the opposition between it and the Constitution is direct and clear; but when such is the case, the duty of the Court is imperative, and if it should shrink from its performance, it would betray the trust confided to it. Was it within the constitutional competence of the legislature to abolish the power of the Auditor to make a deed after the passage of the Act of 1833, to land sold prior to that time under the Act of 1827, and thereby deprive a purchaser of a deed from that officer, or any other authority competent to make a valid one?

The Constitution of the United States provides that no State shall pass any law impairing the obligation of a contract, &c. The State Constitution contains the same prohibition upon the power of the legislature, with the difference

of the word "validity" in place of that of "obligation," used in the Constitution of the United States. Is the sale made by the Auditor of the land in question, a contract within the meaning of the Constitution? That, I think, will be manifest by adverting to the law authorizing the sale, and the action under it. In order to collect its revenue, the State authorizes the Auditor to sell the land of delinquent tax payers, that officer accordingly gives notice that he will sell all such lands at a time and place specified, and as an inducement to purchasers, the law provides that the Auditor shall give to the purchaser a certificate of purchase, or a deed, at the option of the purchaser, to the whole or such part of each tract of land as he may purchase and pay the tax due theron. Upon these terms the land is sold, the stipulated price paid by the purchaser, and a deed therefor executed by the Auditor; but before the deed is made, the law authorizing this officer to sell and convey delinquent lands is said to be repealed, and the duty of making these sales is imposed upon other officers. The case thus stated embraces all the constituent parts of a contract, so fully and clearly as to leave no doubt as to the character of the transaction. All argument, therefore, to prove it a contract would be superfluous, and that it is such an one as is contemplated by the Constitution, can, I think, be made equally clear, and if so, it follows that the legislature could not constitutionally destroy the authority of that officer to convey the land according to the terms of sale, by a repeal of the law requiring the performance of that duty. Such an act would impair the obligation of the contract, and would consequently be void.

By a series of adjudications the constitutional provision referred to has been so construed, as to protect the validity of contracts from all legislative encroachment, in any and every form in which it may be assailed. Any Act, therefore, which changes the expressed intention of the parties to a contract, or such as results from their stipulations, is held to impair its vaidity, and it is immaterial as to the extent, or the manner of the change, whether it be ever so minute, or

relates to its construction, its evidence, or the time or manner of its performance, the conclusion is the same.(a) Every conceivable change of a contract impairs its validity, and renders it null and void. 3 Story on Const. §§ 13 and 5; 3 Peters' Cond. R. 395; 2 do. 308; 5 do. 369; 3 do. 295. This constitutional provision extends to and embraces both contracts executed and executory, and as well those entered into by a State, as those made by individuals. And in a leading case upon this subject, it has been held by the Supreme Court of the United States, that a legislative grant is a contract within the meaning of the Constitution, and that a subsequent Act of the legislature repealing it was null and void for that reason. Fletcher v. Peck, 2 Peters' Cond. R. 308–20; Story's Com. §§ 1379, 1385.

It is insisted, however, by the counsel for the defendant, that the subsequent Act of the legislature, which repealed the 4th section of the Act, which requires a conveyance to be made to the purchaser, is not in conflict with the Constitution, because it operates only upon the remedy of the purchaser, and not upon the obligation of the contract, and numerous authorities are referred to for the purpose of sustaining this position, but they totally fail to do so. The execution of a deed to the purchaser by the Auditor, at the time, and in the form prescribed by law, is as much a part of the contract as any other portion of it. It is one of the stipulations contained in the law, as an inducement to the purchase of the land, and from its importance as confirming and evidencing title, it cannot be doubted was in the contemplation of the purchaser, at the time he made the contract. It, therefore, enters into and forms a part of the binding obligation of the contract, as much as the agreement of the purchaser to pay the price of the land at which it was bid off by him. 2 Howard's (U. S.) R. 608.

It is not controverted that the legislature may change the nature and extent of the remedy by which a contract, and the rights of parties, may be enforced. But the cases referred to by the counsel for the defendant, to justify the repeal insisted upon, are such as affect vested rights, which

(a) But see Satterlee v. Mathewson, 2 Pet. U. S. R. 380; Cooley on Con. Lim. 368.

are not secured by any constitutional provision, by reason of their not vesting under a contract, or such as take away a peculiar privilege, conferred by a prior Act, or the repeal of a penal or criminal law, by which the jurisdiction of the Court is divested, before any right under it has ripened into a contract, or vested interest. The authority to either repeal or modify according to their nature these pre-existing laws is admitted. There is also another class included in the reference, recording and limitation laws, in relation to which a great stretch of legislative power is allowed, yet, even with regard to them, it is not without its limit.

The obligation of a contract is that which obliges a party to perform his contract, or repair the injury done by a failure to perform, and as regards the remedy, it may be modified by the legislature, but not entirely abolished, for, in substituting one mode of proceeding for another, they must afford a reasonable remedy. An Act that should wholly extinguish all existing remedy so as to leave no redress, and no means of enforcing a contract, would, by operating *in presenti*, impair its obligation. 1 Howard's (U. S.) R. 311, 316, 317; 5 Peters' Cond. R. 369, 373, 374.(*a*) If, therefore, the Act of 1833 be regarded as abolishing the power of the Auditor to make the deed in question, it is equally obnoxious to the constitutional prohibition, whether it is considered as operating upon the obligation, or the remedy upon the contract, because it extinguishes all redress, by taking from the purchaser all remedy against the only one who had authority to make the conveyance, without substituting any one in his place for that purpose, which might have been done; for it is not contended that there is, or can be a vested right in a particular remedy, or in a special mode of administering it. In these, then, there is no vested right, but there is such a right in some substantial and efficient remedy, and that right is as much within the protection of the Constitution, as the obligation of the contract. The Act, therefore, that takes away the old remedy, as is contended has been done in this case, without providing a new one, is repugnant to the Constitution, and

(*a*) Newkirk *v.* Capron, 17 Ill. R. 350.

void. 3 Story's Com. 1379, 1375; 4 Littell, 42, 56; 6 Wend. 526; 4 Cowen, 384.

It has been suggested by counsel that the legislature would make a deed upon a proper application; but there is not an adequate remedy, the grant of which depends upon the will of the legislature. "When," says Judge Story, "we speak of the obligation of a contract, we include in the idea some known means acknowledged by the municipal law to enforce it."

It is a well settled principle, that the repeal of a law in which a contract consists, is an infringement of the Constitution. A legislative grant is a contract of this description, and so is the one under consideration so far as relates to the conveyance. A repeal, therefore, of that part of the law that provides for a conveyance would impair to that extent, the obligation of the contract. Whatever diversity of opinion, therefore, there may be as to how far the existing law enters into, and forms part of a contract between individuals as a general rule, I think there can be no question but it does in this case, and that the purchaser's title to a deed cannot be taken from him by the repeal of a law that forms part of the contract. If it was otherwise, then every executory contract entered into by the State, or its officers on her behalf, in virtue of an Act of the Legislature, may be avoided by them at discretion, although the terms of the contract have been complied with by the other contracting party. 2 Peters' Cond. R. 308, 457; 3 do. 295, 418; 4 do. 526, 539, 555; 3 Story's Const. 1385.

The second assignment of error is, that the Court erred in deciding that the plaintiff's right of recovery was not barred by the Statute of Limitations.

The assignment of error can be disposed of in a few words. The Statute of Limitations that went into operation the 2d day of March, 1839, provides that, "any person having color of title made in good faith to vacant and unoccupied land, who shall pay the taxes legally assessed thereon for seven successive years, shall be deemed to be the legal owner, &c."

In this case the defendant had been in possession and paid the taxes for seven years prior to the commencement of this action, but seven years had not intervened between the commencement of the operation of this statute, and the commencement of this action. The possession of the defendant commenced after the passage of the statute, but before it went into effect, and between the time when the statute took effect and the bringing of this action, there was less than seven years intervening.

This statute declares that seven years' possession, &c., shall confer title, but it is obvious that as it is by virtue of this statute that the title is acquired, that the possession must be under it, and that until the statute has been in operation seven years, no title can be perfected under and by virtue of it. It is insisted, however, that inasmuch as the possession of the defendant commenced after the passage of the Act, that seven years from that time should bar the plaintiffs' title. This distinction would escape the injustice, and I might say the absurdity, of supposing that seven years' possession that terminated, and was complete but the day after the statute took effect, would mature a title under it. But either construction would violate well established legal principles, for no rule of interpretation is better settled, than that no statute shall be allowed a retrospective operation, unless the will of the legislature to that effect is declared in terms so plain and positive, as to admit of no doubt, and this case is a good illustration of the wisdom of the rule. By giving the statute a retrospective operation, many who were relying confidently upon the existing law, might in a few months, or even days after its passage, be deprived of all title to their land. Law is a rule of conduct, but how can that be said to be a rule to govern our conduct, or to affect our rights to-day, which is only to-day announced as a rule which shall thus govern our conduct, &c., ten days hence. This point is too well settled by authority, to require further comment. This very question has been decided by this Court, in the case of Rhinehart *v.* Schuyler, 2 Gilm. 473, and the same

principle has been affirmed in numerous adjudications of other Courts.(a)

The judgment of the Court below is affirmed with costs.

The following separate opinion was delivered by

PURPLE, J. I fully concur in opinion with the majority of the Court, in affirming and reversing the above judgments. I am, however, constrained to dissent upon one point. Whatever my individual opinion may have been upon the question of the constitutionality of the former revenue law of this State, I consider the question no longer an open one. It has been settled by repeated decisions of this Court, and should not again be agitated. But upon the point of the repeal of the law of the 19th of February, 1827, by the Act of Februery 28th, 1833, I think the judgment of the Court is wrong. I may admit, that it was not intended by the legislature, but yet I cannot concede that they have not done it. I regard the 4th section of the Act of 1827 as the only one which confers any authority upon the Auditor to make a deed. In this alone the power is given, and the form of the deed prescribed. It provides that the purchaser, on presenting the treasurer's receipt for the payment of the money, shall be entitled to receive, at his option, either a certificate of purchase or a deed in the following form, to wit: (here follows the form of the deed to be made by the Auditor.) If the 25th section is examined, it will be found that it confers no new power, but was only passed with the intention and design of regulating the exercise of one already supposed to exist. It is as follows: "All sales of lands for taxes, whether by the Auditor or sheriff, the officer selling the same, shall, previous to the sale, designate in what part of the tract the part sold shall be located, and shall make his deed accordingly." Clearly, to my mind, this provision pre-supposes that the Auditor has already authority to make the deed, and was only enacted for the purpose of defining the specific duties of the officer in the execution of a power already conferred by law.

(a) Thompson v. Alexander, 11 Ill. R. 54

I agree to the affirmance and reversals of the judgments, because I believe that independent of any legislative enactment to that effect, the power to sell necessarily carries with it, by implication, authority to make a deed for the land sold; and for the reason, that the purchase under the law which requires the Auditor to make a deed, is a contract between the State and such purchaser; that the law under which such contract is made, is a part of the contract itself, and that the same cannot be unconditionally repealed, without a violation of the obligation of the contract, and a consequent infringement of the 10th section of the 1st article of the Constitution of the United States.

TREAT, J. said: I concur in the views expressed by Mr. Justice Purple.

Judgment affirmed.

JOHN BEAN *et al.*, appellants, *v.* JOHN DOE, *ex dem.* JAMES MCNUTT *et al.*, appellees.

Appeal from Adams.

EJECTMENT, in the Adams Circuit Court, brought by the appellees against the appellants, and heard before the Hon. Norman H. Purple and a jury, at the April term, 1846.

At the trial, the defendants below offered to read in evidence an Auditor's deed, executed in the usual form, to Walter Mead, for the premises in controversy, reciting that said premises had been sold on the 4th day of January, 1832, for the taxes of 1831, and dated December 19th, 1845. The plaintiffs objected to the introduction of the deed in evidence, denying the right of the Auditor to make deeds after the passage of the Revenue Act of 1833. The Court sustained the objection, when a verdict and judgment were rendered for the plaintiffs.

This case was argued in connection with the preceding case.

O. H. Browning and N. Bushnell, for the appellants.

A. Williams, for the appellees.

The Opinion of the Court was delivered by

Wilson, C. J. This was an action of *ejectment* for the recovery of the south west quarter of section eleven, in township thirteen south, range eight west of the fourth principal meridian. Upon the trial of the cause, the defendant offered in evidence a deed executed by the Auditor of the State of Illinois, for this quarter section of land, but the Court refused to permit it to be read in evidence. To this opinion of the Court the defendant excepted, and now assigns the same for error. Several other errors are assigned, but the Court declines expressing an opinion upon them, as its decision upon this one will dispose of the case.

There was no objection made to the deed except the want of authority in the Auditor to make it. The deed is in all respects like the one given in evidence in the case of Bruce *v.* Schuyler, (*ante* 221), decided at this term, which was a deed made by the Auditor for land sold for taxes under the Act of 1827, but not executed until 1845, after the Act of 1833, which is contended repealed the power conferred upon the Auditor to make the deed, went into operation.

The same question, therefore, arises in this case, as to the power of the Auditor to make this deed, that was made in the case referred to, and it was agreed by counsel that the decision of that case should decide this also, and the deed was held to be valid, and sufficient to confer title in that case. The decision of the Court, in refusing to permit the deed to be read in evidence in this case, must for that reason be reversed, and the cause remanded with directions to the Circuit Court to re-hear the case in accordance with this opinion.

Judgment reversed.

HERMAN BRUEN *et al.*, devisees of Matthias Bruen, deceased, plaintiffs in error, *v.* WILLARD GRAVES, defendant in error.

Error to Adams.

EJECTMENT, in the Adams Circuit Court, originally brought by Matthias Bruen against Willard Graves. Bruen having died *pendente lite*, his devisees, the present plaintiffs in error, were made parties to the suit.

The cause was heard before the Hon. Norman H. Purple and a jury, at the April term, 1846. The plaintiff offered to read in evidence a deed executed to him by the Auditor, for the premises in question, dated March 2, 1840, founded upon a sale of the same for taxes on the 10th day of January, 1833. The defendant objected to its introduction, contending that the Auditor had no authority to execute deeds for lands sold for taxes, after the passage of the Revenue Act of 1833. The Court sustained the objection, when judgment was rendered in his favor.

This case was argued in connection with the two preceding cases.

O. H. BROWNING and N. BUSHNELL, for the plaintiffs in error.

A. WILLIAMS, for the defendant in error.

The Opinion of the Court was delivered by

WILSON, C. J. Upon the trial of this cause, which was an action of *ejectment*, brought by the plaintiff to recover of the defendant a tract of land described as the north east quarter of section thirteen, in township one south, in range seven west of the [4th] principal meridian. The plaintiff offered in evidence a deed of the described land; executed to him by the Auditor of the State of Illinois. The defendant moved the Court to exclude this deed from being read in evidence to the jury, and the Court sus-

tained the motion, and decided that the deed could not be read as evidence of the plaintiff's title to the land sued for. This decision of the Court the plaintiff excepted to, and now assigns it for error.

The deed is regular upon its face, and is properly authenticated, but it appears to have been refused as evidence of the plaintiff's title upon the ground that the Auditor had no authority to make it. The sale of the land in controversy was made on the 10th day of January, 1833, in pursuance of the Acts of the Legislature of 1827 and 1829. It is not questioned that at this time these laws were in force, and empowered the Auditor to sell this and other delinquent land for taxes due thereon. But the deed was not made until the 2d day of March, 1840, and it is contended that before this time, the Act of 1833 had taken from the Auditor the power to make the deed in question by a repeal of that part of the Act of 1827 that conferred such power.

This question has been settled by this Court at the present term, in the case of Bruce *v.* Schuyler (*ante* 221), in which it is decided that the authority of the Auditor to make deeds after the passage of the Act of 1833, of land sold by him prior to that time, under the Acts of 1827 and 1829 is not abrogated by the Act of 1833, but still exists in full force.

There is another assignment of error in this case, but as the judgment of the Circuit Court must be reversed for that already noticed, the Court is of opinion that it is unnecessary to inquire into the other one.

The judgment of the Circuit Court is reversed with costs, and the cause remanded for further proceedings agreeably to the opinion of this Court.

Judgment reversed.

NATHANIEL PASCHALL, appellant, *v.* ELIZA S. HAILMAN, administratrix of William Morrison, deceased, appellee.

Appeal from Randolph.

The distribution of the estate of a testator or intestate is to be controlled by the law which was in force at the time of the death of the testator or intestate.

In the distribution of the assets of deceased persons, judgment creditors and simple contract creditors are placed upon an equal footing.

THIS was the case of an appeal from an order of the Probate Justice of Randolph county, allowing an administrator a preference claimed by him over the creditors of the estate. It was taken by agreement from the Probate to the Circuit Court of Randolph county, where, at the November term, 1847, a judgment *pro forma*, was made affirming that of the former Court, from which, by further agreement, the case was brought by appeal into this Court.

The facts in this case appear in the Opinion of the Court.

J. SEMPLE, for the appellant, made the following points:

1. The appellant contends that the whole of the assets in the hands of the administrator should be païd *pro rata* to all the creditors of Edgar, who had filed their claims and had them allowed within two years from the date of administration in the Court of Probate, and that the administrator could not retain his debt, or have any preference.

The Statute of Wills (section 105), provides that "when any real estate shall at any time be ordered to be sold, the moneys arising from such sales shall be received by the executor or administrator applying for such order, and shall be considered as assets in his or her hands for the payment of debts, and shall be applied in the same manner as assets arising from the sale of personal property."

The same statute (section 110), provides that "all demands against the estate of any testator or intestate, shall be divided into classes in manner following, to wit: 1st. All funeral and other expenses attending the last sickness, shall com-

pose the first class; 2nd. All expenses of proving the will and taking out letters testamentary, or of administration and settlement of the estate, and the physician's bill in the last illness of the deceased, shall compose the second class; 3d. Where any executor, administrator, or guardian has received money as such, his executor or administrator shall pay out of his estate the amount thus received and not accounted for, which shall compose the third class; 4th. All other debts and demands of whatsoever kind, without regard to quality or dignity, which shall be exhibited within two years from the granting of letters as aforesaid, shall compose the fourth and last class. And all demands not exhibited within two years as aforesaid, shall be forever barred, unless such creditor shall find other estate of the deceased not inventoried or accounted for by the executor or administrator, in which case his claim shall be paid *pro rata* out of such subsequently discovered estate."

The same statute (section 114), provides that "all claims and demands against estates, when allowed by the Court of Probate, as aforesaid, shall be classed, and paid by the executor or administrator, in the manner provided in this Act, commencing with the first class; and when the estate is insufficient to pay the whole of the demands, such demands in any one class, shall be paid *pro rata*, whether the same shall be due by judgment, writing obligatory, or otherwise, except in such cases as shall be herein excepted.

The same statute (section 115), provides that "when any executor or administrator shall have any demand against his testator or intestate estate, he shall be required to file his demand with the Court of Probate, as other persons, and the Court shall appoint some discreet person to appear and manage the defence for the estate."

Section 119 makes further provision for a *pro rata* division of assets among creditors at each and every settlement. Nothing can be clearer than these statutory provisions and directions, that all debts, including *judgments by name*, shall be paid out of the assets of an insolvent estate *pro rata* in each of the classes shown.

Unless then, it can be shown that Morrison's judgments had some lien or right to preference in payment, established by law, making them an exception to these general provisions, then this statute settles this question beyond all doubt.

II. The appellant contends that Morrison never had any lien whatever on the personal estate of Edgar, or on the assets in the hands of his administrator, nor could he retain as administrator, that right being taken away by the statute (sec. 115), which requires him to "file his demand *as other persons.*" The same principle of an executor proving his debt as other persons, is decided by the Supreme Court of the United States in Nichols *v.* Hodges, 1 Peters, 565, and Paige *v.* Patton, 5 do. 311. In this last case the Court, after deciding that the executor may retain his own debt of equal dignity but not inferior dignity, under the laws of Virginia, say, that "in some of the States this rule would not apply, as there is no difference made in the payment of debts between a bond and simple contract."

This is one of the States in which all debts being placed on the same footing by statute, the decision above applies, and thus excludes the idea of an executor retaining his own debt even of the same dignity.

III. The appellant contends that Morrison had no lien on the real estate of Edgar, because his judgment being obtained in 1826 came under the provisions of the Act of 17th January, 1825, which limited judgment liens to seven years, which lien ceased at the death of Edgar, or if it extended beyond his death, it had expired before the sale of the lands aforesaid in 1834 and 1836. During all the time of the existence of the lien, he had the right, undisturbed by injunctions or otherwise, to proceed with his lien against the lands of Edgar; but he failed to do this, stood by and saw the lands sold, or rather sold them himself as administrator, and turned into personal assets without even attempting to assert his lien, and now, more than twenty-one years after his judgment was obtained, claims his lien on the assets in the hands of the administrator.

In the case of Bustard *v.* Morrison, administrator of Edgar,

1 Scam. 235, this Court say: "If by the lapse of time, and their (the plaintiffs') own laches they have lost their lien, a Court of Chancery cannot aid them, by extending the lien beyond the period limited by law."

In Indiana, the Courts have gone much further then ours in cutting off these judgment liens when an estate is insolvent, and subjecting the whole to the more equitable rule of a *pro rata* division.

In Berry *v.* Marshall, 1 Blackf. 340, a judgment obtained in the lifetime of deceased, and a pending lien on his land at the time of his death, was held to be divested by a statute passed subsequent to the judgment, but before the death of deceased, and the Court ordered the insolvent estate to be divided *pro rata* according to the last mentioned statute. This decision was made under the Act of 1821. The Act of 1828 changed this rule and preserved the lien on an insolvent debtor's estate obtained in the lifetime of the deceased.

But even under the statute thus preserving the lien, it was held in Joyce *v.* Hufford, 7 Blackf. 382, that a judgment against the heirs must give way to an equal distribution among the creditors.

In these cases, the Act of 1828 preserving the lien was passed after the Act of 1821 requiring a *pro rata* division. In our State, the Act of 1829 requiring an equal distribution was passed after the Act of 1825 giving the lien, and repeals all Acts coming within its purview or conflicting with its provisions. It is therefore respectfully suggested that the case of Reynolds *v.* Henderson, 2 Gilm. 110, is not good law.

The case of Menard *v.* Marks, 1 Scam. 25, rests on different grounds. The distinction seems to be, that a mortgage is a contract between the parties, which the law cannot divest, but a judgment lien, being given by statute, creates no vested right which may not be taken away by the same power in a subsequent statute. See Bank of Hamilton *v.* Dudley, 2 Peters, 522, where this point is decided.

Here we might rest the case either on the ground that

the lien was lost at Edgar's death, or that if it continued after his death, it expired by the parties' own laches before the sale of the lands; nor could it by any known rule of law be followed to the proceeds of the sales of the lands when reduced, under the statute, to assets in the hands of the administrator.

IV. But to take this in every possible or supposable contingency, even should the lien be construed to extend beyond the seven years, the appellant contends, that by filing his judgments in the Court of Probate to come in for a *pro rata* distribution of the assets, Morrison waived any lien he might have had.

V. The appellant further contends, that in this case the judgment, in any event, would only be a lien on Edgar's lands in the county of Randolph, and could not extend to the lands situated in other counties. See case of Bustard *v.* Morrison, administrator of Edgar, 1 Scam. 235.

There might have been some reason on the part of Morrison for filing his claim to come in *pro rata*, for at the time of these sales, the lands in the counties of Madison and St. Clair were considered the most valuable and the most saleable. Morrison might have supposed that he would get more out of his *pro rata* on the whole of Edgar's land in the State, than he could have obtained by enforcing his lien on the lands in the county of Randolph. Though it does not appear on the record, and it may be improper to allude to it, yet, in point of fact, the lands in other counties brought a great deal more than the lands in Randolph. The record, however, shows that there were judgments against Edgar prior to Morrison's, which would have taken a considerable part of the lands on which Morrison's judgment was a lien.

VI. If any lien existed, the only remedy of the party was to pursue his lien by a proceeding *in rem* against the lands subject to the lien, and he can in no state of case pursue it as against assets. If the lien existed in 1834 and 1836, the lands were sold of course subject to the lien. See Bustard *v.* Morrison, administrator of Edgar, 1 Scam. 235. Morrison may yet pursue his lien, if he has one, by selling the lands subject to it. The

judgments being a matter of record, the purchasers bought the lands with knowledge of the lien, and made their calculations accordingly in bidding for the land. The administrator may sell lands subject to a mortgage, and the purchaser buys it subject to the incumbrance; the proceeds would be assets to pay other debts than the mortgage debt.

R. S. Blackwell, also for the appellant.

1. Morrison's judgment is no lien upon the real estate of which Edgar died seized: Because the lien expired by limitation of law, in May, 1833. Laws of 1825, 151 § 1; Roe *v.* Swart, 5 Cowen, 294; Little *v.* Harvey, 9 Wend. 157; Tufts *v.* Tufts, 18 do. 621. If, therefore, the lien has expired by lapse of time, Morrison's administratrix has no right to retain assets sufficient to satisfy that judgment, in exclusion of other debts. Steel *v.* Rorke, 1 Bos. & Pul. 307, 310; Hickey *v.* Hayter, 6 T. R. 384. Even a Court of Chancery will not aid him. Bustard *v.* Morrison, 1 Scam. 235.

2. Admitting, however, that Morrison's judgment is a lien, his administratrix must proceed to enforce it, by a proceeding against the land. 1. The lien having once attached, cannot be defeated by any species of alienation whatsoever. Morris *v.* Mowatt, 2 Paige, 590; Rankin *v.* Scott, 12 Wheat. 177; S. C. 6 Peters' Cond. R. 605. 2. Nor is it affected by the death of Edgar. Menard *v.* Marks, 1 Scam. 25; Reynolds *v.* Henderson, 2 Gilm. 110; Laws of 1829, 85, § 2. Upon his death, the lands descended to his heirs subject to all the liens, charges and incumbrances, which existed against those lands at the time of his decease. Wilkinson *v.* Leland, 2 Peters, 657; Drinkwater *v.* Drinkwater, 4 Mass. 358-9. 3. The administrator's sale passed no greater rights than the heirs had in the lands at the time of the sale. 4. The administratrix had no right to the proceeds of the sale of the real estate. Paysinger *v.* Shampard, 1 Bailey, 237, cited in 2 U. S. Dig. 316, Note 23; Conard *v.* Atlantic Ins. Co. 1 Peters, 442-4.

3. The doctrine of retainers does not exist under our

laws, as unqualifiedly as it was recognized by the Common Law: 1. The reason of the rule has ceased. 3 Bl. Com. 18–19; Laws 1829, 230, § 115. 2. Personal assets only can be retained by the administratrix. The proceeds of land are equitable assets, which must be distributed *pro rata* among the creditors, without regard to the dignity of the debts. Rogers *v.* Rogers, 3 Wend. 516.

4. Again, Morrison's lien did not extend to lands situate beyond the limits of Randolph county. Therefore, as the sale of all the lands of Edgar created a confusion of assets, Morrison's administratrix had no right to retain a sum sufficient to satisfy the judgment of her intestate. Bustard *v.* Morrison, 1 Scam. 235.

5. Nor did Morrison's judgment create any lien upon the personal estate of Edgar, or give him any right to retain the personal assets in exclusion of other creditors. Laws of 1825, 152, § 6. Blount *v.* Traylor, 4 Ala. 667.

6. By filing a transcript of those judgments in the Probate Court of Randolph county, Morrison waived the specific lien he had acquired upon the lands of Edgar, and elected to take a *pro rata* distribution out of the general assets.

From this view of the subject, the conclusion follows, that the judgments of Morrison have no preference over other creditors, in the distribution of the assets of Edgar's estate, and that if his administratrix has any right to retain, under our laws, she can only retain a *pro rata* part.

D. J. Baker, for the appellee, made the following points:

1. The Common Law gives to a creditor by judgment a priority of payment over simple contract or specialty creditors, in respect to the personal assets of a deceased debtor. See Toller's Law of Ex'rs. 258, *et seq.* This right is distinct from the judgment creditor's right of lien, which is created, and its character and extent determined by statute. See section 2 of Act relative to judgments and executions, approved January 17th, 1824. See also Act of 1825. By the Act of 1823, the proceeds of the sales of real estate, when all the land of the deceased debtor were sold, were made equitable

assets. See Laws of 1823, 169. By the Acts of 1825 and 1829 they are legal assets, or rather are made assets generally, and to be applied in payment of creditors, as are the proceeds of the personalty.

2. The Act to amend the Act regulating administrations, and the descent of estates, and for other purposes, approved February 12th, 1823, does not profess to take away this right of priority in payment from the judgment creditor. The legislature is not competent to take it away from a creditor, who had obtained his judgment before the passage of the Act; but judgments are not embraced by the terms of the Act. The words are: "Not giving any preference to any debts on account of the instrument of writing on which the same may be founded." The rights of the judgment creditors, Morrison & Tiffin, having obtained their judgments while this Act was in force, are to be determined by it. In the case of Betts *v.* Smith, administrators of Jones *v.* Bond, this Court decided, that this Act does not apply to the estates of those who died before its passage. Bre. 223. In the case of Woodworth *v.* Greenup & Conway, administrators of Payne, this Court held that judgments were not embraced by the Act, and were entitled to priority in payment over simple contracts or specialty debts, when the estate of the deceased was insolvent, and notwithstanding the provisions of the Act of February 12th, 1823. Moreover, the last section of the Act concerning wills and testaments, &c., passed in 1829, contains an express saving of the rights acquired under former laws. It is said by the counsel on the other side, that the right of priority in payment, is in consequence of the lien of the judgment created by the law. This cannot be so, for debts by specialty at the Common Law had priority over debts by simple contract; and the debts due by specialty, or instruments under seal, were never a lien on property. The lien, too, of a judgment, is on the lands of the debtor, and the priority of payment relates only to the personalty. Most of the authorities referred to by the counsel for the appellant, it is submitted, have, at most, only a remote application to this case. In Woodworth *v.* Greenup

& Conway (administrators, &c.), this Court affirm the right of the judgment creditor to a priority in payment out of the personalty, and decide it to be a vested right. If so, it is not taken away, nor could it be, by the Act of 1829, concerning wills, &c. The last section of that Act is ample to secure all rights vested under former laws. The right of Wm. Morrison, as the administrator of John Edgar, deceased, to retain in this case, is incidental to, and grows out of his right of priority of payment.

T. Ford, for the plaintiff in error, in conclusion.

The Court is likely, in this case, to be misled by mixing up together the doctrine of judgment liens upon land, a creditor's right to priority of payment, and the common law right of an administrator to retain for a debt due to himself. These matters must be considered separately, or otherwise the law will be confounded.

I. Can an administrator who is also a judgment creditor, after a sale of lands to pay debts, follow the land into the money and assert his lien on the money? The administrator filed his judgment in the Probate Court, procured it to be allowed, and it being thus made to appear that personal estate was insufficient, obtained from the Circuit Court an order to sell land. By so doing he abandoned his lien on the land. If he sold the whole interest in the land, his lien is gone. If he sold only the interest of the heir, then he has no claim to the money, because in that case the land was sold only for the value of the land over and above the amount of the judgment. Morrison's lien would still be in full force, and might be asserted by execution, notwithstanding the sale. Is, then, the judgment creditor not only to have a lien on the land to be prosecuted by execution, and also the money for which the land sold over and above the amount of the judgment.

The proper remedy for a judgment creditor to enforce his lien is by execution. 2 Gilm. 110. In this case, it is decided that the judgment holds against the administrator. It has been held, that if a grandfather devise land to his son, and the son dies, and the land is sold by order of Court, the

money does not go to the grandchildren, but is assets. The thing devised, by a sale, is divested of its character of land, and will be disposed of as money. 14 Pick. 345. This case shows that the incidents which belong to land do not follow the land into the money for which it has been sold. It has been held, also, that if a judgment creditor loses his lien at Law, a Court of Equity cannot assist him. 2 Gilm. 110; 1 Scam. 235. Also that an administrator cannot be specially ordered to pay off a judgment lien. Such an order would require him to act in the character of a commissioner, and not in that of an administrator. 3 Scam. 207. If a debtor himself should sell his own land, the judgment creditor has no right to the purchase money; his lien is on the land itself, which is to be enforced in the manner given by law and not otherwise; he has only a power over the land, and no right in the land, and therefore has no right to resort to a fund raised by a sale of the land. 1 Peters, 442–4. A judgment lien binds the property in whosoever hands it may be found (2 Paige, 590), and is continued as long as the law which governs it is in force. 6 Peters' Cond. R. 504. The heir takes land subject to incumbrances, and his interest may be made assets in the hands of the administrator. 2 Peters, 657; 4 Mass. 358. The statute in force at the time the lands were ordered to be sold and when they were sold, expressly declares that the proceeds of the sale shall be assets in the hands of the administrator, and be applied as personal estate. Acts of 1829, Wills and Testaments, § 105.

II. Nor has the administrator a right to retain. The right to retain was given by the Common Law, because an administrator cannot sue himself. 5 Peters, 304–311. The same case establishes the doctrine, that there is no right of retainer in those States where the law does not give a priority. The Act of 1829 takes away the priority of a judgment. Wills and Testaments, §§ 110, 114. The same law allows an administrator to sue for a debt due himself. § 115. By this section, the administrator is compelled to file his claim, whatever it may be, with the Judge of Probate, and get it allowed as other claims; the Judge of Probate is to appoint

some person to defend the estate. The administrator may appeal, and the Judge of Probate is to appoint some person to defend in the Circuit Court. In the very next section following (§ 116,) it is enacted that all claims thus allowed shall be classed, entered of record, and paid *pro rata*. In none of the provisions of the Act, is the debt due to an administrator treated of, or placed on a different footing from debts due other persons. At all events, the doctrine of retainer does not apply to money arising from a sale of and by an administrator. 3 Wend. 516.

III. But it is said that although the administrator has no lien, nor a right to retain, yet is he entitled to a priority of payment. This claim is made out as follows: The Common Law allowed a priority of payment in favor of judgments. This Common Law right was in force when the judgment was recovered in 1826, and attached itself to the judgment. It became a vested right, and was not affected by the Act of 1829, taking away the priority of judgments. To support this view, the defendant relies on the authority of Betts *v.* Bond, Bre. 223; and Woodworth *v.* Payne's administrators, *ibid.* 294. In the first case it is decided, that the law in force when Payne died is to govern in the settlement of his estate. This is an authority for the plaintiff, because Edgar lived until 1830, long after the Act of 1829 had taken away the priority of judgments, and in effect decides that the law of 1829 is to govern in the settlement of his estate. The other case decides nothing that I can see. The Court there so mix up the law about judgment liens, and liens obtained by the levy of an execution on personal estate, though not in question in the case, with the right of priority, that it is impossible to find out what is decided. The Court, however, holds even in this case, that the law in force at the time of the decedent's death is to govern in selling his estate, and they hold the plea to be bad because it did not show whether he died before or after the Act of 1823. The position that the right of priority attached itself to the judgment as soon as rendered, and in the lifetime of Edgar, and became a vested right, is untenable. Even a judgment lien is not a

vested right. It is a mere power over the land, and not a right in it. 1 Peters, 442–4. It continues no longer than the law is in force which governs it (6 Peters' Cond. R. 505), and may be destroyed altogether by a repeal of the law. 1 Blackf. 340; 7 do. 382; 1 Ohio Cond. R. 258–9. The right of priority can be no more sacred than a judgment lien. The Act of 1829 professed to be, and is a revision and full system of law for administrators and executors. As such, it must necessarily repeal the Common Law in all cases where the two conflict. But it is said that the repealing clause reserves all rights acquired under former laws. In this case I insist that Morrison could not have a right of priority of payment out of Edgar's estate until Edgar died. The right if any there was, according to Breese, 223, 294, attached to the administration and not to the judgment. The judgment is in force truly, but during the debtor's life there can be no priority. A lien attaches to the judgment immediately, and may be enforced in the lifetime of the debtor; but a right to be paid first out of the estate of a deceased person, from the very nature of the thing, can have no existence in the lifetime of the debtor. If it does so exist there is no mode of enforcing it. It is therefore, not a right at all, and cannot be reserved by the repealing clause of the Act of 1829.

The Opinion of the Court was delivered by

Purple, J. At the May term, 1826, of the Randolph Circuit Court, William Morrison, obtained a judgment against John Edgar, for $791.05¼, upon which execution was issued within one year thereafter. Edgar died on the 1st of December, 1830, and Morrison was appointed his administrator. During the interval between the years 1831 and 1835, both inclusive, claims to a large amount were filed and allowed against Edgar's estate; among which was one in favor of Martha Eliza Edgar, now intermarried with appellant, for $10,500.00 on a bond filed and allowed the 25th April, 1832; and also the judgment in favor of Morrison, also filed and allowed December 8th, 1833; which, at the time, amounted to

$1053.56½. The personal assets of the estate of Edgar amounted to $764.25. Of this sum, $306.36 was applied by Morrison in payment of debts, which by law were entitled to priority; and the residue, $467.89, in payment of his judgment against Edgar. Edgar, at the time of his death, owned several tracts of land, situated partly in Randolph, and partly in other counties of the State. The personal estate being insufficient to pay the debts of the intestate, Morrison applied to the Circuit Court for leave to sell the real estate before mentioned. An order was made for the sale, which took place on the 22nd August, 1834, and February 2nd, 1836, Morrison died, and Eliza S. Hailman, appellee, was appointed his administratrix *cum testamento annexo.*

Paschall applied to the Probate Justice of Randolph county for an order, that the money arising from the personal assets of the estate of Edgar, and also the proceeds of the sales of the real estate, deducting the said $306.36, paid upon claims which had priority in law, should be distributed *pro rata* among the creditors of Edgar, including the judgment in favor of Morrison before referred to. The Court decided that Morrison, in his life-time, and his administratrix since his death had a right, as against the appellant and other creditors by simple contract, to retain the whole amount due upon said Morrison's judgment out of the said personal assets and the proceeds of said sales.

From this decision, Paschall appealed to the Circuit Court of Randolph county, where, by consent of parties at the November term, 1847, a judgment *pro forma* was rendered, affirming the judgment of the Probate Justice, and the appellant prosecuted an appeal to this Court. Whether the judgment of the Circuit Court affirming the decision of the Probate Justice was erroneous, is the question to be determined here.

It is insisted by the counsel for the appellee: 1st. That Morrison and his administratrix, by virtue of their appointments as administrator and administratrix, had a Common Law right to retain so much out of assets of the estate of Edgar, as would be sufficient to pay Morrison's judgment

against him, as against other creditors whose claims were of equal degree, and that this provision of the Common Law was in force at the time Morrison recovered his judgment; and that he thereby acquired a vested right to have the judgment enforced according to the Common Law rule against the estate of Edgar, who died on the 1st of December, 1830.

It cannot be denied that the Common Law rule in relation to the right of an administrator to retain is as the counsel contend. Toller on Ex'rs, 295; 3 Burrow, 1380, cites Cro. Eliz. 232. But whether the appellee is in a condition to avail herself of its benefits, is a question which must be settled by reference to the statutes of this State.

On the 12th of February, 1823, the legislature of the State passed a law providing for the distribution of estates of deceased persons, dying insolvent by paying: 1st. Funeral expenses, Probate fees, or fees incurred on administration; 2nd. All other demands in equal proportions, without regard to their nature, giving no preference to any debts, on account of the instrument of writing on which they might be founded. Laws 1823, p. 127. Under this statute it has been held, in the case of Jones' administrators *v.* Bond, Bre. 223, that the same did not apply to cases where the intestate had died before the passage of the law. And also in the case of Woodworth *v.* Paine's administrator, Bre. 294, that on a *scire facias* to revive a judgment rendered in 1822, this law did not apply to judgments rendered before its passage; but upon the express ground that judgments were not named in the Act, and that being of superior dignity to other debts, were not included; and that they retained their priority as at Common Law. From an examination of this last case, it will be seen that the judgment creditor sought only to enforce his lien against the land of the intestate.

A short time previous to the passage of the law before referred to, on the 28th of January, A. D., 1823, an Act was passed authorizing executors and administrators, in case of deficiency in personal assets to pay the debts of the testator or intestate, to apply to the Circuit Court and obtain an order for the sale of the real estate for the purposes aforesaid; the 4th section of which, among other things, provides that the

moneys arising from such sales, shall be assets in the hands of the executor or administrator, for the payment of debts due from such testator or intestate. Laws 1823, p. 90, 93. The Act of the 12th February, 1823, remained in force until it was supplied and repealed by the Act of July 1st, 1829, of "Wills and Testaments." Laws 1829, p. 190–237.

This Act provides for the distribution of the effects of deceased persons who died insolvent as follows. 1st. By the payment of funeral and other expenses attending the last sickness of the deceased; 2nd. Expenses of proving the will, taking out letters of administration and settlement of the estate, and physicians' bills during the last illness; 3rd. For the payment of money received by the deceased as executor, administrator or guardian, and not accounted for; 4th. All other debts and demands of whatsoever kind, without regard to quality or dignity, which shall be exhibited in two years from the granting of letters of administration. See section 110. The 114th section provides, that debts of such deceased persons shall be paid in the manner provided in the Act, and when the estate is insufficient to pay the demands of any one class, the same shall be paid *pro rata*, whether due by judgment, writing obligatory, or otherwise, except as in said Act excepted. Section 115 provides, that executors or administrators having demands against the testator or intestate, shall file the same with the Court of Probate as other persons, and that the Court shall appoint some person to manage the defence. Section 119 provides, that upon each settlement, the Court of Probate shall ascertain the amount of debts against the estate, and of the money which has come to the administrator belonging to the estate of the deceased, and if the same shall not be sufficient to pay all the debts due from the estate, he shall make an order, that the same be paid out *pro rata* among the creditors, according to their several rights as established by this Act. Section 140 repeals former laws upon the same subject, and provides, "that no rights acquired under former Acts which are repealed, shall be invalidated or affected by the provisions of this Act."

It is believed that the foregoing provisions of the laws of this State, are all that have any peculiar bearing upon the present question. Since the date of the passage of the law, they have, without any material change, remained in force.

This right of retainer is said by Blackstone, in his Commentaries, Vol. 2, p. 18–19, to be a "remedy by mere act and operation of law, and to be grounded upon this reason: That an executor or administrator cannot, without apparent absurdity, commence suit against himself as representative of the deceased, to recover that which is due to him in his own private capacity; but, having the whole personal estate in his hands, so much as is sufficient to answer his whole demand, is by operation of law, applied to that particular purpose, to the exclusion of other creditors in equal degree, in case of a deficiency of assets to pay the whole of that class of claims against the estate of the testator or intestate.

Without stopping to inquire into the soundness of the reasons given, why the claim of an administrator or executor, because he cannot sue himself, should be preferred in the whole, to the debt of another in equal degree, it is suffiicient that we find the law so written; and if the appellee here has shown that she has brought herself within the provisions of the Common Law, her right is indisputable.

This depends upon the solution of one simple proposition; Whether the distribution of the estate of a testator or intestate, is to be controlled by the law which was in force at the time of the death of the testator or intestate; or that which existed at the time when the debt, or right, accrued to the creditor.

We apprehend that there can be but one rational conclusion formed upon the subject. When Edgar died, the Act of 1829 was in force, and that of 1823 repealed, and all the provisions of the Common Law of England, in relation to the right of an executor or administrator to retain in preference to other creditors in equal degree, supplied, by prescribing the manner in which he may prove his demand against the estate; that all moneys in his hands, whether arising from personal property, or the sale of real estate, shall be assets in

his hands for the payment of debts due from the testator or intestate; and by declaring, with certain exceptions before mentioned, that the assets shall be distributed, *pro rata*, among all the creditors who shall file and prove their claims within the time limited by law, without regard to the quality or dignity of the same.

The idea, that because Morrison obtained a judgment against Edgar in 1826, when, it is said, that the Common Law applicable to the distribution of the estates of deceased persons was in force in this State, he thereby acquired a vested right, that Edgar's assets, whenever he might die, should be applied in payment of his debts, according to the law as it existed at the time his judgment was rendered, cannot for one moment be indulged, and the decisions of the Supreme Court before referred to, fall far short of establishing any such principle. In order to sustain such a position, it would be necessary that Morrison should show that by virtue of his judgment, he had acquired a vested right to administer on Edgar's estate.

The Court has no hesitation in coming to the conclusion, that the appellee in this case has no right under the law, to retain her demand against the estate of Edgar, to the exclusion of other creditors in equal degree according to the rules of distribution of intestates' and testators' estates, as prescribed by the Act of 1829.

The next point made by the appellee is, that being a judgment creditor, she is entitled to priority in payment out of the assets of Edgar over creditors by bond or simple contract; and for the same reasons, and upon the same principles substantially, that she has the right to retain; that is, that such was the law at the time of the rendition of Morrison's judgment. The reasons which have been before given against her right to retain, and the law before referred to regulating the distribution of estates in force at the time of Edgar's death, are as conclusive upon this as upon the other point. By the Act of 1829, the idea that any such right of priority existed, is totally excluded. So far as the distribution of assets is concerned, judgment creditors and

simple contract creditors are placed upon an equal footing.

It has not been seriously urged by the counsel for the appellee, that she was entitled to claim priority in payment, by virtue of her judgment lien upon the land which had been sold and converted into assets.

Such a position, we think (if taken), would be untenable. If Morrison had a lien upon any portion of the land, he might, had he chosen to do so, have enforced the same; but he could not sell the land, nor the interest of the heirs of Edgar in the same, and thereby transfer his lien from the land to the money arising from the sale, which the law has declared shall become assets in his hands for the payment of debts, *pro rata*, of the testator or intestate. If he sold the land itself without reservation or qualification, he will be presumed to have waived his lien. If he only sold the interest of the heirs of Edgar, he may still retain his lien; and in either event, he sustains no injury of which he has any just right to complain.

The order and decision of the Probate Justice, and also of the Circuit Court affirming the same, was erroneous. The order should have been made as applied for by the appellant, that the appellee, after discharging such claims, as by the law of 1829 were entitled to precedence, should pay *pro rata* to the creditors of the estate of Edgar, whose claims had been filed and allowed within the time prescribed by law, all such sums of money as may have come to her hands as administratrix, with the will annexed, of William Morrison, deceased, who was administrator of John Edgar, deceased, whether the same were due by judgment, writing obligatory, or simple contract.

The judgment of the Circuit Court is reversed at the costs of the appellee, both in this Court and the Court below, to be paid by the said appellee in the due course of administration.

Judgment reversed.

WILLIAM TAYLOR *et al.*, plaintiffs in error, *v.* HANKS TAYLOR *et al.*, defendants in error.

Error to Wayne.

The presumption of law is, when a father purchases land in the name of his children, unaccompanied by any extraordinary or explanatory circumstances, that it was intended as an advance or gift to them. This presumption, however, may be rebutted by circumstances. (*a*)

BILL IN CHANCERY, in the Wayne Circuit Court, to enforce a specific performance of a resulting trust, and also for a partition. The case was heard before the Hon. William Wilson, at the August term, 1846, and a decree entered in conformity with the prayer of the bill.

A. T. BLEDSOE, for the plaintiffs in error.

The Opinion of the Court was delivered by

CATON, J. This bill was filed by the children of James Taylor by a second marriage against the children which he left of a former marriage, to enforce the specific performance of a resulting trust. The bill states, that James Taylor, the ancestor of all the parties, in the year 1820, with his own money, and for his own use and benefit, purchased a certain quarter section of land of the United States, in the names of William and Isaac Taylor, his two eldest sons, who were at that time minors, which was not intended as an advance to them, but in trust for himself. James Taylor died in 1841, without having procured the said trustees to execute the trust, for which purpose this bill is filed. The bill also states that Isaac Taylor has sold by quitclaim deed to William Merritt, who was also made a defendant. There is also a prayer for partition. The bill also sets forth a variety of circumstances, as tending to prove the right claimed, which will be noticed when the proof comes to be considered.

William Taylor admits the purchase by James Taylor as charged, but says that the money with which the land was bought,

(*a*) Cartwright *v.* Wise, 14 Ill. R. 417; Bay *v.* Cook, 31 Ill. R. 345.

was furnished by their grandmother or by their mother, for the express purpose of purchasing said land for him and his brother Isaac. He denies a portion of the circumstances set up in the bill, as tending to prove the trust.

Merritt admits that he purchased a portion of the land as charged, but denies all knowledge of the other matters stated in the bill.

In this case there are no principles of law which are controverted, except as to the amount of evidence which should be required to make out the case. We entertain no doubt, that the money with which this land was purchased belonged to James Taylor, and but for the relationship of the parties, the law would imply a trust at once. But the presumption of law is the other way, where a father purchases land in the name of his children. Where that is done, unaccompanied by any extraordinary or explanatory circumstances the supposition is, that it was intended as an advance or gift to them, and it has been regretted by some very able judges, that this presumption has ever been allowed to be rebutted, by considering the child a purchaser, for a good consideration which the natural love and affection of the father for the son, would warrant. 2 Story's Eq. Jur. §§ 1202, 1203, and note 2, 2d Ed. The law, however, is too well settled to admit of doubt, and upon looking into the cases it is found, that this rebutter is often established by circumstances, not the most cogent and satisfactory, as where the father takes possession of the land and receives the rents and profits, or where the son gives receipts in the father's name, or where the son had been previously provided for. But after all, the most that can be said on this subject is, that no fixed and definite rule can be found to guide us but the intention of the father, at the time the purchase was made, which must be gathered from all the lights which the attending circumstances afford. Now, in this case, I confess that we have so much light that I have great difficulty in seeing my way clear. Indeed, it rarely occurs where the evidence is so equally balanced, when all taken together, as to leave the mind so nearly upon an equipoise.

In support of the legal presumption in favor of the defendants below, is the fact, which I think is proved, that the father obtained the money with which the land was purchased by his first wife, who was the mother of his two sons in whose name he entered it. But the answer to this is, first, that we ought not to suppose that he intended to bestow all that he had received by his first wife upon her two sons, leaving her two daughters entirely unprovided for. Besides, James Taylor expressed his intention to give to his four children by his first wife, sixty dollars each, on account of what he had received by their mother; and this he did do, either in money or property, as to all except, perhaps, one of the daughters. But it is proved by several witnesses, that the father repeatedly declared that the land was entered with money received by his first wife, and that he intended it for Isaac and William; and then there are other witnesses who swear to contrary declarations during the same time, insisting that the land was his. It is also proved clearly that James Taylor took possession of the land immediately after he entered, improved it and continued to reside on it till the time of his death in 1841, a period of over twenty years, with the exception of a few years when it was in the possession of William or Isaac, which I shall advert to again, and that he cultivated and treated it as his own. But the answer to this is, that he declared that he expected to live on the land as long as he lived, unless he got another place, as there was room enough for them all; from which it is inferred that he manifestly recognized it as belonging to his two sons; and he declared while in possession, that it belonged to William and Isaac, as several witnesses state.

If the evidence had stopped here, I should be of opinion that the legal presumption would have to prevail, that at the time the father entered the land, he intended it for his sons, in whose names he purchased it. But the testimony of Isaac Taylor, one of the grantees, is certainly entitled to very great consideration, from the superior means of knowledge which

he possessed, and from the interest which he had in knowing precisely how the matter stood, and from the fact also, that his interest at one time, at least, was indentical with that of William, who is now particularly resisting this claim. He says that he knew of the purchase, and how it was made, and with what funds, and that he always understood that the land was entered in his and his brother's names, not for their benefit, but for the benefit of their father. Now, if the father really intended the land for their benefit, it can hardly be possible that Isaac would not have known it. It is true that it is not easy to reconcile this with the repeated declarations that the father made in his lifetime to the contrary, unless we are to suppose that he had some object in holding out this idea to the world, which is not explained. This most probably may have been the case, especially when we take into consideration another circumstance, which is clearly proved by Isaac, which, I think, is entitled to more weight than any loose declarations which may be proved, and which is entirely inconsistent with the idea that either of the parties considered the land as really belonging to the sons.

Isaac Taylor testifies, that in 1823 William purchased one half of this land of his father, for which he paid him sixty dollars down, and was to pay him $250 more. This he was told by both his father and William. Under this contract William took possession of the land, and held till about 1830, when he sold it back to his father, who paid him back the sixty dollars, and also thirty dollars for improvements which he had made on the land. After this, Isaac bought the land of his father for the same price, and held it for one year, when he also sold it back to his father at the same rate. Isaac also says that he agreed to give a bond for a deed at any time, and he heard William say he was willing to do the same.

Now all of this is utterly inconsistent with the idea that either of the parties understood the land really to belong to the sons. They bought and sold it, as if it belonged to the father, and treated it throughout as if it were his. This circumstance can be explained upon no rational hypothesis, consistent with any other supposition, and it is calculated to

carry conviction to the mind with more certainty than loose declarations made to third persons, which may have been made with interested motives to conceal his real interest in the premises. If we are bound to reconcile all of this conflicting testimony, I see of no other way of doing it with any degree of plausibility.

On the whole, we cannot say that we are dissatisfied with the decree of the Circuit Court, and it is affirmed with costs.

Decree affirmed.

THE PEOPLE OF THE STATE OF ILLINOIS, plaintiffs in error, *v.* JOHN NICHOLS, defendant in error.

Error to La Salle.

The State continues to be the beneficial owner of the canal lands, notwithstanding the conveyance by the Governor to the Trustees, and may maintain an action to recover the penalties given by the legislature against trespassers on such lands.

DEBT, in the La Salle Circuit Court, brought by the plaintiffs in error against the defendant in error, and heard before the Hon. John D. Caton, without the intervention of a jury. Judgment for the defendant.

The material facts of the case are stated by the Court in their Opinion.

The cause was argued orally by A. WILLIAMS and E. D. BAKER, for the plaintiffs in error, and by T. L. DICKEY, for the defendant in error.

The following argument was submitted in writing by C. B. LAWRENCE, for the plaintiffs in error:

Is the Act to protect canal lands from trespasses, approved February 27, 1845, now in force—the lands having been conveyed to the Trustees?

1st. What is the estate of the Trustees in the lands?

By the Act of March 1, 1845, the Governor is directed to convey these lands to the Trustees in conformity with the Act of February 27, 1843.

By the tenth section of the Act of 1843, it is directed that these lands shall be conveyed as *security*. By the thirteenth section, that none of the lands shall be sold by the Trustees until three months after the completion of the canal. By the fourteenth section, that the Trustees shall keep a full and true account of their expenditures, and of the revenues derived from the canal and canal lands, and report the same to the Governor. By the sixteenth section, that the canal lands shall revert to the State after the payment of the canal indebtedness. By the nineteenth section the same provision is made, and also, that the State may, at any time, pay off the canal indebtedness, and that, in that event, the Trustees shall resign the lands to the State.

From these provisions it is very clear, both upon principle and adjudged cases, that, until sale of the lands after completion of the canal, the Trustees will, and do now occupy the position of mortgagees, and the State that of mortgagor, before foreclosure, or entry for condition broken. 3 Pick. 484, where a similar deed is held to be a mortgage; also, numerous authorities cited in 3 (U. S.) Dig., title *Mortgage*, § 28.

It is now the established doctrine, that, as against all persons but the mortgagee, the mortgagor, until foreclosure, is the owner of the estate; and that he has the *legal title*, while the mortgagee has but a *lien* on the land for his debt. 4 Kent, 160; 7 Mass. 138; 11 do. 469; 7 Johns. 278; U. S. Dig. vol. 3, page 31, cases cited in paragraph 76, *et seq.* The mortgagor may maintain ejectment to which the mortgage cannot be set up as an outstanding title in a third person. Numerous cases cited in 1 Hilliard's Abr. page 276, note.

Now, the ground taken by counsel on the other side is, that these lands are no longer canal lands owned by the State, and that, therefore, the trespass Act of 1845 does not apply to them. But if the positions stated above be cor-

rect, the State is to be considered the owner of these lands until they are sold by the Trustees after the completion of the canal, while the Trustees themselves have in the meantime only a lien on the lands to secure the payment of their debt. It certainly cannot be denied that the State has an interest in the lands, which it is important to protect from trespassers. Indeed, the State has the same beneficial interest in the lands as she had before the deed to the Trustees, since, whatever is realized from the sale or profits of the lands, goes, in the end, into the State Treasury, and whatever is lost by trespasses on the lands is so much lost to the State Treasury. The State, as mortgagor, has, undeniably, sufficient interest in the lands to enable her to sustain the statutory action for trespass.

Inasmuch as it is only pretended that this trespass Act is repealed, because there are no longer any canal lands in which the State is interested, upon which the Act can operate, it would seem that this view as to the interest of the State, if correct, decides the question. But there are other strong arguments against considering this act repealed by implication, to be drawn from the legal doctrine respecting statutes.

It is an established principle, that the intention of the legislature is to govern in the construction of statutes. It is decided in the case of State *v.* Rackley, 2 Blackf. 249, that "statutes enacted at the same session of the legislature are to be construed *in pari materia*, and should receive a construction which will give effect to each if possible."

Now, the first Act providing for the conveyance of these lands as security to the Trustees, was passed in February, 1843. The act directing the Governor to execute a deed to the Trustees, in conformity with said Act of February, 1843, was approved March 1, 1845, and the Trespass Act under which these suits were brought, and which, it is contended, was repealed by this Act of March 1, 1845, was itself approved February 27, 1845, but two days before the approval of the Act by which counsel contend it is by im-

plication repealed. From the respective dates of their approval it is manifest that the two last mentioned Acts went through the legislature together. Now, what is the unavoidable inference from these facts, as to the intention of the legislature? Two years after the passage of an Act providing for the conveyance of these lands to the Trustees, the legislature pass an Act to protect the same lands from trespassers, and at the same time with the passage of the latter Act, they pass another Act providing for the execution of a deed to the Trustees, and yet it is contended that this last Act, which is simply supplementary to an Act already two years in force, and which contains no repealing clause of any character whatever, does repeal the trespass Act which went through the legislature at the same time with itself. On the contrary, are we not obliged to believe that the legislature, in passing the trespass Act, had in view the conveyance of the lands to the Trustees, in conformity with the Act of the preceding session, and that it designed to extend this protection from trespasses to the lands after they should be conveyed to the Trustees, the more especially as this protection would be of precisely the same importance to the Trustees after as before the conveyance?

This conclusion is made, if possible, still more unavoidable when we notice the phraseology of the Acts. The Act, which it is contended is repealed, is an Act to protect "canal lands" from trespasses; and it appears from the first, third, eighth, and other sections, that it is designed to apply exclusively to the lands appertaining to the Illinois and Michigan Canal. Are not these lands, in the hands of the Trustees, as much "canal lands" as they ever were? Are they not now, as much as before their conveyance to the Trustees, a fund for the construction of the canal—the only difference being, that they have been placed in the hands of the Trustees as security for money advanced, but with no power to sell for some time to come. In all these Acts, as well the trespass Act, as those providing for the conveyance to the Trustees, the lands are indiscriminately designated as "canal lands," or "property," and they will continue to be "canal lands" until they are sold to private individuals by the Trus-

tees under the direction of the State. From these considerations it would seem manifest, that the intention of the legislature—the thing for which we must look—was to protect by this Act the canal lands from trespasses, as well after as before they should be conveyed to the Trustees. Unless we adopt this construction, we must stultify the legislature, and charge them with burdening the statute book with useless lumber by passing the trespass Act at the same time that they are passing another Act designed to operate its repeal. But if the intention of the legislature were not evident from these considerations, we should be bound so to construe all Acts passed at the same session, as to make them all, if possible, effective. 2 Blackf. 249.

The argument from inconvenience has also a strong application, for, unless this trespass Act is now operative, these lands, which it is more important to protect by special legislation than any other lands in the State, from their greater liability to trespasses, are left to the protection of the Common Law action, while all other lands in the limits of the State are protected by special legislation. The Supreme Court has twice decided (3 Scam. 259, and 4 do. 336) that the private statutory action of trespass only lies in behalf of the owners in fee simple of the land trespassed upon. The Trustees are not the owners in fee simple of these canal lands. They have only a fee simple for the single purpose of conveyance at a future time, and not even for that purpose, if the State chooses in the meantime to redeem the lands. Section nineteen, Act of 1843. The Trustees, so far from being owners in fee simple, are, as already said, in the position of mortgagees before foreclosure or entry for condition broken, and a mortgagee thus situated, is not considered a freeholder, and his interest in the estate passes, at his death, to his executor as assets. Hilliard's Abr., title *Mortgage*, ch. 30, § 2; ch. 32, § 1. If, then, this canal trespass Act is to be considered repealed, the Trustees cannot bring the private statutory action in their own name, and these canal lands are left to be despoiled.

Additional authorities. It is contended that this Act is re-

pealed by implication. The cases of Loker *v.* Brookline, 13 Pick. 342, 348, and Haynes *v.* Jenks, 2 do. 172, 176, decide that the law does not favor repeal by implication.

Again, the case of Brown *v.* Miller, 4 J. J. Marsh, 474, decides "that when the provisions of a precedent statute are not incompatible with those of a subsequent one, *in pari materia*, it is not repealed by construction." In this case there is nothing in the latter statute incompatible with the former; on the contrary, its provisions are necessary to carry out the former, by protecting the property therein pledged from wanton degradation.

The case of Payne *v.* Conner, 3 Bibb, 180, decides that "a statute repealing all former ones within its purview, does not repeal the provisions of former laws, as to cases not provided for by the repealing statute." In this instance, the statute, which it is contended is the repealing one, has no repealing clause whatever, and if it had, yet it does not itself provide for cases of trespass, and would therefore fall within the exception laid down in the above rule.

Counsel contend that the trespass Act provided for its going into immediate operation, by the appointment of an agent before the conveyance to Trustees. True, but the legislature were at the same time passing an Act for the conveyance to the Trustees, and if they had designed that the trespass Act should cease to operate as soon as the conveyance to the Trustees should be made, they would have so provided in the Act in terms. But they have not so provided, and their silence on this point, is, under the circumstances, a strong reason for drawing the opposite inference.

The Opinion of the Court was delivered by

Lockwood, J. This was an action of *debt*, commenced by the plaintiffs against the defendant, to recover the penalties given by the Acts of the legislature, passed for the protection of the canal lands against trespassers.

The cause was tried by the Court below without a jury. On the trial, evidence was given tending to prove that the defendant entered on land that had been granted to this

State, by the United States, for the purpose of aiding the State in the construction of the Illinois and Michigan canal, and cut and hauled away three trees which were growing on said land.

It was admitted on the trial, that said land had been conveyed by the Governor of this State, before the cutting of said trees, to the board of Trustees of said canal, in accordance with the provisions of an Act entitled, "*An Act supplemental to an Act to provide for the completion of the Illinois and Michigan Canal, and for the payment of the canal debt*, approved February 21, 1843," approved March 1st, 1845.

Upon this state of facts the Circuit Court decided, that after the passage of the Act of 1843, and the organization of the board of Trustees of the Illinois and Michigan canal, and the execution by the Governor to said board of a deed of trust, of the canal lands and property, as directed in the Act of 1845, the title to said canal lands included in said deed of trust, was passed by the State of Illinois to said board of Trustees, and no longer remained canal lands within the meaning of the Act entitled, "*An Act to amend an Act to protect the canal lands against trespassers*," approved March 4th, 1837, and an Act to amend an Act entitled, "*An Act to protect the canal lands against trespasses*, approved February 19th, 1839," approved February 27th, 1845, and that therefore the defendant was not liable to the penalties provided in said Act. This decision of the Circuit Court is assigned for error.

By the fourth section of the amended Act above mentioned, it is provided that " if any person shall cut, fell, box, bore, injure or destroy, any tree or sapling of any description, standing or growing upon canal land, he or she so offending, shall pay five times the value of every tree or sapling so cut, felled, bored, injured or destroyed, to be recovered by action of debt, in the name of the State of Illinois, before any Circuit Court or justice of the peace having jurisdiction of the amount claimed."

It was conceded on the argument, that the Act containing this provision to protect the canal lands from trespassers, has not been repealed, yet it was contended by the counsel for the defendant,

that the conveyance of the canal lands to the board of Trustees, has, by implication, repealed the section, giving the penalties sued for. This position is not correct. The canal lands, before they are sold by the Trustees in pursuance of the various laws authorizing them to complete the canal, are as much canal lands since the transfer, as they were before, and just as much stand in need of the protection afforded by those Acts against trespassers. The State still continues the beneficial owner of the land, in order to carry out the object of the donation made to it by Congress.

The object of the conveyance to Trustees was to enable them to fulfil a public trust, and they are substituted in the place of the former Canal Commissioners, to accomplish the same great object, to-wit: the construction of the canal. Whenever the canal shall be completed under the direction and supervision of the present board of Trustees, and the canal debt and expenses are paid, the canal and all the lands that remain unsold by the Trustees, will revert to the State.(*a*)

We are consequently of opinion, that the Circuit Court erred in deciding that the lands trespassed on were no longer canal lands. For this error, the judgment below is reversed with costs, and the cause remanded for a new trial.

Judgment reversed.

(*a*) Fitch *v.* Pinckard, 4 Scam. R. 83; Reece *v.* Allen, 5 Gil. R. 241, and notes.

JOHN MOORE *et al.*, plaintiffs in error, *v.* JABEZ CAPPS, defendant in error.

Error to Sangamon.

Where the Statute of Limitations is pleaded, and there is any matter which takes the case out of the operation of the Statute, it should be set up in a replication.

The Statute of Limitations was pleaded to a writ of error, brought by several plaintiffs, and replication that two of them were still infants, and that another arrived at full age within five years next before the suing out of the writ of error. There was a general demurrer to the replication: *Held*, that the Statute permitting either of several parties to remove a cause by appeal or writ of error into the Supreme Court and to use the names of others, if necessary, those plaintiffs in the case, who had been of full age more than five years, could not avail themselves of the non-age of some of their co-plaintiffs to accomplish indirectly what they would not be allowed to do directly. (*a*)

BILL IN CHANCERY, originally filed by the defendant in error against the plaintiffs in error, in the Peoria Circuit Court. The bill was taken *pro confesso* against the infant defendants, and a specific performance decreed at the September term, 1836, the Hon. Thomas Ford, then Circuit Judge, presiding.

The case was heard in this Court on demurrer to plea and replication.

A. WILLIAMS, for the plaintiffs in error :

If one of the persons against whom a decree is given be an infant, his infancy will prevent the Statute of Limitations from barring the persons who are co-parties with him. The whole of the parties in such case may prosecute a writ of error to reverse such decree, at any time within five years from the maturity of such infant. Kennedy's heirs *v.* Duncan, &c., Hardin, 366–7; May's heirs *v.* Bennett, 4 Little, 313–14; Wilkins *v.* Philips, 3 Ham. 49; 1 Ohio Cond. R. 464; 5 Cruise's Dig. 243, §§ 1, 22, 30, 38, 39, 43, 53, 54; 2 U. S. Dig. 809, §§ 370, 377; Jones *v.* Henry, 3 Little, 43; 2 Peters' Cond. R. 454.

A judgment cannot be affirmed as to one plaintiff, and reversed

(*a*) See Angel on Lim., sec. 484.

as to another; but must be reversed or affirmed *in toto*. Zouch *v.* Thompson, Ld. Raym., 176; Richard & Finney *v.* Walton, 12 Johns. 434; Arnold *v.* Sanford, 14. do. 425; 6 Com. Dig. 468–9, and cases there cited; Hall *v.* Williams, 6 Pick. 246; Montgomery *v.* Brown, 2 Gilm. 581.

S. T. Logan, for the defendant in error.

A. T. Bledsoe, concluded for the plaintiffs in error.

The Opinion of the Court was delivered by

Treat, J. At the September term, 1846, of the Peoria Circuit Court, Jabez Capps obtained a decree against John Moore and others, for the specific performance of a contract. It appears on the face of the decree, that some of the defendants were then infants. In September, 1847, a writ of error was sued out in the names of all the defendants below. The defendant in error has pleaded generally, that more than five years elapsed between the rendition of the decree, and the suing out of the writ of error; and that the right of the plaintiffs to maintain their writ of error did not accrue within five years next before the issuing of the writ. There is a general demurrer to the plea. In the opinion of the Court, the plea is good. If there is any matter which takes the case out of the operations of the statute, it should be set up in a replication. It does not follow, because some of the plaintiffs were minors when the decree was pronounced, that they have now the right to prosecute a writ of error for its reversal. It may be that they arrived at full age more than five years before the writ of error was sued out. The Court expresses no opinion upon the question, whether under our statute an adult defendant can take the advantage of the non-age of a co-defendant to reverse a judgment or decree of more than five years' standing. The demurrer is overruled, and leave is given the plaintiffs to reply to the plea.(*a*)

Demurrer overruled.

(*a*) Enos *v.* Capps, 12 Ill. R. 255; Marsteller *v.* McLean, 7 Cranch R. 156; 4 Durnf. & East's R. 518.

After the overruling of the demurrer to the plea in this case, a replication was filed (the substance of which is stated in the following Opinion of the Court), to which there was also a demurrer:

TREAT, J. The plaintiffs in error have replied to the plea, which the Court on a former day held to be good. The replication alleges that two of the plaintiffs are still infants, and that another of them arrived at full age within five years next before the suing out of the writ of error. There is a general demurrer to the replication. The 53d section of the 83d chapter of the Revised Statutes, reads thus: "A writ of error shall not be brought after the expiration of five years from the passing of the judgment complained of; but when a person, thinking himself aggrieved by any decree or judgment that may be reversed in the Supreme Court, shall be an infant, *feme covert*, *non compos mentis*, or imprisoned when the same was passed, the time of such disability should be excluded in the computation of the said five years." The Supreme Court of Kentucky held under a statute precisely like this, that where some of the plaintiffs in a writ of error were within the saving clause of the statute, the case was saved as to all of the plaintiffs. Kennedy *v.* Duncan, Hardin's R. 365. The decision, however, was put expressly on the ground that the parties could not sever, but must all join in the writ of error; and as those of full age could not maintain a several writ of error, and had not the right of compelling the infants to join with them, the saving for the benefit of the infants must necessarily accrue to the benefit of the adults; otherwise, the latter would be deprived of their right without their fault. See also, the cases of Thomas *v.* Mackin, 4 Bibb, 412; and Wilkins *v.* Philips, 3 Ham. 48. Such would undoubtedly be the rule here, but for the 51st section of the chapter before referred to, which provides that: "In all cases where a judgment or decree shall be rendered in any Circuit Court, in any case whatever, either in Law or in Chancery, against two or more persons, either one of said persons shall be permitted to remove said suit to the Supreme Court by appeal or writ of error, and for that purpose shall he be permitted to use the names of all of said persons, if neces-

sary." This provision removes all of the obstacles in the way of the parties, free from legal disability, to the prosecution of a writ of error, within the time limited by the statute. Those of full age are not compelled to join the infants, but may sever by suing out a separate writ of error in their own names. The reason of the rule ceasing, the rule itself should cease. In the present case, the most of the plaintiffs were long since barred of their right to reverse the decree. They ought not now to be permitted, by availing themselves of the non-age of some of their co-plaintiffs, to accomplish indirectly what they would not be allowed to do directly. In this case, there was no necessity for all of the defendants below to join in the writ of error. As it is, they have all joined in a writ of error, which but a part can maintain. The joint writ must therefore be dismissed, and such of the plaintiffs, as are within the saving clause of the statute, must resort to their separate writ of error to reverse the decree. It is proper to remark that they may join in bringing the writ. If they do so, and the decree is found to be erroneous, it will then be in time to determine the question whether the decree shall be wholly reversed.

The demurrer will be sustained to the replication, and the writ of error dismissed with costs.

Demurrer sustained.

PHILEMON B. SELBY, appellant, *v.* RICHARD A. HUTCHINSON, administrator of Charles Teed, appellee.

Appeal from Knox.

Where an affidavit was not embodied in the bill of exceptions, and the record did not show that the opinion of the Court overruling the motion on which it was based, was excepted to, the Supreme Court refused to consider the objection.

Motions for security for costs are addressed to the discretion of the Court, and a decision in relation to such motion cannot be assigned for error.

It is a general rule that an administrator is not personally liable for costs.

A misjoinder of counts, upon which the same judgment cannot be rendered, may be assigned for error. (*a*)

In determining a question of misjoinder, the Court will be governed more by the form of the count than by the substance of it.

Where a party has performed labor under a special contract and has been prevented, by the act or default of the opposite party, from completing all that he had undertaken to perform, he may recover for such labor in an action of *assumpsit*. (*b*)

Where the record of a cause satisfactorily shows, that the parties did not deem it proper to question certain of their respective rights in the Court below, they must be considered as having waived them, and cannot be permitted to dispute them in a Court of appeal for the first time.

It is not every partial neglect or refusal to comply with some of the terms of a contract by one party, which will entitle the other to abandon the contract at once. In order to justify an abandonment of it, and of the proper remedy growing out of it, the failure of the opposite party must be a total one; the object of the contract must have been defeated or rendered unattainable by his misconduct or default.

ASSUMPSIT, in the Knox Circuit Court, brought by the appellee against the appellant, and heard before the Hon. Norman H. Purple and a jury, at the November term, 1846. The jury rendered a verdict for the plaintiff for $462.50, upon which there was judgment.

So much of the evidence and proceedings in the Court below as is material to the decision of the cause will be found to be stated by this Court.

C. K. HARVEY, for the appellant.

I. The Court ought to have required security on the affidavit. Rev. Stat. 126–7, § 5. An administrator is liable for costs.

(*a*) Cruickshank *v.* Brown, 5 Gil. R. 75, and notes.

(*b*) Butts *v.* Huntley, 1 Scam. R. 410, and notes.

Ibid. Burnap *v.* Dennis, 3 Scam. 478. Estate is liable to the administrator sometimes. S. P. Chevalier *v.* Finnies, 5 Eng. Com. Law R. 82. Where an executor was ruled to give security for costs. 1 Tidd's Pr. 534.

There is a misjoinder of counts, the fourth count being in covenant.

Misjoinder is not cured by verdict (3 U. S. Dig. 169, p. 897), and may be assigned for error. 1 Ch. Pl. 236; Cooper *v.* Bissell, 16 Johns. 146.

Covenant cannot be joined with assumpsit. 1 Ch. Pl. 231. Different forms of action cannot be joined. 26 Wend. 30. In Cobbet *v.* Packington, 13 Eng. Com. Law R. 170, one count was in assumpsit omitting the word "promised," the other in assumpsit: *Held*, a misjoinder. In Orton *v.* Butler, 18 do. 361, a count colorably in trover, but really in assumpsit, *held*, misjoined with a count in case.

The facts stated in the fourth count show a case in covenant,and not in assumpsit (Young *v.* Preston, 2 Peters' Cond. R. 98), holding that the plaintiff is hindered from performing his covenant he cannot recover in *assumpsit*. Same point, 2 Greenl. Ev. 80.

III. The contract set out in the fourth count, and given in evidence in this case, is a contract of partnership. For the distinctive features of partnership, see Story on Partn. 22, 37, 2, 6, 19, 22, 28, 37, 48, 49, 87; an ownership of stock is not necessary, p. 88, 89, 90; property, 127, 138; *delectus personæ*, 6; Job *v.* Halsey, 16 Johns. 39; Goddard *v.* Pratt, 16 Pick. 412, 414, 421, 428; Holt *v.* Kernoddle, 1 Iredell, 202; Mills *v.* Hughes, 1 A. K. Marsh. 181; Cheen *v.* Bailey, 29 Eng. Com. Law R. 276. One partner cannot maintain action for work against co-partner. Holmes *v.* Higgins, 8 do. 28.

IV. The first instruction asked should have been given. Young *v.* Preston, 2 Peters' Cond. R. 95. This instruction is copied from that approved in Fresh *v.* Gibson, 16 Peters, 327–8.

V. The second instruction should have been given. Jennings *v.* Camp, 13 Johns. 94.

VI. The other instructions should have been given. If there be a special contract, there can be no recovery on an *indebitatus assumpsit.* Ellis *v.* Hamlen, 3 Taunt. 52.

When *covenant* lies, *assumpsit* will not. Baber *v.* Harris, 36 Eng. Com. Law R. 793; 2 Greenl. Ev. 78, 104. If the contract is not put an end to, there can be no recovery on the common counts. 16 Wend. 636. If there be covenant to pay, *assumpsit* does not lie. Miller *v.* Watson, 4 Wend. 270, 275; Reans *v.* Wallace, 1 Port. 116. When payment is in land, count must be special. Burlingame *v.* Burlingame, 7 Cowen, 92. The work must be done. Morford *v.* Mastin, 3 J. J. Marsh. 689. If the pay be not money, the common count does not lie. Pringle *v.* Samuel, 1 Bibb, 172, 597; Cochran *v.* Tatum, 3 Monroe, 405; Coursey *v.* Covington, 5 Har. & Johns. 45; Clarks *v.* Smith, 14 Johns. 326.

VII. The instructions given were not proper. Eldridge *v.* Rowe, 2 Gilm. 96.

VIII. The new trial should have been granted, the verdict being against evidence and law. There was no such failure by Selby as would authorize Teed to rescind. Fillent *v.* Armstrong, 34 Eng. Com. Law R. 160. Where the object of the contract is not lost, their is no rescission. Freeman *v.* Taylor, 21 do. 250, 251. In Franklin *v.* Miller, 31 do. 148, "it is a clearly recognized principle, that if there is only a partial failure of performance by one party to a contract, for which there may be a compensation in damage, the contract is not put an end to." 1 U. S. Dig. 125, § 549.

A contract cannot be rescinded, unless rescinded *in toto*, and parties placed *in statu quo.* Duht *v.* Silk, 5 East, 451; Potter *v.* Titcomb, 22 Maine (9 Shepley), 300.

J. Manning, for the appellee.

I. The general rule is, that an administrator is not liable for costs. Burnap *v.* Dennis, 3 Scam. 481.

He who claims the benefit of an exception to a general rule, must affirmatively show himself entitled to it.

Therefore, he who seeks to make an administrator responsible

for costs, must show the administrator's liability; or if he ask security against such liability in *futuro*, he must show the danger of such liability's arising. For if there is no danger of liability, such security cannot be required. People *v.* Pierce, 1 Gilm. 553.

Admit then, that an administrator may in certain cases be held to security for cost; yet in this case, the defendant below did not show one of those cases by his affidavit, and on that affidavit, could not require such security.

II. It is argued on the authority of 5 Eng. Com. Law R. 82, and 1 Tidd's Practice, 534, that an administrator may be held to security for costs; but there the executor was a non-resident of the territorial jurisdiction of the Court; here, the administrator is not shown to be within the facts, and of course not within that rule.

In all cases where an administrator can be made liable for costs, his securities in his administrator's bond will also be liable (Stat. 557, as to form of bond); so that he has once given security for all his possible liabilities, and is not to be required to do so again.

III. But if the administrator may, in the manner proposed, be required to give security for costs, under what law may he be required so to do?

If not by virtue of the statute, then necessarily it is discretionary with the Court to require or not require, and the judgment of the Court in regard to it, is not assignable for error, though erroneous.

If, by virtue of the statute, it can only be under this portion of it. And here also, it is in discretion of the Court to require or not require it, as much as the ability of a party to pay costs. Gesford *v.* Critzer, 2 Gilm. 698.

But the affidavit is not set out in the bill of exceptions, and the Court cannot notice it; therefore, the administrator is not shown to be liable in any manner to give security for costs.

IV. As to the misjoinder.

1. The fourth count though special, is in *assumpsit*. It claims to recover only because the contract mentioned in the count is rescinded; whereby, the defendant became liable, and promised to pay the value of the work done.

2. Suppose a bond for payment of money at three per cent. In consideration of extension of time, promise to pay with six per cent.; *assumpsit* brought, and the bond set out as inducement; is the action on the bond?

V. As to the alleged partnership.

1. The cases cited are of questions concerning what constitutes a partnership as to third persons.

2. There is not one as to the effect of a default to perform in preparing the partnership property.

3. In this case the party was to be remunerated for his services specified, and advances by the title to an undivided one-fourth of certain property.

4. Suppose I make an entire contract to erect a store on another's land—he to advance $5000 to purchase goods, out of the one-half profits of which I am to be paid; I build the house and he advances nothing—am I without a remedy? Equity cannot take an account—there are no accounts. May I not as in other cases declare the entire contract rescinded and recover the value of work?

5. But in the same case, suppose he is to furnish the materials so that I cannot proceed, may I not, as in other cases, recover the value of my services?

6. What, as between the parties, is there to distinguish a contract to pay for services in the profits of a partnership, from one to pay in property?

7. But a partnership may be dissolved at the option of any one partner. Story on Part. 386, § 269; 395, § 275. If so, much more in this case than others may one party, before the contract to form the partnership is fulfilled, rescind such contract for the default of the other party.

8. But there is no evidence that Teed received any of the profits; on the contrary, the jury have found that Selby prevented him from proceeding with the work.

9. It will not be contended but that if Selby had entirely failed, and prevented Teed from proceeding, Teed might have maintained an action at law on the contract. Now there is no case where this can be done, but that the party not in default being so prevented,

may, on that account treat the contract as rescinded, and recover the value of his services.

10. This is now a question of fact passed on by the jury.

11. The plaintiff prevented Teed from entering on the partnership—would not let him share profits. Nelson Selby's evidence. A jury may believe part, and disbelieve part of a witness' evidence.

VI. As to the issue on sixth plea, and first instruction.

1. The issue is, whether the contract is rescinded as stated in the replication.

2. The "but the contract was in full force at the time the work was performed," is mere surplusage, it being re-stating what was admitted by not being traversed in the replication.

3. If the issue on this point is an immaterial issue raised by Selby, and 1. if it were found for defendant below, the plaintiff would have been entitled to judgment *non obstante veredicto;* 2. therefore, the Court was not called on to notice it in the instructions.

4. But if the rejoinder be issuable in both members, then the *similiter* raised two questions: 1. whether the contract was in force when the work was done; 2. whether the contract was rescinded as alleged in the replication; and 3. the instruction only covers one of these, and therefore it was properly refused.

5. But misjoinder may be taken advantage of on demurrer. 1 Chit. Pl. 235-6, and after judgment on demurrer, there can be no motion in arrest for causes which might have been determined on demurrer. 2 Tidd's Prac. 917–18; Edwards *v.* Blunt, 1 Strange, 425; Creswell *v.* Packham, 1 Eng. Com. Law R. 503; Rouse *v.* Peoria Co., 2 Gilm. 99.

VII. As to the instructions.

1. The instruction asked was not law, for work done under such a contract, may be recovered for in such action. 2 Scam. 410.

2. The second is either unintelligible, or it is not law. It means that the jury shall find the value of the work done under the contract, in favor of the defendant, or it means nothing; then it is not law.

3. The third is not law, because there is evidence of other work than that done under the contract; and though the jury find that the plaintiff is entitled to nothing for the work done under the contract, it does not follow that they should find for the defendant generally.

4. The same remark applies to the fourth instruction prayed.

5. Same, and irrelevant for there is no evidence tending to show that Teed abandoned the job.

6. The sixth instruction is no law; the statute commences running from the time that the right of action accrued; no such right had accrued October 29th, 1840.

7. The word "prevented" is too general, and calculated to mislead the jury, and the plaintiff might recover for other work, not done under the contract; and there was evidence tending to show a "preventive" of the administrator, therefore the instruction as asked, did not meet the whole facts of the case; the Court could not say the contract was not rescinded unless Teed was "prevented."

8. This is too general, and does not notice the "prevention," of the administrator. But this was before the law prohibiting a Judge giving instructions.

Admit that these instructions as prayed are all law, yet the Judge gave the law substantially as prayed. State *v.* Wilson, 2 Scam. 226; Bland *v.* People, 3 do. 366; Hays *v.* Borders, 1 Gilm. 46.

VIII. As to the law governing the case.

Where there has been a contract, whether under seal or not, and it is partially performed by one party, and he is prevented from completing the performance by the default of the other party, he may treat the contract as rescinded, and recover for the value of what he has done. Butts *v.* Huntly, 1 Scam. 410; Herrington *v.* Hubbard, *ib.* 569; Reed *v.* Phillips, 4 do. 40; Bannister *v.* Reed, 1 Gilm. 100; Lenningdale *v.* Livingston, 10 Johns. 36; Dubois *v.* The Delaware & Hudson Canal Company, 4 Wend. 290; Britton *v.* Turner, 6 New Hamp. 481.

IX. Where substantial justice has been done, a new trial

will not be granted. Greenup *v.* Stoker, 3 Gilm. 216; Gillett *v.* Sweat, 1 do. 475.

Where a new trial is granted, on the ground that the verdict is against the weight of the evidence; that weight must be overwhelming. 2 Gilm. 294, *et passim.*

The Opinion of the Court was delivered by

KOERNER, J.* This cause was tried in the Circuit Court of Knox county, at the November term, A. D. 1846, and a verdict was found by a jury in favor of Hutchinson, administrator of Teed, the plaintiff below, for $462.50. The Court overruled a motion for a new trial, and rendered judgment for said amount, in favor of plaintiff, from which judgment the defendant, Selby, has appealed.

The errors assigned upon this record are very numerous indeed; but we do not deem it necessary to consider them all, as many of them involve no principles of importance, and as a decision of all of them is rendered unnecessary by the disposition which the Court has made of the case.

The first error assigned, which we feel inclined to notice, is, that the Court overruled a motion made by Selby's counsel for security for costs, founded upon an affidavit showing the insolvency as well of the plaintiff, the administrator, as of the estate of Teed itself. (*a*) The affidavit of the defendant not being embodied in the bill of exceptions, and the record nowhere showing that the opinion of the Court, in overruling said motion, was excepted to, this objection is not properly before us for adjudication. We are, however, of opinion, that inasmuch as the Court is not directed by the statute to grant such a motion unless it be satisfied that the plaintiff is unable to pay the costs, the decisions of the Judge in relation to motions of this character, cannot be assigned for error. This has been so held in Gesford *v.* Critzer, 2 Gilm. 699. It is, moreover, a general rule, that an administrator is not personally liable for costs. See Burnap *v.* Dennis, 3 Scam.

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

(*a*) Lucas *v.* Farrington, 21 Ill. R. 30; Bell *v.* Bruce, 27 Ill. R. 332.

478 and 483, and nothing is shown here by the defendant to take the plaintiff out of the operation of this general rule.

The assignment of the second error presents the question whether there was a misjoinder of counts or not. The action is in *assumpsit*, and it is contended by the counsel for appellant that the fourth count in the declaration is substantially one in *covenant*, and should not have been joined with the other counts, which are all in *assumpsit*. A misjoinder of counts upon which the same judgment cannot be rendered, may be assigned for error, and is not cured by verdict. 16 Johns. 148. And hence this point is properly before us. In determining the question of a misjoinder, we have to be governed more by the form of the count, than by the substance contained in it. Although a count may be held on demurrer to be defective in stating the cause of action, yet, if in its form it correspond with the other counts, to which it may have been joined, an objection to the whole declaration on account of misjoinder does not exist. Counsel have much relied on the case of Orton *v.* Butler, 16 Eng. Com. Law R. 361. But that case is one where a count intended to be one in *trover*, was joined with one in *trespass*, when in fact it had none of the characteristics of a count in *trover* in it, except the usual conclusions, and showed upon its face a clear cause of action in *assumpsit*. It is expressly said in that case by one of the Judges (p. 363), that the count was not, in point of form, like one in *trover*. Now, in the present case, the fourth count alleges that the parties made a certain agreement in writing, under seal, reciting the same, and then avers that the plaintiff's intestate proceeded to comply with all the stipulations on his part, but that he was prevented by the defendant's failure to comply, from wholly doing and performing the said agreement, and that by reason thereof the said agreement became rescinded. It avers farther, that in consequence of this rescission, the defendant became liable to pay to said Teed as much as the work done by him was reasonably worth, &c., &c., concluding in the usual way by averring an *assumpsit* and refusal. There can be no doubt, that in point of form this is a count in

(*a*) Hays *v.* Borders, 1 Gil. R. 50.

assumpsit. The sealed instrument is merely set out by way of inducement, a rescission of the contract is plainly alleged, restoring the parties to the condition in which they stood before making it, and from this original condition, the liability of the defendant to pay for the work a reasonable price is correctly deduced.

There was a separate demurrer to this fourth count, but as the defendant, after the demurrer was decided against him, pleaded over, the question whether a party can sue in *assumpsit* under a state of case as shown in said count, is not presented on the demurrer. The instructions, however, which the Court gave, and to the giving of which the defendant below objected, raise the same point, bringing the question properly before us. We are aware that Courts of very high authority have held, that a party must seek his remedy on his special contract alone, where he has performed work under said contract, and has been prevented by the act or default of the opposite party, to complete all he had undertaken to perform. The case in 16th of Peters, 319, however, to which our attention has been specially directed, does not go quite that far. The Court there decide no more than this, that where a deed is the foundation of the claim, and can still be regarded as subsisting and in full force between the parties, the action to enforce its provisions must be upon the instrument itself. This decision we are not disposed to question. It is different, however, where a manifest default on the part of one of the parties can be made to appear, amounting in law to the total rescission by him, and putting it in the power of the other party to rescind it on his part. This Court has repeatedly and uniformly decided, that in such a case a party may recover for work and labor done in *assumpsit.* We do not feel called upon to disturb the law now as settled in our State by a train of decisions. This Court have said in the case of Butts *v.* Huntley, 1 Scam. 413,(*a*) "that where a written contract exists to perform a particular piece of work, and the workman performs part and is prevented from finishing it by the other party, he may treat the contract as rescinded, and recover the value of his

(*a*) See notes to this case.

labor." This decision is sustained in Herrington *v.* Hubbard, 1 Scam. 569; Reed *v.* Phillips, 4 Scam. 40, and Bannister *v.* Read, 1 Gilm. 100; in which last case the authorities seem to have been carefully collected and reviewed. In addition, 10th Johns. 36, and 4 Wend. 290, may be cited as sustaining the view taken by the Supreme Court.(*a*)

Another error assigned is, that by the contract set out in the fourth count, and given in evidence by the plaintiff, the parties became partners, and that consequently the plaintiff has mistaken his remedy. In this agreement, Teed covenants "to do the carpenter and mill-wright work appertaining to a flouring mill of four run of stone, in a good and workmanlike manner, to pay the defendant $50, to furnish money for the purchase of irons, glass, nails, bolting cloths, &c., which, with all other moneys advanced, was to be refunded with twelve per cent. interest from the completion of the mill, from defendant's share of the profits of said mill. Teed was to advance such further sums as he could command, and as should be necessary for the prosecution of the work, and was to advance the money for the payment of one Consel for hewing timber for the mill, one year from the date of the agreement. All money to become due Teed under the contract, was to remain unpaid until all debts then due by the defendant could be liquidated. The defendant, Selby, covenanted to furnish the hewn timber, sawed lumber, mill stones and other materials, to do the necessary digging, to board Teed and his hands, and to convey to Teed on the completion of the mill, one undivided fourth part of certain lands, and an undivided fourth part of the mill and appurtenances. Six months from the date of the contract, which was May 2d, 1840, Teed was to receive one fourth part of the profits arising from the saw mill on the lands to be conveyed, and one fourth part of the profits of the flouring mill, as soon as started, and no hand was to be employed without the consent of both parties.

Upon a careful examination of the terms of this agreement, and applying to them the general principles in relation to what constitutes a partnership, as between the parties themselves,

(*a*) See notes to Butts *v.* Huntley, 1 Scam. R. 410.

inter sese, we are strongly inclined to the opinion that Teed and Selby did become partners by virtue of said instrument, at least from the time that Teed became entitled to the perception of the profits in the said two mills. It is, however, unnecessary to decide upon the character of this instrument, under the view which we take of this objection. It is now made for the first time, the record clearly showing that the defendant never made it in the Court below. As remarked before, the fourth count is not before us on demurrer, the defendant having waived any objections to it by pleading over. No motion was made to exclude this paper when offered by plaintiff, nor was the evidence demurred to as showing a state of facts destructive of the plaintiff's right to recover. The Court was not called upon in any manner whatever, to determine whether the contract created a partnership or not. On the contrary, it seems to have been the desire of defendant's counsel to make it appear by the evidence, that Teed was not a partner of the defendant. Under these circumstances, we cannot allow him now the benefit of this objection. In a case precisely like the present, where it was insisted, in the Supreme Court of New York, that the action could not be sustained, as the plaintiff and defendant before the commencement of the suit had become partners in the subject matter, it was held "that it was too late to urge the objection now for the first time." Smith *v.* Allen, 18 Johns. 247. We think that when the record satisfactorily shows, that the parties did not deem it proper to question certain of their respective rights in the Court below, they must be considered as having waived them, and cannot be permitted to dispute them here, in a Court of Appeal, for the first time. If a different course were allowable, this Court in many cases, and in violation of the Constitution, would become a Court of original jurisdiction.

The last assignment of error goes to the overruling of the motion for a new trial, which was made by defendant, for the reason amongst others, that the verdict was against law and evidence; and the consideration of this assignment renders it necessary to advert to the evidence which is very

voluminous indeed. The following facts, which bear particularly on the question of rescission, and are deemed important, and which have been extracted and condensed with some considerable care, appear to have been established by the evidence:

Teed, sometime after the contract was made, employed hands and went to work on the frame of said flouring mill, and sometime in August, 1840, he was ready to raise said frame, but he was delayed in doing so, the defendant, Selby, not having done the necessary digging. It was not before sometime in October that the frame was put up. Some of the materials, as some witnesses say, were not furnished quite as fast as they were needed. If they had been furnished in time, witnesses think that Teed would have probably procured hands and finished the job sooner. Teed went on and put in the running work at first for two run of stones, and the mill was started. In summer of 1843, about three weeks before his death, Teed had prepared in part, the wheels for the running work of the remaining two run of stones, and wanted timber to make the cogs for said wheels, which was not then furnished. The mill stones for the last two run were not furnished before Teed's death. Some of the plaintiffs witnesses are of opinion, that if the materials had all been properly on hand, the grist mill might have been completed before Teed died. Some time after Teed's death, his administrator, a physician, offered to complete the contract entered into by his intestate, which defendant declined, unless he would first take out the running work put in by Teed, as it was not well done, and of no use, and put in other work. It is shown by the testimony of several wheelwrights that the running work put in by Teed was really very defective, not worth the material, and that it had to be taken out and had to be replaced by a new one. The delay in digging is explained be several witnesses, as arising from the fact that Teed had to direct it, or to lay it out, and that he failed to do so; that at one time when the digging should have been done, he was absent for upwards of a week. Teed, while he was at work at Selby's mill, was engaged in building two or

more mills for other people. The defendant, Selby, complained often to Teed about the work not being well done, and also heard Selby complain that he, Teed, had failed to give directions as to the digging. Teed was never heard to complain about Selby's delay. If full credence were to be given to one of defendant's witnesses, it would appear that in several instances, the materials were ready a year before Teed made use of them, and that at one time, he did not work at all for six months; and also that when Teed asked for the timber to make the wheels for the remaining two run of stones, he was required to point out what kind of timber he wanted, which he promised but failed to do. The witness, for reasons apparent on the record, is, however, not entitled to full credit, but in so far as his testimony is supported by others, and this is really the case with the greater portion of his statements, it cannot be rejected. All witnesses who are asked the question, testify that Teed, up to the time of his death, claimed that the contract was in force. It does not appear that Teed furnished the $50.00, which he was to have furnished, nor any other sums of money, save what he had made out of the profits of the grist mill, and what he had paid to Consel. Several witnesses say that if Teed had worked steadily, the whole work might have been performed before he died.

Upon this testimony, the jury below found a verdict for plaintiff, or in other words, they found that the contract heretofore existing, had become totally rescinded by the default or neglect of the defendant, Selby, as to himself, and that Teed, having done everything on his part to be performed, became entitled to treat it as rescinded.

Now, we are of opinion that in this the jury were most obviously and manifestly mistaken. If the evidence show any default at all on defendant's part, it shows one so slight in its nature, that no rescission can be founded upon it, for it is not every partial neglect or refusal to comply with some of the terms of the contract by one party, which will entitle the other to abandon at once the special and solemn obligation entered into by the parties, and by which they had made

for themselves the law which was to control them. In order to justify an abandonment of the contract, and of the proper remedy growing out of it, the failure of the opposite party must be a total one; the object of the contract must have been defeated, or rendered unattainable by his misconduct or default. For partial derelictions, and non-compliances in matters not necessarily of first importance to the accomplishment of the object of the contract, the party injured must still seek his remedy upon the stipulations of the contract itself.

The most that can be said of Selby's conduct is, that he was somewhat dilatory in preparing the digging, and furnishing materials. But it was at last all furnished, with the exception of some timber which was asked for a short time before Teed died. There was no necessity for furnishing the two last mill stones, as the running work for them was not yet prepared when Teed died. Much of the defendant's testimony contradicts the fact that there was any delay; but as the jury had a right to determine the contradictory evidence in favor of the plaintiff, we, of course, do attach no weight to these denials here. It is clearly established, however, by the proof, that Teed was equally dilatory —that he did not work steadily, and that some of Selby's delay was in fact caused by Teed's own negligence and carelessness. But even if Selby's default had been one of greater magnitude, and one which could have been clearly charged upon him alone, it is manifest from the evidence that Teed waived all objections on that score, and proceeded with the work until very shortly before his death. If, then, he had any cause to abandon the contract at any time while he was progressing with his work, it is evident that he has not chosen to do so, but by going on after the existence of such cause, he has affirmed, in the most unequivocal manner, the continued subsistence of the contract.

As for the offer of the administrator to complete the contract, and the refusal of Selby, it is only necessary to say, without deciding any other point which might be presented by this peculiar state of facts, that the refusal of Selby was qualified by

his stating, that he would allow such completion, provided the defective work was first taken out, and other put in place of it. This we think he had a right to demand, and it does not appear that the administrator assented to this proposal.

The motion for a new trial, for the reason that the jury found against the law and the evidence, ought to have been allowed by the Court below. For this error, judgment must be reversed at the costs of the appellee, to be paid by him in due course of administration, and the cause is remanded for a new trial, and such further proceedings as to law and justice may appertain.

Judgment reversed.

WILLIAM W. PICKERING, appellant, *v.* FLETCHER MIZNER *et al.*, appellees.

Appeal from Kendall.

Where a case is taken to the Supreme Court by appeal, the appeal bond should be copied and certified by the clerk of the Circuit Court as a part of the record, that the Supreme Court may determine whether the order allowing the appeal has been complied with.

This case originated before a justice of the peace of Kendall county, who rendered a judgment in favor of the plaintiff for $54, and the defendant appealed to the Circuit Court. It was there heard before the Hon. John D. Caton and a jury, at the April term, 1847, when a verdict was rendered for the plaintiff for $37.78, for which sum the Court rendered a judgment, and for five-sixths of the costs.

The defendant prayed an appeal, which was allowed on condition that he enter into a bond with one Decolia Towle, as security, in the sum of $150, within forty days.

T. L. DICKEY, for the appellees, moved to dismiss the appeal in this case, because, by the order of the Circuit Court, the appeal was allowed on condition that the appellant

should enter into bond with Decolia Towle, his security, in the sum of $150, in forty days from the adjournment of said Court, and it appeared that the appeal bond was executed by said "Decolia Towle and others as his securities." It did not appear from the record sent up, that the bond was in the sum of $150, nor what was the condition, if any, therein contained.

He contended that a copy of the bond should be certified in the record; that the parties thereto should be the same as directed in the order granting the appeal; and that an equivalent bond would not be a compliance with the order. In support of these positions he cited Ryder *v.* Stevenson, 3 Scam. 540, and Brooks *v.* Jacksonville, 1 do. 568.

D. L. GREGG, for the appellant, resisted the motion.

The Opinion of the Court was delivered by

TREAT, J.* The appellees move to dismiss this appeal, because the record fails to show that the appeal was perfected by the appellant. The clerk certifies that an appeal bond was filed as required by the order allowing the appeal, but the bond is not copied into the record. This is not sufficient. The clerk should have copied the bond, and certified it as a part of the record, so that this Court could determine whether the order of the Circuit Court was complied with. That is a question for this Court, and not the clerk, to decide. The motion is granted.

Appeal dismissed.

* WILSON, C. J. and Justice DENNING did not hear the motion, &c.

RACHEL RIGG, appellant, *v.* JOHN COOK, who sues by his next friend, A. G. Edwards, appellee.

Appeal from St. Clair.

A settled on certain lands, and to secure the title, purchased of B certain Militia claims. To secure the purchase money and other indebtedness to B, he mortgaged the lands to him with a covenant of warranty. The claims were afterwards confirmed, and the lands entered with them: *Held*, that A although he had not the legal estate at the time of executing the mortgage, by entering the land, acquired it, and that the same enured to the benefit of the mortgagee: *Held*, also, that A and all persons claiming through him were estopped by the covenant of warranty contained in the mortgage from asserting any title as against the mortgagee and those claiming under him.

Where a Court has authority to order a sale of land and a sheriff to make such sale, the errors of the one and the irregularities of the other must be inquired into and corrected directly, and not collaterally; either by a resort to an appellate tribunal, or a direct application to the Court issuing the process, and having the right to control it.

A witness was inquired of as to the control of the property of a deceased person: *Held*, that the inquiry was proper.

A witness was asked to state all that was said by a person in possession of land at a time when he paid rent, relating to and explanatory of such payment: *Held*, that the statements accompanying the payment of the rent were a part of the *res gestæ*, and were admissible for the purpose of illustrating the character of the transaction, and explaining the object and intention of the party.

While a tenancy exists, the tenant cannot dispute the title of his landlord, either by setting up a title in himself or a third person. The possession of the tenant is the possession of the landlord as long as the tenure is acknowledged. It is not until the tenure is denied, and the fee claimed adversely, that the possession assumes a hostile character and the Statute of Limitations begins to run.

Where a possession has been consistent with or in submission to the title of the real owner, nothing but a clear, unequivocal and notorious disclaimer and disavowal of the title of such owner will render the possession, however long continued, adverse.

A party has the right to have the jury polled on the receipt of the verdict, whether it is brought in sealed or delivered *ore tenus* by the foreman. This right, however, must be exercised before the jury are discharged.

A direction to the jury to seal up their verdict and separate, does not dispense with their personal attendance in Court when the verdict is opened; and if any of them then dissent, the verdict cannot be received.

After a verdict is received, and the jury discharged, the control of the jury over the case is at an end, and they cannot be recalled to alter or amend the verdict.

EJECTMENT, 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 May term, 1847. Verdict and judgment for the plaintiff.

The evidence and instructions on the trial in the Court below, are stated in the Opinion of this Court.

W. H. Underwood, for the appellant.

1. The four militia claims mortgaged by Hosea Rigg and wife to Perry, were confirmed under an Act of Congress of March 3rd, 1791, the sixth section of which authorized the Governor of the Northwest Territory to make a grant of not exceeding one hundred acres of land, to certain persons who had done military duty at Vincennes, to be laid in such form and place as said Governor should direct. Public Land Laws, &c. Part I, 42. The claims in question were unlocated grants at the time of the making of the mortgage in question. Afterwards, by an Act of Congress of February 20th, 1812, commissioners were appointed to inquire into the validity of claims derived from the confirmations of Governors under the above Act. *Ib.* 198, § 1. Afterwards, on the 16th day of April, 1814, an Act of Congress was passed, confirming the claims in question among other claims, setting apart a district for the same to be entered, and allowing persons having such unlocated claims to enter lands therein, by giving in exchange the old confirmations. *Ib.* 244–6, §§ 2, 3, 4, 6.

The mortgage was given of claims which were inchoate, and were chattels real (5 Johns. Ch. R. 227), and, at the time it was given, it was presumed from the description in the mortgage, that it would have been located under the Act of 1791. The fact that the mortgaged claims were exchanged afterwards under a subsequent Act of Congress, did not enable the mortgagee or his representatives to proceed at law against the property taken in exchange for the mortgaged chattels. 3 Gilm. 463; 13 Peters, 498, 450. The foreclosure at law only transferred the title of the mortgagor in the mortgaged property at the time of the execution of the mortgage. State Bank *v.* Wilson (*ante* 57); 4 Scam. 364.

2. The execution against Rigg and wife ought not to have been admitted in evidence, because it varied from the judg-

ment in names of parties. Williams *v.* Claytor, 1 Scam. 505; Blanchard *v.* Blanchard, 3 Iredell, 107; and because the property directed to be sold is uncertain, and the execution, therefore, void. Fitch *v.* Pinckard, 4 Scam. 83. To make a judicial sale valid, there must be a legal judgment, and an execution authorized by such judgment against the property sold. Curtis *v.* Doe, Bre. 100; Hinman *v.* Pope, 1 Gilm. 136; Atkins *v.* Hinman, 2 do. 448.

3. The mortgage not being of the land in question, the title afterwards acquired in 1814 and perfected by Patent in 1840 in Rigg, does not enure to the benefit of the purchaser on the mortgage. By the Common Law, a subsequent title only enures where there is a warranty of title to the particular land. 11 Ohio, 253; 1 Cowen, 616; 9 do. 18; 1 Wend. 502. Our statute in relation to titles enuring, in force, July 1st, 1827 (long after this mortgage was made and foreclosed), only applies to a case where a grantor conveys in fee simple absolute. § 7.

4. The Patent to Rigg in 1840 is conclusive evidence of title in him at that time, and merges all previous equities in a Court of Law. 13 Peters, 498, 450, 517.

5. The Court below erred in permitting Davis to testify who had the control of Gov. Edwards' real property after his death; that is a question of law. And also who administered upon his estate; that should have been proved by the records the Probate Court. Williams *v.* Jarrot, 1 Gilm. 129.

6. The statements made by Rigg at the time of paying rent were admissible as a part of the *res gestæ*. 1 Greenl. Ev. 123, §§ 108–9; 1 Starkie's Ev. 36; 2 J. J. Marsh. 383. The payment of rent, as rent, is always open to explanation. Chitty on Con. 260; 1 Eng. Com. Law R. 355.

7. The doctrine of estoppel is construed strictly, and must be certain to a certain intent. 1 Greenl. Ev. 26; § 22. By the Common Law, a tenant is not estopped from denying the title of his landlord, except a tenant by indenture. The latest decisions are, that only a tenant by indenture and one who enters upon land under his landlord's title, is estopped from denying the landlord's title. 2 Smith's Leading Cases,

472; 2 Thomas' Coke, 331; 7 Wend. 403; 12 do. 108; 1 Greenl. Ev. § 25; 1 Scam. 209.

L. TRUMBULL, for the appellee.

I. The witness, Davis, was not asked who administered upon the estate of N. Edwards, and his statement that Mrs. Edwards was executrix was uncalled for and wholly immaterial, as the will of said Edwards, also in evidence, established that fact. Davis was required to state, and did testify all that Rigg said about the payment of rent and explanatory thereof, and the refusal of the Court to permit said witness to state what Rigg told him upon other subjects, was right.

II. By the payment of rent and the mortgage with covenants of warranty, Rigg was estopped from disputing plaintiff's title. 3 Peters, 48; 1 Greenl. Ev. § 24.

III. The militia claims were real estate. 15 Peters, 93. A title to land becomes a legal title when confirmed, and such confirmation is a higher evidence of title than a Patent. 2 Howard's (U. S.) R. 344.

A confirmation to the original claimant and his legal representatives enures by way of estoppel to the grantee of the original claimant. 1 Ohio Cond. R. 181, 487; 5 Ohio, 337; 1 Ld. Raymond, 729; 12 Johns. 204; 4 Bibb, 436; Adams Ej. 47, 48, and 306 and notes. 2 Gilm. 541; 4 Peters, 85.

The Patent to Rigg cannot be construed to operate against his grantee. 2 Howard's (U. S.) R. 316, 344.

IV. The generality of the objection made by defendants below to the admissibility in evidence of the record and proceedings upon the foreclosure of the mortgage, precludes the party from pointing out any specific objections in this Court.

A general objection to the introduction of testimony is vague and nugatory, and without weight in an appellate Court. Camden *v.* Doremus, 3 Howard's (U. S.) R. 530. If it were admissible to raise the objections at this time, they would not be tenable. There is no variance in parties or amount between execution and judgment when carefully examined.

All questions arising on judicial sales, when their validity is questioned in an ejectment suit, must be those of *authority*, not *irregularity*, or *error* in awarding, executing or confirming process. 1 Baldwin's C. C. R. 271, 272.

The regularity of the execution cannot be questioned collaterally. Buckmaster *v.* Carlin, 3 Scam. 111 ; Swiggart *v.* Harber, 4 do. 364 ; Voorhies *v.* U. S. Bank, 10 Peters, 474.

V. Defendant's right to poll the jury was waived by the agreement of counsel dispensing with the further attendance of the jury ; at all events, it is matter of discretion. 2 U. S. Dig. 696, § 296.

The Opinion of the Court was delivered by

TREAT, J. This was an action of *ejectment*, commenced in the St. Clair Circuit Court, on the 23rd of October, 1845, by John Cook against Rachel Rigg, for the recovery of the south-east fractional quarter of section twenty-three, and the north fractional half of section twenty-six, in township one north of range eight west, containing three hundred and thirty-nine acres, and eighty-five hundredths of an acre.

On the trial before the jury, the plaintiff read in evidence four several deeds of assignment of military claims from Jean B. Robillard, Michael Chartran, Charles Lafoevre, and Regis Martin to Jean F. Perry, bearing date in 1803, also a warranty deed, for the consideration of $800, from Perry and wife to Hosea Rigg, for the four militia claims, dated the 2d of May, 1808 ; also a mortgage from Rigg and wife to Perry, bearing date the 3d of May, 1808, in which the mortgaged premises are thus described: "all those four several tracts or quantities of one hundred acres of land, which, by a law of the United States, were severally granted to Michael Chartran, Charles Lafoevre, Regis Martin, and Jean Baptiste Robillard, as being militia men in the Illinois country, on the first day of August, one thousand seven hundred and ninety, and had done militia duty therein, and who, by several deeds recorded in the recorder's office, had conveyed the same to the said Jean F. Perry, and which the said Jean F. Perry, conveyed to the said Hosea Rigg, in fee

simple by deed dated the second instant, and which said four hundred acres of land are laid in the improvement of the said Hosea Rigg, where he now resides, at Turkey Hill aforesaid," and which mortgage was given to secure the payment of $1544, and contained a covenant of general warranty. The plaintiff then proved by the certificate of the Commissioner of the General Land Office, that the claims of one hundred acres each were confirmed to Jean F. Perry, as the assignee of Robillard, Chartran, Martin and Lefoevre, on the 15th of January, 1813. He then introduced a certificate of the register of the land office at Kaskaskia showing that Hosea Rigg did, on the first day of October, 1814, enter the south-east fractional quarter of section twenty-three, and the north fractional half of section twenty-six, in township one north of range eight west, which contain by the certificate of Elias Bancroft, deputy surveyor, three hundred and thirty-nine acres, and eighty-five hundredths of an acre, and paid for said fractional quarter and fractional half of sections aforesaid, with his confirmed unlocated claim to three hundred and eighty-nine acres, and eighty-five hundredths of an acre, being the whole claim of Jean B. Robillard of one hundred acres, the whole of the claim of Regis Martin of one hundred acres, the whole of the claim Michael Chartran of one hundred acres, and part of the claim of Charles Lefoevre of one hundred acres, which said claims appear of record in the books of this office, to have been confirmed as militia claims to Jean F. Perry, as assignee of the said Robillard, Chartran, Martin and Lefoevre; also another certificate from the same officer, showing that Rigg, at the date of his entry, established a right of pre-emption to the north fractional half of section twenty-six, by proof that he cultivated and improved the same, prior to the 5th of February, 1813.

The plaintiff then read in evidence certain entries from the records of the St. Clair Circuit Court, which showed that at the September term, 1822, in a proceeding by *scire facias* to forclose a mortgage, entitled "Adelaide Pensoneau, by her intermarriage, &c. *v.* Hosea Rigg, and Han-

nah, his wife," a verdict was returned in favor of the plaintiff for $2686, for which amount and the costs the plaintiff had judgment, with a general award of execution, and the plaintiff remitted $104.96 of the judgment; that at the March term, 1823, the record was so amended as to show that the *remittitur* was of a part of the verdict, and not of the judgment, and that the execution ordered was a *levari facias*. It appeared from these entries that the suit was contested. The plaintiff then introduced an execution issued out of the same county, on the 28th of March, 1823, commanding the sheriff of St. Clair county, "that of that certain tract of land with the appurtenances thereunto belonging in said county, containing four hundred acres, be it more or less, being the same tract on which Hosea Rigg and Hannah his wife lately resided, and being the same mentioned in the mortgage deed in the *scire facias* set out, you cause to be made as well the sum of two thousand five hundred and eighty-one dollars and four cents, with interest to be computed thereon from the ninth of September last, which Adelaide Pensoneau by her intermarriage with Augustin Pensoneau, deceased, administratrix with the will annexed, of all &c. of Jean Francois Perry deceased, lately in our Circuit Court of said county recovered against the said Hosea Rigg and Hannah, his wife, in damages, by reason of the non-performance of the covenants in the said *scire facias* mentioned, as also the sum of thirty dollars and forty-two cents for the costs and charges about her suit in that behalf expended." On this writ, the sheriff made return, that he levied the same on the land in question on the 9th of April, 1823, and sold the land on the 26th of that month for the sum of $1004.64. The defendant objected to the introduction of the judgment, the execution, and the sheriff's return, and excepted to the decision of the Court allowing them to be read in evidence. The plaintiff proved that the lands were duly appraised before the sale, and then introduced a sheriff's deed to Adam W. Snyder, the purchaser at the sale, dated the 3rd of September, 1823, for the lands in question; also, a warranty deed from Snyder and wife, to the late Gov. Edwards; also,

legal conveyances from the heirs at law of Gov. Edwards to the plaintiff.

The plaintiff then called William C. Davis, who testified that Gov. Edwards died between 1831 and 1834, leaving Elvira Edwards, his widow, and certain persons, his heirs at law. Witness did not know the land in dispute by the numbers, but Hosea Rigg resided on it, and paid a rent of $25 per year for two years between 1836 and 1840, to witness for Mrs. Elvira Edwards. Witness acted as the agent of Mrs. Edwards and the family, and Rigg did not object to the payment of the rent. The plaintiff's counsel then asked the witness who had the control of Gov. Edwards' property after his death; to the answering of which question, the defendant objected, but the Court overruled the objection, and the witness stated that Elvira Edwards, executrix, controlled the property and managed it for herself and children. The defendant's counsel then asked the witness if Rigg did not say, when he paid the rent, that he was defrauded by Snyder and Edwards in the land transaction, and to state all that he then said about the title to the land; but, on an objection by the plaintiff's counsel, the Court refused to allow the question to be answered, but instructed the witness to state all that Rigg said in relation to and explanatory of the payment of rent, but not to state what he said in relation to the title of the former owners of the land, and as to his once having paid the mortgage. The witness proceeded to state, that at the time of the payment of the rent, Rigg said he was under great obligations to Gov. Edwards, who had promised to let him have the premises as long as he (Edwards) lived, and he then expected that Gov. Edwards would live longer than himself; that he expected to pay the rent with his pension money, and had been in the habit of paying rent when the pension agent came around; that at this time, Rigg had an inclosure of thirty acres on the land, and was eighty or ninety years of age.

Joseph Scott testified, that Rigg lived on the land in 1797, and afterwards had two mills on the land, and forty acres in cultivation; that Rigg, up to his death, claimed and used the

land as his own; that the defendant always resided on the land with her father, and since his death has used and claimed the land as her own.

William Moore swore, that Rigg's improvement was on the north fractional half of section twenty-six; that from 1820, W. G. Brown claimed one hundred acres of the land, and for some years has had an inclosure thereon; that Rigg had possession of the land in 1814, and cultivated and claimed it as his own to his death, and the defendant has claimed the part unsold since.

Joseph Newberry stated, that there was a small improvement on the north part of the land, on which the defendant resided; and he advised her before the commencement of the suit, to sell the land, but she replied she had gained it, and wanted a home.

The defendant then introduced a Patent from the United States to Hosea Rigg, for the land in question, dated the 22nd of October, 1840; also a deed from Hosea Rigg to the defendant, for the north fractional half of section twenty-six, dated July 1st, 1841. She then proved by Alexander Scott, that Rigg settled on his improvement in 1801, and resided there until his death, claiming and using it as his own.

Hardy Johnson stated, that he had fourteen acres of the land inclosed at the commencement of the suit; that Davis Pulliam had also an inclosure of twelve acres.

The defendant then introduced a deed from her to Johnson for fourteen acres of the land, dated 25th of March, 1843; also a deed from her to Pulliam for twelve and a half acres, dated the 9th of October, 1845.

The defendant then offered to prove by a witness, that A. W. Snyder paid, in fact, nothing for the land, and that witness employed Gov. Edwards as an attorney, in 1818, to examine into the title to the land; and that Edwards afterwards purchased the land, well knowing that Snyder paid nothing for it; which evidence was objected to and excluded by the Court. This was all of the evidence.

The Court, at the instance of the plaintiff, gave the following instructions: *First*, if the jury believe from the evidence,

that Hosea Rigg occupied the premises described in the declaration, or a part thereof, as the tenant of the plaintiff or of those from whom he derives title, and paid rent therefor, then the said Hosea Rigg and those claiming under him are estopped by such payment of rent, from questioning that those to whom he paid rent, had at the time title to the land. *Second*, that the possession of the land in question for more than twenty years by the defendant, or those under whom she claims, is no bar to the recovery of the plaintiff in this suit, if they believe that such possession was in submission to the title of the plaintiff, or those from whom he claims. *Third*, that possession, in order to bar the claim and right of the plaintiff in this suit, must be adverse to the plaintiff's title; and a possession for more than twenty years consistent with the plaintiff's title constitutes no defence to this action. *Fourth*, that the only question in this case is between John Cook and Rachel Rigg, and that the jury in this case have nothing to do with the rights of other persons. *Fifth*, that the jury have no right to draw any inference unfavorable to the plaintiff by reason of his objecting to the introduction of testimony, which was excluded by the Court as improper. *Sixth*, that the mortgage from Rigg and wife to Perry is a mortgage of real estate. *Seventh*, that the Patent issued to Hosea Rigg in 1840 inures to the benefit of his mortgagee, and those claiming under him; and the issuing of said Patent to Rigg in 1840 cannot be set up in this case to defeat the title derived from Rigg, for the same land and before the Patent issued. *Eighth*, that the claims of innocent purchasers not parties to this suit, have nothing to do with this case; and their titles and possessions obtained before the commencement of this suit are not affected by the decision in this case. *Ninth*, that if the jury believed from the evidence, that the defendant's only claim to the land in question is derived from Hosea Rigg, and that said Hosea Rigg, before the Patent issued for the land, mortgaged the same to one Perry with a covenant of warranty, and that the plaintiff has shown a connected title from said Perry to himself, then the said defendant is estopped from setting up the title

acquired by the issuing of said patent against the said plaintiff. The defendant excepted to the giving of these instructions.

Before the jury retired, it was agreed by counsel, that the jury might seal up their verdict and separate, and that the verdict might afterwards be reduced to proper form. The jury accordingly made up a sealed verdict as follows, "we the jury find the defendant guilty," which was opened the next morning at ten o'clock; and at two o'clock of the same day, it was reduced to form by the plaintiff's counsel, to which the defendant made no objection, but asked that the jury, which had not then been discharged for the term, might be polled; which request the Court denied, and the defendant excepted. The verdict, as finally entered, finds the defendant guilty of withholding the possession of the land in question from the plaintiff, who is entitled to an estate in fee therein; except as to the part claimed by Brown, Johnson, and Pulliam, as stated in the evidence, of which part the defendant is not guilty. The Court overruled a motion for a new trial, and rendered judgment on the verdict. The defendant prosecuted an appeal to this Court.

For a full understanding of this case, it may be proper to look into the origin and character of these militia claims. The sixth section of the Act of Congress of the 3d of March, 1791, conferred authority on the Governor of the Territory northwest of the Ohio, to make a grant of land not exceeding one hundred acres, to each person who had not obtained any donations of land from the United States, and who, on the first of August, 1790, was enrolled in the militia at Vincennes, or in the Illinois country, and had done militia duty therein; the land to be laid out at the expense of the grantees, and in such place and form as the Governor might direct. 1 Story's Laws, 203, ch. 101. The Act of the 20th of February, 1812, appointed commissioners to inquire into and report upon the validity of claims to land in the Kaskaskia Land District, which were derived from confirmations made or pretended to have been made by the Governors of the Northwest and Indiana Territories. 2 Story's Laws,

1213, ch. 22. The Act of the 16th of April, 1814, confirmed the claims reported by the commissioners, and set apart a certain tract of country within the Kaskaskia Land District, to satisfy the unlocated claims of persons to land within the Illinois Territory, confirmed to them theretofore, or by that Act; and gave to every person residing within the reserved district, and who had actually cultivated or improved a tract of land therein prior to the 5th of February, 1813, a right of pre-emption in the purchase of not less than one quarter section, nor more than one section, including his improvement, the entry to be made on or before the first day of October, 1814; and authorized the purchaser, if the owner of any unlocated confirmed land claim, to deliver the evidence thereof to the receiver, in full payment of the quantity of acres contained in the claim. The Act further provided, that after the first of October, 1814, the land within the reserved district should be subject to entry by any person being the owner of unlocated confirmed land claims. 2 Story's Laws, 1415, ch. 120.

It appears from the evidence, that Rigg settled on the land in controversy as early as the year 1801, and continued in the actual possession until his death, subsequent to the 1st of July, 1841. In 1808, he purchased the militia claims for the purpose of securing the title to the land. To secure Perry in the payment of the purchase money and other indebtedness, he mortgaged the four hundred acres called for by the claims, which were described in the mortgage as laid in the improvement, where he then resided. The claims were not confirmed, and could not, therefore, be so appropriated as to vest in Rigg the legal estate in the land; but the mortgage gave them a fixed and definite location on the land claimed and improved by Rigg. It was no doubt the understanding of the parties, that the claims should be applied in obtaining the title to the land then claimed by Rigg; and that the mortgage should embrace this identical land, and not a floating right to that number of acres anywhere in the country. Rigg, intending in good faith to carry this design into effect, did not hesitate to mortgage the land of which he expected to

become the legal owner; and the more effectually to secure Perry he covenanted to warrant and defend the title. The claims were confirmed in 1813, and Rigg, availing himself of the right of pre-emption, founded on his residence and improvements, entered the land with the claims, in 1814, and thus acquired the legal estate. We entertain no doubt that the mortgage was intended to embrace the land in question. The difference in quantity was probably the result of subsequent surveys and sub-divisions, not then in the contemplation of the parties. That cannot affect the validity of the mortgage as to the part actually entered by Rigg. If the land purchased by Rigg in 1814, was the same mortgaged by him to Perry in 1808, the after-acquired title enured to the benefit of the mortgagee; and Rigg, and all persons claiming through him, are estopped by the covenant of warranty contained in the mortgage, from asserting any title as against the mortgagee, and those claiming under him. On this point the authorities are uniform and conclusive. 4 Kent's Com. 98; Jackson *v.* Matsdorf, 11 Johns. 91; Jackson *v.* McCrackin, 14. do. 193; Terrett *v.* Taylor, 9 Cranch, 43; Somes *v.* Skinner, 3 Pick. 52; White *v.* Patten, 24 do. 324; Allen *v.* Parish, 3 Ham. 107; Bond *v.* Swearingen, 1 do. 395.(*a*)

The mortgage being a valid one of the lands in dispute, the question arises, was the title of Rigg divested by the proceedings to foreclose the mortgage? These proceedings are evidence in a collateral action, and in determining upon their validity, the only question is one of authority; whether the Court pronouncing the judgment had the power to adjudicate upon the rights of the parties under the mortgage, not whether its decision was correct, or erroneous; and whether the sheriff had authority to execute the process of the Court, not whether his acts under it were regular or irregular. If the Court had jurisdiction of the case, and the officer authority to make the sale, the errors of the one, and the irregularities of the other, are to be inquired into and corrected directly, and not collaterally; either by a resort to an appellate tribunal, or a direct application to the Court issuing the

(*a*) De Wolf *v.* Hayden, 24 Ill. R. 529; Jones *v.* King, 25 Ill. R. 383; Gonchneur *v.* Mowry, 33 Ill. R. 333.

process and having the right to control it. Voorhees *v.* The Bank, 10 Peters, 449; Buckmaster *v.* Carlin, 3 Scam. 104; Swiggart *v.* Harber, 4 do. 364.(*a*) The Act of March 22d, 1818, provided for the foreclosure of a mortgage upon a *scire facias* to the mortgagor sued out by the mortgagee, his heir, executor, administrator or assignee, and authorized a sale of the mortgaged premises on process of *levari facias*, after an appraisal of the property, and upon twenty days' notice of sale. Laws of 1819, page 177. By the Act of the 17th of February, 1823, the sheriff was required to give but fifteen days' notice of the sale. Laws of 1823, page 169. The remedy pursued in the foreclosue of the mortgage was authorized by the statute. The Court had jurisdiction of the subject matter, and acquired jurisdiction over the persons of the parties; and its decision must be regarded as conclusive of their rights under the mortgage. The process issued for the enforcement of the judgment was a legal one, and justified the sheriff in levying on and selling the land in question. If there was error in the judgment, the mortgagor might have procured its reversal; if the proceedings under it were irregular, the Court would have set them aside on his application.

It is insisted that there are fatal variances between the judgment introduced in evidence, and the one set out in the execution, in the amount of the judgment, and in the names of the parties. The answer to the first objection is, that the judgment as amended at the subsequent term corresponds precisely in amount with the one described in the writ. There is no substantial variance in the names of the parties. The name of the plaintiff is the same, both in the record of the judgment, and in the process; the only difference being in the description of the person, or the character in which she sued. This description is abbreviated in the entry of the judgment, while it is set out at length in the execution. The two descriptions are consistent with each other, and clearly indicate the same person.

It is contended that the sale by the sheriff was void, because twenty days did not intervene between the levy and the sale.

(*a*) Buckmaster v. Rydea, 12 Ill. R. 215; Guynon *v.* Astor, 2 How. U. S. R. 345; Hickey *v.* Stewart, 3 How. U. S. R. 762; Schnell v. Chicago, 38 Ill. R. 388.

The Act of the 17th of February, 1823, in force when the proceedings on the execution took place, required but fifteen days' notice of the sale. The sheriff, therefore, had time to give the required notice.

The estate of the mortgage was divested by these proceedings, and vested in the purchaser at the sheriff's sale; and that estate, by intermediate conveyances, has passed to the appellee.

The offer of the appellant to prove that Snyder paid nothing, in fact, for the land and that this was known to his grantee before he purchased it, was properly refused by the Court. The land was sold to Snyder for more than a thousand dollars, and Rigg received a credit on the judgment to that extent. Whether the plaintiff in the judgment, or the sheriff, ever received payment of this amount, was a matter of no importance to Rigg, or the appellant. That was a matter exclusively between the plaintiff, the sheriff, and the purchaser.

The Court did not err in permitting the witness to state who had the control of Governor Edwards' property after his death. This testimony was not called out with a view of showing who was the personal representative of Edwards; but for the purpose of ascertaining who had the management of the property. The appellee did not offer to prove by the witness who was the executor of Edwards. The letters testamentary would have been the best evidence of that fact.

The Court properly allowed the witness to state all that Rigg said at the time he paid the rent, relating to, and explanatory of such payment. These statements accompanying the act of payment, were a part of the *res gestæ;* and admissible for the purpose of illustrating the character of the transaction, and explaining the object and intention of the party. But the declarations of Rigg, respecting the payment of the mortgage, and the title of the former owners of the land, were properly excluded by the Court. These matters were foreign to the question of the payment of the rent, not tending to explain or elucidate it. If the mortgage was paid, that would have been a good answer to the appli-

cation to foreclose it; and the defence should have been interposed in that proceeding. The fact that the mortgage was unpaid was *res adjudicata;* and the judgment must forever be conclusive of that question. The title of the parties under the mortgage had long since vested, and was not to be impeached by the declaration of a party interested in defeating it. It was a clear attempt on the part of the appellant to prove facts indirectly, and by testimony coming from an interested source, which she would not have been allowed, on any principle of law, to do directly and by disinterested testimony.

The appellant can claim no right to the land in consequence of an adverse possession. The possession of her ancestor was subservient to the title derived under the mortgage, as late, at least, as 1836. After that time, he voluntarily paid rent to the heirs of Gov. Edwards, and thereby admitted himself to be their tenant. Even if adverse from that period, the possession had not ripened into a right when this suit was commenced, the right of entry of the real owner not being barred until an adverse possession of twenty years. While a tenancy exists, the tenant cannot dispute the title of his landlord, either by setting up a title in himself, or a third person. The possession of the tenant is the possession of the landlord as long as the tenure is acknowledged. It is not until the tenure is denied, and the fee claimed adversely, that the possession assumes a hostile character, and the Statute of Limitations begins to run. And where the possession has been consistent with, or in submission to the title of the real owner, nothing but a clear, unequivocal and notorious disclaimer and disavowal of the title of such owner, will render the possession, however long continued, adverse. Willison *v.* Watkins, 3 Peters, 43; Zeller *v.* Eckert, 4 Howard's (U. S.) R. 289; Jackson *v.* Burton, 1 Wend. 341.(*a*)

There was no error in the instructions of the Court. The law of the case was fairly and correctly stated to the jury.

A party has the right to have the jury polled on the receipt of the verdict, and a denial of the right is error. Johnson *v.* Howe, 2 Gilm. 342. It makes no difference whether the verdict is brought

(*a*) Peyton *v.* Stith, 5 How. U. S. R. 486.

in sealed, or delivered *ore tenus* by the foreman. Fox *v.* Smith, 3 Cowen, 23; Jackson *v.* Hawks, 2 Wend. 619. A direction to the jury to seal up their verdict and separate, does not dispense with their personal attendance in Court, when the verdict is opened; and if any of them dissent, the verdict cannot be received. Root *v.* Sherwood, 6 Johns. 68; Lawrence *v.* Stearns, 11 Pick. 501. After a verdict is received and the jury discharged, the control of the jury over the case is at an end, and they cannot be recalled to alter or amend the verdict.(*a*) Sargent *v.* The State, 11 Ohio, 472. When the verdict was opened in the present case, the appellant might have insisted on her right to have the jurors severally asked if it was their verdict; but omitting to exercise the right then, she was precluded from doing it afterwards. As we understand the bill of exceptions, the verdict was received by the Court in the presence of the jury; and the jury were then discharged from the case, with an existing stipulation of counsel, that the verdict might afterwards be reduced to form and entered of record. The right of the appellant to have the jury polled was gone, for the reason that the control of the jury over their verdict had ceased. She had still the right to insist that the real finding of the jury should be pursued in putting the verdict into form. No objection on this score was taken, and could not with any show of propriety have been; for while the verdict, as returned by the jury, was for the whole of the premises claimed, the verdict as finally entered was but for a part of the premises. This modification was not to her prejudice.

The judgment of the Circuit Court is affirmed, with the costs of this appeal.

Judgment affirmed.

(*a*) Nomaque *v.* People, Beecher's Breese R. 150.; Johnson *v.* Howe, 2 Gil. R. 345; Martin *v.* Morelock, 32 Ill. R. 485.

WASHINGTON COUNTY, appellant, *v.* ISAAC PARLIER, *et al.*, appellees.

Appeal from Washington.

Where the subject matter of a suit does not relate to a franchise or freehold, and where the judgment does not amount to twenty dollars, the remedy is by a writ of error, and not by an appeal. (*a*)

Motion made by the appellant, against a collector, in the Circuit Court of Washington County, the Hon. Gustavus P. Koerner presiding, at the October term, 1847, that he pay over the sum of $2398.97, due the county. The motion was disposed of by the Court, who rendered a judgment in favor of the defendant for costs. From this judgment the plaintiff appealed to this Court.

W. H. UNDERWOOD, and J. GILLESPIE, for the appellees.

Appeals for the removal of causes from an inferior to a superior tribunal are unknown to the Common Law, and can only be prosecuted in cases where they are expressly given by statute. Schooner Constitution *v.* Woodworth, 1 Scam. 511.

The appeal in this case should be dismissed:

1. Because the judgment below was not for twenty dollars besides costs. Rev. Stat. 420, § 47;

2. Because an appeal cannot be taken by a Corporation. The said forty-seventh section only applies to natural persons. County of Schuyler *v.* County of Mercer, *ante*, 20;

3. Because the appeal bond was executed more than twenty days after the order was made allowing an appeal, and no time is fixed in said order for executing the bond. It should, therefore, have been executed presently or during the term.

L. TRUMBULL, for the appellant, resisted the motion.

The Opinion of the Court was delivered by

TREAT, J.* The County of Washington made application

(*a*) But see Laws of 1865. p. 3.

*WILSON, C. J. did not hear the motion, &c.

to the Circuit Court for a judgment against the collector for failing to pay over a portion of the county revenue collected by him. The proceeding resulted in a judgment in favor of the collector for costs. From that judgment, the county prosecuted an appeal, which the appellee now moves to dismiss. The motion must be sustained. The ordinary mode of removing cases into this Court is by writ of error. The forty-seventh section of the eighty-third chapter of the Revised Statutes declares that, "appeals from the Circuit Courts to the Supreme Court shall be allowed in all cases where the judgment or decree appealed from be final, and shall amount, exclusive of costs, to the sum of twenty dollars, or relate to a franchise or freehold." This provision does not embrace the present case. The subject matter of the suit does not relate to a franchise or freehold, nor does the judgment below amount to twenty dollars. The remedy of the county is by a writ of error, and not by an appeal.

Appeal dismissed.

JOHN LAWRENCE, plaintiff in error, *v.* JOSIAH LANE, defendant in error.

Error to Peoria.

Where a party has paid money by compulsion under the judgment and process of a Court of competent jurisdiction, he will not be compelled to pay the same a second time.

No Court of Law, even with the assent of a debtor, has authority or power to appropriate the private property of one to the payment of another's debt.

Where a Court has no jurisdiction over the person or property of an individual, his interests cannot be affected by its judgment or decree.

The common practice in Courts of Chancery upon the foreclosure of mortgages, is, to decree a surrender of the possession and title papers by the mortgagor, and those claiming under him.

A person who acquires an interest in a suit, *pendente lite*, cannot be made a party defendant on the record, unless he personally assert his claim.

BILL IN CHANCERY to foreclose a mortgage, &c. filed in the Peoria Circuit Court by the defendant in error against

the plaintiff in error. The case was heard upon the bill and answer before the Hon. John D. Caton, at the May term, 1847, when the usual decree of foreclosure was rendered.

The substance of the bill and answer is stated by the Court in their Opinion.

E. N. Powell, for the plaintiff in error, relied upon the following points and authorities:

1. This cause being set for hearing upon bill and answer, the answer is to be taken as true, and no evidence shall be received unless it be matter of record to which the answer refers. Rev. Stat. 96, § 32.

2. The answer of Lawrence shows that he was summoned as garnishee, at the suit of Arthur Tappan *et al.* *v.* Alexander P. Lane, and that, upon filing his answer to the interrogatories filed in said suit, a judgment was rendered against him for the amount due on the mortgage. The answer to this bill makes an exhibit of these proceedings in the attachment suit, a part of his answer herein. The answer of Lawrence to the interrogatories in the attachment suit, clearly shows that the money due upon the notes and mortgage was really and *bona fide* due to Alexander P. Lane. This answer in this suit, then, is to be taken as true; there can be no doubt that the judgment against the plaintiff in error would be a bar to this suit. The complainant has so elected to consider it, and the proceedings in the attachment suit shows that the money due upon the notes and mortgage, was really and *bona fide* due to Alexander P. Lane. Then this being the case, what right has the defendant in error to recover money which he admits, by not denying the truth of the answer, belongs to another and that that money has been attached in the hands of plaintiff in error, in a suit against the person who really and *bona fide* was the person to whom it was due.

III. Where a party has been compelled by a Court of competent jurisdiction, to pay a sum of money, no Court will compel him to pay it a second time. 3 Term R. 127, 128, 130; Holmes *v.* Remsen, 4 Johns. Ch. R. 467; Embree & Collins *v.* Hanna, 5 Johns. 101; Holmes *v.* Remsen, 20 do. 229.

A garnishee can plead the recovery, even though the plaintiff did not prove his debt, and even though the original debtor had not notice, in fact, of the attachment. Holmes *v.* Remsen, 4 Johns. Ch. R. 467; Andrews *v.* Herriot, 4 Cowen, 521, note.

Where the maker of a note was sued as garnishee in Georgia, and compelled to pay the money as debtor to the maker of the note, though it was indorsed *bona fide* to a citizen of Massachusetts, before the suit in Georgia was commenced; yet it was held by the Court in Massachusetts, on a suit by the indorsee, that the proceedings in Georgia were a bar. Hull *v.* Blake, 13 Mass. 153. And it may be laid down as a principle without exceptions, that a person compelled by a competent jurisdiction to pay a debt once, shall not be compelled to pay it over again. *Ibid.*; 4 Johns. Ch. R. 467; Embree & Collins *v.* Hanna, 5 Johns. 101.

The answer clearly showed that Shane was interested in the suit, and he was not made a party. The rule is, that if the answer disclose an interest in a third person in the subject matter of the suit, that person should be made a party. Herrington *v.* Hubbard, 1 Scam. 569.

Shane, as fully appears from the answer and exhibits, claimed the premises in the bill mentioned, by virtue of a sheriff's deed executed on a sale on execution issued upon the judgment rendered against plaintiff in error, as garnishee. He was interested, as the decree requires him to surrender up the possession of the premises, and the decree might otherwise affect his rights.

L. B. Knowlton, for the plaintiff in error, cited The People's Bank *v.* The Hamilton Manufacturing Co., 10 Paige, 481; 3 Powell on Mort. 964, 990; Cook *v.* Mancius, 5 Johns. Ch. R. 96; Reed *v.* Marble, 1 Paige, 409; Story's Eq. Pl. § 225, § 193; *Ibid.* § 228; 6 Maddock's Ch. R. 231.

Powell, in reply.

It is said by the counsel for the defence, that a mortgagor cannot dispute his mortgagee's title. This may be true, but certainly the mortgagee is not precluded from showing

that the mortgage has been satisfied, by the payment of the mortgage debt. This is what is alleged by the plaintiff in error.

The case referred to in 10 Paige (Reed *v.* Marble), only decides that the assignee of a mortgage must give notice of the assignment to the mortgagor, in order to protect himself against a *bona fide* payment of the mortgage debt. But this case decides more, and is decisive of this case; that the owner of the equity of redemption must be made a party to the foreclosure.

But it is said, that Shane comes into his interest in the matter in suit, *pendente lite*, and the case of The People's Bank *v.* The Hamilton Manufacturing Co., 10 Paige, 480, and 3 Powell on Mort. 990, are referred to in support of this position.

These authorities assert what no one will deny, that a purchaser, *pendente lite*, need not necessarily be made a party. But these cases do not determine what will constitute a *pendente lite*, so as to dispense with the necessity of making a person who becomes interested a party.

To constitute *pendente lite*, there must be a bill filed and subpœna served, and the following authorities are referred to in support of this position. 1 Vernon, 318; *ibid.*, 286; 29 Eng. Ch. R. 444; Bennett's Lessee *v.* Williams, 5 Ohio, 292; 3 do. 541.

The Opinion of the Court was delivered by

Purple, J. On the 27th day of July, 1841, Lawrence, the plaintiff in error, executed to Josiah Lane, defendant in error, a mortgage upon certain lands in Peoria county, conditioned for the payment of four hundred and fifty dollars in ninety days from the date of the same. On the 12th day of October, A. D. 1843, Lane filed his bill in Chancery in the Circuit Court of said county to foreclose this mortgage. The cause was continued from term to term, to October, 1844, when Lawrence appeared and filed his answer, in which he admits the execution of the mortgage as charged in the bill. He then proceeds to state, that on the 15th

of August, 1842, Lewis Tappan and others commenced an attachment suit against one Alexander P. Lane, in the Circuit Court of said county of Peoria, which on the day following, was served on him (Lawrence), as garnishee; that at the October term, 1842, the plaintiffs in said attachment suit recovered a judgment against said Alexander P. Lane for $2151.42; that interrogatories were filed to be answered by Lawrence touching his indebtedness to the said Alexander P. Lane, to which he made the following answer: "The said John Lawrence says, that he had no lands, tenements, goods, chattels, effects or estate of any kind in his possession or under his control, at the time of the service of the garnishee process, or at any time since; nor does he know of any person who is indebted to him, the said Lane.

"This respondent further says, that on or about the month of August, A. D. 1841, he purchased from Josiah Lane, the father of the said Alexander P. Lane, a tract of land for eight hundred dollars, and paid part down, and gave his promissory notes for four hundred and fifty dollars, one of which was for four hundred dollars, payable in three months from date, or in about that time, and the other for fifty dollars payable in good promissory notes on other persons; that the land purchased was purchased from Josiah Lane and the deed taken from him; but this respondent has no doubt, but that the said Alexander P. Lane was the real *bona fide* owner of said land, and that the sale was made by him and for his benefit, and that the notes taken in his father's name were for his benefit, and that it was so done to keep his creditors from reaching it, and that the amount due upon the said notes is really and *bona fide* due to said Alexander P. Lane.

"This respondent further shows to the Court, that the amount due from this respondent to said Lane now amounts to the sum of $450.00, there having been payments made which leave that sum now due;" that upon the filing of this answer, the Court, on the 12th of October, 1842, entered a judgment against him as garnishee of said Alexander P. Lane for the amount of $450.00, being the sum then due upon the notes and mortgage executed by him to Josiah

Lane aforesaid; that on the 17th of November, 1842, an execution was issued upon this judgment, which, on the same day, was levied upon the premises described in complainant's mortgage, which, on the 22d of December, 1842, were sold to Elihu N. Powell and William F. Bryan for $491.36; that on the 23d day of March, 1844, Powell and Bryan assigned their certificate of purchase to one David Shane, who, on the 23d day of September following (the time of redemption having expired), received from the Sheriff of Peoria county a deed for the premises so sold as aforesaid; that the said sum of $450.00 was all that was due from him to said Alexander P. Lane, at the time of the rendition of the said judgment upon the said garnishee process; and that said judgment was for the same money, the collection of which was sought to be enforced by the bill to foreclose the mortgage before mentioned.

The cause was set down for hearing upon bill and answer, and at the October term, 1847, a decree was made, appointing a day for the payment of the money due upon the mortgage, which was ascertained by the Court to amount to the sum of $582.55; and that in default thereof, that the mortgaged premises be sold by the Master in Chancery, and the money arising therefrom, applied in payment of the sum due by the mortgage, and costs of the foreclosure, and the surplus, if any, retained by the Master, subject to the order of the Court; that the defendant should be foreclosed of his equity of redemption, and that he, and all persons claiming under him, should surrender the possession of the mortgaged premises and title papers to the purchasers.

The counsel for the plaintiff in error contended: 1st, that David Shane should have been made a party defendant to the complainant's original bill, the answer of Lawrence disclosing, that he had an interest which might be affected by the decree; 2nd, that Lawrence having been served with a garnishee process in the suit of Tappan *v.* Alexander P. Lane, and a judgment having been rendered against him for the amount due on the mortgage, the same is thereby satisfied; and that having once paid the money, or the same

having been made out of the mortgaged premises, he can not be compelled to pay it again, and that the complainant in the Court below had no right to foreclose his said mortgage; and 3rd, that there was error in that part of the decree, which enjoins the surrender of the possession of the premises, as against Lawrence, and those claiming under im.

This is certainly an anomalous proceeding, and presents a question, which, at the first view, would appear somewhat embarrassing. While on the other hand it cannot be questioned, that where a party has paid money by compulsion, under the judgment and process of a Court of competent jurisdiction, he will not be compelled to pay the same a second time; yet, it is equally clear, that no Court of Law, even with the assent of a debtor, has authority or power to appropriate the private property of one to the payment of another's debts. The answer of Lawrence in this case discloses these facts: that Josiah Lane had a mortgage against him for $450: that, on being served with a garnishee process in the suit of Tappan and others against Alexander P. Lane, he admits in answer to interrogatories, that he owes that amount upon the mortgage, and states, without offering any reason for his opinion, that he believes that Alexander P. Lane is the equitable owner of the sum of money secured thereby; and permits a judgment to pass against him for that amount, and the land which had been mortgaged is sold on execution, and the proceeds applied in part payment of Tappan & Co.'s judgment against Alexander P. Lane; to all which proceedings, Josiah Lane is an entire stranger, having had no day in Court, and no opportunity to contest or assert his rights; and when he seeks to foreclose his mortgage, he is, for the first time, met with an objection, which, when rendered into plain English is, that by the judgment of a Court of Law, his money has been taken and applied to the use of another person, because the mortgagor, his creditor, entertained the belief that he, the mortgagee, was not the equitable owner of the mortgage. The Court is unanimously of opinion, that so far as the present defendant in error, Josiah Lane, is concerned, the pro-

ceedings in the attachment suit are wholly void; that the Court neither had jurisdiction over his person, nor his property. No suit or proceeding whatever had been instituted or was pending against him. It was a matter in which, if he had had actual notice of it, he would have had no right to interfere, either by way of objection, interpleader, exception or appeal.(*a*)

There is no principle of justice or law, which will thus deprive a man of his property without trial or notice. It is not to be presumed that the judgment upon the garnishee process, set out in the answer of the plaintiff here, was rendered with a full knowledge of the facts. No Court would render such a judgment, unless there was some misconception of the circumstances of the case.

We take the answer of the plaintiff to be true, and from that answer we can come to no other conclusion, than that there was collusion between Tappan & Co. and the plaintiff here, to devise some means to make the defendant's money pay the debt of Alexander P. Lane. If Josiah Lane really was not, and Alexander P., in equity *was* the owner of this mortgage, it was not the place to contest or decide that question upon a garnishee process in an attachment suit between Tappan & Co. and Alexander P. Lane.

The cases referred to in support of the principle, that a person who has once been compelled to pay money, by the decree of a Court of competent jurisdiction, shall not be compelled to pay the same again, do not meet this question. In all those cases, the proceedings were against the party whose interests were to be affected by the judgment or decree, and there was either actual or constructive notice given to the party, whose money or effects were to be appropriated, not in payment of another's, but of his own debt. They were contests between creditors of the same debtor, in which the garnishees, who owed the debtor, or had effects of his in their hands, had, upon a proceeding directly against the debtor under a judgment of a Court of competent jurisdiction, been compelled to pay to one, and in which the Courts very properly determined, that such payment, or a

(*a*) Pierce *v.* Carlton, 12 Ill. R. 363; Cooper *v.* McClure, 16 Ill. R. 443; Born *v.* Staden, 24 Ill. R. 322; May *v.* Barker, 15 Ill. R. 89.

judgment without payment, would bar any subsequent claim against him for the same demand. Thus, in the case of Holmes *et al. v.* Remsen *et al.*, executors of Clason, 4 Johns. Ch. R. 460, one Mullet, who resided in England, became a bankrupt, and under the law of England, assigned his effects to commissioners. Clason, who resided in New York, was indebted to him at the time of his assignment. The agent of Clason, residing in London, had money belonging to Clason in his hands, which, by process from the Lord Mayor's Court, was attached, and judgment entered against him, by which he was compelled to pay over the money to the assignees of Mullet. An attachment was issued in New York against the effects of Mullet, as an absent debtor, under the laws of that State, and the plaintiffs, being appointed trustees for the benefit of the creditors of Mullet, claimed of the executors of Clason, payment of the sum of money due from Clason to said Mullet. It was held, that Clason's executors, having once been compelled, through their agent, by the judgment of a Court of competent jurisdiction, to pay the money, the plaintiff's claim against them was barred.

The same principles and nothing farther, are repeated in 5 Johns. 101, 20 do. 229, in a note in 4 Cowen, 521, and 13 Mass. 153.

Unless there is something outside of this case, which does not appear by the bill or answer, it is not easy to perceive how the plaintiff here is injured by this decree. The mortgaged premises have already been sold, and, as he asserts, purchased by the assignors of Shane, who has a deed from the sheriff under the sale which vests all his equity of redemption in said Shane; and as the decree only proceeds against the land and those claiming under the mortgagor, to require them to surrender the possession, and does not in fact make him personally liable for the money due thereon, we cannot see from the record, that the decree can operate to his prejudice.

It is the common practice in the Courts of Chancery in this, and many other of the United States, upon the foreclosure of mortgages, to decree a surrender of the possession

and title papers by the mortgagor, and those claiming under him. In this there was no error.(*a*)

It was not necessary to decide whether David Shane, would, under other circumstances, have had such an interest in the suit, as would have made it necessary to have made him a party defendant to the bill of foreclosure. If he had such an interest, he acquired that interest pending the litigation between these parties. and it is unnecessary to refer to authorities to show, that a party thus situated is not entitled, unless, at least, he asserts his claim himself, to be made a defendant on the record.

The decree of the Circuit Court is affirmed with costs.

Decree affirmed.

(*a*) Aldrich *v.* Sharp, 3 Scam. R. 264, and notes; Flowers *v.* Brown, 21 Ill. R. 273; Gilerest *v.* Magill, 37 Ill. R. 300.

CHARLES A. LORD *et al.*, plaintiffs in error, *v.* GEORGE W. BURKE, defendant in error.

Error to Jersey.

A petition for a *certiorari* set forth, in substance, that the petitioners resided in St. Louis, a distance of some forty or fifty miles from the place of trial; that they had employed an attorney to attend the collection of their debt, but had not authorized him to sign an appeal bond, should it become necessary; that the attorney, the day after the trial of the right of property, informed his clients by the next mail of the result thereof, and requested them to send a letter of attorney to authorize him to take an appeal and execute a bond for them; that the letter was executed and sent to him, but that it was not received by him until the sixth day after the trial, which was one day after the time allowed for an appeal in such cases. It further stated that the amount in controversy was so small that the petitioners could not afford to employ a messenger to go to St. Louis to procure the letter of attorney: *Held*, that sufficient diligence was not shown to authorize the *certiorari*.(*a*)

CERTIORARI, in the Jersey Circuit Court, brought by the plaintiffs in error against the defendant in error, and heard before the Hon. Samuel D. Lockwood, at the May term, 1847. Certiorari dismissed.

The facts of the case and the substance of the petition, on which the writ was issued, will be found in the Opinion of the Court.

(*a*) Bragg *v.* Fessenden, 11 Ill. R. 544.

W. K. Titcomb, and J. W. Chickering, for the plaintiffs in error, submitted their points in writing:

The Court erred in sustaining the motion to dismiss the *certiorari*. Rev. Stat. 325.

I. It was not in the power of the defendants below to appeal in the ordinary way.

1. The time was five days. They were distant fifty miles, and knew nothing of a cause brought on for trial, the same day which saw it commenced. In what consists their negligence?

2. The first mail communicated the result, and asked for the means of appeal. These means were immediately prepared and and forwarded by the next mail. They arrived just in season to be too late. It would be unjust to require more diligence, to require expresses, special messengers, and enormous expense. The legislature has prescribed no such rule. Its Act is remedial, to be construed fairly for the correction of accidents, and in aid of the unfortunate. Mails are established for the convenience of the subject, to prevent the very expenses which the decision below would necessitate. Notice of the dishonor of bills through them is sufficient. What principle of destruction exists in the *certiorari* law, demanding that it be restrained by the certainty of a certain intent in every particular?

II. The petition does show an erroneous judgment. The mortgagor of a chattel, having the right of possession for a definite period, has an interest which may be levied on execution, and the purchaser acquires title subject to the incumbrance. Bailey *v.* Burtin, 8 Wend. 339; White *v.* Cole, 24 do. 117. The verdict was, that such an interest is not subject to levy.

J. T. Stuart, for the defendant in error, argued that the petition for the writ of *certiorari* did not show a state of facts sufficient to make it manifest that it was not in the power of the appellants to take an appeal in the ordinary way, and cited Cushman *v.* Rice, 1 Scam. 565; White *v.* Frye, 2 Gilm. 65.

The Opinion of the Court was delivered by

DENNING, J. On the 22nd day of September, A. D. 1846, Lord & McKee recovered a judgment against Charles Glazier, before James Harriott, a justice of the peace in and for Jersey county. On the 24th day of October following, an execution was issued and put into the hands of William Shepherd, a constable for said county, who, on the 27th day of the same month, levied the said execution on two horses and a buggy, which were in the possession of the said Glazier, he having previously given a mortgage on them to George W. Burke, to secure the payment of a debt to him, which was to fall due some eighteen months from the date of the levy. The said property was levied on subject to the mortgage. On the 28th of the same month, being the next day after the levy, Burke gave notice that he claimed the property in question, and of his intention to prosecute his claim. The trial of the right to said property took place on the same day, before the justice who issued the execution, and it was submitted to a jury, who found in favor of the claimant, whereupon an appeal was prayed by the counsel of Lord & McKee, and the same not having been perfected within the five days, as required by our statute, the case was taken up to the Jersey Circuit Court on a writ of *certiorari*.

At the May term of the Jersey Circuit Court, 1847, a motion was made by the claimant to dismiss the *certiorari*, which was sustained by the Court, and the *certiorari* dismissed. Lord & McKee bring the case to this Court, by writ of error, and assign for error, the decision of the Court in dismissing the writ of *certiorari*.

Several points have been urged by the counsel for the plaintiffs in error, why the decision of the Court below should be reversed, but one of which it is considered necessary by this Court to notice, inasmuch as upon this point the decision must turn. That is, whether the plaintiffs in error have used the necessary diligence required by our statute, in endeavoring to take an appeal to the Circuit Court of Jersey, in the ordinary way, from the trial of the

right of property, before the justice in Jersey county above named.

The petition for a writ of *certiorari*, or so much as has any particular bearing upon this point, is substantially as follows: The plaintiffs in error are residents of the city of St. Louis, a distance of some forty-five or fifty miles from the place of trial. They had employed counsel to attend to the collection of the debt above specified, but had not empowered him to sign an appeal bond, in the event of its becoming necessary to appeal. On the 27th of October, 1846, the constable levied on the property in question, and the day following the trial took place, and by the next mail, the counsel for the plaintiffs in error informed them of the result of said trial, and requested them to send a power of attorney, authorizing the counsel to take an appeal, and execute an appeal bond for them, which was done by the said plaintiffs, but the power of attorney did not reach the counsel until the sixth day after the said trial, one day after the time within which the appeal could have been taken. It is also averred that the amount in controversy was so small that the plaintiffs in error could not afford to employ a messenger to go to St. Louis for the purpose of getting the necessary power of attorney, to enable their counsel to execute an appeal bond in the case.

The Court have several times had occasion to pass upon the statute, in relation to the granting of writs of *certiorari*, and to say what is or is not sufficient diligence to authorize a party desiring it to bring a case into the Circuit Court by this process.

It will be observed that this statute (Rev. Laws, 325, § 75), is rather peculiar in its phraseology, and does not admit of as liberal a construction, as many have contended should be placed upon it.

Courts, doubtless, in construing statutes of this kind, remedial in their character, where their language and phraseology will permit, should avoid as far as possible the hardships which would arise from a strict and rigid construction

on the one hand, and the consequent abuses from a lax and liberal construction on the other, while they should give to the party who had merits in his case, the fruits of his diligence. They should cut off all those cases devoid of merit, prosecuted simply for hindrance and delay.

The statute under consideration, however, is one which admits of very little latitude of construction. It provides, that when it is out of the party's power to appeal from the justice's decision in the ordinary way, within the time limited by law, and setting forth facts in a petition showing why it was out of his power to appeal, and also showing a meritorious cause of action, he shall be entitled to the writ of *certiorari;* but, in every instance, it must appear clearly that it was out of the party's power, by reason of sickness, absence of the justice and clerk, or their refusal to allow him to take the appeal in the time limited by law, or some other reason equally good.

I apprehend that a proper construction of this section of the statute would require a party desiring to appeal from a decision of a justice of the peace, to use something more than ordinary diligence to perfect his appeal, before he would be entitled to bring the cause into the Circuit Court by writ of *certiorari;* nor is it the particular sum in controversy, or the hardship of the case which will dispense with this diligence.

In the case under consideration, the plaintiffs in error had but five days to take an appeal. Our statute, in relation to the trial of the right of property, having limited it to that time, was it out of their power to take the appeal in that time? It is true that their counsel communicated the result of the trial to them at St. Louis by the first mail. How often the mail passed back and forth in a week we are not informed, it may not have returned from St. Louis until after the expiration of the five days; or even if it was a tri-weekly line, it is not always the most safe and expeditious way of transacting business, and even if this could be called any diligence at all, it is clearly not sufficient. A person might have easily rode from the place of trial to St. Louis (fifty miles), procured the

necessary power of attorney to execute the appeal bond, and have returned back in four days, leaving one day to perfect the appeal in. The Court cannot lay down a positive rule applicable to cases of this kind, as each one must depend more or less upon its own facts and circumstances. In the case under consideration, we are of opinion that the plaintiffs in error have shown no sufficient diligence to authorize them to prosecute a writ of *certiorari* in this case, and that the Court below did not err in dismissing it.

The judgment of the Court below is affirmed with costs.

Judgment affirmed.

THOMAS MORGAN, appellant, *v.* WILLIAM D. SMITHSON, *et al.*, County Commissioners of Scott County, appellees.

Appeal from Scott.

Persons aggrieved by the assessment of their property for taxes, may apply to the County Commissioners' Court of their county for a reduction, as provided by the 25th section of the 89th chapter of the Revised Statutes. Such applications are addressed purely to the discretion of the Court, and the exercise of that discretion cannot be reviewed elsewhere.

APPEAL from a decision of the County Commissioners of Scott county. The proceedings in the cause are stated by the Court in their Opinion. The appeal was dismissed at the November special term, 1846, the Hon. Samuel D. Lockwood presiding.

M. MCCONNEL, for the appellant, submitted the case to the Court in writing.

S. T. LOGAN, for the appellees, argued orally.

The Opinion of the Court was delivered by

TREAT, J. Thomas Morgan applied to the County Commissioners' Court of Scott county, for a reduction of the as-

sessment of his property for the year 1845. The application was denied, and he prosecuted an appeal to the Circuit Court. He there asked leave to dismiss the case, but the Court refused the leave, and then dismissed the appeal. Those decisions are assigned for error.

The 26th section of the 89th chapter of the Revised Statutes, declares, that "any person feeling aggrieved by the assessment of his property, may, at the September term of the County Commissioners' Court immediately succeeding such assessment, and not afterwards, apply to said Court for a reduction of said assessment, which may, in the discretion of the Court, be made on proof that the valuation was too high, which correction shall be made of record, and a list certified by the clerk to the collector."

It will thus be seen, that applications of this character are addressed purely to the discretion of the County Courts, and the exercise of that discretion cannot be reviewed elsewhere. The Circuit Court, consequently, had no jurisdiction of the case, and decided correctly in dismissing the appeal. The only action it could take, was to dismiss the appeal, and leave the adjudication of the County Court in full force. It follows that Morgan had no right to dismiss the case in the Circuit Court. The decision of the County Court was final in the premises, not to be overturned by an unauthorized appeal to another tribunal. We fully recognize the right of the plaintiff to dismiss an appeal case properly pending in the Circuit Court. In such a case, the Circuit Court has authority to hear and determine it. It is to be tried *de novo*, and in order to succeed, the plaintiff has again to establish his cause of action. Instead of doing this, he may abandon the case altogether, and fall back to the position he occupied before he commenced the suit in the inferior Court. If he chooses the latter course, the previous proceedings in the cause necessarily fall, and the differences of the parties are to be adjusted in some other action.

The judgment of the Circuit Court is affirmed with costs.

Judgment affirmed.

WILLIAM R. McCLAY, administrator, &c., *et al.*, plaintiffs in error, *v.* GEORGE H. NORRIS, defendant in error.

Error to La Salle.

An infant may prosecute a writ of error in the Supreme Court by his next friend. If, however, he prosecutes in his own name, and there is a joinder in error, his disability is waived by that proceeding.

A writ of error is a writ of right, and may be prosecuted in all cases, unless prohibited by some statute or inflexible rule of law.

The general rule in regard to taking testimony in Chancery cases is, that it is not to be done *viva voce* in open Court as at law, but written questions are to be put to the witnesses, either by an officer of the Court, or by some person duly authorized, and the answers are taken down in writing by such person. (*a*)

To the general rule that all testimony in Chancery cases is to be taken in writing, there are two exceptions: *first*, proof of exhibits in or attached to and made a part of the complainant's bill or the defendant's answer; and *second*, where, under the statute, the Court has authority, for want of a plea or answer, to render a decree *pro confesso* against the defendant. In either of these cases, evidence by parol may be heard upon the trial of the cause.

An answer of a guardian *ad litem*, if it admit the truth of the charges in the complainant's bill, cannot affect the infant's rights; but with respect to him, all allgations must be proved with the same strictness as if the answer had interposed a direct and positive denial of their truth.

Neither a default, or a decree *pro confesso* can be entered against an infant.

Where infants are defendants in Chancery proceedings, the proper and convenient practice is, for the Court to refer the matter which requires to be proved to the Master in Chancery, that he may take the evidence and report the facts to the Court for its final determination.

When a question of fact is referred to the Master in Chancery, it is his duty to appoint a day for the examination of witnesses before him, of which the parties should receive due notice. The witnesses may then be examined *viva voce*, or upon interrogatories, and must then be taken down and preserved by the Master, so that the same may, if necessary, be used by the Court. The Master is not required to report the evidence, nor the circumstances to the Court and leave the Court to draw conclusions; but he is to report facts, and conclusions of his own, unless, under special circumstances, a question of law is involved, upon which the opinion of the Court should be taken. This report being prepared, either party may file objections to it before the Master prior to its being returned into the Court. If the objections are not sustained, and the Master adheres to his report, he returns it into Court, where the party objecting may file exceptions, upon the hearing of which the whole evidence is brought forward, and passes in review before the Court. (*b*)

BILL IN CHANCERY to foreclose a mortgage, and to correct mistakes therein, filed by the defendant in error against

(*a*) See Laws 1849 p. 133.

(*b*) Holdridge *v.* Bailey, 4 Scam. R. 126; Brockman *v.* Anger, 12 Ill. R. 278, and notes; Rhoades *v.* Rhoades, 43 Ill. R. 249; Stacy *v.* Randall, 17 Ill. R. 470.

the plaintiffs in error, in the La Salle Circuit Court. The cause was heard at the November term, 1842, before the Hon. John D. Caton, when a decree of foreclosure, &c., was rendered.

The substance of the bill and proceedings therein will be found in the Opinion of the Court.

T. Ford, for the plaintiffs in error.

A writ of error is a writ of right, and cannot be denied except in capital cases. Bowers *v.* Green, 1 Scam. 42. This case refers to the statute. See Rev. Stat. § 7, page 143, as to the jurisdiction of Courts of Equity.

The decree not having given day to the defendant, makes it final as to him, and therefore, he may prosecute a writ of error.

A writ of error will lie to the Circuit Court, sitting as a Court of Chancery. Greenup *v.* Porter, 2 Scam. 417. Therefore, if a writ of error is a writ of right, it is a writ of right as well in Chancery cases as others.

There is no evidence in the record, that John Armstrong is a minor, or otherwise. If he is a minor, and does not sue out his writ by his next friend, the fact, before joinder in error, can be shown, and the writ dismissed under the Practice Act. This objection goes to quash the writ, and is in the nature of a proceeding in abatement, and cannot be taken advantage of after joinder in error. It is of the same nature as an objection to a want of security for costs, by a non-resident, which must be noticed before a plea to the merits is put in. But as the objection has not been thus made, the Court, if they deem it for the benefit of the infant, may, and will presume that he has become of age.

The question, then, before the Court is simply this, whether an infant after he comes of age may not prosecute a writ of error. Bowers *v.* Green, 1 Scam. 42; Greenup *v.* Porter, 2 do. 417; Rev. Stat. § 7, p. 143. A writ of error is barred in five years, but when an infant thinks himself aggrieved by any decree or judgment that may be reversed in the Supreme Court,

he shall have until five years after he comes of age. This is the Statute of Limitation contained in the Practice Act. Rev. Stat. § 53, p. 421.

This Common Law and statutory right to prosecute a writ of error is not taken away by any of the authorities referred to. All they prove is, that the infant when he comes of age, has another and perhaps a fuller remedy. A writ of error reaches errors only which appear on the record; a bill of review reaches errors both of law and fact. The case in 18 Vesey, 83, proves only that the decree to foreclose would bind the infant, and that he ought to have a day to show cause after he comes of age (note here), the Lord Chancellor afterwards made a precedent to sell. In connection with this the New York practice has been to sell.

Foreclosure by sale has grown to be the settled practice everywhere since the above decision, and I shall not detain the Court by referring to authorities on this point. But a decree of strict foreclosure ought not to be made, where it is not manifestly for the interest of the mortgagor. This is the doctrine in the 4th vol. of Kent's Commentaries. Strict foreclosure ought not to be decreed against an infant unless it appears that it was the best for his interest. The decree does not pretend to find whether the land was, or was not worth more than the sum secured by the mortgage.

A decree is erroneous which hath not these words: "Unless cause be shown within six months, &c." 8 Eng. Ch. R. 59, 60, 62. This case proves only that the Chancellor was in doubt, whether an infant could be let in to defend and make a new case, but he has no doubt of his right to prosecute a writ of error.

The doctrine has since been well established, that an infant may have a bill of review, be let in to defend and make a new case after he comes of age, in all Chancery proceedings. 1 Smith's Ch. Pr. 259; 8 Peters, 143. It is said that this decision is founded on a statute of Maryland. If so, then the infant must have his writ of error here, or there is no remedy. But so far as the statute requires, it only made

the case a Chancery proceeding. This case nor any other pretends to decide that because the infant has a right to make a new case of law and fact after he comes of age, that he has no right to a writ of error to reverse for errors of law appearing on the record. The writ of error may be all sufficient for his purpose, and why compel him to make a new case?

It is said on the other side, that the infant may have error and bill of review both. If John Armstrong is of age he has made his election; if not, it is the defendant's fault that he did not show it before he joined in error. The Court cannot know that the plaintiff is an infant. Nothing of the sort appears on the record. On the contrary, as the defendant has not objected, the presumption is that he has come of age.

Then is there error of law in the record? 1. The Court decreed that there was a mistake in the mortgage. The matter mistaken is a capital fact, and ought to be proved as other facts. And in case of an infant, it ought to be proved by evidence of record. The case in 2 Scam. 218, did not turn on this point; the question was not raised, though the Court think the guardian may admit the facts in the bill. But the point relied on there arose on the Statute of Frauds. The infant's answer cannot be read in evidence against him; it is the guardian's answer. 1 Smith's Ch. Pr. 259; 8 Peters, 144–5. The facts of the bill ought to be proved notwithstanding an answer admitting them all.

If it be true that the facts are to be proved, how are they to be proved? As against the infant, in the same manner, I contend, as if he had answered denying everything. In this case, the guardian *ad litem* has admitted nothing. The administrators are not parties in interest, and are joined by statute for form, and because they have assets, and may pay the debt. *Pro confesso* against them should not prejudice the heir. He has the inheritance, and proof ought to conform to law as to him; no decree *pro confesso* against minors. If he is satisfied with testimony, he may prosecute error and waive review.

The rules of evidence in Chancery require that the evidence should be in writing. 3 Black. Com. 449, 450; 1 Smith's Ch. Pr. 339. And it is to be presumed that the record contains all the evidence, for which see 4 Scam. 126; Rev. Stat. 93, § 1.

The trial of issues out of Chancery is a legal proceeding, and there may be an exception, but no bill of exceptions can be filed on a hearing in Chancery. If, then, there is no bill of exceptions allowed, the only mode preserving the evidence in the record, is by depositions and other writings in the record, or by a Master's report. The Master is to take down the evidence in all cases of reference to him, for the use of the Court if necessary. 1 Barb. Ch. Pr. 501, 502.

If the evidence is not taken down and put on the record for an infant, he will be denied his writ of error, or, at least, he will get no benefit from it. Parol evidence may be given against parties on a decree *pro confesso*, because one who will not answer the bill, may be well presumed to have no defence. But no such presumption can safely be indulged as against infants.

It is said that the mortgaged property has greatly increased in value. This is *dehors* the record. I might as well say that the lot was worth three times the amount of the debt secured on it, and thus attack the strict foreclosure.

The complainant ought to proceed cautiously, and at his peril as against an infant, and if it be true, as the defendant contends, the infant defendant has a bill of review when he comes of age, and if he will come of age several years hence, and if there is error in this proceeding, the sooner it is looked into, the better it will be for the defendant; for if deferred, the property, by improvements the defendant may put on it, may be made still more valuable, and make the case still worse for the defendant.

The bill of review, after the infant comes of age ought not to be the only remedy. The witnesses for him may die, and other evidence upon which he might rely, might be lost or

destroyed by time and accident. And if the infant complains only of error apparent on the record, there can be no manner of use in restraining him to a bill of review as his only remedy.

O. PETERS, for the plaintiffs in error :

As to the infant, John Armstrong. The Court is the guardian of the rights of infants. When an infant defendant is before the Court, it will see that its rights are protected. The law has provided no particular mode of doing this by the Court.

It is not denied that, ordinarily, the mode of proof in Chancery causes, when an issue is made, is by depositions. This is settled in the case cited on the other side. Holdridge *v.* Bailey, 4 Scam. In that case, however, the bill was founded upon the bond, which had been lost, and which was not made part of the record.

In the case of infants it is different. As to them, the Court has a general power to protect their interests and rights. It is bound to appoint a guardian *ad litem*, it has power to control the guardian, to make him perform his duty, to remove him, &c.

But the Court may make all necessary inquiries by itself or its Master. It is usual to refer the matter to a Master, but this is not necessary. Wall *v.* Bushley, 1 Brown's C. C. 425, top paging. The Lord Chancellor says, that though it is usual, in case of infants, to refer the matter to a Master, yet it is not necessary. But if the decree is rendered without such reference, the authority is the same as if it had been referred. So in Quantock *v.* Buller, 5 Mad. Ch. R. 56, held that depositions taken before the infants were made parties, should not be read against them, but the cause should go to a hearing, and so to the infants, referred it to a Master.

The Master as a general rule, when a reference is made to him, may take the testimony orally; the usual mode is so to take it. 1 Barbour's Ch. Pr. 502, 83, 148, 150, 334, 373, 149. What the Court may do by another, it may do itself. If it is proper for the Master, who only acts for the Court, to take oral testi-

mony, surely the Court may do the same thing. If so, then it would seem to follow, that the judgment should not be reversed because the evidence is not contained in the record. It was competent, as already shown, to prove by parol, as against the other defendants, that there was a mistake in the mortgage. Can it be said that it was the duty of the Court to delay the cause and put this infant and other parties to the expense to obtain depositions, when the Court had already become fully advised, that it was equitable and right to amend the mortgage? As the guardian of the infant, could not the Court be as well advised in this mode as any other?

The answer of the infant only puts the Court upon inquiry as to what is right, and is most beneficial for the infant. The Court, as guardian of infants will be careful to see their rights protected; and it is enough that the Court is satisfied. No rule of law or practice points out what evidence the Circuit Court shall require. It is enough that the Court is satisfied.

The case of Thornton *v.* Heirs of Henry; 2 Scam. 219–21, shows that it is matter of discretion with the Circuit Court, and is an authority directly in point.

But if there was error in the proceedings, the parties have not sought the proper remedy. On this writ of error, this Court can make no inquiry so as to do justice, and decree that which is best for the minor. No authority can be found for the correction of an error of a decree in Chancery by an infant, by a writ of error.

There are several modes provided by law, that an infant may obtain relief from an erroneous decree. On coming of age, he may put in a new answer and make another defence, and examine witnesses. Fountain *v.* Cain, 1 P. Williams, 504; Napier *v.* Effingham, 2 do. 401; or, he may have a bill of review, or a re-hearing, or he may impeach the decree for error, by an original bill, charging that the first decree was obtained by fraud, &c. Richmond *v.* Taylor, *ib.* 736, note; Brook *v.* Hereford, 2 do. 519. Infants are as much bound by decrees of a Court of Chancery as adults. Williamson's heirs *v.* Johnston's heirs, 4 Monroe, 255.

It would be a useless ceremony to reverse the decree on this writ of error, inasmuch as it will not restore the infant to his estate, nor re-instate him in any of his rights. By the forclosure, the estate becomes vested in the mortgagee, fully divested of any equity of redemption. But the infant, even if this decree should be reversed on this writ of error, must still go into the Circuit, by bill of review, original bill, petition, or motion, so that the Court may see that no injustice is done; so that the reversal of this decree, will be a work of supererogation, and afford no relief whatever to the infant. If the decree is reversed, this Court cannot decree an account, or restore the estate to the infant, but must leave him to his petition, &c., in the Circuit.

Though it may be erroneous, in other cases than foreclosure, to take a decree against an infant without giving him a day in Court after he shall arrive at full age, yet though the decree be thus taken, it bars him of no right; he has his day in Court, nevertheless, when of full age; 1 Barb. Ch. Pr. 335; and the Court will open the decree or not, as it shall appear to be for his benefit.

Had the question been, whether a decree was regular that directed a sale of the mortgaged premises, the plaintiffs in error could have sustained their proposition by the authority of numerous adjudications. It is only comparatively recently that decrees for sale of mortgaged premises were made. The legislatures of many of the States have given the authority to Courts of Chancery, to order sale of the premises, instead of a strict foreclosure.

In the case of the Bishop of Winchester *v.* Beaver, 3 Vesey, 317, it is held, "an infant may be foreclosed. You can have your decree against him. He is foreclosed to all intents. You may go to market with it (his estate), and the purchaser is only liable to be overhauled in the account."

In Goodier *v.* Ashton, 18 Vesey, 83, Sir William Grant refused an application for a decree of sale against an infant heir of the mortgagor, and decreed a foreclosure. He says, "the modern practice was to foreclose infants, and he would not make the precedent." But in the case of Munday *v.*

Munday, 1 Vesey & Beames, the Chancellor said, "that if there was no precedent for decree of sale of mortgaged premises, he would make one."

Such had long been the practice in the Irish Courts, and when the precedent was set by Lord Erskine, it was followed in England. As late as the case of Lansing *v.* Gaelet, 9 Cowen, 358–83 per Jones, Chancellor, there will be found a very full discussion of this subject, and review of the authorities. And see Kelsell *v.* Kelsell, 8 Eng. Ch. R. 58, where it is holden, that infants may have their day in Court to open a decree, after attaining full age, but that this does not extend to foreclosure suits.

There is no reason why the infant should come here for relief, on account of his infancy. Even at law, he must seek his remedy in the Circuit Court. Beaubien *v.* Hamilton, 3 Scam. 213.

But an infant cannot prosecute a suit but by his *prochien amie*, and John Armstrong cannot prosecute this writ of error, but by his next friend. He has not done it in this case.

If this Court will let the infant in to his relief on his writ of error, great injustice may be done to innocent purchasers, who hold under the decree. They have purchased under the faith of a decree of a Court of general and competent jurisdiction. Even though it may not affect the title thus acquired, yet it may beget distrust of the title, and depreciate the value of the property. Large and valuable improvements may have been made upon the lot, and this Court cannot say that the infant shall be let in to enjoy the benefit of the labors and capital of innocent purchasers. If such shall be the result, it will alarm the community, and no one will be found to purchase property sold under a decree of Court. But a further answer is, that on inspection of any authorities or practice in other Courts, in other States and countries, it is sufficient to say, that a practice precisely like that pursued in this State, has been very generally pursued in this State for a long period of time. It has become a rule of property. The title of immense amounts of property rest wholly upon the validity of similar proceedings. If this

decree is reversed, there will be no end to the evils resulting to property holders thereby. Courts have always been careful to conform their decisions to a state of things as they exist, when the interests of the community, and titles to property are to be seriously affected. It is much on this principle that local and general customs, contravening rules of law, have been regarded, and rights acquired, protected under them.

The Opinion of the Court was delivered by

PURPLE, J. On the 2nd day of October, 1841, Norris, the defendant in error, filed his bill in the La Salle Circuit Court, against the plaintiffs in error, to foreclose a mortgage executed by James G. Armstrong in his lifetime, upon a lot in the town of Ottawa in said county. Among other things, the bill alleges that there was a mistake made in the description of the lot, by the omission of the words, "in the town of Ottawa and county of La Salle," which were intended to have been inserted as part of the description of the mortgaged premises, and also, that by mistake, the said James G. Armstrong, at the time he signed said mortgage, omitted, contrary to the intention of the parties, to affix his seal to the mortgage. It is also shown by the bill, that John Armstrong is the son of said James G. Armstrong, and that he was a minor at the time of the filing of the bill. The prayer of the bill asks, that the mistakes in the making and execution of the mortgage may be corrected, and amended so as to conform to the original agreement and intention of the parties, and, that the same, in default of the payment of the money due thereon, may be foreclosed. Process was duly served on all the defendants in the Court below.

James J. Holt was appointed guardian *ad litem* of John Armstrong, and filed the usual answer, that he had no knowledge of the matters charged in the bill of complaint, and requesting that the rights of the said miner might be secured to him.

McClay and Mrs. Armstrong filed a plea in abatement, which, upon hearing, was adjudged insufficient by the Court,

and making no farther answer or defence, the bill was taken as confessed against them. Whereupon, without farther evidence appearing in the record, other than a recital in the decree, that "the Court having heard the proofs and allegations of the parties," a decree was made and entered, directing the mortgage to be amended and corrected as prayed for in the bill; that the sum due by the mortgage, should be paid on or before the first day of the next term of the Court; and, that in default of such payment, the said plaintiffs in error shold be barred and foreclosed of all equity of redemption in and to the mortgaged premises.

Several errors are assigned as causes for a reversal of this decree, but the one principally relied upon is, that it is not apparent from the record, that there was any evidence in the Circuit Court to sustain the decree as against the minor, John Armstrong.

Preliminary to the discussion of this main question, it will be proper to notice some objections taken by the counsel for the defendant upon the argument. He contends, *first*, that an infant is not entitled to a writ of error in a Chancery proceeding; that his remedy when he arrives at his majority is, by application to the Circuit Court, in ordinary cases to be let in to make defence; and *second*, that in cases of foreclosure, he is not entitled to his day in Court.

At a remote period of the history of English jurisprudence, when suits were prosecuted against an infant, relating to real estate which had descended to him, he was permitted to resort to his parol demurrer, which is defined to be, "a plea or privilege formerly allowed an infant sued concerning lands which came to him by descent; whereupon the Court gave judgment, *quod loquela predicta remaneat quousque;* the infant attained the age of twenty-one years. And when the age was granted on parol demurrer, which might happen on the suggestion of either party, the writ did not abate, but the plea was put *sine die* until the infant was of full age, and then there was a re-summons." 3 Tomlin's Law Dic. 64.

Experience having shown that the practice of allowing

parol demurrers, was attended with much inconvenience and vexatious delays, in process of time a different rule obtained, and instead of the parol demurrer, which had been formerly interposed in behalf of infants, in Chancery proceedings against them affecting their interests in lands, upon the proper proof being made, a decree was immediately entered up against them to be binding, unless they should within six months after they should have attained the age of twenty-one years (being served with process for that purpose), show unto the Court good cause against the said decree.

All the authorities which have been referred to, and others which have been examined, both English and American, maintain the principle that in suits and proceedings against infants, at law and in Chancery, whereby they are divested of their lands (except in cases otherwise provided for by special statutes), they are entitled to their day in Court. The case referred to in 3 Vesey, 317, is not in conflict with this principle. It is decided there, that "an infant may be foreclosed. You can have your decree against him. He can do nothing but show error. He is foreclosed to all intents. You may go to market with it (*i. e.* the estate) and the purchaser is only liable to be overhauled in the account."(*a*)

The distinction taken by, and which runs through all the authorities cited and examined is this: In cases of foreclosure, whether by sale or otherwise, the infant on arriving at full age, on showing cause, can only allege error on the face of the decree; whereas, in other cases, he will be permitted to file a new answer, and litigate the merits of the case. To review the decisions upon this question, inasmuch as they appear to be all one way, would be unnecessary. A simple reference to them will be sufficient. 18 Vesey, 83; 21 do. 223; 9 Cowen, 397; 4 Monroe, 225; 3 Johns. Ch. R. 367; Kelsell *v.* Kelsell, 8 Eng. Ch. R. 58; 1 Smith's Ch. Pr. 419; 1 Barb. do. 34, 149; Harris *v.* Youman, 1 Hoff. do. 178. Such has been, and still is the doctrine of the English, and many of the American Courts. Whether this rule obtains in this State, or is changed or repealed by the second section

(*a*) But see Enos *v.* Capps, 15 Ill. R. 277.

of the Act concerning "Fraudulent Devises," approved February 28, 1833 (Revised Laws of 1833, page 315), is not necessary to be determined in this case, and is a matter of such grave and serious import, that without further reflection and examination, we are unwilling to express any opinion upon it. We do not, however, entertain any doubt (whatever may have been the prevailing practice in England and the United States), that an infant may, if he sees proper to do so, prosecute a writ of error in the Supreme Court of this State. So that, in the view we take of this case, it is immaterial whether it is to be intended by the record that John Armstrong is, or is not now, a minor. If an infant sues out a writ of error, he should do so by his next friend; but no objection could be taken against his proceeding in his own name, after the party has joined in error. The infant's disability is waived by such proceeding. Our opinion of the right of any person, whether infant or adult, to prosecute a writ of error in this Court, is founded upon the fact, that it is a "writ of right," and lies in all cases, unless prohibited by some statute or inflexible rule of law; and also upon the statute of our State, passed July 1, 1829, entitled "*An Act regulating the Supreme and Circuit Courts*", by the second section whereof, it is provided; "The said Supreme Court shall exercise appellate jurisdiction only (except as hereinafter excepted), and shall have final and conclusive jurisdiction of all matters of appeal, error or complaints, from the judgment or decrees of any of the Circuit Courts of this State, and from such other inferior Courts as may hereafter be established by law, in all matters of law and equity, wherein the rules of law or principles of equity, appear from the files, records, or exhibits of any such Court, to have been erroneously adjudged and determined." "And their judgments, decrees and determinations, shall be final and conclusive on all the parties concerned." Revised Laws of 1833, pages 147–8.

This statute is broad and comprehensive in its terms, and

seems designed to embrace every case in which an erroneous decree or judgment may have been rendered in the Circuit Court.

Such a construction of this law cannot operate to the prejudice of any parties. For, if an infant sues out a writ of error, and a decree in this Court is passed against him, such decree would be conclusive as well against him, as it would have been had he attained full age, both under the provisions of the statute before recited, and upon the principle that he is a plaintiff in the writ of error, and as such concluded by the judgment or decree. Williamson's heirs *v.* Johnston & Nash's heirs, 4 Monroe, 255.

It must be apparent, then, that it is most beneficial to the opposite party, that an infant should prosecute his writ of error at the earliest period after any error in the record may have been discovered, without waiting until he arrives at full age. For it cannot be disputed, that when his minority had ceased, he would, by the English practice, in a case like the present, be entitled to show error on the face of the decree, the effect of which would be to reverse the judgment in the same or a similar manner, and with like effect upon the interests of the parties as would result from a reversal in this Court.

I proceed to the inquiry, whether the decree rendered in this case is sustained by the facts appearing upon the record. In the determination of this question, there is an important principle of law, and rule of practice necessarily involved. Of law, as to whether the answer of a guardian *ad litem* of an infant defendant can in any event affect or conclude the rights of such infant; and of practice, as to the method of proof in Chancery cases, and whether it must be shown by evidence in the record that the decree made was properly rendered.

With regard to the method of taking testimony in Chancery cases, the general rule is, that it is not to be done *viva voce*, in open Court, as at law, but written questions are to be put to the witnesses, either by an officer of the Court, or by some person duly authorized; and the answers are taken

down in writing by such persons. 1 Smith's Ch. Pr. 339; 1 Barb. do. 309–10. The only exceptions to this general rule are two: *first*, proof of exhibits in, or attached to and made part of the complainant's bill, or the defendant's answer; and *second*, where, under our statute the Court has authority for want of plea or answer, to render a decree *pro confesso* against the defendant. In either of these cases, evidence by parol, may be heard by the Chancellor upon the trial of the cause. In the first case mentioned, the evidence is confined to the proof of exhibits, and will scarcely ever be received when anything but handwriting is to be proved. This kind of testimony is applicable to ancient records and writings, office copies of records, deeds, bonds, instruments in writing to which there may be subscribing witnesses, promissory notes, bills of exchange, letters, receipts, &c., all which, when made exhibits, may be proved at the hearing. But this cannot be permitted when something more than bare proof of handwriting is required. If the evidence is of a character to admit of cross-examination, or requires other testimony to be given to entitle it to be received, such as proof of the death or absence of a subscribing witness before his handwriting can be proved; or if a document is impeached by the defendant's answer, the testimony, if offered at the hearing, will be rejected. 1 Barbour's Ch. Pr. 309–10; Holdridge *v.* Bailey, 4 Scam. 126; 1 Smith's Ch. Pr. 339.

Such, we believe has been the usage and practice of Courts of Equity from the earliest period of their establishment down to the present time; and this usage and practice, when not otherwise prescribed in our Chancery Act, is made the rule of proceeding in the Courts of Chancery in this State. 118, § 1. Wherever, by the rules of proceeding in this State, as prescribed by our statute, a bill may be taken for confessed against the defendants, which occurs in cases of default in filing plea or answer, the Court may hear oral testimony of witnesses, or in its discretion may examine the complainant under oath, in which cases the evidence on which the decree is founded need not be spread upon the record.(*a*).

(*a*) Dunn *v.* Keagin, 3 Scam. R. 298; White *v.* Morrison, 11 Ill. R. 364.

Upon the other question, it is entirely clear, that the answer of a guardian *ad litem*, even if it shall admit the truth of the charges in the complainant's bill, can in no case affect the infant's rights; and with respect to him, all allegations must be proved with the same strictness, as if the answer had interposed a direct and positive denial of their truth. No default or decree *pro confesso* can be entered against him. "A decree upon an answer of a guardian *ad litem*, will not bind an infant. He can open it, or set it aside when he comes of age. No laches can be imputed to him, and no valid decree can be awarded against him merely by default. The plaintiff, in such case, ought to prove his demand, either in Court or before the Master, and the infant is usually entitled to a day to show cause. When he comes of age, he is to be served with process of subpœna for that purpose; and then he is not entitled to redeem, but only to show error in the decree." "The plaintiff must prove his debt before the Master in the same manner as if nothing had been admitted by the answer, and the Master must report such proof, &c." 3 Johns. Ch. R. 367; see, also, 3 Powell on Mort. 980; U. S. Bank *v.* Ritchie, 8 Peters, 144; 1 Barb. Ch. Pr. 149; 1 Smith's do. 259.

If it should be asked whether it is deemed indispensable in all cases, where infants are made defendants in Chancery proceedings, that the complainant must go through with all the formal requirements of the statute, by giving notice to the infant or his guardian, the length of time required, and by taking depositions, to be read and filed in the cause, we answer that we think not. A proper and convenient practice is, for the Court to refer the matter which requires to be proved to the Master in Chancery, that he may take the evidence and report the facts to the Court for its final determination. Or perhaps the Court in its discretion, the guardian *ad litem* of the infant being present, and being permitted to cross-examine the witnesses, might hear the testimony in open Court, and cause the same to be reduced to writing, and made part of the record. The inconvenience of this

practice, however, if allowable, ought, in the judgment of the Court, to operate against its adoption.

As to the subjects which may properly be referred to a Master, no general rule can be laid down. It is stated in 1 Barb. Ch. Pr. 468, and sustained by numerous authorities there referred to, that "there is no question of law or equity, or disputed fact or facts, which a Master may not have occasion to decide upon, or respecting which he may not be called upon to report his opinion to the Court."

When any question of fact has been so referred, the Master's duty is to appoint a day for the examination of witnesses before him, of which the parties should receive due notice. The witnesses may be examined *viva voce*, or upon interrogatories, and the evidence is taken down and preserved by the Master, so that the same may, if necessary, be used by the Court. 1 Barb. Ch. Pr. 502; 2 Smith's do. 147. The Master is not required to report the evidence nor the circumstances to the Court, and leave the Court to draw conclusions; but he is to report facts, and conclusions of his own, unless under special circumstances a question of law is involved, upon which it is proper that the opinion of the Court should be obtained. 1 Barb. Ch. Pr. 544; 2 Smith's do. 161.

After the Master's report has been made out, if either party is dissatisfied therewith, it is usual to file objections to the same before the Master, before the report is returned into Court; the object of which, is, to give the Master an opportunity to consider and re-examine the same, and if he deems it in any respect erroneous or improper, to correct it. If the objections are not sustained, and the Master adheres to his report, it is returned into Court, when the party objecting may file exceptions, upon the hearing of which the whole evidence is brought forward, and passes in review before the Court. 2 Smith's Ch. Pr. 166–7–8; 1 Barb. do. 546. Thus far these questions have been discussed, partly for the reason that we considered the principles not inapplicable to the case at bar, and partly because it is apprehended that in cases like the present, a laxity in practice has been fre-

quently indulged, which is unwarranted in law, and highly dangerous to the rights of infants, of whose estates and interests the Courts of Chancery are nominally, and should be practically, guardians.

It remains only to apply these principles to the facts presented in this record to determine whether this decree shall stand. And we feel no hesitation in saying that the decree is unwarranted by any evidence before us. The bill contains an allegation of a mistake in the description of the mortgaged property, by an omission of the words, "in the town of Ottawa and county of La Salle." Without the correction of this mistake, the description was unmeaning, and applied as well to any other lot, as to that which has passed to the defendants in error under this decree. The Court had, in this case, no power to correct this mistake without evidence of its existence, and of the original intention of the parties at the time of the execution of the mortgage. There is no such evidence in this record.

The decree of the Circuit Court is reversed, and the cause remanded for further proceedings not inconsistent with this Opinion, the defendant in error to pay the costs in this Court.

Judgment reversed.

THOMAS PLUMLEIGH *v.* THOMUS M. WHITE.

Agreed Case from McHenry.

The parties to a suit pending in the Circuit Court agreed to submit their case upon a question of law, to the Supreme Court for adjudication. There was no record of the Circuit Court filed, but simply the agreement of counsel: *Held*, that the case did not come within the provisions of the 16th and 17th sections of the 29th chapter of the Revised Statutes, no decision of the Circuit Court being certified by the clerk.

The Supreme Court has appellate jurisdiction only, except in certain specified cases.(*a*)

AGREED CASE, from McHenry county. In this case, the following agreement was filed, together with the written arguments of counsel, to wit:

(*a*) Crull *v.* Keener, 17 Ill. R. 246.

"This was an action of *debt* brought by plaintiff against the defendant as sheriff of McHenry county. The declaration was in *debt* for an escape on *ca. sa.* The defendant filed a general demurrer. The question raised is, whether the action of *debt* will lie in this State for a voluntary escape on a *ca. sa.*

"It is agreed that the above case shall be submitted on written argument, to be filed on or before the first of January next.

"Dec. 10, 1847. MORRIS & BROWN, for Deft.
I. N. ARNOLD, for Plaintiff.

It did not appear from any of the papers filed in this case, that there had been a decision of the Circuit Court upon the question at issue, nor was there any certified copy of the agreed case.

The cause was submitted on the merits upon the written arguments of I. N. ARNOLD, for the plaintiff, and of B. S. MORRIS & J. J. BROWN, for the defendant.

The Opinion of the Court was delivered by

TREAT, J.* The Court has no jurisdiction of this case. There is no record from the Court below. There is an agreement of counsel on file, referring to an action pending in the McHenry Circuit Court, and stipulating that a certain question arising therein may be submitted to the decision of this Court. The case does not come here pursuant to the provisions of the 16th and 17th sections of the 29th chapter of the Revised Statutes. The agreed case and the decision of the Circuit Court thereon should be regularly certified into this Court. There must be a decision of the question by the Circuit Court, before there is anything to be reviewed here. By the Constitution, this Court has appellate jurisdiction only, except in certain specified cases, of which the present is not one. The case must be dismissed.

Case dismissed.

*WILSON, C. J. was absent.

WILLIAM F. GRAHAM *et al.*, appellants, *v.* JAMES DAY *et al.*, appellees.

Appeal from La Salle.

The decision in regard to sales of land on execution *en masse* (Day *v.* Graham, 1 Gilm. 435), affirmed.

On the 29th of April, 1839, several tracts of land and town lots were sold by a sheriff on execution *en masse*, to the attorney of the plaintiff in the execution. In December following, a portion of the same were again sold by other judgment creditors, and deeds subsequently given by the sheriff, they not being aware of any previous judgment or sale against their debtor until the summer of 1842, when the attorney of the former execution exhibited his deed. In November of the latter year, they entered their motion to set aside the prior sale, which was taken under advisement by the Court until November, 1843, when it was overruled, and that judgment was subsequently, in 1844, affirmed by the Supreme Court. Immediately after this decision, in April, 1845, a bill was filed to set aside the sale, and the defendants set up the lapse of time in bar of the relief sought by the complainants: *Held*, that the delay, being satisfactorily accounted for, was no bar to the relief.

BILL IN CHANCERY, in the La Salle Circuit Court, filed by the appellees against the appellants, April 21, 1845, to set aside a sheriff's sale *en masse* of divers tracts of land and town lots. The sale was vacated by a decree at the November term, 1846, the Hon. John D. Caton presiding.

The facts as alleged in the bill, the substance of defendants' answers, and of the decree of the Court below in the case, are fully stated in the Opinion of the Court.

S. T. LOGAN, for the appellants.

A. T. BLEDSOE, for the appellees.

The Opinion of the Court was delivered by

TREAT, J. In April, 1845, James Day, Lyman Rhodes, Charles Weed, William H. Weed, Charles R. Swords, William M. Halstead and Edward Corning exhibited their bill in Chancery, in the La Salle Circuit Court, against William F. Graham, John V. A. Hoes, Edwin S. Leland, Henry L. Brush, and fourteen others.

The bill alleges, that the defendant Graham recovered a judgment against the complainant Day, and the other defendants, except Hoes, on the 22nd of September, 1837, for $246.29 debt, and $22.75 costs, and that an execution issued thereon on the 20th of October, on which was collected $233.55; that an *alias* execution issued on the 8th of April, 1839, on which the sheriff made return, that he levied the same on eight tracts of land, containing seven hundred and twenty acres, and four town lots; and that on the 29th of the same month, he offered the lands and lots for sale in separate parcels, and there being no bid for any of them, he sold the whole in a body to the defendant Hoes for $50.62, which satisfied the judgment; that on the 30th of July 1840, the sheriff conveyed the land and lots to Hoes, the deed reciting the sale of the property *en masse*, which deed was filed for record on the 14th of April, 1842; that Hoes was the attorney of Graham in recovering the judgment; that the title to the lands and lots was mostly in Day, and the whole was worth $4000; that at the April term, 1838, the complainants, Rhodes and C. & W. H. Weed recovered a judgment against Day for $3355.21, and on an execution issued thereon, they purchased five of the tracts of land and one of the town lots for $2900, on the 20th of December, 1839, and have since received a sheriff's deed therefor; that at the same term the complainants, Swords, Halstead & Corning recovered a judgment against Day for $1123.44, and under an execution issued thereon, they purchased two of the tracts of land for $900, on the 20th of December, 1839, which have since been conveyed to them by the sheriff; that Day has no other property out of which the judgment can be satisfied, and that he was, at the rendition of the judgments, and has been most of the time since, a lunatic, and incompetent to transact business; that the other complainants reside in New York, and their attorneys, Butterfield & Collins, have had the sole management of their interests; that their attorneys, after diligent search, could find no record of any judgment against Day, and never knew anything of the Graham judgment until the summer of 1842, when Hoes showed them

his deed from the sheriff; that at the November term, 1842, their attorneys moved the Court to set aside the sale to Hoes, and the Court took the motion under advisement until the November term, 1843, when it overruled the same, and this decision was affirmed by the Supreme Court at the December term, 1844; and the bill dispenses with the oaths of the defendants to their answers, and prays that the sale and conveyance to Hoes may be set aside.

The defendant, E. S. Leland, admits the recovery of the judgments and the proceedings under them, as alleged in the bill; denies that the lands and lots were the property of Day, and worth $4000; denies the alleged incapacity and insolvency of Day; alleges that on the 6th of March, 1845, he purchased from Hoes, for the consideration of $500, two of the tracts of land, and received a warranty deed therefor; that this purchase was made in good faith, and without notice of the irregularity in the sale to Hoes, and that Hoes was then in the possession of a part of these tracts, and had made improvements thereon; insists that the complainants are barred by the lapse of time from avoiding the sale, and denies generally the other allegations of the bill.

Hoes admits the allegations of the bill respecting the recovery of the judgments, and the proceedings had under them, and that he was the attorney of Graham; states that Butterfield & Collins consulted him concerning the lands in the summer of 1842, when he informed them of his purchase, and showed them his deed from the sheriff; admits the motion in the Circuit Court to set aside the sale, gives a history thereof, and copies the affidavits introduced by him in resisting the application; denies that the lands and lots were worth $4000, and that the title was mostly in Day; denies that Day was either insane or insolvent; sets up the sale and conveyance to Leland, and alleges that he was in the possession of the two tracts of land at the time of the sale, and had made improvements thereon.

Graham admits the recovery of the judgment against Day and his co-defendants, and the proceedings thereon, and denies the other allegations of the bill. The defendants, Brush, Green, Pitzer, Bergen, Norris, L. Leland, Hale and the admin-

istrators of Cloud, admit the recovery of Graham's judgment, and the proceedings under it, and deny generally the other allegations of the bill.

Replications were filed to these answers, and the bill was taken *pro confesso* against the other defendants. The cause was heard at the November term, 1846. The decree recites that proof was made of the recovery of the judgments, and the proceedings under them; that the only entry made in the judgment docket of the rendition of the Graham judgment was this:

"Sept. 22nd, 1837.

"Brush, Henry L. *et al.* | William F. Graham. $246.29

19.62½
3.12½

22.75;"

that Hoes was the attorney of record of Graham, and that he made the conveyance to Leland for two of the tracts of land, at the time stated in the answers, and for the expressed consideration of $500. The Court then decrees that the sale and conveyance to Hoes be set aside, and that Hoes and Leland be forever enjoined from asserting any title under the sheriff's deed; that the complainants pay to Hoes, or deposit with the clerk, to his use, the amount bid for the lands and lots, with legal interest, and that upon such payment or deposit, the Graham judgment shall be deemed to be satisfied; that Hoes pay the costs, and the Master in Chancery ascertain and report the value of the improvements made by Hoes, and the rents and profits received by him. To reverse this decree, Hoes and Leland prosecute an appeal.

This case is not a new one in this Court. It was here on a writ of error to the decision of the Circuit Court denying the motion to set aside the sale to Hoes. Day *v.* Graham, 1 Gilm. 435. That decision was affirmed solely on the ground that the application should have been addressed to a Court of Equity. The opinion was expressed that the sale was clearly irregular, and ought to be set aside. We are entirely satisfied with the reasons then given for that conclu-

sion, and shall not re-iterate them here. The prominent facts of the case remain unchanged, except that the defendant Leland has become the purchaser of a part of the land in question. So far as the other parties are concerned, the case is not essentially different. The defendant Hoes has shown no additional reason why he should be allowed, by a sweeping bid of a nominal sum, to obtain the title to a large quantity of real estate to the exclusion of the creditors of the owner, who have bid nearly four thousand dollars for a portion of the same property. For all of the purposes of this case, it sufficiently appears that Day was the owner of the land. The other complainants have treated it as his property, by purchasing it in for a large amount, in part satisfaction of their judgments against him. None of the defendants pretend to have any interest in the property, except Hoes and Leland, and they claim no title but what they acquired by virtue of the sale under Graham's judgment. It may seem singular that they should set up the imperfection of Day's title, as a reason why their purchase should be permitted to stand. This, however, has been the drift of the defence from the beginning of the controversy. The bad reputation of Day's titles, resulting from his careless mode of transacting business, and the imperfect state of things in the recorder's office is relied on as a good reason why the sale should be sustained. As this Court said in the former case, "all this may have justified great caution on the part of bidders, but will not justify such a sale to enable purchasers to make such fishing bids. They should have examined his titles, such as they were, and made their bids according to their opinion of his title to each tract." Hoes cannot complain of the terms on which the sale is set aside. He receives back the purchase money with legal interest, and if he has any just claim, on account of improvements made on the land, he can yet obtain compensation. The other defendants are not prejudiced by the setting aside of the sale. Graham has already received full payment of his debt, and the payment required to be made to Hoes will relieve the judgment debtors from all further liability, and operate as a

full satisfaction of the judgment. Leland is not a *bona fide* purchaser, without notice of the irregularity. He was a party to the judgment, and is therefore chargeable with full notice of the proceedings under it. Even if a stranger to the judgment in the first instance, he could not now deny notice. The irregularity distinctly appears on the face of the sheriff's deed, and as he claims title through the grantee of the sheriff, he is bound by the recitals in the deed.

The most plausible ground of defence is, that the complainants are barred by the lapse of time from obtaining the relief sought, more than five years intervening between the sale to Hoes and the filing of this bill to vacate it. If this long delay was not satisfactorily accounted for, the objection would probably be a fatal one. Such a sale is not absolutely void, but may be avoided by the injured party. He is at liberty to treat the sale as valid or invalid, but he ought to make his election within a reasonable time after he is informed of the irregularity. If he does not manifest his intention to take advantage of the irregular sale by the commencement of proceedings within a reasonable time, to vacate it, he will be deemed to have renounced his right to do so. But the circumstances of this case, when properly understood, do not show any want of diligence on the part of the complainants, who are the judgment creditors of Day, in the assertion of their rights. These creditors allege that they had no actual knowledge of the existence of the Graham judgment until the summer of 1842, long after they had bid in the property, and there is nothing in the case inconsistent with the truth of this allegation. Hoes makes the affidavits, introduced by him on the hearing of the motion, a part of his answer; and among them is his own affidavit, in which he swore that the complainants' attorneys applied to him in the summer of 1842, to commence actions of *ejectment* for the recovery of the lands purchased, for their clients, under the judgments, and he then apprised them that he had a conflicting claim to the lands, and produced his deed from the sheriff. The inference is very strong, that up to that time they were not aware of the sale to Hoes. The entry

(*a*) Noyes *v.* True, 23 Ill. R. 504; Prather *v.* Hill, 36 Ill. R. 405.

in the judgment docket furnished no evidence of a judgment against Day. The judgment docket is intended by the statute to afford complete information of the existence and extent of a judgment, but the entry in the case of the Graham judgment was so defective as not to furnish the least notice to the creditors of Day; and this defective entry, although it did not affect the lien of the judgment, must not be regarded as furnishing the complainants with any actual notice of the judgment, or of any of the proceedings under it. The complainants made their motion to set aside the sale during the fall of 1842, and have been zealously engaged ever since in endeavoring to accomplish that object. They filed this bill immediately after the final decision against them on the first application. In the opinion of the Court, they have not been guilty of any laches in the prosecution of their rights.

The decree of the Circuit Court is affirmed, the costs in this Court to be paid by the appellants, Hoes and Leland.

Decree affirmed.

FREDERIC PEARL, appellant, *v.* HIRAM B. WELLMAN, *et al.*, appellees.

Appeal from Tazewell.

A petition for a re-hearing will be allowed at a term subsequent to that at which the case was decided, on reasonable notice being given to the adverse party, if the petitioner show to the Court that circumstances prevented him from making the application at the time required by the rule of Court. (*a*)

This cause was argued and decided at the December term, 1846, of this Court (3 Gilm. 311), when the judgment of the Circuit Court of Tazewell county was reversed.

At the present term, J. T. STUART, for the appellees, applied for a re-hearing of the case, upon the facts set forth in the statements of the counsel, and in several affidavits filed

(*a*) Selby *v.* Hutchinson, 5 Gil. R. 261, and notes.

therewith, due notice of the intended application having been given to the adverse party. It was agreed by counsel that their statements should be read in evidence on the motion, and that the usual oaths, and the formal petition usually required be waived.

The following are the statements and a portion of the affidavits referred to:

Statement of EDWARD JONES, Esq.

STATE OF ILLINOIS, *ss.* In the Supreme Court.

Frederic Pearl,

v. Appeal from Tazewell.

Hiram B. Wellman and
Marshall D. Wellman, partners trading under name, style and firm of Wellmans.

Edward Jones, being first duly sworn according to law, deposeth and saith, that he really believes that the petition foregoing, filed by Wellmans the appellees for a re-hearing in this cause, is true in all its parts. This affiant swears that, as the attorney of the said Wellmans, he did bring suit on a record against Pearl, the appellant as in said petition mentioned. That the appellant, Pearl, did appear by H. O. Merriman, Esq., his attorney, and defend said suit; that said H. O. Merriman, Esq., filed to said said action three pleas in bar; that to the third of said pleas, this affiant for appellees was about to write out and file a general demurrer, and make up issues of fact upon the first two pleas; that at the suggestion of the said H. O. Merriman, Esq.. and at the desire of the Hon. Samuel H. Treat, Judge, &c. presiding in said cause, this affiant consented to have said issues of fact and said issues of law decided, as if the pleadings in the cause had been regularly written out, and though he objected in the first instance, he consented thereto. This affiant further swears that immediately after said issues of law and fact were found for the said appellees, this affiant, to prevent misunderstanding, the said appellant by his said attorney having stated that he would present a bill of exceptions, and pray an appeal to this Court, wrote out said general demur-

rer, replied to the first plea, and filed a replication to the second plea denying payment, and to said replication added the *similiter*. This affiant further swears, that before the transcript of the record and proceedings in the Tazewell Circuit Court filed in this Court at its last term was made out, that this affiant had left the United States, and did not return thereto until after the adjournment of said term, and that he knows of no other person, save the said H. O. Merriman Esq. and himself, personally cognizant of the proceedings had in said cause in said Circuit Court unless his Honor Judge Treat has some recollection thereof. This affiant swears, that all the pleadings in said cause after the declaration are upon the same sheet of paper and in the following order; First, plea of *nul tiel record*, then replication in short to that plea; then second plea, then third plea, closely following, leaving no room between second and third pleas for replication to second plea; then general demurrer to third plea which concluded at the bottom of the page, and was signed by this affiant as attorney for the said appellees, and the replication to the second plea, with the *similiter* on the reverse side of said page, which accounts, in the opinion of this affiant, for the omission of the said replication in the transcript made out by the clerk of said Court, the demurrer concluding as aforesaid at the bottom of the page being an answer to the third and last plea.

This affiant further swears, that the first information that this affiant received of the reversal of said judgment in this Court, was in the latter part of June last, and that he was informed of the same at the said time, by the said H. O. Merriman Esq. while returning in the stage coach from Springfield to Tazewell county. This affiant asked the said Merriman upon what ground said judgment had been reversed, and upon being informed by said Merriman thereof, this affiant, forgetting at the time that through an abundance of caution he had written out said demurrer, replications and *similiter*, reminded said Merriman of said agreement, to which the said Merriman replied, after some moments' reflection, that he had entirely forgotten the agreement at

the time of the hearing in the Supreme Court, but now that he was reminded of it, he believed he did remember something about it, and that he believed that the Hon. Judge Treat did also, from the very great repugnance the Judge manifested toward the reversal of said judgment. This affiant, however, feels it to be his duty in justice to Mr. Merriman to state, that he does not believe that the agreement between this affiant and the said Merriman occurred to the mind of the said Merriman while prosecuting said appeal, though the said Merriman has stated to this affiant, that he had not thought of looking into the manner in which said issues were made up, until the omission of the replication to the second plea in the transcript, after the same was filed in this Court, was pointed out to him by Ebenezer Peck Esq. This affiant further swears, that he never saw any of the original papers in this cause after his return to the United States, until during the sitting of the September term, 1847, of the Circuit Court for Tazewell county, Illinois, when seeing the demurrer to the third plea written out, it first called to his recollection the fact of his having made up said issues. He further swears, that the replication to the first plea, and the demurrer to the third plea, and which were embodied in the transcript filed in this cause at the last term, were reduced to writing by this affiant at the same time at which replication was written out, which answered the second plea and omitted from said transcript.

This affiant further swears, that early in September last, he called upon Lawson Holland, the security in the appeal bond in this case, and informed him that application would be made for a new hearing in this cause, and that said Holland then informed this affiant, that he held counter security to indemnify him from liability upon said bond, and would hold the same until the cause was decided.

And the said Jones in relation to the matter contained in the counter statement of H. O. Merriman, Esq., states that according to his recollection upon the trial of this cause in the Circuit Court, that nothing was said relative to waiving any objection to the third plea, which could be reached upon

general demurrer, although it is true that the demurrer was not argued at length, and that the only objection to the sufficiency of the plea urged to the Court in support of the demurrer, was the distinction between a levy on mesne, and a levy on final process. Mr. Merriman, at the time, asked me directly, if the demurrer was general or special, to which I replied, general; and the said Jones further states, that at the last September term of the Circuit Court of Tazewell county, this cause was on the docket of said Court, but was there placed by the clerk, without any order of the Court to that effect, and that the said H. O. Merriman objected to its being upon the docket for that cause; and that the said Jones, the only counsel for appellees attending at said term, expressly refused to recognize said cause as a cause pending in said Court. No action, I believe, was taken by the Court in the matter.

Relative to the counter security held by Holland, the security in the apeal bond, I can only say, that in a conversation I had with him within a fortnight, I received the idea that he was still very nearly, if not quite secured.

(signed) EDWARD JONES.

The said Jones further states, that unless the judgment of the Circuit Court in this cause shall be affirmed, in his opinion it will be very difficult, if not impossible, to collect the said demand from the said Pearl.

(signed) EDWARD JONES.

Statement of H. O. MERRIMAN, Esq.:

It is my understanding, that the counsel for appellees was to make the issues after the trial of the cause in the Court below, though my recollection of the facts is very indistinct. It was also my distinct understanding, that all objection to the form of the third plea was waived, and certainly not insisted upon.

I further state, that upon the decision of this Court, at the December term, 1846, to-wit: in June last, Thomas J. Little caused a transcript of the judgment of this Court to be filed in June last, in the office of the clerk of the Court

below, and the clerk of said Court docketed the cause (without any special order of Court), and the cause is still depending in that Court, neither party at the September term of said Court taking any action in the case. That the claim on which said suit was instituted, was, as I am informed by said Jones, confided to said Little as an attorney, and by said Little to said Jones.

That the security upon the appeal bond, as I am informed and believe, took notes to himeelf as counter security against his liability on said bond, given by divers individuals, in small amounts to said Holland, for no other consideration than to save the liability of said Holland in that respect, some of whom are dead and others have left the country since last winter; thereby, to some extent (how far I am not advised), lessening the said security.

I further state, that in procuring the record originally filed in this cause, I requested the clerk of the Court to make a copy of the record and send to Springfield, which he did, and until after the said term was commenced, I did not see or know the contents of said recoid, nor, as I believe, did said Pearl, and I never heard of said replication to the second plea being filed, until September last, nor did I know of the demurrer to third plea being filed, until I saw it in the record, and a thought of what passed at the trial did not enter my mind, until my attention was called to it by said Jones, and now, it is most remarkably indistinct, and can state only my impressions.

(signed) H. O. Merriman.

Affidavit of J. A. Jones, clerk, &c.:

State of Illinois, } sct.
Tazewell County. }

This day personally appeared before the undersigned, Probate Justice of the Peace in and for said county, John A. Jones, who, having been duly sworn, according to law, deposes and says, that as Clerk of the Circuit Court of said county, he was directed by the counsel of each of the parties to a certain cause removed by appeal from said Court, and wherein Hiram B. Wellman and Marshall D. Wellman,

are plaintiffs, and Frederic Pearl defendant, to furnish a complete record thereof, except of the bond for costs which the defendant's attorney, according to the best of the recollection of the said deponent, desired to be omitted in his transcript. That with said exception, he made the second transcript from the first, copying all the record he then saw on file in his office. That if the replication to the second plea was omitted, it was entirely withuot the direction of the said defendant, or his attorney. Said deponent further says, that he never again examined the papers of said cause, until the first or second day of the late September term of this Court, when the plaintiffs' attorney exhibited to said deponent in Court, said replication written upon the defendant's pleas, filed in said cause, and so folded under as to have escaped his notice when copying the record. And further this deponent saith not.

(signed) J. A. JONES.

Sworn to and subscribed before me, this 20th December, A. D. 1847.

(signed) PALMER HOLMES, P. J. P.

State of Illinois, } ss.
Tazewell County. }

I, William B. Parker, being duly sworn according to law, deposeth and say, that from a personal examination, the facts set forth in the foregoing affidavit are substantially true.

(signed) WILLIAM B. PARKER.

Subscribed and sworn to before me, this 20th day of December, A. D. 1847.

(signed) PALMER HOLMES, P. J. P.

Affidavit of N. BUSHNELL, Esq.

In the argument of this case, it was my understanding that Mr. Merriman waived all the errors assigned, except that relating to the demurrer to the third plea. We had several conversations in which this matter was mentioned, and as I wished to prepare a written argument, and return home, leaving the case to be argued by Mr. Merriman orally, I desired Mr. Merriman to inform me of the points on which he relied, that I might shape the argument to meet his view;

and in answer to the inquiry, I clearly understood him to say, that the point above mentioned, was the only one to be argued. I thereupon prepared an argument on that point, the same reported in 3 Gilm., and handed it to Mr. Merriman to read. He returned it to me the next day, and I then understood from him, that it discussed all of the case to be submitted. I then advised him I should leave it with Mr. Gilman, of whom he could obtain it whenever he desired, which I did, and left for Quincy. From what passed between Mr. Merriman and myself, so completely was my attention drawn to the question arising on the third plea, that I took no notice of the point on which the case was reversed, nor have I any recollection of having been aware that any such point was presented by the record, until I read the opinion after the adjournment of the Court. Had I been aware of it, unless it had been waived, I should certainly have applied for a *certiorari* to perfect the record; and I think I should have discovered it, unless my attention had been diverted from a careful examination of the record by the facts already detailed.

(signed) N. BUSHNELL.

Subscribed and sworn to before me this fifth day of January, 1848.

(signed) NOAH DIVILBISS, Dep. Clerk, S. Ct.

H. O. MERRIMAN, for the appellants, filed the following written argument against the motion for a re-hearing:

This Court has decided repeatedly, that a petition for a re-hearing must be made at the term in which the Opinion is delivered. People *v.* Pearson, 3 Scam. 406.

Here the application is not only for re-hearing, but also to annul the record. This, I humbly conceive, should have been done under the rules of Court before joinder in error. It seems that two copies of the record were made out for appellees and one for appellant, and no efforts made by appellees before trial to remedy the defect. It would be an extraordinary thing now to allow such an application.

A supposed agreement at the trial below is relied upon as

a ground for this application. I certainly did not understand from anything said at the time, that liberty was given to appellees' counsel to make up the pleadings after the term; and it is evident the adversary's counsel did not so understand it, or at least did not rely upon such understanding; because, as appears by statement of E. Jones, Esq., the demurrer to the third plea and replication to plea of *nul tiel record*, were not written out then, but were written out afterwards, and thus he must have understood at the time, that it was his duty to make the issues then. And no lawyer would rely upon such an agreement not reduced to writing, nor put upon the records, and take a judgment liable at any time to be reversed. I would willingly correct the matter by agreement now, if I could convince myself that any agreement was made by me which had caused the result. But I did not consider what was then done as entitled to the dignity of an agreement.

But the point particularly relied upon now is, that the clerk below, through inadvertence, omitted the replication to second plea. This was not done by any direction of the appellant or his attorney, as the clerk swears. He also gives the present appearance and location, if I may so term it, of that replication upon the record. From the record now produced it does not appear when this replication was filed, and from the clerk's statement it does appear that the replication was never seen by him until the September term, 1847, of the Tazewell Circuit Court, when it was shown to him by the appellees' attorney. The cause then being on the docket in that Court, I then took issue upon that plea. Now, if this application is allowed there is no case where there is an informality in the pleadings it may afterwards be written upon another piece of writing, without anything showing when made, and this Court afterwards called upon to reverse a previous decision upon an amended record. To prevent frauds, the defect should be obviated before joinder in error, at least before trial, and at all events at the term in which the decision is made.

My third plea is decided here upon points amendable and

not decided by or called to the attention of the Court below; and, although the learned Judge of this Court, who delivered the Opinion, intimates that the matters attempted to be set up in the third plea are untrue, yet, without attempting to contradict that intimation, I would respectfully suggest that my sources of information on that subject are superior to his, and that in my opinion, from the information in my possession, the plea is true; and this may account for a desire on the part of the appellees' counsel to have the cause determined upon technical objections to that plea, and not upon its merits, when, if any understanding existed between the counsel, it related as much to a waiver of all technical or formal objections to the third plea as to anything else. But for reasons above stated, I cannot suppose that any agreement is the cause of the results of the cause here.

Another object of the appellees I suppose to be, to avoid the costs of this Court. Whatever may be the result of their application, that object cannot be obtained. This would be another incentive to fraud in altering the position of the pleadings. In this case, however, I wish to be distinctly understood as not imputing anything of the kind to Mr. Jones, and what I have said upon that subject is only as to the results that might, and probably would follow from such a precedent as is sought to be established in this case.

An avowed object on the part of the appellees is to hold the security on the appeal bond. Securities are favored in law, and only charged by strict law, as this Court has repeatedly decided; and the situation of the security is changed from what it was a year since, his counter security lessened, as appears by Mr. Jones' statement. And I apprehend that this Court will not interfere for the purpose of charging a security, and will even if the application is granted it would be upon payment of costs and a release of the security.

Mr. Jones says in his statement, that if this application is refused it will be doubtful whether the debt can be collected, &c. In this I concur with him fully, but probably for different reasons. I think it doubtful whether the appellees will ever get another judgment, and if I am correctly advised, such

will be the result. But my opposition to their application I place upon higher ground than considerations in relation to costs or security; the danger that will probably ensue from such a precedent, founded upon such a state of facts as is disclosed in their application.

The Opinion of the Court was delivered by

THOMAS, J. This case was disposed of at the last term of this Court (3 Gilm. 311), and again comes before us on a re-hearing, granted at the present term on the appellee's petition.

The error for which the judgment of the Circuit Court was reversed, was found in its proceeding to try the issues formed on several of defendant's pleas, and rendering judgment thereon against him, when his plea of payment remained wholly unanwered.

An amended record has been filed by leave of the Court, from the inspection of which it appears that a replication to the defendant's said plea of payment was in fact filed before the trial of the cause in the Circuit Court, but inadvertently omitted from the transcript of the record prepared and sent up by the clerk, on which the Court acted.

That ground of error being thus removed, and the Court having held that the opinions and proceedings of the Circuit Court were in no other respect erroneous, its judgment is affirmed with costs.

Judgment affirmed.

DANIEL O. DICKINSON, appellant, *v.* ELI WHITNEY, appellee.

Appeal from Lake.

If a person sell the property of another and receive the price in money, an action for money had and received will lie to recover it. Even where the sale is made without any authority from the owner, he may waive the tort and sue in *assumpsit* for the price actually received. (*a*)

ASSUMPSIT, in the Lake Circuit Court, brought by the appellee against the appellant, and heard before the Hon. Jesse B. Thomas and a jury, at the September term, 1847. Verdict and judgment for the plaintiff below for $713.30.

The evidence given on the trial, and the instructions asked by counsel are embodied in the Opinion of the Court.

G. GOODRICH, for the appellant.

A. T. BLEDSOE, for the appellee.

The Opinion of the Court was delivered by

TREAT, J.* This was an action of *assumpsit*, commenced in the Lake Circuit Court by Eli Whitney, the appellee, against Daniel O. Dickinson, the appellant. The declaration contained two special counts, and a common count for money had and received. Plea, *non-assumpsit*, and trial by a jury.

The appellee read in evidence this receipt, "Received in store, Little Fort, Nov. 6, 1846, 726 $\frac{51}{60}$ bushels of Wheat, subject to the order of Eli Whitney, on return of this receipt and payment of charges and advance. D. O. Dickinson." It was proved by a witness, that Dickinson requested him on the 10th of June, 1847, to tell Whitney that he had sold or contracted to sell, his wheat to net him one dollar per bushel, and that the money would be ready for him on the next Tuesday or Wednesday, of which witness

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

(*a*) Morrison *v.* Rogers, 2 Scam. R. 319, and notes.

informed Whitney. Dickinson said to witness, that Whitney had authorized him to sell the wheat when it would net him a dollar. A second witness swore, that Dickinson told him he had purchased Whitney's wheat. A third witness testified, that Dickinson told him previous to the 10th of June, 1847, and while wheat was rising, that he had bought Whitney's wheat. Another witness stated, that Dickinson informed him between the 10th and 15th of June, 1847, that he had sold all his wheat. Witness offered Whitney one dollar and four cents for his wheat, but he said that Dickinson had the preference; wheat was worth one dollar on the 10th of June. Another witness said, that wheat was worth one dollar and six cents on the 6th of June.

A witness introduced by the appellant, testified to a conversation between the parties on the last of June, in which witness said he had come to see if the wheat was gone and receive his pay for it, and Dickinson replied that he had contracted the wheat to the captain of the steamboat Empire to net him one dollar. Whitney said it was a good sale and asked whether the sale would be good if wheat should fall, and Dickinson answered that the captain had promised to take it the next trip, and would no doubt do so if the price continued the same. This witness heard another conversation on the last of July, in which Whitney asked what was to be done as the captain did not take the wheat, and Dickinson said he would deliver him as good wheat on his receipt, or pay him the market price, and Whitney remarked that he would see about it. A second witness for the appellant stated, that he had been in the employment of Dickinson and had charge of his warehouse; that the captain of the Empire called on the 23rd of June, but took no wheat; he promised to stop the next trip but did not; there were thirty-five thousand bushels of wheat in the warehouse during the preceding winter, which was all mixed together; the last shipment of wheat, one thousand bushels, was made on the 23rd of July, leaving on hand only one hundred bushels; there was a waste on the receipts of that season of six hundred and forty-three bushels as ascertained by actual weight; wheat was

worth but sixty-six cents between the 10th and 23rd of July; the usual charge for storage and shipment was four cents per bushel.

The Court, at the request of the appellee, instructed the jury, *first*, "if they believe from the evidence, that the defendant has sold the wheat stored with him by the plaintiff and received the money for it, then an action for money had and received will lie;" and *second*, "if the defendant has sold the wheat as his own and received the money, this action will lie."

The appellant asked the Court to instruct the jury, *first*, "If they shall believe from the evidence, that the defendant offered to deliver to the plaintiff before the commencement of this suit, the quantity of wheat called for by his receipt, and of as good quality as that stored with the defendant, then the law is for the defendant, unless the jury shall also find from the evidence that the defendant had sold the plaintiff's wheat for him at one dollar per bushel net as he had been authorized to do;" *second*, "that the defendant was not bound to deliver to the plaintiff the same wheat received in store on his receipt, but only wheat of as good quality;" and *third*, "that if the jury believe from the evidence, that there was an insufficiency of wheat on hand in the warehouse to fill the plaintiff's receipt at any time during the season and before the commencement of this suit, and that such deficit was occasioned by waste, then the law is for the defendant, unless the jury shall also find from the evidence, that the plaintiff's wheat was sold in pursuance of the authority given to the defendant by the plaintiff."

The Court gave the second of these instructions, but refused to give the first and third. The jury returned a verdict for the appellee for $713.30. The Court refused to grant a new trial, and rendered judgment on the verdict. The several decisions of the Circuit Court, in giving and refusing instructions and in overruling the motion for a new trial, are assigned for error.

The instructions given by the Court at the instance of the appellee are unquestionably correct. They assert the

familiar principle of the law, that if a party has sold the property of another and received the price in money, an action for money had and received will lie to recover it. Even where the sale is made without any authority from the owner, he may waive the tort and sue in *assumpsit* for the price actually received. The first and third instructions demanded by the appellant were properly refused. These instructions apply to the whole declaration. Without stopping to inquire into their propriety with reference to the special counts, it is very clear that they are erroneous as to the general count for money had and received. When applied to this count, they in effect deny all responsibility on the part of the appellant, unlsss he has strictly pursued the authorty given him by the appellee, and would excuse him from all liability, if he had sold the wheat on any other terms than those prescribed by the appellee. He was liable on the common count, even if he had sold the wheat in express violation of the instructions of the appellee, provided he had received the price in money.

In the opinion of the Court, the application for a new trial was properly denied. We are not prepared to say that the finding of the jury was manifestly against the weight of evidence, as we would be compelled to say in order to set aside the verdict. It was peculiarly a case for the consideration of a jury, and the verdict should not be disturbed but for the most substantial reasons. Laying out of view the special counts, which the testimony perhaps did not sustain, the real question in the case was, whether the appellant had sold the wheat and received the price in money; and that was purely a question of fact to be determined from all of the circumstances developed on the trial. It conclusively appeared, that he received the wheat from the appellee and mixed it with a large amount of other wheat in his warehouse, and that the whole, with the exception of one hundred bushels, was shipped before the suit was commenced. In the absence of any other testimony, this would make out a *prima facie* case against him, and require him to show circumstances rebutting the presumption that he had received the current value in money. He had voluntarily parted with the wheat, and the presumption was that he required payment when he delivered it. The other evidence does not conflict

with this view of the case. While the wheat was in the warehouse and advancing in value, the appellant stated to several persons that he had purchased it, and he admitted to another person that he had sold all of his wheat. He sent information to the appellee that he had sold, or contracted to sell, his wheat to net him one dollar per bushel, and to call on a particular day and receive the money. When called on for payment, he insisted that the wheat was not then paid for and delivered. When called on a second time after the whole of the wheat had been sent forward, and when it had fallen much in value, he offered to procure other wheat for the appellee, or pay him the reduced price. It was in his power to explain away the case made against him, if he had not actually obtained the money for the wheat. If it was shipped without being sold, or sold upon credit, he could easily have established it on the trial. Failing to do it, the jury were authorized to believe that he had sold the wheat when it bore the price the appellee demanded; and that his subsequent conduct and declarations were but expedients to induce the appellee to take other wheat, or the depreciated price. The circumstance, that the waste on the whole of the wheat in store and the balance on hand would account for the amount received of the appellee, was entitled to but little consideration, for the reason that the appellee was, at most, only bound to bear a proportionate share of the loss. We are satisfied that no error has been committed in the case, and the judgment of the Circuit Court is affirmed with costs.

Judgment affirmed.

HENRY B. TRUETT, appellant, *v.* CHARLES B. WAINWRIGHT, *et al.*, appellees.

Appeal from Jo Daviess Co. Court.

A being indebted to B and being suddenly called away from his business, gave to C, his general agent, a sheet of paper with his signature at the foot of it, for the purpose of being filled up with a letter of attorney to confess a judgment. He took it to the attorney who held the claim for collection, who wrote a letter of attorney over the signature and then suggested to the agent that he add a scroll to the name of his principal, that being the most usual mode of executing such papers. He complied with the suggestion and then delivered the paper to the attorney: *Held*, that the letter of attorney was sufficient, and that, although it was usual to affix a seal or scroll to such instruments, it was not necessary. (*a*)

THIS case was heard in the Jo Daviess County Court, before the Hon. Hugh T. Dickey, at the September term, 1847, when a former judgment of the Court at the July term, in favor of the appellees, who were plaintiffs below, for $503.25, was in all things affirmed.

The several proceedings in the Court below are stated in the Opinion of this Court.

S. T. LOGAN, for the appellant.

T. FORD, for the appellees, cited the following authorities: 1 Salk. 86; 1 Stra. 693; 1 Binney, 214, 469; 6 Johns. 300, 301, 310, 317; 9 Wend. 439; 3 Dallas, 331; 12 Sarg. & Rawle, 243; 2 Gilm. 635, 1 Ohio Cond. R. 658; Bre. 258; 1 Scam. 428; 6 Littell, 186; 6 Johns. 34; 1 Scam. 291; 1 Peters, 155.

The Opinion of the Court was delivered by

KOERNER, J.* At the July term, 1845, of the Jo Daviess County Court, E. B. Washburne, an attorney of that Court, filed a warranty of attorney, purporting to be under the hand and seal

(*a*) See People *v.* Organ, 27 Ill. R. 29.

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

of the appellant, H. B. Truett, directed to Thomas Drummond, Esq., or any other attorney of any Court of record in this State, and authorizing such attorney (waiving all process), to confess judgment in favor of Wainwright & Co. (the appellees), for the amount due, with legal interest, upon a certain bill of exchange for $640.19; which warrant of attorney bears the signature of Miers F. Truett as a subscribing witness. At the same term judgment was entered up upon this warrant, for the sum of $503.25, the plaintiff's attorney having allowed a credit, and execution was awarded.

At the April special term, 1847, the appellant, H. B. Truett, moved the Court to stay the execution and set aside the said judgment, upon filing an affidavit which was intended to show that the said Truett had never given proper authority for the confession of such judgment, and which alleged that since the rendition thereof he had ascertained that in fact nearly the whole of said bill of exchange had been paid from the proceeds of certain merchandise, left in the hands of the plaintiffs for that purpose, at the time when the bill of exchange was drawn up and accepted. The affidavit also avers, that he had never sanctioned or assented to the proceedings in obtaining said judgment.

Counter affidavits having been filed by J. P. Hoge, the attorney for Wainwright & Co., and by E. B. Washburne, the Court ordered a stay of the execution, and a suspension of the judgment, directing at the same time that the said judgment should stand as a security, so far as the plaintiffs might maintain their claim in the premises. The plaintiffs were ordered to file a declaration in this cause, and leave was given to defendant to enter his appearance and to plead. The counsel for Truett excepted to this decision of the Court, but the plaintiffs having filed their declaration, the defendant appeared and pleaded to the action at the September term, 1847. Before trial defendant asked leave to withdraw his pleas, which having been refused, the case was by agreement tried by the Court, who found the issues for the plaintiff. The Court thereupon ordered that the former

judgment be in all things affirmed, as of the July term, 1845. From this judgment Truett prosecutes this appeal.

The errors assigned resolve themselves all in one, that the Court erred in not wholly setting aside the said first judgment. It is not necessary to set out the affidavits at full length. When properly understood they are not inconsistent with one another, and the merits of the controversy can be readily ascertained. It may be remarked, however, that the affidavit of the appellant is by no means as precise and free from ambiguity as it should be, and that it gives room for inferences both ways, which, according to the well settled rule in such cases, must be drawn when they fairly permit of more than one construction in favor of his adversary.

In the first place, then, Truett does not deny, but what his name, which appears to the warrant of attorney was signed by him; but he avers that said warrant was not executed by him, "in the manner in which it now appears," but that it was executed by Miers F. Truett, then acting as his general agent, but not authorized by him "by any power under seal," to do this or any other act, and that it was given by said Miers without the knowledge or consent, and in the absence of him, the affiant. It is also stated in the affidavit, that he had no notice of the time that judgment was intended to be taken by plaintiffs, or that he assented to a judgment being taken.

The affidavit of Mr. Hoge, while it presents the facts of the case in a very lucid manner, explains at the same time very satisfactorily, the somewhat ambiguous passages of the affidavits of Truett, which have just been mentioned.

Mr. Hoge had several conversations with appellant concerning this claim in the spring of 1845. Truett made a statement in relation to certain goods left and attached in Pittsburgh for the purpose of satisfying this claim, whereupon Mr. Hoge, showed him a record of the proceedings in the attachment suit in Pittsburgh, and the sheriff's return of the sale of the goods, stating that this amount would be credited, but that unless he would satisfy the balance or give a power of attor-

ney to confess a judgment, he would have to sue him to the next term. Truett then promised that if Hoge would not sue him, he would arrange the matter before he (Truett) would depart for the East. Truett having made this promise, no suit was brought, but Truett left for the East without making such arrangement. Sometime afterwards Miers F. Truett, the brother of appellant, called, and upon Mr. Hoge's complaint that appellant had disappointed him, and had made it impossible to obtain service on him, the said M. F. Truett stated that his brother had called before leaving, but had not been able to find Mr. Hoge; that he had left the matter with him to be arranged. He then produced a sheet of paper with the signature of the said Henry B. Truett at the foot thereof, but without a seal, being the same paper now on file, and upon which the judgment was entered up, stating that it had been left by his brother for the purpose and with full authority to him to make any satisfactory arrangement with said Hoge. Upon suggestion that a scroll had better be added to it, this being the most usual mode of executing such papers, Miers F. Truett attached a scroll to it, and, the warrant of attorney having been written over the signature by Hoge, delivered it to the latter.

At the early part of the term, and before judgment was entered up, the appellant returned from the East, called upon Hoge and requested him to indorse a credit on said claim for some $300 or $400.00, which was declined, as Hoge had not been advised by his client to do so, and Truett produced no evidence of such credit. Truett then intimated that he would defend the case, but was told by Mr. Hoge that all he could do was to delay the case near to the close of the term, so that if he received advices he could act accordingly. Judgment, in consequence of this promise, was not entered until the last day but one of the term. During this conversation, Truett never questioned or denied the authority of said Miers to give said warrant of attorney, or that he had left the paper with said Miers for the purpose to which it was applied.

The affidavit of Mr. Washburne shows, that about the same

time Miers F. Truett, in order to arrange a claim which Hempstead & Washburne held against him, presented a paper with the name of said Henry B. Truett, under similar circumstances, and also for the purpose of writing a warrant of attorney over it; that said Miers also added a seal to it, and that said power of attorney was used accordingly, and the judgment obtained thereon was paid by said Henry B. Truett.

From all this it is apparent, that Truett, the defendant below, had no reason to complain of the order of the Court made in the premises. This Court has already decided, in Lyon *v.* Boilvin, 2 Gilm. 629, a case that was well considered, and in which the authorities upon which the decision is founded were fully examined, that where judgment has been obtained against a party represented by one who was wholly unauthorized to appear, the Court may set aside such judgment on reasonable terms. The order of the Court made in this case is almost identical with the one now before us. The counsel for the appellant is not inclined to question the correctness of that decision, but insists that a distinction is to be taken; that in cases where Courts have set aside judgments in part only, and on terms, the facts did not show that there was the slightest fault on the part of the plaintiffs; that in such cases the defendants appeared by the record as being regularly in Court, and that they had no reason to doubt their right of taking judgments. Whenever it appears that the party who obtained the judgment acted throughout *bona fide*, the counsel admits that it is but right and proper that the plaintiff should not lose the fruits of his diligence, when the defendant asks as a favor of the Court to be relieved from the consequences of the misconduct of a third party, who has equally imposed upon the plaintiff and the defendant, and to whom according to the strict law as it stood in former times, the defendant had alone to look for redress. But the counsel contends it is far different, when the plaintiff himself, as in this case, was instrumental in procuring an unauthorized appearance. In such a case the Court has no discretion, and must at once wholly set aside the judgment so obtained by the procuration of the plaintiff. We have no hes-

itation in admitting the truth of this proposition to a certain extent. Whenever the Court is satisfied that the plaintiff acted *mala fide* in the matter, then it follows, as a necessary consequence, that a judgment procured by fraud should be instantly set aside. Fraud not only vitiates contracts, but the most solemn legal records are for nought esteemed, whenever they rest on the basis of fraud. But we are most clearly of opinion that the present case can, by no manner of means, be classed with cases of fraud. The counsel for plaintiff, Wainwright, seems to have acted with the most perfect good faith. He had proposed that such a warrant should be executed by Truett. Accidentally no interview had taken place between him and Truett, before the latter's departure. The general agent of defendant presents himself with a paper, bearing the genuine signature of defendant, and declares his authority to act in the matter. The counsel might have easily procured personal service, but had delayed it on account of defendant's promise to arrange the matter before his leaving for the East. Defendant came home before the judgment was entered, and by the conversations with Mr. Hoge, had obtained full knowledge of the proceedings about to take place, although he may not have known the precise time, when it was entered. The authority of Miers F. Truett is never for once questioned by him. All he relies upon now, is the fact that he himself did not put a scroll to the paper, and that his brother had no sealed authority to do so for him. He is under the impression that this was necessary to make the warrant technically valid, and disputes its validity on this ground alone. He imputes an evil design to plaintiff, because he procured the addition of a seal to an instrument, which he, the defendant, at the time, considered as sufficient for the purpose of confessing judgment, and which he intended for that purpose, but which, he flatters himself, he has discovered since to be insufficient by the omission of the seal, and the force of which, for this technical defect alone, he seeks to avoid. This will not do. Whatever strictly legal advantage a party may occasionally derive from denying the validity of his own acts, which he at a previous time has thought to be perfect and binding, he can never succeed in fastening the reproach of

unfair dealing on the other party, who has considered them in the same light, and has acted accordingly.

The present case then falls, in our opinion, precisely within the principle adopted by this Court in the case of Lyon *v.* Boilvin, and the cases in New York, upon which that decision was principally founded; and we can, consequently, see no error in the decision of the Court. Indeed, if any one had reason to complain, it was the plaintiff in the action, whose judgment became suspended by the order of the Court. The Court would have been perfectly justified in denying all relief in this matter, for it cannot be denied that the power of attorney to confess judgment (the signing of which for the purposes intended is not denied in the appellant's affidavit), was just as good without as with the seal. Although it is usual to affix a seal to such instruments, it is by no means necessary to do so. This is laid down as law in several cases in the English Courts, as in 5 Taunton, 264 (1 Eng. Com. Law R. 103); 1 Chitty, 707 (18 Eng. Com. Law R. 209). Such seems to have been the opinion of the Court in 2 N. Hamp. 520. Upon the authorities of these and other cases, the law is so stated in Tidd's Pr. 546, Graham's Pr. 767, Hammond's Principal and Agent, 221, 445. The defendant, then, by his own showing, was properly in Court on his warrant of attorney without his seal, and the first judgment was binding upon him to all intents and purposes. So it should have remained. Judgment below affirmed with costs.

Judgment affirmed.

HENRY B. TRUETT, plaintiff in error, *v.* CHARLES B. WAINWRIGHT *et al.*, defendants in error.

Error to Jo Daviess Co. Court.

The setting aside of judgments, as well in the case where they were procured by the misconduct of the plaintiffs as where they were obtained by the unauthorized appearance of strangers, rests on the ground of fraud, such practices being regarded by Courts as fraudulent, whatever might have been the original intentions of the party. (*a*)

It is a well settled rule, that in cases of fraud, Chancery has always jurisdiction, though Courts of Law may exercise it concurrently in all cases in which their powers are sufficient for the relief sought.

BILL IN CHANCERY for discovery, &c. in the Jo Daviess County Court, filed by the plaintiff in error against the defendants in error. There was a demurrer to the bill for want of jurisdiction, which was heard before the Hon. Hugh T. Dickey, at the July term, 1846, when the same was sustained, and injunction dissolved and the bill dismissed.

The bill in this case set forth substantially the same facts as were made the foundation of the motion in the preceding case between the same parties.

S. T. LOGAN, for the plaintiff in error.

T. FORD, for the defendants in error, relied upon the following authorities: 1 Ohio Cond. R. 658; 1 Scam. 428; 2 Gilm. 635; 9 Wend. 439; Rev. Stat. 382, § 11.

The Opinion of the Court was delivered by

KOERNER, J.* This cause is closely connected with the one immediately preceding, as it grew out of the judgment rendered against Henry B. Truett in the Jo Daviess County Court, at the July term, 1845, in favor of Wainwright & Co. to set aside which he had made the motion, which was the

(*a*) Nelson *v.* Rockwell, 14 Ill. R. 376, and notes; Morris *v.* Thomas, 17 Ill. R. 114.

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

subject matter of the decision in the cause just mentioned. Before that motion was entered by him, he had filed the bill in the present case, to wit, to the October term of said Court 1845, in which he sets forth pretty much the same facts which are contained in his affidavit in the case just decided, with some additional allegations, which will have to be noticed hereafter. To this bill which asked for a discovery on some points, and for a setting aside of the judgment at law, and for an injunction of the execution issued upon said judgment, the defendants below, who are also the defendants here, interposed a demurrer, which, at the July term, 1846, was sustained by the Court, and the bill was dismissed and injunction dissolved. The sustaining the demurrer, dismissal of the bill and dissolution of the injunction are the errors assigned upon this record.

It is strongly insisted upon by the counsel for the defendants amongst other reasons, that the demurrer was properly sustained for want of jurisdiction. It is argued that inasmuch as Courts of Law have exercised a full and ample authority in cases like the present, where it is contended that a party has been represented by an attorney wholly unauthorized, and has been made subject to proceedings and judgments without being really a party to the action, and have granted all relief which a Court of Chancery could possibly have extended to the party alleged to have been injured, it does necessarily follow that Courts of Chancery can have no jurisdiction over this matter. For this position we are referred to the case in the Ohio Reports, Crichfield *v.* Porter, 1 Ohio Cond. R. 656; 4 Hammond, 518. This case unquestionably sustains this position. The Court there say: "The relief which is now given by Courts of Law upon motion, is equitable in its character, extended upon equitable terms, and so framed as to protect the rights of one party without sacrificing or jeopardizing those of the other. It may be afforded in the Court rendering the judgment with more facility, and more certainty of doing justice, than in a distinct tribunal, and the party injured can then obtain all relief he is justly entitled to, without subjecting the other party against whom there is no

complaint, but having, as he supposed, in due course of law, obtained a judgment in his favor, to the delay and expense of a Chancery proceeding." For the reason so assigned, the Supreme Court of Ohio decided in that case that a Court of Equity could not exercise jurisdiction. In the case decided in our Court (Lyon *v.* Boilvin, 2 Gilm. 635), we have adverted to the doctrine as laid down in Ohio; but while we have, on the strength of that and other cases, decided that such relief might be granted by the Courts in which judgment was rendered, we have not determined (and the points in the case did not call for such determination), that we would go to the length which the Court in Ohio has gone, in deciding that such Court had exclusive jurisdiction. We see no reason why Chancery should not have concurrent jurisdiction in such cases. Much as we respect the decisions of the Supreme Court of Ohio, we cannot but differ from them to a considerable extent in their argument. While we admit that relief can be obtained in a Court of Law by motion with more facility, we are inclined to deny that it can be afforded there with more certainty of doing justice. Of this the party complaining ought to be the best judge. While in a proceeding by motion he has the advantage of his *ex parte* affidavit, the defendant, on the other hand, has it in his power by on *ex parte* counter affidavit to destroy the effect of the first one. Indeed it is hard to imagine how a Court at Law can finally settle the contest, when contradictory *ex parte* affidavits are produced by both the parties. The party injured should have the right to select, according to his own judgment in the matter for his tribunal such an one as would give him the advantage of a discovery from the defendant, full and explicit, and of an examination of witnesses conducted according to the well known and excellent rules of evolving truth. Testimony which has not undergone the ordeal of cross-examination is hardly worthy to be called by that name, and a party ought not to be compelled to have his rights determined by *ex parte* statements.

The setting aside of judgments as well in the case where they were procured by the misconduct of the plaintiffs, as

where they were obtained by the unauthorized appearance of strangers, rests at last on the ground of fraud. The law looks upon such practices, however far the parties may have been from the thought of actually committing a wrong, as fraudulent, and treats them as such; and it is a well settled rule, that in case of fraud Chancery has always jurisdiction, though Courts of Law may exercise it in all cases in which their powers are sufficient for the relief sought concurrently. It is not perceived, then, why in the present and similar cases a Court of Equity should be stript of one of its most efficient, and therefore most valuable powers. In our opinion, the Court below had full jurisdiction over the matter.

As regards the averments of the bill, it cannot be denied that they are not set forth with that perspicuity and distinctness which is so desirable in pleading. Still we think that the complainant has made out a *prima facie* case sufficiently strong to entitle him to an answer from the defendants. It is much stronger than the one which was presented by the affidavits on the motion in the former case. In this bill, the authority of Miers F. Truett to give a warrant of attorney in any form whatever is unequivocally denied, the complainant using, in this respect, the following language: "Your orator had then left with Miers F. Truett your orator's simple signature in blank, without any seal being affixed or attached thereto, for no other object or purpose whatever than to enable the said Miers F. Truett to make such simple contracts without seal, as might be necessary in conducting the mercantile business in which your orator was then engaged, but not to execute any warrant of attorney, or any other writing of that nature." That in this averment there seems to be some mental reservation as respects powers of attorneys without seal (which in complainant's imagination appear to be mere blanks), is manifest enough; but still we are not at liberty to disregard statements so comprehensive and *apparently* so unqualified, and we must consider them as importing an unequivocal denial of all authority to confess judgment in favor of Wainwright & Co.

The bill also charges that the attorney for Wainwright &

Co. in the absence of complainant, procured of Miers F. Truett, the blank signature of complainant, and affixed himself a seal thereto, and wrote the power of attorney over it, without his knowledge and consent and that no notice whatever was given him in any manner of the proceedings in obtaining said judgment, and that he was not aware of such judgment having been rendered against him until after it was done, to which judgment he afterwards assented. Whatever we may think of all these statements, after having learned the real facts of the case in the cause just decided, we cannot look beyond this record, and must consider them on the demurrer to the bill, as absolutely true. They are certainly sufficient to entitle the complainant to some relief, if not to all he asked for in the bill when connected also with the further consideration that in another part of said bill he sets out, very inartificially, it is true, and somewhat ambiguously, a defence to the action, and alleges that certain facts rest in the knowledge of him and the defendant alone, for which he calls for a discovery.

We think that, under all the circumstances, he showed sufficient to put the defendants on their answers, and as the jurisdiction of the Court was undoubted, the demurrer to the bill should have been overruled. The Court erred in not doing so, and the decree below must therefore be reversed, and the cause remanded for further proceedings, the defendants in error to pay the costs in this Court.

Caton, J. delivered the following dissenting opinion:

I think this decree should not be reversed. Admitting the jurisdiction of the Court to relieve against a judgment rendered in a Court of Law, where the Court has acquired only apparent jurisdiction of the person of the defendant by his appearance being entered by an attorney without authority, yet I do not think that the Courts of Equity ought to take jurisdiction, unless some substantial reason be shown why he cannot obtain adequate relief in the Court of Law. Crichfield *v.* Porter, 1 Ohio Cond. R. 658. Now, it is not denied but that the Court of Law has an adequate jurisdiction over

its own judgments and process, and I hazard nothing in saying, that in most instances it can afford more satisfactory relief, and without the procrastination attendant upon suits in Equity. No better illustration of this can be desired than the history of this judgment furnishes. After the Court refused to sustain this bill upon the ground, undoubtedly, that the party had an adequate remedy at law, he applied to that power, and as this Court has just decided, obtained all the relief to which he was justly entitled. Had the County Court entertained the same view of the law which has now been determined by a majority of this Court, what would have been the result? It would have taken a year or two at least, before the case would have been brought to a hearing, and the judgment opened so as to have let the defendant in with his defence, while this was done in the Court of Law, and without the least delay. I am not forgetting that this case must be determined as if no proceeding had been instituted in the Court of Law, but I am only referring to them by way of illustration, and I think it forcibly demonstrates the propriety of the well known rule, that the Court of Equity ought not to interfere when the Court of Law can afford the party as speedy and as ample relief as he could obtain in Equity. Indeed, when it can afford the proper relief, it can generally do it much more speedily. The very great extent of the powers of a Court of Equity to do the most exact justice, makes its machinery necessarily cumbersome, and its proceedings slow and deliberate, and these powers ought not to be called into requisition, unless something is shown why the more summary proceedings of a Court of Law cannot afford a sufficient remedy. Because a Court may take cognizance of a cause, I do not think that it necessarily follows that it will. Take for instance, the administration and settlement of estates of deceased persons; there the Courts of Equity may be said to have jurisdiction in all cases. 1 Story's Eq. Jur., chap. 9; Mahar *v.* O'Hara (*post.* 424). But I do not think it necessarily follows that it will, whenever applied to, take the settlement of an estate away from the Probate Court, but in the exercise of a sound discretion, it will leave the matter there to be determined, unless there is something shown that complete justice cannot be

done there. Many other familiar instances might be referred to in illustration, but it is unnecessary. I think the County Court properly determined, that there was nothing in this bill which showed that the complainant could not obtain adequate remedy at Law, and that, consequently, the decree should be affirmed.

Decree reversed.

HELEN MAHAR, plaintiff in error, *v.* JAMES O'HARA, defendant in error.

Error to Randolph.

The several Circuit Courts of this State in their respective Circuits have the same jurisdiction in Chancery which the Court of Chancery in England has, except where its jurisdiction is limited by express statute, or by necessary implication; as where some other Court may be vested with exclusive jurisdiction of the particular matter. (*a*) The same practice prevails as in the English Courts, except where the statute has made particular provision.

Courts of Equity regard a devisee, who takes a devise, chargeable with legacies or debts, as a trustee, and will enforce the execution of the trust reposed.

The word "action" used in the proviso in the 131st section of the Statute of Wills has reference to the action of account to enforce the payment of a legacy.

The rule that nothing is to be presumed in favor of a pleading is applicable to an answer in Chancery.

A devisee, by taking an estate devised to him by a will, assumes the payment of legacies imposed upon him by the terms of the will.

BILL IN CHANCERY, &c. filed in the Randolph Circuit Court, by the plaintiff in error against the defendant in error, and heard upon bill, answer, replication and testimony taken in the case, at the April term, 1843, before the Hon. James Semple, when the bill was dismissed with costs.

The material portions of the bill are substantially stated by the Court.

(*a*) Rolston *v.* Hughes, 13 Ill. R. 477.

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

1. A Court of Chancery has jurisdiction of this case, and can afford to complainant the relief sought. 1 Story's Eq. Jur. 553, §§ 589, 591, 593, *et seq.*; 1 Jarman on Wills, 755; 2 Williams on Ex'rs. 1372–3, 1437.

2. By the terms of the devises and bequests made to the defendant, he was bound, upon acceptance of the same, to pay the annuity of corn, wheat and pork specified to the complainant, when she ceased to live with him. It is part of the grant under which she claims, that he shall make the yearly payment to her upon the happening of the contingency provided for. It is clearly the intention of the testator to secure a support to the complainant during her life, out of the property granted by him to the defendant. 2 Jarman on Wills, 525, 6, 7, 534; 1 U. S. Dig. 91, § 372; 2 Barb. & Har. Dig. 151, § 13; Hammond's Dig. 693, xiv. § 1; *ib.* 694, xiv. §§ 19, 20, 24; 3 Mylne & Keene's Ch. R. 252, in 9 Eng. Ch. R. 22; also Glen *v.* Fisher, 6 Johns. Ch. R. 33, 37; 1 Paige, 32; Messenger *v.* Andrews, 4 Eng. Ch. R. 479.

3. The defendant's acceptance of the benefits secured to him in the will of Henry O'Hara, deceased, made him a trustee to the complainant, and bound him to pay to her the annuity based on and growing out of the grants to him. See cases and authorities referred to above.

4. No condition was attached to the right of the complainant to have the annuity provided for her, except that only of living separate from the defendant. The intention of the testator would be defeated by a construction which shall attach to this right any other condition or contingency.

5. A demand by the complainant of this annuity is perhaps not necessary in this case. The defendant repeatedly declared he would *not* pay; but a demand is proved by testimony and in fact admitted by the defendant in his answer. 2 Barb. & Har. Dig. 175, § 8; Glen v. Fisher, 6 Johns. Ch, R. 33, 37.

L. Trumbull, for the defendant in errror.

The Opinion of the Court was delivered by

CATON, J.* On the 20th of July, 1840, Helen Mahar filed her bill in the Randolph Circuit Court to enforce the payment of a contingent legacy secured to her by the last will and testament of Henry O'Hara, against James O'Hara, executor and residuary legatee of the said Henry O'Hara. The bill states that before and at the time of the death of the said Henry O'Hara, she was his wife, and that on the 20th of June, 1826, he made and published his last will and testament in due form of law, whereby among other things he gave to his son James, the present defendant, his homestead, except certain specified portions which he gave to other devisees; and after making various other bequests and devises, the testator declared it to be his desire, that those of his children who then resided with him should continue to reside on the plantation after his death, with his son James, and that his wife Helen, the present complainant, should continue to reside there and act as a mother to his children and to her own, and that they should reside there together so long as they could agree; but in case the complainant should desire to reside by herself, James should build her a comfortable dwelling house convenient to a good spring of water, and should deliver to her one hundred bushels of corn, twenty bushels of wheat and five hundred pounds of pork annually. By the will, also, there were a considerable number of specific bequests made to the complainant, although of no great value. The bill then declares that inasmuch as he had given the principal part of his estate, and requested him to make the several payments as before expressed, to the other legatees and to the complainant, he appoints him, the said James, his executor.

The bill then avers, that soon after the death of the testator, to wit: on the 3d of July, 1826, James O'Hara proved the will, and took upon himself the execution thereof, and possessed himself of all the real and personal estate of

*WILSON, C. J. did not sit in this case. KOERNER, J. was counsel in the Court below.

which the said testator died seized, and possessed and accepted the real estate and personal property, which by the said will were devised and bequeathed to him. The defendant delivered to her all of the specific property bequeathed to her in the will, and built the house as directed in the will for her, and delivered to her the provisions as specified in the will till the year 1830, since which time he has refused to pay the said annuity, although she has ever since lived separate from the said James; that the said defendant has, ever since the death of the said testator, received, accepted and enjoyed the real and personal estate bequeathed and devised to him, of the value of $5000.

The defendant in his answer admits all of the material allegations of the bill, except that he denies that real and personal estate which he received himself by the will, was worth $5000. He admits that he had refused to pay the annuity for the time mentioned in the bill, for the reason that she had ceased to live in, and occupy, the house which he had built for her on his premises, but had married a man of the name of Mahar and removed to the State of Missouri.

A replication was filed and proofs taken, and the cause was heard by the Court below, and the bill dismissed with costs, in April, 1843, which decree we are asked to reverse, and to render a decree in favor of the complainant according to the prayer of the bill.

As the jurisdiction of a Court of Equity is questioned, that will be first considered. The several Circuit Courts of this State in their respective circuits, have the same jurisdiction in Chancery which the Court of Chancery in England has, except where its jurisdiction is limited by express statute, or by necessary implication, as where some other Court may be vested with exclusive jurisdiction of the particular matter. Our Courts are vested with the same powers, and are governed by the same practice; or agreeably to such rules as may be established by said Courts, except where particular provision is made by our statute.

Without stopping to inquire into the general jurisdiction

of Courts of Equity over the administration of estates, either exclusively, or concurrently with the Ecclesiastical Courts in England, or in this country the Probate Courts, it is sufficient to observe that the jurisdiction of the Courts of Equity in cases of legacies, has been firmly established, and beyond controversy, at least since the time of Lord Nottingham. The grounds of that jurisdiction are various, and most satisfactory. 1 Story's Eq. Jur., Chap. 10. In Equity, executors and administrators are trustees, and so also is a devisee who takes a devise, chargeable with legacies or debts. No better illustration could be desired, than the case before us. Here the testator devised an estate to his son, who also he made his executor, and in consideration of the devise, he imposed upon his son the burthen of supporting the widow of the testator in his family, so long as they could agree, or she should choose to reside there, and when she should choose to live by herself, he should build for her a house, and furnish her annually with a specified quantity of corn, wheat and pork. Now, in Equity he is considered a trustee for the purpose of executing these provision in favor of the widow, and by accepting the estate he assumed the trust, and the estate thus devised is not only chargeable in Equity with the trust, but by accepting the devise he became personally responsible for the payment of the legacy, according to the provisions of the will. Indeed, without the aid of the searching powers of a Court of Equity, estates might never be fairly settled, frauds would go undetected, and legacies but too frequently would remain unsatisfied, and the intention of testators would be defeated. But so far from the jurisdiction of the Courts of Equity in cases of legacies being taken away by our statute, it is expressly confirmed. The 131st section of our Statute of Wills, among other things, provides: "And every executor, being a residuary legatee, may have an action of account, or suit in Equity against his co-executor, or co-executors, and recover his part of the estate in his or their hands; and any other legatee may have the like remedy against the executors; *provided*, that before any action should be commenced for the legacies as afore-

said, the Court of Probate shall make an order directing them to be paid." Now nothing more need be said on this subject of jurisdiction, except perhaps to give a proper construction to the proviso in the last clause of the section, as some might suppose that the legislature had made so absurd a law as to tie up the hands of the Courts of Equity, as well as all other Courts, in all cases of legacies, no matter how complicated, extraordinary or difficult the case might be, whether involving a construction of the will or not, till the Court of Probate had made an order for the payment of the legacy, thus making the Court of Chancery a mere instrument in the hands of the Probate Court, to carry into effect its orders and judgment. Such a construction should not be adopted, unless the language of the law will admit of no other. In this case, however, we think we may safely say, that the legislature meant no such thing. In the preceding part of the section, two modes are prescribed for enforcing the payment of the legacies, one by action of account and the other by suit in Equity; and the proviso declares that before any action shall be commenced for legacies as aforesaid, an order shall be made by the Probate Court, &c. This clearly applies only to cases where the action of account shall be commenced, for the term *action* is never properly applied to a suit in Equity, nor is *suit* a proper designation for an action of account. The proviso, therefore, does not apply to a suit in Equity to enforce the payment of a legacy.

It is next objected that the husband of the complainant should have joined her in the bill. The objection would have been fatal beyond all doubt, if the answer had only shown that she had a husband living. Apparently, not with a view of showing a want of proper parties, but for the purpose of presenting an excuse for not paying the annuity, the answer states that the complainant was married to one Mahar in 1831 or 1832, but it does not state that he is still living. If he had been, we are not to presume that the answer would have omitted to state it. Like any other pleading, nothing is to be presumed in favor of the answer. By the same rule, had the bill shown the

marriage to Mahar, it would probably have been necessary to have went on and shown a sufficient reason for not making him a party.

We will next inquire into the proper construction of this will, or that portion of it which is relied upon as the foundation of this suit. I have before shown, that by taking the estate devised to him, he assumed to pay the legacies imposed upon him by the will. Messenger *v.* Andrews, 4 Eng. Ch. R. 479. It is, therefore, only necessary to inquire what the complainant is entitled to under the will.

It is insistod upon by the counsel for the complainant, that he was only bound to provide her with a house, and furnish her with the provisions during the time that she resided by herself, in the house built for her, and not after her marriage to Mahar. This is the clause relied upon: But in case my wife shall choose to separate from them (James and the other children), and desire a residence to herself, I direct that my son James shall build her a comfortable dwelling house, on his part of the land above given him, convenient to a good spring of water, and to deliver to her one hundred bushels of corn, and twenty bushels of wheat, and five hundred pounds weight of good pork annually." To say that the testator intended that she should have the provisions no longer than she lived in the house by herself, is almost as unreasonable as to say that she was not intended to have the house any longer than she should eat all the provisions herself. It cannot be presumed that he intended to compel her to reside in that house, whether it suited her convenience or not. By residing to herself, is only meant a residence away from the family of the defendant. A refusal to enjoy one portion of the provision did not deprive her of her right to the other; nor can we reasonably infer that the testator intended to prohibit her marrying, should she desire to do so, by limiting this bounty to her during her widowhood. The law is averse to any provision in a will or other instrument in restraint of marriage, as being against the interest of the State, and it will not attribute any such intention to the testator, unless his language will bear no other reasonable construction. If

a testator design to exercise a control over the acts and happiness of those who shall live after him, not for their own good, but from mere caprice, or from an apprehension that he may be forgotten, he must at least manifest such an intention clearly, or else we cannot attribute to him such a design. While it may be admitted that a testator may impose reasonable restraints upon his legacies against improvident marriages, yet there are many cases which show that an absolute prohibition of marriage will be disregarded, either in a bequest or a gift; and such may be the law as a general rule, yet it is said, and I think with truth, that an annuity to a widow during widowhood, is not void by the Common Law, although it generally was by the Civil Law; (1 Story's Eq. Jur. § 285, note 4); but such conditions are held to great rigor and strictness. Long *v.* Dennis, 4 Burr. 2055; Parsons *v.* Winslow, 6 Mass. 169. However, as this question in its full extent does not necessarily arise in the decision of this case, I shall refrain from a review of the authorities on the subject, or from attempting to point out the mere distinctions which will be found to prevail on this subject. Enough has been said to show, that by no legal or reasonable construction, does this will provide that this annuity was limited to her during her widowhood; and this legacy was far from being a gratuity to the complainant, and at the expense of the defendant, for by accepting it, she has lost her right of dower, which, if we may judge from what appears in the record, would have been of vastly greater value than this pittance of about $60 a year, and the use of a house; and this loss of dower has been a direct gain to the defendant, who took the lands discharged of it, so that he has received directly from her much more than an ample consideration for all that she claims of him; and it does seem to me, that it is most ungracious of him to refuse to pay this small annuity, yet it is his right, if he thinks he has a legal defence, to make it, yet certainly he ought not to expect a very strained construction in his favor.

What has already been decided substantially determines this case without looking particularly into the depositions, for

although the defendant denies that the estate which he received by the will was worth $5000, as charged in the bill, yet he has not stated how much less it was worth. The proof, however, is that it was worth at least $3000; but I apprehend that this makes but very little difference. Some question was also made on the argument as to the sufficiency of the demand made of the defendant for the annuity, yet the demand is not only sufficiently established by the proof, but the defendant, in his answer, admits that he has refused to pay it ever since her removal from the house which he built for her, and since the time charged in the bill.

The case made by this bill vests the Court with a right, not only to declare the right of the complainant to an annuity for life, but to secure and enforce its payment, as well for the future as for the past, which may be well done here under the general prayer, and in this case most particularly should it be done, to avoid the expense and vexation of an annual suit to recover the annuity as it may fall due. The decree of the Circuit Court must be reversed and the cause remanded, with directions to that Court to enter a decree declaring the complainant to be entitled to the use of the dwelling house mentioned in the pleadings, which was built for her by the defendant, during her natural life; also, that she is entitled to recover, of the defendant the value of said annuity of corn, wheat and pork, from and including the year 1831, till the time of filing this bill; also, that she is entitled to recover, in like manner, the said annuity from the said defendant from the time of the commencement of the said suit up to the time of rendering said decree, in case it shall be found that the said defendant has refused to pay said annuity in kind, according to the directions of said will; and if there has been no such refusal, then she is entitled to receive the amount of said annuity in kind, during the time aforesaid of the said defendant; also, that she is entitled to receive from the said defendant, the said annuity in kind of the said defendant during her natural life; and that the Circuit Court have an account taken, to ascertain the amount due the complainant up to the time of rendering said decree,

either in money or in kind, and that it enforce the payment thereof, either by execution or attachment as the case may require; and also that the Circuit Court enforce the payment of the said annuity by the said defendant, from time to time as it may fall due, either by attachment or otherwise, as the case may require, upon proper application, made by the said complainant under that decree, and that the defendant pay the costs. As it was stated upon the argument by the complainant's counsel, that the defendant is one amply responsible, the decree need not make the said annuity a lien upon the land devised to the said defendant in and by said will, unless it shall be found to be necessary by a subsequent application to be made to the Circuit Court.

The decree of the Circuit Court is reversed with costs, and the cause remanded with directions for further proceedings according to this Opinion.

Decree reversed.

SILAS NOBLE *et al.*, plaintiffs in error, *v.* THE PEOPLE OF THE STATE OF ILLINOIS, defendants in error.

Error to Lee.

Whenever a recognizance is taken, or entered into out of a Court of record, a *scire facias* issued upon it must contain sufficient averments to show the jurisdiction or authority of the officer taking the same, and also that it was entered and filed of record in the proper Court.

SCIRE FACIAS, in the Lee Circuit Court, issued upon a recognizance, &c., heard before the Hon. Thomas C. Browne, upon a general demurrer. Demurrer overruled and judgment against the defendants below.

A copy of the *scire facias* is set out in the Opinion of the Court.

S. T. Logan, for the plaintiffs in error.

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

The Opinion of the Court was delivered by

Purple, J. The defendants in error sued out a writ of *scire facias* against the plaintiffs in error, from the Circuit Court of Lee County, upon a recognizance signed by the plaintiffs as sureties for the appearance of one Henry W. Lane, to answer to a charge of receiving stolen goods. The *scire facias* is as follows:

"Whereas, heretofore, to wit: on the 16th day of May, A. D. 1845, before James Campbell, sheriff of said county, Henry W. Lane, as principal, and W. W. Heaton and Silas Noble as security, entered into a recognizance, and as appears by the terms thereof, acknowledged themselves to owe and to be indebted to the People of the State of Illinois, in the sum of five hundred dollars lawful money of the United States, to be levied of their goods and chattels, lands and tenements, for the use of the People of the State of Illinois, if default should be made in the condition following (to wit): if the said Henry W. Lane, should personally be and appear at the (then) next term of the Circuit Court, to be holden in and for said county of Lee, on the second Monday of September (then) next, on the first day of the term, to answer unto an indictment presented against him, the said Lane, for receiving for his own gain, stolen goods, knowing them to have been stolen; and should not depart the said Court without leave, then the said obligation to be void, otherwise to be and remain in full force and effect. And whereas, at the September term, A. D. 1845, of the said Circuit Court in and for the said county of Lee, such proceedings were had that the said recognizance was taken as forfeited; therefore, we command you, &c.," concluding with the usual form of a summons part of a *scire facias*.

The plaintiffs in error appeared and filed a general

demurrer to the *scire facias*, which was overruled by the Court, and judgment thereon entered against the said plaintiffs. The decision of the Circuit Court overruling the demurrer, is assigned for error.

It is the opinion of this Court, that the *scire facias* is clearly defective in not containing an averment, that the recognizance was returned into the Circuit Court, and had become a matter of record in such Court. This principle is distinctly recognized in all the authorities upon this question. Whenever a recognizance is taken, or entered into out of a Court of record, a *scire facias* issued upon the same must contain sufficient averments to show the jurisdiction or authority of the officer taking the same, and also that it was returned and filed of record in the proper Court. Libby *v.* Main 2 Fairf. 344; Bridge *v.* Ford, 4 Mass. 641; Andress *v.* The State, 3 Blackf. 109; People *v.* VanEpps, 4 Wend. 390.(*a*)

The judgment of the Circuit Court is reversed, and the cause remanded for further proceedings.

Judgment reversed.

(*a*) McFarlan *v.* People, 13 Ill. R. 13.

MICAJAH CHAUNCEY, owner of the schooner General Thornton, appellant, *v.* JOHN JACKSON, appellee.

Appeal from Cook.

By the maritime law, the master of a ship has no lien on it for his wages, but his remedy is *in personam* against the owners. The mariner, however, has a lien for his wages, which may be enforced against the ship. The statute of Illinois, entitled "*An Act authorizing the seizure of boats or other vessels by attachment in certain cases,*" on the contrary, places their claims upon the same footing, and creates a lien in favor of all "employed in any capacity" in the running and management of the vessel.(*a*)

ATTACHMENT, under the Act entitled "*An Act authorizing the seizure of boats and other vessels by attachment in certain cases,*" in favor of John Jackson, against the schooner General Thornton, on the 30th of Aprll, 1842, and served on the same day. Jackson filed his declaration, alleging

(*a*) This statute is invalid. Hine *v.* Trevor, 3 Wal. U. S. R. 555; Williamson *v.* Hogan, 46 Ill. R.

that the plaintiff, on, &c., at the request of the master and owner, did furnish, for the use and benefit of said schooner, materials, labor, goods and provisions, for the use and benefit of said schooner, and annexed thereto a bill of particulars of his account. To this declaration, Micajah Chauncey, the owner of said schooner, pleaded the general issue. The cause was tried at the March term of the Cook Circuit Court, 1845, before the Hon. Jesse B. Thomas, without the intervention of a jury.

On the trial the plaintiff offered to prove that he was master and captain of the schooner in the summer of 1838, for about two months, and that his services were worth fifty dollars per month. This testimony was objected to by the defendant, on the ground that the Act did not authorize the master or captain of a vessel to proceed by attachment under the said Act for the recovery of his wages. The objection was overruled by the Court, and the testimony admitted, to which decision the defendant excepted.

H. Hubbard, a witness called on the part of the plaintiff, testified that the plaintiff was the master of said schooner, in the summer or fall of 1838, about two months, and that the wages of a master were worth about fifty dollars per month; that the expenses of sailing such a vessel were, at that time, about one hundred dollars per month, exclusive of the master's wages. It was proved by the defendant, that while the plaintiff was master as aforesaid, he had received, for freights carried by the schooner, one hundred and eighty dollars. This being all the evidence, the Court rendered jndgment for the plaintiff below for one hundred dollars.

The defendant below moved for a new trial, on the following grounds:

1st. That the judgment was contrary to law and evidence;

2nd. That the plaintiff, as master and captain of said schooner, cannot proceed under the Act for the recovery of his wages; and

3rd. That the damages were excessive.

The Court overruled the said motion, to which the defendant excepted.

J. H. Collins, for the appellant.

I. The master cannot maintain an action of Attachment under the Act for the attachment of boats and vessels.

The Attachment Act enumerates the persons or class of persons who may have a lien upon the vessel for services. "All Engineers, Pilots, Boatmen and others employed in any capacity in and about any vessel," &c., shall have their action, &c. The master is not named, but only those of a grade inferior to him. Gale's Stat. 73, § 4.

"A statute enumerating things or persons of an inferior dignity, shall not be construed to extend to those of a superior dignity." Bre. 294.

The master can have no lien upon the vessel for his wages. The law of admiralty does not recognize such a lien. The master contracts upon the credit of the owners, and not of the ship. 5 Wend. 315, 320, 327; Steam Boat Orleans *v.* Phœnix, 11 Peters, 184.

II. The judgment is against evidence.

A. T. Bledsoe, for the appellee.

The Opinion of the Court was delivered by

Treat, J.* This was a proceeding by attachment, commenced in the Cook Circuit Court, by John Jackson, against the schooner General Thornton. The declaration was in *indebitatus assumpsit.* Micajah Chauncey entered his appearance, as the owner of the vessel, and pleaded *non-assumpsit* with notice of set-off.

On the trial before the Court, it was proved by two witnesses that Jackson was the master of the schooner for two months in 1838, and that his services were worth $50 per month; and by one of them, that the expenses of running such a vessel would amount to $100 per month, exclusive of the master's wages. A third witness testified, that he paid to Jackson, while he acted as master, $189 for freight earned by the schooner.

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

On this evidence, the Court rendered a judgment in favor of Jackson for $100, and awarded a special execution against the schooner. The decision is assigned for error.

This proceeding was instituted under the provisions of the tenth chapter of the Revised Statutes. The first section makes a vessel liable for all debts contracted for labor done on, and supplies and materials furnished for the vessel; and gives such debts a preference over all other demands against the owner, except the wages of mariners and others employed in running the vessel, which are to be first paid. The fourth section provides, that "all engineers, pilots, mariners, boatmen and others employed in any capacity, in and about the service of any such boat or vessel, who may be entitled to arrearages of wages in consequence of such service, may proceed to collect such wages under the provisions of this chapter, and shall be entitled to all the benefits hereof."

By the maritime law, the master has no lien on the ship for his wages, but his remedy is in *personam* against the owners. The mariner has a lien for his wages, which may be enforced against the ship. Abbott on Shipping, 475, and notes; Steam Boat Orleans *v.* Phœnix, 11 Peters, 175. It is contended, that the statute was not designed to change this principle of the maritime law. There are some good reasons for the distinction between the master and the mariner. The former is engaged directly by the owner, and ordinarily has the right to pay himself out of the receipts of the vessel; while the latter is employed by the master, and has no such right of payment from the earnings of the vessel. It seems very clear, however, that the legislature did not intend to discriminate between them; but on the contrary, intended to place their claims for wages on the same footing. The broad and comprehensive terms of the fourth section necessarily embrace the master. It creates a lien in favor of all "employed in any capacity" in the running and management of the vessel. The master is clearly within the statute, and entitled to the benefits of its provisions.

The Circuit Court erred in rendering judgment for the

appellee. He peformed services as master, to the value of $100, and received, while acting as such, $189 of funds belonging to the vessel. There is no evidence that he in any manner accounted for this latter sum. The proof of its receipt made out a *prima facie* case against him, which he was bound to rebut, by showing that he had paid it over to the owner, or disbursed it in defraying the current expenses of the vessel. Failing to do this, he was charged with so much money had and received to the use of the owner of the vessel. It cannot be presumed that the money was applied towards the payment of demands against the schooner. For aught appearing in the case, the debts incurred on account of the schooner while the appellee was in charge of her, may be still unpaid, and exist as liens on the vessel.

The judgment of the Circuit Court is reversed with costs, and the cause is remanded for further proceedings.

Judgment reversed.

JAMES BROWN, plaintiff in error, *v.* THE PEOPLE OF THE STATE OF ILLINOIS, defendants in error.

Error to Grundy.

To constitute the offence of having in possession a counterfeit Bank bill under the statute, three facts must conspire, and be proved by the prosecution: 1. possession of the Bank note; 2. the knowledge of its being counterfeit; and 3. the intention to pass it with a view to defraud.

The statute relating to the giving of instructions does not inhibit the Court from giving such instructions, as to the law of the case he thinks proper and conducive to justice, without their being asked, provided they are given in writing.

The Court may revoke an order issued for a special term, and appoint another time for holding the same. The Judge is authorized to appoint a special term, either in or out of term.

INDICTMENT, for having in possession a counterfeit Bank note, &c., originally filed in the La Salle Circuit Court. The case was subsequently taken by change of venue into the Grundy Circuit Court.

At the June term, 1847, an order was entered of record, appointing a term of the Court to be held on the 15th of November following. Afterwards on the 25th of September, it being in vacation, the Judge revoked the former order and issued a second, directing the term to be held on the 22d day of November.

At the trial, the Court compelled the accused to acknowledge his identity in the presence of the jury and witnesses. An instruction was given by the Court, which is set out in the Opinion.

T. L. Dickey, for the plaintiff in error.

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

The Opinion of the Court was delivered by

Koerner, J. Change of venue from La Salle. The defendant was indicted for having in this possession a counterfeit bill, knowing the same to be counterfeit, with the intent to defraud, &c.

On the trial of the cause, the Court instructed the jury, "that when the prosecution have proved circumstances sufficient to show that defendant knew the bill was counterfeit, the burden of proof rests upon the defendant, to show by proof where he got the bill, and under what circumstances he obtained it, or that he did not intend to pass it as genuine." To this instruction the defendant excepted, and now assigns it for error.

We cannot entertain a doubt that this instruction, taken by itself, was improperly given. In order to constitute the offence of which the prisoner was indicted, three facts must conspire, and have to be proved by the prosecution: 1. the possession of the counterfeit Bank bill; 2. the knowledge of its being counterfeit; and 3. the intention to pass it with a view to defraud. If any of these ingredients are wanting, the offence is not complete, and the accused must be acquitted. The last one may be considered as being the

most important of the three. Many persons receive counterfeit bills innocently, consequently have them in their possession, they ascertain that they are not genuine, and consequently know it. But if they have no intention to pass the same, how can they be said to be guilty of offence, yet if the law was as indicated in the instruction, they would be held to be so. It is very true that the intention of passing seldom permits of positive proof, and in most cases it must be made out from the circumstances surrounding the case, but it has to be made out nevertheless, and before the jury can be justified in pronouncing a verdict of guilty, they must be satisfied of the fact of intention, as clearly as of the fact of possession, and the fact of knowledge. Indeed, the last mentioned fact is hardly ever susceptible of positive proof, and often inferred from circumstances, but without its existence there could be no conviction.

The burden of proof according to all the principles of jurisprudence never devolves upon the accused, until the prosecution has at least made out a *prima facie* case. The instruction given would be subversive of these principles, and was consequently not warranted.

Another error assigned is, that the Court erred in modifying two of the defendant's instructions, and in not giving them in the terms asked. There is no force in this objection, as the law of the last session (1846–7), does not inhibit the Court from giving instructions as to the law of the case, such as he thinks proper, and conducive to justice, without their being asked, provided such instructions are given in writing. Any other construction of that law is not warranted by its language, or consonant with sound sense. If the instructions of the Court, or the modification of those asked for by the counsel, contain substantially law applicable to the case, and asked for by counsel, the objects of justice are obtained, and the party has no right to complain. The same view has been expressed in a case decided at this term. Vanlandingham *v.* Huston, (*ante*, 125).(*a*) It does not appear

(*a*) Green *v.* Lewis, 13 Ill. R. 545.

from the record, that the instructions given by the Court were not reduced to writing.

The counsel below also assigns an error (abandoned by the counsel here), in this, that the Court compelled the defendant to acknowledge his own identity in the presence of the jury and witnesses. We only notice this assignment of error for the purpose of disapproving, in the strongest possible manner, of the conduct of the counsel for the prisoner, in partinaciously refusing to point out his client, and in persisting to advise him not to answer to his name, as is shown by the bill of exceptions. The Court undoubtedly ascribed this conduct to a misapprehension, on the part of the counsel, of his professional duty, and the generally laudable zeal of the advocate for his client, for otherwise he would have certainly vindicated the authority of the law by imposing a severe fine.

The error assigned for not arresting the judgment brings into view another point, which we desire to notice. It appears from the record, that the Judge of the seventh Judicial Circuit, according to the power vested in him by the legislature (Laws of 1847, 28, § 6), at the June term of the Grundy Circuit Court entered an order appointing a term in said county for the 15th November, 1847. The Judge afterwards, in vacation, made another order changing the term first appointed, to the 22nd day of November, 1847.

It is contended that the Judge had no power to make this change, as his power over the subject was gone after the first appointment. We can see no good reason for this proposition. Usually, the legislature fixes the terms of Court, but in some cases it has delegated that power, for purposes of public convenience, to the respective Judges of the Courts. The power to appoint, as a general rule, implies the power to revoke. If the Court, for reasons satisfactory to himself, and in order to better consult the public interest, thought proper to set aside the first order, and appoint another time more convenient, we think he acted properly and within the scope of his authority. That the order was made in vacation,

cannot be objectionable, as the law authorizes the Judge to make the appointment of the term, which authority he can exercise either in term or out of term.

We are of opinion, then, that all the errors last noticed, are not well assigned; but for the one first mentioned, the judgment must be reversed and the prisoner discharged.

Judgment reversed.

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

Error to Madison.

A suit upon a replevin bond was brought in the name of the sheriff for the use of one of the parties in interest, and the defendant demurred: *Held*, that the nominal plaintiff was the only one of whom the Court would take notice, and the fact of one of several parties interested having brought a suit in the name of the sheriff, could not be questioned by a demurrer.

To an action upon a replevin bond, it was pleaded that after the plaintiff in the replevin suit had commenced his suit and before the trial thereof, one of the defendants in that suit had carried away the property replevied and had converted it to his own use: *Held*, that if such was the fact, a return of the property should have been pleaded in the replevin suit, and the Court would not have awarded a writ of *retorno habendo*. (*a*)

Pleas purporting to answer the whole declaration, and which answer but a part, are bad.

The proper practice in regard to exceptions, is, to make them upon the trial and to file a bill of the same at that term. The Court, however, may in its discretion, permit the bill to be filed at the next term, but the practice is not commendable.

DEBT upon a replevin bond, in the Madison Circuit Court, brought by plaintiff in error against the defendants in error, and heard before the Hon. James Semple and a jury, at the May term, 1843. Verdict and judgment for the defendants.

The pleadings and evidence are stated by the Court.

(*a*) Laws of 1849, p. 62; King *v.* Ramsey, 13 Ill. R. 624, and notes.

L. TRUMBULL, for the plaintiff in error.

J. GILLESPIE, and A. T. BLEDSOE, for the defendants in error.

The Opinion of the Court was delivered by

KOERNER, J.* This was an action of *debt*, brought by N. Buckmaster, late sheriff of Madison county, for the use of Denham, at the May term, 1842, of the Madison Circuit Court, against Beames and Arthur, on a replevin bond, executed by defendants to said sheriff, on commencing an action of replevin against said Denham and two others, James K. Osborn and William Brady. In this replevin suit Beames had been nonsuited, and a writ *de retorno habendo* had been awarded, which writ had been returned by the said sheriff, that the said Beames had refused to re-deliver the property, and that he had not been able to find it.

The breaches assigned in the declaration are, that Beames did not prosecute the suit with effect; that he did not pay the costs and condemnation money, and that he did not return the property replevied by him to the sheriff, present plaintiff, nor to any of the owners of the property, the defendants in the replevin suit.

It has been contended in the argument that this declaration is bad, inasmuch as it is brought for the use of but one of the defendants in the replevin suit, while it ought to have been for the use of all. We cannot see the force of this objection. Buckmaster is the only plaintiff in this record, of whom notice can be taken, and the propriety of but one of the parties beneficially interested in the performance of the conditions of this bond, using the name of the sheriff for the purposes of this action, cannot be questioned by a demurrer.

The pleadings subsequent to the declaration, are of the most multifarious and confused character, making it difficult indeed to state them intelligibly. An effort seems to have been made in the Court below to involve the case in utter

*THOMAS, J. having been of counsel in this case, did not sit at the hearing.

obscurity, for the purpose perhaps of gaining an advantage in pleading, which the merits of the case failed to afford. We cannot but express our disapprobation of such a practice, so little calculated to obtain the ends of justice, and most generally detrimental to the very party which is intended to be protected by this species of pleading.

The first plea interposed by defendants, avers that Osborn, one of the defendants in the replevin case, had, since the last continuance of the present suit, released defendant Beames (to the extent of said Osborn's interest), from all liability on said replevin bond. This plea, being one of *puis darrein continuance*, was defective in form, and being pleaded as a plea in bar, defective in substance. It averred a release made by one alone of three persons beneficially interested, by one who was no party to the record in any respect, and executed to one only of two defendants, equally liable. The plaintiff filed a demurrer to this plea, but the record does not show that the Court ever gave a decision on its validity, and the plaintiff appears to have waived his objection by filing subsequently *two* replications to this plea, alleging in the first that said Osborn had no interest in the suit (which the pleadings had already sufficiently shown), and in the second, that the said release was executed by fraud and collusion. The defendants never took issue on these replications, and they seem to have been forgotten in the further progress of the suit. The second plea of defendants, alleges that Beames, one of the defendants, was the owner of the property claimed by him in the replevin suit, and which the Court had ordered him to return.

The third plea avers, that Denham never was the sole owner of said property.

The fourth plea sets forth, that Denham, Osborn and Brady never were the sole owners. The Court very properly sustained a demurrer to each of these last pleas.

The fifth plea alleges, that after Beames had commenced his replevin suit, and before the trial thereof, Denham had carried away the property so replevied, and had converted it to his own use.

This plea was defective. If Denham, one of the persons out of whose possession the property had been replevied, had, before the trial, re-taken it, Beames could have shown this on the trial of said replevin suit, and the writ *de retorno habendo* would not have been granted, or he might have sued Denham for the trespass. But this is a suit on the bond, wherein Beames and Arthur have bound themselves to abide the judgment in the suit they were then commencing, and return the property, and they must comply with their obligations. Be this, however, as it may, the proper plea to make these facts available, would have been one alleging a return of the property. This plea was also bad in another respect, as it professed to answer the whole declaration, while it in fact answered but one of the breaches.

The plaintiff, nevertheless, took issue on this plea, as also on the sixth, which averred that Beames paid the costs and condemnation money, and which was also bad, it being an answer to but one of the breaches, while purporting to answer the whole declaration.

The seventh plea alleges, that Beames paid Brady, who is no party to this suit, nor the obligee in the bond, the penalty of the bond; on this plea, which we consider also as defective, the plaintiff took issue.

The eighth plea is *non est factum*, concluding to the country, to which the plaintiff replied, also concluding to the country. The defendants joined issue on the replications to the fifth, sixth and eighth pleas, but not on the replication to the seventh plea. There was a demurrer to one of the plaintiff's replications to the defendant's plea of release, but to which one the record does not inform us, nor does it appear what became of it. There is also an order in the record, showing that the Court overruled a demurrer to defendant's last plea, but as the last plea thus far pleaded, was the general issue, this decision must have applied to some other plea, but to which one we cannot possibly determine. Some of these pleadings were filed at the September term, 1842, and at the May term, 1843, the defendant filed another plea (not numbered), which alleges that Beames was the *bona*

fide owner of the property replevied, and that he did pay all the costs and condemnation money adjudged against him, and that the plaintiff had sustained no damage. This plea, as defective as any of the rest, was replied to, the replication traversing, 1st, the allegation that Beames was *bona fide* owner; 2d, that plaintiff had sustained no damage, and leaving the averment that Beames had paid the costs and condemnation money unanswered; it alleged that defendant had not paid the sum of money in said bond mentioned. The defendants joined issue on this replication, but made subsequently a motion to strike out the last allegation in the replication; it being a departure from their plea, of which motion no disposition seems to have been made.

This being the situation of the case, the issues, such as they were, were submitted to the jury, who found a verdict for the defendants on all the issues, whereupon the plaintiff's counsel entered a motion for a new trial and a repleader, which motions were overruled, and judgment was entered for defendants.

The errors assigned are as numerous as the pleadings to the case.

1st. That under the issues joined, the Court permitted defendants to read in evidence to the jury, an assignment of a bond or contract for land from one J. H. Osborn to one Cameron, and from Cameron to Beames.

2d. Because after reading said bond, the Court would not permit plaintiff to ask witness Osborn, if he assigned said bond to Cameron.

3d. Because the Court allowed defendants to read in evidence a pretended release of the property replevied by one Cameron, of date 31st October, 1836.

4th. Because the Court refused to allow plaintiff to prove to the jury, that the pretended assignment read in evidence, did not include, and was not intended to include the wood and coal.

5th. Because the Court refused evidence offered by the plaintiff pertinent to the issue.

6th. Because the Court admitted illegal testimony to go to the jury on part of defendant.

7th. Because the Court rejected the first, third and sixth instructions to the jury, asked for by plaintiff.

8th. Because the Court admitted and gave to the jury the instructions asked for by the defendants' counsel and excepted to by plaintiff's counsel.

9th. Because the Court gave the instructions asked for by the defendants, and refused to give those asked by plaintiff.

10th. Because the Court refused to grant a new trial.

11th. Because the issue presented by the fourth plea of defendants, was an immaterial issue, and did not determine the merits of the action.

The bill of exceptions, after reciting the testimony of one or two witnesses, and also that certain title papers were introduced, which are set out at length, states that no other witnesses were examined. It also embodies various instructions, given or refused to be given by the Court, and sets out what objections were made by plaintiff during the progress of the trial. This bill was filed at the succeeding November term (a practice which we do not commend, but which the Court had discretion to tolerate), and is very inartificially drawn. After setting forth the decision of the Court on many of the points, of which the party now complains, it goes on to state in the present tense, "to all of which decisions of the Court the plaintiff excepts." From this mode of expression we cannot understand, that the exceptions were made upon the trial, which must be done in order to make the decisions of the Circuit Court revisable here. This is expressly decided in Gibbons *v.* Johnson, 3 Scam. 63, where many decisions on the same point are referred to in the Opinion of the Court. By the application of this long settled rule, it appears by a careful examination of the bill of exceptions, that this Court cannot look into the alleged errors, embraced by the fourth, fifth, seventh, eighth, ninth, tenth and eleventh assignments of error. The second and third assignments have no foundation at all in the record, as the bill of exceptions does not show, that either such a release as is spoken of in the third assignment was produced, nor such a question as the one mentioned in the second was ever asked. The first and sixth assignments are one and the

same, and the only ones which we can notice, the bill stating that the plaintiff *excepted* to the introduction of the said papers. This assignment of error questions the correctness of the decision of the Court, in permitting defendants to read in evidence a certain paper executed by one Osborn to one Cameron, purporting to convey forty acres of land, described as the land on which Osborn lives, and also the possession thereof, and his interest in the coaling thereon; and a similar paper from Cameron to Beames, conveying to the latter the same indefinite interest, together with one hundred and eighty-six cords of wood, and one pit of charcoal.

It is proper to remark here, that the property originally in dispute in the replevin suit was a pit of charcoal and a lot of cord wood, and if the legitimate question in the present case had been the right of property in the articles formerly replevied by Beames, this testimony, vague as it was, might have had a tendency to show property in Beames. But as before remarked, this issue, though raised by the parties by the additional plea last filed, and which in the assignment of errors by mistake, is designated as the fourth, was wholly irrelevant and immaterial, and the Court for that reason ought to have excluded the testimony.

It is insisted, however, that because the plea of *non est factum* was interposed, and a verdict found for defendant on all the issues, this judgment must stand, since the jury may have found on that good issue. The whole record of the case forbids us to indulge in this presumption. All the evidence which we find incorporated in the bill of exceptions, and the instructions asked for as well by plaintiff as by defendant (and for the purpose of ascertaining the true point of contest in the case, this Court may treat the instructions as properly before it), make it manifest, that the parties made their whole case turn on the question as to whether Beames was the owner of said property or not. The bill of exceptions does not show that the replevin bond was in testimony, but it does not give all the evidence, but only so much as the plaintiff thought necessary to exhibit the alleged errors of the Court. It cannot be supposed, however, that the defendants' counsel would ever have gone into proof of his defence, if plaintiff's

counsel had failed to show his bond, the ground work of his action, and the only point he had to prove. Nor can it be presumed that the Court would have permitted such an idle waste of time. The bond evidently formed no point of dispute between the parties in the Court below, and it would not be reconcilable with the administration of substantial justice, for this Court to shut its eyes to everything which transpired between the parties on the trial, and to raise presumptions in favor of verdicts on the most far-fetched and improbable hypothesis. Hill *v.* Ward, 2 Gilm. 285.

We are of opinion that the merits in this case have never been tried, and that the judgment be reversed, and a *venire de novo* awarded, for the purpose of trying the cause on the issue of *non est factum*, or such other issue as the Court below may allow in its discretion to be made up.

The costs in this suit to be paid by the defendants in error.*

Judgment reversed.

*This cause was argued and decided at the December term, 1845, at which term a re-hearing was granted. It was re-argued at the present term and the former decision affirmed.

EMANUEL ORR, plaintiff in error, *v.* JOSEPH THOMPSON, who sues for the use of William Curtis, defendant in error.

Error to Edwards.

A suit in favor of A for the use of B against E and F was entered upon a justice's docket, when E appeared and confessed judgment upon a joint and several promissory note executed by them. Subsequently the justice issued process against F reciting the previous proceedings, and requiring him to show cause why judgment should not be rendered against him also. He appeared and pleaded in abatement the death of the nominal plaintiff prior to the commencement of the suit, which defence was overruled by the justice, who rendered a separate judgment against him: *Held*, that the process, if regarded as a *scire facias*, was unauthorized, and could not continue the suit; that it could only be sustained as a new and independent suit; and, also, that the previous proceedings constituted no bar to the suit against F to enforce his liability as one of the makers of the note.

THE plaintiff in error, with one other person, executed a note to Joseph Thompson, the nominal defendant in error. His joint and several promissor appeared before a justice of the peace and confessed a judgment for the amount of the note, no process having been issued. Subsequently, the justice issued process against the present plaintiff in error, which recited the previous proceedings before him. The defendant appeared and pleaded the death of Thompson in abatement, and to the jurisdiction of the justice, both of which pleas were held insufficient, when a judgment was rendered against the defendant for the amount of the note and interest. He then appealed to the Circuit Court, and, at the September term, 1846, the Hon. William Wilson presiding, insisted on the same pleas, which were again adjudged insufficient, and the separate judgment against him affirmed.

W. H. HERNDON, for the plaintiff in error.

1. All personal actions survive to the legal representatives of the deceased, and all actions should be brought in the name of executors or administrators. 1 Chitty's Pl. 1,

2, 3, 19; Gould's Pl. 264, § 90; Clapp *v.* Stoughton, 10 Pick. 468.

2. *Scire facias* only issues from Courts of record. 3 Tomlin's Law Dic. 426; 6 Bac. Abr. 103, *a;* 2 Bouvier's Law Dic. 379.

3. Justice's Courts are not Courts of record. Thomas *v.* Robinson, 3 Wend. 267; 5 Ohio, 350; Trader *v.* McKee, 1 Scam. 558.

4. If the justice had no right or power to issue *sci. fa.* and had no jurisdiction over the person of defendant, it was the duty of the Circuit Court to dismiss the suit; for if the justice had none, the Circuit Court could have none. Allen *v.* Belcher, adm'r, 3 Gilm. 594.

5. A *sci. fa.* issues in Vermont by statute from a justice's judgment. 3 U. S. Dig. 391, § 164.

A. T. Bledsoe, for the defendant in error.

The Opinion of the Court was delivered by

Treat, J.* The record discloses this state of case. Evin Shelby and Emanuel Orr, by their promissory note, dated the 20th of October, 1838, jointly and severally promised to pay Joseph Thompson $14.50 in twelve months. A suit was docketed on this note, on the 13th of November, 1845, before a justice of the peace, in the name of "Joseph Thompson, for the use of William Curtis, *v.* Evin Shelby and others;" and on the same day, on the appearance and confession of Shelby, the justice entered a judgment against him for $19.50, the amount then due on the note. On the 27th of April, 1846, the justice issued process reciting the previous proceedings, and requiring Orr to show cause why judgment should not be rendered against him. He appeared and pleaded in abatement, the death of Thompson prior to the commencement of the suit; but the justice overruled the defence, and rendered a separate judgment against Orr for

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

$20.25. He appealed to the Circuit Court, and there pleaded the same matter in abatement; but the Court sustained a demurrer to the plea, and affirmed the judgment of the justice.

The process issued by the justice was probably intended by him as a *scire facias* to bring in Orr, and make him a party to the judgment against Shelby.(*a*) As such, it was unauthorized. It cannot be regarded as a continuation of the first suit, for that was at an end when the judgment was entered against Shelby; but must be treated as a new and independent action against Orr. As such, it may be sustained, unless the matter set up in abatement will defeat it. The previous proceedings constituted no bar to a subsequent suit to enforce the liability of Orr, as one of the makers of a joint and several promissory note.(*b*) The action was in the name of the payee as the legal plaintiff. The plea alleged that he died previous to the institution of the suit. If true, the legal interest was in his personal representative, and the suit should have been brought in his name. The fact that Curtis was the beneficial holder of the note, did not dispense with the necessity of suing in the name of the administrator. The Circuit Court erred in sustaining the demurrer to the plea. Its judgment will be reversed with costs, and the cause remanded for further proceedings.

Judgment reversed.

(*a*) See Laws 1863, p. 74.

(*b*) Moore v. Rogers, 19 Ill. R. 348; 2 Ind. R. 373.

ALPHONZO N. DELAUNAY, appellant, *v.* MILTON G. BURNETT, appellee.

Appeal from Jo Daviess.

The certificate of a Register or Receiver of any of the Land Offices of the United States to any fact or matter of record in his office, is competent evidence to prove the fact so certified in any Court in this State.

In an action of ejectment, an extract from a book purporting to contain the records of Commissioners appointed by the President of the United States, to determine claims to certain lots in Galena arising under certain Acts of Congress, was read in evidence, which book was identified by the testimony of one of the Commissioners as the record of their proceedings in adjudicating upon and determining the rights of the several claimants. In connection with this record, a permit from the proper officer to occupy a particular lot was also read to prove a pre-emption: *Held*, that the record was the proper and legitimate evidence to confirm the fact of such right of pre-emption, and taken in connection with the permit, established the right beyond controversy.

In a certificate of proof of a deed by testimony as to the handwriting of the subscribing witness thereto, it was stated that the witness called to prove such handwriting "was well acquainted with him: *Held*, that this was a substantial compliance with the requisition of the statute, being equivalent to the declaration that he "personally knew him:" *Held*, also, that the statute does not require the officer to state that the witness, in such case, was "competent and credible."

The interest acquired by a pre-emption right is not an estate within any definition known to the Common Law. It is not an interest in the legal title, but merely a right of occupancy for the time being, with the privilege of purchasing at some future period at a stipulated price. Such interests, however, are regarded by the Courts of this State as property, which may pass by deed or other transfer.

The purchaser of a pre-emption right is regarded as the "legal representative" of the original claimant, under the Act of Congress granting such rights.

The construction of the term "legal representative" at Common Law, depends upon the intention manifested by the party using it, and it has not, therefore, always necessarily the same signification. Such intention is not to be gathered solely from the instrument itself, but in part from concomitant circumstances, the existing state of things, and the relative situation of the parties to be affected by it.

A verdict and judgment which have been set aside for the purpose of a new trial under the statute relating to actions of ejectment cannot, in general, be given in evidence up on the second trial of the same cause between the same parties for any purpose whatever.

EJECTMENT, in the Jo Daviess Circuit Court, by change of venue, having been originally commenced in the County

Court by the appellee against the appellant. The cause was finally heard in the Circuit Court at the October term, 1847, the Hon. Thomas C. Browne presiding, when the jury rendered a verdict in favor of the plaintiff.

The various proceedings in the Court below are very fully stated by this Court in their Opinion.

The cause was argued early in the term by E. B. Washburne and A. T. Bledsoe, for the appellant, and by S. T. Logan, for the appellee. At the earnest solicitation of T. Drummond, the counsel for plaintiff in the Circuit Court, who was not present at the time of this argument, he was permitted by the Court to argue in behalf of his client, and was replied to by A. T. Bledsoe.

Points and authorities of A. T. Bledsoe, C. S. Hempstead and E. B. Washburne, counsel for the appellant:

The five first errors assigned question the relevancy and legality of the evidence which the plaintiff was permitted to give in evidence to the jury in the Court below.

It is insisted that the evidence referred to in the first, second, third and fifth errors assigned, was entirely irrelevant, and had nothing to do with the issue. The rule is, that the evidence offered must correspond with the allegations and be confined to the point in issue. 1 Greenl. Ev. § 52.

The record of the former trial in this case in the County Court, which was permitted to go to the jury, was not evidence, but was opposed to the plainest and most familiar principles. Adams on Ejectment, 327, 215. It was utterly irrelevant and was calculated to lead the jury astray. If the testimony offered does not prove the issue, or is calculated to lead the jury astray, it ought to be rejected. 1 Scam. 230; 3 Peters, 336.

The deed was not properly proved. The mode of proof is statutory, and being in derogation of the Common Law must be strictly pursued.

The grantor and witness are both dead. What should be

done in such a case? The foundation for secondary evidence must be laid by showing the death of the witness, and then the statute provides that proof is to be taken of the handwriting of the grantor and witness and the examination of a "competent and credible witness," who shall state an oath that he personally knew the person whose handwriting he is called to prove, and well knew his signature (stating his means of knowledge), and that he believes the name of such person, as party or witness, was thereto subscribed by such person.

How does the proof of the handwriting of the witness conform to this proof which the statute requires. The officer does not certify that Potts is a credible and competent witness. Potts does not swear that he well knew the signature of the witness, Kerney. He does not state his means of knowledge. He does not state that he believes that the name of Kerney was subscribed by him. He only states that he is well acquainted with Kerney's handwriting, and believes the above signature to to be his.

The proof of Henry, by whom it is attempted to prove the handwriting of the grantor of the deed (Guyard), is more formal than the proof of the handwriting of the witness (Kerney); but that proof is substantially defective in not showing that Henry is a competent and credible witness and that he well knew the signature.

The deed of Guyard to Burnett, conveyed old wharf lot number three and no more, that lot the grantor intended to convey and the grantee expected to receive. The deed, the situation of the parties and of the country, all prove this.

The intention of the parties will govern as to the construction of a deed, and a particular intent must control the general intent. Dawes *v.* Prentice, 16 Pick. 435.

In construing deeds, effect is to be given to every part of the description if practicable, but if the thing intended to be granted, appears clearly and satisfactorily from any part of the description, and other circumstances of description are mentioned, which are not applicable to that thing, the grant

will not be defeated, but those circumstances will be rejected as false or mistaken. Jackson *v.* Moore, 6 Cowen, 717.

What is most material and most certain in a description shall prevail over that which is less material and less certain. *Ibid.*

The rule that the deed must be taken most strongly against the grantor is never resorted to, even in a deed poll, till every other rule of construction fails. *Bac. Max.* Rule 3.

A deed, as to the extent of the premises conveyed, must receive the same construction which would have been given to it immediately after its execution; the subsequent development of facts unknown to the parties at the time of the conveyance, and in reference to which course they cannot have contracted, cannot affect its construction. Van Wyck *v.* Wright, 18 Wend. 157.

In the construction of a grant, the Court will take into consideration the circumstances attending the transaction and the particular situation of the parties, the state of the country and of the thing granted at the time, in order to ascertain the intent of the parties. Adams *v.* Frothingham, 3 Mass. 352.

And where the intention of the parties can be discovered by the deed, the Court will carry that intention into effect, if it can be done consistently with the rules of law. Bridge *v.* Wellington, 1 Mass. 219; Wallis *v.* Wallis, *ib.* 135; Marshall *v.* Fiske, 6 do. 24; Pray *v.* Pierce, 7 do. 381.

A clear general description in a deed is not controlled by any subsequent expressions of doubtful import in respect to any particular. Ela *v.* Card, 2 New Hamp. 175; Lyman *v.* Loomis, 5 do. 408; White *v.* Gay, 9 do. 126.

If the description be sufficient to ascertain the estate intended to be conveyed, although the estate will not agree to some of the particulars in the description, yet it shall pass by the conveyance, that the intent of the parties may be effected. Worthington *v.* Hylyer, 4 Mass. 196.

Where the grantor in deed described the premises, in the first place by fixed, known and visible metes and bounds, as

well as by corresponding courses and distances, and then added a further description, bounding the land on its several sides by the adjoining proprietors, and the grantee claimed land within the latter description, it was excluded by the former. In an ejectment against him from the land, it was held that the intention of the parties apparent from the deed, was not by different descriptions of the premises, to convey different parcels of land, but one and the same parcel, the additional description being of less certainty than the preceding one, was controverted by it, and parol evidence was inadmissible to show the grantor intended to convey the demanded premises. Benedict *v.* Gaylord, 11 Conn. 332.

Where the boundaries mentioned in a deed of conveyance are inconsistent with each other, those are to be retained which best subserve the prevailing intention manifested on the face of the deed. Gates *v.* Lewis, 7 Verm. 511.

Where the particulars in the description of land in a deed, are inconsistent and incongruous, the Court may reject a part, to give effect to the deed. In doing this they will be guided by the intent of the parties, as gathered from the deed. Hall *v.* Fuller, 7 Verm. 100.

It is contended that Burnett is the legal representative of R. P. Guyard, but being a purchaser, he cannot be.

The legal construction of the words "legal representatives" is, the executors or administrators. 1 Roper on Legacies, 108.

Each of the terms "personal representatives," and "legal representatives," in its strict and literal acceptation, evidently means "executors" or "administrators;" but in cases of wills, as these persons sustain a fiduciary character, it is improbable that the testator would make them beneficial objects of gift, and accordingly in those cases it has been determined to mean *next of kin.* 1 Jarman on Wills, 38.

A representative of a deceased person, sometimes called a personal representative, or legal personal representative, is one who is executor or administrator. 2 Bouvier's Law Dictionary, 317; 6 Mad. 159; 2 Vesey, 402.

In its ordinary sense, the term "legal representatives," is synonymous with the term "executors and administrators." 2 Williams on Executors, and the case there cited of Price *v.* Strange, 819.

In the case of Bennett *v.* Farrar. 2 Gilm, 598, the Supreme Court of this State has decided that the term legal representatives under the act of Congress, February 5th, 1829, meant executors, heirs or administrators, and not purchasers. That was a suit in relation to a Galena town lot, the controversy arising under the law of Congress of 1829.

T. DRUMMOND, for the appellee, examined the errors assigned by the plaintiff in their order.

1. The paper book was admissible. It is a substantial compliance with the law. Rev. Stat. 232. The whole paper book must be taken together, in connection with the certificate, by which it will appear that the records referred to consist of a statement of the number of each certificate, date of entry, purchaser's name, and number and situation of each lot and out-lot in the town of Galena. It is in every respect, therefore, a substantial compliance with the law.

It is like a certificate from a land officer of the various entries in a township, in a section, &c., by lists with a proper heading, in which case it certainly could not be contended, that in each entry there ought necessarily to be a separate and distinct certificate of the register.

This is unimportant at all events, because the special certificate of the register of the 29th of October, 1846, was a literal compliance with the statute, and this error would only present the ordinary case of two deeds from the same party, one of which might be objectionable for mere informality, the other entirely unexceptionable; the admission of the former though improper, would not be error, when the fact or chain of title was established by the latter.

But it is particularly desired, and in this, I am confident, I speak the sentiment and wish of the whole Galena bar, that the Court should express an opinion upon the question as to this paper book, because it is one constantly arising in

our Courts. When the land office was removed from Galena to Dixon, it was foreseen that some general list of the entries in Galena would be necessary, and to meet this necessity this paper book was obtained; since then it has always been used, and whenever objection has been taken, it has uniformly been overruled by our Courts.

It is to be observed, that though an objection and exception was taken to the admission of the register's certificate of the 29th of October, 1846, no error is assigned upon that point.

2. The Acts of Congress of February 5, 1829, and July 2, 1836, were clearly admissible. They are private Acts. 1 Black. Com. 86, note 21; 14 Peters, 353; 16 do. 234; 2 Howard, 591.

By what general law are town and city lots liable to entry at a land office? There is none. We refer to the Acts and introduce them. If not necessary, there is certainly no error in their admission. But it may well be doubted, whether they are not absolutely necessary in order to show Burnett's right. A man claims property under a private Act of Congress. It would be a most extraordinary doctrine to hold that law inadmissible, more particularly in relation to real estate.

3. The records of the Board of Commissioners were properly admitted. 12 Peters, 418; 2 Howard, 285, 316; 4 do. 421, 449.

They were admissible in order to identify the lot. There was a deed made prior to the entry of the land; of course the land conveyed was to be connected with the entry. The Commissioners' records were the most conclusive and satisfactory proof of that. A confirmation by Act of Congress and the certificate of the Commissioners, entry at the land office, and issuing of Patent, are substantially the same thing. 12 Peters, 454; 2 Howard, 285; 4 do. 458. Wann's testimony was addressed to the Court (not to the jury), as preliminary to the introduction of the records.

The only ground of objection that can be made, is, that we cannot go behind the Register's certificate. But this dif-

fers from an ordinary case; usually, the Register's certificate (prior to the issuing of a Patent), is the only evidence of title. In this case the board were to adjudicate and decide, the Register and Receiver of the Land Office were mere instruments who were obliged to issue a receipt on presentation of the commissioner's certificate.

We do not go behind the Register's certificate to show that it issued improperly, but to sustain it and conform to it, and establish that our right accrued prior to the entry.

This must always be the rule in like cases. We show our old claim and trace it down, and the reason of the rule is shown by a part of the plaintiff's testimony on the defence in the Court below. In order to defeat us, they introduce a plat made by Captain Craig long before the entry. It is unnecessary to notice the permit book, for, though its admission was objected to and an exception taken, no error is assigned on that point.

4. As to Guyard's deed of October 13, 1829, this was properly admitted in evidence.

In placing a construction on this deed, as to the description, &c., it is just to consider the situation and circumstances of the country. 2 Howard, 316. As to the acknowledgment, it is not necessary that the certificate of the officer should state that the witness was competent and credible. The presumption is, that they are both until the contrary is shown.

The law never contemplated that the magistrate or officer, before whom the proof of a deed was taken, should be the judge of the competency of the witnesses. To be satisfied of this, it is only necessary to consider the very many and difficult questions which arise in determining this point. The witness must be of sufficient understanding, comprehend the obligations of an oath, be free from interest, not a party. 1 Greenl. Ev. § 327. Now, in these matters are frequently involved the most abstruse and difficult questions in the law, and it would be singular if the statute intended to leave the determination of such questions to an officer authenticating a deed. If it did, then their judgment would

seem to be final. But such is not the law. 4 Johns. 161; 2 Wend. 308; 2 Hill's (N. Y.) R. 612.

If the witness is incompetent and incredible, that fact must be made to appear by the party alleging it. It is true that the general principle of law is undoubted, that when there is a witness to a deed, you must call him, if within reach of the jurisdiction of the Court, and if not, you must prove his handwriting; but the reason of the rule is exceedingly artificial, and it has been much modified by the current of modern authority. It is clear that the good sense of the principle, lies not so much in determining who witnessed a deed, as who executed it as grantor. 5 Peters, 319; 22 Pick. 90; 11 Wend. 110; 13 do. 178; 2 do. 576; 2 Johns. 451; 1 Greenl. Ev. §§ 575, 569, 572. It is conceded, however, that this deed of Guyard is offered under the statute, and we must show a compliance with it.

But it has been repeatedly decided in this and other States, that a literal compliance is not necessary. 2 Scam. 308, 374, 525; 1 Gilm. 116, 160, 302; 3 Ohio, 140; 6 do. 353; 15 do. 423; 6 Blackf. 476; 3 Cowen & Hill's notes, 1247, 1249.

The authentication in this case is a substantial compliance with the law.

In the proof of the handwriting of the subscribing witness to the deed, Mr. Potts does not particularly state his means of knowing the handwriting. It may be admitted that this should appear to the certifying officer; but the important question is, is it indispensable that it should affirmatively appear in the certificate the officer gives?

The same remark is applicable here as before. The certificate of the officer has a particular locality—gives the name of the witness, &c. It is generally in the power of the other party to negative the proof, if any serious doubt is entertained as to the genuineness of the instrument. The statute only makes this authentication it prescribes *prima facie* evidence.

The certificates or affidavits attached to the deed do not show that they personally knew the party whose handwriting the witnesses were called on to prove. But they state they

were "acquainted," and "well acquainted" with the party. These are stronger terms than personal knowledge, because while we know many, we are acquainted with but few. To be acquainted or well acquainted with a man, is to have a familiar knowledge of him. Then, as to the handwriting of the grantor—the most important—the means of knowledge are given. We do not insist that this authentication follows the precise words of the statute, but their general tenor, scope and spirit. It may be like a declaration on a written instrument, correctly set forth in legal terms, but not contain a word of the original. In leaving this branch of the subject, it may well be borne in mind, that when any doubt is thrown upon a written instrument, it is not the fact that there has been an exact compliance with a statute in all its minute particulars that will remove the doubt, but the contrary. When men commit a fraud in a transaction that a statute requires to be done in a particular manner, they are careful to come up to its very letter, while on the other hand, if everything is fair and honest, they are apt to be heedless and indifferent.

5. The judgments of the County Court were admissible to show the former trials, not as conclusive or as a bar, but to have such weight as the jury might think proper, as in case of doubt, or to rebut presumption arising from possession. 12 Peters, 418, 434, 766, 767: 4 Wash. C. C. R. 477; 25 Wend. 432, 437; 9 Cowen, 233; Adams on Eject. 351, and notes. But if the Court erred in this point it was immaterial, and the judgment will not for that be reversed. 1 Taunt. 12; 6 Bing. 561; 2 Moore, 150; 1 Blackf. 164; 3 do. 222; 5 do. 59; 3 Scam, 18. This principle is peculiarly applicable in a case like this, when the main questions in the cause depend upon documentary evidence.

6. Under this head will be considered the instructions given and refused on both sides; and this brings up the gravest question in the cause—the meaning, effect and operation of Guyard's deed of 1829 to Burnett under the Laws of Congress of 1829 and 1836. And in the first place, what was Guyard's right? It was a right to property, an inchoate right to real estate, and as such, assignable, devisable, descendible. It

was at least a possibility coupled with an interest. 11 Wend. 110; 13 do. 178; 1 W. Black. 606; 1 H. Black. 30; 3 Term R. 88; 9 Ohio, 147; 9 Peters, 133; 10 do. 330, 722. If the permit should only be regarded as a license, that would not change it. 15 Wend. 380, &c.

The difficulty and error in this part of the case consist in assimilating this to an ordinary pre-emption, which in general, is a mere personal privilege.

Here was a survey recognized by authority of law; a permit given in pursuance of law (14 Peters, 526), and the Act of 5th February, 1829, itself, recognized the validity of the permits. On the faith of these permits large improvements were made, money expended, and valuable rights of property acquired. A special Act of the legislature had recognized them as valid. Act of January 13, 1836; Laws of 1836, 238, Rev. Stat. Eject. § 57.

These rights have been regarded as property by many of the Acts of the legislature, and by several decisions of this Court. They can be assigned and transferred, and are liable to execution. Turney *v.* Saunders, 4 Scam. 527. They pass to an assignee under a decree in bankruptcy. French *v.* Carr, 2 Gilm. 664.

Then as to the question of warranty. It is a general warranty, "warrant and defend the said M. G. Burnett from all other persons except the United States of America:" It is almost precisely like the warranty in Stoddard *v.* Chambers, 2 Howard, 284, where as I have ascertained by a certified copy of the deed, the warranty, by Bell in that case, was to Mackay against heirs, &c., but not against the Government; and this warranty was there held an estoppel. The exception amounts to nothing. In an ordinary general warranty, an Act of the Government, within its constitutional limits, would be no breach. The doctrine of estoppel is sometimes said to be odious, but truly understood, it promotes justice. It is applied to prevent circuity of action.

It operates here. The principle I contend for is, that if a person acquire for himself an inchoate and imperfect right to land, and the perfection or consummation of that right is

dependent upon his holding it, a transfer or assignment of it will prevent him from perfecting it for his own benefit; or if in terms he is the party to perfect the right, it shall, in point of fact, be for the benefit of his grantee. His heirs could not perfect it in such case. A right that had been assigned could not descend to heirs.

This was not a life estate in Guyard, and if he parted with his right or interest, his heirs could not perfect an imperfect right which did not descend to them. This is not the case where one acquires property by title paramount in a third person. 4 Wend. 622; 11 do. 110; 13 do. 178; 3 Metc. 121; 7 Greenl. 96; 4 Kent's Com. 98; 3 Pick. 52; 13 do. 116; 8 do. 153; 24 do. 325, 327; 5 Ohio, 125; Frisby v. Ballance, 2 Gilm. 141.

As to the difference in the survey, I take this position: If by virtue of a law of Congress, either special or general, a person has the right of perfecting his title to land, by purchase or otherwise, and the boundaries are to be determined by the Surveyor General, or by a board of commissioners, whenever they are determined by the competent authority, such determined boundaries govern and conclude the parties, as well at Law as in Equity, no matter now many other or different boundaries or surveys may have been previously set up by the claimants, nor how many mesne conveyances there may be. Jourdan v. Barrett, 4 Howard, 169, 421, 449; 3 do. 788.

It is conceded there is a difference between the superintendent's survey and that of the Commissioners. They were identical, as to this lot, only in part. The land granted by the deed was neither, exactly. When made, this was only a private survey. It was of no effect till the law of Congress gave it validity. The same law that recognized it, declared that a strip of land along the river should remain forever a public highway. There was only, therefore, as valid, the survey of part of the wharf lots.

But the Commissioners (taking the place of the Surveyor General), had the right to survey, having regard to the streets

and lots already surveyed, that is, not rigidly bound by them, but taking the superintendent's survey as their general guide. Now my doctrine is, that the Commissioners having this power, where there is a variance between the old survey and the new, the new survey controls the rights of the parties, because it is the legal Government survey.

By virtue of the permit to the front lot on the river, new lot number three was entered.

But, however it may be, in relation to the warranty and survey, Burnett, under the Act of 1829, is the legal representative of Guyard, and as such, his title to the lot is perfect.

What is the meaning of the term "legal representative," as used in the Act? It may be heirs, devisees, or purchasers—certainly not executors or administrators.

If the original claimant had transferred his right, then the person to whom the right was transferred *legally represented* him as to that claim; if he died, leaving a will, then the devisee; if without a will, the heir represented him.

The only difficulty as to the question, is the not properly distinguishing as to property. As to personalty, the administrator and executor are always legal representatives, as to realty, never. The only power an executor has over realty, is by the express provisions of the will; that of the administrator is ordinarily to make application to the proper Court to sell it for the payment of debts. 15 Peters, 113.

It may, in principle, be likened to the case of land warrants, in relation to which, it is well settled that they do not go to administrator or executor. See part 2d of Public Lands Instructions, &c. There is no pretence of title in Delaunay. It is a mere naked possession.

The record states in this case the death of Guyard, and an attempt is made, not to establish title in the defendant below, but to make it appear that there is an outstanding title, either in the heirs of Guyard, or in his administrator. The *prima facie* right of Burnett, at least in part, must be admitted. But to set up an outstanding title, it must be clear and unquestionable. 6 Peters, 312, 498; 3 Howard,

759; and yet the record does not show an heir, executor or administrator in existence.

The land is passed "to the legal representatives of R. P. Guyard." If Guyard had been living, and it were passed to him by name and so entered, it may be conceded that his title would be good, at least at law, in spite of his deed of 1829. 12 Peters, 458; though in that case the contrary doctrine was strongly pressed. 12 Peters, appendix 765. But as it is to his legal representative, it becomes immaterial whether Guyard were living, or died leaving heirs, &c. Let us look at the question upon principle. Here were most valuable rights of property. It is notorious that they were improperly transferred from hand to hand; in some instances, particular lots in Galena for thousands of dollars. These transfers are a part of the history of the country, and yet if it be true, that under the law of 1829, a purchaser does not represent the original claimant, he loses his money and the claimant gets the land. And it would be a singular condition of things, if, after the claimant has sold his lot, and received and used the purchase money, at his death his heir, as heir, could have the benefit of that property which his ancestor had already sold; or that the administrator could hold it for the estate of the original claimant. It is apparent that it was never contemplated to produce consequences so unjust and oppressive, by the Act of 1829.

The authorities cited on the other side, Roper, Jarman, Williams and Bouvier, as to the meaning of "legal representative," show that circumstances must determine.

But the important question is not what these elementary writers understand by the terms, but what did the Congress of the United States mean when, in this and similar laws, the term "legal representive" is employed?

This expression has been repeatedly used by Congress in various laws. 1 Land Laws, 122, 90, 132, 115, 153, 453. If the Court will examine these and many other Acts that might be cited, and also some of the cases in Peters, and Howard, already referred to, where these Acts, many of

them are construed, it will find a uniform course of action upon this point.

Again, Patents are almost every day issued under some such laws, to a man and his legal representatives. It has never been supposed in such a case, if the man had parted with his right, that the grantee could not hold by virtue of the Patent. An examination of the proceedings of all the Boards of Commissioners, who have acted under similar laws, will tend to the same result. They have uniformly considered the purchaser as representing the original claimant.

The practice of the Board at Galena was uniform in thus construing the law. Such was the construction on exactly like Acts by the Boards of Dubuque, Mineral Point, Burlington, &c.

These Acts are the same. 1 Land Laws 549, 562. And see particularly Senate Document for 1835–6, Vol. 1, Doc. 16, pp. 7, 15, 33, 69, &c., where many cases will be found where confirmations were made, as in the present instance.

It is well settled, then, adjudications made by Boards of Commissioners are conclusive. Such is the law of this Court. 2 Gilm. 598. But they are only conclusive when within authority of law; but admitting the expressions in the law of 1829 to be ambiguous, it is perfectly notorious what has been the construction of the Board. In a vast majority of applications, assignees and grantees represented the original claimants. It will not be pretended that the Board had a right to give a certificate to any one. They were bound by the law. When no claimant came forward, as purchaser, heir, devisee, or permittee, to demand the right, they gave it to the legal representative of the original claimant, and let the Act of Congress decide who was such.

This course of action on the part of the various Boards of Commissioners has been sanctioned by Congress and by the Government. In this particular case, the law of 1836 required the Board to file the evidence with the Register and Receiver. Patents have issued to purchasers as legal representatives of their grantors.

In Missouri, similar questions have often arisen under like Acts of Congress, and the case of Montgomery *v.* Landusky, 9 Missouri 714, is an authority in point for the doctrine I maintain.

If this be the true construction of the law of 1829, then the various questions connected with the instructions of the Court below become unimportant.

7. It is unnecessary to examine particularly the questions connected with the motion for a new trial, and for an amendment of the record.

The first has already been fully considered, even admitting that an exception was taken at the trial. The amendment of the record was a matter of discretion and the refusal was proper, because to amend it in the manner requested, would have spread a fact on its pages which did not occur. It would be to allow it to speak what a party supposed and understood to take place, and not the actual fact.

On the whole it is insisted that the judgment below should be affirmed. There have been three trials in the Courts below, the last of which was with the consent of the plaintiff below, all resulting in the same way. Full justice has been done between the parties.

The Opinion of the Court was delivered by

PURPLE, J. This was an action commenced in the County Court of Jo Daviess county to recover the possession of a certain lot of ground in the city of Galena. The declaration contains two counts. The first count describes the lot as being "Lot No. three, on the east side of Main street, and running back to Water street, on the west side of Fevre river." The second count describes the lot as being "Lot No. three, on the east side of Main street, and running back to Water street, on the west side of Fevre river, known and designated before the survey of the town of Galena, as a lot situated on Main street adjoining Peck's warehouse, and bounded by Main street on the west, by Peck's lot on the south and Fevre river on the east."

There were two trials of the cause in the County Court, verdicts in favor of the plaintiff, and new trials granted. The defendant then *moved* the Court for a change of venue in the cause, which motion was allowed, and by agreement the cause was taken to the Jo Daviess County Circuit Court.

On the 9th day of October, 1847, the said cause came on for trial in the said Circuit Court, and the following verdict was returned by the jury: "We, the jury, find the defendant guilty of unlawfully withholding the premises claimed by the plaintiff, as alleged in his declaration, and find that the estate established in the plaintiff on the trial is an estate in fee simple," &c.

The plaintiff first called Charles G. Thomas as a witness, who being sworn, stated that he was acquainted with George Mixter's handwriting; that he had seen him write often, and that he believed the signature to the instrument purporting to be signed by said Mixter, to be in the proper handwriting of the said Mixter, and that said Mixter was, at the time the said instrument bore date, acting Register of the Land Office at Dixon, Illinois, and that Galena was in the Dixon Land District, and thereupon the plaintiff offered to read in evidence to the jury the instrument, which was in words and figures following, to wit:

"I, George Mixter, Register of the Land Office at Dixon, Illinois, certify that on the 20th day of February, A. D. 1838, lot No. three (3), Main and Water street, Galena, Illinois (which then and now is in the Dixon Land District), was entered and purchased of the United States in the name of 'the legal representatives of R. P. Guyard,' which fact of such entry and purchase appears of record in my office.

"Given under my hand at Dixon, this twenty-ninth (29th) day of October, A. D. 1846.

(signed) GEO. MIXTER, Register."

The plaintiff then called Dan Stone as a witness, who being duly sworn, said he was acquainted with the handwriting of Samuel Hackelton, and had seen him write, and

believed the signature to be genuine to the certificate, purporting to be signed by him, in the words and figures following, to-wit:

"LAND OFFICE, GALENA, September 26, 1840.

I hereby certify that the foregoing entries are correctly copied from the records of this office.

(signed) SAMUEL HACKELTON, Register."

Which certificate was at the end of a paper book, purporting to be a statement of the sale of town and out-lots in the town of Galena, Illinois, and which was set down in separate and distinct columns, 1st, the number of the certificate; 2nd, the date of the entry; 3rd, the name of the purchaser; 4th, the number of the lot; 5th, its situation, &c. And said Stone also stated, that at that time, he (Hackelton) was the acting Register of the Land Office of the Galena Land District, and thereupon the plaintiff offered to read in evidence an extract from said paper book, which showed, that on the 20th day of February, 1838, lot three, Main and Water streets, was entered in the name of "the legal representatives of R. P. Guyard." Said Stone also stated, that in September, 1840, and prior thereto, the Land Office was at Galena, and was subsequently removed to Dixon. To the reading of which extract in evidence to the jury, the defendant by his counsel objected, and the Court overruled the objection, and the extract as aforesaid was read to the jury, and the defendant by his counsel excepted.

The plaintiff then offered in evidence two certain Acts of Congress which are as follows:

"An Act authorizing the laying off a town on Bean river, in the State of Illinois, and for other purposes.

1. *Be it enacted*, &c. That a tract of land in the State of Illinois, at and including "Galena," on Bean river, shall, under the direction of the surveyor of the public lands for the States of Illinois and Missouri, and the Territory of Arkansas, be laid off into town lots, streets and avenues, and into out-lots, having regard to the lots and streets already surveyed, in such manner, and of such dimensions, as he may think proper:

Provided, that the tract so to be laid off shall not exceed the quantity contained in one entire section, nor the town lots one quarter of an acre each, nor shall the out-lots exceed the quantity of two acres each. When the survey of the lots shall be completed, a plat thereof shall be returned to the Secretary of the Treasury, and within twelve months thereafter the lots shall be offered to the highest bidder at public sale, under the direction of the President of the United States, and at such other times as he shall think proper: *Provided*, that no town lot shall be sold for a sum less than five dollars; and *provided further*, that a quantity of ground of proper width on the said river and running therewith the whole length of the said town, shall be reserved from sale for public use, and remain forever a common highway.

2. *And be it further enacted*, that it shall be the duty of the said surveyor to class the lots already surveyed, in the said town of Galena, into three classes, according to the relative value thereof, on account of situation and eligibility for business, without regard, however, to the improvements made thereon; and previous to the sale of the said lots as aforesaid, each and every person, or his, her, or their legal representative or representatives, who shall hertofore have obtained from the agent of the United States a permit to occupy any lot or lots in the said town of Galena, or who shall have actually occupied and improved any lot or lots in the said town, or within the tract of land hereby authorized to be laid off into lots, shall be permitted to purchase such lot or lots, by paying therefor, in cash, if the same fall within the first class, as aforesaid, at the rate of twenty-five dollars per acre; if within the second class, at the rate of fifteen dollars per acre, and if within the third class, at the rate of ten dollars per acre; *Provided*, that no one of the persons aforesaid shall be permitted to purchase by authority of this section more than one half acre of ground; unless a larger quantity shall be necessary to embrace permanent improvements already made.

Approved February 5, 1829.

"An Act to amend an Act entitled "an Act authorizing the laying off a town on Bean river, in the State of Illinois, and for other purposes," approved fifth February, eighteen hundred and twenty-nine.

1. *Be it enacted*, &c., that all acts and duties required to be done and performed by the surveyor of the States of Illinois and Missouri, and the Territory of Arkansas, under the Act to which this is an amendment, shall be done and performed by a Board of Commissioners of three in number, any two of whom shall form a quorum to do business; said Commissioners to be appointed by the President of the United States, and shall, previous to their entering upon the discharge of their duties, take an oath or affirmation to perform the same faithfully and impartially.

2. *And be it further enacted*, that the said Commissioners shall also have power to hear evidence and determine all claims to lots of ground arising under the Act to which this is an amendment, and for this purpose the said Commissioners are authorized to administer all oaths that may be necessary, and reduce to writing all the evidence in support of claims to pre-emption presented for their consideration; and when all the testimony shall have been heard and considered, the said Commissioners shall file with the Register and Receiver of the Land Office at Galena, the testimony in the case, together with a certificate in favor of each person having the right of pre-emption; and upon making payment to the Receiver at Galena, for the lot or lots to which such person is entitled, the Receiver shall grant a receipt therefor, and issue certificates of purchase, to be transmitted to the General Land Office, as in other cases of the sale of public lands.

3. *And be it further enacted*, that the Register and Receiver at Galena, after the Board of Commissioners have heard and determined all the cases of pre-emption under the Act to which this is an amendment, shall expose the residue of lots to public sale to the highest bidder, after advertising the same in three public newspapers at least six weeks prior to the day of sale, in the same manner as provided for the

sale of the public lands in other cases; and after paying to the Commissioners the compensation hereinafter allowed them, and all the other expenses incident to the said survey and sale, the Receiver of the Land Office shall pay over the residue of the money he may have received from the sale of lots aforesaid, by pre-emption as well as at public auction, into the hands of the County Commissioner of Jo Daviess county, to be expended by them in the erection of public buildings, and the construction of suitable wharves in the town of Galena.

4. *And be it further enacted*, that the Commissioners appointed to carry this Act into effect, shall be paid by the Receiver six dollars each, per day, for their services, for every day they are necessarily employed.

Approved July 2nd, 1836."

To the reading of which said Acts of Congress in evidence, the defendant's counsel objected and excepted.

The plaintiff then called Daniel Wann, who being sworn, testified that he was one of the acting Commissioners with John Turney and Samuel Leech, under said Act of Congress of 1836; that they, as such Commissioners, kept a record of their proceedings and doings, and employed a clerk, and that he recognized a book then shown to him, as being the said record of their proceedings and doings, and that Phillip B. Bradley was their clerk, and that the entry in the said book was in the handwriting of the said Bradley, and therefrom the plaintiff offered to read in evidence an extract from page 169 of said record, in the words and figures following, to-wit:

"The legal representatives of Robert P. Guyard claim Lot No. 3, between Main and Water streets, and in support of their claim produced a certified copy of a permit, granting the same to Robert P. Guyard, dated March 12th, 1828, signed Charles Smith, together with evidence of the loss of the original permit.

"The Commissioners are of opinion, that the legal representatives of Robert P. Guyard are entitled to a pre-emption

to said Lot No. 3, embracing twenty-four feet front on Main street and forty-seven feet front on Water street, containing .08 of an acre, of the first class."

To the testimony of said witness, and to the reading of said extract from said book in evidence to the jury, the defendant by his counsel objected, and the objection was overruled by the Court; and thereupon the Court permitted the said extract to be read to the jury, to which ruling of the Court the defendant, by his counsel, excepted. The said witness, Daniel Wann, then recognized a book shown to him by plaintiff's counsel, as the original "Permit Book," so called, being a record of the Superintendent of the U. S. Lead Mines, of permits to lots in the town of Galena; that said book was before the said Commissioners, and that they acted upon it. To all which testimony in relation to said Permit Book, the defendant, by his counsel, objected, but the Court overruled the objections.

The plaintiff then called Albion T. Crow, who being duly sworn, testified that he was acquainted with Charles Smith, who was acting Superintendent of the U. S. Lead Mines, at Galena, on March 12, 1828, and that Martin Thomas was the real Superintendent at the time, and that an entry in said Permit Book, bearing date March 12, 1828, was in the handwriting of said Charles Smith; and thereupon the plaintiff offered to read in evidence an entry in said Permit Book, which was in the words and figures following, to wit:

"Robert P. Guyard is permitted to occupy Lot No. 3, Wharf Row, under the usual restrictions.

GALENA, March 12, 1828.

(signed) CHARLES SMITH."

To the reading of which entry in evidence, the defendant, by his counsel, objected, which objection was overruled by the Court, and the said entry read to the jury, to which ruling of the Court, in permitting said entry in the Permit Book to be read to the jury, the defendant, by his counsel, excepted.

The plaintiff then offered to read in evidence to the jury an instrument in writing, purporting to be signed by R. P. Guyard, and the proof and authentication thereof, which was in the words and figures following, to wit:

"For value received, I have this day bargained and sold, and by these presents, do bargain, sell, convey and confirm unto Milton G. Burnett, all my right, interest and claim to a certain lot in the town of Galena (permit being lost, the number not recollected), situated on Main street, nearly opposite Lytle & Wann's store, and immediately adjoining Peck's wherehouse, and bounded as follows: by Main street on the west, by Peck's lot on the south, and Fevre river on the east, running on to the river just below a stone wall, about two or three [feet] high, at the edge of low water mark, and to the best of my recollection, it is the third from the corner, Soulard owning the corner and Peck the next lot. To have and to hold the above described lot, with all and singular the improvements thereon: I warrant and defend the said M. G. Burnett, from all other persons except the United States of America. Given under my hand and seal, this the thirteenth day of October, in the Year of our Lord eighteen hundred and twenty-nine.

(signed) R. P. GUYARD. [L. S.]

Witness, E. KERNEY,
MINERAL POINT, Oct. 13, 1829.

State of Illinois, }
Gallatin County. }

Before me, William Edwards, the undersigned, acting justice of the peace in and for said county, and State above named, appeared Isaiah L. Potts, who being duly sworn, says, that he was well acquainted with Elliott Kerney, a subscribing witness to a deed made by R. P. Guyard, to Milton G. Burnett, and dated at Mineral Point, October 13th, 1829, both before and after the date of said deed, up to the time of his death, which was in ———— and was well acquainted with his handwriting during the whole time, and verily believes the above signature to be Elliott Kerney's,

who he knows resided in or about Mineral Point, during the whole of 1829 and a part of thirty, to the best of his belief. Given under my hand and seal this 19th day of May, 1845.

(signed) ISAIAH L. POTTS. [L. S.]

Sworn to and subscribed to, this 19th day of May, A. D. 1845.

(signed) WILLIAM EDWARDS, J. P.

State of Illinois, } ss.
Gallatin County. }

I, Leonard White, clerk of the County Commissioners' Court in and for said county, do certify, that the above William Edwards, who signed the above affidavit, is and was, at the time of taking the same, an acting justice of the peace, duly commissioned and qualified as such, and that full faith and credit are due to his official acts as such.

In testimony whereof, I have hereunto set my hand and the seal [L. S.] of said Court, at Equality, this 21st day of May, A. D. 1845.

(signed) LEONARD WHITE.

Territory of Wisconsin, } ss.
County of Iowa. }

William Henry, of the town of Mineral Point, in the county aforesaid, being duly sworn, on his oath, says he was acquainted with R. P. Guyard (whose name appears to the annexed deed of conveyance to Milton G. Burnett, dated at Mineral Point, October 13, 1829), when said Guyard lived in Galena; also when he lived in Mineral Point. Deponent further states, he has seen much of said Guyard's handwriting, and have seen him write, and knows that said Guyard lived at Mineral Point in the year 1829, and this deponent believes that the signature to the deed hereto annexed, is in the handwriting of said R. P. Guyard.

(signed) WILLIAM HENRY. [L. S.]

Sworn to and subscribed before me, James S. Bowden, a justice of the peace, in and for Iowa county aforesaid, this 12th day of June, A. D. 1845.

(signed) JAMES S. BOWDEN, J. P.

Territory of Wisconsin, } ss.
County of Iowa. }

I, Henry L. Dodge, clerk of the District Court of the United States, within and for said County and Territory, do hereby certify that James S. Bowden, whose name appears to the above affidavit, was on the day of the date thereof, and now is an acting justice of the peace, in and for said county and Territory, duly elected and qualified, and that as such, full faith and credit are, and of right ought to be given to all of his official acts. And I further certify, that the above signature, purporting to be his, is genuine.

In testimony whereof, I have hereunto set my hand and affixed
[L. S.] the seal of our said Court, at the clerk's office in (the) Mineral Point, in said county, this 12th day of June, A. D. 1845.

(signed) HENRY L. DODGE, D. C. I. C., W. T.

Recorded this 13th day of June, A. D. 1845, at nine o'clock A. M.

(signed) JEREMIAH BETTIS, Recorder."

To the reading of which in evidence, as aforesaid, the defendant, by his counsel, objected, *first*, because it was not properly authenticated; *second*, because of a variance from the declaration; *third*, it was not such an instrument as title could enure to plaintiff under, and for other reasons; which objections were overruled by the Court, and the instrument, and authentication thereof, were read to the jury, to all of which the defendant, by his counsel, excepted.

The plaintiff then called William H. Bradley, who being sworn, said he was acting as deputy clerk of the Jo Daviess County Court, and thereupon produced the record of the said Court, and thereupon offered to read in evidence certain entries from the records of said Court in this suit, when pending in said County Court. To the reading of all which entries the defendant, by his counsel, objected, which objection was overruled by the Court, and said entries were read to the jury, to the reading of which the defendant, by his counsel, excepted.

The plaintiff's counsel then offered the transcript from the Jo Daviess County Court in this State, filed May 20th, 1847, stating that he desired it might be considered in evidence before the jury, as containing a transcript of the entries read from the record. The defendant's counsel objected, which objection was overruled by the Court, to which defendant excepted. The transcript was not, in point of fact, read to the jury, but the Court allowed the transcript to go to the jury, as aforesaid, to which defendant objected, which objection was overruled, and defendant excepted.

The plaintiff then called Charles R. Bennett, who being sworn, testified that he was a surveyor, and that he laid off the town of Galena in 1837, under the direction of the Commissioners, and that he made a plat of the town, which was then produced and recognized by him as one of the original plats. Said witness stated he did not know much about the wharf lots; that he run off the new lots under the direction of the Commissioners aforesaid; that he did not know how the old lots were situated on the ground; if the lines of old lot No. 3, Wharf Row, were run out to Main street, they would embrace nearly the present lot No. 3; they would not miss it very much; that he never run off old wharf lots, and only judges from the plat. That the description of the lot in Guyard's deed, extended out to Main street, would take considerable part of the present lot, but only judges from the plat like anybody else, but could not tell what proportion better than any body else looking at the plat; does not know the present occupant of said lot No. 3, Main street. None of the lots under the present survey run to the river. On the cross-examination, said witness testified, that he did not know the boundary line of the old wharf lots; that he judges of the lines only by his eye and the map; that in 1829, there was a road that run into the bottom across the square; that James Craig, a witness on a former trial in this case, was dead.

The plaintiff then re-called Albion T. Crow, who testified that he recollected the old wharf lots, and the old stone wall made by Guyard on said lots, but he did not know whether

wharf lots run to the river or not; that Main street runs now as it did then; that in 1829 the triangular piece of ground between, Wharf Row and Main street was a public square, and no permits were ever granted upon said ground; that he was acquainted with Guyard. The defendant occupied present lot No. 3 under the new survey, during the year 1845, and has occupied the same from 1836 to the present time. The Wharf Row lots as surveyed by the Superintendent, did not come up to Main street. The public square between the Wharf Row lots and Main street, was not called Main street in 1829.

Daniel Wann was then re-called by plaintiff, who testified, that all the old wharf lots were changed; three of them were changed to front on Main street by new survey, and a street left along the river. Soulard owned the first lot, and Peck the second lot in 1829. The old wharf lots did not run up to Main street. That in consequence of the street running along the river, the lots 1, 2 and 3 of the Superintendent's survey were extended up to Main street by the Commissioners' survey, the lines of the old survey and the new survey not running in the same direction; present lot No. 3, being bounded by Main and Water streets; that by virtue of the permits to old lots 1, 2 and 3, pre-emptions were granted to new lots 1, 2 and 3.

The plaintiff here rested his case.

The defendant then called Daniel Wann who testified that he knew the old wharf lots in 1829; that they fronted upon vacant ground which was claimed by nobody, being a public square, and said lots were bounded on the east by the river; the deed of Guyard to the plaintiff of October 13th, 1829, being read to the witness, he stated that he came to Galena the 30th day of October, 1829, and subsequently, on the 3rd of November, 1829, he opened a store nearly opposite wharf lot No. 3, under the style of Lytle & Wann; that there never was any such firm or store here before that time, and that he was not known in the country before October 30th, 1829, nor was his partner Lytle; that such a firm or store as Lytle & Wann never could have been known in

Galena on October 13th, 1829; that he never rented any store before he came here, October 30th, 1829; knows he cannot be mistaken in the time of his coming; that in 1829, by the description of said deed, it would have conveyed old wharf lot No. 3.

On cross-examination, witness stated that a part of the old wharf lots were taken for a street, and present lot No. 3, Main street, was given in substitution of wharf lot No. 3. He also stated on cross-examination, that if the western boundary of the lot conveyed in Guyard's deed, was Main street, the deed conveyed more than old lot No. 3, and would thereby cover more of the present lot No. 3, between Main and Water streets.

Charles Peck was then called by defendant, and being sworn stated, that he came to Galena in 1827; that he was well acquainted with lots in Wharf Row in 1828 and 1829; that said lots were well known and defined as constituting Wharf Row in Galena; that he owned lot No. 2, Wharf Row, in 1829, and had a building thereon at that time, which came up to the front of it; that the said lots fronted on vacant ground, laid out, used, known and occupied as a public square; that at that time there were no lots laid out on the said public square, and nobody at that time claimed any; that Soulard owned the first lot on wharf Row in 1829, and that old lot number three, Wharf Row, was the lot conveyed by the deed of Guyard to the plaintiff, bearing date October 13, 1829, which deed was read to him; that old wharf lot No. 3 under the old survey, and lot No. 3 under the new survey are different grounds, except a small piece.

On cross-examination said witness stated, that if the lines of old wharf lots one and two were extended to Main street, they would embrace part of lots one and two, now owned by him on Main street; that he does not claim all of old lots one and two, but he claims new lots one and two, because he bought them of the United States. Witness also stated on his cross-examination, that in 1829 lots one and two, as surveyed then, did not run to Main street, and he did not claim

to Main street for lot two, nor for lot one after he purchased it; that in 1829 he claimed to Fevre river; that by virtue of the permits to old lots one and two, he obtained a pre-emption to new lots one and two, and purchased them of the United States; that since the new survey he claims to Main street, and does not claim to Fevre river; that if the lot in Guyard's deed run to Main street, it conveyed more than old lot No. 3.

A. L. Holmes being then called as a witness for defendant, and being sworn, testified that he was present on a former trial of this cause, and assisted in trying it, and recollects the testimony of James Craig, a witness called and sworn on said trial, who is now dead; that James Craig testified on the said trial, that he, the said Craig, was appointed a surveyor in 1827, by Martin Thomas, then Superintendent of the United States' Lead Mines, to lay off the town of Galena; that he proceeded to lay off and survey said town of Galena into streets and lots, and made a plat thereof, a true copy of which the witness then identified as the same plat which said Craig certified to on said trial, and was a copy of the original plat sent to the proper department at Washington, which said map went to the jury as evidence in the former trial and on this trial; that there were six lots laid off by said survey, and called Wharf Row, on the west bank of Fevre river. That the said Craig further testified on the said trial, that under the Acts of Congress a new survey was made of the town of Galena, in the years 1836 and 1837, under the direction of the United States' Commissioners to lay out the town of Galena, and that he knew the location and boundaries of the lots under the new survey and the old survey; that he had in his possession the field notes of the old survey made by him in 1827; that he had since made a plat and survey, showing the location of the old wharf lots, and of the lots under the survey of 1836 and 1837, which plat or survey and certificate was in the handwriting of said Craig. The witness then produced it to the jury, which he testified was the same plat used on the former trial in this cause, and which said Craig testified he made, and which

correctly represents Lot No. 3, Wharf Row, under the old survey, and lot No. 3, Main street, under the new survey, which said Craig testified were only identical to the extent of 144 square feet; and the said witness then explained to the jury, that said Craig testified that wharf lot No. 3 covered only 144 square feet of present lot No. 3, as shown by said diagram; that wharf lots were forty feet front by eighty feet deep, and the present lot was twenty-four feet front on Main street by forty-seven feet on Water street; that the lots under the new survey occupied ground which was vacant under the old survey, excepting the 144 square feet as shown by the diagram.

On the cross examination said witness testified, that Craig said on the former trial, that lots one, two and three under the new survey, were given by the Commissioners in lieu or in substitution for lots one, two and three on Wharf Row, for the reason that a street called Water street was laid out along the bank of the river, which was required by the laws of Congress, and which the Commissioners made one hundred feet wide, covering a part of the ground occupied by the old wharf lots, and that the new lots one, two and three on Main street, were given to persons who had lots on Wharf Row; that, he, said Craig, further testified, that the description in Guyard's deed to plaintiff of October 13, 1829, was a very good description of lot No. 3, under the new survey, inasmuch as it was bounded on Main street and by Peck's present lot on the south. It was conceded by both parties on the trial, that Guyard had been dead many years.

The plaintiff then called Charles Bracken as a witness, who testified that he was well acquainted with Guyard, and that he (Guyard), lived at Mineral Point in September, October, November and December, 1829.

The counsel for the defendant asked the Court to instruct the jury:

"3. That said deed from Guyard to said plaintiff, dated October 13, 1829, does not prevent the defendant from setting up a title to other and different ground from that described in said deed; that if the jury believe that the defendant had, at the time

of the commencement of this suit, actual and peaceable possession of the ground described in said plaintiff's declaration, and that said plaintiff's deed does not cover said ground, then the jury must find for the defendant.

4. That if the jury believe from the evidence, that the ground in dispute is other and different ground from that conveyed in said deed from Guyard to the plaintiff, and said ground in dispute was entered by Guyard's representatives, and the defendant was in possession of the same at the commencement of this suit, then the jury must find for the defendant.

5. That if the jury believe from the evidence, that Guyard conveyed, by his deed of 1829, to the plaintiff, lot No. 3, on Wharf Row, and that the lot described in the plaintiff's declaration is a different lot of ground from lot No. 3, on Wharf Row, then the jury must find for the defendant.

6. That if the jury believe from the evidence, that a part of the lot described in the deed of Guyard to the plaintiff, is covered by the lot described in the plaintiff's declaration, then the jury can find for the plaintiff, that part of the present lot which is identical with the old lot on Wharf Row, and no more."

The Court refused to give these instructions.

The plaintiff then asked the Court to give the five following instructions to the jury:

1. If the jury believe from the evidence, that the right of pre-emption to lot No. 3, under the new survey, was granted by the Commissioners, by virtue of the permit for old lot No. 3, then the action of the Commissioners is final and conclusive as to the right of such pre-emption to new lot No. 3.

2. If the jury believe from the evidence, that the lot granted in the deed from Guyard, in 1829, to plaintiff, was a part, or the whole of old lot No. 3, and that the old lot comprehended a part of the new lot No. 3, and that by virtue of the permit to the old lot, a pre-emption was granted to the legal representatives of Guyard, and an entry made in the Land Office of new lot No. 3, in the name of the legal rep-

resentatives of Guyard, then the legal title of the plaintiff is perfect to the new lot and the deed of 1829 enures to enable the plaintiff to hold the new lot No. 3; and if they further believe that the defendant was in possession of the same, or claimed title or interest therein at the commencement of the action, then the plaintiff is bound to recover.

3. That the difference between the old survey and the new, cannot affect the right of the plaintiff to recover, provided the jury believe that old lot No. 3, comprehended a part of new lot No. 3, and provided further, they believe, that by virtue of the permit to the old lot, a pre-emption was granted to the new lot.

4. That if the jury believe from the testimony, that in the deed of 1829, Guyard claimed to Main street, and by the deed conveyed to Main street, that it is perfectly immaterial whether the permit gave land to Main street, or whether Guyard's claim was good to Main street; still, that an entry at the Land Office in the name of the legal representative of Guyard, would enure to the benefit of Guyard's grantee (the plaintiff), for all granted by the deed covered by the entry."

All the foregoing instructions were given, as asked for by plaintiff.

The jury having found a verdict for the plaintiff, the defendant, by his counsel, moved the Court for a new trial, for the reasons that the Court gave improper instructions, and refused proper instructions to the jury; that the Court permitted improper testimony and excluded legal testimony; and that the verdict was against law and evidence; which motion was overruled. The records did not show that the defendant excepted to the opinion of the Court overruling the said motion for a new trial, and he moved to amend the records to show that fact, on affidavit filed, which motion was overruled.

The following are the errors relied to reverse the judgment in this case.

1. That the Court erred in permitting the plaintiff's counsel to read in evidence to the jury, an extract from a certain paper

book, purporting to be signed by Samuel Hackelton, Register, Galena Land Office.

2. That the Court erred in permitting the plaintiff's counsel to read to the jury two Acts of the Congress of the United States, to-wit: the Act of February 5, 1829 (4 Story's Laws U. S., 2163), and the act of July 2, 1836 (*ibid.* 2463).

3. That the Court erred in permitting the plaintiff's counsel to read in evidence to the jury what purported to be an extract from a record of the proceedings and doings of certain Commissioners, under the said Act of Congress of 1836, and also permitting Daniel Wann's testimony in relation thereto, to go to the jury.

4. That the Court erred in permitting the plaintiff's counsel to read in evidence to the jury, a certain instrument in writing, purporting to be signed by one R. P. Guyard, and the proof and authentication thereof.

5. That the Court erred in permitting the plaintiff's counsel to read in evidence to the jury, certain entries from the record of the Jo Daviess County Court in this suit. when pending in that Court, and also in permitting the transcript of the proceedings in the Jo Daviess County Court in this suit, to go to the jury without being read, though defendant's counsel insisted upon the same being read.

6. The Court erred in refusing to give the third, fourth, fifth and sixth instructions, as asked for by the defendant's counsel.

7. The Court erred in giving the first, second, third and fourth instructions asked for by the plaintiff's counsel.

8. The Court erred in refusing to grant a new trial in this case.

9. The Court erred in refusing to amend the record in this case, as asked for by defendant.

A copy of the original map of the town of Galena, showing the situation of the "Wharf Row" lots, a plat drawn by Capt. Craig, showing the relative positions of the old Wharf lots, and the lots under the new survey of the town of Galena, together with a map of the new survey of the town of

Galena, accompanied the record in this case, and were made part thereof.

The several errors assigned upon this record, and the points arising under them, will be considered in their order.

With regard to the *first*, the Court is of opinion that the objection taken to the certificate of Samuel Hackelton, Register of the Land Office, is too technical to be allowed to prevail. The Act of the General Assembly of this State, of the 10th of January, 1827 (Revised Laws, 1833, p. 280), makes the certificate of any Register or Receiver, of any Land Office of the United States, to any fact, or matter on record in his office, competent evidence to prove the fact so certified in any Court in this State; and although the sale and purchase of this lot, which was the fact sought to be proved by the introduction of the paper book, copied from the records of the Land Office, is not literally certified as a fact, the evidence from which alone the officer derives his knowledge, is certified; which is believed to be a substantial compliance with the spirit and intention of the law. However this may be, the certificate of Mixter, as to the propriety of the admission of which in evidence we do not entertain a doubt, proved the same fact beyond all controversy, and left no room for the remotest supposition that the appellant could have been injured by the testimony, even if it had been erroneously admitted.(*a*)

Second; the Court is of opinion that there was no impropriety whatever, in permitting the Acts of Congress to be read to the jury. It is due to counsel to say that this point has not been seriously urged.

Third; in relation to the book containing the records of the Commissioners appointed by the President, to determine the claims of lots in Galena, arising under the Acts of Congress before recited. It was fully proved by the testimony of Wann, who was one of the said Commissioners, that this was the book which contained the records of their proceedings, in adjudicating upon, and determining the rights of the several claimants. The proceeding was judicial in its character, and unless disapproved by the Commissioner of the General Land Office, conclusive

(*a*) Aldes *v.* Abbot, 23 Ill. R. 61.

evidence of the rights thereby established. This record was the proper and legitimate evidence to confirm the fact which was sought to be proved by its introduction, to-wit: that the "legal representatives" of Guyard were entitled to the right of pre-emption, under the Acts of Congress before mentioned, to the lot in controversy in this suit. Taken in connection with the certificate of Smith, granting to Guyard permission to occupy lot No. 3, in the old survey, for the purposes of this suit, the right to a pre-emption to lot No. 3, of the survey made in 1837, in Guyard's "legal representatives" is beyond controversy.

Fourth; this assignment questions the correctness of the decision of the Court in the admission of the deed from Guyard to Burnett in evidence; 1st. because it was not properly authenticated; 2nd. because of a variance from the declaration; 3rd. because it was not such an instrument as title could enure to plaintiff under.

Whether this deed is, or is not properly authenticated, is to be determined by the construction of a statute of this State, passed January 31, 1827. Rev. Laws, 1833, p. 133, which is as follows:

"Where any grantor, or person executing such deed or writing, and the subscribing witnesses are deceased or cannot be had, the Judge, or officer as aforesaid, may take proof of the handwriting of such deceased party, and subscribing witness or witnesses (if any), and the examination of a competent and credible witness, who shall state on oath or affirmation, that he personally knew the person whose handwriting he is called to prove, and well knew his signature (stating his means of knowledge), and that he believes the name of such person subscribed to such deed or writing as party or witness (as the case may be), was thereto subscribed by such person; and when the handwriting of the grantor, or person executing such deed or writing, and of one subscribing witness (if any there be), shall have been proved as aforesaid, the Judge or officer, shall grant a certificate thereof, stating the proof aforesaid."

The certificate in this case, offered to authenticate this deed in relation to the handwriting of Elliott Kerney, the subscribing witness, is quite informal in its character. It is in the form of an *ex parte* affidavit; it does not state that the witness, Potts, was competent and credible, nor does it show his means of knowledge of Kerney's handwriting, other than what may be inferred from the declaration, that he was well acquainted with him; nor that the justice himself, who took the proof, was satisfied therewith.

The proof of the execution of this instrument falls far short of a literal compliance with the provisions of the statute; and while, for the reasons hereinafter given, the admission of the same in evidence, is not adjudged erroneous, the Court is constrained to disapprove and reprobate this laxity of practice, in taking proof and acknowledgment of deeds, as being directly calculated to jeopardize the rights of parties, and promote and encourage vexatious and expensive litigation. Under statutes of a similar character to this, it has been frequently decided in other States, and indeed under this same statute in this State, that if the prescribed conditions are substantially complied with, this will dispense with a literal, technical compliance with the strict reading of the law. Wiley *v.* Bean, 1 Gilm. 302; Vance *v.* Schuyler, *ib.* 160; Livingstone *v.* Kettele, *ib.* 116; Ayres *v.* McConnell, 2 Scam. 307; McConnell *v.* John, *ib.* 523; Watson *v.* Clendenin, 6 Blackf. 477; Brown *v.* Farran, 1–4 Ohio, 508; 15 Ohio, 423. But while we admit that mere form should be disregarded, and should not vitiate in this respect, we ought also to be cautious that we do not discard substance, leave room for the perpetration of forgeries and frauds, and by judicial legislation, nullify the statute.

In view of these principles, authorities and considerations, it is the unanimous opinion of the Court with reference to the proof of the execution of the deed, so far as relates to the proof of the handwriting of Kerney, the subscribing witness, that the statement, that the witness, called to prove his signature, "was well acquainted with him," the attesting witness, is equivalent to the declaration that he "personally

knew him." Neither is it considered indispensable, that the officer taking the proof should certify that the witness is "competent and credible." He is not required to do this by the statute. It will be presumed that the witness is "competent and credible," until the contrary is shown by testimony. The Court is equally divided in opinion, as to whether the witness' means of knowledge of the handwriting of the attesting witness should be disclosed by the certificate of the proof of the execution of the deed; consequently that point must remain undecided, and the judgment of the Circuit Court in that respect concerning this particular case, must stand.

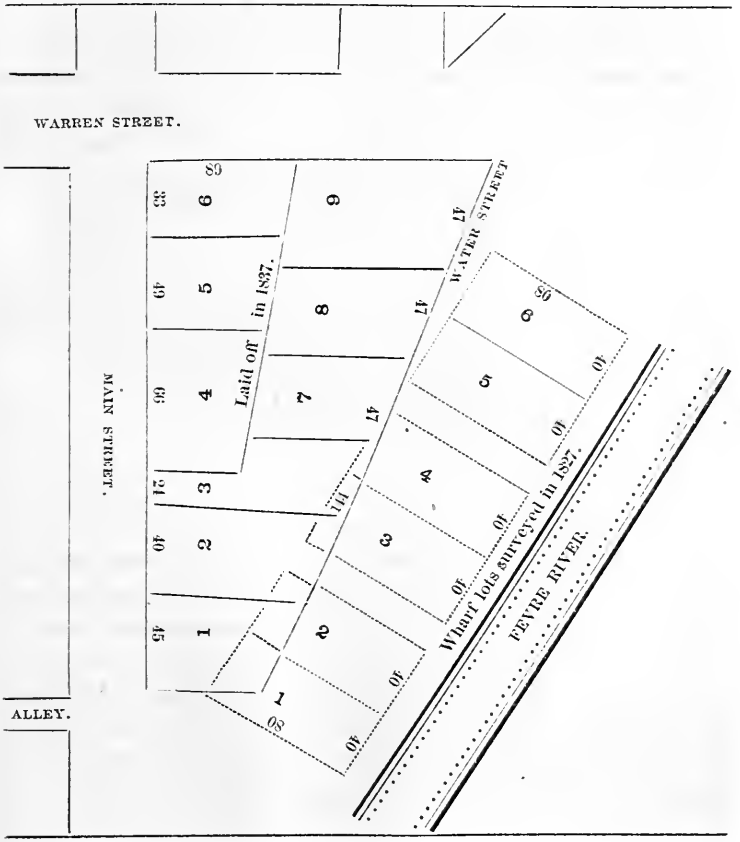
As to the question of variance, and whether title can enure to Guyard's grantee under this conveyance, under the view which the Court has taken of this cause, they become entirely immaterial in this, or any other similar proceeding. That the views of the Court may be fully understood upon this question, a brief recapitulation of the material facts is deemed proper:

On the 12th of March, 1828, Guyard was permitted to occupy lot No. 3, Wharf Row, in Galena. On the 5th of February, 1829, Congress granted to those who had been permitted to occupy, or who had actually occupied lots in said town, and to "their legal representatives," a pre-emption right to the lots so occupied, &c.

Prior to the passage of this Act, in 1827, a survey and plat of the town had been made, whether under authority or not, does not appear; but it is evident that the Act of Congress aforesaid had reference to the occupation of lots as described in this survey and permits granted under it. It will be further evident from the said Act, and an inspection of the annexed plat,* that the land reserved from sale along the river for the purposes of a highway, would include nearly all of original lot No. 3, Wharf Row; in fact, the evidence justifies the conclusion, that lot No. 3, Wharf Row, and lot No. 3 under the survey made in 1837, are only identical

* See next page.

to the extent of 144 square feet. Guyard's deed to Burnett bears date October 13th, 1829. The Act authorizing the President to appoint Commissioners to settle the claims of occupants and those holding permits, was passed in July, 1836. The record does not show at what particular date these claims were adjudicated upon, but the entry of the lot in controversy, in the name of the "legal representatives" of Guyard, was made on the 20th of February, 1838; so that it will be presumed that the action of the Commissioners was but a short time previous to that date. Considering all of the evidence in connection with the determination of the Commissioners, it is proved, that by virtue of his



permit, Guyard at the time of his transfer to Burnett, was entitled to a pre-emption to lot No. 3, Wharf Row, and, that after his death by virtue of the same permit, his "legal reprepresentatives" (by the equitable construction which was put upon the law by the Commissioners), were entitled to a pre-emption to lot No. 3 in the survey of 1837.

It is difficult to define the nature and character of an interest or estate (if it may be so called), which is acquired by these pre-emption rights. Strictly speaking, it is not an estate within any definition known to the Common Law. It is not an interest in the legal title; but only a right of occupancy for the time being, with the privilege of purchasing at some future period at a stipulated price. Yet, in this State, by several judicial determinations, it has always been treated and considered as property which, when not prohibited by Act of Congress, is subject to be transferred, is liable to be taken and sold on execution, and capable of passing to an assignee under a decree of bankruptcy. Turney *v.* Saunders, 4 Scam. 527; French *v.* Carr, 2 Gilm. 664. Without attempting to give a name to this peculiar species of property in or claim to lands, we will content ourselves by saying that there can be no question that it is such a right, or property as may pass by deed or other transfer. In one class of cases embraced in the Act of Congress of 1829, the interest of the occupant might undoubtedly pass by parol, accompanied with delivery of possession. The Act embraced such as occupied merely, as well as those who had been permitted (in writing) to occupy.

According to our understanding of the subject, then, Guyard, by his deed of October, 13th, 1829, conveyed and sold to Burnett all the interest which he had acquired, or which might thereafter be acquired by virtue of his permit to occupy, and the Law of Congress granting to him and his "legal representatives," a pre-emption right to lot No. 3, Wharf Row; and that with regard to the right or interest thus transferred, within the spirit, meaning and intention of the Act of Congress, Burnett became the "legal representative"

of Guyard, and moreover, that the entry and purchase of lot No. 3, of the new survey, being in the name of such "legal representative" and being adjudged by the Commissioners to belong to such "legal representative" under the original right acquired by the permit to Guyard; and it not being manifested by the record, that any other person or persons have entered said lot, claiming to represent the said Guyard, the Court will intend that the entry was made by Burnett as such "legal representative," and that the legal title thereby became vested in him.

The doctrines of enuring and estoppel do not apply in this case. In fact, they could not bear upon the questions presented in the record; *first*, because Guyard has made no covenant which would estop him from setting up a title derived from the United States; and *second*, if Burnett is *quoad hoc* the representative of Guyard, there is nothing which can enure.

We have labored under some embarrassment on account of the Common Law definition, and generally received interpretation of the term, "legal representative." Upon a critical examination of the authorities, however, at Common Law, it will be found that the construction of the term depends somewhat upon the intention manifested by the party using it. In Roper on Legacies, Vol. 1, p. 108, it is said: "The legal construction of the words "personal representatives" or "legal personal representatives" is, the executors or administrators of the person described. This legal construction and appointment only take place, when testators have not manifested any intention in their wills to the contrary; for if it appears from the dispositions in the instrument, whether it be a deed or will, that those words are used in reference to other persons than executors or administrators, that intention will prevail." Upon an examination of the doctrine in relation to this subject, on the succeeding pages of the same work, it will be found that the term "personal representatives," "legal personal representatives," and "legal representatives," may mean executors, administrators or heirs, according to the intention of the party using

them; which is to be gathered from the whole instrument and the attending circumstances.

In Bouvier's Law Dic. p. 357, the term "representative" is defined to be "one who represents or is in the place of another. A representative of a deceased person, sometimes called a "personal representative," or a "legal personal representative," is one who is executor or administrator of the person described."

To the same effect is the doctrine contained in Williams on Ex'rs, Vol. 2, p. 819, *et seq.*

"The construction of the words 'legal representatives,' or 'personal representatives,' has presented another perplexing and fruitful topic of controversy. Each of these terms, in its strict and literal acceptation, evidently means executors or administrators, who are, properly speaking, the 'personal representatives' of their deceased testator or intestate; but as those persons sustain a fiduciary character, it is improbable that the testator should intend to make them beneficial objects of gift. And almost equally so that he should mean them to take the property as part of the general personal estate of their testator or intestate, which is in effect to make him the legatee. Accordingly, in numerous cases, the term 'legal representative,' or 'personal representative,' has been construed as synonymous with next of kin, or rather as descriptive of the person or persons taking the personal estate under the Statutes of Distribution, who may be said, in a loose and popular sense, to represent the deceased." 2 Jarman on Wills, 48.

These authorities are sufficient to establish the position, that the term "legal representative," has not always necessarily the same signification. That there is a question of intention to be considered in its construction, and that this is not to be gathered solely from the instrument itself, but in part from concomitant circumstances, and the existing state of things, and the relative situation of the parties to be affected by it.

Now upon subjects similar to the one involved in this controversy, we believe it will be found that the action of the

General Government has been uniform and consistent in accordance with the principles laid down in this decision; and while we freely admit, that we can find no case precisely parallel in principle to this, with one exception which will hereafter be mentioned, yet the analogies are so strong that we cannot doubt, had this case actually been presented to the highest judicial tribunals of the country, the result would necessarily have been the same as that to which we have arrived. Congress has often granted pre-emption rights to settlers upon the public lands, to occupants of town lots who had made settlements or improvements on the same, while the title to the land remained in the Government. They have also uniformly acknowledged the rights of persons claiming under British, French and Spanish grants, concessions or donations, which had their origin at a period of time anterior to the acquisition of the territory, in which they were situated, to the United States. And the constant and universal practice has been, after recognizing the right to exist in those who had been the beneficiaries of such grant, concession or donation, or their "legal representatives," to appoint commissioners or agents to settle and adjudicate upon the same, and make report of their proceedings in manner required by law.

In some instances, the authorities thus appointed have confirmed the claim to the original claimant and his "legal representatives;" in others, to his "legal representatives;" and again in others, to purchasers by name, claiming through divers mesne conveyances and transfers from the original claimant. And we have not ascertained that in any instance the officers of the Land Office, or Congress, have refused to ratify such acts of the commissioners or agents, upon the ground that a purchaser could not take under the denomination of "legal representative." U. S. Senate Doc. 1835–6, vol. 2; 2 How. 316; 12 Peters, 458. What, then, are we to suppose Congress intended by the term "legal representatives" in the Act of 1829? It has before been shown, that taken in its literal sense, and without reference to intention, it is understood to include only executors and administrators. But the law says, that by the use of these gen-

eral terms, it shall not always be presumed that a testator intended to pass his estate to his personal representatives, and, therefore, it shall mean heirs, as well as executors and administrators.

Well, then, is it to be presumed, that when Congress granted the right of pre-emption to Guyard and to his "legal representatives," that it was intended that the right should be limited to him, his heirs, executors and administrators? What good reason can be assigned why, in a case like this, a purchaser or grantee, as to the thing granted or purchased, may not be the "legal representative" of the grantor or vendee, as well as the heir who succeeds to the same estate or property?

Guyard, at the time of his death, had no estate, interest or property in the right or claim to the lot in controversy. He had parted with the whole in 1829. In 1838, this right, which had been thus sold and transferred by him, and in which he had no interest at his death, it is contended, ripened into a legal title in favor of his heirs or administrators, not because they are the real owners of the property, or can legally succeed to a right or claim which their ancestor or intestate had not at his death, but simply for the reason that the grant is to Guyard's "legal representatives."(*a*)

The case of Montgomery *v.* Landusky, 9 Miss. 714, is a case in point, affirming the principle, that a purchaser or grantee may be the "legal representative" of an original claimant, in cases of this character. In coming to this conclusion, we do not wish it to be understood, that it is the intention of the Court to extend the principle beyond that class of cases to which reference had been made, and to such, only for the reason that it seems to be warranted by the intention of the Acts of Congress, and the constant usage and practice of the Government.

This view of the present case dispenses with the necessity of considering the residue of the errors assigned, and points made under them in this cause. Whether the instructions given or refused, were technically correct, or otherwise; whether the record of the Jo Daviess County Court was

(*a*) Phelps *v.* Smith, 15 Ill. R. 572, and notes.

properly admitted, is not material, if the Court is right in its conclusions, that Burnett, by the entry of the lot in the name of the legal representatives of Guyard, has acquired the fee simple title to the same. But inasmuch as the counsel have desired an opinion upon all the main points in controversy in the Court below, we do not hesitate to say that, in our judgment, a verdict and judgment which has been set aside for the purposes of a new trial, under the statute of this State relating to actions of Ejectment, cannot, in general, be given in evidence upon the second trial of the same cause between the same parties, for any purpose whatever, and that it would be error if admitted under circumstances where the Court could not clearly see, that the verdict could not be affected by it.

The judgment of the Circuit Court is affirmed with costs.*

Judgment affirmed.

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*Since the decision of this case, the attention of the Reporter has been called to a recent decision in Mississippi, with a request to refer to the same in some way. Not having seen that decision, he adopts the following statement of the case and extract furnished him.

The case is entitled "The Grand Gulf Railroad and Banking Company *v.* Bryan," and is reported in 8 Smedes & Marshall, 234. The prominent facts are these: The Act of Congress of the 3rd of March, 1803, gave to certain persons and their "legal representatives," the right of pre-emption in the purchase of public lands within the Mississippi Territory, and Commissioners were appointed to decide upon the validity of claims arising under the Act. By the provisions of the Act, Burnett was entitled to a pre-emption to two hundred and forty acres, which, on the 8th of February, 1804, he conveyed to Matlock. Matlock died in October, 1804, and in December, 1805, his administrator, by the order of the Orphan's Court, sold the land to Harmon. In December, 1806, Harmon conveyed to Wallace; and in January, 1810, Wallace conveyed to Patterson, whose heirs subsequently conveyed to the Railroad and Banking Company. In December, 1806, the claim was con-

firmed by the Commissioners to the the "legal representatives of Gideon Matlock;" and in January, 1807, the land was entered in the same name, and one-fourth of the purchase money paid. In September, 1810, the rest of the purchase money was paid by Patterson. Bryan, the heir at law of Matlock, filed her bill in Chancery, alleging that the entry and first payment were made for her benefit, and claiming a decree for the land in payment of the amount advanced by Patterson, and interest. The Court of Appeals dismissed the bill on the ground, that the entry and first payment were made by Wallace, the grantor of Patterson, and not by the complainant.

It was insisted on the part of the complainant, that the term, "legal representatives," used in the confirmation and entry, necessarily meant the heirs. In answer to this position the Court say: "But we deny that the words 'legal representatives,' as used in the Act of Congress, mean children, or heirs only. In legal parlance, the executor or administrator is most commonly called the legal representative. Still, in regard to things real, the heir is also the legal representative, and so is a devisee, who takes by purchase. Heirs may be the legal representatives, or they may not. Suppose by will, a testator should give his land to one who is not his heir, the devisee would be the legal representative, in regard to the thing devised. The Act of Congress was evidently intended to have a broader signification than that contended for. This is manifest from the fifth section, which required that any claimant should file with the Register every grant, order of survey, deed, conveyance, or other written evidence of his claim. There was no provision in favor of assignees or grantees, by name, yet we find they were required to present their evidence of title; they were necessarily intended to be embraced by the use of the phrase, 'legal representatives.' If the word 'heirs,' only had been used, it would have excluded assignees and grantees. An assignee or grantee is a legal representative of the assignor or grantor, in regard to the thing assigned or granted. If Congress intended that heirs only should be entitled to represent the original settler, it is remarkable that the word 'heirs' was not used. Its meaning is well known; it is the appropriate expression, when those on whom the law casts

the estate, are spoken of. And as Congress used a phrase more comprehensive, we must suppose that other persons besides heirs were intended. General expressions in a law must be construed to have a general application, unless there be a clear indication that they were intended to be used in a restricted sense."

GEORGE W. FERRIS, appellant, *v.* AMOS WARD *et al.*, County Commissioners of Knox county, appellees.

Appeal from Knox.

In proceedings under the Road Law of 1841, for obstructing a road, it is not necessary to produce record evidence of the steps taken preliminary to the location, the statute not requiring that they should be entered of record.

A road is to be considered as established, and in contemplation of law, opened, when the proper Court have approved of the report of the viewers, and sanctioned the location.

When one obstructs a road which is used by the public, for even the shortest period of time, he does it at his peril; for if it should be made to appear that such road was legally established, he would be accountable, whether he had actual knowledge of the fact or not.

A notice by a supervisor required a person to remove two certain rail fences, built by him across a public road (describing it), which were an obstruction, and specified the particular place of the obstruction, by stating the direction of the fences made by him: *Held*, to be sufficient.

In estimating the amount of a verdict to be rendered for obstructing a public road, the jury may count fractions of a day.

A claim for damages occasioned by the location of a public road, is not to be presumed, but must be expressly made, and at the proper time, so that if the State or county thinks the payment of damages too great a sacrifice for the benefits to be obtained by having a road, may abandon the project, or locate it elsewhere. (*a*)

A supervisor is a competent witness in a proceeding against a person for obstructing a public road.

Penalties which accrued under the Road Law of 1841, are not repealed by the Revised Statutes.

A supervisor may institute proceedings to recover the penalties for obstructing roads given by the Road Law of 1841, before justices of the peace. (*b*)

THIS action was originally brought before a justice of the peace of Knox county, to recover the penalty provided by the

(*a*) Laws 1847, p. 111, sec. 3.

(*b*) Laws 1852, p. 176. McDonough *v.* Markham, 19 Ill. R. 149; Leech *v.* Waugh, 24 Ill. R. 228.

Road Law of 1841 for an obstruction. The defendant recovered a judgment for costs before the justice, against the County Commissioners of Knox county, from which an appeal was taken by them to the Circuit Court. At the November term, 1845, the cause was heard before the Hon. Norman H. Purple and a jury, when a verdict and judgment were rendered against the defendant, Ferris, for $90.

The various proceedings in the cause will appear in the Opinion of the Court.

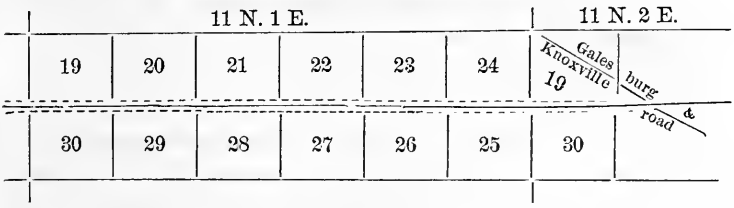
The cause was submitted in this Court upon the written arguments of C. K. Harvey, for the appellant, and J. Manning, for the appellees.

The Opinion of the Court was delivered by

Koerner, J. This action was brought by the appellees as County Commissioners of Knox county, on the 13th day of August, A. D. 1844, against Ferris, the appellant, before a justice of the peace of the said county, by the issuing of a summons to summon the defendant, Ferris, to answer the County Commissioners on the complaint of John L. Clay, supervisor of Road District No. 34, for obstructing a certain public road in said district, by fencing up the same, and permitting the same to remain for a long length of time, to-wit: for the space of 200 days, after having been ordered to remove the same by the said John L. Clay. On the 24th day of August, the defendant, Ferris, having removed the case to another justice of the peace, recovered a judgment for costs against the County Commissioners. On the 4th day of September, A. D. 1844, the County Commissioners appealed to the Circuit Court of Knox county, and filed an appeal bond.

On the first day of the November term of the said Circuit Court, A. D. 1845, the defendant, Ferris, moved the Court to dismiss the suit, which motion was overruled, and the defendant excepted. The defendant then moved to dismiss the appeal, which motion was in like manner overruled and exceptions taken. The plaintiffs then proved to the jury impanneled in the case, that at the June term, 1841, of the

County Commissioners' Court of said county, John L. Clay presented the petition of thirty-five voters of said county, for a road running from the north-west of section 30 in township 11 N. 1 E. easterly on the section line between sections 19 and 30, till it intersected the Knoxville and Galesburg road, at or near sections (blank) of township 11 north, 2 east. The defendant's name was signed to the petition. It was then proved by the record of the County Commissioners' Court, that three viewers were appointed who returned a plat of the said road, as follows:



whereupon the said County Commissioners' Court entered the following order:

"Ordered, that the above road be established in accordance with the foregoing plat, report and field notes, and that the width thereof be fifty feet, and that the clerk refund to John L. Clay the $3.00 deposited." It was then proved, that the said viewers stuck stakes every half mile in said road, three of which were upon the defendant's land; that the road was cut out to within three or four miles of the defendant's farm; that there was a track on or near the line of said road through the defendant's farm, which was smooth prairie, caused by the passing of carriages. Some timber was hauled near the defendant's land, to bridge a slough. The defendant said he had done one day's work on the road, and thought that that and giving the land was enough for him. In March, 1843, the defendant was appointed supervisor of the said road district, and while he was such supervisor, in May, 1843, built a fence across the line of said road, running from section 19 to 30. The supervisor, Clay, who instituted this suit, was offered as a witness, excepted to, but was

admitted, and testified that having been appointed supervisor in March, 1844, he delivered to the defendant in April, 1844, a notice as follows:

"Mr. George W. Ferris, Sir, you are hereby ordered to remove two certain rail fences, built by you across, and which are now obstruction to a certain public road, known as the road from the south-west corner of section 19, in township numbered 11 north of range numbered one east of the fourth principal meridian, thence east on the section line, till it intersects Galesburg and Knoxville road, which said fences are the one erected from the north-east the other from the north-west corner of the north-east quarter of section 30, and running to the one to the south-east quarter of section 19, in said township.

(signed) JOHN L. CLAY, Supervisor
of road district No. 34, in Knox county, Ill."

to the giving in evidence of which, exception was taken. The fences were continued till the time of trial. The defendant then prayed the Court to instruct the jury as in case of non-suit, which was refused, and exception taken. The defendant then proved that he was the owner in fee of the land when the fences were built; that on the 13th of September, 1843, his damages on account of said road running through his land, were assessed at $95.00, which damages the County Commissioners at their next term refused to pay. The above is all the evidence. The Court instructed the jury, "that if they find that the defendant obstructed the road, and continued it after notice to remove it, and that it was opened through his land by his consent, or without objection prior to the time of his procuring the damages to be assessed they will find for plaintiff, the verdict not exceeding one hundred dollars.

The jury returned a verdict of $90.00. A motion for a new trial, for the reasons that the verdict was against the evidence, against law, and improper instructions were given, was overruled and exception taken, and judgment.

The errors assigned, are: 1st, in overruling the motion to dismiss the suit; 2nd, the motion to dismiss the appeal; 3rd,

in admitting in evidence the road plat; 4th, in admitting in evidence the defendant's statement about giving land; 5th, in permitting Clay to testify; 6th, in admitting in evidence the notice; 7th, refusing to instruct the jury to find as in case of nonsuit; 8th, in overruling the motion for a new trial; 9th, in giving judgment for the plaintiff, for $90.00 and costs.

It will be perceived that the errors assigned upon this record are quite numerous. It becomes necessary to examine them all, though they will not be taken up in the order in which they are assigned.

The errors assigned respecting the decisions of the Court in admitting the road plat in evidence, as also the defendant's statement concerning the road in question and his agency therewith, and in the admission of the order of supervisor for a removal of the alleged obstruction, and in overruling the motion to instruct as in case of non-suit, as also the motion for a new trial, may be all considered under one head.

The plaintiffs proved that the road had been properly petitioned for, that the County Commissioners' Court had acted upon this petition, had appointed viewers to view and locate the same; that they had done so, and marked the location by setting stakes, &c., &c. They further prove that the viewers made a return of their doings to said Court, and filed a plat of the road located by them together with the field notes, which plat shows that the said viewers located said road in accordance with the prayer of the petitioners. Upon this report being made, the Court ordered that the above road be established in accordance with said plat, report and field notes, and that the width thereof be fifty feet.

It is contended that this evidence was not sufficient to show that said road was really opened, as it does not appear that the County Commissioners' Court ordered the supervisor of the proper road district to do so, and also because the plat returned is not sufficiently explicit and certain. The twelfth section of the Road Law of 1841, page 236, under which law the proceedings in this case were commenced, simply provides that the County Commis-

sioners, upon a road being located (established), shall immediately cause the supervisor of each district through which such road shall pass, to be notified of such location. The ninth section provides, that the clerk, in such a case, shall furnish the supervisor with a list of the petitioners, with a view to make those of the petitioners who reside out of said district perform, nevertheless, road labor on said road. It does not seem necessary that any record evidence of these steps should be preserved. The road is established, and, in contemplation of the law, opened, when the Court have approved of the report, and have sanctioned the location. If, in pursuance of such an order, the road has been actually opened by the supervisor, has been worked upon, and used for a considerable time, as the proof shows in the present case, it would be very singular indeed, if its legality could be contested on the ground, that there was no record evidence to show that the Court actually notified the supervisor of its having been established. It might as well be urged that such road was illegal, because the clerk did not send a list of the petitioners to the supervisor.

The road plat is, in our estimation, sufficiently certain, and if it was not, it certainly could be made certain by the field notes which accompanied it. It shows clearly that a portion of the road run on the sectional line between sections nineteen and thirty, and it was on that portion that the obstruction was alleged to have been made. Indeed, we cannot discover any ground at all for the whole of this objection, particularly when we reflect that the defendant for a while acted as supervisor on said road, worked on it, and according to his own statements, had given his own land for the purposes of establishing said road, after having petitioned for it.

The evidence of the defendant's statements just mentioned, as also that he had worked on it, and that he had sought to obtain permission from the supervisor who then acted, to raise the very obstruction, for which he is sued now, was perhaps superfluous, as it only tended to show his actual knowledge of the opening, &c., &c. It was not strictly

necessary that such actual knowledge should be brought home to him. When one obstructs a road which is used by the public, for ever so short a time, he does it at his peril; for if it should turn out, that such road was legally established, he would be accountable, whether he actually knew that fact or not. The admission of this evidence under the circumstances of this case when it was clearly shown, as we think it was, that the road was legally established and opened, could not have been prejudicial to the defendant. But we need hardly have considered this branch of the objection to the evidence, since the record does not show that the defendant objected to its introduction.

The order or notice to remove the obstruction, given to the defendant by the supervisor, is objected to on account of its alleged uncertainty. The language of the Road Law of 1841, respecting obstructions is as follows: if any person shall obstruct any public road by falling a tree or trees across the same, by encroaching upon or fencing up the same, &c., &c., he shall forfeit, &c., after he shall have been ordered to remove the same, by any supervisor, &c., &c."

Now, although this is a proceeding penal in its nature, entitling the defendant to have his liability established beyond a reasonable doubt, yet it appears to us very plain, that in this case the officer had strictly and amply complied with the pre-requisites of the law.(a) In reason, nothing more can be required, than that the obstructing party should be made to understand by the order, what place he is charged with having obstructed, so that he might be enabled to examine into the matter, and to ascertain his real rights respecting it.

The order in question informs the defendant, in the first place, specifically of the nature of the alleged obstruction. It gives a description of the road in conformity with the survey thereof. It points out the precise place of the obstruction itself, by stating the direction of the strings of fences, made by the defendant, and which cause the obstruction. We really deem this order to be as specific and full, as could be desired. It is said, that the width of the road is not specified in the order, nor that it does appear from it, how far

(a) But see Lewiston v. Proctor, 27 Ill. R. 419, 420; Toledo &c. R. R. Co. v. Foster, 43 Ill. R. 481.

defendant was to remove his fence, all of which it is contended, was necessary to have been stated in the order. Authorities are cited in support of this point. (19 Johns. 359; 22 Wend. 135; 2 Hill, 473). Without stopping to inquire, whether these authorities go as far as it is insisted, and whether if they did, it would be safe to follow them in our State, under the circumces peculiar to a newly settled country, it is enough to say, that in this case the defendant was informed (and that actually was the case), that he built his fences across the whole of the road. No matter, then how wide the road was, he was certainly obstructing it, and the question how far he had encroached upon the public highway did not arise, since he had shut it up totally.(*a*)

It is objected to the finding of the jury that no possible state of facts could have sustained it, as the amount proved was $90.00. Without following up the calculations of counsel by which he shows that the verdict must have been either $88.00 or $91.00, we will merely remark that the jury was justified in a case like this, to count fractions of a day, which of course cannot be but favorable for the persons accused, and upon this hypothesis the verdict can be easily explained.

An objection is also taken in the argument, that there was no proof in what Road District the obstruction was erected, but this we hold to be wholly untenable, as also another one, that the plat returned by the road viewers, was signed by only two of them. This latter objection has no foundation in the record, which simply states that the said viewers returned a plat of said road as follows, &c., &c. From this statement, we have certainly no right to infer that it was signed or returned by two only.(*b*)

The ground assumed by the counsel for the defendant below, that this road could not be considered as legally established because the County Commissioners had failed to pay the defendant his damages as assessed according to law, which he claimed to have sustained by reason of the opening of this road over his land, cannot be maintained. It is very true that he was not bound to permit the road to run

(*a*) Neeley v. Brown, 1 Gil. R. 14.
(*b*) Lonk v. Wood, 15 Ill. R. 262, and notes.

over his land, before he was paid for his damages, if any, he had sustained; but surely, after the road was opened in 1841, and after he had worked on it, and supervised it, and had given the land for it as he himself stated, he had no right to claim damages in September, 1843. A claim for damages is not to be presumed, but must be expressly made, and at the proper time, so that if the State or county thinks the payment of damages too great a sacrifice for the benefits to be obtained by having a road, may abandon the project or locate it somewhere else.(*a*)

Having disposed of these numerous objections arising under the first class of the errors assigned, we shall proceed to notice in as brief as possible a manner, those which are said to have been committed by the Court in admitting the testimony of Clay, he being, as it is alleged, incompetent, and in overruling the motions both to dismiss the case and the appeal. Clay, the supervisor, was neither the plaintiff on the record, nor the substantial plaintiff. The suit is in the name of the County Commissioners, and not in their name for his use. We cannot see that any rule of law was violated in permitting him to testify. As no part of the penalty either directly or indirectly goes to him, he was not an interested witness; not as much so as an informer is, who is commonly entitled to a portion of the recovery, and yet it is well settled that this class of persons are competent witnesses.

It remains now to consider the errors which are assigned, as arising under the decisions of the Court, in overruling the motions to dismiss the case, and to dismiss the appeal. No reasons being assigned for the latter motion, we presume that it was urged the same ground that was assigned for the motion to dismiss the cause, and we therefore proceed to an examination of the points presented by the decisions of the Court on the last mentioned motion. The counsel for the defendant below, insists first, that the law of 1841, under which these proceedings were instituted, was repealed before the cause was tried in the Circuit Court. It is necessary to examine the different laws passed by the legislature of

(*a*) Curry v. Mt. Sterling, 15 Ill. R. 323; Taylor v. Marcy, 25 Ill. R. 518; Commissioners v. Durham, 43 Ill. R. 90.

1844–5, which bear upon this point. Such an examination, it must be confessed, appears at first but little satisfactory, and it requires much patience and labor to extricate one's self from this labyrinth of legislation.

The Revised Statutes of 1845, under the Chapter of "Revised Statutes," pages 468, 470, repeal the road law of 1841, not only once, but twice. By the 37th section of the same chapter, it is provided that the Revised Statutes, shall take effect, 10th September, 1845, and that all Acts and parts of Acts, consolidated or included in the Revised Statutes, or therein repealed, shall be in force until said day, &c.

By virtue, then, of this section, the Road law of 1841, though intended to be hereafter repealed, remained in force until 10th of September, 1845.

The 40th section of the same chapter provides as follows: "No suit or prosecution pending at the time of such repeal, for any offence committed, or for the recovery of any penalty or forfeiture incurred under any of the Acts of this chapter repealed, shall be affected by such repeal." This 40th section, by a proviso in the 37th section of said chapter, went into force at the close of the session, March 6th, 1845.

So far the matter is plain enough. The penalties, &c., incurred under the old road law were saved, before it was repealed by virtue of the Revised Statutes. But the legislature passed at the same session various other laws, not incorporated in the Revised Statutes, and amongst others, an Act amendatory of the Act of 1841, concerning roads. (Rev. Stat. Appendix, 1845, p. 592.) And the Revised Statutes provide (22 section, same chapter), that when the provisions of any law passed at the present session (1844–5), and published with the chapters composing the Revised Statutes, without being incorporated in the same, shall contravene or be inconsistent with the provisions of such chapter, the provisions of such law shall prevail.

The 8th section of this session law, which was to be in force 1st June, 1845, purporting to amend the road law of 1841, if literally understood, repeals the law of 1841, and in fact would seem to repeal itself. Giving it this literal con-

struction, it might be contended that the law of 1841, stood thereby repealed, and as the saving clause speaks of laws only repealed in the revised laws, it could not apply to laws which are repealed independent of the Revised Statutes. This would be too narrow and technical a construction. The saving clause means to affect all laws, which were to be repealed on the 10th of September, 1845. It went into force in March, and why should it not also affect the session law, which went into effect in June, if the latter is really a repeal of the road law of 1841, which road law was also intended to be repealed by the Revised Statutes. If the session law repeal the road law, then it contravenes the Revised Statutes, only in so far that it fixes the time of repeal at the 1st of June, instead of the 10th of September, 1845. But it does not contravene in terms, or by any reasonable construction, the saving clause, which intends to operate upon certain laws, described in it as laws repealed by the Revised Statutes, clearly embracing thereby the road law of 1841. It certainly meant to save the penalties under the road law of 1841, about to be repealed by virtue of the Revised Statutes, and the fact that the same law was also repealed, as it is alleged, by another not contained in said statutes, cannot, in reason, defeat this object.

We now turn our attention to the last point made under this assignment of error, which is, that the justice of the peace had no jurisdiction in this case, and the supervisor no authority to institute the suit in the manner adopted by him. The want of jurisdiction and authority is attempted to be shown by a long train of reasoning, which is not without plausibility. It may be briefly summed up thus: By the 31st section of the law of 1841, supervisors are authorized to bring suits before justices of the peace, for all fines and forfeitures imposed by this Act, which are intended to come into the hands of such supervisor for road purposes, and to collect, disburse and account for the same, suing in the name of the County Commissioners. But the fine imposed under the 8th section of the Act, for obstructing a road, is one which the law does not direct how it should be collected, and consequently it flows into the county treasury, like fines, for instance, which are collected under indictments preferred under

this Act. As the supervisor has not the collection of the fine in question, it follows that he cannot sue for it.

Such a construction, it is apparent, would defeat the object of the legislature. It is not perceived, how a person obstructing a road, could ever be made to answer in a fine, if the supervisor could not sue him in the manner pointed out by the 31st section. The law is perfectly silent as to any other mode of proceeding, except in cases where it provides for indictments, which is not the case where it speaks of obstructions. The 20th section of the law provides, that all fines and forfeitures incurred under the provisions of this Act, shall be applied to the improvement of roads within the bounds of such road district, wherein such fines and penalties may have been incurred. Now, it certainly requires no forced construction to say, that in the present case, the fine collected by the Supervisor would, or at any rate, might properly come into his hands to be disbursed, as the fine has been incurred in his district. If it may legally come into his hands to be disbursed, it follows that he may sue for it. This construction upholds the law, is by no means a strained one, and is such a one as Courts have always found it their duty to adopt, in order to give meaning and effect to the will of the legislative power. Taking this view of this branch of the case, we are of opinion, that the justice had jurisdiction, and that the supervisor proceeded properly in suing before a justice, in the name of the County Commissioners, for the recovery of the fine for obstructing a public highway.

Having examined all the points which we believe have been made by counsel for appellant, we have not been able to find any error in the decisions of the Court below, and we therefore affirm the judgment with costs.

Judgment affirmed.

THOMAS MANCHESTER, *et al.*, plaintiffs in error, *v.* WILLIAM MCKEE, executor of Jesse McKee, deceased, defendant in error.

Error to Pike.

It was alleged in a creditor's bill to subject certain lands to execution, that two judgments had been recovered by the complainant against the debtor, that executions had been issued thereon, and that they had been returned unsatisfied, except for a small amount of each. The bill further alleged fraudulent transfers of the lands, for the purpose of hindering and delaying creditors, &c.: *Held*, that the allegations of the bill entitled the complainant to file it.

A party against whom a bill has been taken for confessed, cannot complain and assign for error that the proof does not sustain the allegations of the bill.

Under the provisions of the 19th section of the Chancery Act, when a bill is taken for confessed, it is left to the discretion of the Court, whether any proof shall be required in support of the bill; or what parts of the bill shall be supported by proof, and, of necessity, what shall be the amount, nature and character of the proof to be produced.

One cannot allege as error that which is for his own benefit.

Where it appeared that a creditor had not caused an execution to be issued on his judgment, and had made no effort to collect it, and the Court, on a creditor's bill being filed, decreed the payment of such judgment, it was *held* to be erroneous.

Where a judgment in attachment has been rendered against a defendant who has not been brought into Court so as to make it a judgment *in personam*, such judgment is not evidence of a debt.

BILL IN CHANCERY, &c., in the Pike Circuit Court, filed by the defendant in error against the plaintiffs in error, and heard before the Hon. Samuel D. Lockwood, at the September term, 1844.

The decree rendered in this case, and the allegations of the bill, &c., are stated in the Opinion of the Court.

M. MCCONNEL, for the plaintiffs in error.

D. A. SMITH, for the defendant in error.

The Opinion of the Court was delivered by

CATON, J. The bill states that the complainant, on the 9th of February, 1839, received from three of the defendants, J. &

G. A. Manchester and Dewell, three promissory notes, bearing date of that day, and executed by them for a good consideration, amounting in the aggregate to the sum of $2876.92. The one which fell due last, was for the sum of $980.21, which was payable one year from date. That on the 2nd December, 1839, he obtained a judgment against John Manchester, impleaded, &c., on another of said notes before the Probate Court of Pike county, for the sum of $920.09. That at the April term, 1840, of the Pike Circuit Court, he obtained a like judgment on the other of said notes, for $994.90. That executions have been issued on said judgments, but returned unsatisfied, except as to $49.50, made on the first judgment, and $160.01 made on the second judgment. That he is in danger of losing the balance of said indebtedness by the fraud and insolvency of the makers of the notes, and of the defendant, Thomas Manchester.

That on the 11th of October, 1839, the defendant, Delahay, mortgaged to John Manchester certain real estate, which is described, to secure the payment of $2700, payable in one year. That on the 13th of November, 1839, John Manchester conveyed to Thomas Manchester, certain other real estate described, fraudulently and with the intent to defraud the complainant and other creditors. With the view of showing that this transfer was fraudulent, the bill sets forth a variety of circumstances, which it is unnecessary to notice here. That on the same day, John assigned to Thomas the said mortgage with the like fraudulent intent. To foreclose this mortgage, Thomas Manchester filed his bill in the Pike Circuit Court, on the 2nd of March, 1841, and a decree of foreclosure was entered at the September term, 1841, under which the mortgaged premises were sold on the 18th December, 1841, to the said Thomas Manchester, for $2730.25.

There is another proceeding set out in the bill, which, as it cuts no important figure in the case, it is unnecessary to mention.

The bill then avers, that "by a mortgage junior to the aforesaid mortgage," Vansyckle for himself, McConnell &

McDougall, "or otherwise, is in possession of said mortgaged premises, claiming an interest therein," and is exercising a ferry privilege, &c., and that Matthews "is in possession of some other parts of said real estate, claiming some sort of interest in the same."

In the prayer of the bill, the complainant asks for an equitable writ of attachment, to be levied upon the said real estate as the property of John Manchester, to be applied under the decree of the Court to the payment of the note first above mentioned. The prayer also asks that the said conveyances of real estate, and assignment of the mortgage from John to Thomas Manchester, may be set aside as fraudulent, and that the said real estate may be sold by the order of the Court, "in satisfaction of what may be due your orator in the premises," and for general relief.

John, Thomas, and George Manchester, and Dewell, being non-residents, were brought in by publication, and the other defendants were served with summons. On the first day of June, 1843, an order was made allowing the complainants to take the deposition of the defendant, Delahay, subject to exceptions for interest, and on the same day, also, the bill was taken for confessed as to George Manchester, Dewell and Delahay.

On the eighth of June, 1843, Thomas Manchester filed his answer, and on the twelfth of the same month, John Manchester filed his answer, both denying the alleged fraud, and insisting that the sales and assignment were *bona fide*, and for a good consideration. And on the twenty-third of the same month Vansyckle, McConnell and McDougall filed their demurrer to the bill.

On the ninth of September, in the same year, a replication was filed, and on the same day, by leave of the Court, the complainant filed an amendment to his bill as the record states, showing that, at that term of the Court, the complainant had obtained a judgment at law, on the first described note for the sum of $1190.91, and costs.

On the sixth of September, 1843, the demurrer was submitted to the Court, and was taken under advisement, till the fourth of

September, 1844, when it was overruled, and for want of answer, the bill and amended bill were taken as confessed against Vansykle, McConnell, McDougall and Matthews. On the same day, the cause was finally heard and a decree upon the merits entered.

The decree determines:

First, That the complainants obtained judgment at law on the said three promissory notes, as alleged in the bill and amended bill;

Second, that the said assignment and transfers were made in fraud of the said complainant;

Third, that the Master make sale of said premises, and convey the same to the purchaser by deed, conveying all the right, &c., of the defendants to said premises, subject only to such right of redemption as the judgment creditors of John Manchester may have to the same; and that said Master pay over the proceeds of said sale to the complainant, the balance due on such judgments and interest;

Fourth, it is ordered that upon making sale of any of said premises, all persons in possession thereof by virtue of any assignment from any of the defendants since the filing of the bill, give the possession to such purchaser, and especially to the Naples Ferry appertaining to a portion of said land; and

Fifth, costs are adjudged against John and Thomas Manchester, and cause continued for report.

On the nineteenth of April, 1845, the Master reports that on the fourteenth of September, 1844, after notice, &c., in pursuance of the decree, he offered four of said tracts separately, the first containing forty acres, the second containing five acres, the third containing one hundred and fifty-five acres, and the fourth containing fifty-eight acres, the said land being appurtenant to the Naples Ferry, and there were no bidders, when he offered them together, and the complainant became the purchaser at $1400.00. At the same time, he offered for sale four tracts which were bid off by the complainant at prices from seventy-five cents to three dollars and seventy-five cents per acre; and two tracts of forty acres, and one tract of eighty acres, which were struck off

to the complainant for ten cents each; for all of which he had given a deed to the complainant, subject to the right of redemption as specified in said decree. The commissioner further reports, that there had been no offer to redeem any part of said premises under said decree, which report was approved by the Court.

I shall first inquire, whether the demurrer of Vansyckle, McConnell and McDougall was properly overruled. These defendants, so far as is shown by the bill, were merely nominal parties, who might or might not have any interest, which might be affected by the decree. They were made parties to give them an opportunity to come in and show their interest, if they had any, to specify its nature and extent in their answers, and to defend and protect it. The bill does not show that they had any, nor does it appear that the complainant knew of any interest existing in them. The averment of the bill is, that one of them was in possession of a portion of the premises sought to be subjected to the payment of complainant's debt, for himself and the other two, by a junior mortgage or otherwise. This showed such a claim of interest, as the complainant had a right to protect himself against, by making them parties, and concluding them by the decree, unless they could show that they ought not to be thus concluded. Such is the usual and proper course in all Chancery proceedings. The averment, then, so far as these defendants were concerned, was right and proper, and if the bill was, in other respects, such as entitled the complainant to relief, the demurrer was properly overruled.

This is a creditor's bill, whereby the complainant seeks to subject certain lands, which he could not reach by an execution, to the payment of two judgments, one obtained in the Probate Court, and one in the Circuit Court of Pike County. The bill shows the recovery of the judgments against John Manchester, that executions had been issued upon those judgments, which had been returned unsatisfied, excepting as to a small amount of each. This is sufficient to entitle the party to file his bill. Beck *v.* Burdett, 1 Paige, 305; Rev. Stat. § 35, ch. XXI, title, *Chancery*. It shows *prima facie* that he had exhausted his legal remedy.

It is as much as is required, in the first instance, of a second indorser of a note under our statute to show, to enable him to recover of the first indorser; and in this case as in that, the defendant might probably resist the application successfully, by showing that the complainant actually knew of other property, out of which he might have made his debt by execution. This far, then, the bill is sufficient. It further shows, that for the purpose of hindering and delaying the complainant in the collection of his debts, and for the purpose of defrauding other creditors, the judgment debtor had transferred a considerable amount of real and personal property to the defendant, Thomas Manchester, and had, with the like intent, assigned to him a mortgage upon other lands, which the assignee had foreclosed, and purchased in the lands in his own name, and prays that all these lands may be subjected to the satisfaction of what may be due to the complainant in the premises. According to the well established rules of Equity law, this shows such a case as entitles the complainant to relief. The extent of that relief may be hereafter considered, but this is sufficient to show that the bill was not obnoxious to a demurrer.

I may here remark upon a novel proceeding attempted to be introduced by this bill, and that is, that for the purpose of securing and obtaining satisfaction of one of the notes mentioned in the bill (but upon which no judgment had been obtained at law), the party prays for an *equitable attachment* to be levied upon the premises upon which the mortgage had been foreclosed, and which had been purchased in by Thomas Manchester, the alleged fraudulent assignee of the mortgage. But, for this proceeding, I can find no authority in the former practice of the Courts of Equity, or in the provisions of our statute. For the purpose of obtaining a satisfaction of this note the amended bill was filed, averring that since the filing of the bill in this cause the complainant had obtained a judgment upon that note also. This branch of the case will be again referred to.

It may be well now to examine and see what position the

several plaintiffs in this writ of error occupy in relation to this decree, as exhibited by this record. In the first place, the bill was taken for confessed, as to all of them except John Manchester and Thomas Manchester. Vansyckle, McConnell, and McDougall appeared and demurred to the bill, That demurrer, as we have seen, was properly overruled. They then refused, or at any rate failed to file an answer, and then the bill was regularly taken *pro confesso*, as we are to presume, acccording to the rules of practice and usage of that Court, against them, as also against the other defendants, G. A. Manchester, Matthews, Dewell and Delahay, who never appeared before that Court at all. I am of opinion, that a party against whom a bill is taken for confessed cannot complain and assign for error, that the proof does not sustain the allegations of the bill. The nineteenth section of our Chancery Act, provides that, "where a bill is taken for confessed, the Court before a final decree is made, if deemed requisite, may order the complainant to produce documents and witnesses to prove the allegations of his bill, or may examine the complainant on oath or affirmation, touching the facts therein alleged; such decree shall be made in either case as the Court shall consider equitable and proper." By this law, when a bill is taken for confessed, it is left to the discretion of the Court, whether any proof shall be required in support of the bill or not, or what parts of the bill shall be supported by proof, and of necessity, what shall be the amount, nature and character of proof to be produced. With such a discretion vested in the Conrt, it would seem absurd to say, that the Court acted upon insufficient proof. If it would not be error to make a decree without any proof, it is not easy to comprehend where the error is, in rendering a decree upon insufficient proof. Where a bill is taken for confessed from the silence of the party, he is as much estopped in that particular case, from denying its truth—except in particular instances where he may come in under the statute and open it—as if he had appeared in open Court and filed an answer, confessing the truth of the bill throughout.(*a*) Here, a part of these defendants did, in fact, confess

(*a*) Gault *v.* Hoagland, 25 Ill. R. 268; Stephens *v.* Bicknill, 27 Ill. R. 447; Sullivan *v.* Sullivan, 43 Ill. R. 318; Cronor *v.* Frizell, 43 Ill. R. 319.

the truth of this bill by their demurrer, and insisted that the facts, thus confessed, did not entitle the complainant to any relief, and when that was ruled against them, they chose to abide by that confession rather than withdraw it, and file an answer putting in issue the allegations of the bill. After this, they cannot complain that that is not proved which they have admitted to be true.

As to Thomas Manchester, it appears from the record here, that he has released to the complainant all errors in this cause, by not replying to the complainant's plea avering that fact, so that he has ceased to complain, and he is the only party in fact, whose interest could have been affected essentially by this decree, so far as it appears from this record. A similar plea is interposed as to Mitchell, to which also there is no replication.

And now how stands it with John Manchester? He, it seems to me, is the last person of all others who has any right to complain of this decree, in which, if there is any error, it most manifestly is in his favor, and directly to his advantage; for by it a considerable amount of judgments against him is paid out of the property of another, which, according to his own answer he has sold and received his pay for; and it seems to me that his conscience need not be too sensitive on the subject, since he has promptly come forward, and done all he could to prevent such a result by his answer. If, in this decree, error has been committed, it is in his favor, although against his will, he cannot complain. Schlencker *v.* Risley, 3 Scam. 486. Although, as we have seen, none of the parties who are complaining, have any right to complain that the allegations of this bill are not sustained by the proof, yet we do not hesitate to say, that those allegations are made out in their most material particulars by the evidence, especially so far as they have been put in issue by the answers; but from the view which we take of this cause, it is not necessary to encumber the Opinion of the Court with a particular review of it.

It now remains to be considered, whether the decree which was rendered, was such as the allegations of the bill and

amended bill authorize; for although the defendants below, who allowed the bill to be taken *pro confesso*, cannot now deny its truth, yet they have a right to insist that no decree shall be made which may affect their interest, beyond what their admissions will warrant. The complainant has made them parties to bar their interests, and he must see to it, that he confines himself to the rights which he has claimed to have.

What has been already said on the subject of the demurrer, shows that the complainant was entitled, by the allegations of the bill, to the relief sought, to the extent of the payment of the two first judgments out of the property fraudulently conveyed. But as it was insisted that the prayer only sought the payment of the note described in the bill, and not of the two judgments, it becomes necessary to examine the prayer with the view to ascertain if that be so.

The prayer of the bill commences with asking for an equitable attachment to be levied upon said real estate, as the property of John Manchester, to be applied under the decree of the Court to the payment of the first note. It is supposed by the counsel for the defendant in error, that it is upon this portion of the prayer, that the Court decided the payment of the two judgments; and if so, it was certainly unauthorized; for by this the party only seeks satisfaction of the note under that attachment proceeding, which, as we have seen, was unauthorized, and hence the prayer must be considered as if that portion were stricken out. After that, the prayer asks that the said real estate may be sold by the order of the Court, in satisfaction of what may be due your orator in the premises. This was manifestly asking that all that was due to him on account of the several demands previously stated in the bill, and was manifestly sufficient. But if any doubt could be entertained on the subject, the general prayer is sufficient to authorize the granting of any relief which the statement of the bill would warrant.

It now remains to be examined, whether the Court was warranted in decreeing the payment of the judgment which was rendered in the attachment suit, which was obtained after the filing of the bill in Chancery, and which is brought to the notice of the

Court by the amended bill. There are two objections, which, to my mind, are conclusive against that portion of the decree which directs the payment of this judgment. The first objection is, that no execution was ever issued upon this judgment, and consequently, no effort made to collect it at law. This is indispensable, according to the case of Beck *v.* Burdett before referred to, and this is supported by all the cases which I have examined.(*a*) If it should be said, with a view to obviate this difficulty, that the property levied upon was not liable to an execution, and that, consequently, it would have been futile to have issued one upon which nothing could possibly have been made; that but shows that the attachment was levied upon property not liable to the attachment, and that being a proceeding *in rem*, for want of anything upon which it could legally act, the Court should not have entertained the case, but dismissed it, which it would have done, had the plaintiff informed the Court that the property levied upon was not subject to attachment. But there is another objection, which it seems to me is equally fatal, and that is, that a judgment in an attachment suit where the defendant has not been brought into Court so as to make it a personal judgment, is not evidence of the debt upon another suit brought upon that record.(*b*) The decree, then, will have to be modified, so as to allow the complainant only to seek a satisfaction, out of the said real estate, of the two judgments stated in the original bill, and that portion of it which directs the satisfaction of the judgment in the attachment suit will have to be reversed. As the sale was ordered and made upon an erroneous decree, which is partially reversed, the sale has to be set aside of course, and a re-sale ordered; and hence it becomes unnecessary to look into the regularity of that sale, which otherwise would present a very serious question.

The decree of the Circuit Court is reversed, and the cause remanded with directions to the Circuit Court, to render a decree, and to proceed consistently with the principles of this Opinion; and that each party pay one half of the costs of this writ of error.

Decree reversed.

(*a*) Hencock *v.* Durand, 42 Ill. R. 230; Steele *v.* Hoagland, 39 Ill. R. 264.

(*b*) Branigan *v.* Rose, 3 Gil. R. 128.

ORRIN SHERMAN *et al.*, plaintiffs in error, *v.* HENRY GASSETT *et al.*, defendants in error.

Error to Cook Co. Court.

To a *scire facias* to foreclose a mortgage, the defendants pleaded the usury laws of Massachusetts, alleging in substance, their indebtedness to plaintiffs; that in order to obtain forbearance thereon, they executed certain notes therefor, payable in Boston at intervals, with ten per cent. interest semi-annually, which notes were intended to be secured by the mortgage sued on; and that, though the notes appear on their face to have been executed in Chicago, they were in fact executed in Boston. The mortgage was acknowledged and recorded in Cook county, on the day of its date: *Held*, that the forfeiture provided for in the usury laws of Massachusetts being a part of the law of remedy, could not be enforced by the Courts of this State.

It is a well settled rule, that the Courts of one country will not enforce either the criminal or penal laws of another; nor will they carry out or be guided by the laws of another, regulating the forms of actions, or the remedies provided for civil injuries. But it is equally well settled, that in the construction of contracts, and in ascertaining whether they are valid, the law of the country where the contract was made, or to be performed, shall, in general, govern.

The *lex loci* only governs in ascertaining whether a contract is valid and what the words of the contract mean. When the question is settled, that the contract of the parties is legal, and what is the true interpretation of the language employed by the parties in framing it, the *lex loci* ceases its functions, and the *lex fori* steps in and determines the time, the mode and the extent of the remedy.

To a *scire facias* to foreclose a mortgage, a plea commencing as a plea of part payment, and concluding by praying judgment, was interposed, to which there was a general demurrer which was sustained: *Held*, that payment in part, or in whole, might properly be pleaded, and that in this case, if the plea had been specially demurred to, it should have been held bad.

SCIRE FACIAS, to foreclose a mortgage, issued from the Cook County Court, at the instance of the defendants in error, against the plaintiffs in error. The cause was heard before the Hon. Hugh T. Dickey, on demurrer to pleas. The demurrers were sustained, and the defendants brought their writ of error to reverse the decision of the Court.

The substance of the pleas are stated in the Opinion of this Court.

A. T. Bledsoe, argued orally for the plaintiffs in error. Written arguments were submitted by J. Y. Scammon and N. B. Judd, upon the same side, and by A. Cowles and W. H. Brown, for the defendants in error, both of which were mislaid and were not received by the Reporter.

L. Trumbull, argued orally for the defendants in error.

1. The pleas of usury are defective in not averring that the law of Massachusetts, set out in said plea, was in force at the time of the execution of said mortgage, and of filing said pleas.

None of said pleas, or the plea of payment profess to answer the whole cause of action, and the plaintiffs were at liberty to treat all of said pleas as nullities, and take judgment as by *nil dicit*, or they might demur. Gould's Pl. 363; Fitzgerald *v.* Hart, 4 Mass. 429; 11 Pick. 75; Sterling *v.* Sherwood, 20 Johns. 206; Hickok *v.* Coates, 2 Wend. 421; Slocum *v.* Despard, 8 do. 617; Phelps *v.* Sowles, 19 do. 547; Mee *v.* Tomlinson, 31 Eng. Com. Law R. 66.

The Judge who tried this cause below, certifies that the plea of payment was not passed upon by him upon the argument, and the attention of the Court below not being called to said plea, it is too late to urge in this Court for the first time, that said plea was sufficient. Gelston *v.* Hoyt, 13 Johns. 575; Bell *v.* Bruen, 1 Howard's (U. S.) R. 187; 3 do. 530.

2. The mortgage being made and executed in Illinois, must be governed by the laws of Illinois. Chapman *v.* Robinson, 6 Paige, 627.

3. The statute of Massachusetts does not make a contract for taking more than six per cent. void, but applies to the remedy and inflicts a penalty. Rev. Stat. Mass. 307.

Penal laws are local. Story's Confl. of Laws, § 619, *et seq.* Remedies upon contracts are governed by the law of the place where the action is instituted. 2 Kent's Com. 462.

That the statute of Massachusetts is penal, and applies to the remedy only, is established by her own Courts. Gale *v.* Easton, 7 Metc. 14.

The Opinion of the Court was delivered by

Lockwood, J. The plaintiff below sued out of the County Court of Cook County, a *scire facias* against Sherman & Pitkin, to foreclose a mortgage, dated September 1st, 1842. The mortgage was duly acknowledged and recorded on the day it bears date, and was executed to secure the payment by the mortgagors to the mortgagees of three several promissory notes, amounting to the sum of $7000, dated the 15th of June, 1842. The time when the notes were to fall due, is not stated in the mortgage, but the *scire facias* avers they had all fallen due. The mortgage recites that Sherman & Pitkin are residents of the county of Cook, in the State of Illinois, and the plaintiffs below are residents of the State of Massachusetts. Sherman & Pitkin pleaded four special pleas of usury, in violation of the laws of Massachusetts, and a plea of part payment. To all these pleas, Gassett & Co. severally demurred, and the Court sustained the demurrers, and rendered judgment for the plaintiffs for the amount due on the mortgage, and that the mortgaged premises be sold.

The errors relied on, are the sustaining the demurrers to all the pleas of the defendants. The four pleas of usury are substantially alike, and aver that Sherman & Pitkin being largely indebted to Gassett & Co., who were merchants, residing and doing business in the city of Boston, for goods previously sold to them, on the 15th day of June, 1842, in order to obtain forbearance on said indebtedness, it was corruptly agreed that Sherman & Pitkin should execute to Gassett & Co. three several promissory notes, payable in twelve, twenty-four and thirty-six months, at Gassett & Co's office in Boston, with interest at the rate of ten per cent. per annum, payable semi-annually. The pleas state that the notes, although they appear on their face to have been executed in Chicago, in this State, yet were executed in Boston.

These pleas further aver, that the mortgage recited in the *scire facias*, was executed to secure the payment of said notes. The pleas further aver, that on the 15th of June,

1842, it was provided and enacted by the laws and statute of the Commonwealth of Massachusetts, of which Commonwealth Boston was the capital, "that the interest of money should be six dollars and no more upon one hundred dollars for a year, and at the same rate for a greater or less sum, and for a longer or shorter time;" and that, "whenever an action shall be brought upon any contract or assurance, and it shall appear upon special plea to that effect, that a greater rate of interest has been directly or indirectly reserved, taken or received, the plaintiff shall forfeit three-fold the amount reserved or taken, and shall have judgment for the balance only, which shall remain due after deducting said three-fold amount." The defence set up in the defendants' pleas of usury, is unconscientious and inequitable, and should not be sustained unless some stern rule of law requires it. In equity the original debt and legal interest are justly due, notwithstanding an agreement to pay more than legal interest. Where a creditor, however, has acted oppressively towards his debtor, or has evinced a manifest disposition to violate the laws of the country where the contract is made or to be performed, justice requires that Courts should be astute in ascertaining if there be not some rule of law that will enable them to punish the oppressive creditor, or the wilful violater of the law. These pleas, instead of disclosing any oppression on the part of Gassett & Co. towards Sherman & Pitkin, clearly evince a great degree of forbearance and lenity. Sherman & Pitkin were residents of the State of Illinois, where it was legal to stipulate for the payment of twelve per cent. interest; consequently, the agreement to pay ten per cent. did not violate any law of this State. What law, then, has been violated by the contract between the parties? It is apparent that the mortgage was executed in Illinois, for it was acknowledged and recorded in Cook county, on the day it bears date, and as it does not specify any place of payment, were it not for the notes recited in the pleas, the legal presumption would be, that the mortgage was payable in Illinois, where the land was situated and the mortgagors resided, and in that event, the mortgage

would be free from any taint of usury. The pleas, however, aver that the mortgage was executed to secure the payment of three promissory notes, with ten per cent. interest, which notes, it is alleged, were executed in Boston, and made payable there.

It is a well settled rule of jurisprudence, that the Courts of one country will not enforce either the criminal or penal laws of another. Nor will the Courts of one country carry out or be guided by the laws of another regulating the forms of actions, or the remedies provided for civil injuries. But it is equally well settled, that in the construction of contracts and in ascertaining whether they are valid, the law of the country where the contract was made or to be performed shall in general govern. It might in this case be urged, with great propriety, that a mortgage on real estate should be governed by the *lex situs*, and consequently not be affected by the usury laws of the place where it may have been executed, or where the money is to be paid; the presumption being that the parties must have had the laws of the country in view where the land was situated, and where suit must be instituted in case of foreclosure. The case of Chapman *v.* Robinson, 6 Paige, 627, was decided on this principle. In that case a loan was negotiated in England, where the creditor lived, to be secured by personal security and a mortgage on real estate in New York, where the borrower resided. Seven per cent. interest was reserved in the mortgage, which was higher than the rate of interest allowed by law in England, although authorized by the laws of New York. Chancellor Walworth, in delivering his Opinion, says: "Upon a full examination of all the cases to be found upon the subject, either in this country or in England, none of which, however, appear to have decided the precise question which arises in this case, I have arrived at the conclusion that the mortgage executed here, and upon property in this State, being valid by the *lex situs*, which also is the law of the domicil of the mortgagor, it is the duty of this Court to give full effect to the security, without reference to the usury laws of England, which neither party intended to violate, by the execution of a mortgage upon

the lands here." The Chancellor, in that Opinion, further says: "But if a contract for the loan of money is made here, and upon a mortgage of lands in this State, which would be valid if the money was payable to the creditor here, it cannot be a violation of the English usury laws, although the money is made payable to the creditor in that country, and at a rate of interest which is greater than is allowed in England." This question was fully and ably examined by Judge Martin, in the case of Depeau *v.* Humphreys, in the Supreme Court of Louisiana (20 Martin, 1), and that Court came to the conclusion, in which the Chancellor says he fully concurs, "that in a note given at New Orleans, upon a loan of money made there, the creditor might stipulate for the highest legal rate of conventional interest allowed by the laws of Louisiana, although the rate of interest thus agreed to be paid was higher than that which could be taken upon a loan by the laws of the State where such note was made payable." The Chancellor continues: "Here the verbal contract for a loan upon the security of a mortgage on lands in this State, was wholly inoperative, until the mortgage and other written security were executed in this State, and which agreement was consummated by the deposit of the money (in England), to the order of the borrower. It was a contract partly made in this State and partly in England. And being actually made in reference to our laws, and to the rate of interest allowed here, it must be governed by them in the construction and effect of the contract as to its validity. An appeal to the Courts of this State was also contemplated by the parties if necessary to enforce a performance of the written agreement for the re-payment of the loan, although from the residence of the mortgagee in England, it might be necessary to send the money there to make a legal tender of the debt."

In the case of Robinson *v.* Bland, 2 Burr. 386, which is a leading case on the subject of the *lex loci*, Lord Mansfield holds the following emphatic language: "In every disposition or contract, where the subject matter relates locally to England, the law of England must govern, and must have been intended to govern. Thus a conveyance or will of

land, a mortgage, a contract concerning stocks, must be all sued upon in England, and the local nature of the thing requires them to be carried into execution according to the law here.

These authorities come from sources of the highest respectability, and being consonant with the principles of equity and justice, would, in my opinion, justify this Court in coming to the conclusion that the mortgage being executed here, and this being the domicil of the mortgagors, the law of this State ought to govern in its construction. But as I conceive it is not necessary to place the decision on this point, I am willing to concede that if the mortgage was given to secure the payment of promissory notes which were void by the usury laws of Massachusetts, then this Court would be bound, however contrary to the principles of honorable dealing we might consider the defence, to decide that a contract, void where it was made or to be performed, was void here. The statute Massachusetts in relation to usury, however, does not declare the contract void, but authorizes a suit to be sustained on it, and inflicts a forfeiture of a part of the debt, as a penalty for violating the Act; and points out a particular mode by which the forfeiture shall be enforced. On this statute the question arises, is this forfeiture a penalty? And if not a penalty, then are the means provided for its recovery addressed to the Courts of Massachusetts solely, or in other words, are the means of recovering the penalty, a part of the law of remedy, and consequently, confined to the *lex fori*.(*a*)

The answer to the question, whether the forfeiture is not a penalty, which foreign Courts will not enforce, is not free from difficulty. If it is not a penalty, it closely resembles one, for a heavy forfeiture is imposed for the violation of the statute. Webster defines the word "forfeit," as follows: "To lose or render confiscable by some fault, offence or crime; to lose the right to some species of property or that which belongs to one." And under the noun he defines it, "that which is forfeited or lost, or the right to which is

(*a*) See Barnes *v.* Whitaker, 22 Ill. R. 606.

alienated by a crime, offence, neglect of duty or breach of contract, hence a fine, a mulct, a penalty. He that murders pays the forfeit of his life. When a statute creates a penalty for a transgression, either in money or in corporal punishment, the offender, who on conviction pays the money or suffers the punishment, pays the forfeit." It would seem that these definitions of the word "forfeit," would constitute the forfeiture provided by the Act of Massachusetts, a penalty. It was, however, inquired on the argument, if the Massachusetts Act inflicted a penalty for taking usurious interest that foreign Courts would not enforce, why will foreign Courts enforce the usury statutes of England, and some of the United States? The answer to this inquiry is, that in England, their statute absolutely forbids the making of any contract infected with usury, and renders the whole contract null and void; and so are the usury laws in several of the United States. A contract, being absolutely void where it was made, cannot become valid by transportation. It being once corrupt, it cannot become pure by change of time or place. As has been conceded, if the statute of Massachusetts had declared the contrat void, no Court would enforce it. But having only inflicted a forfeiture or penalty on the person who attempts to violate it, it seems but reasonable to consider the forfeiture as a penaly, which the Courts of Massachusetts can alone render effectual.

But whether this question be decided in the affirmative or not, I think there is no difficulty in arriving at a satisfactory conclusion on the question, whether the forfeiture is not governed by the law of remedy, and can alone be enforced in the *lex fori*. The statute directs, that when an action shall be brought on any contract, tainted with usury, and it shall appear by special plea to that effect, that a greater rate of interest, &c., the plaintiff shall forfeit three fold, &c., and shall have judgment for the balance only. The Act points out a particular mode, by which the forfeiture is made available to the defendant, and if he neglects that mode, he loses the forfeiture. The mode of reaching the forfeiture is made by the statute a matter of substance, that cannot be

dispensed with in the Courts of Massachusetts. This circumstance alone renders the forfeiture a part of the law of remedy, which can only be enforced in the *lex fori.* To test this question, suppose this action had been commenced in a State where all special pleas are forbid by statute, and the defendant had specially plead the facts and statute of Massachusetts, would the Courts of such State, on demurrer have hesitated to decide that the special plea was bad? Such necessarily would be the decision. Again, suppose the defendent had plead the general issue, and had offered on the trial the statute of Massachusetts, with the facts going to establish the usury, would the Court have received the evidence? Certainly not, because the defendant had not complied with the mode required by the statute to entitle him to the forfeiture. If, however, the whole contract had been void, no such difficulty would be experienced; for no Court will sustain an action upon a void contract, and its invalidity would be matter of defence under the general isssue. We have a similar Act in relation to usury, to that which exists in Massachusetts, with this difference, that our Act requires, when usury is pleaded and proved, that the defendant shall recover his full costs, and that two-thirds of the forfeiture shall be paid into the treasury of the county in which the suit shall have been instituted, and each of the parties may be sworn as witnesses. Suppose that an action was brought on a usurious contract made in Illinois, in the Courts of Massachusetts, where by law, if the plaintiff recovers anything, he recovers costs; and where neither party can be witnesses, would the Courts of Massachusetts give effect to the forfeiture, by declaring that one-third should be paid to the defendant, and two-thirds to the county, and violate their own laws, by giving judgment against the plaintiff for costs, and also suffer the parties to be witnesses? There can, it is conceived, be but one opinion on this question. No sound lawyer would hesitate to reply in the negative. Can any good reason be given, why the Act of this State should not be enforced abroad, that will not apply to the usury law of Massachusetts? The objects of both Acts are

the same—the punishment of a party who exacts usurious interest. The penalty inflicted on the usurer is also the same, the mode of enforcing and disposing of the penalty only being different. The object of both laws, being in harmony, it would appear unreasonable that one statute should be enforced extra-territorially, and the other not. The usury Act of Massachusetts, not having declared the contract void, but having furnished a special mode, by which the forfeiture inflicted for its violation shall be recovered, must be considered as part of the law of remedy, and, consequently, can only be enforced in the Courts of Massachusetts.

The principle, that the Courts of one country will not enforce the law of remedy in another, is settled by numerous decisions. They will be found collected in 2 U. S. Dig. p. 795, title "*Limitations of Actions.*"

In the case of Ruggles *v.* Keeler, 3 Johns. 267, to a plea of set-off, it was objected that it was barred by the Statute of Limitations of the State of Connecticut, where both parties resided when the set-off arose. Kent, Chief Justice, in delivering the Opinion of the Court, says: "Statutes of Limitation are municipal regulations, founded on local policy, which have no coercive authority abroad, and with which foreign or independent governments have no concern. The *lex loci* applies only to the validity or interpretation of contracts, and not to the time, mode or extent of the remedy."

In the case of Scoville *v.* Canfield, 14 Johns. 337, which was debt on a judgment recovered in Connecticut, Spencer, Justice, in delivering the Opinion of the Court, says: "Although we notice the *lex loci* in construing and giving effect to the contracts between the parties, we must administer justice to them according to our laws, and the forms prescribed by our legislature, or the usages of our Courts." The Judge also, says, in the same Opinion: There is another decisive answer as regards the Act pleaded. The plea admits the validity of the judgment declared on, and we are called on by the defendant not to apply the *lex loci* in the construction of the contract; but we are required to give effect to a law which inflicts a penalty for acquiring a right

to a chose in action. The defendant cannot take advantage of, nor expect this Court to enforce the criminal laws of another State. Penal laws are strictly local, and affect nothing more than they can reach." 1 H. Black. 135; Foliot *v.* Ogden, Cowper, 343.

The cases above referred to, although not precisely analogous, yet settle the principle, that the *lex loci* only governs in ascertaining whether the contract is valid, and what the words of the contract mean. When the question is settled, that the contract of the parties is legal, and what is the true interpretation of the language employed by the parties in framing it, the *lex loci* ceases its functions, and the *lex fori* steps in, and determines the time, the mode and the extent of the remedy.

That the Courts in one State will not enforce the usury laws of another, where the contract is not declared void, has recently been decided by the Supreme Court of Massachusetts, a tribunal whose opinions are entitled to the highest respect. From a careful examination of that case, it will appear, that they have put a construction upon their usury Act, in relation to the forfeiture set up in the pleas under consideration, which settles the question, that the Supreme Court of Massachusetts regard the forfeiture as applicable to the remedy, and can only be enforced in their Courts.

The case referred to, is Gale *v.* Easton, 7 Metc. 14. The Opinion of the Court sufficiently explains the nature of the case under discussion. Chief Justice Shaw, in delivering the Opinion of the Court, says: "By the law of New Hampshire, the contract, even though usury were taken or received upon it, was not void; it was so far legal that an action might be maintained on it with certain deductions. Act of February 12, 1791. By the second section, it is provided, that when usury is relied upon in defence, a special mode of trial may be offered by the defendant; that is, a trial by the oath of the parties, as formerly practiced under the law of Massachusetts (Stat. 1783, ch. 55), but which mode of proof and form of trial are not allowed in this State. By the law of New Hampshire still in force, if the usury is thus proved, a certain amount shall be deducted, in assessing the dam-

ages, from the principal and interest due on the note. These provisions apply only to the remedy, and of course can extend only to suits brought in New Hampshire, and can haye no effect when a remedy is sought under our laws. The general rule is, that those provisions of law which determine the construction, operation and effect of a contract, or part of a contract, and follow it and give effect to it wherever it goes, but that in regard to remedies, the *lex fori*, the law of the place where the remedy is sought, must govern. We therefore cannot be governed by the law of New Hampshire, which professes only to regulate the remedy on a usurious contract. The law of Massachusetts, although somewhat analogous cannot apply, because although the mode of enforcing the law against usury is by applying it to the remedy, yet the law to be enforced is the law of Massachusetts. The law of this State declaring what shall be the rate of interest, and what contracts shall be deemed usurious, also directs, when suits are brought, what deductions shall be made; but it is suits brought on such contracts, that is, contracts made in violation of its provisions."

In that case the plaintiff had judgment for his demand, although the usury was admitted by an agreed case.

The principle fairly deducible from these cases is, that the forfeiture provided for in the usury Act of Massachusetts is part of the law of remedy, and ought not to be enforced by the Courts of this State. The Court below, consequently, decided correctly in sustaining the demurrers to the defendants' pleas of usury.

The only other question presented by the assignment of errors is, whether the plea of part payment, was not a good plea. Payment in whole or in part may undoubtedly be pleaded. It was objected on the argument that the plea was bad, because it commenced as a plea to part of the plaintiffs' demand, yet concluded by praying judgment.(*a*) The plea is clearly informal, and had it been demurred to specially, it would have been bad. We are, however, of opinion that the plea substantially means to say, that defendants have paid

(*a*) Wells *v.* Mason, 4 Scam. R. 88.

$5000 to the plaintiffs, and that in regard to that amount they deny the plaintiffs' right to recover. In this view of the matter, the plea, although informal, is subtantially good, and the general demurrer was improperly sustained. For this error, the judgment below must be reversed with costs, and the cause remanded with instructions to the Court below to permit the plaintiffs below to withdraw their demurrer and take issue on the plea, and then proceed to dispose of the case as shall be consonant to law.

The following dissenting opinion was delivered by

KOERNER, J. I regret that on one point in the case just decided I cannot agree with a majority of the Court. I mean as to the invalidity of the pleas of usury. The Court hold that, although the contract in question was made performable in Massachusetts, and usurious under the laws of that State, yet the Massachusetts law cannot be enforced in our State. I understand that this view is founded on the opinion, that the usury laws of another State, where they provide for a partial forfeiture of the debt, is penal in its nature, and also that it is only remedial, not affecting the contract, and that for both these reasons they cannot be enforced here.

It is not denied by a majority of the Court, but what the usury laws of the place govern the contract of the place, as far as regards the rate of interest claimed. It is also admitted, that where such laws declare a usurious contract wholly void, such contract, by the comity of nations, cannot be enforced anywhere.

Now, if they were really criminal or penal laws in the proper sense, no other State but the one in which they were violated would take cognizance of them. Laws cannot be criminal in part, and not criminal in part; they must be either the one or the other. The case in 7 Metcalf, 14, does not go on the ground that the usury laws are penal, or criminal laws.

To maintain that we are bound to declare a usurious contract wholly void, when the laws of the contract make it so, whereby

the creditor is deprived of the whole of his claim, but that we are not bound to regard the law when it provides for a forfeiture only, by which the creditor loses but a part of his claim, seems to involve a singular inconsistency. It, in other words, involves the following remarkable syllogism: "The law everywhere avoids usurious contracts, when they are declared wholly void by the law of the place. This contract was void in part, and consequently is good as to the whole."

The decision in Massachusetts proceeds upon the ground, that the usury laws of New Hampshire (which are analogous to the laws of Massachusetts), were remedial in their nature, and therefore could not be applied in Massachusetts. I dissent from this opinion with all due deference to the superior wisdom of that Court. If the usury laws of another country are remedial and do not affect the contract, then the usury laws of the State where the suit is brought must apply, because they are remedial. The interest stipulated in the Massachusetts case was usurious according to the law of New Hampshire, as well as that of Massachusetts. If the law is remedial in one, it must be in the other. It seems to me that there is a failure of proper distinction. A law of another State may affect the contract, and also the remedy, in presenting a peculiar mode of trial or a peculiar kind of evidence. As far as such a law operates upon the contract, in declaring it either wholly void, or partially so, or limits and modifies the essential rights growing out of it, it will be enforced by every other State; as far, however, as it affects the remedy, or the means of proceeding to enforce it, it will be disregarded if there is any conflict.

Now, in the present case, by the Massachussetts law, the plaintiffs, having acted in violation of law, must submit to a deduction of their claim, the amount of which deduction to be ascertained by a certain prescribed mode of computation, which every Court is able to make. As far as the law operates upon the *quantum* allowed to be recovered of the whole claim, it certainly affects the contract most materially. If the Massachusetts law, however, prescribes rules as to evi-

dence in such cases, or the forms of proceeding, or the sum forfeited, which are inconsistent with our remedial laws, they will be disregarded, and their place will be supplied by our own.

This view of the case, thus briefly, and I fear imperfectly expressed, seems to me to be sustained by what is said by the Supreme Court of the United States in the case of DeWolf *v.* Johnson, 6 Cond. R. 141. In that case the question arose on a contract originally made in Rhode Island, where the usury law did not avoid the contract, or the securities given for it, but only declared a forfeiture of one-third of the principal, and all of the interest of the loan, as a penalty to be recovered by information or action of debt. This law was set up in Kentucky, where such loan, it was contended, had been secured by mortgage. On page 151, the Court say in reply to the argument that the Rhode Island contract was wholly void: "The law of Rhode Island certainly forbids the contract of loan for a greater interest than six per cent., and so far, no Court would lend its aid to recover such interest. But the law goes no further; it does not forbid the contract of loan, nor preclude the recovery of the principal under any circumstances. The *sanctions* of that law, are the loss of the interest and one-third of the principal, if sued for within one year. On what principle could this Court add *another* to the penalties declared by the law itself." I have italicized some of the words just transcribed, in order to make the applicability of the whole passage more apparent.

The policy of the usury laws in general, and the impropriety or iniquity of the decree in this particular case, are subjects on which I am not called upon by anything in the record to express an opinion.

Justices CATON and THOMAS concurred in the dissenting opinion.

Judgment reversed.

CHARLES BENJAMIN, impleaded with Mark W. Delahay, appellant, *v.* MURRAY MCCONNEL, *et al.*, appellees.

Appeal from Scott.

The statute does not give to a defendant the right to plead specially, and also give notice of the special matter relied on as a defence under the general issue; and when this is done, the proper practice is, for the Court, on motion, to direct him to elect how he will proceed. This, however, is discretionary with the Court.

In the construction of a contract, where the language is ambiguous, Courts uniformly endeavor to ascertain the intention of the parties, and to give effect to that intention. But where the language is unequivocal, although the parties may have failed to express their real intention, there is no room for construction, and the legal effect of the agreement must be enforced.

A proviso in a contract totally repugnant to the contract itself, is void.

A release of one of two or more joint, or joint and several obligors, or promisors, is a release of all.

A personal action once suspended by the voluntary act of the party entitled to it, is forever gone and discharged.

A release of contract, not under seal, but made a part of a decree of Court, is valid; and where a consideration is expressed in a release, or otherwise proved to have passed between the parties, it is immaterial whether the instrument is sealed, or otherwise.

A seal but imports or furnishes evidence of a consideration, and, except in cases where a release is designed to effect a conveyance or transfer of real estate, or some interest in or concerning it, which can only pass by deed, it may be dispensed with.

When the consideration of a contract is not expressed or implied, it must be proved.

On a settlement of an account, a note was written at the foot of the same, expressing that the account was the consideration thereof. The note was subsequently separated therefrom, this consideration stricken out, the words "on demand," prefixed thereto, and suit brought: *Held*, these facts being set forth in a plea of *non est factum*, and sworn to, that the alteration was material, and that the plea was a good bar to the suit.

DEBT, originally brought in the Pike Circuit Court by the appellees against the appellant and Mark W. Delahay, whence the venue was changed by consent of parties, to the Scott Circuit Court. The cause was heard before the Hon. Samuel D. Lockwood and jury. Verdict for the appellees.

The pleadings and evidence are stated in the Opinion of the Court.

D. A. SMITH, for appellant.

I. The plea of *non est factum* sworn to, shows that the note sued on in this case, was not merely a mutilation or spoliation of the original note, but that its terms were changed by the insertion of the words "*on demand.*" It is, in effect, admitted by the demurrer that if the alteration in the note be in a material part, the plea is good. It cannot be pretended that the statement of the account is no part of the note. The parties have chosen to make it so, by referring to it as being the consideration of the note. It is a material part of the instrument to the makers, because it affords proof as a voucher of the settlement of accounts with the appellees as successors of McConnel, Ormsbee & Co. It may well be insisted upon for the appellant, that the note would never have been given in any other form than the one in which it was given, only for purposes of peace, and to effect a settlement of long, difficult and mutual accounts, and that it was his right, on payment of the note, to hold it not merely as discharged, but as evidence of such settlement. To use the note in the way attempted in this suit, is to suppress his only voucher, and is, therefore, a faudulent invasion of his clear and absolute right.

But suppose the mutilation of the instrument, and the interpolation of the words "on demand," be considered immaterial, it by no means follows that the instrument is not thereby made void. When an instrument is altered, it is incumbent on the party claiming under it to explain the alteration. The law, to prevent fraud, and to preserve the identity and integrity of contracts, as being the sole repositories of the agreements of the parties, is exceedingly jealous of any alteration of a written instrument, without the privity of the party to be bound thereby. The special plea of *non est factum* sworn to, put in issue the identity of the instrument sued on, and devolved on the appellees the obligation to explain to the satisfaction of the jury, the mutilation and alteration, or interpolation of that instrument. See 1 Greenl. Ev. § 564–8 *a*, inclusive.

II. The refusal of the charge relied upon as the third error, involves the position, that in this case there was a joint subsisting contract against Benjamin and Delahay, by virtue of the note sued on in this case. Unless there was, the suit being on a joint contract, there should have been no recovery against Benjamin. He had a right to show that the cause of action was suspended and gone as to Delahay, and if so, by operation of law, he, Benjamin, was discharged from the obligation of the note. Thomas *v.* Thompson, 2 Johns. 474. Where there are several joint debtors, whatever extinguishes or merges the debt as to one, merges or extinguishes it as to all. Suspension of the right of action as to one, releases, discharges, and extinguishes the action as to both. Robertson *v.* Smith, 18 Johns. 478–9–81. See, also, 3 Scam. 14. I maintain that the appellees by their positive and unequivocal act of record, and for consideration, released Delahay, and if so, Benjamin is also released. It will doubtless be admitted, that if the agreement of the 27th of March, 1844, which was entered at the decree of the Court at May term, 1844, had been a sealed paper, that that would have been such a technical release as would have discharged Benjamin. I insist that that decree is a matter of record, of more solemnity and of higher consideration than a mere sealed release. Contracts or obligations are of three sorts: 1. By parol, or in writing, as contra-distinguished from specialties; 2. By specialty, or under seal; 3. Of record, uch as judgments, recognizances, &c. These last are of superior force, because they have received the sanction of, and are founded on the authority of the Court of Record. Chitty on Contracts, pages 1, 2.

"A release is giving or discharging of a right of action which a man hath or may claim against another, or that which is his." "Releases are distinguished into express releases, or releases in deed, and those arising by operation of law; and are made of lands and tenements, goods and chattels, or of actions real, personal und mixed." Bac. Abr. *Release.*

A release may be by Act of Parliament. "An express release must regularly be in writing and by deed according to

common rule, *eodem modo quo oritur, eodem modo dissolvitur;* so that a duty arising by record, must be discharged by matter of as high nature; so, of a bond or other deed." Bac. Abr. *Release*, A. 1.

"An award that all suits shall cease, hath the effect of a release, and the submission and award may be pleaded in discharge as well as a release." Strangford *v.* Green, 2 Mod. 228; Bac. Abr. *Release*, A. 2.

"If two or more are jointly and severally bound in a bond, a release to one, discharges the other; and in such case the joint remedy being gone, the several is so likewise." Bac. Abr. *Release*, G. and authorities there cited.

"Also if two are bound in an obligation, and the obligee releases to one of them, proviso that the other shall not take advantage of it, this proviso is void. Lit. Rep. 190; Bac. Abr. *Release*, G. This principle annihilates the sly and false proviso inserted in the release to Delahay. It was the palpable intention of the appellees, as to him, to release and cancel the note sued on in this case. Stronger language could not well be selected for that purpose. And if the judgment in this case is sustainable, it involves the dilemma of having Delahay made a party to it, notwithstanding he has been solemnly released by act of record.

We are not driven to rely upon a mere technical release under seal. A discharge by operation of law is sufficient. Hob. 70; Cro. Eliz. 762. If a release may be by Act of Parliament, and award, as already shown, and without the magic of a seal, why not by a decree of a Court of Record that is clothed in so much solemnity? Again, if a recognizance which is a debt of record, and of higher dignity than an ordinary specialty, may be created without a seal, why not sanction the superior sanctity of the decree under which we claim protection in this case?

In Wentz *v.* De Haven, 1 Serg. and Rawle, 312, it was decided, that a seal is not necessary to a release of a debt secured by the most formal sealed instrument, and whether due or still owing. In Whitehill *v.* Wilson, 3 Penn. 405,

the same Court decided that a parol release of a judgment is sufficient, but a consideration is necessary to support it; and that it is not enough that it is in writing, if without a consideration. A release, not by deed, and without consideration, after a breach of promise, is void. Crawford *v.* Millspaugh, 13 Johns. 87.

M. McConnel, for the appellees.

The Opinion of the Court was delivered by

Purple, J. The appellees sued the appellant by petition and summons, upon a promissory note, as follows:

"On demand, for value received, we promise to pay Murray McConnel and Holloway Vansyckel, or order, two hundred and four $\frac{44}{100}$ dollars, without defalcation, discount or set-off.

December 4, 1839.

C. Benjamin & Co."

Benjamin only was served with process, although the writ issued against both him and Delahay. Appellant pleaded,

1st. Payment;

2nd. That appellant and Delahay made the note as partners; that on the 27th day of March, A. D. 1844, appellees made an agreement in writing with Delahay, and filed the same of record in the Scott Circuit Court, in a Chancery suit then pending in that Court, between McConnel, Vansyckel and Jas. A. McDougall, complainants, *v.* Mark W. Delahay, defendant, by which agreement Delahay was discharged from the payment of the note, and the same, as against him, was released and canceled. That by this agreement, it was expressly provided, that the same should not operate to release Benjamin, nor be considered as canceled as to him. The plea further shows, that this agreement was made upon a compromise and settlement of said Chancery suit;

3rd. That on the 4th day of December, 1839, the firm of C. Benjamin & Co. executed a paper of which the following is a copy: "Charles Benjamin and Mark W. Delahay, trading and doing business under the name, firm and style of C. Ben-

jamin & Co., to McConnel & Vansyckel, successors of McConnel, Ormsbee & Co., Dr.

1839, Jan'y 1.	To balance as per acc't rendered,		$227.37
Dec. 4.	11 months' interest on same,		25.00
			252.37
Dec. 4.	By their acc't rendered,	$43.22	
	Interest from Jan'y 1,	4.75	47.97
	To balance,		204.40

For and in consideration of the above account, and for value received, we promise to pay to Murray McConnel & Holloway W. Vansyckel, or order, two hundred and four $\frac{44}{100}$ dollars, without defalcation, discount or set-off.

December 4, 1839.

C. Benjamin & Co."

and the said defendant having examined the note set forth in plaintiffs' petition and summons, says that the said note is a mutilated part of the note and account above set forth; therefore defendant avers, that the note set forth in plaintiffs' petition and summons is not his note, and that he did not make and execute the same in manner and form as stated in the plaintiffs' petition. The truth of this plea was sworn to by Benjamin.

4th. *Nil debet*, under which the appellant gave notice, that he would offer in evidence upon the trial, the proceedings and record in the Chancery suit, and the facts relative to the release and discharge of Delahay from the payment of the note sued on, as stated in and referred to in appellant's second plea.

To the first and fourth pleas the appellees replied generally, and issues on each were joined to the country. Demurrers were filed to the second and third pleas, which were sustained by the Court.

The Court, on the trial, permitted the record of the Chancery suit before mentioned, containing the contract releasing Delahay from the payment of the note sued on in this case, to be read in evidence. After the evidence was closed, the appellant's

counsel requested the Court to instruct the jury, that "if the jury believed from the evidence, that the facts stated in the notice under the general issue are proven, they must find for the defendant Benjamin;" which instruction the Court refused, and the defendant excepted. The jury returned a verdict for appellees —appellant moved for a new trial which motion was overruled, and appellant excepted.

The agreement releasing Delahay from the payment of the note, which the second plea alleges is the note sued on in this case, constitutes a portion of the decree entered in the said Chancery suit, which decree is recited at length in said plea, and is as follows:

"This day came all the parties to this suit in open Court, and by consent of the parties, it was ordered as follows (to wit): The said complainants hereby release all claims to all and each of the demands and notes (that is, the balance due thereon), mentioned and set forth in the bill filed in this cause, and all of which notes are hereby released and conceled as against him, the said Delahay. Provided, that this shall not operate so as to release C. Benjamin from a note given by him under the firm of C. Benjamin & Co., on the 4th day of December, 1839, which last mentioned note is not cancelled, or is the said Delahay bound therefor. The said Holloway W. Vansyckel hereby agrees to pay all the costs made by the complainants, or either of them in this case, and all the costs made by them, or either of them, in the case taken to the Supreme Court. It is further ordered and decreed by consent as aforesaid, that the said Delahay hereby releases and conveys to the said McConnel and Vansyckel, all his rights and claims to all the property and real estate mentioned in the bill filed in this case, and the sale of the Master in Chancery of the same, is hereby confirmed; and to all the rents, and profits, and proceeds of all of said property, at all and any time growing out of the same, to this date, he, the said Delahay, surrenders his claim, and it is ordered by consent, that the costs made in the Supreme Court by taking this case there, by the said Delahay, is to be entered upon the fee book of this Court in this case, and the said Delahay agrees to pay the costs made by him, both in the Supreme Court and in this Court, in this cause,

and that fee bills including all said costs against each of said persons, issue from this Court, for the costs made by each of them respectively. 27th March, 1844.

M. McConnel,
H. W. Vansyckel,
Mark W. Delahay."

The errors relied on by appellant, question the correctness of the judgment of the Court in sustaining the demurrer to the second and third pleas, and in refusing the instruction asked by the counsel for appellant. There is no direct assignment that the Court erred in sustaining the demurrer to the second plea, and the questions involved by the demurrer to said second plea, but the refusal to give the instruction asked are the same, whether the release set up presents a good bar to the appellees' cause of action in this suit. It is manifest from an inspection of this plea, and also from an examination of the decree set out in the Chancery suit, and read in evidence upon the trial, that the release by McConnel and Vansyckel to Delahay, was for a valuable consideration.(*a*) It was made upon the settlement and compromise of a contested suit, pending between the parties. Delahay, in consideration of this release, and other matters set out in the decree, also released to McConnel and Vansyckel, "all his rights and claims to all the property and real estate mentioned in the bill" of complainant, and agreed that the sale of the Master should be confirmed, &c.; and the whole contract was, by the consent of the parties, made the decree of the Court, and entered of record as such. That this agreement, thus solemnly made, completely and forever discharged Delahay from all liability to pay any portion of the note in controversy, there cannot be a doubt. It was as much binding and obligatory upon McConnel and Vansyckel, as the release on the part of Delahay was upon him. As to Delahay, the cause of action was extinguished. It may, perhaps, not be improper to remark here, that the statute does not give to a defendant, the right to plead specially, and also give notice of the special matter relied on (*b*) as a defence under the general issue;

(*a*) Ryan v. Dunlap, 17 Ill. R. 40.
(*b*) Gilmore v. Nowland, 26 Ill. R. 200.

and when this is done, the proper practice would be for the Court, on motion, to direct him to elect how he will proceed. This, however, is a matter of discretion.

But it is contended, that inasmuch as there is a special proviso in this agreement, that the contract shall not operate to discharge Benjamin; and inasmuch as the same is not executed under the seals of the parties, that his liability still remains.(a) This is a proposition which the law must settle. In the construction of a contract, where the language is ambiguous, Courts uniformly endeavor to ascertain the intention of the parties, and to give effect to that intention. But where the language is unequivocal, although the parties may have failed to express their real intentions, there is no room for construction, and the legal effect of the agreement must be enforced. A proviso in a contract totally repugnant to the contract itself, is void. "If two are bound in an obligation, and the obligor releases to one of them, with a proviso that the other shall not take advantage of it, this proviso is void." 5 Bac. Abr. 702, G. The doctrine has long been considered as settled, that a release to one of two or more joint, or joint and several obligors or promissors, is a release of all. 5 Bac. Abr. 702, G; 2 Salkeld, 574; 6 Vesey, Jun. 146; and "a personal action, once suspended by the voluntary act of the party entitled to it, is forever gone and discharged." Thomas *v.* Thompson, 2 Johns. 473; 18 do. 478; 9 Wend. 336; 17 Mass. 581; 13 do. 148; 7 Johns. 207.

In the case of Hall *v.* Rochester, 3 Cowen, 374, an action was brought on a joint and several promissory note against them; two of the defendants appeared and pleaded that the note was fradulently obtained. The plaintiff entered a *nolle prosequi* as to them, and took a default against the other defendant. This was held to be error. In Tolman *v.* Spaulding, 3 Scam. 14, this Court say: "It is well settled, that in actions *ex contractu* against several, the plaintiff, to entitle himself to recover, must prove a promise as to all of

(a) See Parmelee *v.* Lawrence, 44 Ill. R. 413; Rice *v.* Webster, 18 Ill. R. 332; Williams on Per. Prop. 240.

the defendants, and he is not permitted to take a judgment against part of the defendants, and enter a *nolle prosequi* as to the rest, unless a defence personal to them is interposed." The same principle is re-affirmed in the case of Wann *v.* McNulty, 2 Gilm. 355, and also in the cases before referred to. But it is objected, that this release or contract is not under seal, and, therefore, is ineffectual to bar the action as against Benjamin. Our answer to this, is founded in the authorities above quoted: "That if it is a release as to one, it is equally so as to all." Another is, that is evidenced by an act, which, in legal contemplation, is of higher authority than any instrument under seal,—a decree of a Court of record, the validity of which cannot be assailed, nor its verity questioned. And thirdly, where a consideration is expressed in a release, or otherwise proved to have passed between the parties, it is, in the opinion of the Court, totally immaterial whether the instrument is sealed, or otherwise. A seal but imports, or furnishes evidence of a consideration; and, except in cases where the release is designed to affect a conveyance or transfer of real estate, or some interest in, or concerning it, which can only pass by deed, may, without infringing any rule of law, be dispensed with. A release without a seal and without consideration is void. 13 Johns. 87; 1 Cowen, 122. So is any other contract. The rule applies as well to bonds, promissory notes and all other instruments in writing, as to releases. The distinction is, that when the consideration is not implied or expressed, it must be proved. I have not been able to find one authority, that a release not under seal, when made for a good or valuable consideration, is not of binding force.(*a*)

In the present case, Delahay has been wholly released from the payment of this note. On his part there is no longer any liability. Benjamin cannot be sued alone. If an action is brought against them jointly, Delahay can interpose no plea founded on this agreement, personal to himself. The release, when set up, is an effectual bar to the cause of action, and destroys the right to maintain the suit. The contract is entire; whatever discharges one, releases the other.(*b*)

(*a*) Scott *v.* Bennett, 3 Gil. R. 254.

(*b*) But see Parmelee *v.* Lawrence, 44 Ill. R. 413.

The Court is also of opinion, that the appellant's third plea presents a substantial bar to the appellees' cause of action. If true, and this is admitted by the demurrer, the alteration is material. The note and the account stated, constitute together one contract; by separating the one from the other, the proof of the consideration for which the note is given, is placed beyond the power of the appellant; and this might, in a suit upon the note, seriously affect his interests. Chitty on Bills, 182.

The Circuit Court erred in sustaining the demurrer to the second and third pleas, and in refusing the instruction asked by the counsel for the appellant.

The judgment of the Circuit Court is reversed with costs, and the cause remanded for further proceedings.

Judgment reversed.

JAMES SEMPLE *et al.*, plaintiffs in error, *v.* JOHN ANDERSON *et al.*, defendants in error.

Error to St. Clair.

When a Circuit Court sends its process beyond the limits of the county in which the suit is brought, its jurisdiction must be shown by express averments in the declaration.

A person may be sued in any county where he may "be found," and be compelled to appear and answer, notwithstanding he may reside in a different county from that in which the suit is brought.

A summons was issued by the Circuit Court of one county against two defendants, and was duly served on one them in that county. A second summons was sent to another county to be served on the other defendant, where it was served accordingly. The declaration filed in the case contained no averment as to the place where the cause of action accrued, or of the residence of any of the parties: *Held*, that the Court had no jurisdiction over the defendant who resided out of the county. (*a*)

When a case has once been decided upon its merits in the Supreme Court, and shall at a subsequent time, be brought before the same tribunal, the Court will not go behind its former adjudications, even though it shall appear upon the record that the Court acted without jurisdiction.

COVENANT, in the St. Clair Circuit Court, brought by the defendants in error against plaintiffs in error. The cause

(*a*) But see Easley *v.* Davis, 13 Ill. R. 19, and notes.

was heard at the May term, 1846, the Hon. Gustavus P. Koerner presiding, when a judgment was rendered for the plaintiffs below for $1975, damages.

A history of the case will be found in the Opinion of the Court.

J. Gillespie, W. Martin, and M. Brayman, for the plaintiffs in error, relied upon the following points and authorities for a reversal of the judgment of the Circuit Court:

The record shows that the suit was commenced in St. Clair county; that service was had on Semple in that county, and on Cairns, his co-defendant, in Monroe county. It does not show that the plaintiffs resided there; nor that the cause of action there arose; nor that the contract was specifically made payable there; nor that either of the defendants resided there. Consequently, there was no such compliance with the statute as would give the Circuit Court of St. Clair county jurisdiction over the persons of the defendants. Rev. Stat. 413, § 2; Bellingall *v.* Gear, 3 Scam. 576, and cases there cited; Swiggart *v.* Harber, 4 do. 371.

When a want of jurisdiction appears, no plea is necessary, but a demurrer or writ of error may be resorted to. Grant *v.* Tams, 7 Monroe, 222; McCormick *v.* Sullivant, 6 Peters' Cond. R. 73–4.

Objection to the jurisdiction is not waived by an appearance and a motion to set aside the steps taken. Brown *v.* McKeis' Rep's, 1 J. J. Marsh. 475.

As to the jurisdiction of the Circuit Court, see Clark *v.* Harkness, 1 Scam. 56; Key *v.* Collins, *ib.* 403; Clark *v.* Clark, 1 Gilm. 34. These authorities go to show that the facts, which confer jurisdiction, must affirmatively appear.

L. Trumbull, for the defendants in error.

The only question now before the Court is, as to the jurisdiction of the Circuit Court of St. Clair county over the persons of the defendants in the said Court. Two writs issued from the Circuit Court of St. Clair county, one to the sheriff of that county, and one to the sheriff of Monroe county. One of

the defendants was duly served with process in St. Clair, and the other in Monroe county.

The declaration contains no averment as to the residence of any of the parties. Judgment was entered by default, but was afterwards arrested by the Circuit Court, and the Supreme Court, at its December term, 1845 (2 Gilm. 455), at the instance of the plaintiff in said cause, reversed the decision of the Circuit Court arresting judgment, and remanded the cause for further proceedings.

The Circuit Court subsequently entered up judgment against the defendants, who now prosecute this writ of error, and insist for the first time, that the judgment should be reversed for the reason, that the Circuit Court had no jurisdiction over the persons of the defendants.

Two answers may be given to this assignment of error.

First. It is too late to raise the question of jurisdiction. That matter is already *res adjudicata* by the former decision of this cause, reversing the order arresting judgment and remanding the cause for further proceedings.

Would the Supreme Court be guilty of the absurdity of remanding a cause for further proceedings to a Court that had no power to proceed further? Yet such is the consequence of determining at this time, that the Circuit Court had no jurisdiction. The circumstance that a different party now brings the case before this Court, can make no difference. A defendant is as much concluded by a judgment as a plaintiff, and a defendant cannot, by making himself plaintiff, litigate a second time matter that has once been decided between the same parties. Parties are mutually bound by a judgment rendered in a case between them, and if a judgment was not conclusive upon a defendant, it clearly would not be upon a plaintiff. 1 Greenl. Ev. § 524, and authorities there cited.

If it be insisted that the question of jurisdiction was not presented to the consideration of the Court upon the former hearing, the answer is, that it matters not whether the point of jurisdiction was at that time urged before the Court or not. It is sufficient if the question of jurisdiction might

have been raised, and if the Court, in deciding upon the merits of the case, virtually determined it. Could, then, the present plaintiffs, and then defendants in error, have raised this question upon the former hearing in this Court? The record shows no want of jurisdiction at this time that did not appear then. Had the defendants in error at that time have urged upon the Court, that the Circuit Court had not jurisdiction of the case, would this Court, believing said position to be correct, have reversed the judgment and remanded the cause for further proceedings? If not, then it was in the power of the present plaintiffs in error to have raised this very point at that time, although they were then defendants in error. It needed no cross error on their part to bring it to the notice of the Court, but it would have been a sufficient ground for sustaining the judgment of the Circuit Court arresting judgment, if it had been shown in argument in answer to the error assigned, that the Circuit Court had not jurisdiction of the case.

The arrest of judgment by the Court below did the plaintiffs no harm, if that Court had not jurisdiction to enter judgment, and it is well settled, that "a party cannot assign for error a decision that does him no injury." 1 Scam. 342; 3 do. 486.

A defendant would have little to do in this Court indeed, if he could not, without assigning cross errors, which the rules will not permit, show that the error assigned by the plaintiff had no existence in fact, was waived or cured by other parts of the record, or was not in the least injurious to the party assigning it. Such a position would be absurd, and yet it follows, if the defendants upon the former hearing could not, without assigning a cross error, have been permitted to urge the very same reason for sustaining the judgment of the Circuit Court at that time, which they now offer for reversing its last decision.

The positions above assumed are not only sustained by reason and common sense, but they are abundantly supported by authority.

The case of The Washington Bridge Company *v.* Stewart,

3 Howard, 413, and that of Skillem *v.* May, 6 Cranch, 267, are believed to be directly in point. In the former of these cases, the Supreme Court of the United States say: "It does not follow * * * that the Supreme Court can or ought, on an appeal from a decree in the same cause which is final, examine into its jurisdiction upon the former occasion." "The case is not brought here in such a case for any such purpose. It was an exception of which advantage might have been taken, by motion on the first appeal. The appeal would then have been dismissed for want of jurisdiction. * * * But the exception not having then been made of the alleged want of jurisdiction, the cause was argued upon its merits, and the decree appealed from, was affirmed by this Court. To permit afterwards, upon an appeal from proceedings upon its mandate, a suggestion of the want of jurisdiction in this Court, would certainly be a novelty in the practice of a Court of Equity." The Court add: The case, however, "might have been dismissed upon the authority of a case in this Court, directly in point. Skillem's Ex'rs. *v.* May's Ex'rs, 6 Cranch, 267. And upon the footing that there is no mode pointed out by law, in which an erroneous judgment by this Court can be reviewed in this or any other Court. In Skillem's case, the question certified by the Court below to the Supreme Court was, whether the cause could be dismissed from the Circuit Court, for want of jurisdiction, after the cause had been removed to the Supreme Court, and the Supreme Court had acted upon, and remanded the cause to the Circuit Court for further proceedings. The Supreme Court said: It appearing that the merits of the cause had been finally decided in this Court, and that its mandate required only the execution of its decree, it is the opinion of this Court, that the Circuit Court is bound to carry that decree into execution, although the jurisdiction of that Court is not alleged in the pleadings. * * * When that cause was before this Court, though the judgment of the Court below on it would have been reversed upon motion, for the want of jurisdiction on the face of the record, the defect having escaped the notice of the Court and of coun-

sel, and the Court having acted upon its merits, it determined that its decree should be executed. The reasons for its judgment no doubt was, that the motion to dismiss the case in the Court below, for the want of jurisdiction, after it had been before this Court by writ of error, and had been acted upon, would have been equivalent, had it been allowed, to a decision that the judgment of this Court might have been reversed, when the law points out no mode in which that can be done, either by this or any other Court. See also upon the same point: 7 Metc. 286; 5 Cranch, 314; 10 Wheaton, 431; 1 do. 304; 7 do. 58; 12 Peters, 492.

Second. Admitting, for argument's sake, that the question of jurisdiction could now be raised, it is insisted that the service of process upon one of the defendants, in the county where the suit was brought, was sufficient to give the Court jurisdiction, and authority to send process to another county for another defendant. The Statute provides that, "when there is more than one defendant, the plaintiff commencing his action where either of them resides, may have a writ or writs issued, directed to any county or counties where the other defendants or either of them may be found." Rev. Stat. 413, § 2.

In this record there is nothing to show where either of the defendants resided. What, then, is the presumption? Surely that they resided where they where served with process. This is not only a legal, but a natural presumption and more especially is this presumption to be raised in favor of a Court of general jurisdiction. That the Circuit Courts of this State are Courts of superior and general jurisdiction, has been repeatedly decided. People *v.* Scates, 3 Scam. 352; Beaubien *v.* Brinkerhoff, 2 do. 273; Brewster *v.* Scarborough, *ib.* 280. And the law is equally well settled, "that nothing shall be intended to be out of the jurisdiction of a superior Court except what specially appears to be so." "Every presumption is to be made in favor of the jurisdiction of a Court of general jurisdiction." Wells *v.* Mason, 4. Scam. 88; Beaubien *v.* Brinkerhoff, 2 do. 273; Peacock *v.* Bell, 1 Saund. 74; Foot *v.* Stephens, 17 Wend. 483. In the last case

the Supreme Court of New York say: "In Courts of general jurisdiction, the jurisdiction is presumed till the contrary appear." * * * "The declaration fails to show a territorial power. All the cases are against this objection, and would fill a page of quotation. Shall it be said that the law will not presume, until the record first asserts the fact in the line of circumstances which gives jurisdiction? I answer such a construction of the rule, again contradicts the leading case of Peacock *v.* Bell, and confounds all distinction between Courts of general and limited jurisdiction. Even as to the latter, its record asserting the fact, becomes *prima facie* evidence. In such case there is no need of presumption; there is direct proof. And does the rule mean to say no more in respect to a Court of record? It seems to me a solecism."

The case of Beaubien before referred to, is believed to be directly applicable to the one now before the Court.

In that case, the Municipal Court of Chicago had jurisdiction only in cases when the cause of action arose in the city of Chicago, or when the parties resided in Chicago, or county of Cook. "The declaration contained no averment that the plaintiff and defendant, or that the defendant resided, at the time of the commencement of the suit, in the city of Chicago," and it was insisted that the Court had not jurisdiction, but this Court say: "The note may have been executed in Chicago, which would have given jurisdiction. The plaintiff and defendant may also have resided in Chicago, or the county of Cook. In one of those ways, the Municipal Court may rightly have had jurisdiction both of the person and of the cause of action; and as it does not appear from the declaration, but that some one of the facts existed which would have given the Municipal Court jurisdiction, this Court is bound to intend, that the Municipal Court had jurisdiction both of the person and of the subject matter of the action." Apply the principles laid down in Beaubien's case, to the case now before the Court. It does not appear from the record, that the defendant served with process in St. Clair county, did not reside in said county, and the nat-

ural presumption would be, that he resided where he was found. Is this Court bound to intend that a party served with process in Cook county, resided in Cook county, unless the contrary appears, and not bound to make the same intendment as to a person served in St. Clair county? It is impossible to conceive of a case more directly applicable to the one now before the Court, in the principles involved in each as to jurisdiction, than that of Beaubien. Will this Court overturn the doctrine so strongly laid down in the above cases, and not only refuse to infer that the defendant resided in St. Clair, where he was served, but in the absence of any evidence, infer that he did not reside there, and that a Court of general jurisdiction acted without authority? This would be reversing the rule, and presuming against the jurisdiction of a superior Court, which this Court has solemnly decided it is bound not to do.

The case of Gillett *v.* Stone, 1 Scam, 539, is also believed to be in point. In that case the process issued to a foreign county, where all the defendants were served. The declaration contained an averment that the plaintiffs resided, and the cause of action arose in the county where the suit was brought, but it did not contain any averment as to the residence of the defendants. The language of the statute in a case where the cause of action accrues in the county of the plaintiffs, is, "that process may issue to the sheriff of the county where the defendant resides." If, in the case now before the Court, it be necessary to aver that the defendant served in St. Clair county, resided in St. Clair, or the Court will infer the contrary equally, would it be necessary to aver that the defendants resided in the foreign county to which process was sent in the case of Gillett? But this Court decided in that case, that the averment that the plaintiffs resided, and the cause of action arose in the county where the suit was brought, was sufficient to give the Court jurisdiction, although there was no allegation as to the residence of the defendants. It is not easy to perceive why it is necessary to allege the residence of the defendants, when part reside in the county where suit is brought, and not necessary to allege it where all the defendants reside

out of the county. The statute, in the same section, uses the word, "resides," in reference to both cases, and unless this Court would give to the word different meanings, it cannot hold an allegation of residence necessary in the present case, without directly overturning the decision in the case of Gillett.

None of the cases referred to by the plaintiffs, as decided by this Court, are applicable. They were all cases where the process for all the defendants was sent out of the county where the suit was brought, and the defendants there served, the declaration containing no allegation to give the Court jurisdiction. Such is the case of Key *v.* Collins, 1 Scam. 413, and of all the other cases. In none of the cases were any of the defendants served with process in the county where suit was brought.

Thus far the question of jurisdiction has been presented as if it were admitted, that the true construction of the statute would not allow defendants to be sued in a case like the present, unless some of them had a permanent residence in the county where the suit was brought, and the Court has been called upon to sustain the jurisdiction in this case, upon the authority of the cases above cited, and upon the ground that the Court is bound to intend, if such "permanent" residence be necessary, that the defendants served in the county where suit was brought, did permanently reside there, in the absence of any evidence in the record that he did not so reside.

But there is still another ground upon which the jurisdiction must be sustained.

The statute does not require that some of the defendants should be permanent residents of the county where the suit is brought. The word "resides" may very properly be construed to mean, actually being or residing at the time, so that notice could be served upon the defendants. Our statute is almost a literal copy from a statute which has existed in Kentucky for many years, and such is the construction that the Courts of that State have put upon the word "resides." In the case of Moore *v.* Smith, 2 B. Monroe, 341, the Court, in putting a construction upon their statute,

say: "The legislative intent may be supposed to have been, that if suit should be brought where, according to law, it might be instituted, that is, in any county where any defendant was actually living, in other words residing at the moment, and could be served with notice, process might be issued against any other co-defendant to any other county where he might, in like manner, happen to be at the time; and this appears to us to be the only useful and consistent interpretation; otherwise, if two joint obligors domiciled in another State, should be sojourning in Kentucky for a season, each for example in a different county, both could not be sued, because no suit could be brought in the county in which either of them resided, interpreting *residence* as synonymous with *domicil.*"

In Arkansas, if one of the defendants resided in the county where the suit was instituted, that was sufficient to confer on the Court jurisdiction of the case. The party objecting to the jurisdiction, if he relies upon the fact that none of the defendants resided in the county, must make that fact appear by plea to the jurisdiction, and if he failed to do so he cannot afterwards avail himself of the objection. "The right of being sued in the county where some one of the defendants resides, when they reside in different counties, is a personal privilege of which the defendants may avail themselves by a proper plea to the jurisdiction of the Court;" but unless the party objecting to the jurisdiction shows the fact upon the record, that none of the defendants were residents of the county where the venue is laid, the Court cannot judicially know it, and "it is not usual, nor considered necessary to allege in the declaration, in what county each defendant resides." Hughes *v.* Martin, 1 Ark. 463.

So, in Massachusetts, the statute provides that transitory actions shall be sued within the county where either the plaintiff or defendant lives. The Courts of that State say: "This remedy was given to the defendant. He may consequently waive it; and he must be considered as waiving it unless he seek it by plea in abatement to the writ. For the exception is not to the jurisdiction of the Court of Common

Pleas, which has cognizance of all transitory actions above the value prescribed, in the statute, but is to the writ as sued out and returned in a wrong county." Cleveland *v.* Welsh, 4 Mass. 591 ; 5 do. 96.

According to the above authorities from Arkansas and Massachusetts, the objection to jurisdiction, if available at any time, could only be taken advantage of by plea in abatement. But it is insisted upon the authority of the case of Moore, above referred to, that had it been made to appear by plea that the defendant served in St. Clair, was only temporarily there, it would not have defeated the jurisdiction, for, as has been well said, if it be necessary that some of the defendants should be permanent residents of the county where suit is brought, before process can issue to an adjoining county for other defendants, several joint obligors who are residents of some other State could not be sued at all in Illinois, if they happen to be temporarily in this State in different counties, because it would be impossible to bring the suit in a county where either permanently resided. The legislature surely never intended such absurd consequences to flow from the law in question, nor does the language used require such a construction.

The Opinion of the Court was delivered by

PURPLE, J.* The defendants in error sued the plaintiffs in error in the Circuit Court of St. Clair county, in an action of covenant, claiming damages for the breaches of covenants in a deed made and executed by the said plaintiffs to the ancestor of the defendants.

The summons issued in the suit was served on Semple, in St. Clair county, on the 13th day of May, A. D. 1845. A summons was issued against Cairns to the sheriff of Monroe county, which was served on him on the 13th of September following, in said last mentioned county. Both

* THOMAS, J. having been of counsel in this case, did not sit at the hearing. The case was argued at the December term, 1846, a re-hearing granted, and finally decided at this term.

summons were issued on the same day, May 13th, 1845. The declaration contains no averment as to the place where the cause of action accrued, or of the residence of any of the parties, plaintiffs or defendants.

At the October term, 1845, a judgment by default was entered against the plaintiffs, and a jury called and sworn, who assessed damages against them to the amount of $2319.

On the 20th of October, 1845, Semple appeared and filed a motion in arrest of judgment, which the Court sustained, upon the ground that some of the counts in the declaration were defective, the jury having assessed damages generally upon all the counts. The cause was removed to the Supreme Court by the present defendants in error, where, at the December term, 1845, the judgment of the Circuit Court was reversed, and the cause remanded for further proceedings.

At the May term, A. D. 1845, of the St. Clair Circuit Court, the defendants filed the transcript of the order and proceedings of the Supreme Court, and entered a motion for a judgment upon the verdict of the jury. Semple appeared and moved for a continuance of the cause to the next term, upon an affidavit filed by him, which being adjudged insufficient by the Court, the motion was overruled. The defendants then entered a *remittitur* of damages to the amount of $344, and the Court gave judgment against Semple and Cairns upon the verdict of the jury for $1975.

The only question arising upon the assignments of errors in this case which we feel called upon to notice is, whether the Circuit Court had jurisdiction over the persons of the plaintiffs in error.

The Act of January 29, 1827 (Rev. Laws 1833, p. 145), provides, "that hereafter it shall not be lawful for any plaintiff to sue a defendant out of the county where the latter resides or may be found, except in cases where the debt, contract or cause of action accrued in the county of the plaintiff, or where the contract may have specifically been made payable, when it shall be lawful to sue in such county,

and process may issue against the defendant to the sheriff of the county where he resides; provided, that where there are several defendants living in different counties, the plaintiff may sue either in the county where the cause of action arose, or in any county where one or more of said defendants may reside and shall have the like process against such as reside out of the county where the action shall be brought as above." This suit is sought to be maintained under the proviso above recited.

This statute authorizes the Circuit Court to send its process to a foreign county in three cases: 1st. Where the contract or cause of action accrued in the county of the plaintiff; 2nd. When suit is brought in a county where the contract is specifically made payable; 3rd. Where there are several defendants who reside in different counties.

This Court has frequently been called upon to decide questions pertaining to the exercise of jurisdiction on the part of the Circuit Courts under the provisions of this law. In the case of Clark *v.* Harkness, 1 Scam. 56, a suit was commenced in Adams and the process issued to Morgan county: *Held*, that there should have been a special averment in the declaration of one of the causes enumerated in the Act to give the Court jurisdiction.

In Key *v.* Collins, 1 Scam. 403, it was also decided, that where process had issued from the county of Morgan to the county of Pike, the Circuit Court had no jurisdiction, the declaration containing no averment that the plaintiff resided in Morgan, or that the cause of action accrued in that county, and that under the first clause or provision of the statute, the cause of action must accrue, and the plaintiff reside in the county where the suit is commenced.

The same doctrine is re-affirmed in the cases of Shepherd *v.* Ogden, 2 Scam. 259; Wakefield *v.* Goudy, 3 do. 133; Brown *v.* Bodwell, 4 do. 302, and Clark *v.* Clark, 1 Gilm. 33. None of these cases referred to precisely meet the question now under consideration. It must be admitted, however, that they settle beyond controversy, this principle: That wherever and whenever a Circuit Court sends its pro-

cess beyond the limits of the county in which the suit is brought, its jurisdiction must be shown by express averments in the declaration. It is admitted that any defendant may be sued in any county where he may "be found;" and this is all that is determined by the cases of Beaubien *v.* Brinkerhoff, 2 Scam. 270, and Brewster *v.* Scarborough, *ib.* 280. The doctrine is, that when such defendant comes within the territorial jurisdiction of a Court, process may issue against him, and he be compelled to appear and answer, notwithstanding he may reside in a different county from that in which the suit is brought. I apprehend that this is a principle of the Common Law, which has been adopted by statute in this State, and in no way altered or supplied by any legislative action.

In this case, Semple, at the time process was served on him, was found in the county of St. Clair. The Circuit Court of that county had jurisdiction over his person. But does it follow, that, because a Court has obtained jurisdiction over the person of one of several joint obligors, that such jurisdiction necessarily extends to others, who reside beyond the territorial limits of the county in which the suit is pending? What does the law require to authorize the Court to send its process against Cairns to the county of Monroe, where he resides? Clearly it must be, that the residence of Semple is in the county of St. Clair. In what manner is this fact to be shown?

It is contended, that for this purpose, the return of the sheriff upon the writ is sufficient evidence. We cannot assent to such a doctrine. It is directly opposed to all the former decisions of this Court, which determine, without exception, that where extra-territorial jurisdiction is assumed, it must be claimed by positive averments in the declaration.

By the proviso of the statute under which this suit is brought, the same might have been commenced where the cause of action arose, or in a county where either of the covenantors resided. Had it been commenced in the county where the cause of action arose, can there be a reasonable

pretence, under the decisions of this Court, for contending that the facts conferring jurisdiction need not have been specially alleged in the declaration?

The return of the officer only proves, that he served the process at the time, in the manner, and at the place mentioned in his return. This is all he is authorized or required by law to do. It proves that the party who is served with process was in his county at the time of service, and there is no principle of law, which makes the return of such officer evidence of the domicil of a defendant. It is the opinion of the Court, that there is nothing in this record showing that the Circuit Court had jurisdiction over the person of the plaintiff Cairns.

It was insisted on the argument, that the Courts in Kentucky, under statutes similar to ours, have held a different doctrine. A statute of that State, passed in 1796, reads as follows: "When two or more persons are bound jointly and severally in any bond or writing obligatory, and the persons so bound shall reside in different counties, it shall be lawful for the clerk of the Court, where the suit is brought against one of the obligors, to issue a *capias ad respondendum* against the other obligor, or obligors, directed to the sheriff of the county where they may reside;" and also by a subsequent Act, passed in 1812, it is provided that, "in every species of personal actions where there is more than one defendant, the plaintiff, commencing his action in the county where either of them resides, may issue any writ or writs to any county where the defendants, or any of them, may be found."

In the case of Moore *v.* Smith, the Supreme Court of Kentucky decided, that the description of persons mentioned in these Acts, might be sued in any county in the State, where either of them might be found; and that when process had been served on one, the others might be brought in from foreign counties, even though some of them were non-residents of the State; that the Acts were both in force, and not inconsistent with each other; and, that the right to sue was not confined to the domicil of one of the obligors; that the word "reside," as used, in these Acts, might properly be con-

strued to mean wherever the defendants might happen to be at the time of service. This part of the decision was unnecessary, and would hardly bear criticism. We apprehend that there is a plain and manifest distinction between the statutes of Kentucky and this State.

By the Kentucky Act of 1796, if the obligors in a bond or writing obligatory, reside in different counties, it is made lawful for the clerk of Court, where the suit is brought against one of the obligors, to issue process against the others to the county where they may reside. By this provision, the jurisdiction of the Court to send its process to a foreign county does not depend upon the residence of the obligor first sued, but it arises from the fact of the institution of a suit against him at any place where he may happen to be found. Again, by the subsequent Act of 1812, the jurisdiction of the Court, when the action is commenced in the county where either of the defendants resides, is extended to any county where the said defendants, or either of them, may be found. The Court, in the decision before referred to, construed these Acts together, considered them both in force, and the Common Law jurisdiction of the Court over all parties who might come within its usual territorial jurisdiction, still existing, and in no wise affected or altered by the statutes; and placed considerable stress upon a usage and practice which had long prevailed, and been considered settled and established in the State. The case and the one at bar are not parallel. But if they were, although the former is entitled to respect, we should not feel justified in departing from the spirit of the adjudications which have been made by our own Courts, so repeatedly, that they ought to be considered as settled law.

A point has been made by the counsel for the defendants here, and not without much plausibility, that the judgment in this case cannot now be reversed for want of jurisdiction in the Court below, for the reason that the cause having been once before in this Court, brought here by the present defendants in error, passed upon by this Court, and the judgment of the Circuit Court reversed, that it is now too late

to raise the question of the jurisdiction of the Circuit Court. This question is not clear of doubt, and for this reason I have carefully examined the authorities, and considered them in connection with the established rules and practice of this Court. The substance of the decisions seems to be, that when a case has been once decided on its merits, and the same cause shall, at a subsequent time, be brought before the same tribunal, the Court will not go behind its former adjudications, even though it shall appear upon the record that the Court acted without jurisdiction; that a superior Court cannot review or reverse its own decisions solemnly made. 5 Cranch, 314; 6 do. 267; 10 Wheat. 431, 432; 1 do. 304; 7 do. 58; 12 Peters, 492; 7 Metc. 286.(*a*)

I have looked into all these cases. Those contained in the U. S. Reports are principally, and I believe all, cases in which the same party had a second time removed the cause from the Circuit to the Supreme Court of the United States, after the same had been heard in both Courts upon the merits, and remanded for further proceedings; and in which, such party sought to assign errors upon the record, which had occurred prior to the first adjudication in the Supreme Court. That of Booth *v.* The Commonwealth, 7 Metc. 286, was a second writ of error brought by the plaintiff. To the first, there had been a plea of *in nullo est erratum*. Shaw, Chief Justice, said: "On such a plea, any error apparent on the record may be assigned, and the entire validity and legal correctness of the judgment are open, and of course decided. Upon the principle of *res judicata*, the plaintiff in error is now estopped from denying that the supposed error, now insisted on, was not considered and adjudged against him by the affirmance of the judgment." "New errors may be assigned *viva voce* at the hearing, taking care that the adverse party is not surprised; and that has been frequently done; and if the judgment be erroneous, in the particulars thus indicated, though not in the particulars assigned for error, the judgment will by reversed." In this Court the defendant in error is not permitted to assign errors, and the constant rule of practice has been, to notice no errors or irregularities in the record or

(*a*) Hollowbush *v.* McConnel, 12 Ill. R. 204.

proceedings, which have not specially been set down and assigned for error. Consequently, the presumption that the question now before the Court is *res adjudicta*, is not raised. In this Court it will be presumed, when a party sues out a writ of error and brings his case here for adjudication, and the same is determined upon the merits and errors assigned, that he has no further objection to urge against the record, and that if errors exist, which are not so assigned, that they are waived. The parties are mutually entitled to this right—no more. In this case, it is the opinion of the Court that Cairns, at least, has done nothing which can be considered as amounting to a waiver of his privilege.

The judgment of the Circuit Court is reversed with costs.

TREAT, J., dissented.

Judgment reversed.

MICHAEL CARROLL *et al.*, plaintiffs in error, *v.* WILLIAM CRAINE, defendant in error.

Error to Madison.

Under the mechanics' lien law, the petitioner is required to prove his contract as alleged, in order to entitle him to recover. He cannot abandon, or depart from his special agreement as laid, and recover upon a *quantum meruit*. (*a*)

A petition for a mechanics' lien alleged the making of several contracts, providing for the payment of specific sums for certain labor, &c., and also, that while the work was progressing, the petitioner was employed to do certain extra work, for which he was to be paid as much as it was reasonably worth. The answer, denying one of the contracts as set up in the petition, alleged that the sum to be paid for a particular job included the extra work done. The evidence showed that the parties met for a settlement; that the petitioner made an account of his labor in a book, and that, after some conversation, he wrote something in the book, arose from his seat, throwing down the book, and said: "We will make it $1500." The witness stated that he understood it to be a final settlement of the accounts of the parties, and that they appeared to be satisfied: *Held*, that the evidence showed a final settlement.

PETITION for a mechanics' lien, filed in the Madison Circuit Court by the defendant in error against the plaintiffs in error,

(*a*) Van Court *v.* Bushnell, 21 Ill. R. 625; Stein *v.* Schultz, 23 Ill. R. 646; Brady *v.* Anderson, 24 Ill. R. 110; Martin *v.* Eversoll, 36 Ill. R. 222.

and heard at the August term, 1847, before the Hon. Gustavus P. Koerner, when a decree was rendered for $901.25, in favor of the petitioner, and a sale of the premises ordered to satisfy the same.

The substance of the bill, answer and evidence is stated by the Court.

J. Gillespie, N. G. Edwards and L. Davis, for the plaintiffs in error, relied upon the following authorities: Green *v.* Vardiman, 2 Blackf. 328; Simson *v.* Hart, 14 Johns. 63; Hart *v.* Ten Eyck, 2 Johns. Ch. R. 62; 7 do. 75, note; Kimball *v.* Cook, 1 Gilm. 423; Garrett *v.* Stevenson, 3 do. 261; Loveridge *v.* Botham, 1 Bos. & Pull. 49.

W. Martin, for the defendant in error, argued that the evidence sustained the allegations of the petition.

The Opinion of the Court was delivered by

Caton, J.* This petition was filed by the defendant in error to enforce a mechanics' lien for work done on the Catholic church in the city of Alton. The petition sets forth four special contracts under which it is alleged that the work was done.

It is averred that by the first, which was made in April, 1844, Craine contracted to do the carpenter's work on the church for $1000.00, which work is particularly specified in exhibit A. Craine was to commence the work immediately, and the money was to be paid him within one year from the completion.

The second contract, it is averred, was made in the spring of 1845, by which Craine agreed to put up the pews in the church, for which he was to receive $500.00, payable within one year from the time of the completion of the work.

It is further averred, that while the work under the two first contracts was in progress, Craine was employed to do cer-

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

tain extra work upon the church, which amounted to $721.26, for which he was to be paid what it was reasonably worth, within one year after the said work should be completed.

Fourth, that Craine superintended the building, and made the plans of the church, commencing in April, 1844, for which it was agreed he should receive as much as it was reasonably worth, which was to be paid in one year after the completion of the church, and that said services were worth $400.00.

The petition further avers, that the work done under the three first contracts, was completed on the 14th July, 1845. It is further averred, that the work was done according to the several contracts, and that no part of the money due him therefor has been paid, and concludes with the usual prayer.

The only answer which it is necessary to notice, is that of Carroll, which admits the making of the first contract substantially alleged in the petition, except the time of payment, for which no particular time was agreed upon, but that the money was to be paid as he could pay it, after the work was done.

The answer denies the making of the second contract, as alleged, but admits that he made a contract with Craine in the spring of 1845, for the putting up of the pews in the church, but denies that he was to receive $500.00, for putting up the pews alone, but that it was agreed between the parties, that Craine was to have $500.00 for putting up the pews and extra work and jobs, not included in the $1000.00 contract.

The answer denies the making of any other contract with Craine, and that he was never employed to do any other work on the church of any kind, and all that he did was included in the two aforesaid contracts, for the doing of which he was to receive $1500.00 and no more. Of this, the answer avers, that he has been paid the sum of $1055.96½, leaving still due him, the sum of $444.03½.

The answer further avers, that in July, 1845, after the work was completed, the said Carroll and Craine had had an

accounting and settlement together, for the said work and services done and rendered by said Craine on and about said church, when Carroll requested Craine to enter his account in his own handwriting upon the church account book kept by Carroll, whereupon he entered on said book the following:

"William Craine's account with church, per first contract $1,000
extra, pews, seats, &c. 500";

that Craine never set up, or pretended to have any other claim or demand for said work and services till the commencement of this suit.

A replication was filed and the cause was tried by the Court without a jury, who found for the petitioner, and rendered a decree for $901.25, to reverse or modify which, this writ of error is prosecuted.

As it was agreed by the counsel here, that the defendant in error has been paid the sum of $1055.96½, and as the plaintiffs' counsel have consented that the decree shall be affirmed for $434.03½, the amount admitted by Carroll's answer to be due to Craine, under the contracts which it is admitted were made; we are relieved from the necessity of examining the record any further than to ascertain whether the petitioner can recover any more than that amount, to prevent which, the plaintiffs' counsel insist upon all their legal rights.

The answer denies in positive and unqualified terms the making of the two last contracts, under which this excess is claimed, and we have sought in vain, among the evidence sent up, for any proof to establish them.

By the law under which this proceeding was instituted, the petitioner is bound to prove his contracts as laid in order to entitle him to recover. He cannot abandon or depart from his special agreements as laid, and go as upon a *quantum meruit*. Kimball *v.* Cook, 1 Gilm. 423. This seems to be an insuperable bar against his recovering more than for the work done under the contracts as laid and proved, no matter how much the evidence may show him to be justly entitled to for other work. It is most probable, that in the

Court below, the contest was upon the amount actually due for the work done, without adverting to the state of the proof in relation to the contracts, and that had the attention of the Court been directed to that subject, there would have been no occasion for prosecuting this writ of error. As the record stands (and by that alone must we decide this as all other cases), there is no possible way of making out a case for the petitioner, for more than the amount admitted to be due by the answer.

Although there can be but little doubt that Craine, from a change of plans and style of work, did a considerable more than was contemplated at the time of the making of the second contract in the spring of 1845, yet we are inclined to the opinion that he is concluded by the settlement made with Carroll, about the time of the completion of the work.

The witness, Buck, states that some week or two after the dedication of the church, and after the work had all been done upon the church, except putting up the bell-frame, which the hands were doing at the time, Craine and Carroll were in the room of the latter; that they commenced to settle accounts between nine and ten o'clock in the morning; that Craine did all the writing on that occasion. They first spoke of the board, and that after being engaged some time, they spoke of the $1000 contract; and after that, one of the parties said: "What about the pews?" When, as witness thought, Carroll said: "they were to be $400. We have not spoken of them since we were on board the steamboat, but I want you to do what is right between yourself and the church. I have no personal interest in the matter." Carroll stood in a maze, by which the witness afterwards states, he means he was standing or musing, and then wrote upon the book, and got up and threw down the book, and said, "we will make it $1500"; when both parties went to dinner, and did not again return to the room. The witness says he understood it to be a final settlement of their accounts. The parties seemed to be satisfied, and on good terms all the time.

This account book was produced on the trial. On the left hand side of one of the page, is an account of payments

amounting to $1055.96½, and opposite to which on the right hand side of the page, admitted to be in the handwriting of Craine, is written:

"William Craine's account with church, per first
contract $1,000.00
extra, pews, seats, &c. 500.00."

This is all of the evidence on the subject of that settlement, and although the other evidence in the case shows that the work done by Craine, not included in the first contract, was worth a very considerable more than $500, or allowing $500 for the pews (and one Bremen says that he once heard Carroll say what he was to give $500 for making the pews, but cannot tell at what time), the work beside them, amounted to a considerable sum. We are much inclined to the opinion, that this evidence, all taken together, shows that the parties at that time, agreed that Craine should be allowed $1500 for the work done under the first contract, and for the extra work, pews, seats, &c., including all the work that he had done on the church. We may well believe that there was a misunderstanding between the parties, as to the nature and extent of the second contract. It was never reduced to writing in form, but rather existed in loose conversations, and tacit understandings, each probably reposing great confidence in the other, and neither anticipating any difficulty. That the plan of the building was materially changed after the spring of 1845, the proof clearly establishes, yet it is altogether probable that nothing was said between the parties on the subject of the additional expense, Carroll not anticipating that the expense would be very much increased, and Craine expecting that Carroll would be willing to allow him what was right. In this state of feeling the parties met, at the time of the settlement spoken of, while their friendship still subsisted, and their mutual confidence in each other remained unimpaired; and in that state of feeling, Craine determined, rather than to have a misunderstanding with the Priest, to sacrifice the additional amount that he supposed himself entitled to, this feeling being undoubtedly promoted by the generous appeal made by Carroll, when he

said, "I want you to do what is right between yourself and the church—I have no personal interest in the matter." Under these influences and sentiments he consented to take $1500 for his work on the church. Upon subsequent reflection, and after making a clear estimate of the increased expense, occasioned by the change of plans, he became dissatisfied with the amount thus agreed upon, and thought he was justly entitled to more, and persuaded himself that he ought not to be bound by that arrangement. This, undoubtedly, led to the subsequent difficulty and the institution of this suit.

Upon the whole record, we are of opinion that the decree will have to be modified so as to allow the petitioner his lien upon the church for $444.03\frac{1}{2}$, with interest thereon from the fourteenth day of July, 1845, together with his costs in the Court below, and that each party pay one half the costs of this writ of error.

Decree modified.

JOHN FRINK, Junior, appellant, *v.* ABSALOM B. MCCLUNG, impleaded, &c., appellee.

Appeal from Peoria.

Before a Court of Chancery will entertain a bill praying for a new trial on the ground of accident, loss of papers, &c., it must sufficiently appear to the Court that error was committed by the decisions of the Court at Law in matters of substance.

An interest which will render a witness incompetent must exist at the time when he is offered for examination, or when his deposition is taken.

An honorary obligation will not constitute a disqualifying interest in a witness.

All exceptions to depositions, which go to the form of the same, or to the incompetency of witnesses must be made before the case is called for trial and submitted to the jury. Objections to their substance, however, may be made on the trial.

BILL IN CHANCERY, for a new trial, &c., filed in the Peoria Circuit Court by the appellant against the appellee, and

finally heard before the Hon. John D. Caton, at the October term, 1847, when the injunction was dissolved and the bill dismissed.

So much of the record as is material to the determination of this case, is adverted to by the Court in their Opinion.

H. O. Merriman, for the appellant.

O. Peters, and C. Ballance, for the appellee.

The Opinion of the Court was delivered by

Koerner, J.* This was a bill in Chancery, filed in the Peoria Circuit Court, to the October term, 1845, praying for an injunction, and asking relief by granting a new trial out of Chancery in a certain cause theretofore decided in the Circuit Court of said county, wherein one A. B. McClung was plaintiff, and Frink and Trowbridge were the defendants. In this bill, as amended, Frink was the sole complainant, and said McClung, Trowbridge and S. Frye, the sheriff of Peoria county, were the respondents. McClung answered, not under oath, the same having been waived by complainant; the other defendants made default. The answer denies many substantial allegations in the bill. The complainant replied generally, and depositions having been taken by both parties, the cause was finally heard at the October term, 1847, and the Court dissolved the injunction and dismissed the bill. From this decree, the complainant Frink has taken an appeal to this Court.

The record is so exceedingly voluminous, that it would be impracticable to give more than a very general outline of this case, which is presented in a record covering about eighty closely written pages.

At the October term, 1840, McClung, the respondent below and appellee here, sued Frink and Trowbridge in *assumpsit*, claiming compensation for his services in carrying the

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

mail under a certain agreement, from some time in February, 1838, to the first of January, 1840, and also damages for being prevented from carrying it from said first day of January, 1840, to the commencement of the suit. From the language of the pleas, as given in the record from the recollection of Frink's counsel, it is fairly inferrable that there were several counts in the declaration, though it does not appear with certainty that it contained the common counts. Several pleas were filed, and issues joined thereon, and finally, at the April term, 1842, the cause was submitted to a jury, who found a verdict for plaintiff, amounting to $330.33. During the pendency of the suit, and upon the trial, various exceptions to the decisions of the Court were taken by defendants' counsel, a motion was made for a new trial, which was overruled, and the decision of the Court also excepted to. Judgment was rendered by the Court for the amount of said verdict. The Court being on the eve of adjournment for the term, when said motion was decided, it was agreed by the counsel for both parties, that a bill of exceptions might be prepared after adjournment, to be signed by the then presiding Judge of that Circuit in vacation.

An appeal was prayed for and granted, and the appeal bond executed by defendant, Frink, and security. The bill of exceptions was prepared, and, together with all the original papers in the case, came into the hands of the Judge in vacation. Said bill of exceptions, and a great portion of the material papers in the case were casually lost, and have not been recovered. The appeal taken to the Supreme Court was consequently dismissed for want of a record, and Frink and Trowbridge obtained a stay of the execution issued upon the judgment, with a view to have the original papers supplied below, so as to enable them to make up another bill of exceptions, and to procure a reversal of the judgment. The proceedings under this motion to set aside the execution, extended through several terms, and finally proved unsuccessful, the Court overruling said motion, on the ground, as it is alleged, that defendants' counsel were unable to properly supply the pleas which had been lost with other papers.(*a*)

(*a*) Troy *v.* Reiley, 3 Scam. R. 19; Archer *v.* Spillman, 1 Scam. R. 553.

As before stated, the object of the bill is to obtain a new trial at law, for the reason that by the loss of the papers in the cause, as the complainant alleges, he has been deprived of his important right to appeal and to have the errors, which he avers have been committed to his disadvantage, corrected by the proper tribunal.(a)

The jurisdiction of a Court of Chancery to afford relief in a proper case of this kind, is undoubted. Concerning the loss of these papers, the respondent, McClung, at least, has no right to lay the blame on the complainant. It is very true that the practice of preparing bills of exceptions and having them signed by the Judge in vacation, is one which is frequently productive of embarrassments, and is in strictness, irregular. But necessity has often induced, and the practice consequently sanctioned such a proceeding to a certain extent, though it is very desirable that it should be resorted to only in cases of the utmost necessity. In this case, however, the counsel for McClung assented to its being done, and of course cannot now object to it. But before a Court of Chancery will extend relief in cases of this class, it must necessarily inquire into the substantial merits of every case. It is not enough that it should be satisfied that a loss or accident actually has occurred, which possibly might have deprived a party of his rights, but it has first to institute an inquiry, whether, in fact, important rights have existed, the assertion of which has become impracticable through such casualty. In other words, it must sufficiently appear to the Chancellor that error was committed by the decisions of the Court at Law, on matters of substance, before it will restore the parties to their original position. It would be unjust in the highest degree to the successful party in the Court at Law, to allow to his adversary the experiment of another trial, if it were apparent that the Court decided correctly the first time, or at any rate decided in such a way as could not have affected the merits of the case. We must examine, then, into the alleged errors of the Court, and unless we are convinced that they were such as to have made it probable in the highest degree, that they would have pro-

(a) See Beams v. Denham, 2 Scam. R. 60; Crafts v. Hall, 3 Scam. R. 132.

duced a reversal in the Court of appeal, we cannot reverse the decree which was rendered by the Court below.

It is proper, however, that another, and it might be said, the main feature in this bill, which the complainant has prominently placed in the foreground, should be adverted to before proceeding further. The bill, besides alleging that errors prejudicial to complainant have occurred, sets out at length another unfortunate accident attending the trial of this cause, and much pains appear to have been taken to establish it by proof. It is contended in the bill, and has been urged on the hearing here, that that accident alone would entitle the complainant to the relief sought. We allude to the fact, that the complainant Frink was absent at the trial, and that certain receipts for $200, given by McClung for money paid him by Frink and Trowbridge, were also beyond the reach of complainant's counsel. The history of this portion of the case is something like this: At the trial Mr. Frink was in Washington City on important business with the Post Office department. The above mentioned receipts for $200 had some time before the trial, accidentally, as it is alleged by him, fallen into the hands of McClung, but had been given up by the latter under an order of Court, to the attorneys of Frink, at Peoria. McClung was indicted in Chicago for stealing these receipts, and for the purpose of using them on the trial, they were placed in possession of the prosecuting attorney at Chicago, by a partner of Mr. Frink. Previous to the trial, the counsel for Frink in Peoria applied for them to Mr. Walker, who called upon the prosecuting attorney for them. They happened to be mislaid and could not be found, and were consequently not forthcoming upon the trial. The bill of complainant ascribes the defeat of Frink and Trowbridge in the said suit, principally, to these untoward circumstances.

In regard to the absence of Frink, it is sufficient to remark, that it is not shown that it was unavoidable. Neither the act of God, nor any legal process prevented him from being present. When one has several important matters to attend

to, he must decide on their relative claims to his attention, and after having determined to prosecute one, runs the risk of the consequences, if he neglect another. It is not perceived, however, how his presence could have mended the matter. The receipts were mislaid, and as he had no knowledge where they were, his agency in the matter would have been of no avail. If Frink's counsel had thought it indispensably necessary to have these papers, in order to secure success at the trial, he ought to have made an effort at least, to have the cause continued. Under the circumstances, as far as we can now judge of them, he would have been entitled to a continuance. As he has not done so, he ought not now to complain.

It seems to be pretty clear, however, for several reasons, that the complainant is mistaken in supposing that the want of these receipts produced the unfavorable verdict. In the first place, according to his showing, McClung was entitled, under the contract, to $562.35. He did produce receipts to the jury, to the amount of $280.00. Now, if the jury had allowed that amount only, as paid, still their verdict could have been but $282.00, instead of $339.00. This hypothesis, then, fails to explain the verdict. But in the next place, the counsel for McClung gave in evidence a memorandum made by him from these identical receipts, while they were in his possession, stating the dates and amounts, making a little upwards of $200.00. This testimony, coming from the adverse party himself, was very conclusive, and it would be unreasonable, indeed, to suppose that they disregarded it. The original receipts were amply supplied by this testimony. The jury, then, in allowing $480.00 as paid by defendants, as they undoubtedly did, and still finding so much in favor of defendant, must have found that he was entitled to much more than the complainant was willing to allow him.

It is also alleged in the bill, that the testimony of one of the witnesses, who heard Frink admit, before the suit was commenced, that he owed the plaintiff, McClung, some inconsiderable amount, could be contradicted. But even if

this statement was much more distinct and explicit than it is, this would certainly be no reason for a new trial, as is well settled by many decisions.

We will now pass to the alleged erroneous decisions of the Court during the progress of the cause. It happens that certain objections were made as to the proper form, &c. &c., of the depositions of Hobbie and others, which the court overruled. The record does not show what they were, and, consequently, we cannot decide whether they were well founded or not. The presumption is, that the Court below decided correctly, A more serious objection was made to the depositions of Havens and Brown, and the record discloses the nature of it. Havens and Brown, at the April term, 1841, were present as witnesses for McClung. They were anxious to depart, and it was proposed to take their depositions. Frink consented to have their depositions taken, provided McClung would give security for costs. McClung, Frink not being then present, requested them to go his security upon the bond for costs, which they agreed to do. Their depositions were then taken, and the next morning they executed the bond for costs. The evidence is conflicting whether the fact of their having gone security was communicated to Frink or his counsel before the bond was executed, or not. The counsel learned it, however, very soon, and obtained, at the same term, an affidavit of one Bell, proving these facts. Upon the trial, these depositions were objected to, as being given by incompetent witnesses, and the affidavit of Bell was then read for the first time, and also the bond for costs, to which their names were affixed.

It is contended by complainant, that in a Court of Law, the depositions of a witness, who has become interested after their being taken, cannot be given in evidence. This rule, which is not recognized in Courts of Chancery, is said to be founded on a case in 1 Salk. 286, and on decisions made upon its authority, in 1 Pere Williams, 287, and 1 Strange, 101. It may well be doubted, whether, upon a critical examination, these cases do support the general doctrine, as asserted by complainant. They are all cases, where the

witness himself had become a party to the record, or where his depositions *de bene esse* had been taken before he became interested, in which latter case they were not permitted to be read on account of the existence of a mere technical rule, that such depositions can only be read in the event of witness' death. But even if the cases alluded to could be considered as establishing such a doctrine, we would not feel inclined to consider it as law. The correct and reasonable rule is certainly the one adopted by the Courts in Chancery, which is, that the interest which will render a witness incompetent must exist at the time when he is offered for examination, or when his deposition is taken. Mr. Greenleaf (1 Greenl. Ev. § 168), evidently assumes this to be the true rule.(*a*) It is suggested, however, that in the present case, inasmuch as the witnesses had agreed before they deposed, to become security for costs, they were really interested when their depositions were taken. It may well be admitted, that in honor and conscience, they were bound by their mere promise, but still, it is equally clear, that they were not legally bound to pay the costs, consequently, not legally interested until they had executed the bond. It nowhere appears, that they even believed themselves liable, after they had verbally agreed to become securities. Had they believed so, the question might not be of so easy solution, as the authorities are somewhat conflicting on that point. But most that we can presume in the present case is, that they might have felt under an honorary engagement, at the time they gave their testimony, to comply with their promise. It is laid down by all the writers on evidence, that an honorary obligation shall not constitute a disqualifying interest in the witness, and repeated decisions, both in England and in this country, have well settled this principle. 1 Campb. 145; 1 Strange, 129; 8 Johns. 462; 9 do. 219; 4 Wend. 292; 3 Pick. 108; 6 Conn. 365; 3 Gill & Johns. 282.

But there is another reason, why the decision of the Court in overruling the exceptions to the depositions on account of the incompetency of the witnesses, was not erro-

(*a*) N. E. F. M. I. Co. *v.* Wetmore, 32 Ill. R. 246.

neous. The fact of these witnesses having agreed to become securities before their depositions were taken, and of their having signed the bond, was made known to complainant about the time when it was done. The evidence to establish their supposed disqalification, was instantly prepared, Bell having made his affidavit on the 2nd of April, 1841, and yet no steps were taken, either at that term, or at the intervening term, or at the term when the case was finally disposed of (April term, 1842), previous to the trial, in order to exclude said testimony on account of this objection, which had rested in com plainant's knowledge for a whole year. The record shows that Bell's affidavit, and the bond for costs, were produced upon the trial, and the objection then taken for the first time. It is a well established and universal rule on the Circuit, which, in some or the Circuits is one expressly entered on the record, that all exceptions to depositions, which go to the form of the same, or to the incompetency of witnesses, should be made before the case is called for trial, and submitted to the jury. Mr. Starkie says: "The objection to incompetency ought to be taken, in the first instance, previous to an examination in chief, for otherwise the party objecting might suspend the objection for the purpose of obtaining an unfair advantage." Starkie's Ev. 122. Besides, were it otherwise, the trial would be interrupted, and the time of the jury taken up by hearing and deciding motions of this character. The objection was taken altogether too late, and the Court was well justified in overruling it. In regard, however, to the substance of the depositions, as well as of other testimony alleged to have been prejudicial to the plaintiffs' rights, the objection was properly made upon the trial,(a) and we have, therefore, to proceed now to an examination of the question, whether any testimony besides such as came from the Post Office department, in relation to the length of the mail route in question, could be properly received under the contract declared upon, or the state of the pleadings generally, as it appears to have existed. It is necessary, here, to state sufficient from the record to make the controversy on this point intelligible. In doing so, how-

(a) Pullman v. Gaty, 5 Gil. R. 190; Moshier v. Knox College, 32 Ill. R. 163; Fash v. Blake, 38 Ill. R. 369; Walker v. Dement, 42 Ill. R. 375.

ever, we must be careful not to confound the testimony taken by the parties to this bill of complaint, with the evidence as it appeared upon the trial, for it is the latter alone which we have to examine, in order to determine upon the correctness of the decisions of the Court.

In June, 1837, the Post Office department issued an advertisement inviting proposals for the transportation of mails, amongst others, on route No. 2807, from Ottawa to Bloomington, Illinois, sixty-five miles and back once a week, the service to commence on the first of January, 1838, and to terminate June 30th, 1842. On the 23rd of October, 1837, Frink and Trowbridge put in written proposals to carry the mail from Bloomington to Crow Meadow, (a place between Bloomington and Ottawa, though not on a direct line, but lying considerably west of both places, and consequently covering but a portion of the whole route from Bloomington to Ottawa), at ten dollars per mile per annum, which was recorded under the number 2807, and accepted by the department. On the first day of February, 1838, the plaintiff McClung on the one part, and Frink and Trowbridge on the other part, entered into the following agreement:

"The said McClung, for and in consideration of the compensation hereinafter expressed, to be paid him by the said Frink and Trowbridge, agrees with the same to transport the United States mail on horseback, from Ottawa, La Salle county, Illinois, to Crow Meadow, Illinois, by way of Hudson and Josephine, and back once a week until 30th June, 1842, inclusive; and said Absalom further agrees with said Frink and Trowbridge, to comply with all the regulations of the General Post Office and requisitions of all the U. S. laws in the transportation of said mail, and to preserve and save harmless the said Frink and Trowbridge from all liabilities which they may incur from being the original contractors for carrying said mail; and said Frink and Trowbridge agree and covenant to pay to said McClung or order, at the rate of eight dollars per mile per annum, for each and every mile in distance from Ottawa to Crow Meadow, by way of Hudson and Josephine; said distance to be ascertained and fixed

by the General Post Office department, and said payment to be made quarterly. And it is mutually agreed between said parties, that in case the General Post Office department shall make any alterations in said route, that the compensation for carrying said mail shall be raised as to distance, agreeably to said alteration; and said agreement shall still be binding and remain in full force in every other respect, &c., &c.

(signed) A. B. McClung.
Frink & Trowbridge."

On the 17th of May, 1838, an order was made by the Postmaster General directing the said contractors to commence at Crow Meadow, and run thence once a week by Hudson and Josephine to Bloomington, forty miles, at $400 per annum and back the same road; and the indenture was executed on the 17th of May, 1838; to take effect 1st January, 1838. The number of said route remainded the same as before.

Now, it is evident from this, that an error was committed by the department. The bid of Frink and Trowbridge was for the route from Bloomington to Crow Meadow, which was accepted, but this route was still called 2807, although this was the number of the route from Ottawa to Bloomington, as advertised. From the order made on the 17th of May, directing the contractors to run the route, for which they had really contracted, it is plain that they must have run a different route in the first place, under the misdirections of the department. McClung carried the mail from Ottawa to Crow Meadow by Hudson and Josephine, a distance, as alleged by him, of eighty-four miles, commencing some time in February, 1838, for about three months. From May, 1838, McClung carried the mail from Ottawa to Bloomington, sixty-five miles, as ascertained by the department, until the first of July, 1838, when he finally carried it on the route from Bloomington to Crow Meadow, forty miles, which was the route originally bid for by Frink and Trowbridge, and in accordance with the order of the department, made May 17th, 1838, until February, 1840.

Before the order of the department was made in May,

which came to be executed about the first of July, the mail was carried by different routes, and over a much greater distance than forty miles. Nevertheless, the department ordered that the indenture then executed with Frink and Trowbridge, the original contractors, should take effect from the first of January, 1838, covering five months of the service performed by McClung, under his express contract with Frink and Trowbridge, which was liable, it is true, to be altered as regards the routes, by the directions of the department, but was not altered to the forty mile route until July. It is our opinion, that he, as sub-contractor, was not bound to submit to such retrospective orders. It is known as a matter of history, that the Post Office department, it its dealings with contractors, manages things in a peculiar way, not altogether consistent with the scrupulous and legal notions of Courts of Law; that they consider the necessities of the service as overruling every other consideration; and that compensation for injuries sustained is not often voluntarily granted. The contractors know this, and consider the instability of their contracts before they enter into them. It is different with those who contract with the original contractors. If they were liable to conform to the ever changing, and often oppressive orders of the department, without having a claim for compensation on the main contractors, their situation would be bad indeed, as they have no means to urge and prosecute their claims in the department. The principal contractors, if their sub-contractors were to be affected by the rules of the department, and not they themselves, might take but little interest in pressing and obtaining just demands in the department, leaving the sub-contractors without any remedy at all. How could McClung, when he carried the mail for a while, first eighty miles, then sixty-five miles, have ever supposed that the department would allow only forty miles, the distance of the last route, as fixed by the department, and that all three different routes should be called one and the same, and should be considered as being all equally long? His contract with Frink and Trowbridge, when properly understood, means no such thing.

It appearing from the deposition of Hobbie, read at the trial, that the distance from Bloomington to Crow Meadow was fixed by the department, at forty miles, there is no question that McClung was entitled to compensation at that rate, from the first of July, 1838, until the first of February, 1840. This is not denied by Frink. The distance from Bloomington to Ottawa was also ascertained by the department (see proposals) to be sixty-five miles. On this route, the evidence shows, the mail was carried by McClung from the first of May to the first of July, or thereabouts. He is entitled to compensation for this service at the rate of sixty-five miles.

As against his recovering for services performed on the first route, from Crow Meadow to Ottawa, the one specified in his contract, it is urged that he failed to show that eighty-two miles was the distance, as ascertained by the department. If it anywhere appeared that the department had ever fixed the distance on that route, he would certainly be bound by such ascertainment. But for aught we know, it was never fixed, as no such route is spoken of either in the proposals of the department, the bid of Frink and Trowbridge, or in the subsequent order. In the absence of the action of the department, was McClung to lose his rights, by having obtained no standard by which to measure them? We think not. It was Frink's duty, when he was apprised of the claim, to have got the department to ascertain said distance, but it seems that he relied entirely on the fact that the department had fixed the distance of another and different route, which route it had pleased to direct might be considered as the original one.

There is another view of this matter, however. The witnesses who swear to the distance from Ottawa to Crow Meadow by Hudson and Josephine, as being eighty-two miles, were Postmasters on the route. They are agents, or rather parts of the department, and expressly swear that the head of the department fixes distances according to the information obtained from Postmasters. It is not perceived how their testimony, even if they could not be considered the department itself, could have prejudiced the complainant, as it is undeniable, that any

evidence of the length of the route, if it had been given by the department, would have been but the echo of their official statements. We think that, under all the circumstances of the case, the evidence was properly admitted. It is likely from the verdict that a small amount of damages was allowed to McClung, on account of the contract being taken away from him, before the time of service contracted for had expired. The evidence below is favorable to McClung on this point. It is shown that, by the direction of Frink, he was not permitted to carry the mail any longer, and no sufficient ground is made out, as far as the evidence on the trial below goes, for this rescission of the contract on Frink's part. The declaration of McClung not only claimed compensation for services performed, but also contained counts claiming damages for rescission of contract. Entertaining these views of the case, it follows as a necessary consequence, that we cannot see error in the decision of the Court in overruling the motion for a new trial, or in refusing the last instructions asked by Frink's counsel below, which assumed the ground that McClung was not entitled to recover, if he had failed to prove the length of the route from Ottawa to Crow Meadow was ascertained by the department, for carrying the mail on that route.

Being of opinion, then, that the rights of the complainant, in matters of substance, have not been prejudiced by anything that happened on the former trial, and that the loss of the papers could not have affected him, as a record of them would not have shown such errors as would have produced a reversal below, we come to the conclusion, that the Court below did not err in dismissing the complainant's bill and dissolving the injunction. Decree below affirmed with costs.

Decree affirmed.

LEWIS SHIRLEY, appellant, *v.* JAMES SPENCER, appellee.

Appeal from Winnebago.

Payment of the consideration money and possession of land under a parol contract, is sufficient to take a case out of the Statute of Frauds. (*a*)

It is the province of the Court to enforce a contract which the parties have made—not to make a contract for them, and then enforce it.

A being about to enter land, called on B for a specified sum of money due him. B was unable to pay the debt, and told A to hire the money on the best terms he could for him, and that he would pay him whatever he had to pay. The money was procured at an exorbitant rate for three years, &c., and the land was entered in the name of the person who loaned the money. B was informed of the arrangement and approved of it, but neglected to do as he had agreed in regard to payment. A was accordingly obliged to pay it to save the land: *Held*, that A was entitled to receive of B the amount paid by him to the lender, as he acted as B's agent only.

BILL IN CHANCERY, &c., filed in the Winnebago Circuit Court by the appellee against the appellant, and heard before the Hon. Jesse B. Thomas, at the May term, 1847.

The material facts will be found in the arguments of counsel, and in the Opinion of the Court.

A. T. BLEDSOE argued orally for the appellant, and submitted the following written argument of E. PECK and J. A. MCDOUGALL:

The case contained in the abstract may be now briefly stated thus:

In 1836, Shirley had claimed a half section in Winnebago county. He employed Spencer to go on to it and keep it, promising Spencer therefor, eighty acres or a hundred dollars, and the value of his improvements, who had the election as to modes of payment being in dispute. Spencer went on and kept the half section as he had agreed, and until the land sale. The premises to constitute the eighty of Spencer, were agreed on, except that the 17 acre tract was only ascertained by quantity and contiguity. There is no dispute but that Spencer performed by keeping the claim. Execution of this agreement by Shirley is asked by the bill. It appears, however, that previous to the land sale, Spencer

(*a*) Thornton *v.* Hrs. of Henry, 2 Scam. R. 218, and notes.

owed Shirley seventy dollars. It required a hundred dollars to enter Spencer's eighty acres. Shirley called on Spencer for the seventy dollars to aid in making his payment into the Land Office. Spencer appears to have suggested that he preferred the hundred dollars and the value of his improvements, but did agree that Shirley should go to Galena and enter the eighty acres for him, and as he was in default to Shirley the seventy dollars, he further agreed that Shirley should borrow the seventy dollars to replace his upon the same terms that Shirley should borrow for himself. Shirley went to Galena, borrowed the money for himself and Spencer, of one Taylor, for three years at thirty-three and a third per cent. per annum, and ten per cent. per annum thereafter, (these were about the rates, at the time and place). After Shirley's return, Spencer acquiesced in the arrangement, although he thought the interest high, saying he believed Shirley had done as well as he could. Afterwards Spencer refused to pay more than twelve per cent. per annum, and out of this question all the difficulty between the parties has grown.

It appears to have been understood that this indebtedness of Spencer was to be paid Shirley before Shirley conveyed. The question really in dispute was as to the amount to be paid.

The respondent's answer is not a very skillful piece of pleading, but it is supposed that this is more the fault of counsel than client. The main and substantial facts are, however, sufficiently averred and are sufficiently clear, if once separated from the rubbish.

The bill sets out a location by agreement of the timber lot which was nothing more than an agreement between the parties by proof. And the arbitration pleaded in the bill amounts to nothing. There is no proof of an agreement to submit on the part of the respondent. Their proceedings appear to have lacked the regularity to give them force under any circumstance, and it does not appear that either party acquiesced in the finding. Respondent has most emphatically dissented. Then there is no proof that Spencer ever performed his part

precedent to the conveyance to him under the arbitration. For a dozen reasons manifest, it is presumed that the finding of arbitrators was not regarded by the Court below, in rendering decree, and cannot be considered as of weight by this Court. But suppose the arbitration and award to have been regular and acquiesced in, yet Spencer has not complied with the conditions of the award; he did not tender the money and security, as directed by the award.

The questions, then, that suggest themselves as to the case presented, are:

First. Is the agreement averred and proved, such an one as resting in mere parol, is not reached by the Statute of Frauds?

Second. If the Statute of Frauds would reach the agreement, is it avoided by the possession of Spencer?

Third. If the parol agreement is binding, was the complainant, at time of filing his bill, entitled to a conveyance?

Fourth. Is the agreement proved sufficiently certain to authorize a decree of specific performance?

First point. It is clear that any parol agreement to convey lands held *in presenti*, is void. It is equally clear, that a similar agreement to convey lands to be acquired *in futuro* is void. That there was a consideration is nothing; for the full payment of purchase money does not release from the statute, and services are nothing more than money.

This is not to be confounded with those cases of implied trusts, the boundaries of which are well defined and jealously guarded. If A entrusts B with money, and B converts the money into lands, the land is A's, and the law will imply a trust. If A acquire a title in fraud of B, for the purpose of relieving against the fraud, the law will imply a trust. But, except in cases where the property of the *cestui que trust* is traced into the estate in question, and except in cases of fraud, the law implies no trusts, and trusts must be declared in writing, as agreements to sell or convey must be reduced to writing.

This agreement is a simple undertaking to convey land or money as a compensation for services, the agreement on both

sides being executory. It is not perceived that it possesses any features as an agreement, that would relieve it from the Statute of Frauds. For the purposes of the prosent case, whether or not Shirley had the choice of the mode of compensation is not considered material, although it might well be said, that as complainant had an adequate remedy at law, if there was a failure on the part of respondent, he should have been left to that, rather than be allowed at least a novel, if not a doubtful claim in Equity.

Second point. The Statute of Frauds does not, in terms, admit of any exception to the rule, that "no action shall be brought whereby to charge any person upon any contract, for the sale of lands, tenements or hereditaments, or any interest in or concerning them, unless the promise or agreement upon which such action is brought, or some memorandum or note thereof shall be in writing, and signed by the party to be charged therewith."

Our statute is the same in substance, with the Cro. Eliz. and was made to remedy the same evil. The policy of the law is, to prevent estates being defeated by mere parol testimony, which may be false, landed estates being specially guarded by the English law; also to remove the great temptations to perjury that would exist, could an estate in lands be defeated by parol testimony.

It has been with a view to this policy, as well as to the language of the statute, that Courts have held that this note or memorandum in writing, must be sufficiently certain to show clearly what particular land is to be conveyed under the agreement. If the memorandum should show an entire contract for a given number of acres, part defined and part undefined, then, as an entire contract must be good in *toto*, or void in *toto*, and as there would be a part here unlocated and undefined, upon which the Statute of Frauds must operate, it must be made to operate upon the whole agreement, leaving the party to his Common Law remedy for the consideration. If we assume that all the agreement alleged or proved had been reduced to writing, could a specific performance be enforced?

It is an entire agreement for eighty acres of land (saying

nothing of the alternative), for a consideration which is substantially in gross, and cannot be severed. The consideration has been paid; the Court is asked to compel a conveyance. The agreement ascertains sixty-three acres; seventeen acres of the eighty is altogether undetermined; it is to be located in a certain neighborhood, and out of a certain large tract; but this is just as indefinite for all practical purposes, as if it was located anywhere in the county. The particular land to be conveyed is not ascertained by the bargainor, and the policy of the law is to prevent Courts as well as witnesses, by parol, to ascertain this for him; and it is here assumed and insisted upon as law, that a Court of Equity cannot enforce the specific performance of any contract for the conveyance of land where, by the terms of the agreement, the bargainor has not ascertained the precise premises upon which the decree of the Court is to operate.

If this position be true, the Court below erred in decreeing an arbitrary location of seventeen acres of Shirley's land by a commissioner, who receives neither starting point, course, distance, monument or boundary, either in the agreement of the parties, or indeed, in the decree of the Court.

The Common Law left the parties to their damages for breach of contract. Equity has interposed, and has been clothed with the power to compel a specific performance, but the Court of Equity cannot do more or other than this; it cannot make a new agreement, it cannot modify or change; neither can it ascertain as part and parcel of an agreement, a matter left open and undetermined by contracting parties, and into which conclusion of the Court of Equity, the contract of the contracting parties never entered; as in this case, the commissioner locates seventeen acres; the Court compels its conveyance. It will not be contended, that Shirley ever agreed to convey these seventeen acres, or that the Court, in making the decree, is compelling a specific performance of Shirley's contract.

In order to maintain the position involved in this portion of the decree, it is necessary to maintain the position, that a Court of Equity has the power to compel a performance of an agree-

ment, not only in specific, but in kind; that upon an agreement to convey eighty acres of land, the Court may enforce the conveyance of any eighty acres of land. The law unquestionably is, that in exercising the power to compel a specific performance, the Court must confine itself to the terms of the agreement; that the extent of the power is limited by the terms of the agreement. The Court cannot make a new contract for the parties; that under this power of the Court of Chancery, no man can be compelled to surrender any specific thing, which specific and identical thing he has not agreed to part with by the terms of the agreement to be enforced. Colson *v.* Thompson, 2 Wheaton, 341, 342.

The decree is, then, erroneous in attempting to enforce the agreement so far as seventeen acres are concerned, and if so, it is entirely erroneous. If the agreement itself could be made several, if it had been a sale by the acre, and a price for each acre, or a sale by lots, and a price for each lot, then it would have been possible and competent for the Court to have treated the several portions of the contract severally. But such is not the case; the agreement is inseverable. Suppose the Court to decree a conveyance of the sixty-three acres, will it give damages for the seventeen acres in lieu thereof? The damages must be the consideration of the seventeen acres; but this consideration was a gross consideration for the eighty acres; the consideration of the seventeen acres must be severed. The question must be, how much of the labor and services rendered, was rendered on account of the seventeen acres, and the value thereof, a fact which cannot be ascertained; for the subject matter, the consideration or services, do not, in their nature, admit of this kind of severance, as no particular amount of services are rendered for these seventeen acres.

If, then, the agreement be entire, and an entire performance cannot be enforced, then no performance can be enforced; for the performance exacted must be either of an entire agreement, or some several and entire portion thereof.

It would not follow from this position of appellant, that

the agreement was necessarily void or within the Statute of Frauds. The agreement was here treated as one in writing, a specific performance of which, from its uncertain character, could not be enforced in Equity, but upon which the aggrieved party might have a full and adequate remedy at Law. Lindsay *v.* Lynch, 2 Schoales & Lefroy, 7; Phillips *v.* Thompson, 1 Johns. Ch. R. 149; Boardman *v.* Moysten, 6 Vesey, 467; 2 Story's Eq. Jur. 764–67.

To recur, then, to the Statute of Frauds. It is, of course, admitted that possession and part performance may take a case out of the statute. This possession is understood to stand in place of and answer for, the deliberate and certain act of the bargainor, manifested in and by his memorandum in writing. He must be placed in possession by the bargainor under the agreement. The possession must be co-extensive with the agreement and not greater or less, for it is the placing in possession, and the actual possession that is the evidence, which the law respects, of the extent of premises with which the bargainor undertook to part. It may be said that a bargainor, by accepting the price and putting a party in possession of certain definite premises, has concluded himself.

In this case, Spencer did not go into possession of any part of the premises in dispute under the agreement sought to be enforced. When he located on the half section, his location, or the location of the interest he was to acquire, was undetermined. He took possession for and in behalf of Shirley, of the three hundred and twenty acres as his agent; he appears to have enclosed and improved a small tract, but with this exception, from all that appears in bill, answer or proofs, his possession has continued the same down to this day. Various subsequent understandings have been had as to in what part of the half section his interests were to be located; but that any new act of possession or of putting into possession, have either accompanied or followed such understandings, does not appear. Cole *v.* White, 1 Bro. Ch. R. 409; Wills *v.* Stradling, 3 Vesey, 378; Frame *v.* Dawson, 14 do. 386; Sugden on Vendors, ch. 3, § 3; 2 Story Eq. Jur. § 763.

It cannot strictly be said that Spencer was ever in possession

of more than the improved tract. The case does not show that he was. He "held" the three hundred and twenty for Shirley. It could hardly be said that this was possession. The wood land was measured, but it was wild wood land still; and indeed without a man's possessions are what one claims, there is no reason to suppose Spencer was ever possessed of more than a small portion of the eighty acres.

Then when placed in possession, he was placed in possession as the agent of and for the benefit of Shirley. At that time, he was not placed in possession of any part of the premises as his under the agreement. He has maintained the same possession ever since. There has been no new act of placing in possession by Shirley. Nothing has transpired that can stand in lieu of the written agreement of Shirley defining the nature and extent of his agreement, except the testimony of witnesses speaking of a parol agreement resting in their memories. And this testimony shows that Shirley claimed the option of paying in money for the services rendered by Spencer.

If it is insisted that the possession in this case can aid the agreement, what possession is it, and when acquired, and what are its boundaries? If it is the possession of the half section, he must show an agreement for the half section, and that he went into possession under it. If the possession of the eighty, he must show that he was placed in possession of eighty acres, under an agreement; for eighty acres and the possession must be co-extensive with the agreement; but this is not pretended, as it is admitted that parcel of the eighty is yet unascertained.

There is then, no such placing in possession under agreement, and there is no such possession as will take the agreement in question, out of the operation of the Statute of Frauds.

Third point. Admitting that the agreement is a binding one upon respondent, the question next arises, has he placed himself in a position to claim relief, and if so, is he entitled to the relief decreed?

He who asks equity must have done equity, or he must

offer to do it. If he has not done all, or proffered to do all, or if he has refused to do all that entitles him to an equitable claim, he has no right in equity to assert the claim. 2 Wheaton, 342.

The agreement between Spencer and Shirley was not completed at any one time; it was an understanding from time to time, resting in parol between the parties, each confiding in the other. At the time Shirley procured Taylor to enter the land, it was clearly the understanding, that Spencer should have the eighty acres. The money for the entry was to be furnished by Shirley, but seventy dollars of the money he designed for the purpose, was in the hands of complainant. He authorized Shirley to negotiate on his account a loan of that amount, and charge it upon the lands. Shirley did so and Spencer approved. (The testimony upon this point is not in conflict with any other). Taylor took the title in trust to convey to Shirley on payment of money borrowed. Shirley alone was named in the papers, but seventy dollars of the debt secured and interest was the debt of Spencer, and Spencer was bound to pay it. Such is the agreement and understanding proved by the testimony. This made the trust in equity just the same as if Taylor had declared a trust upon eighty acres in favor of Spencer, upon Spencer's paying seventy dollars and the interest, and upon remainder of premises in favor of Shirley, in case Shirley paid the balance. Suppose such to have been the case; suppose further, the entire premises conveyed by Taylor to Shirley; Shirley would have received the Spencer eighty subject to the trust declared, and certainly would have been under no obligation to convey to Spencer, until Spencer had fully paid.

The same is true in the present case, for the fact that no trust was declared in favor of Spencer, places him in no better situation than if such had been the case. At the time Shirley settled with Ferguson who represented Taylor, Spencer had not made good any part of his proportion of the borrowed money. Shirley had to pay it all, and had to pay on Spencer's account (or get Spencer's land discharged from Spencer's debt), about two hundred dollars.

Shirley paid it, took the deed, and stood substituted to Taylor's rights as to the money borrowed for Spencer. This amount Spencer has always refused to pay, and without paying it he has no right to the land.

His bill and his proof should have shown that he was ready and willing to have accounted for the principal and interest of his debt, whereas the whole controversy has been about, and the cause of the controversy was, that Spencer refused. And certainly the defendant was right. Nothing could be more inequitable than to charge upon Shirley the usance upon monies first lent to Spencer, and then borrowed by Shirley on Spencer's account at Spencer's request, to replace the money Spencer had borrowed, and where Spencer had approved the loan after it was made. Yet such is the effect of the decree in this case.

It is, and will be insisted by the respondent, that after he settled with Furguson and notified Spencer, and Spencer absolutely refused to pay his part according to the understanding with which respondent made his arrangements with Taylor, that respondent had the right to remit Spencer to his claim of a hundred dollars and value of improvements; and that Spencer so refusing, Shirley properly exercised such right in selling a part of the eighty to Henderson, and that Spencer having refused to entitle himself to the land, and Shirley having in consequence thereof, parted with a part of it. Spencer must now seek his remedy for services, at Common Law, either under the alternative provision of the agent, or otherwise.

W. I. Ferguson, argued orally, and submitted the following written argument of W. T. Burgess, for the appellee:

The errors that have been assigned in this case are:

1. The Court erred in refusing to dissolve the injunction on motion of defendants below;

2. The Court below erred in striking demurrer of defendant below to the bill in this cause from the files, and in refusing to entertain said demurrer;

3. The Court below erred in rendering the final decree in this cause;

4. The Court below erred in rendering any final decree for complainant below; and

5. The Court below erred in granting the particular final decree exhibited in the record of this cause.

The first assignment, if such an assignment can be made, calls for a construction of the statute on injunctions, and the practice of the Courts in granting them.

I have not been able to find in any work on Chancery Practice in England, that a bond was required previous to the granting of an injunction. It issued upon proper case being made, supported by affidavit, and generally on an *ex parte* motion. Our statute is, therefore, an innovation upon the rules of Chancery proceeding in this point. 1 Madd. 174, *et seq.*; 2 do. 267, *et seq.*

The Revised Statutes, 382, § 11, prescribe the mode of granting injunctions on judgments at law. The first clause is, that no injunction shall be granted to stay any judgment at law, for a greater sum than the complainant shows himself equitably not bound to pay, and costs; and injunction, when granted, operates as a release of errors. The next clause requires a bond to be given with security to the defendant, approved by the officer granting it, and filed with the clerk, in double the sum directed to be enjoined and conditioned for the payment of all money and costs due, and to become due to the complainant in the action at law, and such costs and damages as shall be awarded in case the injunction is dissolved. And the next clause goes on to prescribe what those damages shall be—not more than ten per cent. upon the part released from the injunction, exclusive of legal interest and costs—for which the clerk shall issue execution.

Now, how can the provisions of this statute be twisted round to apply to all cases where an injunction is to be granted. A bond with a certain condition and penalty, that penalty and condition having exclusive reference to a judgment at law, is, by the statute, required upon enjoining a judgment at law, and very properly. There is a strong presumption that the proceedings have been correct and right, and when a party has gone so far as to recover a sum of

money, and it is only necessary for him to have satisfaction thereof, he should not be stayed without having additional security. But can a statute making express provisions for one case of a class of cases, and not extending to other cases of the same class, be extended to all and every kind of cases? This statute does not make provision for actions pending, and not in judgment. It has express application throughout to judgments at law, and without interpolating, it cannot be applied to anything else.

I shall not argue the other point made in the motion, that the equity of the bill does not authorize an injunction.

I have argued this assignment, on the assumption that the record is in such a shape that this error can be assigned, but the record does not show it. This was a motion to dissolve, and the motion itself, and the decision of the Court upon it, should have been preserved by bill of exceptions.

The second assignment questions the propriety of striking the demurrer from the files for frivolousness. The same objection lies here, that the motion and its disposition is not preserved by bill of exceptions.

The last three assignments may be met and considered together.

The bill of complainant in this cause was filed February 13th, 1846, and the facts as stated in the bill, and admitted by the answer filed June 5th, 1846, are shortly these: That in 1836, the complainant resided in Indiana. At the solicitation of defendant he removed to this State. It was agreed between them before he came, that if Spencer would keep for Shirley a claim of a half section of land until public land sales, Shirley would deed and convey to him eighty acres of it, including such improvements as Spencer might make, and one eighth of the timber land on the half section, or pay him one hundred dollars and the value of such improvements. The option in the bill being claimed by Spencer, and in the answer by Shirley. That Spencer came in 1836, and was in the winter of 1836–7 put in possession by Shirley, of the east half of section twenty five, township forty-three, range two, in Winnebago county; that

there was a log house on it, for which Spencer paid Shirley twenty-two dollars and fifty cents. Spencer kept possession of said land until the land sales in October, 1839, and made valuable improvements on it, and has continued in possession of it up to the time of the filing of the bill; that the eighty acres to be held and deeded to Spencer under the agreement, had been settled upon part before, and part after the land sale; but seventeen acres are not bounded, but ascertained by quantity and contiguity; that Shirley was unable to enter the land himself, not having the money, and was obliged to procure one Taylor to enter it on a share for him.

From the answer it appears, that previous to the land sale, Spencer was indebted to said Shirley to the amount of seventy dollars.

Now, Shirley claims that Spencer agreed with him to pay interest upon this seventy dollars, at the same rate that he was paying Taylor; that this should be paid before the land was conveyed by him to Spencer. This agreement Spencer denies, expressing his willingness, however, to pay the debt and twelve per cent. interest. This seems to have been the dispute out of which this litigation has grown.

Now, as to the points made by the counsel for plaintiff in error: "Is the agreement averred and proved such an one as resting in mere parol, is not reached by the Statute of Frauds?" and does the possession of Spencer take the case out?

All agreements for the conveyance of land resting in parol, not evidenced by writing signed by the parties, are within the Statute of Frauds, unless the parties by their own acts under the agreement, have placed themselves in a situation, that to apply the Statute of Frauds, would be enabling one party to commit a fraud on the other, and thereby have taken the case out of the statute.

The question in such cases is not, as the counsel in arguing under these points seek to make it, whether resulting or implied trusts exist, but did the parties make an agreement, and if the agreement is not in writing, have the parties or either

of them, done such acts under that agreement, as to make it inequitable to apply the statute, and refuse a specific performance of the agreement.

In this case, bill and answer admit the agreement, and admit its performance on the part of Spencer, up to the land sale, and only raise a question by the answer that a debt should be paid before conveyance, yet, admitting facts which clearly, under all the decisions, take the case out of the statute. Now, the party cannot claim the benefit of the statute in his answer, if the facts which take the case out of the statute are not denied. This, then disposes of the first two points made by plaintiff in error. 2 Mad. Ch. R. 487.

As to the other point, Shirley contends, that at the time of the land sale, anothor condition was engrafted on the agreement: That the seventy dollars and thirty-three and one third per cent. interest should be paid by Spencer. This is denied by Spencer, averring his willingness to pay the debt and twelve per cent. interest.

Here, then, it becomes necessary to look at the proofs, and we contend that they are not before the Court; that they form no part of the record in this cause, any more than the affidavit requiring security for costs does, that follows them. And, that if the counsel intended to rely upon them, they should have been referred to in some way, in the record itself. There is nothing in the record itself to identify and show that these are the particular depositions and proofs; and all the depositions and proofs that were taken in the cause, and submitted to the Court at the hearing. 3 Scam. 257.

The debt referred to was evidenced by a note. Was that note produced? Should it not have been? Does the record show whether it was or not? If the note was produced, it may have denied the whole case sought to be made out by Shirley.

But, reserving this point, let us see if the proofs as they are, make out that the condition as contended for by Shirley was engrafted on the agreement.

The only witness who testifies to this point is Norton; he

says, that he heard it admitted by Spencer, that the seventy dollars was to be paid before Spencer got a title from Shirley. But in the same examination he says, and in reply to the questions of Shirley, that Spencer never mentioned any rate of interest in connection with these seventy dollars, and it is material here to ask, was this admission made before or after the award? If made after, it was just such an admission as, under the circumstances, Spencer should make, and yet not make it any part of the original agreement; and the time when this admission was made does not appear in the testimony.

Again, Spencer never denied this indebtedness—was always willing to pay it; but under the circumstances, would he have been justified in paying Shirley seventy dollars, whilst this matter was in dispute, and before Shirley got a deed? For it will be seen by the answer, that Shirley did not get his title until about six weeks before suit brought. If Shirley never procured a title, Spencer then must have sued him for the one hundred dollars and interest; and why pay a man a debt when he is indebted to you? Spencer says: "True, I am owing Shirley seventy dollars, and I will pay him when he gives me a deed of my place." Norton hears this, and could he not come in and swear, just as he has done, that he understood that these seventy dollars were to be paid before Spencer got a deed? But still, this does not prove the precise agreement set up by Shirley. The Court has gone thus far in making up their decree, and we contend that Shirley has been allowed by the Court below, all that the proof warrants him in asking. He has been allowed seventy dollars and twelve per cent. interest.

Here, however, we will probably be referred by the counsel to the conversations between Norton and Spencer, just before and after land sales. We contend that these conversations prove too much for their purpose. The entire eighty on which Spencer lived, that is, the west half of the quarter section, never was selected and set apart to Spencer. And again, Spencer was not indebted to Shirley in an amount necessary to enter an eighty—one hundred dollars; clearly showing, that admitting the witness

to recollect the conversations correctly, yet, Spencer must have had some other object in view, than that of informing the witness of the exact relations existing between him and Shirley. It will be recollected, that these were claim times; that a man could not claim more than half a section; from the proof, Shirley had another claim, and that if Spencer had stated truly the relationship existing between him and Shirley, it would have shown that Shirley was claiming more than he had a right to. Then, from the evidence, this witness was none of the claimites; he never attended their meetings, and did not know their regulations; he comes to one that is such, and makes inquiries about his land, and asks if he is going to enter. Spencer calls the claim his; that he has no money to enter it with; that he has made Shirley his agent to enter for him an eighty; that Shirley has no money; is going to borrow; and that he told him to do as well by him as he did by himself; all the way mis-stating his own case, to protect Shirley's rights. After land sales he repeats this story, but the counsel ask, why afterwards? The answer says: Shirley entered only the quarter; there was, then, another quarter to be protected under the claim law. And now, Shirley seeks to take advantage to Spencer's wrong and prejudice, and in violation of every principle of honor and fair dealing, of Spencer's statements made to protect Shirley's rights.

Again, this is not the agreement set up by Shirley, but he seeks to infer from it that such was the agreement. But such an inference is in conflict with all the other direct proof in the case. That conversation may have occurred just as related, and yet, the fact sought to be deduced from it, not true.

Powell, the other witness, proves nothing unless it is that he was an arbitrator, and made the award set out in the bill, and that this matter was contested before him, one party claiming, and the other denying the very point in controversy.

There is no proof that Shirley has paid Taylor anything.

It may be inferred that he has done so, from his having got a deed, but that is not proof. Again, the legitimate proof of the bond made by him to Taylor, for the purchase of these lands, is the bond itself. That is not produced, nor its absence accounted for. It is the best proof, and it is incumbent on Shirley to produce it, so that, in fact, from the record, there was no proof before the Court below on the points, that Shirley did take a bond from Taylor, only as far as stated in the bill; that by that bond he was to pay interest on the purchase money, at the rate of thirty-three and one-third per cent., and that he did actually pay it.

The plaintiff in error relies upon these grounds:

1. That this contract is within the Statute of Frauds, and yet does not deny facts which have been by this Court decided to take the case out of the statute, payment of the purchase money, or other consideration, and delivery of possession. 2 Scam. 221.

2. That he who seeks equity must do equity; gives his version of the agreement; seeks to add to that agreement conditions; *first*, that Spencer agreed to pay him on the seventy dollars, the same interest that he should pay Taylor; and *second*, that until he did so he was not to have a deed.

Now, the burthen of proving these is on him, and he must prove them clearly and satisfactorily. Can the first be proved by inference from admissions stating something entirely different, that Spencer had constituted Shirley his agent to enter land, nearly one half of which is not in the controversy, and to which Spencer as against Shirley, and under the agreement, never made any claim whatever? And can the other, from the mere fact of an acknowledgment of indebtedness, and expressing a willingness to pay it when he got a deed? But admit it. Shirley sold to Henderson, on the ninth of December, 1845, and before he got a deed from Ferguson, land claimed by Spencer, and clearly proved, to the amount of two hundred and twenty dollars, and received the money. Shirley paid Taylor five hundred and twenty dollars and ninety-one cents; seven-twentieths of this is but about one hundred and sixty dollars, so that Shirley

had already, at and before the commencement of this suit, received more than he was entitled to under his own version of the agreement. Now, what becomes of the argument of doing equity?

It was entirely unnecessary to tender any money to Shirley, under these circumstances, before instituting suit. And Shirley expressly states in his answer, that he refused, and always had refused to make a deed to Spencer.

The Opinion of the Court was delivered by

CATON, J.* This cause was submitted to the Court principally upon written arguments, and we acknowledge the assistance which they have afforded in enabling us to come to a satisfactory conclusion; and where the cause has been so ably discussed by counsel, but little need be said by the Court more than to state conclusions.

As there is very little disagreement as to the substantial facts of the case, it is unnecessary to set out a full abstract here, which would necessarily be very voluminous, but the facts will be referred to as occasion may require. This agreement, which is sought to be specifically enforced resting in parol, is within the Statute of Frauds. And the first question is, whether such acts have been done under it as will relieve it in equity from the operation of that statute. Spencer took possession of the whole half section of land under the agreement. At this time, however, the eighty acres which Spencer was to have, were not designated. Afterwards and at different times, all but seventeen acres of the land was designated, Spencer still being in possession. From that time, we think, that Spencer was in possession of this specific land under the contract, upon which he had made valuable and lasting improvements. It is admitted on all hands, that Spencer had paid the entire consideration for the eighty acres, by the services which he had rendered Shirley according to the agreement. The law is well set-

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

titled, that this is sufficient to take the case out of the Statute of Frauds unless the uncertainty as to the location of the seventeen acres will prevent it.

We have sought in vain through this record, to find any evidence by which we can locate these seventeen acres. The evidence does not show that the parties ever did complete that portion of the agreement, by designating them. Such is the finding of the Court below, as is recited in the decree, and in consequence of this, the Court appointed a third person to go and complete this unfinished agreement of the parties for them, by ascertaining and settling the bounds of the said seventeen acres. We are of opinion that that portion of the decree, at least, was erroneous. It is the province of the Court to enforce the contract which the parties have made, and not to make a contract for them, and then enforce it. This portion of the land not having been selected by the parties, the Court ought not to have appointed a Commissioner to select it for them. When the Court compels the conveyance of these seventeen acres, how can it say that they are the seventeen acres which the party agreed to convey?

It is insisted that, inasmuch as this is an entire contract, and that because a part of it is so uncertain that it cannot be enforced, that, therefore, the Court will enforce no part of it, but will leave the party to his remedy at law. But this, we think, is carrying the doctrine too far. When a man has bargained and paid for eighty acres of land, and we can only locate sixty-three of it, to say that because we cannot give him all which he contracted for, we will therefore turn him out of Court with none, would seem to wear the appearance of a hardship. If he choose to take what he can locate and make certain, we think he may do so without violating any principle, and without giving the defendant below any just cause to complain.

About the time Shirley was going to enter the land, he called on Spencer to pay him seventy dollars, which he owed him, he not having the means to enter the the land himself.

Spencer could not pay him, but told him to hire the money on the best terms that he could for him, and he would pay him whatever he had to pay. This, we think, is a fair conclusion, taking all of the evidence together. In pursuance of this instruction, Shirley procured the money of one Taylor at an interest of thirty-three and a third per cent. for three years, and in case the money was not paid by that time, then interest was to be paid on the whole at the rate of ten per cent. The land was entered in Taylor's name for security. Spencer was informed of this arrangement afterwards, and approved it. He never, however, paid the money thus loaned, and Shirley was obliged to pay it for him in order to get a title to the land, which he did in 1845. This matter is adjudicated upon in the Court below, and perhaps properly; but in the decree, the Court, instead of allowing the interest which Shirley paid on the seventy dollars for Spencer, only allowed him interest at the rate of twelve per cent. This was wrong. Shirley either had a right to recover what he had paid, to Taylor, or he had only a right to recover interest at six per cent. It was only by virtue of a special agreement, that he was bound to pay more than six per cent., and there was no agreement that he should pay twelve per cent. It is true that he once stated, that he was willing to pay twelve per cent., but this was never agreed to by Shirley, who all the time insisted he had a right to all that he paid Taylor's estate for Spencer. And we think he was right in this claim. He was not obnoxious to the charge of claiming usury on his own account, but was claiming to be re-imbursed what he had contracted for with Taylor, and paid as the agent of Spencer, and according to his directions.

After the timber land had been set off to Spencer, Shirley sold eighteen and six-eighteenth acres to Henderson for two hundred and twenty-three dollars and eighty cents, as is found by the Court below, which is probably about correct. In equity, this money was received by Shirley to the use of Spencer, as he has chosen to affirm the sale. From this amount must be deducted one hundred and eighty-two dol-

lars, the amount, as near as we can ascertain, which Shirley paid to the estate of Taylor for the use of Spencer, which leaves only forty-one dollars and twenty cents, which the complainant is entitled to recover of Shirley.

That portion of the decree which directs Shirley to convey the said seventeen acres, and appointing a Commissioner to ascertain the same, must be reversed, as also that portion of the decree which awards Shirley to pay to Spencer more than forty-one dollars and twenty cents, and the balance of said decree must be affirmed, and the Circuit Court must be directed to issue an execution for the said forty-one dollars and twenty cents and costs, and that each party pay one half of the costs of this appeal.

Decree modified.

INDEX.

ANSWER.

See CHANCERY, 2, 8, 10.

APPEAL.

See PRACTICE, 1.

ASSESSMENT OF TAXES.

ASSIGNOR AND ASSIGNEE.

CERTIFICATE.

See APPEAL, 2 ; CRIMINAL LAW, 3 ; DEED ; EVIDENCE, 12 ; PRACTICE, 1 ; VENUE.

CERTIORARI.

A petition for a *certiorari* set forth, in substance, that the petitioners resided in St. Louis, a distance of some forty or fifty miles from the place of trial; that they had employed an attorney to attend to the collection of their debt, but had not authorized him to sign an appeal bond, should it become necessary ; that the attorney, the day after the trial of the right of property, informed his clients by the next mail of the result thereof, and requested them to send a letter of attorney to authorize him to take an appeal and execute a bond for them ; that the letter was executed and sent to him, but that it was not received by him until the sixth day after the trial, which was one day after the time allowed for an appeal in such cases. It further stated, that the amount in controversy was so small that the petitioners could not afford to employ a messenger to go to St. Louis to procure the letter of attorney: *Held*, that sufficient diligence was not shown to authorize the *certiorari*. *Lord* v. *Burke*, 363.

CHANCERY.

1. It is a doctrine of Equity, that a creditor, who has two funds to which he may resort for payment, shall be required to exhaust the one in which he has an exclusive interest, before he goes upon the fund to which another creditor can only resort. *Ladd* v. *Griswold*, 25.

2. Where a bill in Chancery avers a fact, which, if presented by a special replication to the plea thereto (were such practice allowable), would remove the bar, then such fact must be met by an answer. The plea should present the legal bar alone, leaving unnoticed any matter in the bill which meets that bar, and the answer comes in as a rejoinder to such matter as stands for a special replication to the plea.
State Bank v. *Wilson*, 57.

3. A Court of Chancery will entertain a bill for relief when the defendant is found within its jurisdiction, and the relief sought can be obtained by acting directly upon the person, whether the subject matter of the bill be within its control or not. Of this character are cases for a specific performance of a contract for the conveyance of, or relating to land beyond the jurisdiction of the Court, where the Court will compel a conveyance in accordance with the mode and form prescribed by the laws of the country in which the land is situated; and should it be necessary in order to carry out such a decree, the defendant may be prevented by a *ne exeat* from leaving its jurisdiction, *pendente lite*. This is the rule of the Common Law, and the statute has not changed it.
Enos v. *Hunter*, 211.

4. A Court of Chancery will not entertain a bill where the relief sought renders it necessary that it should act upon the specific thing, unless the subject matter of the litigation is within its jurisdiction. Where

CONSTITUTION AND CONSTITUTIONAL LAW.

CONSTRUCTION.

CONTRACT.

CONVEYANCE.

See DEED.

COSTS.

COUNTY.

See ACTION, 1, 2; CONSTRUCTION, 1, 2.

COUNTY COMMISSIONERS' COURT.

See ASSESSMENT OF TAXES.

CREDITOR'S BILL.

CRIMINAL LAW.

DELIVERY.

See DEED, 8–10.

DEMAND.

As a general rule, a demand should be made for money collected by one person for another, before bringing a suit. The collector, it is presumed, after deducting a reasonable compensation, will transmit the money by the earliest safe opportunity. But where so long a time has elapsed since its collection as to rebut such presumption, he may be considered as having appropriated it to his own use, and a demand is not required. *Bedell* v. *Janney*, 193.

DEMURRER.

See PLEADING, 1.

DEPOSITIONS.

All exceptions to depositions, which go to the form of the same, or to the incompetency of witnesses, must be made before the case is called for trial and submitted to the jury. Objections to their substance, however, may be made on the trial. *Frink* v. *McClung*, 569.

DEVISEE.

1. Courts of Equity regard a devisee, who takes a devise chargeable with legacies or debts, as a trustee, and will enforce the execution of the trust reposed. *Mahar* v. *O'Hara*, 424.
2. A devisee, by taking an estate devised to him by a will, assumes the payment of legacies imposed upon him by the terms of the will. *ib.*

DILIGENCE.

See ASSIGNOR AND ASSIGNEE, 1–3; CERTIORARI; PROMISSORY NOTE, 1–3.

DISCRETION.

See ASSESSMENT OF TAXES; BILL OF EXCEPTIONS; COSTS, 2; NEW TRIAL, 1, 2; PLEADING, 9; PRACTICE, 4.

EJECTMENT.

See EVIDENCE, 13, 14; NEW TRIAL, 2, 3.

EQUITY.

See CHANCERY.

ERROR.

1. A party against whom a bill has been taken for confessed, cannot complain and assign for error that the proof does not sustain the allegations of the bill. *Manchester* v. *McKee*, 511.
2. One cannot allege as error that which is for his own benefit. *ib.*

ESTOPPEL.

EVIDENCE.

INDORSEMENT.

See ASSIGNOR AND ASSIGNEE; EVIDENCE, 5, 6.

INFANT.

1. An infant may prosecute a writ of error in the Supreme Court by his next friend. If, however, he prosecutes in his own name, and there is a joinder in error, his disability is waived by that proceeding.
McClay v. *Norris*, 370.
2. Neither a default, or a decree *pro confesso* can be entered against an infant. *ib.*

See CHANCERY, 8; MASTER IN CHANCERY, 1.

INSTRUCTIONS.

The statute relating to the giving of instructions does not inhibit the Court from giving such instructions, as to the law of the case he thinks proper and conducive to justice, without their being asked, provided they are given in writing. *Brown* v. *The People*, 439.

INTEREST.

Interest is recoverable on money collected by one person for another, who has neglected to pay it over in a reasonable time.
Bedell v. *Janney*, 193.

INTERPRETATION.

See CONSTRUCTION.

INTRUSION.

Intrusion and trespass, under the statute, are distinguishable in this; the former implies an unlawful possession of lands, while the latter may amount to a mere entry upon land without retaining possession, but doing some damage. *Hulick* v. *Scovil*, 159.

JUDGMENT CREDITORS.

See ADMINISTRATION OF ASSETS, 2; CREDITOR'S BILL; LIEN, 1.

JUDGMENT LIEN.

See LIEN, 1.

JUDGMENT, DECREE AND EXECUTION.

1. A sheriff purchased of a defendant in an execution which he held in his hands for collection, certain property, and undertook to satisfy the judgment out of his own funds: *Held*, that this arrangement did not discharge the judgment, it not having been made by the direction or consent of the plaintiff in such execution. *Hood* v. *Moore*, 99.
2. Where a party has paid money by compulsion under the judgment and process of a Court of competent jurisdiction, he will not be compelled to pay the same a second time. *Lawrence* v. *Lane*, 354

2. When a question of fact is referred to the Master in Chancery, it is his duty to appoint a day for the examination of witnesses before him, of which the parties should receive due notice. The witnesses may then be examined *viva voce*, or upon interrogatories, which must then be taken down and preserved by the Master, so that the same may, if necessary, be used by the Court. The Master is not required to report the evidence, nor the circumstances to the Court and leave the Court to draw conclusions; but he is to report facts, and conclusions of his own, unless, under special circumstances, a question of law is involved, upon which the opinion of the Court should be taken. This report being prepared, either party may file objections to it before the Master prior to its being returned into Court. If the objections are not sustained, and the Master adheres to his report, he returns it into Court, where the party objecting may file exceptions, upon the hearing of which the whole evidence is brought forward, and passes in review before the Court. *ib.*

MISDEMEANOR.

See VERDICT, 2.

MISJOINDER.

1. A misjoinder of counts, upon which the same judgment cannot be rendered, may be assigned for error. *Selby* v. *Hutchinson*, 319.
2. In determining a question of misjoinder, the Court will be governed more by the form of the count then by the substance of it. *ib.*

MONEY HAD AND RECEIVED.

If a person sell the property of another and receive the price in money, an action for money had and received will lie to recover it. Even where the sale is made without any authority from the owner, he may waive the tort and sue in *assumpsit* for the price actually received. *Dickinson* v. *Whitney*, 406.

MORTGAGE, &c.

See CHANCERY, 5; PRACTICE, 2; REMEDY, 1; SCIRE FACIAS, 1.

NEW TRIAL.

1. In a criminal prosecution, a motion for a new trial on the ground that the verdict was contrary to the evidence, is addressed to the discretion of the Circuit Court, and its decision thereon cannot be reviewed by the Supreme Court. *Holliday* v. *The People*, 111.
2. Under the 30th section of the 36th chapter of the Revised Statutes, the party against whom a verdict is rendered may, on application to the Court and payment of costs and damages within one year after the rendition of the first judgment, have a new trial as a matter of right, without showing cause. The Court may, also, within one year after the rendition of a second judgment, on application of the party and on

POSSESSION.

PRACTICE.

PROMISSORY NOTE.

See VARIANCE, 2.

RECOGNIZANCE.

See PLEADING, 7.

RE-HEARING.

RELEASE.

RES GESTÆ.

See EVIDENCE, 11.

RES JUDICATA.

When a case has once been decided upon its merits in the Supreme Court, and shall, at a subsequent time, be brought before the same tribunal, the Court will not go behind its former adjudications, even though it shall appear upon the record that the Court acted without jurisdiction. *Semple* v. *Anderson*, 546.

RESULTING TRUST.

See EVIDENCE, 9.

RETORNO HABENDO.

See REPLEVIN.

REVENUE LAW.

See REPEAL.

ROADS.

1. In proceedings under the Road Law of 1841, for obstructing a road, it is not necessary to produce record evidence of the steps taken preliminary to the location; the statute not requiring that they should be entered of record. *Ferris* v. *Ward*, 499.
2. A road is to be considered as established, and, in contemplation of law, opened, when the proper Court have approved of the report of the viewers, and sanctioned the location. *ib.*
3. When one obstructs a road which is used by the public for even the shortest period of time, he does it at his peril; for if it should be made to appear that such road was legally established, he would be accountable, whether he had actual knowledge of the fact or not. *ib.*
4. A notice by a supervisor required a person to remove two certain rail fences, built by him across a public road (describing it), which were an obstruction, and specified the particular place of obstruction, by stating the direction of the fences made by him: *Held*, to be sufficient. *ib.*
5. In estimating the amount of a verdict to be rendered for obstructing a public road, the jury may count fractions of a day. *ib.*
6. A claim for damage occasioned by the location of a public road, is not to be presumed, but must be expressly made, and at the proper time, so that if the State or county thinks the payment of damages too great a sacrifice for the benefits to be obtained by having a road, may abandon the project or locate it elsewhere. *ib.*
7. A supervisor is a competent witness in a proceeding against a person for obstructing a public road. *ib.*
8. Penalties which accrued under the Road Law of 1841, are not repealed by the Revised Statutes. *ib*

SALE OF LAND.

SCIRE FACIAS.

See Remedy, 1.

SEAL.

SECURITY FOR COSTS.

See Costs.

SET OFF.

Demands to be set off must be mutual, and exist between the parties to the record. *Hinckley* v. *West*, 136.

SHERIFF.

1. A sheriff is the agent of the law in performance of his official duties, and not of the parties interested. He must follow the direction of his precept, that being his only authority. Any private arrangement between him and a debtor, without the sanction of the creditor, is illegal and not binding on the latter; and where a debtor enters into such an arrangement with a sheriff, and has parted with his property, his only remedy is against the sheriff to recover the value of the property so received by him. *Hood* v. *Moore*, 99.

2. A sheriff purchased of a defendant in an execution which he held in his hands for collection, certain property, and undertook to satisfy the judgment out of his own funds: *Held*, that this arrangement did not discharge the judgment, it not having been made by the direction or consent of the plaintiff in such execution. *ib.*

SPECIAL TERM.

The Court may revoke an order issued for a special term, and appoint another time for holding the same. The Judge is authorized to appoint a special term, either in or out of term. *Brown* v. *The People*, 439.

STATUTE OF FRAUDS.

1. An agreement by two persons for the use and benefit of a third, upon which such third person may maintain an action against the party promising, is not such an undertaking to pay the debt of another as will bring it within the Statute of Frauds. *Prather* v. *Vineyard*, 40.
2. Payment of the consideration money and possession of land under a parol contract, is sufficient to take a case out of the Statute of Frauds. *Shirley* v. *Spencer*, 583

STATUTE OF LIMITATIONS.

1. If a party be out of a State so that process cannot be served on him, the Statute of Limitations ceases to run for the time being; and in such case it is not necessary, in order to produce this result, that the party should remove absolutely; nor, on the other hand, is it sufficient in order to allow the Statute to operate, that his residence should be within the State, while temporarily absent. Every absence from the State, whether there exists in the debtor the *animus revertendi* or not, prevents the service of process, and therefore suspends the operation of the Statute. *Vanlandingham* v. *Huston*, 125.

2. The Statute of Limitations makes two classes of cases, arising *ex contractu*: 1. All actions for arrearages of rent due on a parol demise, and

See CONSTRUCTION, 3, 5; POSSESSION, 1.

SUPERVISOR.

See ROADS, 4, 7, 9.

SURPLUSAGE.

See DEED, 6.

TORT.

See MONEY HAD AND RECEIVED.

TRESPASS.

Intrusion and trespass, under the statute, are distinguishable in this: the former implies an unlawful possession of lands, while the latter may amount to a mere entry upon the land without retaining possession, but doing some damage. *Hulick* v. *Scovil*, 159.

See CANAL LANDS.

TRUSTEE.

Courts of Equity regard a devisee, who takes a devise, chargeable with legacies or debts, as a trustee, and will enforce the execution of the trust reposed. *Mahar* v. *O'Hara*, 424.

USURY.

See LEX LOCI, &c.; REMEDY, 1.

VARIANCE.

1. If a written instrument is neither set out in the pleadings by its tenor, nor described by its legal import, but is merely brought forward to sustain an allegation not referring to it expressly in any way whatever, a variance will not be fatal, if the substance of what is alleged be proved. *Prather* v. *Vineyard*, 40.

2. In an action of *assumpsit* upon a promissory note, against *Loring Pickering*, the declaration averred that the defendant made the note. To support the declaration, a note signed "*L. Pickering*" was introduced on the trial, which was objected to for variance, but it was read in evidence. No other testimony was offered, nor was there any averment in the declaration that the defendant, by the name of *L. Pickering*, made the note: *Held*, that it was not a substantial variance. *Pickering* v. *Pulsifer*, 79.

VENUE.

On a change of venue in a criminal case, the transcript sent to the county where the case was to be tried, showed the finding of the indictment, and contained a copy thereof, as also all the proceedings. On an appeal to the Supreme Court, the record sent up, stated that the original indictment was received with the transcript. The clerk of the Circuit Court omitted to append a certificate, to the transcript, that the paper transmitted therewith was the original indictment: *Held*, that this omission ought not to vitiate the proceedings. *Holliday* v. *The People*, 111.

VERDICT.

WAIVER.

See Writ of Error, 2.

WARRANT OF ATTORNEY.

See Letter of Attorney.

WARRANTY.

WRIT OF ERROR.

1. Where the subject matter of a suit does not relate to a franchise or freehold, and where the judgment does not amount to twenty dollars, the remedy is by a writ of error, and not by an appeal.
Washington Co. v. *Parlier*, 353.

2. An infant may prosecute a writ of error in the Supreme Court by his next friend. If, however, he prosecutes in his own name, and there is a joinder in error, his disability is waived by that proceeding.
McClay v. *Norris*, 370.

3. A writ of error is a writ of right, and may be prosecuted in all cases, unless prohibited by some statute or inflexible rule of law. *ib.*

END OF VOLUME IX.