REPORTS

OF

CASES AT LAW AND IN EQUITY,

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF ILLINOIS.

RE-REPORTED AND ANNOTATED BY

MARSHALL D. EWELL,

AUTHOR OF "EWELL ON FIXTURES," ETC.

VOLUME XXXIII.

CONTAINING THE REMAINDER OF THE CASES DECIDED AT THE NOVEMBER TERM, 1863, AND ALL OF THE CASES DECIDED AT THE JANUARY TERM, 1864.

CHICAGO:
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1877.

JUSTICES OF THE SUPREME COURT OF ILLINOIS,

DURING THE PERIOD COVERED BY THESE REPORTS.

CHIEF JUSTICES: (*a*)

JOHN D. CATON.
PINKNEY H. WALKER,

ASSOCIATE JUSTICES:

SIDNEY BREESE.
CORYDON BECKWITH.

(*a*) Caton, C. J., resigned January 9th, 1864. Hon. Corydon Beckwith was appointed and took his seat in the Court, January 11th, 1864.

TABLE OF CASES.

CASES [9]

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF ILLINOIS,

FIRST GRAND DIVISION,

AT THE

NOVEMBER TERM, 1863.

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*The People of the State of Illinois *ex rel.* Harless *v.* Ozias M. Hatch, Secretary of State.

The People, Etc., *ex rel.* Keyes *v.* Jesse K. Dubois, Auditor of Public Accounts.

Mandamus: *Alternative writ stands for a declaration.*[1]

The alternative writ of *mandamus* stands in the place of a declaration—it is the declaration of the relator, and, as in an ordinary case commenced by declaration, the plaintiff is bound to state a case *prima facie* good, so is a relator in this proceeding.

Same: *Carrying back demurrer.*[2]

Where the alternative writ does not state a *prima facie* case, a demurrer to the return thereto will have the operation of a demurrer to the writ, and will bring in question its sufficiency.

Same: *When it lies; general rule.*

The writ of *mandamus* is a high prerogative writ; it is not a writ of right, but is to be awarded in the discretion of the court,[3] and ought not to

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[1] See The People *v.* Mayor, 51 Ill., 17; Silver *v.* The People, 45 id., 224; The People *v.* Salomon, 46 id., 333; The People *v.* Ohio Grove Town, 51 id., 191.

[2] See the cases on this subject cited in note to Ward *v.* Stout, 32 Ill., 399.

[3] The People *v.* Illinois Cent. R. R. Co., 62 Ill., 510.

issue in any case, unless the party applying for it shall show a clear legal right to have the thing sought by it done, and in the manner and by the person or body sought to be coerced, and must be effectual as a remedy if enforced, and it must be in the power of the party, and his duty, also, to do the act sought to be done.[1]

SAME: *Not in doubtful cases.*

It is well settled that in a doubtful case, this writ should not be awarded. The right of the relator must be clear and undeniable.[2]

SAME: *Confers no new right.*[3]

This writ can only be used to compel a party to act, when it is his duty to act without it. It confers upon the party, against whom it may be issued, no new authority.

SAME: *Remedy at law.*

When there is a complete remedy at law, it will never be awarded.[4] Per Walker, J.

SAME: *Does not lie where sum involved is trifling in amount.*

The award of the writ being discretionary, where substantial interests are not involved, and the award of the writ would be to encourage petty litigation, as in the case of an application for a *mandamus* to compel the auditor of public accounts to issue a warrant upon the State treasurer for the *per diem*[5] of a member of the State house of representatives, amounting to the sum of $2, even though the claim be admitted just, the writ should be refused. Per Walker, J.

AUDITOR: *Not bound to issue warrant upon speaker's certificate of* per diem.

Under the statute requiring the speaker of the house of representatives to give a certificate to each member, of the amount of compensation to which he is entitled, on presenting which to the auditor, he is author-

[1] See The People *v.* Chicago & A. R. R. Co., 55 Ill. 95; The People *v.* Cline, 63, id., 394; Commissioners *v.* The People, 66, id., 339.

Mandamus lies to control an abuse of discretion working injustice. Village of Glencoe *v.* The People, 78 Ill., 382.

[2] See The People *v.* Forquer, Breese, 104; The People *v.* Chicago, 53 Ill., 424.

[3] See The People *v.* Gilmer, 5 Gilm., 242.

[4] See People *v.* Forquer, Breese, 104; People *v.* Chicago, 53 Ill., 424; School Inspectors *v.* Grove, 20 id., 526; The People *v.* Hilliard, 29 id., 413; The People *v.* Cover, 50 id., 100; City of Ottawa *v.* The People, 48 id., 233; Commissioners *v.* The People, 66 id., 339.

[5] For a case denying a *mandamus* to compel the State treasurer to pay *per diem* in gold, see The People *v.* Beveridge, 38 Ill., 307. For other cases of *mandamus* against the auditor to compel the issue of warrants, see Irroquois Agricultural Society *v.* Bates, 61 Ill., 490; The People *v.* Secretary of State, 58 id., 90.

ized to issue a warrant for the amount specified in it, on the revenue fund; while the auditor is not authorized to pay a member in any other mode, and while such a certificate would be a proper voucher for him on the settlement of his accounts, it is not conclusive upon him, and does not bind him to issue the warrant; but he is bound to take notice of existing facts, and may act on his own knowledge of the facts, and take the responsibility of refusing to accredit the certificate. Per Breese, J.

SAME:

He is bound, among other things, to know who are the speakers, and who members of the two houses, and also the fact of a session of the legislature at a particular time; and if a certificate should be presented to him of the attendance of a member on a certain day, or at a session then held, when the fact was patent that there was no session on that day, nor for weeks previous; or should the certificate embrace a service of a certain number of days, and his own records informed him that the session continued a less number of days only, for which he had settled with the members, he has a right and must act on his knowledge of the facts, and take the responsibility of his actions, and may refuse to issue a warrant. He cannot shut his eyes, and issue warrants on all the certificates that may be presented. Per Breese, J.

SAME: *Mandamus to compel issue of warrant.*

If in such case he decides wrong, a corrective may be found by *mandamus*, if no other legal remedy exists. Per Breese, J.

SECRETARY OF STATE: *When compellable to certify an act as law.*

Under section 5, chap. 96, Rev. Stat. 1845 (p. 491), providing that the Secretary of State shall, when required by any person so to do, make out copies of all laws, acts, resolutions or other records appertaining to his office, and attach thereto his certificate under the seal of State; and section 7, providing that all public acts, laws and resolutions, passed by the general assembly, shall be carefully deposited in his office, with the safe keeping of which he is by said section specially charged, he cannot be compelled by *mandamus* to certify any act to be a law which does not come into his possession as such, under and by virtue of the law defining his duties.

SAME.

Where, therefore, an enrolled bill was within ten days from its presentation to the governor (Sundays excepted), delivered by the governor, with his objections thereto in writing, to the lieutenant-governor, by him to be presented to the senate, where it originated, on the first day of the next session thereof, who delivered the same to the secretary of State for safe custody only, till required for such presentation, with directions to keep the same in a secure and private place till that time, subject to be redelivered to the lieutenant-governor, or other person authorized by the governor to receive and present them, it was *held*,

that the secretary of State could not be compelled by *mandamus* to give a copy of it even, much less to certify it as a law, because the bill was not in his possession as secretary of State, as a law.

SAME.

The secretary of State cannot be compelled to certify as a law, a bill in his possession, which has not been authenticated to him as such, on the ground that it has become a law by reason of the failure of the governor to return the same with his objections, to the house in which it originated, within ten days (Sundays excepted) after its presentation to him; for the reason that it is not made his (the secretary's) duty under the statute to do so. He is not authorized to declare any writing in his possession, having the form of an act of the legislature, but bearing no marks of authenticity, to be a law of the land; nor does his position as secretary of State endow him with knowledge that a bill has been duly presented to the governor, remained with him ten days, and was not returned by him within the time required by the constitution.

SAME.

Where, however, a bill in the possession of the secretary of State, has received the proper authentication, and has been deposited with him as a law, he cannot justify a refusal to give a copy of it certified as a law, on the ground that the passage of the bill was procured by fraud and misrepresentation.

COUNCIL OF REVISION: *Not abolished by Const. of* 1848.

The council of revision, as such, (Const. 1818, art. 3, sec. 19; Rev. Stat. 1845, 337), as a power to revise all laws passed by the general assembly, was not abolished by the constitution of 1848. The power, instead of being deposited with the governor and justices of the Supreme Court, since the Const. of 1848, is deposited with the governor alone, who is to all intents and purposes the council of revision.[1]

STATUTES: *Authentication of.*

There is no other mode by which to authenticate a bill which has been passed by both houses of the legislature, and has become a law by reason of the failure of the governor to return the same, with his objections, to the branch of the general assembly in which it originated, within ten days (Sundays excepted) after it was presented to him, but that prescribed in section 3, chap. 62, Rev. Stat. 1845 (p. 337), which provides that such a bill, having thereby become a law, shall be authenticated by the governor causing the fact to be certified thereon by the secretary of State, that the bill having so remained with the governor ten days (Sundays excepted), and the general assembly being in session, it has become a law.[2]

[1] See Wabash R'w'y Co. *v.* Hughes, 38 Ill., 174.

[2] See Wabash R'w'y Co. *v.* Hughes, *(supra).*

SAME.

This authentication must be under the sanction of the executive, and the act must be deposited in the office of the secretary of State, and these make up the evidence and the only evidence of the existence of a law. By said section 3, such a bill is required to be authenticated by the governor, *he* causing the fact to be certified on the bill by the secretary of State; and until the governor acts, the secretary has no power, and no duty to perform.

MANDAMUS: *Does not lie against the governor.*[1]

When a bill has become a law by reason of the failure of the governor to return the same with his objections, within ten days, etc., the governor has a duty to perform with reference to its authentication, but he cannot, as it seems, be coerced by *mandamus* to perform the same, or any duty.

It may be, should the governor distinctly and without reason, refuse to cause the secretary to place the certificate required to authenticate it, upon a bill so circumstanced, having passed through all the forms required by the constitution, that the Supreme Court might declare it to be a law, but not by *mandamus*.

STATUTES: *Presentation of bill to governor for approval and return thereof.*[2]

Under sec. 21, art. 4, Const. 1848, relating to the presentation of bills to the governor for his approval, and the tenth joint rule of the two houses of the State legislature, which has the force of law, and which requires the day of presentation of a bill to the governor to be carefully entered in the journal of each house, the houses must be in legislative session when the bill is presented to the governor, and when it is returned by him with his objections.

SAME.

When an act has been approved by the governor, however, and deposited in the office of the secretary of State as a law, the court will not inquire whether the legislature was in session or not when it was presented to him, nor whether the time of presentation has been carefully entered on the journal of each house;[3] but when it is asked of the court to declare an act to be a law which wants that sanction, has not been deposited with the secretary of State, and is not authenticated in any manner, in such case the requirements of the constitution and the law must be looked into and applied.

SAME.

Under sec. 21, art. 4, Const. 1848, relating to the presentation of bills to the

[1] See The People *v.* Yates, 40 Ill., 126.

[2] As to power of governor within the ten days, and while the bill is under his control, to retract an approval thereof, see The People *v.* Hatch, 19 Ill., 283.

[3] See Wabash R'w'y Co. *v.* Hughes, 38 Ill., 174.

governor for his approval,—which provides, that "if any bill shall not be returned by the governor within ten days (Sundays excepted) after it shall have been presented to him, the same shall be a law, in like manner as if he signed it, unless the general assembly shall, by their adjournment, prevent its return, in which case said bill shall be returned on the first day of the meeting of the general assembly, after the expiration of said ten days, or be a law,"—the governor is not required to return a bill with his objections, within the ten days, to prevent its becoming a law, unless the general assembly continues its session until the end of that period; and it must be in an organized condition, acting as a general assembly at the end of that period, to require the governor to perform the act. If the members have dispersed, and the officers are not in attendance, he would not be able to return the bill to the house in which it originated; and said section neither requires nor authorizes him to return the bill to the speaker of the house, to the clerk, or any other officer, but declares that it shall be returned to the house, and that can only be as a body. If on the tenth day the members and officers are absent, the governor can return the bill with his objections at the next session, and on the first day thereof, and failing in this the bill becomes a law.

SAME: *Time allowed the governor to return bill.*

By this constitutional provision, the governor is allowed the full period of ten natural days, of twenty-four hours each, excluding Sundays, within which to perform this constitutional duty. The days must be held to be full and complete days, not parts of days. If, therefore, the legislature remains in session only a portion of the tenth day, and then terminates the session by adjournment, the governor will have till the first day of the next session to return the bill with his objections.

SAME.

The method of computing the ten days so allowed, is to exclude the day the bill is presented and the intervening Sundays, and include the last of the ten days.

SAME: *Evidence of presentation.*

The tenth joint rule of the two houses of the State legislature, which has the force of a law, requires the day of presentation of a bill to the governor, to be carefully entered on the journal of each house; and by the journal, and by that only, can the fact of presentation, during a session of the legislature, be legitimately established.[1]

SAME.

The entry of the presentation of an act to the governor, on the executive journal kept by the private secretary of the governor, is for the convenience of the governor alone. The governor is not by law required to keep such a journal, nor is it by law made evidence anywhere.

[1] See Wabash R'w'y Co. *v.* Hughes, 38 Ill., 174.

SAME.

Section 24, art. 4, Const. 1848, requiring the secretary of State to "keep a fair register of the official acts of the governor," has no relation to the presentation of acts to him for approval, that being a duty required to be performed by a standing joint committee of the two houses.

TIME: *Mode of computing.*[1]

The correct mode of computing time, where an act is to be performed within a particular time after a specified day, is to exclude the specified day and to include that upon which the act is to be performed.

DEMURRER: *Effect of as an admission.*[2]

A demurrer admits all facts competent to be pleaded, and which are well pleaded, but not the inferences or conclusions of law drawn therefrom and stated in the pleading demurred to.

SAME.

Whether or not such facts as can only be proved by record evidence, and which from the pleadings appear to exist only in parol, are admitted by demurrer (which is not decided), still all facts necessarily existing outside of, and never appearing upon the journals (the records in question), of the two houses of the State legislature, so far as they would be proper evidence, would be admitted by demurrer; as, the settlement of the accounts, the drawing of their pay by the members, etc., which never appear on the journals, but which, if alleged, and provable for any purpose, would be admitted by demurrer. Per Walker, J.

ADJOURNMENT: *What is within meaning of Constitution.*

Under that clause of section 21, art. 4, Const. 1848, providing that "if any bill shall not be returned by the governor within ten days, Sundays excepted, after it shall have been presented to him, the same shall be a law in like manner as if he had signed it, unless the general assembly shall, by their adjournment, prevent its return," to give full effect to the negative power of the governor in legislation conferred by said section, the adjournment which shall practically deprive the executive of the ability to communicate with the house in which a bill shall have originated, according to legislative or parliamentary usage, must be taken as the adjournment contemplated by the constitution.

SAME.

Where, therefore, the governor claiming to act under sec. 13, art. 4, of the Const. of 1848, providing that, in case of disagreement between the two houses with respect to the time of adjournment, the governor shall have power to adjourn the general assembly, etc., by his proclamation

[1] See, also, Hall *v.* Jones, 28 Ill., 55; Richardson *v.* Ford, 14 id., 332; Forsyth *v.* Warren, 62 id., 68; Faulds *v.* The People, 66 id., 210; Harper *v.* Ely, 56 id., 179.

[2] Deem *v.* Crume, 46 Ill., 69; Lindley *v.* Miller, 67 id., 244; Dunham *v.* Village of Hyde Park, 75 id., 371; Roby *v.* Cossitt, 78 id., 638.

assumed to adjourn the general assembly then in session; and although both houses adopted a protest against its illegality, still nearly all the members settled their accounts with the speakers, obtained their pay and returned to their homes, and the doors of the halls were closed; and, while no adjourning order of either house appeared on the journals, there was an absence thereafter of all entries upon the journals for a period of more than ten days, when less than a quorum attempted to reconvene, it was *held*, that, even admitting that the act of the governor in assuming to adjourn the legislature, was illegal, yet both houses having acquiesced in it and dispersed, there was an adjournment within the meaning of said clause.

SAME: *Question as to right of governor to adjourn, for legislative decision.*

The question whether such a disagreement exists between the two houses of the general assembly, with respect to the time of adjournment, as to call for the interposition of the executive, under sec. 13, art. 4, Const. 1848, is, where such interposition is acquiesced in by the legislature, one for legislative decision, with which the courts cannot interfere. Per Breese, J.

CONSTITUTION: *Construction of, by executive and legislature.*

When the legislative and executive branches of the government, by the adoption of an act, give a construction to a provision of the constitution, if the construction thus given is only doubtful, the courts will not hold the act void. It is only in cases of its clear infringement that courts will interpose to hold the act nugatory. Per Walker, J.

SAME.

In like manner, when the governor asserts his right to adjourn the session of the legislature on the ground of an alleged disagreement between the house and the senate respecting the time of adjournment, if the two houses acquiesce in it, the court will not say that it did not produce an adjournment, unless it is clear that such was not its effect.

ADJOURNMENT: *Mode of; formal resolution not necessary.*

The constitution having provided no mode by which the sessions of the general assembly shall terminate, although the joint rules of the two houses provide for an adjournment *sine die* by joint resolution, and although it is generally laid down that when a legislative body is once organized, the session can be terminated only by the expiration of the time for which the members were elected, by executive action, or by resolution; when the session is not ended in either of the two former modes, a joint resolution formally adopted and spread upon the journals, is not indispensable to the termination of a session without day; but if the sense of the two houses is manifested in any other clear and satisfactory manner, as by acts rendering clear their intention to adjourn, it will be equally obligatory, as if reduced to writing and spread upon the journals. (See the opinion of the court for a variety of hypothetical cases, where it is said a session may be terminated by simple acts.)

SAME. QUORUM: *Where a number less than a quorum fail to adjourn from day to day, and to take means to compel attendance of a quorum.*

Under section 12, art. 3, Const. 1848, providing that two-thirds of each house constitute a quorum, but a smaller number may adjourn from day to day, and compel the attendance of absent members, the general assembly, in regular legislative session, has power to continue its session up to the time for which the members of the lower house are elected, and the further power to preserve the session by the action of a smaller number than a quorum of each house. This power of a smaller number than a quorum to adjourn from day to day, and compel the attendance of absent members, is plenary, and implies the power to arrest and imprison the members, so that they may have their bodies in their respective houses to make up a quorum. But if they fail to exercise this power, cease their labors and disperse, on the unauthorized interference of the executive by proclamation adjourning them, or otherwise, the session is at an end, even though there is no formal resolution to adjourn.

SAME: *Reconvening; mode of.*

Should a legislative body be dispersed by any sudden irruption, or insurrection, or by any external force, the power might, perhaps, remain, and the duty also, to re-assemble without any previous vote for such purpose. Per Breese, J

SAME.

But when such dispersion is the result of its own action, as in acquiescence in an unauthorized proclamation of the executive assuming to adjourn the legislature on the ground of alleged disagreement between the two houses respecting the time of adjournment, but without any formal resolution to adjourn, the legislature cannot be brought together again as a legislative body, in the absence of a previous vote to re-assemble, without a call from the executive. The spontaneous assembling of the members will not have that effect.

SAME: *Entry of adjournments; presumptions.*

Under section 19, art. 3, Const. 1848, declaring that "neither house shall, without the consent of the other, adjourn for more than two days," where the journals close without an adjournment to any day, and there is a blank in the journals, indicating an entire suspension of all business for more than ten days, it will be presumed that such suspension is by consent rather than in violation of the constitution, and, the journals showing no adjournment to a specified time, that there has been an adjournment *sine die*, which terminates the session. Per Walker, J.

SAME.

When the legislative body rises without coming to a resolution to adjourn, or to adjourn to a specified day, and the rising is followed by the body's coming together on the next legislative day, it may properly be presumed that the adjournment was intended to be till that day. But

when they fail to meet on that day the presumption is rebutted. Per Walker, J.

LEGISLATIVE JOURNALS: *Necessity of, and presumption from their non-existence.*

Section 12, art. 3, Const. 1848, requires that each house shall keep a journal of its proceedings, and publish them. The proceedings constitute the journal; one can have no existence without the other, and in the absence of both there can be no houses. The journals must show proceedings to establish a legislative session; and in the absence of entries of legislative proceedings, it will not be presumed from the absence of an adjourning order, that the session still continued.

Where, therefore, the journals do not show any proceedings, but are blank for upwards of ten legislative days, it will be presumed there was no legislative session during that time. No presumption can be indulged against the silence of the journals.[1]

EVIDENCE: *To prove facts outside the legislative journals.*

It seems that parol evidence is admissible to prove the occurrence of facts and circumstances, outside the legislative journals, and which are never found upon them, from which the inference may be drawn that there has been an adjournment of the legislature. Per Walker, J.

SAME.

But it is probable that it could not be proved by verbal evidence that a resolution to adjourn had been adopted, any more than that a bill had been passed which did not appear from the journals, or that a court had rendered a judgment, which the clerk had failed to record. Per Walker, J.

The questions for determination in these two cases, arose upon demurrer to the returns to two alternative writs of *mandamus*, issued from the Supreme Court upon the relation of Thomas Harless, and Charles A. Keyes, respectively, and against Ozias M. Hatch, Secretary of State, and Jesse K. Dubois, Auditor of Public Accounts, respectively.

The relief sought by the former of said writs, and the grounds therefor, are fully stated in the writ itself, which is as follows: "The People of the State of Illinois, to O. M. Hatch, Secretary of the State of Illinois:

[1] See, however, as to the presumption that a bill has been read three times before being put on its final passage. Supervisors *v.* Rock Island & A. R. R. Co., 25 Ill., 182; See, also, Wabash R'w'y Co. *v.* Hughes, 38 id., 174.

As to the correction of legislative journals, see Turley *v.* Logan County, 17 Ill., 151.

"Whereas, The People of the State of Illinois, upon the relation of Thomas Harless, of the county of Cook, have given the Honorable the Judges of the Supreme Court of the State of Illinois to understand and be informed, that the twenty-third general assembly of the State of Illinois, at a regular session begun on the first Monday of January, A. D. 1863, passed in the manner and according to the forms prescribed by the Constitution of the State of Illinois, to wit: The senate on the 22d day of January, and the house of representatives on the 8th day of June in said year, 'A Bill for an Act to Incorporate the Wabash Railway Company,' which declared the relator, Horace A. Hulburt and Charles Hitchcock, and all such persons as should thereafter become stockholders in the company thereby created a body corporate, by the name and style of the Wabash Railway Company, with the usual powers of corporations, and with authority to construct and operate a railway for the transportation of persons and their ordinary baggage in certain streets in the city of Chicago, and which it was declared should be in force from and after its passage, and that said bill was enrolled, signed by the secretary of the senate, in which branch of the general assembly it originated, and by the speaker of the house of representatives, and the following entry made by the speaker of the senate, to wit: 'I sign the within bill with this statement: The same was passed, in my opinion, under a misapprehension on the part of senators, arising out of the statement made by the senator introducing the same previous to the passage of the same,' and then signed also by the speaker of the senate, and the said enrolled bill so certified, was, on the 12th day of June, A. D. 1863, presented to the governor for the purpose and in the manner required by section twenty-one of article four of the Constitution, which said bill so presented to the governor, was not and has not been approved by him. And the said governor has not at any time returned the said bill, with his objections, to the senate, the house in which it originated, unless the facts hereinafter set forth constitute such a return. And more than ten days (Sundays excepted) have elapsed since the same was so presented to him; and the general assembly did not by their adjournment prevent the return of

said bill within ten days (Sundays excepted) after it was presented to him, unless the facts hereinafter set forth constitute such adjournment within the meaning of the Constitution.

"The people aforesaid, upon the relation of said Thomas Harless, give the Honorable the Judges of the Supreme Court further to understand and be informed, that, on the 2d day of June, A. D. 1863, while both branches of the general assembly were in session, Mr. Bushnell, the senator from La Salle, introduced in the senate a joint resolution that the general assembly adjourn *sine die*, on the 10th day of June, 1863, which was laid over under rule 43 of the senate, that 'all resolutions presented to the senate shall lie one day on the table, unless otherwise ordered,' and no further action was taken thereon, until in the forenoon of June 8th, 1863, when the resolution was called up, and after being amended so as to read, '*Resolved*, by the senate, the house of representatives concurring therein, that this general assembly will adjourn *sine die*, on the 8th inst., at six o'clock P. M.,' it was passed by the senate, and a message of such action was delivered by the secretary of the senate to the house of representatives during their forenoon session of that day. The house of representatives adjourned until two o'clock P. M., and immediately after the house was called to order, at the said hour of two o'clock, the said message from the senate was taken up, and upon consideration of the resolution, the same was amended by striking out '8th,' and inserting in lieu thereof, '22d,' and striking out 'six o'clock P. M.,' and inserting 'ten o'clock A. M.,' and then passed by the house of representatives as amended, which action was immediately, on the assembling of the senate at three o'clock P. M., reported by message to the senate, and as soon as the message was delivered the senate took up the same, and the question being, shall the senate concur in the amendment of the house, the vote was taken by yeas and nays, when the question was decided in the negative, as follows, to wit:

"*Yeas*—Berry, Blanchard, Gregg, Green, Knapp, Lindsey, Mason, Moffett, Ogden, Vandeveer, and Worcester.—11.

"*Nays*—Addams, Allen, Bushnell, Dummer, Funk, Lan-

sing, Mack, Peters, Pickett, Richards, Schofield, and Ward.—12;

"And that during the afternoon session on the said 8th day of June, the house of representatives passed the following resolution, to wit:

"'Whereas, the house desires to recede from its action taken this day, in amending and adopting the senate resolution in relation to adjournment, therefore,

"'*Resolved*, That the honorable senate is hereby requested to return said resolution as amended, to the house, for reconsideration,' and the house notified the senate of the passage thereof by a message delivered by the clerk of the house immediately after (and before any intervening business had occurred) the vote of the senate to non-concur in the amendment of the house, and after the delivery of such message, there were no other proceedings in either branch of the general assembly, or messages sent or delivered, on the question of an adjournment *sine die*, on that or any other subsequent day; nor had there been any before that day, and at the hour of four o'clock P. M. of June 8th aforesaid, the senate adjourned until ten o'clock the next morning. The house adjourned at five o'clock P. M., until seven o'clock P. M., when it again convened and adjourned at nine o'clock thirty-five minutes P. M., until nine o'clock June 10th, in pursuance of a prior resolution; and further to understand and be informed, that the senate, in pursuance of adjournment, met at ten o'clock A. M., the 9th day of June, and proceeded as usual with business: and after the reading of the journal, Senator Knapp reported from the committee on township organization, a bill in relation to a bridge across Salt Creek, which was ordered to a third reading. Several messages were received from the house of representatives. Senator Green moved to refer the bill for an act in relation to claims allowed by the army board, to the committee on public accounts and expenditures, which was agreed to; when Senator Mack moved to adjourn until ten o'clock next morning, on which the yeas and nays were demanded, when two voted aye, and fourteen nay. Senator Blanchard moved a call of the house, when sixteen senators answered, and the sergeant-at-arms was

instructed to bring in absent members, and on motion of Senator Green, the senate adjourned until three o'clock P. M., at which hour the senate met pursuant to adjournment, and on motion of Senator Mason adjourned until ten o'clock next morning. That the senate met pursuant to adjournment, at ten o'clock June 10th, when the journal was read and approved, and the senate proceeded with their usual business, in the course of which, bills were reported from several of the standing committees, and ordered to a third reading, and reports made by the committee on engrossed and enrolled bills, after which the speaker of the senate read the following communication, to wit:

"'STATE OF ILLINOIS,
EXECUTIVE DEPARTMENT.

"'To the General Assembly of the State of Illinois:

"'Whereas, On the 8th day of June, A D. 1863, the senate adopted a joint resolution to adjourn *sine die* on said day at six o'clock P. M., which resolution, upon being submitted to the house of representatives on the same day, was by them amended by substituting the 22d day of June and the hour at 10 o'clock A. M., which amendment the senate thereupon refused to concur in;

"'Whereas, The Constitution of this State contains the following provision, to wit:

"SEC. 13, ART. IV. In case of disagreement between the two houses with respect to the time of adjournment, the governor shall have power to adjourn the general assembly to such time as he thinks proper, provided it be not a period beyond the next constitutional meeting of the same."

"'Whereas, I fully believe that the interests of the State will be best subserved by a speedy adjournment, the past history of the present assembly holding out no reasonable hope of beneficent results to the citizens of the State, or the army in the field, from its further continuance;

"'Now, therefore, In view of the existing disagreement between the two houses in respect to the time of adjournment, and by virtue of the power vested in me by the Constitution aforesaid, I, Richard Yates, governor of the State of Illinois,

do hereby adjourn the general assembly now in session, to the Saturday next preceding the first Monday in January, A. D. 1865.

"'Given at Springfield, this 10th day of June, A. D. 1863.

"'RICHARD YATES, *Governor.*'"

"And after reading the same vacated the chair. And on motion of Senator Berry, Mr. Underwood, the senator from St. Clair, was elected Speaker *pro tem.*, and on a call of the senate, twelve senators were found to be in attendance, when the sergeant-at-arms was directed to bring in absent members, and afterwards the proceedings under the call were dispensed with, and a message received from the house, that it had appointed their part of a committee of conference on the bill for the relief of sick and wounded soldiers, and asking the senate to concur, and appoint their part of said committee, and the senate concurred in said resolution and appointed their part of said committee. A message was received from the house that they had passed a resolve that a joint committee be appointed to prepare an address to the people of the State, with the reasons why the members of the legislature were not engaged in transacting the legitimate business for which they were elected, and had appointed their part of the committee, which resolution was taken up, concurred in, and the committee on the part of the senate appointed, and then the senate adjourned until 3 o'clock P. M., at which hour it met pursuant to adjournment, and on call of the senate thirteen senators answered; when Senator Green, from the joint committee of conference on the bill for the relief of sick and wounded soldiers, reported that the committee had agreed to recommend that the house concur in the amendments of the senate. A message was then received from the house, on the passage of a joint resolution, which was concurred in by the senate, and then another message was received that they had adopted a protest and ordered it spread upon the journal, and asked the concurrence of the senate in the same; and on motion of Mr. Green, the protest was taken up, adopted, and ordered to be entered on the journal of the senate, and said protest was

signed by thirteen senators and fifty-six representatives, and reads as follows, to wit:

"'PROTEST.

"'Upon this 10th day of June, A. D. 1863, while the general assembly were in session and engaged in the discharge of their constitutional duties, an attempt by the governor of Illinois was made to dissolve this body; which attempt, illegal, unconstitutional, and outrageous as it is, must inevitably result in the cessation of any further legislation at this time.

"'The circumstances attending this monstrous and revolutionary usurpation of power, and the injurious consequences which must result to the people of the State, demand a brief statement on our part, which we submit with confidence to the consideration of a discerning and candid public, whose rights have thus been ruthlessly invaded, and whose interests have been disregarded and trampled under foot.

"'The action of the governor in this nefarious attempt to stop the legislation of the State is supposed to be based upon the following provision of the State Constitution.

"ART. IV, SEC. 13. In case of disagreement between the two houses with regard to the time of adjournment, the governor shall have power to adjourn the general assembly to such time as he thinks proper, provided it be not a period beyond the next constitutional meeting of the same."

"'And the first question to be determined is, what is such a disagreement under the Constitution as would justify the interposition of the executive? Nor is the answer difficult to arrive at, since this point has been so well and thoroughly settled that it needs but its statement to determine the inquiry beyond cavil or contradiction. When one house amends the resolution or alters legislative action of the other, as to the time of adjournment or any other subject, and the house proposing the resolution or action refuses to concur with the amendments so made, the amending house must be first informed of such non-concurrence, in order to recede and concur or take such other action in the premises as may tend to an agreement of both on the basis of compromise.

"'The amending house, being informed of non-concurrence

in its action by the other, may either itself recede and concur, or adhere, and propose and appoint a committee of conference, which is the next step to be taken. And it is only when one house refuses to join in a committee of conference, or when such committee, having been appointed, fails to arrive at a common result, or, having so done, the same is not agreed on and adopted by both houses, that the disagreement spoken of in the Constitution has been produced; and the usual parliamentary proceeding is to have two free conferences before final disagreement results. Both houses must be at a dead lock, without hope of or effort towards agreement, before executive action can be invoked or legally taken. Were the rule otherwise, it would require the invariable agreement of each house to whatever the other chose to propose. And until this time it has never been questioned in Europe or this country that such was the rule.

"'Nor can the executive take action, even where an actual disagreement exists, until officially informed thereof by both houses.

"'Tested by these principles, we present the facts in the present case, which will demonstrate the indefensible character of the proceeding which we reprobate and condemn.

"*Resolved*, by the senate, the house of representatives concurring therein, That the general assembly will adjourn *sine die* on the 8th inst., at six o'clock P. M."

"'Which resolution was at once transmitted to the house, and, being taken up by that branch of the legislature, was amended by the substitution of the 22d day of June instead of the 8th.

"'The resolution, being thus amended, was returned to the senate for its action, whereupon that body refused to concur in the amendment.

The house was not then, and has not since been, officially informed of the non-concurrence of the senate in the amendment in question, and no opportunity has as yet been afforded that body to recede from its previous action, if it so desired.

"'The regular parliamentary progression has not been observed; the house has not refused to recede and concur with the senate in its action; no committees of conference have been

proposed or appointed; and, in short, no disagreement has existed, or can be presumed as existing in the premises.

"'Neither has the legal and official notification of a disagreement been laid before the governor, as, indeed, it could not have been, since it was well known and understood that there was no such disagreement in fact.

"'We have thus briefly stated the position of affairs which the governor of the great State of Illinois has made use of as a pretext for an arbitrary, illegal attempt to bring the deliberations of the general assembly to a close.

"'By this action he has deliberately and designedly defeated the passage of measures of great public importance, and demanded by the exigencies of the times.

"'He has defeated the appropriation of one hundred thousand dollars for the gallant sons of Illinois who are bleeding and dying upon the battle-field and in the hospital, and whose terrible condition invites the sympathy of every human heart, and demands the earnest effort in their behalf of every citizen of the State on which they have shed imperishable glory. The bill for that purpose, already passed both houses, and pending simply upon a slight difference of opinion as to some of its details, in the lower house, which difference has now been happily removed, is defeated merely because the miserable partisanship of the chief executive, who usurps the unmerited title of the 'Soldier's Friend,' prevented him from consenting that a legislature having a majority of his political opponents should have the honor, as they would enjoy the privilege, of flying to the rescue of their gallant brethren.

"'He has defeated the bill for the sale of the coin in the treasury and the payment of our interest in treasury notes, saving hundreds of thousands to the people, which was on its final passage as the supporters of this action left the halls of legislation at the bidding of their master.

"'He has defeated the passage of the general appropriation bills already passed the senate, and pending in the house and ready for passage, which the senate had acted on without delay, and to which no obstruction was intended to be, would or could have been interposed by the house.

"'He has defeated the printing of the report of the State Agricultural Society, an appropriation for which passed the house, and was on its passage in the senate, and the distribution of the appropriation for agricultural purposes made by the general government, and as yet unapplied to the ends for which it was intended, to the great detriment of the vast agricultural interests of Illinois, for whose benefit the measures were intended.

"'He has defeated the appropriation for the State Normal University, and the property will be sold under the existing judgments, and this noble institution be destroyed.

"'The memory of the great dead could not restrain him, and the appropriation for the erection of a monument to Douglas receives its death blow at his hands.

"'He has defeated the general and local legislation of the State, for much of which pressing necessity existed, and which was so fully matured as to require for its completion but slight farther action.

"'He has done all this without the shadow of a legal pretext, and in defiance of a well nigh universal public opinion.

"'Even partisanship affords no palliation for the pursuit of such a course, since no political measure has been pressed upon either branch of the assembly during the recent period of its session. Which is the more guilty, the individual who proposes, or the wretched agents who carry into effect, an act so utterly indefensible, it is not for us to determine. It is sufficient that all the actors, aiders and abettors of this scheme to block the wheels of government, will receive the condemnation they deserve from an outraged people.

"'The manner in which this action was attempted to be taken, deserves a passing notice. The statement by one branch of a government to a co-ordinate branch thereof, that its action has not been conducive to the public welfare, is disrespectful in terms, and an insult so obvious, that we dismiss it with the remark that if such insinuations could be permitted, or were justifiable in any event, they come with an ill grace from the source of the delays to legislation during the former part of this session, and the entire cessation thereof at the present.

"'When it is considered that the governor has been absent from his post of duty during the present portion of our session until within the last twenty-four hours, and that members of his political party (who render to his commands the most abject obedience), repeatedly seceded from the senate during the winter session, and have given a quorum of but two days and one-half during the summer continuation thereof, the suggestion that the general assembly have failed in the performance of their duties, deserves only our contempt.

"'Earnestly protesting against this arbitrary and illegal act of the governor, and insisting that the general assembly has still a legal existence, and has neither been adjourned nor constitutionally dissolved, we ask that this, our protest, may be entered on the journals of the respective houses.'

"Signed by thirteen senators and fifty-six representatives.

"And thereupon the senate adjourned until 9 o'clock the next morning, when it met pursuant to adjournment. And further, to understand and be informed, that on the morning of June 10th, the house of representatives met pursuant to adjournment and proceeded with its usual business, during the course of which a resolution for a committee of conference upon the bill for the relief of sick and wounded soldiers was adopted; a communication from the governor in relation to the discharge of soldiers from the marine artillery was laid before the house, bills passed, bills introduced and referred, after which a bill for an act to provide for the payment of the interest upon the State debt, and for the sale of certain gold and silver coin, belonging to the State of Illinois, was taken up, when Mr. Lacy, of Mason, moved an amendment, pending which a message from the governor was announced, in regard to which the following is the only entry in the journal: 'A message from the governor was announced by the doorkeeper and read, but the bearer of the message was not recognized by the speaker,' and thereupon motions were made to adjourn, and withdrawn, when a call of the house was made, and forty-four answering, further proceedings under the call were dispensed with, and a joint resolution passed for the appointment of a committee to prepare an address to the people, on the subject of the governor's attempt to

adjourn the general assembly, and then a message was received from the senate that they had concurred in the resolution for a committee of conference on the bill for the relief of sick and wounded soldiers, when the house adjourned until 2 o'clock P. M., at which hour the house met pursuant to adjournment, and the committee of conference on the bill for the relief of sick and wounded soldiers reported a recommendation that the house concur with the amendments of the senate, which was adopted; then a message was received from the senate of concurrence in a resolution of the house, then a resolution was moved by Mr. Keyes, of Sangamon, and adopted, and thereupon the bill for the relief of sick and wounded soldiers was taken up, and on the question, shall the house concur with the senate in its amendments, the yeas and nays were taken, when it appearing that forty-four voted yea and none nay, which being less than a quorum, the bill failed for the want of a quorum; and then the protest hereinbefore set forth, signed by thirteen senators and fifty-six representatives as aforesaid, was submitted to the house and ordered to be spread upon the journal, which was done.

"And whereas, the people aforesaid, upon the relation aforesaid, have given the Honorable the Judges of the Supreme Court further to understand and be informed that the journals of both branches of the general assembly are silent as to any proceedings in either branch after the morning of the 11th day of June, as before recited, until the afternoon of June 23d, 1863, when at the hour of 3 o'clock P. M., the following entry appears on the journal of the senate: 'The speaker *pro tempore*, Mr. Underwood, having retired from the chair, on motion of Mr. Lindsay, the senator from Peoria, Mr. Knapp, the senator from Logan, was elected speaker *pro tempore*, and thereupon took the chair,' when, on motion, the senate adjourned to 9 o'clock the next morning, at which time the senate met pursuant to adjournment, when the journals were read and approved, when a message was received from the house of representatives that they had passed the following resolution, to wit:

"'*Resolved*, by the house of representatives, the senate concurring therein, That the two houses of the general assembly, at 10 o'clock A. M. this day, take a recess until the Tuesday after

the first Monday of January, A. D. 1864, at 10 o'clock A. M.,' which was concurred in by the senate, and then other resolutions were passed by the senate, and among them the following, to wit:

"'*Resolved*, by the senate, the house of representatives concurring herein, That a joint committee of one on the part of the senate and two on the part of the house of representatives, be appointed to wait on the governor and inform him that the general assembly is now ready to adjourn for the recess, and ask him if he has any further communication to lay before them.' And Senator Lindsay was appointed a member of said committee on the part of the senate, and immediately thereafter the senate received a message from the house of representatives that they had concurred in the passage of the same resolution, and appointed Messrs. Fuller and Keyes as their part of said committee, and thereafter Senator Lindsay reported that the joint committee had waited on the governor in obedience to the joint resolution, and that the committee were informed by his excellency that he had no communications to lay before this body, and that he did not recognize the legal existence of this as a legislative body, and after the receipt of a message from the house of representatives that they were now ready to adjourn for the recess, on motion the senate adjourned until the Tuesday after the first Monday in January next, at 10 o'clock A. M., in pursuance of the joint resolution before passed; and further, that the following entry next after the protest appears on the journal of the house of representatives, to wit:

"'On motion of Mr. Fuller, the house, at 2 o'clock and 20 minutes P. M., June 23d inst., adjourned until to-morrow morning at 9 o'clock,' and further, that at the hour last mentioned, on the 24th day of June, the house of representatives met pursuant to adjournment, when the reading of the journal was dispensed with, and a message from the senate received that they had passed the joint resolution aforesaid for the appointment of a joint committee to wait on the governor, which, on motion of Mr. Miller, of Logan, was taken up and concurred in, when the speaker appointed Messrs. Fuller and Keyes on said committee, then the house passed the joint resolution for a recess

aforesaid, and then passed several resolutions on different subjects, when Mr. Fuller, from the joint committee to wait on the governor, submitted the same report to the house that was made by Senator Lindsay from said joint committee to the senate as aforesaid. A committee was then appointed to inform the senate that the house was now ready to adjourn for the recess, and after receiving a message that the senate was ready to adjourn, and the hour of 10 o'clock having arrived, Mr. Speaker Buckmaster declared the house of representatives adjourned for a recess until the Tuesday after the first Monday of January, A. D. 1864, at 10 o'clock A. M., in pursuance of the joint resolution to that effect.

"And the people aforesaid, upon the relation of said Thomas Harless, give the Honorable the Judges of the Supreme Court further to understand and be informed, that all the facts as hereinbefore recited, do appear on the journals of the respective branches of the twenty-third general assembly of the State of Illinois, as they are hereinbefore recited, except as to the presentation to the governor of the bill to incorporate the Wabash Railway Company, and that no other facts touching the question of adjournment *sine die* appear on the journals of the proceedings of the 8th day of June, or prior thereto, at the June meeting, and no other proceedings on the days subsequent to the said 8th day of June than are hereinbefore recited, appear on the journals of the proceedings of said general assembly. And further, that the journals of the proceedings of the 23d and 24th days of June, do not show how many senators or representatives were present. And further, that the record of the executive acts, as kept by his private secretary, and deposited in the office of the secretary of State, shows that 'the bill for an act to incorporate the Wabash Railway,' was presented to the governor for his approval, with other bills passed at the same session, which have been approved, but said record is silent in regard to the disposition of said bill; and further, that the said executive record shows no entry in regard to the adjournment of the general assembly by the governor, or otherwise.

"And whereas the people aforesaid, upon the relation aforesaid, protesting and insisting that the facts as before recited, as being

evidenced by the journals of the 23d general assembly, are exclusive and conclusive evidence, and that no inquiry can be made as to the proceedings of the general assembly, except in and through its journals, yet for the purpose of presenting all the facts touching the subject matter of this information, whether the same be proper for the consideration of a court or not, and giving the defendants all the benefit therefrom that the law will allow, but still protesting that the relator and his associates are not and cannot be, by the rules of law bound by such facts, appearing otherwise than from the journals, have given the judges of the Supreme Court further to understand and be informed, that, on the said 10th day of June, at 11 o'clock in the forenoon, while the house was considering the senate bill to authorize the treasurer to sell the coin in the State treasury, &c., the private secretary of the governor appeared on the floor of that body, and being announced by the doorkeeper, without addressing the speaker, or being recognized by him, commenced to read the proclamation of the governor, purporting to adjourn the general assembly. The speaker rapped continuously with his gavel, until the secretary was about half through, when the secretary persisting in reading, the house and speaker were silent, until he had concluded. The speaker then stated to the house, the secretary being on the floor, that the message was not received by the house, because it was disrespectful in terms, and the secretary had attempted to deliver it without addressing the presiding officer or being recognized by him, and was not delivered to the house through the speaker as established by legislative custom. No action was taken on the matter of receiving the message, and it was not entered on or made a part of the journals; but the paper was carried by a page to the clerk's desk, while the speaker was announcing that it was not received.

"After the reading of the governor's proclamation, all the republican members of both branches left their seats and refused to return, after being summoned, thus leaving but 13 senators and 56 representatives, less than a quorum in both houses, at that time, and a quorum was not obtained thereafter. On the

evening of that day, the members of both houses left their seats, and did not resume business until June 23d.

"The lieutenant-governor remained in Springfield until the 12th of June, but refused to recognize the senate as in session after he had vacated the chair. On the 12th of June he left Springfield, and thereafter was at his home, in Du Page county, and at Chicago, attending to his private business, until after the 24th of June.

"On the 19th of June, the governor prepared a message with his objections to the bill to incorporate the Wabash Railway Company, and sent the enrolled act with his original message by private hands to the lieutenant-governor.

"The lieutenant-governor resides in Du Page county, about 200 miles from Springfield. The messenger went from Springfield to the residence of the lieutenant-governor, in Du Page county, and on the 20th day of June, delivered the bill with the veto message to the lieutenant-governor, who was then at his residence engaged in domestic duties.

"The lieutenant-governor has not delivered the act and message to the secretary of the senate, or laid it before the senate, or in any way treated the legislature as in session, but denied and denies that it was.

"On the 19th and 20th June, there was no actual session of the senate, and the chamber was locked, but the secretary was in Springfield and had possession of the journals and papers of the senate.

"On the 23d and 24th days of June there was less than a quorum present in each branch, all of which facts last recited can only be shown by parol evidence, and the relator again denies that said facts, known to exist only by parol evidence outside the journals, are or can be available in the law so as to be considered by a court, but as such question of law, submits the same to the court.

"And whereas the people aforesaid, upon the relation of the said Thomas Harless, have given the Honorable the Judges of the Supreme Court to understand and be informed that afterward, to wit, on the 25th day of June, A. D. 1863, the corporators named in said act to incorporate the Wabash Rail-

way Company, accepted the same and opened books for the subscription of the capital stock which was then and there subscribed, and the company fully organized by the election of the relator as president, Charles H. Ham as secretary, and Benjamin E. Gallup as treasurer, and it is necessary for the said corporation to have and procure a certified copy of the said act from the secretary of State, to be used as evidence of the contents thereof.

"And whereas, on or about the 10th day of July, 1863, the said Francis A. Hoffman, lieutenant-governor, as aforesaid, stated to one of the stockholders in said Wabash Railway Company, on application for that purpose, that he had the possession of the said enrolled act, and the message purporting to be said veto message, had sealed them both up and should retain them, and the said relator and his associates therefore supposed that the said enrolled act was still in his possession, until, on the 13th October, A. D. 1863, upon the occasion of serving a copy of petition and notice of motion for an alternative writ of mandamus, on the governor and lieutenant-governor, the said Francis A. Hoffman stated that the said bill was not in his possession, and on the 16th day of October, A. D. 1863, the relator applied to O. M. Hatch, the secretary of State, to learn whether the said enrolled act was in his custody, and was informed that it was, and thereupon the relator demanded a copy of said act, with a certificate thereto, under the seal of his office, that the said act was a law, and had become so because of the failure of the governor to return the same, with his objections, to the senate in which it originated, within ten days (Sundays excepted) after the same was presented to him, and thereupon the said O. M. Hatch, secretary of State as aforesaid, refused to give such copy and certificate, although his fees therefor were then and there tendered him.

"The relator further says that the information of the statement of the lieutenant-governor, that the act was not in his custody was first obtained by him on the 15th day of October.

"And whereas the people aforesaid, upon the relation of said Thomas Harless, aver that the foregoing is a full, complete, and true statement of all the facts touching the passage of the

'Act to incorporate the Wabash Railway Company,' and the action of the governor thereon, and the proceedings in and by the general assembly subsequently to the 8th day of June, A. D. 1863.

"Wherefore the people aforesaid, by the said Thomas Harless, relator as aforesaid, pray that an alternative writ may be issued to the said O. M. Hatch, Secretary of the State of Illinois, commanding him to make a true copy of the act to incorporate the Wabash Railway Company, with his certificate thereto appended, under the great seal of the State, that the same is a law, by reason of the failure of the governor to return the same with his objections to the senate, the branch of the general assembly in which it originated, within ten days (Sundays excepted) after it was presented to him, and deliver the same to the relator, and that upon a hearing such other order may be made as to your honors seems meet, &c. And it has been made to appear to the court that due notice of the application for said writ has been served on the said O. M. Hatch, secretary of the State of Illinois, more than ten days before the commencement of the present term, and the court, after consideration of the motion of relator for said writ, has ordered that an alternative writ be issued according to the prayer of the relator; returnable on Friday, the 13th day of November, instant, at the hour of three o'clock of that day.

"Now therefore, you, the said O. M. Hatch, secretary of the State of Illinois, are hereby commanded to appear before the Supreme Court of the State of Illinois, now sitting at Mt. Vernon, on or before the 13th day of November, instant, at the hour of three o'clock P. M., and show cause if any you can, why a peremptory writ of mandamus should not be awarded against you, requiring you to make a true copy of the act to incorporate the 'Wabash Railway Company,' with your certificate thereto appended, under the great seal of the State, that the same is a law, by reason of the failure of the governor to return the same, with his objections, to the senate, the branch of the general assembly in which it originated, within ten days (Sundays excepted) after it was presented to him, and deliver the same to the relator.

"Witness, JOHN D. CATON, Chief Justice of the Supreme Court of the State of Illinois, and the seal of said court, hereto affixed at Mt. Vernon, in the First Grand Division, on this 11th day of November, A. D. 1863.

"NOAH JOHNSTON, *Clerk.*"

The alternative writ issued against Dubois, the Auditor of public accounts, *ex rel.* Keyes, was for the purpose of compelling the issue, by respondent, to said Keyes, of a warrant upon the State Treasurer for his, Keyes', *per diem*, for June 23, and 24, 1863, as a member of the house of representatives of said State, said *per diem* amounting to the sum of two dollars. The said writ alleged the election and qualification of the relator; his attendance upon the sittings of the house, June 23d and 24th, 1863, the proceedings going to show such sittings being stated, as in the writ already quoted; the Speaker's certificate as to the amount due as his *per diem* for said two days; and the refusal of the Auditor, upon presentation of said certificate, to issue his warrant therefor.

The return of the Auditor to this writ, is sufficiently stated in the opinion of the court.

The return of the Secretary of State, alleges, among other things not material to be here stated, the passage, enrollment and signing of the bill in question by the secretary of the senate and the speaker of the house; the entry thereupon by the speaker of the senate; and the presentation of the bill to the governor on June 12, substantially as alleged in the writ; but states that respondent does not know and is not officially informed as to the time of its presentation. The said return also states upon information and belief, the non-approval of said bill by the governor; the lapse of more than ten days (Sundays excepted), since its presentation; its non-return, with his objections, to the senate, where it originated; and the adjournment of the general assembly on June 10, 1863, before the presentation of said bill to the governor, till January, 1865. The said return also states the proceedings of the two houses relative to the resolution to adjourn, the official communication

by certificate of the speaker of the senate of the fact of disagreement relative thereto, to the governor, and his adjournment of the general assembly, as before stated; the fact of the acquiescence of the members in said adjournment; the vacation of their seats and the closing of both houses on June 10th, since which time nothing had been done by either house, except at the pretended sessions on June 23d and 24th by the two members of the senate and four members of the house, referred to by the court in their opinion, the proceedings whereof as stated in the journal and set forth in the writ, were, as therein set forth, alleged to have been wrongfully and fraudulently made up; and it was alleged that neither house had held a legal session since June 10th, when so adjourned. The said return also alleges on information and belief that on June 19th, within ten days from the reception of the bill by the governor, as aforesaid (Sundays excepted), he delivered the same with his objections thereto in writing, to the lieutenant-governor, by him to be presented to the senate, where it originated, on the first day of the next session thereof, who, there having been no meeting of the senate since the said bill and objections were so placed in his custody, delivered the same on September 25, 1863, to respondent simply for safe custody till required for presentation to the senate as aforesaid, which were received by respondent solely to be by him kept securely and privately till that time, subject to be redelivered to said lieutenant-governor, or other person authorized by the governor to receive and present them. The return also alleges that the said bill had never been filed in respondent's office as a statute; nor had the governor ever directed it to be certified or authenticated as such; and insists that the relief sought ought not to be granted.

W. C. Goudy and *T. Lyle Dickey* for relators. *Melville W. Fuller* and *A. W. Arrington* for relator in the case against O. M. Hatch, Secretary of State.

Sam'l W. Fuller, *Stephen T. Logan*, *O. C. Skinner* and *E. M. Haines* for respondents. *Thos. Hoyne* for respondent, I. K. Dubois, Auditor, &c. *W. K. McAllister* and *C. Beckwith* for respondent, Hatch.

[123*] *WALKER, J., in the case of the People, *ex rel.* Keyes, against the Auditor:

The record in this case shows, that on the 8th day of June, 1863, the senate adopted a joint resolution, for a final adjournment at six o'clock in the afternoon of that day. It [124*] was sent *to the house, where it was taken up and amended, by inserting the twenty-second of June, at ten o'clock in the forenoon, as the time for adjournment, and thus amended it was adopted by the house. On the same day, as amended, it was returned to the senate, where it was taken up, and on the question whether the senate would concur with the house amendment, it was decided in the negative. During the afternoon of the same day, the house adopted a resolution, in the preamble to which they say they wish to reconsider their action in amending the resolution. By the resolution itself, they request the return of the joint resolution for reconsideration. This resolution seems to have been communicated to the senate immediately after the vote had been taken refusing to concur in the house amendment to the joint resolution, but it does not appear that the senate took any action upon this request, nor that either house took any further steps on the resolution to adjourn.

At four o'clock, in the afternoon of the eighth, the senate adjourned until ten o'clock the next morning. The house, on the evening of the same day, adjourned over until the tenth, in accordance to a previous resolution of that body. The senate met on the ninth and adjourned to the tenth, when it again met, and whilst in the transaction of business, the speaker read a proclamation from the governor declaring the general assembly adjourned until the first Monday in January, 1865, whereupon the speaker vacated the chair, a speaker *pro tem.* was elected, and a joint committee was appointed, who reported a protest against the action of the governor, which was adopted and spread upon their journals, and adjourned over until the morning of the eleventh, when there is entered a convening order, after which all entries cease upon the journals until the twenty-third of June.

The house met on the tenth, and in the course of their proceedings, the governor's proclamation was read to the house, after which they joined in the appointment of the joint committee to prepare the protest, which was also adopted by the house and spread upon their journals, but the house journals fail to show any adjourning order on the tenth, after which day
* all entries cease until the 23d of that month. It also [125*]
appears, that on the tenth, after a speaker *pro tem.*
was elected by the senate, the roll was called and only twelve senators answered, when a call of the senate was ordered but was afterwards dispensed with.

It appears from the journals of both houses, that entries were made on the twenty-third, stating that the houses had convened, and afterwards that adjournments were had until the twenty-fourth. Convening orders appear on both journals on that day, and a joint resolution to adjourn both houses until the Tuesday after the first Monday in January, 1864, after which no more entries appear upon the journals of either house. The relator alleges that he was present in the discharge of his duties as a representative on these two last days. That he holds the certificate of the speaker therefor, which he presented to the auditor for a warrant on the treasury for the sum of two dollars alleged to be due, but that the auditor refused to draw the same.

The return alleges that, after the governor's proclamation was received, on the tenth of June, the members of the two houses during that and the succeeding day, settled their accounts with the speakers; that they obtained from those officers their certificates of attendance, which were presented to the auditor, who drew warrants on the treasury for their several sums; that they obtained their pay, returned to their homes, and the doors of the halls were closed; that on the twenty-third of June two senators and four representatives met in their several halls, but denies that they were in session as a legislative body at that time, and that relator was not in attendance as a representative, and is, therefore, not entitled to compensation as such. It admits that the speaker's certificate

was presented, and a warrant on the treasury was demanded and refused.

To this return a demurrer was filed, which presents the question as to the sufficiency of the return of the auditor.

The demurrer admits the truth of the facts set out in the pleading to which it is interposed. But it is contended [126*] that it *admits such facts only as are well pleaded, and as could be used as evidence on the trial. That such facts as could only be proved by record evidence, and which from the pleadings appear to exist only in parol, would not be admitted. If this is the true rule, which I deem unimportant to determine, still all facts necessarily existing outside of, and never appearing upon, the journals, so far as they would be proper evidence, would be admitted by the demurrer. The settlement of the accounts, the drawing their pay by the members, their return to their homes, and the closing of the halls, never appear upon the journals, and if such facts might be proved for any purpose, they would, under the rule contended for, be admitted by the demurrer. The inferences or conclusions of law stated in the return would, of course, not be admitted.

The governor's proclamation was issued under the thirteenth section of the fourth article of our Constitution. It is this: "In case of disagreement between the two houses with respect to the time of adjournment, the governor shall have power to adjourn the general assembly to such time as he thinks proper, provided it be not to a period beyond the next constitutional meeting of the same. The force of the argument on both sides of this case seemed to be to the point, whether the contingency contemplated by this provision had arisen, so as to authorize the governor to interpose his power to adjourn the general assembly. From the research and reflection that I have been enabled to give the case, I have arrived at the conclusion that there are other questions involved material to its decision. And I shall, having stated the facts and what I deem proper under the demurrer to be considered, proceed to give my views as concisely as the nature of the case will permit. I regret that an adjudged case cannot be found involving the same or a similar state of facts which could shed light on the question.

It is upon this state of facts the court is called upon to determine whether the general assembly was adjourned on the tenth or eleventh days of June last. If by the governor's proclamation, by the action of the two houses on those days, or if by the joint action of the governor and of the two houses, *the session was either adjourned or terminated, then [127*] there could have been no session on the twenty-third and twenty-fourth of June, and the relator would not be entitled to compensation.

It is not denied that the governor issued his proclamation under the thirteenth section of the fourth article of our Constitution. In doing so he claimed that the contingency therein provided for had arisen, and that he was authorized to act. And whether this be so or not, when we see, from the absence of all entries upon the journals, that the two houses ceased to hold further sessions, the members drew their pay, returned to their homes, and the halls were closed, this apparent acquiescence on the part of the members of the two bodies, to my mind, is satisfactory evidence that they designed to terminate the session. By this course of action it would unquestionably seem that they had determined to cease to meet, and whatever weight they may have attached to the governor's proclamation, they did in fact adjourn, or, at least, ceased to hold their daily sessions, according to the usual course of such bodies, and this cessation was, so far as the journals show, without day. And it seems that it was designed to adopt the act of the governor. Suppose the governor, without any pretense of a disagreement, had come into the houses, and had declared them adjourned *sine die*, and the speakers had so announced, and it had been entered on the journals of each house that on that day the general assembly had so adjourned and the members had dispersed and business had ceased, would any person contend that the session had not been terminated notwithstanding the want of a joint resolution?

Or, suppose the speakers, independent of all action by the governor, were to declare that the general assembly was adjourned *sine die*, and it should be so entered on the journals, and the members were to disperse and further meetings should

cease, what would be the inevitable conclusion? While it is laid down by all writers on parliamentary law, that when such a body is once organized, the session can be terminated only by the expiration of the time for which the members [128*] *were elected, by executive action, or by resolution, they do not, so far as I can find, say that such a resolution must appear upon the journals. It is true that it is usually by such a resolution, that the sense of the two houses is obtained, but, if that sense were manifested in any other clear and satisfactory mode, no reason is perceived why it should not be as obligatory as if it were reduced to writing, and spread upon the journals. It is the agreement of the two bodies that would form the resolution, whilst the written resolve is only evidence of the joint concurrence of the two bodies. If acts of the two houses appear, which render it clear that it was their resolution to adjourn, I have no hesitation in saying that such would be the effect, although a joint resolution did not appear upon the journals. If, simultaneously, each house were to adopt a resolution, or simply vote that they would adjourn at the same time, and when the period had arrived, they were to act upon it, I am unable to perceive that the session would not be terminated.

It is true, that the joint rules of the two houses provide for an adjournment *sine die* by joint resolution. But this is not a constitutional requirement, and like all such rules it was adopted to facilitate the transaction of business, and doubtless, should be observed by the two houses. But will it be said, that, because this or any other rule is violated, an act not in contravention of the Constitution is void alone for that reason? Suppose a law should be adopted with all the constitutional and legislative requirements, but in violation of a joint rule, or a rule of one of the houses, can it be said that the law would be void? Our Constitution has prescribed no mode by which the sessions of the general assembly shall terminate. That is left to the two houses to determine. The only check it has imposed being a prohibition upon either house from adjourning for more than two days without the consent of the other. I am, therefore, of the opinion, that a joint resolution

formally adopted and spread upon the journals is not indispensable to the termination of the session, by an adjournment without day.

Suppose the two houses were, in fact, to adopt such [129] a resolution, and disperse on the day fixed, and suppose the clerks of the two houses, by accident or design, were to fail to enter it upon the journals, would the general assembly be adjourned? Or have the clerks the power to thwart the purpose of the houses, by continuing the session against the unanimous will, it may be, of the members? If such is the effect of their neglect, it would also give them the power to prevent laws regularly adopted and intended to take effect sixty days after the day agreed upon for an adjournment *sine die*, from going into operation. Also, to prevent the executive from returning bills to the house in which they originated, with his objections, within the period limited by the Constitution, and thus deprive the governor of his right to the employment of his limited veto power in the mode prescribed by the Constitution. If an adjournment without day cannot be effected, except by a resolution for that purpose appearing upon the journals, if nothing can be inferred from the absence of all entries for a long space of time, or if parol evidence cannot be received to prove the occurrence of acts and circumstances, outside of the journals, and which are never found upon them, from which inferences may be indulged, then the negligence of the clerks might produce all of these consequences.

As a matter of history in legislation it seems to be true, that when the hour arrives for adjournment, the members are usually not in the halls, and do not remain to see that the journals are made up, leaving that to be done by the clerks. It may be said that such an omission could be corrected by the houses when they again convene, but if the members never returned, it would not be corrected, nor could it generally be done in time to enable the governor to return bills placed in his hands within ten days before the adjournment. Nor is it probable that it could be proved by verbal evidence, that the resolution had been adopted any more than that a bill had passed which did not appear from the journals, or that a court

had rendered a judgment, which the clerk had failed to record.

Again, it is a rule familiar to the profession, that when [130*] the *legislative and executive branches of the government, by the adoption of an act give a construction to a provision of the Constitution, if the construction thus given is only doubtful, the courts will not hold the act void. It is only in cases of its clear infringement that courts will interpose to hold the act nugatory. And it is for the reason that each coordinate branch of the government is under an equally solemn duty to support and maintain that instrument, and when they have performed the act, it must be presumed that they have not acted with a reckless disregard of so high a duty. Then applying this rule, when the governor asserted his right to adjourn the session, if the two houses acquiesced in it, the court would not say that it did not produce an adjournment, unless it was clear that such was not the effect. It is true that the session might terminate, and yet the governor have no constitutional power under the circumstances to adjourn the body. But the course of the two houses acting upon the governor's suggestions in dispersing and not again coming together, would show that both of these branches of the government understood the session to have terminated.

But suppose the case is considered on the subsequent acts of the two houses and the members. It was the manifest design of the framers of the fundamental law of the State to confer ample power upon the two houses of the general assembly to continue their sessions to the full extent of the necessity of its continuance. To effectuate this object they adopted the twelfth section of the third article of the Constitution, which is this: "Two-thirds of each house shall constitute a quorum; but a smaller number may adjourn from day to day and compel the attendance of absent members." The framers of that instrument no doubt supposed that they had conferred ample power, by this clause, to prevent the termination of their session by the reason of a want of a quorum, because they grant power to compel the attendance of absent members. If the members of the two houses who remained after the proclamation was announced,

believed it was unwarranted, why was not this power invoked for the purpose of restoring a quorum?

It was suggested on the argument, that such an [131] effort would have proved unavailing, but the court cannot assume that fact to be true. Each house being clothed with this power, and failing in its exercise, it would seem to indicate that they did not, on their final action, suppose their privileges were invaded. It would seem to be natural, that if they believed the act of the governor to be unconstitutional, they, to preserve the dignity of the house, to prevent the encroachment of executive power upon their rights, would have done some act to preserve the session, if not by the enforcement of the attendance of members, at least by adjourning from day to day, as authorized by the Constitution.

Why was the power given to a less number than a quorum to adjourn from day to day, if not to enable a minority to continue the life of the session? According to legislative usage, any number less than a quorum had no power to perform any legislative function. The framers of that instrument must have supposed that unless such power was conferred, an adjournment from day to day could not be had by less than a quorum, and that in such case the session must end. Otherwise why insert the provision? It must be supposed that those who adopted that instrument employed no language beyond what was necessary to express their ideas in the clearest and most unambiguous manner. Nor can it be supposed that they would delegate, by express provision, power already possessed. Every delegation of power to the officers of government or the legislature, was made to accomplish a purpose. And in this I am at a loss to perceive any other than to enable the body to prevent a termination of their sessions.

Again, by article III, section 13 of the Constitution, it is declared that "each house shall keep a journal of their proceedings and publish them." This requirement being peremptory, it must be presumed that the two houses will, when in session, observe and perform the duty. We have no right to suppose, or by any means conclude that they will disregard the injunction. Then can it be inferred, when we find the

journals blank for at least ten legislative days, that
[132*] the two *houses were in session, and in violation of their obligation to the Constitution, were keeping no journals of their proceedings? Is it not more reasonable to presume that the houses were not in session? It may be said that they did no business, but we would expect to find convening and adjourning orders, at the very least, if they were in session. The almost uniform custom of such bodies is to note every day that portion of their proceedings if no other transaction. Then if they were not in session were they not adjourned? And if so, the minutes of the two journals having closed without an adjournment to any day, was it not an adjournment without day?

Whilst an adjournment from day to day is designed to, and does keep the session in life, an adjournment *sine die* is always understood to terminate the session. And to prevent either house from delaying or preventing the transaction of business and terminating the session before the two houses are ready to end it, the nineteenth section of the same article declares that "Neither house shall, without the consent of the other, adjourn for more than two days, nor to any other place than that in which the two houses shall be sitting." Under this provision, it will be seen that each house was powerless, without the consent of the other, to adjourn beyond two days. And the journals afford no evidence that consent was given by either for a temporary adjournment. Yet we do find from the fact that there is a blank in the journals indicating an entire suspension of all business, from which we must conclude that the two houses were not in session, and if not in session, the presumption must be that they were adjourned either to a particular day, or without day. And, as we find no order of adjournment on the journals to a day, it would seem to follow that it was *sine die*. Each house had the power without the consent of the other to adjourn from day to day, and if they had so adjourned it would be expected to appear from the journals.

It is but a reasonable presumption, when we find the two

houses adjourned, or at least out of session, for more than two days, that it is by consent, rather than in violation of the *Constitution. And when the journals show [133*] no adjournment to a specified time, it must be presumed to be *sine die.* It is, however, said that when the body rises without coming to a resolution to adjourn, or to adjourn to a specified day, that it must be presumed that it was intended to be till the next legislative day. When the rising is followed by the body coming together on that day, the inference would be natural and proper. But when they fail to meet on that day the presumption is rebutted. And in this case the journals fail to show that they did meet on the next or succeeding day.

If this presumption is indulged, that this was not designed to be a final adjournment by consent of the two houses, then the session continued, and the body might come together at any time they choose, before the organization of the next house, and resume business. If this were so, who could know when laws took effect? Could it be possible that the members and officers of the two houses could draw pay during all that time? The fact that the people and officers of the law must know when laws take effect, renders it absolutely necessary that there should be a time, that might be certainly known, when laws became operative, and that can only be from the journals. If we find that the session has terminated in pursuance of a resolution, that is satisfactory and conclusive, or if we find that all business has ceased for a period of more than two days, without an adjourning order, and no entries are found, then the inference should be drawn that it was an adjournment *sine die*, and equally terminated the session.

In this case the last entry is found on the senate journal of the eleventh day of June, and it must be presumed that the session terminated on that day. If so, it cannot matter whether there were many or few members of the two houses came together on the twenty-third, as they had no power to revive the session already terminated, which could only be again brought together by executive proclamation.

The writ of mandamus is not a writ of right, but it is dis-

cretionary with the court whether it will be awarded. [134*] When *there is a complete remedy at law it will never be dispensed. To this effect is the uniform current of authority. Being discretionary, and the sum in this case being only two dollars, even if it were admitted to be just, I do not feel that justice would be promoted by entertaining jurisdiction, as substantial interests are not involved. It would be to encourage petty litigation to the expense of the State, and the delay of other more important interests. For this, if for no other reason, I should be inclined to refuse the writ; but I regard either of the various grounds discussed, as amply justifying the court in arriving at that conclusion. When the alternative writ was granted, all questions as to its sufficiency were reserved, and I am now satisfied that it was improvidently issued, and that there are no grounds showed for relief. The peremptory writ is therefore refused.

Walker, J., in the case of the People, *ex rel.* Harless, against the Secretary of State:

The question presented in this case, is whether the bill to incorporate the Wabash Railway Company, under the requirements of the Constitution, became a law. It was passed by both branches of the general assembly, and was afterwards, on the 12th day of June, 1863, presented to the governor for his approval. He has not returned the bill to the senate, where it originated, either with his approval or his objections. The twenty-first section of the fourth article of the Constitution declares, that "every bill which shall be passed by the senate and house of representatives shall, before it becomes a law, be presented to the governor; if he approve he shall sign; but if not, he shall return it with his objections to the house in which it shall have originated," &c. "If any bill shall not be returned by the governor within ten days (Sundays excepted) after it shall have been presented to him, the same shall be a law, in like manner as if he signed it, unless the general assembly shall, by their adjournment, prevent its return; in which case,

the said bill shall be returned on the first day of the meeting *of the general assembly, after the expiration [135*] of said ten days, or be a law."

It appears from the journals of both houses, that the general assembly was in session on the tenth day of June, but the journal of the house contains no entry after that date, until the twenty-third of that month. The last entry on the journal of the senate was on the eleventh until the twenty-third, when entries appear upon both journals. On that day amongst other entries on each is one of adjournment until the next day. It appears from both journals under date of the twenty-fourth, that a resolution was entered declaring the general assembly adjourned at ten o'clock A. M., until the first Tuesday after the first Monday in January, 1864.

Even if it was conceded that the general assembly was constitutionally in session, at the time the bill was presented to the governor, he was not required to return it with his objections within the ten days, to prevent its becoming a law, unless that body continued its session until the end of that period. The organic law has given him that period within which to determine upon his course of action. It is manifest from this provision of the Constitution, that the general assembly must be in an organized condition, acting as a general assembly at the end of that period, if not during the whole time, to require the governor to perform the act. If the members have dispersed, and the officers are not in attendance, he would not be able to return the bill to the house in which it originated. It neither requires or authorizes him to return the bill to the speaker of the house, to the clerk, or to any other officer, but declares that it shall be returned to the house, and that can only be as a body. Unless the body was in session, he would be unable to return the bill to it as required by this provision.

If on the tenth day the members and officers were absent, the governor would have until the first day of their next assembling to return the bill with his objections. To be required to act, there must be an organized body in session, at the place of holding its sessions. The executive is not required to seek the

members as individuals, but to make his communica-
[136*] tions to a *collective body, constituting the house which, as such, originated the bill. When dispersed there is no such body to whom he can communicate. If it were otherwise the general assembly, unintentionally it might be, could effectually defeat the objects of this provision, and render it nugatory. But the intention of the framers of that instrument must, if it can be ascertained, be fully affectuated.

The convention which framed our Constitution designed to provide for the enactment and enforcement of salutary laws in the mode best calculated to promote the general welfare. They supposed, as one of the means of best attaining this end that the executive of the State should not only be intrusted with the enforcement of all laws, but should also be vested with a voice in their adoption. In distributing the powers of government, they could, if they had chosen to do so, have authorized the general assembly to adopt laws independent of all executive action. But to prevent the evils of hasty, illy considered legislation, they conferred upon the governor the power to arrest the passage of a bill until his objections could be heard, and the bill be again considered and adopted. As the best means of accomplishing this, and of preventing the adoption of injurious measures, they gave to the governor ten days, exclusive of Sundays, in which to bestow that careful examination and consideration, so essentially necessary to determine the effects and consequences likely to flow from the adoption of a new measure. This is the duty imposed, and it is one that must be performed. And the time allowed for the purpose cannot be abridged, or the provision thwarted, by either accident or design. The use of the whole time given to the governor must be allowed. The Constitution has spoken and it must be obeyed. The Constitution in this case has allowed to the governor ten days within which to act, and they must be held to be full and complete days, not parts of days. When a given number of days are named, no one could understand that it was a less period of time than is embraced in the number mentioned. It may be proper, then, to ascertain what is the

legal meaning of a day. Bouvier defines it to be "A division *of time. It is natural, and then it consists of [137*] twenty-four hours, or the space of time which elapses while the earth makes a complete revolution on its axis; an artificial, which contains the time from the rising until the setting of the sun, and a short time before rising and after setting." Wharton, in his Law Lexicon, gives the same definition, and further defines it to include in the space of a day all of twenty-four hours, and that the English and some other nations begin their day at midnight. This is the popular sense as well as the legal. And by it the governor must have had the full period of ten days, of twenty-four hours each, excluding Sundays, within which to perform this constitutional duty.

It was, however, urged that the framers of the Constitution intended legislative and not natural days. That if on the last day of this period, the legislature adjourned at the earliest practical period, it should be regarded, and was designed to be included in the computation. It is not so expressed, and the language employed seems to be so plain and explicit, that I am at a loss to perceive how it will bear construction. Its meaning is plain and explicit. The framers of that instrument seem to have used every precaution and reasonable effort to avoid obscurity, and as far as possible to avoid necessity for construction. This is manifested in this very section, where Sundays are in terms excluded from the computation, and yet in law they would generally be excluded, as they are not judicial days, or days upon which the law will require the performance of any act. No authority is referred to, nor am I aware that any exists which limits the term to a shorter or different period of time than its natural or popular meaning. Chief Justice Marshall, in *Gibbons* v. *Ogden*, 9 Wheat. 188, in the interpretation of one of the provisions of the national Constitution, says: "As men whose intentions require no concealment generally employ the words which most distinctly and aptly express the ideas they intend to convey, the enlightened patriots who adopted it must be understood to have employed words in their natural sense, and to have intended what they said." This is the only

safe rule in giving an interpretation to such an instru-
[138*] ment. If *departed from it would be in the power of the courts to enlarge or diminish powers conferred, to an injurious extent.

Nor does this requirement impose any great hardship upon the legislature. No inconvenience need ever occur to the public interests by observing the requirements. If a bill involving important interests, of an urgent character, is pending, there need be no great inconvenience in remaining in session until the period has elapsed. I can, therefore, perceive no argument arising from inconvenience or great injury.

The question as to the proper mode of computing time in this case then presents itself for consideration. This court has held that the correct mode of computing time, where an act is to be performed within a particular time after a specified day, is to exclude the specified day and to include that upon which the act is to be performed. A party is allowed twenty days after the rendition of a judgment by a justice of the peace, within which to file his appeal bond, and in computing the time the day the judgment was rendered is excluded, and the whole of the twentieth day thereafter is allowed. *Ewing* v. *Bailey*, 4 Scam. 420. So when publication in attachment cases is required to be made for sixty days before the term to which the writ is returnable, the day on which the first publication is made is excluded, and the first day of the term is included. *Varien* v. *Edmonston*, 5 Gilm. 270. So when an act is to be performed on a particular day the party has the whole of that day in which to perform it. *Walter* v. *Kirk*, 14 Ill. 55. According to these decisions, by excluding the twelfth day of June, which was Friday, and the two intervening Sundays, the last of the ten days was the twenty-fourth. And we have seen that the legislature, even if constitutionally in session, only remained so for a portion of that day. And the governor had all of that day within which to return the bill. He, therefore, has until the first day of the next constitutional meeting of that body to return it with his objections. By adjourning, even if the session of the 23d and 24th of June was regular, they pre-

vented the governor from returning the bill. They had no power to abridge the time for even the shortest period.

I fully concur with my brother BREESE in the other [139] views which he has presented in this case, as well as the conclusions at which he has arrived. I, therefore, rather incline to the opinion that the demurrer should be sustained to the alternative writ.

BREESE, J. To avoid unnecessary labor, I shall consider the cases before me as one. They are, in their origin, nature and object, inseparable. The theory of both is, that the general assembly was not adjourned on the 10th of June, but continued in session up to the 24th, finally adjourning on the day last named: hence, Keyes, being a member and attending on those days, is entitled to his *per diem* compensation allowed by law and appropriated by the act of 1861, to be paid out of the public treasury on the warrant of the auditor, to be issued on the presentation of the certificate of the speaker of the house as to such attendance; and the same fact of the session existing on those days, it is claimed by Harless, gives vitality to the bill in which he asserts an interest, entitled, "An act to incorporate the Wabash Railway Company." The prayer of Keyes is, that the auditor be compelled, by mandamus, to issue to him this warrant; whilst that of Harless is, that the secretary of State be compelled to make a true copy of that act, and certify the same, under the seal of the State, to be a law of the land, for the reason the governor did not return it to the senate, in which it originated, within ten days after it was presented to him, the senate being then in session. The same facts, then, sustain the claim of both relators, and there is, therefore, a manifest propriety in regarding them as one case.

The question which presents itself at the very threshold of the investigation is, is a mandamus the proper remedy? Waiving, for the present, any consideration of the matters presented by the returns, I will examine the question on the petitions and alternative writs alone. The writs stand as the declarations of the party, and must prevent a *prima facie* case, at least.

[140*] *The writ of mandamus is a high prerogative writ, to be awarded in the discretion of the court, and ought not to issue in any case, unless the party applying for it shall show a clear legal right to have the thing sought by it done, and in the manner and by the person or body sought to be coerced, and must be effectual as a remedy if enforced, and it must be in the power of the party, and his duty also, to do the act sought to be done. It is well settled, that, in a doubtful case, this writ should not be awarded. It is never awarded, unless the right of the relator is clear and undeniable, and the party sought to be coerced is bound to act. *The People, &c.*, v. *Forquer*, Breese, 104, and cases cited in notes.

Testing the case of Keyes by these principles, has he shown a clear legal right to this compulsory process?

The petition and alternative writ allege the fact that the journals of both houses are silent as to any proceedings in either, after the morning of the 11th day of June, until the afternoon of June 23d, when, at the hour of 3 o'clock P. M. of that day, a certain entry appears on the journal. It is further alleged, that the journals do not show how many senators or representatives were present on that day.

The speaker certifies that the relator, Keyes, attended on those days as a member of the house; and it is insisted this certificate is conclusive—that the auditor must act on it, and issue the warrant.

The statute requires the speaker to give a certificate to each member of the amount of compensation to which he is entitled, on presenting which to the auditor, he is authorized to issue a warrant, for the amount specified in it, on the revenue fund. He is not authorized to pay a member in any other mode; but it does not follow he is bound to pay on that. Such a certificate would be a proper voucher for him on the settlement of his accounts, but he may take the responsibility of refusing to accredit the certificate, because he is bound to take notice of existing facts. He must know who are the speakers, and also who are the members of the two houses. He is bound to know who is the governor, who the secretary of State, treas-

urer and *judges of the courts, and also the fact of a [141*] session of the legislature at a particular time. Suppose a certificate should be presented to him of the attendance of a member on the first day of July, as at a session then held, would the auditor be justified in issuing a warrant, when the fact was patent to the whole world, there was no session on that day, nor for weeks previous? Suppose the certificate should embrace a service of one hundred days, and his own records informed him the session continued but forty-two days, for which he had settled with the members? No one will pretend that he could not act on his own knowledge of the facts. So the fact of a legislative session on particular days was in the cognizance of the auditor, and he had a right to act on that knowledge. It might have been clear to the speakers, that there was a session on the twenty-third and twenty-fourth days of June, but not clear to the auditor. He must act on his own knowledge of that fact, and take the responsibility of his action. If he decides wrong, a corrective may be found in this writ, if no other legal remedy exists. The silence of the journals from the eleventh to the twenty-third day of June was a significant fact, which the auditor was bound to consider, and the further fact, that a regular session of the legislature is open and notorious, patent to everybody. He cannot shut his eyes, and issue warrants on all the certificates that may be presented. He must act on existing facts. Viewing the allegations of the relator in the most favorable light for him, the case made by them is far from clear, and his right to this writ not unquestionable.

Now, as regards the relator Harless, what does he demand? He demands that the secretary of State shall be compelled to make a true copy of the bill, with his certificate thereto attached, under the seal of the State, that the same is a law *by reason* of the failure of the governor to return it with his objections to the senate, in which it originated, within ten days, Sundays excepted, after it was presented to him, and deliver the same to the relator.

It is not alleged in the pleadings of the relator, that these facts appear on the register which the secretary is required,

[142*] by *the Constitution, to keep, of the official acts of the governor, or that they are among the records of the secretary's office.

The question at once arises, is there any power vested in this court to compel the secretary to certify a bill, or an enrolled act, to be a law which is not among the archives of his office, and legally placed there as a law?

How can this court compel the secretary to know that this bill was duly presented to the governor, remained with him ten days, and was not returned by him within the time required by the Constitution? His position, as secretary of State, does not, of itself, endow him with this knowledge. What right has the secretary of State to determine any particular bill or act to be a law of the land?

What right has he to give a reason why it is a law? Can he, without the authority of law, arrogate to himself the high responsibility of declaring any writing in his possession, having the form of an act of the legislature, but bearing no marks of authenticity, is, for any reason his ingenuity or sense of right may suggest, a law of the land? If the fact was true, if the reasons alleged existed, beyond all dispute, I do not believe this court could compel the secretary to certify the bill to be a law. And why? Simply, because it is not his duty, under the statute prescribing his duties, so to do.

What is the statute on this subject? By section 5, chapter 96, Scates' Comp. 445, the secretary of State is obliged, when required by any person so to do, to make out copies of all laws, acts, resolutions or other records appertaining to his office, and attach thereto his certificate under the seal of State; and by section 7 it is provided, that all public acts, laws and resolutions, passed by the general assembly, shall be carefully deposited in his office, with the safe keeping of which in his office he is specially charged. Id. Now the alternative writ does not allege that the act in question is a law, act, resolution or other record appertaining to the office of secretary of State, nor that it has been deposited with the secretary as an act or a law passed by the general assembly; on the contrary, it is distinctly alleged

in the writ that "on the 19th of June the governor prepared a *message with his objections to the bill, and sent [143*] the enrolled act, with his original message, by private hands to the lieutenant-governor." The relator further alleges that the lieutenant-governor, on the 13th of October, informed him that the bill was not in his possession, and on the 16th of that month the relator applied to the secretary of State to learn if the act was in his custody, and being informed that it was, thereupon the relator demanded a copy of it, &c. It is not alleged the act was deposited with the secretary as an act passed by the general assembly, and deposited in his office as such, nor is it anywhere alleged that the act is a public act, for it is only public acts, laws, &c., that this statute declares shall be deposited in the office of the secretary of State. It is very apparent, then, that the secretary of State, from the relator's own showing, is not in a position, with respect to this act, to be compelled to give a copy of it even, much less to be compelled to certify it as a law, for the reason alleged, or for any other reason.

The alternative writ stands in the place of a declaration—it is the declaration of the relator, and as in an ordinary case commenced by declaration, the plaintiff is bound to state a case *prima facie* good, so is a relator in this proceeding. His declaration, in my judgment, makes out no case at all, demanding any other plea or return than a general demurrer, and the demurrer to the return may have this operation. All the material facts being admitted, he shows no title to the relief claimed. It is a case barren of any merits, so far as the relator's right is concerned, connected with any duty the secretary is by law required to perform.

It will not do to say that this view of the case is technical, and the objections taken are of that character. When the nature of the process demanded is considered, the objections will be found to be substantial, and decisive against the right to the particular remedy sought. They do not touch the question whether or not this act is a law. The only question is, do the facts show the relator entitled to this process? It would seem to me, the other question cannot properly be raised on

a mandamus. Suppose there was no doubt about the [144*] fact, that an *enrolled bill had passed through all the forms required by the Constitution, save that of approval by the governor, and he had suffered ten days to elapse without returning it with his objections, the legislature being all the time in session, is there any principle of the common law, or any statute in force in this State, requiring or empowering this court to compel the secretary of State, or any other officer, to certify it as a law? None can be found. He cannot be compelled to certify any act to be a law which does not come into his possession as such, under and by virtue of the law defining his duties, which I have cited. Such a use of the writ of mandamus is unknown to any court governed by the common law, and it is not allowed by any statute.

The inquiry naturally arises here, how and through what channel do laws, acts and resolutions of the general assembly get to the secretary of State, and become records or files of his office, so that he can be compelled to make certified copies of them?

I know of no other channel than the one marked out by chapter 62 of Revised Statutes, 337, title "Laws." The legislature has provided no other mode by which to authenticate a bill in the predicament this bill is alleged to be, as a law. The relator's counsel insist that this statute is no longer in force; that it is obsolete, by reason of the change in the Constitution, abolishing the council of revision. The statute has never been repealed, nor has the legislature enacted any other upon this subject; and if it be obsolete, then there is no mode prescribed. I do not find that this question has ever come before this court for examination. In the absence of any decision on this precise point, I am free to express my own opinion; and that is, that the council of revision, as such, as a power to revise all laws passed by the general assembly, is not abolished by the present Constitution of the State. The power, instead of being deposited with the governor and justices of the Supreme Court, is now deposited with the governor alone. He is, to all intents and purposes, if the design of such a power is regarded, and

not a tenacious adherence to terms, the council of revision. *The sections of chapter 62, applicable to this [145*] subject, are as follows:

"SEC. 2. Whenever a bill which shall have passed both houses of the general assembly shall be returned by the council of revision, with objections thereto, and upon reconsideration, shall pass both houses by the constitutional majority, it shall be authenticated as having become a law, by a certificate thereon, to the following effect: 'This bill having been returned by the council of revision with objections thereto, and after reconsideration, having passed both houses by the constitutional majority, it has become a law, this day of ;' which being signed by the speakers of the senate and of the house of representatives, respectively, shall be deemed a sufficient authentication thereof; whereupon the bill shall be presented to the governor, to be by him deposited with the laws in the office of the secretary of State.

"SEC. 3. Every bill which shall have passed both houses of the general assembly, and shall not be returned by the council of revision within ten days, having thereby become a law, shall be authenticated by the governor causing the fact to be certified thereon by the secretary of State, in the following form: 'This bill having remained with the council of revision ten days (Sundays excepted), and the general assembly being in session, it has become a law this day of . C. F., Secretary of State.'

"SEC. 4. Whenever the general assembly shall, by their adjournment before the expiration of ten days after the passage of any bill, render the return of such bill by the council of revision within that time impracticable, and the same shall not be returned on the first day of the next meeting of the general assembly, and shall thereby become a law, the fact shall be authenticated in the manner provided in the preceding section."

By the first clause of the schedule of the present Constitution, as expressed in the preamble, in order that no inconvenience might arise from the alterations and amendments made in the Constitution, and to carry the same into complete effect,

it is ordained and declared that all laws in force at [146*] *the adoption of this Constitution, not inconsistent therewith, shall continue, and be as valid as if this Constitution had not been adopted. In what respect is this act inconsistent with the Constitution? The Constitution provides for a revision, by the governor, of all laws passed by the general assembly. They are to be presented to him for such purpose, and he thereby becomes a council of revision. There is no other revisory council now known to the Constitution and laws, but the governor. Is there any act, in either of these sections, which that functionary is incompetent to perform? I can perceive none, and by considering the governor the council of revision, which he truly is, no inconsistency can be alleged. It is scarcely to be supposed that successive legislatures, under the present Constitution, knowing, as they must, the great necessity for some law of this kind, should, for fifteen years, have neglected to provide a law, had they not considered the one in question quite consistent with the Constitution and ample for the purpose. This omission to legislate on the subject may be taken as a contemporaneous exposition of the law making power, that the want was fully supplied by this chapter.

Cases have come before this court, in which, by laws passed under the present Constitution, duties were devolved on the "County Commissioners' Court," or on the "Senior County Commissioners," and we have held, as the County Commissioners' Courts were no longer in existence as such, but that "County Courts" were substituted for them, the term "County Commissioners' Courts" should be applied to the County Courts, and the duties would inure to them. The case of *Shute* v. *Ch. and Milw. R. R. Co.*, 26 Ill. 437, is one of that character; so is the case of *The People* v. *Thurber*, 13 Ill. 554.

I cannot discover wherein these sections of chapter 62 are in conflict, or inconsistent with the present Constitution. They are calculated to give full and complete effect to the law making powers, by an uniform proceeding reaching every case, and they afford, what is a great public necessity, certain conclusive and uniform rules, by which it can be readily determined what acts of the legislature are laws. The present Constitution

does *not, nor did the old, execute itself in this particu- [147*]
lar. Legislation was necessary, and adequate rules are found in these sections. The people should not be left in doubt; they should know certainly what bills are laws. This knowledge they will have, if they are authenticated in the mode prescribed by this chapter, and they can regulate their conduct by them. Courts can judicially take notice of them, and they can be used in evidence as laws without question. A certain and proper mode of proof is furnished not sufficiently provided in, or omitted altogether from the Constitution, and it is not, in my judgment, inconsistent with any provision of that instrument.

But if this chapter is not in force, by reason of inconsistency, no mode is provided by which a bill not returned by the governor within ten days can be deposited in the office of the secretary of State as a law. The secretary cannot, *virtute officii*, decide what acts make a law. He has nothing to do with the working of the machinery by which laws are made.

If, then, it be assumed, that this bill must be considered as approved by reason it was not returned to the senate within ten days, then it should carry with it the certificate which the governor must cause the secretary of State to put upon it required by the statute, showing that the senate was in session during that time. Without such certificate, the bill could not be certified by the secretary of State, or be published as a law, nor in such case, could any duty, by any possibility, devolve on the secretary, if the bill was in his official custody, to certify it as a law, or to give a copy of it to the public printer to be published in the volume of laws. The only safe and practicable rule, then, it must be apparent, is to look alone to the bill, its authentication, and its proper place of deposit as a law, when called on to determine whether a bill is or is not a law. This authentication, by the statute, must be under the sanction of the executive, and the act must be deposited in the office of the secretary of State, and these make up the evidence and the only evidence of the existence of a law. By section 3, chapter 62, such a bill is required to be authenticated by the governor, *he* causing the fact to be certified on the bill by the secre-

[148*] tary of State. *Until the governor acts, it is clear the secretary has no power, and no duty to perform. The governor would have a duty to discharge, but this court has decided he cannot be coerced by mandamus to perform any duty. *Bissell's Case*, 19 Ill. 229.

It may be, should the governor obstinately, and without reason, refuse to cause the secretary to place this certificate upon a bill so circumstanced, having passed through all the forms required by the Constitution, that this court might declare it to be a law, but not by a mandamus. The question could only properly arise in a case brought before the court for adjudication, the foundation of which should be the assertion of a right or privilege claimed under and by force of such an act, and against one who may have resisted that right. And this, it seems to me, is the only proper course to be pursued in such a case.

I am perfectly satisfied this case does not come within the reach of a mandamus; that writ can only be issued to compel a party to act, when it is his duty to act without it. It confers upon the party against whom it may be issued no new authority. It can confer none, from its very nature. *The People, &c.*, v. *Gilman*, 5 Gilm. 248. This is the first time, in all judicial history, an application has been made for this writ, for the purpose of authenticating a law, and, in my judgment, it cannot be allowed.

But there is another objection to awarding the writ, on the relator's own theory. He maintains that legislative proceedings can be shown only by the journals of the houses. Assuming this to be so, the alternative writ nowhere shows by that species of evidence that this bill was presented to the governor for his approval during the session of the general assembly. The only allegation upon this head is, "that the record of the executive acts, as kept by his private secretary, and deposited in the office of the secretary of State, shows that the bill for an act to incorporate the Wabash Railway, was presented to the governor for his approval with other bills passed at the same session which have been approved, but said record is silent

in regard to the disposition of said bill." This allegation states no *time at which this bill was presented, nor that [149*] the fact of its presentation was entered on the journal of each house, nor is it alleged the legislature was in session when it was presented. What does the Constitution prescribe in this regard?

Section 21 of article IV provides, that every bill which shall have passed the senate and house of representatives, shall, before it becomes a law, be presented to the governor; if he approves he shall sign it, but if not, he shall return it, with his objections, to the house in which it shall have originated; and the said house shall enter the objections at large on their journals and proceed to reconsider it. * * * If any bill shall not be returned by the governor within ten days, Sundays excepted, after it shall have been presented to him, the same shall be a law in like manner as if he had signed it, unless the general assembly shall by their adjournment prevent its return, &c.

The tenth joint rule of the two houses requires, after a bill shall have been signed by the speakers of both houses, it shall be presented by the committee on enrolled bills to the governor for his approbation. The said committee shall report the day of presentation to the governor, which time shall be carefully entered on the journal of each house. That this rule has the force of a law, will not be questioned. It was made to give full operation to the Constitution, and, taken in connection with it, requires that the legislature shall be in session when a bill is presented to the governor; and the reason is obvious. When it is presented, the responsibility of the governor commences, and from the entry on the journal of the time when, the ten days are to be computed. If it is returned by the governor within ten days, then a new duty devolves at once upon the house to which it is returned. That house must enter the objections at large on their journal, and must proceed to reconsider the bill. Certainly, then, the houses must be in legislative session when the bill is presented to the governor, and when it is returned by him with his objections, else this clause of the Constitution is an idle provision, and the law of the two houses also. This court would not, of course, inquire, when an act has been

approved by the governor and deposited in the office of
[150*] the *secretary of State as a law, whether the legislature was in session or not when it was presented to him, nor whether the time of presentation had been carefully entered on the journal of each house. There could be no propriety in instituting any such inquiry in regard to any act which has received executive sanction; but when it is asked of the court to declare an act to be a law which wants that sanction, has not been deposited with the secretary of State, and is not authenticated in any manner, in such case the requirements of the Constitution and law must be looked into and applied.

As to the entry of its presentation on the executive journal, kept by the private secretary of the governor, that is for the convenience of the governor alone. I am not aware of any law requiring the governor to keep such a journal, nor any making it evidence anywhere. By section 24 of article IV of the Constitution, the secretary of State is required to "keep a fair register of the official acts of the governor;" but this has no relation to duties a standing joint committee of the two houses is required to perform. By the journal, and by that only, can the fact of presentation, during a session of the legislature, be legitimately established, and this on the relator's own theory; on his theory, this objection, if there were no other, would be fatal to his pretensions.

I have now examined the case on the showing of the relator only, without any reference whatever to the facts in the return, and here I might, with propriety, close, since by that showing no claim whatever is established to the process demanded.

The respect, however, which I sincerely entertain for the counsel who have managed the case, and who have presented arguments in its support, not only in the most plausible and persuasive form, but with a force and power seldom exhibited in any forum, impels me to a further examination of it, although it be supererogation, upon the facts presented by the returns, and admitted by the demurrer.

The auditor returns to the alternative writ, as cause why a peremptory mandamus should not issue, that there was no ses-

sion of the general assembly on the 23d and 24th days of June; * that the general assembly had been adjourned [151*] by the governor on the tenth day of June, and that on that day the session closed, the accounts of the members and officers of both houses being certified to by the speaker of each house, as the law required, to the respondent, as auditor, the members, or a large proportion of them, received and receipted for their per diem compensation up to the tenth of June, since which time the journals are blank, and since then there has been no legislative session of the general assembly. He further returns that on the twenty-third and twenty-fourth days of June two members of the senate came together in the capitol, at the seat of government, and four members of the house, and then and there caused certain entries to be made on the journals of each house, which were false and fraudulent, no quorum of either house being then present, and they themselves acting without authority. To these allegations the relator demurs, the effect of which is to admit all the facts competent to be pleaded, and which are well pleaded, but not any legal inferences which may have been drawn from them. Thus the fact that the governor issued an order to adjourn the legislature on the tenth of June, is admitted, but not the inference which the auditor draws from it. The relator insists that the executive order was void, and therefore could not have the effect to adjourn the legislature. So, too, of the assemblage of two members of the senate and four members of the house on the days named, is admitted, but the inference that no session was held on those days is not admitted. Now, if it can be shown, by fair argument, that the legislature was adjourned on the tenth day of June, or terminated its session on that day, without providing for a session at some subsequent period, then the assemblage on the twenty-third and twenty-fourth days of June, as set out in the return, was of no validity, and consequently, the auditor should not be compelled to issue a warrant on the treasury, to the relator for his attendance on those days.

So in the case of the relator Harless. The real and only question in which he has any special interest, is, do the facts

stated in the return of the secretary, and admitted by the [*152] *demurrer, make the bill in his possession, entitled, "An act to incorporate the Wabash Railway Company," a law of the land, or do any other facts legitimately appearing in the record, have that effect. In other questions discussed on the hearing, the relator has no interest, beyond that every citizen has, in the proper action of the functionaries of the government. If it be a law of the land, and in his possession as such, there can be no doubt of the power of this court to compel the secretary to certify a copy of it, under the seal of State, of which he is the keeper. What are the facts? The secretary returns, in substance, that the bill is not in his possession as secretary of State, as a law; that it has not been authenticated to him as such; that he received it from the lieutenant-governor with the written objections of the governor to its becoming a law, bearing date June 19, 1863, accompanying the same; that he was enjoined by the lieutenant-governor to keep the same safely, so that they could be produced on the first day of the next session of the general assembly, and then to be laid before the senate. If, then, he is not in possession of the bill as a law —if it has never been authenticated to him as such—if it has never come to his official knowledge and keeping as a law, how can a mandamus issue to compel the secretary to do that which it is impossible for him to do. The facts he has returned are the existing facts, on which the mandamus must operate, and the writ cannot change them. It is, in my judgment, entirely competent for the secretary to place himself on these facts. He has no duty to perform, in this regard, the performance of which we can enforce.

But waiving this, for the present, let us examine and see if the legislature did, by their adjournment, prevent a return of this bill to the senate, in which it originated.

What does the term adjournment mean, as here employed, in the Constitution?

Has it that restricted and technical meaning counsel are pleased to place upon it? What does the Constitution say? "If any bill shall not be returned by the governor within ten

days, Sundays excepted, after it shall have been presented to *him, the same shall be a law in like manner as if he [153*] had signed it, unless the general assembly shall, by their adjournment, prevent its return." What is the object of the section of which this is an extract? Clearly to give to the governor time sufficient to revise all laws which may be presented to him for his approval, and that there shall be a body in legislative session, during the ten days, to which he can communicate his objections, if he has any.

The Constitution of 1818 used this phraseology: "unless the general assembly shall, by their adjournment, render a return of said bill in ten days impracticable." Although there is a slight difference in the language of the two instruments, I cannot think the sense and meaning is changed, or was intended to be changed, the object of both provisions being essentially alike. The meaning, then, is simply this. The governor shall have ten days for deliberation on the question of approval or disapproval of every bill presented to him, and during that time it shall be practicable to make a return of such as he may not approve to the house in which they originated. The framers of the Constitution did not intend to require of the governor a physical impossibility, but only to lay an injunction upon him to return, with his objections, every bill to the house in which it originated if he did not approve it, within ten days, if the general assembly was in legislative session capable of acting on such bills when so returned.

The object of giving this deliberation and qualified negative was to guard against hasty, improper, or unconstitutional legislation. By this provision, the governor has it in his power to compel closer scrutiny, and a more thorough examination into all bills about to become laws. This action of the executive is upon his official responsibility, from which the Constitution does not permit him to escape, for if he fails to act upon the bills presented to him, within the time prescribed, having the opportunity so to do, the bill is considered as approved by him. He is required to act by approval or disapproval, and to communicate the result of his deliberations to the house in which the

bill originated, only, however, on the condition there be [154*] such a house *with whom it is practicable to communicate. If this be the true exposition of this provision, then it is very clear, if there be no such house in fact, at the expiration of ten days, Sundays excepted—no such deliberative body—no such visible organized assembly to receive the return of the bill with his objections, the return would be an impossibility. If the houses disperse, and abandon the capitol, leaving no existing legislative body in fact, capable of receiving the governor's communication, is not the effect, for all practical purposes, the same as if the legislature had adjourned in due form, leaving the evidence thereof on the journal?

If the house in which a bill originates may disperse, abandon their hall and legislative duties, and the members return to their homes, thereby rendering it impracticable for the governor to return a bill to such house, and by this means, pending executive deliberation, convert the bill into a law, then may such house nullify this clause of the Constitution, and practically destroy the qualified negative, or veto power, as it is called, of the governor. It must be conceded, the mere return of a bill is not of the substance of this constitutional provision. The passage of it by the two houses, according to the forms prescribed, the deliberation and action of the governor thereon, by approval or disapproval, and, in case of disapproval, the further consideration of the bill by both houses, and its passage there once more and by a majority of all the members elected of each house, are the great objects sought by the Constitution, and the return within the ten days is provided to fix executive responsibility in the making of laws, leaving him no way of escaping final responsibility.

Can it be that by a legal fiction the legislature will be deemed in session, when in fact there is no such organized or assembled body, and when the effect of such legal fiction is to nullify a part of the Constitution by a practical overthrow of the governor's negative. Fictions are allowed in support of rights claimed under law, not in derogation of them. If the governor had, within ten days, returned the bill to the senate, where it

originated, without having acted on it, by approval or *disapproval, such return would not have made the bill [*155] a law, and yet it is claimed, because the bill was not in fact returned to a house which had no actual existence, the bill became a law, though in due time acted upon, and negatived by the governor. This position, if sound, would enable one house of the general assembly to evade, at any time, the constitutional effect of his negative. To give full effect to this negative power of the governor in legislation, the adjournment which shall, practically, deprive the executive of the ability to communicate with the house in which a bill shall have originated, according to legislative or parliamentary usage, must, in my judgment, be taken as the adjournment contemplated by the Constitution. It is equivalent to it in all respects. If by reason of an insurrection, invasion, by pestilence or by mob violence, a legislative body is suddenly dispersed and broken up, leaving no adjourning order on the journal, and the governor be, thereby, prevented from making return of a bill with his objections in writing, within the ten days, will it be seriously said, the bill has thereby become a law? If so, when? at what point of time, and what would be competent evidence of its existence as a law?

By the Constitution, acts of the legislature of a public nature do not take effect as laws until the expiration of sixty days from the end of the session at which they are passed, unless in case of emergency the general assembly shall otherwise direct. Art. III, § 23. Hence, it becomes material, sometimes, to inquire, when did the session come to an end, and what certain uniform rules exist, by which it can be readily ascertained when bills become laws? Here, too, it would seem the end of a session is regarded the same as an adjournment; they are equivalent expressions for one and the same contingency.

Now, was there a senate, a legislative body in fact, at the place where the law directed the legislature to assemble, during any portion of the time allowed the governor for deliberation?

The return states the fact that there has been no legislative session of the general assembly since the tenth day of June,

unless an assemblage, occurring on the 23d day of June, [*156] of *two members of the senate and four members of the house, shall be considered such session; that in the interval, no legislative proceedings were had in either house. The relator insists that parol evidence of this fact, which is not denied by him, is inadmissable. He insists, by the Constitution, each house is required to keep a journal of its proceedings, and having shown by the journals that there was a regular meeting of the general assembly at the time appointed by law, the presumption is, it continued in session until an adjourning order shall be entered on the journal.

Section 12, article III, of the Constitution, requires that each house shall keep a journal of its proceedings and publish them. The proceedings, then, constitute the journal; one can have no existence without the other, and in the absence of both, there can be no houses. The journals must show proceedings to establish a legislative session. The journals do not show any proceedings from the tenth to the twenty-third of June, consequently there was no legislative session during all that time. Nor do the journals show a meeting of a quorum of each house, on the twenty-third, nor that there was any vote taken on the tenth to adjourn to that day, nor do they show an adjournment from day to day by a less number than a quorum. The journals must show these things affirmatively. No presumption can be indulged against the journals. By their very silence in these respects, they speak a negative too distinctly to be misunderstood. If, then, there has been no general assembly in session since the twelfth of June, how was it possible for the governor to return the bill with his objections?

The inquiry is pertinent here, if the houses were not in session, after the twelfth of June, what had become of them?

The record answers the question.

An attempt had been made, by joint resolution, passed by the senate, to adjourn both houses on the eighth of June. When it came to the house, it was there amended by substituting the twenty-second for the eighth, in which the senate refused to concur. On the next day no quorum appeared in the senate,

nor in either house on the tenth, and no effort appears to have *been made to compel the attendance of absent [*157] members, as provided by section 12, article III of the Constitution.

Thus matters remained, no agreement of the houses on a day of adjournment, no quorum of either house, and, of course, no transaction of any legislative business, for that requires a quorum. On the tenth, the governor, conceiving from these facts that a case of disagreement as to the time of adjournment had arisen, called into exercise section thirteen of article IV of the Constitution, providing: "In case of disagreement between the two houses with respect to the time of adjournment, the governor shall have power to adjourn the general assembly to such time as he thinks proper, provided it be not a period beyond the next constitutional meeting of the same." This power the governor exercised in the form of a communication from the executive department, which was read, on the tenth, in each house. It is not denied that on that day the accounts of all the members and officers of both houses were duly certified by the speaker of each house, as usual at the close of every session, and as by law required. It further appears that nearly all the members of the house, and all the members of the senate except one, together with the officers, received and receipted for the amounts respectively due them. Neither the executive order of adjournment, nor any adjourning order of either house, appears on either journal at this date. The last entry on the house journal, prior to the twenty-third of June, is a protest against this act of the executive, reported from a special committee on the tenth, and on the senate journal the last entry is as follows:

"Thursday, June 11th, 1863. Senate met pursuant to adjournment."

There is no house journal shown of any proceedings by that body after the tenth, until the twenty-third, nor any of the senate from the eleventh to the twenty-third.

Now, admitting the executive order was unwarranted by the Constitution, do not the journals show an abandonment of all legislative business, and a breaking up of the session imme-

diately on its promulgation? What does the protest de-
[*158] clare? *It sets out by declaring while, on the tenth of June, 1863, the general assembly were in session, engaged in the discharge of their duties, the governor made an attempt to dissolve the body; which attempt, illegal, unconstitutional and outrageous as it is, must inevitably result in the cessation of any further legislation at this time. It charges among other things, that by his adjourning order the governor has defeated the bill appropriating one hundred thousand dollars for the relief of the suffering soldiers; that he has defeated the bill for the sale of the coin in the treasury; that he has defeated the general appropriation bills; that he has defeated the general and local legislation of the State of pressing necessity, and has done all these things without the shadow of a legal pretext; that it was a scheme to block the wheels of government.

If this be so, then most clearly the general assembly ceased to be in legislative session, for if it continued in session, after the governor's communication, it could have passed all those bills in spite of the governor. His concurrence was not necessary for such purpose. The entire legislative authority of this State is vested in the general assembly. The executive cannot restrain, control or direct that body in the slightest degree in the passage of bills. His function is inert until the houses have acted, and then he cannot prevent a bill from becoming a law, if the majority of all the members elected in each house insist on making a bill a law.

If the members of the general assembly deemed the order of the governor illegal and outrageous, having no warrant in the Constitution, what was their plain duty? To submit to it, with a protest against it, which they did, or resist it, which they did not do? If the general assembly, having power by the Constitution to preserve its sessions, omit to exercise the power, and yield to an unconstitutional mandate of the executive, whose fault is it, and where is the remedy? The legislature was fully competent to decide upon the act of the governor, and they did decide upon it. They adopted it, ceased legislative business, and returned to their constituents.

By section 12 of article III, two-thirds of each house constitute *a quorum, but a smaller number may ad- [*159] journ from day to day, and *compel* the attendance of absent members. Of the house, fifty-seven members made a quorum, forty-three of whom could pass a bill; of the senate, seventeen, any thirteen of whom could pass a bill. Fifty-six members of the house, and thirteen members of the senate, signed the protest. No effort appears to have been made to compel the attendance of one additional member of the house, and the requisite number of senators. Had it been made, legislative business might not have ceased, and all the bills specified in the protest, and all others the public exigencies demanded, might have been passed, and presented to the governor for his approval.

Was there any obstacle in the way? If the governor should have refused to receive them, and consider them, then the responsibility would have been fastened upon him, and it might be justly charged that he, by his arbitrary conduct, had "blocked the wheels of government," and defeated important public measures.

If he had no power to adjourn the general assembly, were not the members bound to remain in session? If, on the other hand, he had the power, and this was for the legislature to decide, they were bound to acquiesce, leaving the responsibility where it would justly belong, to the governor and to him only. The question was one for legislative decision, with which this court cannot interfere.

It will not be denied that, by the Constitution, the general assembly, in regular legislative session, has power to continue its session up to the time for which the members of the lower house are elected, and the further power to preserve the session, by the action of a smaller number than a quorum of each house. If they fail to exercise this power, cease their labors and disperse, on the unauthorized interference of the executive or otherwise, what is the inevitable consequence? Why clearly that the session is at an end. There are no other means recognized by the Constitution, by which the general assembly, when in session, can defeat the efforts of faction to terminate it, save

by a resort to this power, bestowed for the very purpose [*160] of *keeping a quorum together. But it is said our legislative history shows this provision of the Constitution is impotent for good. Is this so? Has it been proved by experience that this power is worthless? Has any presiding officer of either house ever attempted to test it, to try the strength of the Constitution in this regard, when sessions heretofore have been broken up factiously by the willful absence and desertion of the members? This power of "a smaller number than a quorum," which the house has fixed by one of its rules at fifteen, to adjourn from day to day and *compel* the attendance of absent members, is understood to be plenary, and to embrace not only the power of the officers attending upon the houses, but through them the *posse civitatis*. It implies the power to arrest and imprison members, and to keep them *in arcta custodia*, so that they may have their bodies in the respective houses to which the fugitives may belong, to make up a quorum. These efforts, under this grant of powers, may be continued *de die in diem*, up to the time of the expiration of the term of service of the members of the house, up to the period when the general assembly expires by lapse of time. Fifty-six members of the house signed the protest; one more would have made a quorum of that body. Thirteen members of the senate signed it; four more would have made a quorum there. It was a question for these members to decide whether they should call into action this power, and preserve the session or close the session on the mandate of the governor. They chose the latter, and perhaps wisely. It may be, an attempt to exercise this power, under the then existing circumstances, might not only have proved fruitless, but have been productive of disastrous results, involving the peace of the country. These were questions eminently fit for the members to decide. They have decided them; have acted on the decision made; have made an informal adjournment, by closing the session, by ceasing to transact legislative business, by receiving their pay and by returning to their constituents, evincing on their departure, no intention to resume their session at any future time.

But it is said this is not a recognized mode of terminating a *session; that the executive order being illegal [161*] and void, no legal consequences could flow from it, and therefore, the acquiescence and dispersion of the members was illegal and contrary to the Constitution.

This may all be admitted, still it does not affect the question. The deed was done, and no power on earth can undo it, nor can the error, if it was one, be corrected by this court. The members of the legislature are not amenable to this court, nor is the body itself. It cannot be denied that the general assembly had the right to determine for itself the alternative presented. It was a question put to them distinctly and directly, of power or no power, and they decided it by their action, and there is an end of it. This court has nothing to do or say in the premises, approbatory or condemnatory.

I am at a loss to perceive if this power to compel the attendance of absent members is suffered to remain dormant, how a session of the legislature can be preserved against the efforts of factionists and disorganizers to break it up, and in this manner "block the wheels of government."

Admitting then, that the act of the governor was, in the language of the protest, "illegal, outrageous and unconstitutional," both houses having adopted it and dispersed, they thereby put an end to the session, evincing at the time no intention to resume it. This, for all practical purposes, was an adjournment *sine die.*

It would have been quite parliamentary to have entered on the journal the governor's message adjourning them. The senate did so, it would appear. The neglect of the house to do so does not make the order less effectual. Its tone and style were well calculated to arouse feelings of indignation and resentment, containing, as it does, a covert censure on the conduct of the majority, in which the executive had no right to indulge. The majority was not responsible to him for their conduct; he was not placed over the legislature as their censor or master. It is not surprising, then, they should not have treated his communication with the respect one more decorous, emanating from

the chief magistrate, would unquestionably have received.
[162*] *But suppose the governor had not interfered at all, had sent no communication to the house ordering an adjournment, and both houses, by their own voluntary action, without any proposition or vote, had unceremoniously abandoned their halls, the speakers of each house had certified to the accounts of the members and officers up to the day of abandonment, and they had received their compensation up to that day, and dispersed, leaving the hall deserted, and were never after that day seen together in session as an organized assembly, so that the governor could communicate with it, would it be a rational conclusion, that they were still in session as a legislative body, by mere force of the fact that they were at one time in regular session, and no adjourning order appeared on the journal of either house? Such a presumption would be destroyed by the fact that the journals would not show the entry of any legislative proceedings after the dispersion. Those proceedings, as I have before said, make the journal. If there are no proceedings, there is no journal, and if no journal, no legislative body in session.

But it is said, this is a question of intention, and the protest shows the houses did not intend to adjourn. The answer to this is, the intention must be gathered from the final fact, and that fact is, the session terminated by dispersal of the members, and that shows a change of intention, and especially when taken in connection with the other prominent fact, patent to the whole world, that since the 10th of June no organized legislative assembly has been seen in session. The only constitutional mode, of which I am advised, by which the houses could have made manifest their intention not to adjourn, was by making an issue with the governor, under the protecting shield of the Constitution. By rule 57 of the house, fifteen members of that body could have preserved its session, and a smaller number than a quorum of the senate could have preserved its session.

If, then, there was no senate in session, it was not possible for the governor to return the bill to them. What more could he do with it than is alleged in the return he did do to pre-

serve his negative? Deliver it to the presiding officer of the *senate, to be by him laid before the senate at its [*163] next meeting; or he might retain it in his own custody, or so deposit it that he might preserve control of it, until such time as he should be enabled to communicate with the senate. In my judgment, this provision of the Constitution means no more than this: if the legislative session has not come to an end, at the time the ten days expire, the governor must return the bill to the house in which it originated, or it will be a law. If the session has terminated before that time expires, the governor can return the bill at their next session, and on the first day thereof, failing in this, the bill becomes a law. Is not this a reasonable and common sense view of the subject? The court, therefore, has a right to treat this bill as suspended by reason of there being no senate in session to whom the governor could return it. This is the condition of the bill, if the substance and spirit of the Constitution are to be regarded. If this is not so, then it must be conceded that the dispersion of the senate, howsoever produced, paralyzed the negative power of the governor, and nullified a plain and salutary requisition of the Constitution in making laws.

If there be no error in these views, it is impossible that I could consent to award any process to the secretary of State, to compel him to certify this bill to be a law—to give to a bill which, according to parliamentary usage, and our own system of law making, is yet *in fieri*, is yet in an unfinished state, the force and effect of a law.

The session having thus terminated, it is needless to inquire if it could be resumed at a future day, without a previous vote of the two houses, or by the proclamation of the governor. Should a legislative body be dispersed by any sudden irruption, or insurrection, or by any external force, the power might, perhaps, remain, and the duty also, to reassemble without any previous vote for such purpose. When such dispersion is the result of its own action, I know of no mode by which it can be brought together again, as a legislative assembly, in the absence of such previous vote, without a call from the executive.

Blackstone says, if, at the time of an actual rebellion, or [*164] *imminent danger of invasion, the parliament shall be separated by adjournment or prorogation, the king is empowered to call them together by proclamation, with fourteen days notice of the time appointed for their reassembling. 1 Black. Com. 145, ch. 2. The spontaneous meeting of all the members, except in the case stated, at a time not appointed by law, and without a previous vote for such purpose, would avail nothing. The executive, if he desired, could not recognize it as a legislative body, nor could it perform a legislative act, having any binding authority. This being so, it follows, a less number than a quorum cannot meet and hold a legislative session, no matter under what convictions they may assemble, or what rights they may suppose they can preserve by such meeting. It would be a proceeding not sanctioned by our Constitution or laws.

I have now examined and discussed all the questions properly belonging to these cases, in view of the relief severally sought. With their political aspect, so far as it may be regarded as a controversy between the executive and legislative departments, this court can have no jurisdiction to interfere in its settlement. Nor could it be settled by any decision it might pronounce. What has been done this court cannot undo, nor has it the power to correct any errors that may have been committed, nor is it their province to sit in judgment upon the political action of either of those departments. The judicial department was never designed to be the arbiter of mere political controversies. Should it assume that unpleasant office, so incompatible as it is with its legitimate duties, its decisions upon them, however honest they might be, however well sustained by reason and authority, would fail to satisfy the public mind, excited as it always is, by the agitating topics which enter into such controversies. Partisans and demagogues on one side or the other of such questions, will not be slow to arouse resentment against the court, if the decision does not accord with their views of right and justice, and its members will be exposed to assaults, against which they cannot defend,

if they have yielded alone to the suggestions of their *own judgments, and listened to no other monitor than [*165] their own consciences. The proper forum in which to settle such controversies, is in the great forum of the people. There it is perfectly legitimate to appeal, not only to reason, but to every passion and prejudice, and to the political sympathies also, of the tribunal whose judgment is invoked. That august tribunal is eternally sitting in judgment on the conduct of all public functionaries, and their judgments are recorded in public opinion.

The question, therefore, whether a disagreement existed between the two houses with respect to the time of adjournment, calling for the interposition of the executive, and authorizing it, is not for this court, on this application, to decide. Had the legislature remained in session, after the receipt of the executive communication of the tenth, and by a quorum of each house continued its legislative business by passing bills, and presenting them to the governor for his approval, and the governor should have failed to consider them, and return them as prescribed by the Constitution, on the plea that the general assembly was adjourned, then, in a proper case brought here for adjudication, the question of the constitutionality of his act would be distinctly presented, and would, of necessity, have to be decided. When such a case comes before me, I shall endeavor to be prepared to decide it.

In every view I have been enabled to take of this case, I am well satisfied the alternative writs should not have been awarded in the first instance, and I am further satisfied, by the facts stated in the several returns on which I have commented, and which are properly pleaded and not denied by the relators, that the demurrers to the same should be overruled.

I have purposely avoided all consideration of other matters presented by the return of the secretary of State, such as the procurement of the passage of the bill through the senate, by the fraud and misrepresentation of the senator having it in charge. The secretary does not pretend he has any actual knowledge of these facts, and if he had, and the bill had re-

ceived the proper authentication, and had been deposited [*166] *with him as a law, I am not of the opinion he could use such facts, in justification of a refusal to give a certified copy of it. Nor have I discussed the question, whether the governor was allowed ten days within which to deliberate. I am inclined to concur with my brother WALKER in the views he has presented on this point, and to hold, with him, that a natural day was intended by the Constitution.

ABRAHAM WIMBERLY *v.* CHARLES R. HURST.

DECREES: *Where the court has jurisdiction, cannot be impeached collaterally.*

Although the proceedings may not have been strictly regular, yet where the court has jurisdiction both of the persons of the parties and of the subject matter of the suit, it will be valid and binding, and cannot be attacked collaterally.[1]

JUDICIAL SALES: *En masse; who may object to.*

Where the plaintiff in ejectment, to show title on his part, introduces in evidence a decree of sale of the land in question, entered by the Circuit Court, and the proceedings had thereunder, the objection that the land was not sold in the lowest legal subdivisions, is one which no mere intruder or trespasser can be permitted to make, however available it might be for the heirs-at-law of the deceased, whose administrator made the sale, to make it before confirmation of the sale, in a motion to set aside the sale.

DECREES: *When binding on third party.*

Where land was entered and purchased by A and B, and subsequently, on the application of the administrator of B, to sell the land, of which B was supposed to have died seized, to pay his debts, a decree was entered in the Circuit Court finding the land to belong to B, and directing a sale, which was made to the plaintiff in ejectment; and subsequently

[1] See Weiner *v.* Heintz, 17 Ill., 259; Chesnut *v.* Marsh, 12 id., 173; Rockwell *v.* Jones, 21 Id., 279; Swiggart *v.* Harber, 4 Scam., 364; Buckmaster *v.* Carlin, 3 id., 104; Wimberly *v.* Hurst, 33 Ill., 166; Wight *v.* Wallbaum, 39 id., 555; Huls *v.* Buntin, 47 id., 396; Mulford *v.* Stalzenback, 46 id., 303; Elston *v.* Chicago, 40 id., 514; Miller *v.* Handy, id., 448; White *v.* Jones, 38 id., 160; Campbell *v.* McCahan, 41 id., 45; Feaster *v.* Fleming, 56 id., 457; Thomson *v.* Morris, 57 id., 333; Botsford *v.* O'Connor, 57 id., 72; Haywood *v.* Collins, 60 id., 328; Gartside *v.* Outley, 58 id., 210; Hobson *v.* Ewan, 62 id., 146.

the residuary legatee and devisee of A, quit-claimed to the plaintiff the land in question: *Held*, that said decree finding the land to belong to B, was, so far as the defendant in ejectment was concerned, conclusive upon him, unless he could set up a deed from A, and, this not being pretended, the decree and deed established a complete legal title in plaintiff.

CONVEYANCE: *Of a particular interest.*

Where a conveyance is general, but by an instrument not adapted for the purpose of conveying a particular interest or as an execution of a power, it will be held to convey whatever interest the grantor had, or as an execution of a power vested in him, if it would, otherwise, be totally inoperative, although his interest or character is not referred to expressly or by implication.

SAME.

Where a quit-claim deed from the residuary devisee of William Kinney contained a clause stating that it was intended by this deed to convey to the grantee therein, the same lands conveyed by William Kinney in his lifetime to J. T. and none others, it was *held*, that, as the grantor had no other interest, and as the deed would be wholly inoperative, if not construed to convey such title as was apparently vested in him as such residuary devisee, although there was no apparent connection between the deed and the will, no reference being made in the deed to his right as residuary devisee thereunder, yet the object of the deed was to vest that apparent title in the grantee, who held the title of said J. T.

ERROR: *Where assigned on rejection of documentary evidence, record must show it to be material.*

In order to make an exception to the rejection of documentary evidence, available on error, such clauses of it, as are deemed pertinent in the cause, should be preserved in the record, so that the court may know that it was material.[1]

ERROR to Circuit Court of *Jefferson* county.

The facts are sufficiently stated by the court.

James Bassett and *Michael Schaeffer*, for the plaintiff in error. *W. P. Thomas*, for the defendant in error.

*BREESE, J. Several objections are made to the recov- [*171] ery in this case, the most important of which we will notice.

The action was ejectment brought by the defendant in error against the plaintiff in error to recover the possession of a cer-

[1] See Boies *v.* Henney, 32 Ill., 130.

tain quarter section of land in Marion county. The plaintiff in the action, to show title on his part, introduced the certificate of the register of the land office at Springfield, after proving his handwriting, of the entry and purchase of the land by William Kinney and John Taylor; also the record of the proceedings of the Circuit Court of Sangamon county on the application of the administrator of Taylor to sell the lands, of which he was supposed to have died siezed, to pay his debts. He also introduced a deed from the administrator reciting this decree to him, for the premises, and also a deed from Wil-
[*172] liam *C. Kinney and wife to him for the same lands, and the will of William Kinney by which, after giving certain legacies, he devised the residue of his personal and real estate to his son, William C. Kinney, whom he appointed executor. The plaintiff then proved the defendant was in possession of the premises at the time of the commencement of the suit.

The defendant showed no other title to the premises than this possession.

It is objected here, that the proceedings of the Circuit Court, on the petition of the administrator, were irregular, and so defective as to convey no title to the purchaser.

It may be admitted the proceedings were not strictly regular, yet at the same time, the court having jurisdiction both of the persons of the parties and of the subject matter, the decree rendered is valid and binding, and cannot be attacked, collaterally, in this action.

The decree recites that due notice of the application had been given to all persons interested, of the intention of the administrator to file the petition, by publication in the Illinois State Register, in the manner and for the period required by law.

The decree also finds that John Taylor died seized of the lands described in the petition; it finds and names his heirs-at-law, and that they were of full age; it also finds that the administrator had applied the proceeds of the personal estate to the payment of the debts of the deceased, and that there was still due and unpaid of debts the sum of more than seven

thousand dollars. The decree directed the administrator to sell the lands described in the petition to pay these debts, and required him to report his proceedings to the court for confirmation.

No substantial objections are perceived to any of the proceedings in the Circuit Court, nor to the regularity of the sale by the administrator. They all appear to be in reasonable conformity to the statute. The objection that the land was sold, not in the lowest legal subdivisions, is an objection, if it was one, which no mere intruders or trespassers could be *permitted to make, however available it might be [*173] for the heirs-at-law of Taylor to make it before the sale is confirmed, on a motion to set aside the sale. They were sold in the same legal subdivisions as they were described, and in separate tracts, and not *en masse*, as the record shows.

It is objected, that the quitclaim deed of William C. Kinney had nothing to operate on, no deed from William Kinney to John Taylor being produced. The decree finds the lands to belong to John Taylor, and, so far as this defendant is concerned, is conclusive upon him, unless he could set up a deed from William Kinney to himself, which is not pretended. Since the decree, and the sale under it, and the purchase by the plaintiff in the ejectment, the deed from William Kinney to Taylor not being found, and it never having been recorded, the devisee of William Kinney quitclaims to the plaintiff all his interest in the premises. So the case stands thus: The decree finds the title to be in Taylor, and although that may not be conclusive, the plaintiff succeeded to all Taylor's rights and interest in the premises, by his purchase under the decree. But to make assurance doubly sure, the devisee of William Kinney conveys all his interest in the premises to the plaintiff, so that a complete legal title is established in the plaintiff.

But the defendant says there is no apparent connection between the quitclaim deed of William C. Kinney and the will of William Kinney, no reference being made in the deed to his right as residuary legatee under the will. This is true; there is no such reference. But what is the rule in such cases?

Where a conveyance is general, but by an instrument not adapted for the purpose of conveying a particular interest or as an execution of a power, it will be held to convey whatever interest the grantor had, or as an execution of a power vested in him, if it would, otherwise, be totally inoperative, although his interest or character is not referred to expressly or by implication. 1 Sug. on Powers, 418.

In the present case the deed of Wm. C. Kinney would be wholly inoperative, if it is not construed to convey such title as was, apparently, vested in him as the residuary legatee [*174] under *the will of his father. The grantor had no other interest whatever. The clause in his deed,[1] explanatory of its object and meaning, assumes the fact to be that his father had, at some time, conveyed the lands described to Taylor, but from the loss of the deed, or from some other reason, there was still an apparent title in William C. Kinney, and the object and design of the deed was to vest that apparent title in Hurst, who held the title of Taylor.

Upon the other point made, that the court rejected the supplemental will of William Kinney, it is only necessary to say that though the will was competent evidence under the statute, it does not follow that it was pertinent to the issue in this case. The supplemental will may have contained a pecuniary legacy to some party and nothing more, hence the necessity of preserving such clauses of it, as are deemed pertinent in this case, on the record. We cannot know that its production was material in any sense.

Perceiving no error in the record, the judgment must be affirmed.

[1]This clause, which followed the description of the land, is as follows:—"It being intended by this deed to convey to the said Charles R. Hurst the said lands conveyed by William Kinney in his lifetime to John Taylor, and none others."

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF ILLINOIS,

SECOND GRAND DIVISION,

AT THE

JANUARY TERM, 1864.

MURRAY MCCONNEL *v.* JARIUS KIBBE.[1]

PARTITION WALLS: *Right to have upper stories supported.*

Where one person owns so much of a tenement as is above the rooms upon the ground floor, through which there is a partition wall extending from the foundation of the building to the top of the same, and another person owns the rooms upon the ground floor, the former has a right to have his portion of the tenement supported by such partition wall, and the removal of such support by the owner of the lower rooms will be an infringement of his right, for which an action may be sustained.

DAMAGES: *Inferred from invasion of a right; allegation of special, when necessary.*

The removal by the owner of the lower story, of a partition wall in a building, supporting the upper stories, is such an invasion of the rights of the owner of such upper stories, as will support an action without showing special damages. The law infers damages from every infringement of a right. The right infringed is property, and for its invasion nominal damages may be recovered.

FORMER RECOVERY: *Where the injury is continuous.*

The recovery of nominal damages for the invasion of a right to have the upper stories of a building supported by a partition wall, is no bar to a

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[1] See S. C., 29 Ill., 483.

suit for actual damages subsequently sustained, where they did not take place before the commencement of the former suit. Successive suits for actual damages may be brought from time to time as the damages are sustained; and in each suit the party may recover such damages as he has sustained prior to its commencement, not barred by a previous recovery.

PLEADING: *Allegation of continuous injury.*

Where in an action of case for injury to plaintiff's reversionary interest, by removing a partition wall, the plaintiff alleged that the defendant on a certain day named, and on divers other days from that time to the commencement of suit, removed said partition wall, thereby depriving the walls above of their necessary support to the injury of plaintiff's reversionary interest, and alleging as special damage the cracking and sinking of a portion of the tenement, it was not considered necessary in such a declaration to state the time or times when the damages were sustained, as the legal effect of the allegation was that they were sustained when the wrongful act of the defendant was committed, and on divers other days between that time and the commencement of suit. Under such a declaration the plaintiff might prove and recover any damages sufficiently described, sustained prior to commencement of suit.

STATUTE OF LIMITATIONS: *In case of continuing injury.*

The Statute of Limitations, in the case of a continuing injury, bars the recovery of all damages, whether nominal or substantial, those inferred by law and special, which were sustained prior to the time within which the law requires an action for their recovery to be brought.

SAME: *How pleaded.*

Where the original wrong is not of itself actionable without special damage, a plea of not guilty within five years is not a good plea, for the reason that the action is not for the wrongful act, but solely for the consequences of it; and it is no answer to the declaration to plead not guilty of the wrongful act within the period of limitation.

But where the original wrong is itself actionable, and the action is brought solely for the wrongful act, such a plea is good, as it is a complete answer to the declaration.

SAME, PLEADING: *Defendant need not answer matter of aggravation in first instance.*

Where the action is for the original wrongful act, which is actionable *per se* without alleging special damage,—and for the subsequent consequences, which are alleged as matters of aggravation, the defendant is not required in the first instance to answer the matters of aggravation, and a plea of not guilty within five years is a good plea.

PLEADING: *New assignment.*

The defendant must make a complete answer to the original wrongful act, being actionable *per se*, and is not in the first instance required to answer

matters of aggravation; if the plaintiff then desires to take advantage of the matters of aggravation he must new assign for them.

STATUTE OF LIMITATIONS: *New assignment.*

Where an action is brought for removing a partition wall, with continuing special damages alleged as matter of aggravation, and the original wrongful act was done more than five years before suit brought, and the defendant pleads not guilty within five years, the plaintiff may upon new assignment recover such damages as have been sustained by him within the five years preceding suit.

SAME.

Where in such case the plaintiff replied that the cause of action accrued within five years, upon which issue was taken, although this was not in form a new assignment, it was *held* that after issue joined it should have been treated as such.

PLEADING AND EVIDENCE: *Must agree.*

Where in an action of case for injury to plaintiff 's reversionary interest, the declaration alleged that the wrongful act was committed after a demise of the premises injured, and while the tenant was in possession, and it appeared from the evidence that the injury was committed before the demise, it was *held*, that the allegation, being descriptive of the plaintiff 's estate when the wrongful act was committed, was a material one and that the plaintiff could not recover.

ACTIONS FOR INJURY TO REALTY: *While in possession of a tenant.*

Where a partition wall supporting the upper stories of a building, is removed while a tenant has a leasehold interest therein, he will have a right of action for such portion of the damages as he sustains, and the owner of the reversion for such portion of them as he sustains. But where the tenant leases the premises after the wrongful act, he has no right to any damages caused thereby though subsequent to the demise, and for such damages the action must be brought by the owner as for an invasion of his interest in fee.[1]

ERROR: *Working no injustice not cause for reversal.*

Where upon the whole case it clearly appears that on another trial the verdict must be the same as in the former trial, the judgment will not be reversed, although the court below may have erred in some of its instructions.[2]

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[1] See Cooper *v.* Randall, 59 Ill., 317.

[2] See New Eng. F. Ins. Co. *v.* Wetmore, 32 Ill., 221; Lawrence *v.* Jarvis, id., 304; Parker *v.* Fisher, 39 Ill., 164; Potter *v.* Potter, 41 id., 80; Watson *v.* Wolverton, 41 id., 242; Curtis *v.* Sage, 35 id., 22; Root *v.* Curtis, 38 id., 192; Coursen *v.* Ely, 37 id., 338; Boynton *v.* Holmes, 38 id., 192; Clark *v.* Pageter, 45 id., 185; Rankin *v.* Taylor, 49 id., 451; Pahlman *v.* King, 49 id., 266; Peoria Ins. Co. *v.* Frost, 37 id., 333; Jarrard *v.* Harper, 42 id., 457;

APPEAL from Circuit court of *Morgan* County.

The facts are sufficiently stated by the court.

Murray McConnel, in person; *D. A. Smith* and *H. B. McClure*, for the appellee.

[*177] *BECKWITH, J. The present action is on the case for an alleged injury to the reversionary interest of the plaintiff in a brick tenement, in the town of Jacksonville. The declaration contains three counts, each alleging in substance that the plaintiff, before the committing of the grievances mentioned, was the owner of so much of the tenement as was above the rooms upon the ground floor, through which there was a partition wall extending from the foundation of the building to the top of the same; and that the defendant was the owner of the rooms upon the ground floor of the building. That before the committing of the grievances mentioned, the plaintiff [*178] had leased so much of the tenement *as belonged to him to one Fox for a term of ten years; and that afterwards, and while Fox was in possession under said lease of so much of the tenement as belonged to the plaintiff, the defendant, on a certain day named, and on divers other days from that time to the commencement of the suit, removed said partition wall between the rooms on the ground floor, thereby depriving the walls above of their necessary support, to the injury of the plaintiff's reversionary interest, and alleging as special damage the cracking and sinking of that portion of the tenement above the rooms upon the ground floor. The defendant pleaded first, not guilty, and second, not guilty within five years. The plaintiff replied to the second plea, that the grievances complained of had been continued from the time they were committed until the commencement of the suit. To this

Lettick *v.* Honnold, 63 id., 335; Stobie *v.* Dills, 62 id., 432; Toledo, P. & W. R'y Co. *v.* Ingraham, 58 id., 120; Hardy *v.* Keeler, 56 id., 152; Graves *v.* Shoefelt, 60 id., 462; Daily *v.* Daily, 64 id., 329; Chicago, B. & Q. R. R. Co. *v.* Dickson, 63 id., 151.

Conversely, the refusal of proper instructions is not ground for reversal when substantial justice has been done. Schwarz *v.* Schwarz, 26 Ill., 81; Hall *v.* Sroufe, 52 id., 421.

replication there was a demurrer, which was sustained. The plaintiff filed a second replication, alleging that the causes of action accrued within five years, upon which issue was joined. Upon the trial the plaintiff proved that he was the owner of the portion of the tenement described in the declaration as his property; and that while he was the owner thereof, and before the demise of the same to Fox, the defendant removed the partition wall between the rooms on the ground floor. The court instructed the jury that the plaintiff could not recover unless the wall was removed after the demise of the premises to Fox and while he was in possession of the same, nor for the original injury or for the subsequent damages, if the wall was removed more than five years before the commencement of the suit. The jury found for the defendant. It was the plaintiff's right to have his portion of the tenement supported by the wall which was removed. The removal of the support was an infringement of his right, for which he might have sustained an action without showing any special damage. The law infers damage from every infringement of a right. 1 Gil. 544; *Fay* v. *Prentice*, 1 C. B. 828; *Sampson* v. *Hoddinett*, 1 C. B. (N. S.) 590. The right infringed is property, and for its invasion nominal damages may be recovered, but such recovery is no bar to a suit for actual damages subsequently sustained *where they did not take place before the com- [*179] mencement of the former suit. Successive suits for actual damages may be brought from time to time as the damages are sustained, and in each suit the party may recover such damages as he has sustained prior to its commencement, not barred by a previous recovery. The bar of the statute of limitations operates in the same manner. It bars the recovery of all damages, whether nominal or substantial, those inferred by law and special, which were sustained prior to the time within which the law requires an action for their recovery to be brought.

The declaration in the present case is for the nominal damages inferred by law from the infringement of the plaintiff's right, and for the actual damages subsequently sustained, which are alleged as a matter of aggravation. Each count states the

wrongful act of the defendant in removing the partition wall, which act, it is alleged, was committed on divers days and times, whereby the plaintiff's right was invaded, from which the law infers damage, and by means of which act he has sustained actual damages. The allegation of special damages as a matter of aggravation is a substantive allegation of fact, and not an inference of law resulting from facts antecedently stated. *Kidgell* v. *Moore*, 14 Jurist, 790. It is not necessary, in a declaration like the present one, to state the time or times when the damages were sustained, as the legal effect of the allegation is that they were sustained when the wrongful act of the defendant was committed, and on divers other days between that time and the commencement of the suit. Under such a declaration the plaintiff may prove and recover any damages sufficiently described which he has sustained prior to the commencement of the suit, and a recovery by him is a bar in any subsequent suit to the recovery of any damages sustained prior to the commencement of the former one. The plea of not guilty within five years was a good one. Where the original wrong is not of itself actionable without special damage such a plea is not good, for the reason that the action is not for the wrongful act, but solely for the consequences of it, and it is no answer to the declaration to plead not guilty *of the wrongful act [*180] within the period fixed by the statute of limitations.

But where the original wrong is of itself actionable, and the action is brought solely for the wrongful act, such a plea is good, as it is a complete answer to the declaration. In the present case the action is for the original wrongful act, and for the subsequent consequences which are alleged as matters of aggravation. The defendant was not required in the first instance to answer the matters of aggravation. He must make a complete answer to the original wrongful act, and then if the plaintiff desires to take advantage of the matters of aggravation he must new assign for them. *Taylor* v. *Cole*, 3 Term, 297; 1 Wm's Saund. 28; 3 Wils. 20. The plea, being an answer to the original act, was good. The replication that the causes of action accrued within five years was not in form a new assign-

ment, but after issue was joined thereon we think it should have been treated as such. As we have before stated, the statute of limitations was a bar to all damages sustained by the plaintiff more than five years before the commencement of his suit, but it was not a bar to any damages sustained within the five years. He was entitled, upon proving his case, as alleged in his declaration, to recover such damages as he had sustained during that period of time, and the court below erred in instructing the jury that he could not recover such damages if the partition wall was removed more than five years before the commencement of the suit. The main difficulty with plaintiff's case is that he did not prove it as alleged in his declaration; and the jury could not do otherwise than find for the defendant under the first instruction given for him, which correctly states the law. The declaration alleges that the wrongful act of removing the partition wall was committed after the demise of the plaintiff's portion of the tenement to Fox, and while he was in possession of the same under said demise. The allegation is descriptive of the plaintiff's estate when the wrongful act was committed which caused all the damages, and is a material one. If the partition wall had been removed while Fox had a leasehold interest in the premises, he would have had a right of action for such portion of the * damages as he sustained, and the plaintiff a right [*181] of action for such portion of them as he sustained as the owner of the reversion. This is the plaintiff's case as he alleges it in his declaration, and the present action is brought to recover only such portion of the damages alleged to have been sustained as the plaintiff is entitled to as the owner of the reversion. The evidence established that the act of the defendant was done before the plaintiff demised the premises to Fox, and while the plaintiff was the owner in fee. Upon the case established by the evidence, the act of the defendant was an invasion of the right of the plaintiff as owner in fee, and not as owner of the reversion; and the subsequent damages sustained by him were by means of an act done to the injury of his ownership in fee, and not by means of an act done to the injury of his reversionary interest as alleged in his declaration. Although

Fox leased the premises after the wrongful act of the defendant, he had no right to any damages caused thereby. Upon the whole case it clearly appears that on another trial a verdict must inevitably be for the defendant; and although the court below erred in some of its instructions, we ought not to grant a new trial where it is apparent that the verdict on a retrial of the cause must be the same as on the former trial. *Sheldon* v. *School District*, 24 Conn. 88; *Walworth* v. *Readsboro*, 24 Verm. 252; *Brantly* v. *Carter*, 26 Miss. 282; 1 Graham and Waterman on New Trials, 301; 3 id. 862, *et seq.*

The judgment of the court below will therefore be affirmed.

Judgment affirmed.

James A. Waugh *et al. v.* Silas W. Robbins.

Decree: *Must correspond to allegations of bill.*[1]

Relief must be granted, if at all, upon the case made by the bill.

Where, therefore, upon a bill to foreclose a mortgage, the complainant alleged that when he advanced the money and took the mortgage, it was with the expectation that the property, to which the mortgagor then had no title, would be conveyed to the mortgagor; but that, contrary to his expectations, it was conveyed to the mortgagor and others jointly, it was *held* that this did not warrant a decree that such conveyance was in fraud of complainant's rights.

Evidence: *Must in chancery be preserved in record.*[2]

In order to sustain a decree in chancery, the evidence upon which it is based must in some manner be preserved in the record.

Infants: *Decree in chancery against.*

Where minors are defendants in chancery, a decree can only be rendered

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[1] See Ohling *v.* Luitjens, 32 Ill., 23; Burger *v.* Potter, id., 66; Woodworth *v.* Huntoon, 40 id., 132; Means *v.* Means, 42 id., 50; Hall *v.* Towne, 45 id., 493; Taylor *v.* Merrill, 55 id., 52; Tiernan *v.* Granger, 65 id., 351.

[2] See Mason *v.* Bair, *post*, 194; Eaton *v.* Sanders, 43 id., 435; Grob *v.* Cushman, 45 id., 119; Wilhite *v.* Pearce, 47 id., 413; Goodwillie *v.* Williamson, 56 id., 523; Hamilton *v.* Stewart, 59 id., 330; Stelle *v.* Boone, 75 id., 457; Delahanty *v.* Warner, id., 185; Driscoll *v.* Tannock, 76 id., 154; Palmer *v.* Gardiner, 77 id., 143; Spring *v.* Collector, 78 id. 101.

Oral testimony heard in chancery causes may be stated in the decree, in a bill of exceptions, in a certificate of the judge, or in a master's report.

against them on full proof.[1] Nor can their natural or legal guardians by consent waive this requirement. Such evidence must be preserved in the record.[2]

ERROR to Circuit Court of *Sangamon* county.

The facts are sufficiently stated by the court.

The questions for determination are, (1) whether the decree that the conveyance to Sarah A. Waugh and her children was in fraud of complainant's rights was warranted by the allegations of the bill; (2) whether the decree could be supported, the evidence upon which it was based not being preserved in the record.

Herndon & Zane, for plaintiffs in error. *James C. Conkling*, for defendant in error.

*WALKER, C. J. In this case complainant exhibited [*183] in the court below his bill to foreclose a mortgage, executed by James A. Waugh and Sarah A. Waugh to him. It alleges that the mortgage was executed to secure the payment of money advanced by complainant for the purpose of improving the mortgaged premises. *That at the time [184*] the mortgage was executed the mortgagor had no title to

White *v.* Morrison, 11 Ill., 361; Ward *v.* Owens, 12 id., 283; Smith *v.* Newland, 40 id., 100.

As to preserving oral evidence in a chancery cause by bill of exceptions, see Ferris *v.* McClure, 40 Ill., 99; Smith *v.* Newland, id., 100.

As to reciting the facts proved, in the decree, see Mason *v.* Bair, *post*, 194, 204; Martin *v.* Hargardine, 46 Ill., 322; Walker *v.* Carey, 53 id., 470; McIntosh *v.* Saunders, *supra*.

Not necessary to preserve the evidence in a proceeding by an administrator to sell land to pay debts. Moffitt *v.* Moffitt, 69 Ill., 641.

[1] See Hitt *v.* Ormsbee, 12 Ill., 166; Hamilton *v.* Gilman, id., 266; Tuttle *v.* Garrett, 16 id., 354; Reddick *v.* State Bank, 27 id., 148; Masterton *v.* Wiswould, 18 id., 48; Carr *v.* Fielden, id., 77; Tibbs *v.* Allen, 27 id., 129; Chaffin *v.* Kimball, 23 id., 36; Cost *v.* Rose, 17 id., 276; Thomas *v.* Adams, 59 id., 223; Campbell *v.* Campbell, 63 id., 502. See, also, Ewell's Lead. Cases, 229 *et seq.*, where the cases on this subject are collected.

[2] See Peak *v.* Pricer, 21 Ill., 164 (withdrawal of plea); Rhoads *v.* Rhoads, 43 id., 239; Quigley *v.* Roberts, 44 id., 503; Barnes *v.* Hazleton, 50 id., 429. See, also, Ewell's Lead. Cases, 229, *et seq.*, and the cases there cited.

the premises, but it was expected the deed would be made to Sarah A. Waugh alone; but on the contrary, the property was conveyed to Sarah A. Waugh and her four children, upon the terms that the children owned jointly one-half of the property, and Sarah A. the other half. That complainant paid the entire consideration for the premises, which was, that it should be improved by the erection of a house thereon, which was built with complainant's money, and the conveyance was made after the building was erected. That the grantees paid nothing. He claims that the property should be sold for the satisfaction of the mortgage.

The adult defendants answer, and insist by way of plea, that they only have a life estate in the premises, and had no other or greater interest. They afterwards filed a cross-bill in which they allege that they are very poor, and their children in need of the necessaries and comforts of life, and their interests in the lot ought to be sold for their support, to say nothing of their education; and that they have no personal property; and pray a sale of their interest in the premises for their support. Complainant answered, admitting the allegations of the cross-bill. The guardian *ad litem* for the minor defendants answered, that he was uninformed of the truth of the allegations of the bill, and required strict proof. On the hearing, the court decreed a foreclosure and sale of the property, also that the conveyance to Sarah A. Waugh and her children was in fraud of complainant's rights, and that the minor defendants take nothing by the conveyance, as against complainant. That the money arising from the sale should be applied to the payment of the mortgage debt, and if any surplus, that it be paid to Sarah A. Waugh for her benefit and that of her children.

There is no evidence in this record to establish the finding of the court that this deed was in fraud of the rights of the mortgagee. Nor does the bill allege that it was in fraud of his rights. It does allege that when he advanced the money and took the mortgage, it was with the expectation that the property would be conveyed to the mortgagors; and that it [*185] was *done in the mode described, contrary to his expectations. He does not allege such was the agreement, or

that it was so understood. It has been so frequently held by this court that the evidence upon which a decree is based must be in some manner preserved in the record, that it is unnecessary to refer to cases. This is especially true in reference to decrees against minors. Where minors are defendants to a bill, a decree can only be rendered against them on full proof. Nor can their natural or legal guardians by consent waive this requirement. This decree operates to deprive them of their property, and yet no evidence is found in the record, even if the allegations of the bill were sufficient, to authorize such a decree. For these reasons the decree of the court below is reversed and the cause remanded, with leave to amend the bill.

Decree reversed.

Great Western Railroad Company of 1859 *v.* Hamilton C. McComas.

Parties Plaintiff: *In actions against common carriers for failure to deliver.*

Where property is delivered to a common carrier for transportation, the consignor, though he is but a bailee of the property, may sue for a non-delivery of the same. He has such a special property in the goods as to give him the right of action. So may the real owner sue, and so may the consignee.[1]

Common Carriers: *Actions against by consignor.*

The carrier cannot excuse itself in an action brought by the consignor of goods for negligence, that the real title was in his bailor, unless it shows that the property has been taken out of its possession by him, without any injury to such consignor. The carrier in such case is the agent of the consignor of whom it received the property, and is not at liberty to dispute his title in an action brought by him.

Bailment: *Bailee can not dispute bailor's title.*

As a general rule, even if the bailor is not the owner of the thing bailed, the bailee must ordinarily restore it to him.

Error to Circuit Court of *Piatt* county.

The facts are stated by the court.

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[1]See Merchants' Dispatch Co. *v.* Smith, 76 Ill., 542.

Nelson & Roby, for plaintiffs in error. *W. E. Lodge*, for defendant in error.

[*186] *Breese, J. This was an action on the case against the Great Western Railroad Company of 1859, for negligence in not delivering certain articles with which they were intrusted as common carriers. The facts appear to be, that, on the 18th of June, 1860, H. C. McComas, the defendant in error, delivered to the railroad company certain articles of property, and received from them this receipt:

"Great Western Railroad Company of 1859,
Bement Station, *June* 18, 1860.

"Received from H. C. McComas the following articles, contents unknown, in apparent good (W. D. Kerr, Attica, Ind.) order, viz: 1 boiler, 1 smokestack, 1 dome (old), subject to the conditions and rules and on the terms mentioned in their tariff (now in force) for the transportation of merchandise, which are made a part of this contract.

"R. B. GRIFFIN, *Agent.*"

It appears, while the articles were on the cars on the route east, they were seized by the sheriff of Vermillion county, by virtue of a writ of replevin, at the suit of one Thomas Lewis. To the action the defendants pleaded, first, *non detinet;* second, that the boiler was the property of one William C. Conrad; third, that the boiler was the property of one William C. Conrad, and not the property of Lewis, and that the boiler [*187] was *delivered by Conrad to the defendant, to be transported from Bement, Piatt county, to a station called the State Line, on the Great Western Railroad, for certain hire and reward paid by Conrad, and that the boiler was held under this contract with Conrad. The company also pleaded that a writ of replevin, issued by the clerk of the Piatt Circuit Court, directed to William Motherspaws, as elizor, came to his hands, and by virtue thereof the elizor seized the boiler on the 26th day of April, 1860, and delivered it to H. C. McComas, attorney of Conrad; that the writ of replevin was then pending between Conrad and the sheriff of Piatt county, and undetermined;

and that Conrad, after the delivery to him of the boiler, delivered the same to the company at Bement, and then and there held and employed the defendant to ship and transport the boiler for him, Conrad, from Bement to the State Line, &c.; wherefore they held and detained the boiler.

The issues upon these pleas were found for the company, and a writ of *retorno habendo* was awarded. By this judgment the articles were restored to the company, and were, in legal contemplation, in their possession.

It would seem, however, the company did not prosecute the writ of *retorno habendo*, but suffered the property to remain in the possession of Lewis; at any rate, they did not deliver it, as they had contracted to do. Now, the question is, as to the liability of the company. About this there can be no doubt.

The property was delivered to the company by McComas, who, it is admitted, was the bailee of Conrad, and Kerr, of Attica, was the consignee. The company made the contract to carry and deliver with McComas, and there is no principle better settled, than that the consignor, for a breach of the duty, be he but a bailee, may sue. He has such a special property in the goods as to give him the right of action. So may the real owner sue, and so may the consignee. The company cannot excuse themselves in a suit brought by the consignor for negligence, that the real title was in his bailor, unless they show the property has been taken out of their possession by him, without any injury or injustice to the lender or bailor. *Here McComas was the bailor of this property, [*188] so far as the railroad company was concerned, and if Conrad was the owner, the company should show that it had been restored to him without injury to McComas. As a general rule, if the bailor is not the owner of the thing bailed, the bailee must, ordinarily, restore it to him. Story on Bailments, § 266; *Whittier* v. *Smith*, 11 Mass. 20. The railroad company was the agent of McComas, of whom they received the property, and they are not at liberty to dispute his title in an action brought by him. *Goslin* v. *Birnie*, 20 Eng. C. L. 153; *Hall* v. *Griffin*, 25 id. 118; *Harman* v. *Anderson*, 2 Cowp.

243; *Stonard* v. *Dunkin et al.*, id. 344. The case of *Freeman* v. *Birch*, 28 E. C. L. 543, settles the point that either the bailor or bailee may sue. *Davis* v. *James*, 5 Burrows, 2680, and *Moore* v. *Wilson*, 1 Term R. 659, are referred to, to support the principle. In *Nichols* v. *Bastard*, 2 Exch. 659, it was also held that either bailor or bailee might sue, and whichever first obtains damages it is a full satisfaction. Angel on Carriers, § 493.

It is very questionable if the carrier can be permitted, of his own mere motion, to set up, as a defense against his bailor, the right of the real owner. 6 Wharton (Penn.), 418.

We see no reason whatever to justify a reversal of the judgment. It must be affirmed.

Judgment affirmed.

St. Louis, Alton and Rock Island R. R. Co. *et al.* *v.* John Coultas.

Same *v.* Alexander J. Hawk's Adm'rs.

Contracts: *Construction of as joint or several.*

A contract will be construed as joint or several, according to the interests of the parties appearing upon the face of the obligation, if the words are capable of such a construction.

Same.

Where an obligation was executed by a railroad company and others as securities, by which the railroad company and securities acknowledged themselves to be jointly and severally bound unto nine specified persons, "according to their relative and respective several interests, in the penal sum of $3,000, on this express condition, that the said railroad company shall, on the assessment of damages, to be made to secure right of way for such railroad, pay to the obligees, relatively and respectively, damages which may be assessed as aforesaid, then this bond to be void, otherwise to remain in full force and effect," it was *held* that the interest of the obligees was several, and that suit might be brought thereon by each separately.

Measure of Damages: *Upon a several obligation in a penal sum.*

In several actions brought by the obligees in an instrument whereby a railway company binds itself to nine specified persons, "according to

their relative and respective several interests in the penal sum of $3,000," conditioned to pay to the obligees relatively and respectively, the damages to be assessed in securing right of way; no one of the obligees has a right to recover upon it more than his relative and respective share of the penalty; and the obligees in their several suits are not to receive more than the $3,000. If the damages assessed in favor of them all amounted to more than the penalty of the instrument, each obligee could only recover his relative and respective share of that sum.

Pleading: *Declaration upon a several obligation, by one of the obligees.* In a several action brought by one of several obligees upon an instrument whereby a railway company binds itself to several specified persons "according to their relative and respective several interests, in the penal sum of $3,000," conditioned to pay to the obligees relatively and respectively the damages to be assessed in securing right of way, the declaration should allege the extent of the interests of the other obligees, so that it can be determined what is the relative and respective right of the plaintiff.

Error to Circuit court of *Scott* county.

Debt by the several defendants in error against plaintiffs in error upon a certain written instrument, which is as follows:

"The Rock Island and Alton Railroad Company, principal, and David Skilling, Robert E. Haggart, William H. Wilson, F. T. Hale, securities, acknowledge themselves to be jointly and severally bound unto Alexander J. Hawks, John Gamon and Mary Ann Gamon, his wife, Robert Scathe, James Coultas, Hezekiah Evans, Hiram Kelly, John Coultas, and William G. Coy, according to their relative and respective several interests, in the penal sum of three thousand dollars ($3,000), on this express condition, that the said railroad company shall, on the assessment of damages, to be made to secure right of way for said railroad, pay to the obligees, relatively and respectively, damages which may be assessed as aforesaid, then this bond to be void, otherwise to remain in full force and effect. Given under our hands and seals, this 26th day of May, 1858."

The judgments of the court below upon demurrers to the plaintiffs' declarations, were for the plaintiffs.

The questions raised upon error are, (1) as to the character of said writing, whether joint or several, so that in the latter case separate suits may be brought thereon by the several obli-

gees; (2) if several, whether the respective declarations should not have alleged the extent of the interests of the other obligees, so that the relative and respective rights of the several plaintiffs could have been determined.

Hay & Cullom, for plaintiffs in error. *Albert G. Burr*, for defendants in error.

[*193] *Beckwith, J. The questions presented for our determination in these cases are the same, and they will be considered together.

The actions are debt, and are brought upon an instrument by which the defendants acknowledge themselves bound unto nine persons according to their relative and respective several interests, in the penal sum of three thousand dollars, which is conditional that the railroad company shall, on the assessment of damages to be made to secure the right of way, pay to the obligees, relatively and respectively, the damages which may be assessed as aforesaid. The declarations allege the assessment of the damages of the plaintiff in each suit, and the non-payment of the same by the railway company; but it is not alleged that the damages of the other obligees have been assessed, nor is there any allegation in regard to the extent of their respective interests. The obligees were severally the owners of different tracts of land over which the railway company were proceeding to condemn a right of way, and the obligation was given to secure to them such damages as might be assessed to them severally in the proceedings for condemnation. It is evident that the interest of the obligees was several. A contract will be construed as joint or several, according to the interests of the parties appearing upon the face of the obligation, if the words are capable of such a construction. 1 Black (U. S.) 309. The instrument sued upon expressly states that the interests of the obligees are several, and we think its words are capable of the construction of an obligation to the obligees severally. The defendants in terms oblige themselves to the obligees, according to their relative and respective interests, to the extent of three thousand dollars. But while we hold the instrument

to be a several one, upon which each one of the obligees may severally sue, yet no one of them has a right to recover upon it more than his relative and respective share of the penalty. The declarations should have alleged the extent of the interests of the other obligees, and then it could have been determined what was the relative and respective right of the plaintiff.

The *obligees in their several suits upon the instrument [*194] are not to recover more than the three thousand dollars.

If the damages assessed in favor of them all amounted to more than the penalty of the instrument, each obligee can only recover his relative and respective share of that sum. The declarations do not show whether the plaintiffs were entitled to recover upon the instrument the whole amounts of their damages or a less sum. For this reason the demurrers should have been sustained. The judgments of the court below will be reversed, and the causes remanded.

Judgments reversed.

John L. Mason *et al.*, *v.* Jacob M. Bair.

Chancery Practice: *Order to answer before a decision in terms as to the demurrer.*

Where a demurrer is filed to a bill in chancery, alleging several specific grounds of demurrer, and the demurrer is sustained as to so much of the bill as makes certain parties defendants, and the bill dismissed as to them; and the order dismissing the bill as to them fails in terms to overrule the demurrer on the other grounds, or to sustain it, but requires the other defendants to answer the bill, this by implication overrules the demurrer as to such other grounds.

Same: *Notice to take evidence in open court.*

No notice is required to take evidence in open court on the hearing of a chancery cause. The hearing of oral testimony in such case has no analogy to taking depositions, and the law regulating them has no application.

Evidence: *Taken in open court on a hearing in chancery, how preserved.*

While oral testimony taken in open court upon the hearing of a chancery cause must be preserved in the record,[1] that may be done by the master's

[1]See Waugh *v.* Robbins, *ante*, 181.

reducing it to writing on the hearing of the cause, or by any one else, or it may be embodied in the decree.

SAME.

It is not necessary that when the evidence was first taken it should have been reduced to writing and preserved in the record. It is only necessary that such evidence appear in the record, and the court below must be left in the exercise of its discretion as to the time when, and the mode in which, it is placed in the record, so it shall be by the time the decree is rendered and filed. And if from accident the evidence thus taken should be lost or forgotten before the decree is rendered or filed, it would be the manifest duty of the court, on application of the party, or, if a decision had not been made, on his own motion, to have the evidence retaken, that it might be understood by the court and preserved in the record.

AMENDMENTS: *After replication filed and cause submitted.*

Amendments of the bill after replication filed and the cause is submitted on the evidence, are allowed in furtherance of justice. They are within the discretion of the chancellor and unless it appears that such an amendment has worked injustice or great hardship to the defendant, the exercise of the discretion will not be controlled.[1]

SAME.

Where in such case, at the time the leave was given to amend the cause was continued until the next term, giving the defendants ample time to meet the amendments by proof, if they had it, it was *held* that there was no error.

PLEADINGS; INTERLINEATIONS IN:[2] *Presumed to have been made before filed.*

Where upon a motion to strike out interlineations in a bill, alleged to have been made as amendments, there was upon appeal no evidence in the record from which it could be inferred that they were made after the bill was filed, it was *held* that no presumption could be indulged that they were subsequently made; but on the contrary it would be presumed the court below had evidence that they were part of the original bill, or at least, that there was no evidence that they constituted the amendments.

EVIDENCE: *Of allowances against estate of deceased person; clerk's certificate admissible.*

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[1]See Moshier *v.* Knox College, 32 Ill. 155; Farwell *v.* Meyer, 35, id. 40; Marble *v.* Bonbotel, id., 40; Wise *v.* Twiss, 54 id., 301; Martin *v.* Eversal, 36 id., 222; De Wolf *v.* Pratt 42 id., 198; Hewitt *v.* Dement, 57 id.. 500. As to amendment of bill after default, see Lyndon *v.* Lyndon, 69 Ill., 43.

[2]See Weatherford *v.* Fishback, 3 Scam. 170; Supervisors *v.* M. & W. R. R. Co., 21 Ill., 365; Stanberry *v.* Moore, 56 id., 472; Teutonia Life Ins. Co. *v.* Mueller, 77 id., 22.

The certificate of the clerk of the county court, under his hand and the seal of the court, that certain allowances, giving the amounts and dates thereof—were made against the estate of a deceased person, as appears of record in his office, is admissible as evidence of the indebtedness of said estate to the person to whom such allowances were made.

ALLOWANCE OF CLAIMS AGAINST ESTATE OF DECEASED PERSON: *Effect of, as to administrator.*

When a claim against the estate of a deceased person is duly presented to the county court and allowed against the estate, the allowance is conclusive upon the executor or administrator, and has the force and effect of a judgment, until it is reversed.

SAME: *Heirs may become parties.*

The 95th section of the statute of wills (Rev. Stat. 1845, p. 556),—which provides that when a claim is presented for allowance, if the administrator, widow, guardian, heirs, or others interested in the estate shall not object the claimant shall be permitted to swear to his claim,—contemplates that the heirs are or may become parties to such proceedings, and gives them the right to be present and contest the justice of the claim.

SAME.

Having the right to be present and contest the justice of claims against the estate of their ancestor, the adjudication of the court in allowing the claims, must be held *prima facie* binding upon the heirs, although they may have neglected to avail themselves of the right to contest their allowance.

CONTRACTS: *Paying for land purchased, by paying vendor's debts.*

Where land is purchased by a person for a certain sum to be paid by satisfying and discharging that amount of the vendor's indebtedness, the vendee has a right, after the death of his vendor, to discharge the balance unpaid by paying claims against the estate; or he may discharge the balance out of claims against the estate, as that would be indebtedness, whether to himself or to other persons.

STATUTE OF FRAUDS: *Part performance to take sale of land out of statute.*[1]

Where a party purchases land by verbal agreement, pays the purchase

[1]See Keys *v.* Test, *post*, 316; Thornton *v.* Henry, 2 Scam. 219; Updike *v.* Armstrong, 3 id., 564; Sherley *v.* Spencer, 4 Gilm. 583; Stevens *v.* Wheeler, 25 Ill., 300; Blunt *v.* Tomlin, 27 id., 93; Hull *v.* Peer, id., 312; Fitzsimmons *v.* Allen, 39 id., 440; Kurtz *v.* Hibner, 55 id., 514; Wood *v.* Thornly, 58 id., 464; Russell *v.* Hubbard, 59 id., 335; Northrop *v.* Boone, 66 id., 368; Cronk *v.* Trumble, 66 id., 428; Deniston *v.* Hoagland, 67 id., 265; Atkinson *v.* Tanner, 68 id., 247.

Part performance is, however, available only in equity. Wheeler *v.* Frankenthal, 78 Ill. 124.

money therefor, takes possession and holds under the purchase, and lasting and valuable improvements are made by him, this will take the case out of the Statute of Frauds, and entitle him to a conveyance.

ESTOPPEL: SPECIFIC PERFORMANCE: *Purchase at administrator's sale.*

Where a party purchases land by verbal agreement, pays the purchase money, takes possession and holds under the purchase, the fact that he has attempted to acquire the title to the land by becoming a purchaser thereof at an administrator's sale rendered defective by a misdescription of the premises, will not estop him from claiming the benefits of his purchase by bill for a specific performance.

ESTOPPEL: *By mistake in describing premises in bill of complaint.*

The fact that a party, entitled to a conveyance of land by reason of payment of the purchase-money, taking possession under his purchase and making lasting and valuable improvements, makes a mistake in the description of the land in the bill as originally filed by him for a specific performance, will not estop him from amending the bill so as to claim a conveyance of the premises really bought.

APPEAL from Circuit Court of *Randolph* county.

Bill in chancery filed by appellee against appellants, as heirs of G. H. Mason, deceased, for the specific performance of an alleged verbal agreement, made by said Mason to convey the land in question to appellee, and to enjoin the prosecution by appellants against appellee of an action of ejectment commenced by them therefor.

The facts are stated by the court.

Thomas G. Allen, for appellants. *H. K. S. O'Melveny* and *W. H. Underwood*, for appellee.

[*203] *WALKER C. J. The first assignment of error on this record questions the correctness of the order requiring the defendants to answer the bill. A demurrer had been filed to the bill, and sustained to so much of it as made R. C. and Mary Petitt defendants, and the bill was dismissed as to them. By the same order, the other defendants were required to answer by the first day of the next succeeding July. The specific grounds of demurrer were, a want of equity apparent on the face of the bill; that it was multifarious, and that the Petitts were improper parties. The order dismissing the bill as to them, and requiring the other defendants to answer the bill,

fails, in terms, to overrule the demurrer on the first two grounds specified, or to sustain it to the bill. Sustaining the demurrer as to one of the grounds, and requiring an answer to that portion of the bill to which the demurrer had been filed, manifestly overruled it by implication. No other inference can be indulged. We are, therefore, of the opinion that the demurrer was disposed of, when the order for an answer was made, and this error is not well assigned.

As to the second assignment of errors, no notice was required to take evidence in open court on the hearing. The parties had been brought into court by service of process. They were bound at their peril to be present when the evidence was heard as much as when any other step was taken in the cause. *It was their duty to be in court until a final [*204] decree was entered. The hearing of oral testimony has no analogy to taking depositions, and the law regulating them has no application. It is true that the evidence thus heard must be preserved in the record, but that may be done by the master reducing it to writing, as it was done in this case, or by any one else, or it may be embodied in the decree.

It is objected, that when the evidence was first taken, it should have been reduced to writing, and preserved in the record, and failing to do so is error. This, no doubt, would be a convenient practice, but there is no statutory requirement rendering such a practice necessary. Nor has this court announced such a rule. It is only necessary that such evidence appear in the record, and the court below must be left in the exercise of its discretion as to the time when, and the mode in which, it is placed in the record, so it shall be by the time the decree is rendered and filed. And if from accident the evidence thus taken should be lost or forgotten, before the decree was rendered or filed, it would be the manifest duty of the court, on application of the party, or, if a decision had not been made, on his own motion, to have the evidence retaken, that it might be understood by the court and preserved in the record. No possible reason is perceived why the court, when it had forgotten the evidence, and when it had not been reduced to writing

and preserved in the record, should not be permitted to have the witnesses recalled and the evidence reheard.[1] A different practice could only produce delay, increase expense and answer no beneficial end. There is no force in this objection.

It is again urged, that the court erred in allowing the bill to be amended after the replication was filed and the cause had been submitted on the evidence. Such amendments are allowed in furtherance of justice. They are within the discretion of the chancellor trying the cause, and unless it appears, that such an amendment has worked injustice or great hardship to the defendant, the exercise of the discretion will not be controlled. *Jefferson County* v. *Furguson*, 13 Ill. 33. Neither oc-

[*205] curred in *this case, as at the time the leave was given to amend, the cause was continued until the next term, giving the defendants ample time to meet the amendments by proof if they had it. There is no weight in this objection. The fourth assignment of errors questions the correctness of the decision of the court, in overruling the motion to strike out the interlineations in the bill, alleged to have been made as amendments. There is no evidence in the record from which it can be inferred, that they were made after the bill was filed. For aught that appears they may have been a part of the bill as originally drafted. We can indulge no presumption that they were subsequently made. On the contrary, we must presume that the court below had evidence that they were a part of the original bill, or, at least, that there was no evidence that they constituted the amendments. There is nothing in this objection.

The fifth error is not well assigned. The evidence was not in depositions, but simply evidence taken in open court, and reduced to writing by the master. The objection taken could only apply to depositions. No objection appeared to the man-

[1] On this point the record recites that "the court not being able to remember the testimony taken in the cause, orders the testimony to be taken again, which is done in open court, and noted down by the master in chancery, to be preserved in the records of the cause."

ner in which it was done in this case. It in all respects appears to have been regularly and properly preserved.[1]

What has already been said in reference to the third assignment of error applies to the sixth,[2] and renders its discussion unnecessary. They both depend upon the same principles, and the same reasoning applies equally to each.

The seventh assignment of errors questions the correctness of the action of the court in receiving the certificate[3] of the clerk of the County Court, as evidence of the indebtedness of Mason's estate to defendant in error, and because it is alleged that it was not pertinent. The law has provided that persons having claims against the estates of deceased persons, shall, within two years after letters are granted, present the same for allowance, or be barred of their recovery, unless from subsequently discov-

[1] This assignment of error related to the refusal of the court to strike from the files the purported depositions of certain witnesses, being the testimony taken in open court.

At the head of this testimony was placed the title of the cause and this caption :

"Deposition of witnesses on the part of the complainant in the above entitled cause in chancery, who were sworn in open court and examined by complainant on the 23d day of April, 1863." (Signed by the master in chancery.)

At the end of the testimony, which was signed by the respective witnesses, and marked as filed April 23, 1863, was placed the following certificate :

"STATE OF ILLINOIS, }
RANDOLPH COUNTY. }

"I, John Michau, master in chancery for said county, do hereby certify that the foregoing witnesses were duly sworn in open court, at the April Term of the Randolph county Circuit Court, and the above are their depositions, correctly written down by me, on the hearing of said cause, on the 23d day of April, 1863.

JOHN MICHAU, *Master in Chancery.*"

[2] This related to the action of the court in overruling appellant's exceptions to the separate paper by order of court attached to the bill, and exhibiting under oath the amendments to the bill of complaint.

[3] This certificate is as follows :

"STATE OF ILLINOIS, }
RANDOLPH COUNTY. }

"I, Isaac H. Nelson, clerk of the County Court of said county of Randolph, do hereby certify that the following allowances and assignment of allow-

ered assets. Where claims are thus presented and allowed against the estate, the allowance is conclusive upon the executor or administrator, and has the force and effect of a judg-
[*206] ment *until it is reversed. *Propst* v. *Meadows*, 13 Ill. 157. The estate, when these claims were allowed, became liable to pay them out of the assets of the estate in due course of administration.

But, as this is a proceeding against Mason's heirs to divest them of title descended to them from their father, and as they were not formally parties to the proceeding in the County Court allowing these claims, it may become material to determine whether they were bound by the allowance. The 95th section of the statute of wills, manifestly contemplates that the heirs are parties or may become parties to such proceedings.[1] It provides that when a claim is presented against the estate for allowance, if the administrator, widow, guardian, heirs, or others interested in the estate, shall not object, the claimant shall be permitted to swear to his claim. This section gives the heirs the right to be present and contest the justice of the claim. Having this right, the adjudication of the court in allowing the claims, must be held *prima facie*

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ances were made to Jacob M. Bair against the estate of George H. Mason, deceased, as appears of record in my office, to wit:

1845.	Sept. 16.	Amount allowed to Bair,.....	$117 73
	Dec. 30.	Amount " "	2 01
1846.	July 11.	Amount " " (1st class),.....	60 00
1845.	Aug. 26.	Amount assigned on book of allowances by Mary W. Mason out of widow's allowance,.....	82 11
		Amount assigned by same out of said allowance, without date,.....	50 00
			$311 85
		Out of the above allowance the books show that the sum of $7.50 was paid,.....	7 50
			$304 35

"In witness whereof, I have set my hand and affixed the official seal, at Chester, this 17th day of September, 1863.

[SEAL.] "ISAAC H. NELSON, *Co. Clerk.*"

[1]See Motsinger *v.* Coleman, 16 Ill. 71.

binding upon the heirs, although they may have neglected to avail themselves of the right to contest its allowance. *Stone* v. *Wood*, 16 Ill. 177; *Hopkins* v. *McCann*, 19 id. 113. There was no evidence offered to show that these claims were unjust, and being conclusive against the personal estate of deceased, and *prima facie* binding upon the real estate as against the heirs, they were evidence until rebutted.

Then was this evidence material to the issue in this case? We think it was. The evidence in the case shows that defendant in error purchased the land in controversy for four hundred and fifty dollars, to be paid by satisfying and discharging that amount of Mason's indebtedness. It also appears that independent of these allowances he had paid debts owing by Mason, the sum of three hundred and eighty-eight dollars, and something over which the witnesses were unable to fix. To discharge the balance he had a right, after Mason's death, to pay other claims against the estate, or he might discharge the balance out of claims against the estate, as that would be indebtedness, whether to himself or to other persons. This then, in *connection with the other evidence, was pertinent to [*207] show that defendant in error had paid the full amount of the purchase-money.

We now come to the main question in the case. Does the evidence sustain the decree? It is clearly proved that defendant in error purchased the land, as claimed in the bill, of Mason before his death. It also appears that he was to pay four hundred and fifty dollars of Mason's debts as the consideration; that he went into possession under the purchase and occupied the premises about nineteen or twenty years. That he paid on the purchase debts of Mason to the amount of $388, besides some others the amount of which witnesses could not remember. Also that he had allowed in his favor against the estate a claim of $179.74, of which $172.74 remained unpaid. He also purchased of the widow, of her special allowance against the estate, the sum of $132.11, making in all due from the estate the sum of $304.35, besides interest. There was no evidence that any portion of the payments on the purchase of the land

was included in these allowances. In fact that purchased of the widow could not have embraced them. One of the items is allowed in the first class which under no circumstances could have been the debts incurred by Mason and to be paid by defendant in error.

We think the evidence clearly shows that the purchase-money was paid; that possession was taken and held under the purchase; and that lasting and valuable improvements were made by him on the premises. Such facts have always been held to take a case out of the statute of frauds. This, then, entitled him to a conveyance, unless he has done some act by which he has estopped himself from claiming the benefits of his purchase, or by which he has rescinded the contract. His effort to acquire the title to this land at the administrator's sale could not have that effect. He was by that means attempting to procure the same title for which he had contracted with Mason in his lifetime. Had that sale been valid, he would have thus acquired the title by that sale, instead of having to resort to a bill for a specific performance of the agreement. But from inad-
[208*] vertence, *or from some other cause, a misdescription occurred in the numbers of the land, by which, to one forty acres of this tract, no title passed. The proof shows that defendant in error agreed to, and did, give the full value of the land when he purchased.

Nor can the fact, that a mistake was made in the description of the land in the bill as it was originally filed, be held to estop him from amending the bill so as to claim a conveyance of the premises really bought. As amended, the bill only truly sets out the agreement as it was made, and, as it was proved by the evidence, by it no injury was done to plaintiffs in error. By it they were not misled to any injurious act, nor did it deprive them of any just and equitable right. It was only in advancement of justice. The principle upon which estoppels *in pais* rest, is to prevent wrong and to advance justice. If this were held to be an estoppel, it would not effect such an object, but would only prevent the attainment of justice, and operate to defeat the contract of the parties.

Upon the whole case, it appears that in equity defendant in error has a right to have a specific performance of the agreement. The court below, therefore, correctly made the injunction perpetual, and decreed a conveyance of the legal title to defendant in error. The decree is therefore affirmed.

Decree affirmed.

William Mattoon, impleaded, &c., *v.* Philander Hinkley.

Default: *Should not be entered pending application to remove cause to U. S. Court.*

While a petition filed by the defendant for the removal of a cause from a State to a United States court, in pursuance of the judiciary act of 1789, is pending and undetermined in the State court, it is irregular to enter the default of the defendant; and, if entered, a motion to set it aside should be granted.

Same: *Where plaintiff treats the cause as removed.*

Where the plaintiff pending a petition by the defendant for the removal of the cause to a United States court, acts in the cause, as if he deemed the cause pending in the United States court, by making an affidavit and sending a notice that he would take depositions to be read in evidence in the suit stated therein to be pending in the United States court; and the cause is removed from the docket of the State court for two years; when it is again placed on the docket without any notice to defendant, and his default entered, such default is irregular and should be set aside on motion, on the ground that the plaintiff has treated the cause as pending in the United States Court.

Same: *Where continuance granted is set aside.*

If a continuance has been granted in a cause, and afterwards set aside, it is irregular to take a default without notice to the other party. Per Breese, J.

Same: *Where case has been removed from docket.*

Where a cause has been off the docket for two years, it should not be placed on the docket again and defendant's default entered without first giving him notice.

Error to Circuit Court of *Coles* county.

The facts are sufficiently stated by the court.

Thornton & Moulton, for plaintiff in error. *Wiley & Parker*, for defendant in error.

[*211] *Breese, J. The only question we deem it necessary to notice arising on this record is, as to the propriety of the action of the court at the October Term, 1862, at which term the default of the defendant was entered, damages assessed, and final judgment entered.

The record shows that at the October Term, 1859, the defendant below filed his petition and bond praying for the removal of the cause to the Circuit Court of the United States for the southern district of Illinois, on the ground that the plaintiff was a citizen of this State, and the defendant a citizen of the State of Massachusetts, in pursuance of the judiciary act of 1789. This application has never been disposed of by the Coles Circuit Court. It is still pending, and while so pending, taking a default was irregular, and the motion to set it aside should have been allowed. It appears from the record that the plaintiff himself was under the belief that the petition had been granted and the cause removed to the United States court; for in December following, he caused a notice to be served on the defendant's attorney that he would take the depositions of certain witnesses to be read in evidence in this suit, "now pending and undetermined in the Circuit Court of the United States for the Southern District of Illinois, to which court said case has been removed from the Coles County Circuit Court." To the same effect is his affidavit made on the 5th of December, 1859, that the cause had been changed from the Coles Circuit Court to the Circuit Court of the United States for the Southern District of Illinois.

It would be unjust, under the circumstances, to permit the plaintiff to take a default: first, because this motion of defendant for the removal of his cause had not been finally acted on by the Circuit Court; and, second, because the plaintiff had acted in the case as if he deemed the cause pending in the Circuit Court of the United States. It was removed from [*212] the *docket of the Coles Circuit Court, from May Term, 1860, to May Term, 1862, when it was again placed on the docket without any notice to the defendant. If a continuance has been granted in a cause, and afterwards set

*aside, it is irregular to take a default without notice [*212] to the other party. *McKee* v. *Ludwig et al.*, 30 Ill. 28. And this is a stronger case.

We have no hesitation in saying the default so taken was irregular and should have been set aside. The judgment is reversed and the cause remanded.

Judgment reversed.

Joshua S. Bond and Laura Bond, his wife, *v.* Eben B. Lockwood.

Guardian and Ward: *Scope of the statute on the subject.*

The provisions of the statute relating to guardians were not designed as a complete code, but were enacted to confer upon the county court power to appoint guardians, and to regulate their conduct in accordance with their duties at common law. Some imperfections in the common law were remedied, and a more simple and convenient mode of procedure introduced. While some of its provisions were declaratory of the common law, many of the powers and duties, rights and liabilities of guardians are not by the statute, specifically defined. The statute contains such provisions as were necessary to define the nature of the jurisdiction conferred, prescribe the manner of its exercise, and correct some defects of the law as it then existed. In other respects, the common law regulating the powers and duties, rights and liabilities of guardians, was left in force.

Guardians: *Liable to account.*

Guardians are regarded as trustees,[1] and may be compelled in chancery to render an account before as well as after the termination of the guardianship. (See the opinion for an account of the various kinds of guardians at common law.)

County Court: *Jurisdiction to compel guardians to account.*

The power of the county court to compel guardians to render an account of their guardianship from time to time is co-extensive with that of a court of chancery.[2]

Guardians' Accounts: *Jurisdiction of county court over; how exercised.*

The accounts are to be rendered upon oath, and the county court may require their settlement. The court may allow or disallow an account in

[1] *In re* Steele, 65 Ill., 322.

[2] See *In re* Steele, *supra.*

whole or in part, and for that purpose may examine witnesses, may require the production of vouchers, and do all other acts necessary to enable it to arrive at a correct conclusion as to whether or not the account ought to be allowed. When allowed it is required to be entered of record.

SAME: *Effect of allowance.*

The allowance by a county court of a guardian's account is a judicial act, and although it is necessarily made during the minority of the ward, *ex parte*, it will be presumed that the act was properly performed until the contrary appears. The approval of a guardian's account, regular upon its face, is *prima facie* evidence of its correctness.

SAME.

If an account has been stated erroneously, the ward may have it restated correctly. If the guardian has omitted to charge himself with anything or with a proper sum, the ward may make additional charges of such matters. If the guardian has obtained an allowance in his account apparently regular upon its face, the ward should be required to rebut the *prima facie* presumption of its regularity, before the guardian can be called upon to establish its correctness; but if it appears from the face of the account that items were improperly allowed, no such presumption will sustain them.

GUARDIAN: *Duty with respect to ward's property.*

At common law the guardian was required to take possession of his ward's property,[1] and he was not only liable for such property as actually came into his possession, but for such as he might have taken possession of by the exercise of diligence and without any willful default on his part.

SAME: *Rents, profits, income.*

So, in regard to the rents and profits of the ward's lands and tenements, and the income from every species of his property, the guardian was chargeable with what he actually received and with what he might have received had he faithfully discharged his duties.[2]

SAME: *Interest on ward's money.*

Guardians will not be permitted to make gain to themselves of trust property in their hands. They were by statute (Rev. Stat., 1845, 266, sec. 8) required to put on interest the moneys of their wards upon mortgage security. (See Rev. Stat. 1874, 560, sec. 22, for the present regulations on this subject.)

SAME.

In this State the statute (Rev. Stat. 1845, 266, sec. 8) required the letting to be for one year, and that the interest should be added to the principal at the end of each year (see now, Rev. Stat. 1874, 560, sec. 22),

[1] He is not under the statute of this State entitled to the possession of his ward's real estate. Muller *v.* Benner, 69 Ill., 108.

[2] See Clark *v.* Burnside, 15 Ill., 62.

and the security was required to be approved by the County Court. Where the guardian neglects his duty in this respect, for such neglect of duty he will be chargeable with interest after a reasonable time has elapsed in which to make the investment. Six months from the receipt of the money has been deemed a reasonable time for that purpose.[1]

SAME; TRUSTEES: *Use of trust fund in business.*

Where a trustee—and, a guardian being considered a trustee, the rule is the same with respect to him—employs trust funds in a trade or adventure of his own, whether he keeps them separate, or mixes with them his own private money, and, notwithstanding difficulties may arise in the latter case in taking the accounts, the *cestui que* trust, or ward, if he prefers it, may insist upon having the profits made by, instead of interest upon the amount of, the trust fund so employed.

SAME.

In the application of this rule to the varied transactions of business, it is sometimes impracticable to trace out and apportion the profits derived by a trustee from the employment of trust funds along with his own, and in such cases the court fixes upon a rate of interest as the supposed measure or representative of the profits, and assigns it to the trust fund.

SAME.

Where a guardian used the money of his ward in a mercantile business in which he was engaged, and there was no evidence of the extent of the business, of the amount of the capital employed, of the skill, judgment and credit required in its transaction, nor of the expenses or losses, the court allowed the ward legal interest at six per cent., that being the highest rate the courts can allow, unless more is specifically agreed upon.

The guardian should render to the County Court yearly accounts, and where he has used the money of his ward, he should charge himself with interest from the time he received it. At such rendering of an account, the interest should be made a part of the principal, and interest computed on the balance in the guardian's hands up to the next annual rendition of his account.[2]

SAME: *Expenditures on account of ward; order therefor.*

It is the duty of a guardian to procure an order of the proper court before making expenditures for the benefit of his ward, which duty existed as well before the passage of the statute (Rev. Stat. 1845, p. 266, sec. 9) imposing that obligation upon him, as afterwards.

SAME.

A guardian may support his ward without any order of court, and all

[1] See Gilbert *v.* Guptill, 34 Ill., 112; *In re* Steele, 65 id., 322.

[2] See Rowan *v.* Kirkpatrick, 14 Ill., 2; *In re* Steele, *supra.*

payments which he can show were necessary for that purpose, will be allowed to him. Any one in possession of the ward's property, or a stranger, may do it, and have a like allowance; but such allowance will only be made upon proof showing the necessity of the expenditure and for what it was made. A minor may become indebted to his guardian for necessaries as well as to a stranger.

SAME.

In determining what expenditures are necessary or proper, courts are exceedingly jealous of encroachments upon the principal of the ward's estate,[1] and in reference to them they will not be allowed, except for necessaries, without an order of court is procured before making the expenditure, unless the guardian can show such a state of facts as would have entitled him to the order had he applied for it at the proper time, and a reasonable excuse for his neglect in that regard. In this State it has not been usual to procure orders of court for prospective maintenance, but such orders have been uniformly required for expenditures other than for necessaries; and such expenditure, whether from income or principal, should be disallowed unless a reasonable cause is shown for not obtaining the proper order at the proper time.

SAME: *Necessaries.*[2]

Board and clothing for minor wards are necessaries.

SAME: *Cannot recall gift to ward.*

Where a guardian relinquishes his claim, as next of kin, to a sum of money, and credits the same to his ward in his account rendered to the County Court, and for aught that appears the large expenditures for education and dress in his account were allowed on the ground of such gift, such credit should remain as credited. The County Court in view of it might with propriety have allowed larger expenditures than it would otherwise have done, and it would be a gross fraud to allow the guardian to recall the gift after expenditures had been made on the faith of it.

SAME: *Commissions for services.*

An allowance to a guardian in the settlement of his account, for commissions on money in his hands and used by him in his business during the year previous, is erroneous. The commissions allowed to guardians should be for services rendered, and not for the neglect of their duties.

"STEP-FATHER": *Not bound to board wife's children by a former marriage, gratuitously.*

A step-father is not required by law to board the children of his wife by a former marriage without compensation, nor is his wife obliged so to

[1] See Davis *v.* Harkness, 1 Gilm., 173; Cummins, 15 Ill., 33.

[2] As to what are necessaries, see the cases collected in Ewell's Lead. Cases, 56–75.

do. He may receive them into his family under such circumstances as to create a presumption that he was to board and clothe them gratuitously, but where a step-father receives children into his family as their legally appointed guardian, and, as such, renders his account for expenditures from year to year, and such accounts are allowed by the county court, the presumption does not arise.

WASTE: *Defined.*[1]

At common law any act or omission which diminished the value of the estate or its income, or increased the burdens upon it, or impaired the evidence of title thereto, was considered waste.

SAME: *Cutting trees.*

In England, where good husbandry required the preservation of growing trees, it was considered waste to cut or permit them to be cut. But in this country, whether the cutting of any kind of trees is waste, depends upon the question whether the act is such as a prudent farmer would do, having regard to the land as an inheritance, and whether the doing of it would diminish the value of the land as an estate.

SAME.

Guardians are chargeable for waste committed or suffered by them. But where the trees upon about six acres of the ward's land forming part of a farm, were cut by the guardian; but the trees were of no great value, and the cutting of them did not diminish the value of the land, and the guardian accounted for what he received for the wood, it was *held* that he should not be charged with waste.

APPEAL from Circuit Court of *Clinton* County.

The facts are sufficiently stated by the court.

H. K. S. O'Melveney, for appellants. *Buxton & White* and *W. H. Underwood*, for appellee.

BECKWITH, J. On the 9th day of October, 1850, the [216] appellee was appointed by the County Court of St. Clair county, guardian of Laura Hart (then between six and seven years of age), and of Lewis Hart (then about five years of age), the children of his wife by a former husband. Lewis Hart died on the 8th day of August, 1854; Mrs. Lockwood, the mother of the two children, died intestate August 26, 1854; Laura married Joshua S. Bond on the 18th day of October, 1860, and after

[1] See 1 Cru. Dig., tit. 3, c. 2, sec. 1; 1 Wash. Real Prop. 107, *et seq.*; McCullough *v.* Irvine, 13 Penn. St. 440; Ewell on Fixt. 81, 180.

she had arrived at the age of eighteen years, she and her husband filed their bill against the appellee for an account.

The bill alleges that the appellee received various sums of money belonging to his wards; and that they were the owners of a farm from which he, from time to time, received as rent various other sums of money. That on the death of Mrs. Lockwood, the appellee relinquished his claim, as being next of kin to his wife as to the share to which she was entitled as next of kin, to Lewis Hart, and gave Laura credit for, and allowed to her such share in his account rendered to the County Court. That appellee had neglected to put his wards' money upon interest when he might have done so at the rate of ten per cent. per annum; and had used the same for his own benefit in mercantile business and made large profits out of the same. That the appellee rented the farm for a sum less than he might have obtained therefor, and committed waste by cutting down growing trees and suffering an orchard to be destroyed. The [*217] bill *further alleges that the appellee wrongfully seeks to charge his wards with divers sums of money expended in their nurture and education, without having procured from the County Court any order for such expenditures; that many articles of the appellee's account are charged at exorbitant prices; and that he has charged Laura for board when she was of an age and ability to earn, and did earn, the same by services rendered in his family.

The appellee, by his answer, admits that he received various sums of money belonging to his wards, amounting to $1,130.92; from the sale of lands the further sum of $255.35; and for rent of their farm, from year to year, the sum of $2,908.31. The answer sets forth an account against Lewis Hart for expenditures on his behalf of $529.45, and an account against Laura Hart for expenditures on her behalf of $2,424.79, in which she is credited with $571.12 for moneys in the appellee's hands belonging to Lewis Hart at his decease; that these accounts were rendered to the County Court of St. Clair county in November, 1853, and yearly thereafter, and were approved; that in the accounts the appellee charged himself with interest, at six per centum per

annum, upon all moneys in his hands, making rests whenever the accounts were rendered. The answer denies the relinquishment of the appellee's claim as next of kin to his wife to the share she was entitled to as next of kin to Lewis Hart, and the allegations of waste. It admits that the appellee did not loan the moneys of his ward, and that he used the same in his own business. From the evidence it appears that the accounts of the appellee were rendered and approved of, as is stated in the answer.

The conclusion to which we have arrived renders an examination, regarding many items of these accounts, unnecessary. For example, the articles charged as having been furnished the wards are such as were suitable and proper for persons in their condition in life; and there is no evidence that the prices at which they were charged were exorbitant. The approval of a County Court of a guardian's accounts, regular upon their face, is *prima facie* evidence of their correctness. The authority of the County Court in this regard is similar to that of a *court of chancery. The provisions of the statute [218*] in relation to guardians were not designed as a complete code, but were enacted to confer upon the county court power to appoint guardians, and to regulate their conduct in accordance with their duties at common law. Some imperfections in the common law were remedied, and a more simple and convenient mode of procedure was introduced. While some of its provisions were declaratory of the common law, and were appropriately introduced in conferring jurisdiction upon a new tribunal, it is evident that many of the powers and duties, rights and liabilities of guardians are not, by the statute, specifically defined. The statute contains such provisions as were necessary to define the nature of the jurisdiction conferred, prescribe the manner of its exercise, and correct some of the defects of the law as it then existed. In other respects, the common law regulating the powers and duties, rights and liabilities of guardians, was left in force. At common law all guardians were regarded as trustees, clothed with such powers and rights as were necessary for the discharge of the trusts imposed upon them, and

they were held accountable for the faithful discharge of their duties. They were liable to be proceeded against for neglect of duty in the common law court, and courts of chancery from since the earliest times have exercised their jurisdiction to compel the discharge of the obligations which by law devolved upon them. A guardian in chivalry who became such upon the death of his tenant, holding by knight's service, had the custody of the person of the minor, and the right to take to his own use all the profits of his ward's land, inasmuch as he had to provide a substitute to perform the service due from the tenant, but he was bound to provide for the nurture and education of his ward and restore to him his lands when the guardianship terminated. A guardian in socage, who was the nearest relative of the minor to whom the inheritance could not possibly descend, was required to take charge of the lands of his ward; and was liable to account for whatever he received or might, but for his own willful default, have received from them. He was also bound to provide for the nurture and education of his ward, and [*219] was *entitled to allowance of reasonable costs and expenses. Coke on Litt. 87, b. Guardians by the customs of Kent and of the manor, guardians by the custom of London and other cities and boroughs, guardians by election, such as was the guardian of Lord Baltimore, guardians appointed by the Ecclesiastical Court, strangers who entered upon the lands of minor, guardians *per cause de ward*, testamentary guardians appointed under the provisions 4 and 5 in Phil. and Mar. c. 8, and of 12 Car. II, c. 24, and guardians appointed by courts of chancery, were all compellable to render an account; and all of them excepting the guardian in chivalry might be compelled in a court of chancery so to do before, as well as after the guardianship terminated. Macpherson on Infants, 40, 108, 259. Even the guardian in chivalry might be removed for neglect of duty (Macpherson on Infants, 13; 2 Ch. Cases, 237; 1 Spence, 611), and the only reason why he could not be required to render an account was that the profits of the land were his own. The powers of the County Court to compel guardians to render an account of their guardian-

ship from time to time are co-extensive with a court of chancery. The accounts are to be rendered upon oath and the court may require their settlement. 1 Purple's Stat. 595; 2 id. 844.

The court may allow or disallow an account in whole or in part, and for that purpose may examine witnesses, may require the production of vouchers, and do all other acts necessary to enable it to arrive at a correct conclusion as to whether or not the account ought to be allowed. When allowed it is required to be entered of record. Laws of 1859, p. 94. The allowance of a guardian's account is a judicial act, and although it is necessarily made during the minority of the ward, *ex parte*, still we are to presume that the act was properly performed until the contrary appears. It is *prima facie* evidence of the correctness of the account allowed. If an account has been stated erroneously, the ward may have it restated correctly. If the guardian has omitted to charge himself with anything, or with a proper sum, the ward may make additional charges of such matters. If the guardian has obtained an allowance in his *account apparently regular upon its face [*220] the ward should be required to rebut the *prima facie* presumption of its regularity before the guardian can be called upon to establish its correctness; but if it appears from the face of the account that items were improperly allowed, no such presumption will sustain them. In accordance with these general principles the appellee's account will be examined.

At common law the guardian was required to take possession of his ward's property, and he was not only liable for such property as actually came into his possession but for such as he might have taken possession of by the exercise of diligence and without any willful default on his part. So, in regard to the rents and profits of the ward's lands and tenements, and the income from every species of his property, the guardian was chargeable with what he actually received and with what he might have received had he faithfully discharged his duties. In the application of these principles, guardians were frequently charged with waste committed or suffered by them.

In England, where good husbandry required the preservation of growing trees, it was considered waste to cut or permit them to be cut. Any act or omission which diminished the value of the estate or its income, or increased the burdens upon it or impaired the evidence of title thereto, was considered waste. Many acts which in England would be waste are not such here in consequence of the difference in the condition of the two countries. In this country, "whether the cutting of any kind "of trees is waste depends upon the question whether the act is "such as a prudent farmer would do, having regard to the land "as an inheritance, and whether the doing of it would diminish "the value of the land as an estate." 1 Wash. on Real Prop. 108. The evidence in this case shows that the trees upon about six acres were cut; that they were of no great value, and that the cutting of them did not diminish the value of the lands. The appellee has accounted for what he received for the wood. There is no evidence showing any waste in regard to the orchard; and the appellee should not be charged with waste in these respects.

It is a well settled rule of courts of chancery that [*221] guardians *shall not be permitted to make gain to themselves of trust property in their hands. They are required to put on interest the moneys of their wards upon mortgage security. Dayton on Surr. 521; *Bogart* v. *Van Velsor*, 4 Edw. Ch. 722. In this State the statute[1] requires the letting to be for one year, and that the interest shall be added to the principal at the end of each year, and the security is required to be approved by the County Court. The appellee neglected to discharge his duty in this respect, and for such neglect of duty he would have been chargeable with interest after a reasonable time had elapsed in which to make the investment. Six months from the receipt of the money has been deemed a reasonable time for that purpose. Dayton on Surr. 533. The appellee, however, used the money of his wards in a

(1) Rev. Stat. 1845, 266, sec. 8. See, also, id., p. 267, sec. 15; Rev. Stat. 1874, p. 560, sec. 22.

mercantile business in which he was engaged; and it is a well established rule that where a trustee employs trust funds in a trade or adventure of his own, whether he keeps them separate or mixes them with his own private moneys, and, notwithstanding difficulties may arise in the latter case in taking the accounts, the *cestui que trust*, if he prefers it, may insist upon having the profits made by, instead of interest upon the amount of, the trust funds so employed. *Docker* v. *Somes*, 2 Myl. & K. 655; *Willett* v. *Blandford*, 1 Hare, 253. In the application of this rule to the varied transactions of business it is sometimes impracticable to trace out and apportion the profits derived by a trustee from the employment of trust funds along with his own, and in such cases the court fixes upon a rate of interest as the supposed measure or representative of the profits, and assigns it to the trust fund. *Jones* v. *Foxall*, 15 Beav. 392. Although the rate of interest thus fixed by courts as the representative of profits may not be exact theoretical justice between the parties, it is the nearest approximation thereto that courts are able to arrive at. A trust fund might be invested in raw materials, and they worked up into goods of the finest fabric, where the work would exceed the value of the materials by a thousand times. The enhanced value in such a case would be solely attributable to the skillful labor bestowed upon them. It would be impracticable under such *circumstances to trace out and apportion [*222] the profits between the capital and the labor. The appellants have furnished no data from which a court can make such an apportionment, or even determine whether it would be practicable or not in the present case.

There is no evidence of the extent of the appellee's business, of the amount of capital employed, of the skill, judgment and credit required in its transaction, nor of the expenses or losses. We are therefore compelled to fix upon a rate of interest as a representative of the profits which the ward would be entitled to. The legal rate of interest in this State is six per cent. per annum, and although parties are allowed to contract for any rate not exceeding ten per cent., courts cannot allow more than

six per cent. where it has not been specifically agreed upon. The guardian should render to the County Court yearly accounts, and where he has used the money of his ward he should charge himself with interest from the time he received it. At such rendering of an account the interest should be made a part of the principal, and interest computed on the balance in the guardian's hands up to the next annual rendition of his account. We are satisfied that this mode of stating an account between a guardian and his ward, under such circumstances, will result in practical justice. The ward runs no risk from an investment. His money is at no time idle, and he pays no commissions for investing, collecting and reinvesting, and no expenses attendant thereon. The mode has been approved by the most enlightened jurists (*Schiefflen* v. *Stuart*, 1 Johns. Ch. 620; *Wright* v. *Wright*, 2 McCord Ch. 185; 2 Kent's Com. 231, *n.* [*c.*]; Harland's Accounts, 5 Rawle,), and places the ward in the condition, as nearly as may be, in which a conscientious discharge of the trust would have placed him. The guardian cannot reasonably object to it. His duty requires that he should make the interest a part of the principal at the end of each year. Having used the money, he may justly be regarded as a borrower upon such terms as will discharge his duty to his ward. This rule was adopted in *Rowan* v. *Kirkpatrick*, 14 Ill. 1. The appel-
[*223] lee *charged himself with interest substantially in accordance with the principles we have enunciated.

The expenditures of the appellee for the benefit of his ward were made without first procuring an order of the County Court for that purpose. The duty of a guardian to procure an order of the proper court before making expenditures, existed as well before the passage of the statute[1] imposing that obligation upon him as afterwards; and the consequences of its neglect were well settled. A guardian may support his ward without any order of court, and all payments which he can show were necessary for that purpose will be allowed to him. Any one in possession of the ward's property, or a stranger, may do it and

[1]Rev. Stat. 1845, p. 266.

have a like allowance (Macpherson on Infants, 213), but such allowance will only be made upon proof, showing the necessity of the expenditure and for what it was made. A minor has power to contract for necessaries, and we see no reason why he may not become indebted to his guardian for them as well as to a stranger. Expenditures not required for necessaries should be approved by the court before they are made. *Davis* v. *Harkness*, 1 Gil. 173; *Cummins* v. *Cummins*, 29 Ill. 452. In England it was usual to obtain from the proper court an order allowing a certain sum for prospective maintenance. Its amount depended upon the fortune, position and necessities of the ward, and it was to be expended for all purposes proper for expenditures to be made by or for a minor; and not unfrequently allowances were made for the support of a minor's father and mother. If no such order was procured, a guardian was only allowed for necessary expenditures actually made. *Bruin* v. *Knott*, 1 Ph. Rep. 572. In determining what expenditures are necessary or proper, courts are exceedingly jealous of encroachments upon the principal of the ward's estate, and in reference to them it has been repeatedly held that they will not be allowed, except for necessaries, without an order of court is procured before making the expenditure, unless the guardian can show such a state of facts as would have entitled him to the order had he applied for it at the proper time, and a reasonable excuse for his neglect in that regard. In this State it has not *been usual to procure orders of court for prospective [*224] maintenance, but such orders have been uniformly required for expenditures other than for necessaries; and such expenditures, whether from income or principal, should be disallowed unless a reasonable cause is shown for not obtaining the proper order at the proper time. The board and clothing charged to the wards in appellee's account were necessaries, and the presumption is that they were properly allowed by the County Court. The evidence adduced does not rebut that presumption. The appellee was not required by law to board the children of his wife by a former marriage without compensation, nor was his wife obliged so to do. He might have received them into his family under such circumstances as to have

created a presumption that he was to board and clothe them gratuitously (*Brush* v. *Blanchard*, 18 Ill. 46), but where a step-father receives children into his family as their legally appointed guardian, and, as such, renders his account for expenditures from year to year, and such accounts are allowed by the County Court, the presumption does not arise. The other items of appellee's account are proper expenditures for a ward; and the presumption is that they were not allowed by the County Court without proof of their propriety and of a satisfactory excuse for not procuring an order for making them before they were made.

The credit in appellee's account of moneys in his hands belonging to the estate of Lewis Hart, at his decease, should remain as credited. For aught we know, the large expenditures for education and dress in the account were allowed on the ground of the gift which the appellee made to his ward. The County Court, in view of it, might with great propriety have allowed larger expenditures than it would otherwise have done, and it would be a gross fraud to allow the appellee to recall the gift after expenditures have been made on the faith of it.

The allowance to appellee, in the settlement of his account on the 11th day of November, 1861, for commissions on money in his hands during the year previous, is manifestly erroneous. The commissions allowed to guardians should be for services rendered and not for neglect of their duties.

[*225] *In accordance with these principles we have restated the appellee's account, and find due from him the sum of nine hundred and seventy-five dollars[1], for which a decree with interest from the last day of the present term of this court, will be rendered with costs in this court.

Decree in this court.

[1]The amount decreed to complainants in the court below, was $766.33.

William Hagenbaugh *v.* John Crabtree.

Evidence: *When an omission to deny a statement is to be construed as an admission.*

Where one party to a contract alleges a certain thing or things to be true concerning that contract, in the presence of the other party, and he remains silent, making no denial, such evidence is proper for the consideration of the jury, but is not conclusive. Nor is such silence always evidence of the truth of the statement thus made, because under a variety of circumstances, it would be highly improper to make a denial. [See a variety of such cases stated by the court.] The extent of the rule is, that it is a question for the jury, in the light of all the circumstances, to say whether or not it amounts to an admission.[1]

Error to Circuit Court of *Douglas* County.

The instruction in question in this case is stated by the court.

Jno. Scholfield and *C. H. Constable*, for plaintiff in error.

A. Green, for defendant in error.

*Walker, C. J. The only question which we propose [*226] to consider in this case is, whether the ninth of plaintiff's instructions to the jury was properly given. It is this: "When one party to a contract alleges a certain thing or things to be true concerning that contract, in the presence of the other party, and he remains silent, making no denial, that is a tacit admission of their correctness unless proved to the contrary." That such evidence is proper for the consideration of a jury is undeniably true, but it is equally true that such evidence is not conclusive. Nor is such silence always evidence of the truth of the statement thus made. And it is for the obvious reason that under a variety of circumstances, it would be highly improper for a party to make a denial. The proprieties of life should not

[1]See Slattery *v.* The People, 76 Ill., 217; Dufield *v.* Cross, 12 Ill., 397; Ingalls *v.* Bulkley, 15 id., 224; Stacy *v.* Cobbs, 36 id., 349; Ayers *v.* Metcalf, 39 id., 307; Yundt *v.* Hartrunft, 41 id., 9; Young *v.* Foute, 43 id., 33; Yoe *v.* The People, 49 id., 410.

As to effect of admissions in open court, see Stribling *v.* Prettyman, 57 Ill., 371; Hensoldt *v.* Town of Petersburg, 63 id., 111.

be outraged or even violated in making such denial. Nor would the party be bound to do so, if it would lead to violent altercation between the parties. If such denial would lead to a breach of the peace, or even to an indecent quarrel and abuse, he would not be bound to contradict the statement. Or if it would be indecorous and offensive to those present, or if it would disturb business, social enjoyment or religious exercises, it would be improper to make a denial. If made in court, where it would be a contempt to make the denial, it would be highly improper. The extent of the rule is, that it is a question for the jury, in the light of all the circumstances, to say whether or not it amounts to an admission.

This instruction was, therefore, too broad in its scope, and should have been modified. It was the province of the jury to determine the question, but this instruction takes it from their consideration. Nor can we say that the verdict should be sustained notwithstanding the instruction. It may have misled the jury and have produced the verdict. They should have been permitted, under a proper instruction, to determine the [*227] question. * As we cannot say that this instruction did not mislead the jury, and produced the verdict which they returned, it was erroneous. We perceive no other error in the record, but for the giving of this instruction, the judgment of the court below must be reversed and the cause remanded.

Judgment reversed.

Doan, King & Co. *v.* Henry G. Mauzey.

Equity Jurisdiction: *Bill for damages for breach of a contract.*

Unless in very special cases, a court of chancery will not sustain a bill for damages on a breach of contract, that not being within the ordinary jurisdiction of that court, but a matter strictly of legal and not of equitable jurisdiction.

Same.

Where, therefore, one party conveyed land to another and took back a memorandum that he should have the privilege of repurchasing the same on complying with certain terms; upon a bill filed against the

party to whom the land was conveyed and subsequent grantees and incumbrancers, alleging that the latter took with notice, and praying in the alternative for a specific performance or for damages for non-performance of the agreement to reconvey, the complainant knowing when he filed his bill that his grantee had disabled himself from performing the contract to convey, and that said contract was not recorded, and having no reason to believe that the purchasers had any notice whatever of his alleged equities: *Held*, that since the object of the bill was compensation in damages, the bill not being filed in good faith for a specific performance, and the allegation of notice being introduced merely to give color of jurisdiction to a court of chancery, the bill should have been dismissed, the remedy at law being clear and perfect by action upon the agreement.

EQUITABLE ESTOPPEL: *A bar to a specific performance.*

Where a party conveys a leasehold interest in land to another under an alleged agreement for its reconveyance upon complying with certain terms, and he subsequently by his conduct aids in promoting a sale thereof by his grantee to another purchasing without notice, and stands by asserting no rights while such purchaser makes improvements upon the property, and purchases the reversionary interest therein, he will not be entitled to equitable relief by enforcing a specific performance of his contract to reconvey.

APPEAL from Circuit Court of *Adams* County.

Bill in chancery filed by appellee against Doan, King & Company, and their grantees, and other subsequent purchasers and incumbrancers, who are alleged to have taken with notice, praying for the specific performance, and, if that cannot be had, then for damages for the non-performance of a certain alleged agreement, which is as follows:

"We hereby agree that H. G. Mauzey shall have the privilege of purchasing the property on lot seven, block nine, in city of Quincy, this day sold and conveyed by him to Wyllys King, at the price of $5,000, if purchased within one year from this date; and that we will allow him the privilege of taking the same at that price, with interest from this day, at any time within five years, in preference to any other person, hereby giving him the refusal: This agreement is not intended to cover any part of the ground, which we may hereafter purchase.

DOAN, KING & CO.

January 6, 1854. Per STEPHENS & WAGLEY."

The remaining facts are sufficiently stated in the opinion.

Buckley, Wentworth & Marcy, for appellants. *Grimshaw & Williams*, for appellee.

[*236] *Breese, J. It is very manifest from the proofs in this case, that the appellee knew, when he filed his [*237] bill for a specific performance, *that the appellants had disabled themselves from performing the contract to convey, if one existed. He knew the contract he took from Stephens & Wagley was not recorded, and had no reason to believe the purchasers from his grantors, the appellants, had any notice whatever of his alleged equities. The object of the bill, then, was not for a specific performance, but was for the purpose of obtaining compensation in damages for the non-performance of the alleged contract by appellants. The bill cannot be supposed to have been filed in good faith for a specific performance on the supposition that the appellants were able to perform the contract made by Stephens & Wagley, as their agents, specifically. The complainant knew better, and his allegation of notice was introduced merely to give color of jurisdiction to a court of chancery. This being so, the bill should have been dismissed. Unless in very special cases, and this is not one, a court of chancery will not sustain a bill for damages on a breach of contract. It is not the ordinary jurisdiction of that court. It is a matter strictly of legal and not of equitable jurisdiction. The remedy is clear and perfect at law by an action upon the covenant. *Kempshall* v. *Stone*, 5 Johns. Ch. 195; *Hatch* v. *Cobb*, 4 id. 559; *Morss* v. *Elmendorff*, 4 Paige, 277; *Lewis and Wife* v. *Yale*, 4 Florida, 437; 3 Leading Cases in Eq. 91; *McQueen* v. *Chouteau's Heirs*, 20 Missouri, 222.

While we do not undertake to pass upon whatever rights the appellee may have at law, we may be permitted to say, his conduct in promoting the sale[1] and standing by asserting no rights

[1] By Doan, King & Co., of the leasehold conveyed to them by Mauzey, to the Buddees, who afterwards purchased from McFadden the reversionary

while the Buddees were making improvements on the property and acquiring the reversion, was such as not to require of this court any special interposition in his behalf. It is not a case demanding the interference of a court of equity, as the facts plainly show. The decree is reversed and the bill dismissed.

Decree reversed.

William T. Fish *v.* Samuel Cleland and Ellen B. Cleland, his wife.

Agent: *Rights of principal cannot be asserted by third party.*

The rights of the principal as against the agent cannot be asserted by a third party on a bill filed by him against the agent.[1]

Fraud: *Undue concealment where there is no special trust reposed.*

Undue concealment which amounts to a fraud from which a court of equity will relieve, where there is no peculiar relation of trust or confidence between the parties, is the non-disclosure of those facts and circumstances which one party is under some legal or equitable obligation to communicate to the other, and which the latter has a right not merely *in foro conscientiæ*, but *juris et de jure*, to know.

Same: *Relation of son-in-law and mother-in-law; undue concealment.*

There is not within the meaning of this rule any such peculiar relation of trust or confidence between parties sustaining to each other the relation of son-in-law and mother-in-law, as to impose upon the former any legal or equitable obligation to make disclosure to the latter, or to authorize the latter to act upon the presumption that there could be no concealment of any material fact from her; and a court of equity cannot afford relief on the mere ground of non-disclosure,—where there is no misrepresentation,—in the absence of any allegation that she acted in such presumption and where there is no evidence from which that fact can be inferred.[2]

Same.

Where the parties owning an interest in land in remainder held a meeting, and it was concluded by them to file a bill for a partition of the property; and in order to facilitate the same it was deemed expedient to

interest in the property, the interest conveyed by Mauzey to Doan, King & Co. being only a leasehold with the right during the term to purchase the premises for a certain sum.

[1] See Merryman *v.* David, 31 Ill., 408; Eastman *v.* Brown, 32 id., 53.

[2] S. C. 43 Ill., 282.

buy on joint account the life estate of Mrs. C., the mother-in-law of defendant, who represented his wife, one of the owners, at the price of from $2,600 to $2,800; and for this purpose defendant, representing one of the joint owners, went to Mrs. C.'s residence in another town, and, without disclosing what had transpired between the joint owners of the remainder, purchased her life estate at what she alleged to be a grossly inadequate consideration, it was *held* that defendant was not required to disclose that the joint owners of the remainder contemplated a partition and sale, their estimate of the value of the life estate, nor the object of his visit to the town where she resided.

SAME: *Misrepresentation as to the law.*

A representation of what the law will or will not permit to be done is one upon which the party to whom it is made has no right to rely, and if he does, it is his own folly, and he cannot ask the law to relieve him from the consequences. The truth or falsehood of such representation can be tested by ordinary vigilance and attention. It is an opinion in regard to the law, and is always understood as such.

SAME: *Misrepresentation as to seller's chances of sale.*

Where one representing a joint owner of land in remainder represented to the owner of the life estate that the property could not be sold unless all the persons interested therein were willing, and that H., one of the joint owners, was not willing to have it sold, when he well knew that H. wished it partitioned and sold, it was *held*, on a bill filed to set aside a sale on the ground of fraud in making such misrepresentation, that if untrue it was only a misrepresentation in regard to the seller's chance of sale, or the probability of her getting a better price for the property than that offered by the one making the representations; and that misrepresentations of this nature were not alone sufficient ground for setting aside a contract.

ALLEGATA ET PROBATA.

The court will not consider evidence introduced upon a point as to which there is no allegation in the bill. The *allegata* must exist before the court can consider the *probata*.[1]

APPEAL from Circuit Court of *Morgan* County.

The facts are sufficiently stated by the court.

I. J. Ketchum and *H. B. McClure*, for Appellant. *D. A. & T. W. Smith*, for Appellees.

[1] See Waugh *v.* Robbins, *ante*, 181; Bush *v.* Connelly, *post*, 447; Lloyd *v.* Karnes, 45 Ill., 62; Carmichael *v.* Reed, id., 108; Dodge *v.* Wright, 48 id., 382.

Beckwith, J. The appellees filed a bill in chancery to [242] set aside a sale made by them to the appellant of a life estate in a town lot in Jacksonville, on the ground of fraud. The specific allegations on which relief is sought are: First. That the parties owning the remainder, held a meeting at Jacksonville, at which the appellant represented his wife, one of the owners, when it was concluded by them to file a bill in chancery for a partition of the property, and in order to facilitate the same it was deemed expedient to buy the life estate of Mrs. Cleland on joint account, at the price of $2,600 to $2,800, or thereabouts; that for this purpose the appellant, representing one of the joint owners, went to Rock Island, where Mrs. Cleland resided, and there purchased her life estate, fraudulently suppressing what had transpired between the joint owners of the remainder at Jacksonville. Second. That the appellant on that occasion fraudulently represented to Mrs. Cleland that the property could not be sold unless all the persons interested therein were willing; and that Hatfield, one of the joint owners, was not willing to have it sold, when he well knew that Hatfield wished it partitioned and sold. By means of the suppression of what had transpired between the owners of the remainder and these representations, the appellees allege that they were induced to sell the life estate in question for a grossly inadequate consideration.[1] In the present case it is not material to define the nature and extent of the appellant's obligation to the owners or the remainder. He may have been under obligation to act for them and not for himself, but their rights cannot be asserted by the appellees, and are not involved in the present controversy. It is mentioned in the bill that the appellant was the son-in-law of Mrs. Cleland, but it is not alleged that this relationship occasioned any confidence between the parties. There might have been such a confidence growing out of this relation as to *authorize the appellees to act [243*] upon the presumption that there could be no concealment of any material fact from them, but a court of equity

[1] $1,000.

cannot afford relief on that ground in the absence of any allegation that the parties acted on such presumption, and where there is no evidence from which that fact can be inferred. Undue concealment which amounts to a fraud from which a court of equity will relieve, where there is no peculiar relation of trust or confidence between the parties, is the non-disclosure of those facts and circumstances which one party is under some legal or equitable obligation to communicate to the other, and which the latter has a right, not merely *in foro conscientiae*, but *juris et de jure*, to know. 1 Story's Eq. § 207. The appellant was not required by this well established rule to disclose that the joint owners of the remainder contemplated a partition and sale of the property, nor their estimate of the value of the life estate, nor the object of his visit to Rock Island. There is nothing shown in the case creating a legal or equitable obligation on his part to do so. The bill does not allege any misrepresentation of the value of the property or of the life estate therein, and we therefore dismiss from our consideration all the evidence in that regard. The *allegata* must exist before the court can consider the *probata*.

The representation of the appellant that the property could not be sold without all the parties interested therein consented, if understood to mean that a voluntary sale could not be made without such consent, was true, and one which every one must know was true; but if the representation is understood to mean that a sale could not be had by an order of court without the consent of all parties, then it was a representation in regard to the law of the land, of which the one party is presumed to know as much as the other. A representation of what the law will or will not permit to be done, is one upon which the party to whom it is made has no right to rely, and if he does so, it is his own folly, and he cannot ask the law to relieve him from the consequences. The truth or falsehood of such a representation can be tested by ordinary vigilance and attention. It is an opinion in regard to the law, and is always understood as such. 5 Hill, *303. We have not deemed it material to ascertain the truth or falsehood of the alleged representation

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that Hatfield was not willing the property should be sold. If untrue, it was only a misrepresentation in regard to the seller's chance of sale, or the probability of their getting a better price for the property than the price offered by the appellant. Misrepresentations of this nature are not alone sufficient ground for setting aside a contract. 1 Sug. Vend. 7; 12 East, 637. Our duty is to administer the law, and having discharged it, we leave the parties before the tribunal of an enlightened public and to their own consciences. Our duty does not require us to become advocates for or against them before those tribunals. The decree of the court below will be reversed, and the bill dismissed.

Decree reversed.

Daniel Cassell *v.* Harvey L. Ross and Ezra Dilworth.

Chancery Pleading: *Effect of sworn answer.*

Where a bill in chancery calls for the answer to be under oath, the answer, so far as it is responsive to the bill, and not contradicted by evidence, must be taken as true.

Contracts: *Consideration; ignorance of law.*

Where land is conveyed with full covenants, and, as alleged by the grantee, may have been worth double the amount for which the grantor would be liable upon his covenants, and the grantor subsequently, upon being requested so to do by the grantee, buys in an outstanding title and before so doing takes his grantee's note for part of the amount to be paid by him therefor, the purchase of such outstanding title, whether perfect or imperfect, if not induced by fraud on the part of the grantor, is a sufficient consideration to sustain such note, although the title when acquired by the grantor would by virtue of his covenants, without any new agreement, enure to the grantee; and in such case it can make no difference that the grantee was ignorant that under the law a title subsequently acquired by his grantor, would by virtue of his covenants enure to the grantee, since "ignorance of law excuses no one."

Same: *Consideration; compromise of doubtful right.*[1]

Since the compromise of a doubtful right is a sufficient consideration for a

[1] As to the compromise of matters in dispute, forbearance, etc., as a con-

promise, and it is immaterial on whose side the right ultimately proves to be, if it is conceded that it is doubtful whether such outstanding title, to enable the grantor to purchase in which such note is given, is paramount, or whether the grantor's covenants would have covered the value of the land, still as a compromise between grantor and grantee, it would be a sufficient consideration for the note.

SAME: *Consideration.*

So, if the grantee in such case is doubtful of his grantor's ability to respond to his covenants, that would form a sufficient consideration for the note.

SAME.

So, even if in such case the outstanding title is worthless, yet if the grantee does not so regard it, and his fears being excited, and he solicitous to procure it to avoid uncertainty and trouble, he is willing to give the amount of the note to have all of those doubts set at rest, this will constitute a sufficient consideration, no unfair or fraudulent means being resorted to to excite his fears or create these doubts.

SAME: *Failure of consideration.*

Where the grantee by deed containing full covenants executes to his grantor a promissory note to enable him to buy in an alleged outstanding paramount title, upon payment of which note the grantor agrees to quit claim to the grantee, and the grantee does not pay up the note in full, the fact that the grantor does not execute such quit claim deed, does not constitute a failure of consideration, inasmuch as he is not bound to do so till the note is paid in full.

VENDOR AND VENDEE: *When the Vendor is in default.*

When a party agrees to execute and deliver a deed to another for land upon payment of a promissory note given by the latter, the former is not in default in not making or tendering such deed until the latter has paid or offered to pay the note in full.

HOMESTEAD: *Power of husband to purchase outstanding title.*

The design of the homestead act was to secure a home to the wife and children of the debtor, the act being for their protection more than his. But the title being usually vested in the husband, he must be treated as

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sideration, see McKinley *v.* Watkins, 13 Ill., 140; Burnside *v.* Potts, 23 id., 415; Farmers' & M. Ins. Co. *v.* Chesnut, 50 id., 111; Knotts *v.* Preble, id., 226; Miller *v.* Hawker, 66 id., 185; St. Claire *v.* Perrine, 75 id., 366 (forbearing legal proceedings); Nichols *v.* Bradsley, 78 id., 44.

Any act which is a benefit to one party or a disadvantage to the other, constitutes a sufficient consideration to support a contract. Burch *v.* Hubbard, 48 id., 164; Buchanan *v.* International Bank, 78 id., 500.

A waiver of any legal or equitable right, at the request of another, is a sufficient consideration for a promise. Severence *v.* Haines, 32 Ill. 357.

acting, at least to some extent, as their trustee for the protection of this right which has been cast by the law upon the wife and children. And by virtue of his relation to their rights, he is necessarily vested with the power to perform all acts necessary to secure the title, and thus effectuate the design of the statute. He is, therefore, authorized, with or without the consent of his wife, when necessary, to purchase upon credit an outstanding title for the purpose of securing the enjoyment of the right.

SAME: *Presumption as to necessity of purchase.*

When he has made such a purchase, it will be presumed to have been necessary, and that the title purchased was paramount; but this presumption may be rebutted by the wife, upon showing that she or her husband owned the paramount title when the outstanding title was acquired.

SAME: *What is purchase money.*[1]

If the wife shall show that the real title was held by herself or her husband at the time the outstanding title was obtained, then the consideration agreed to be paid for such outstanding title will not be regarded as purchase money, so as to subject the land to its payment. On the contrary, if the wife fails to show that the paramount title was already held by one of them, then it must be considered that the money agreed to be paid for the subsequently acquired title is purchase money within the statute.

ESTOPPEL: *To deny that a title purchased is paramount; married women.*

Where an outstanding title is purchased by a husband in possession of land claimed by himself and wife as a homestead, and a trust deed executed by him upon the premises for the price of such outstanding title, containing no release of the homestead right and the wife not joining therein, the husband is estopped to deny that the title so purchased is paramount, but the wife is not, but may show that she or her husband already held the paramount title.

PARTIES IN CHANCERY: *To bill to protect homestead right.*

The wife is a necessary party to a bill filed by the husband to protect an alleged homestead right in premises against a sale thereof for the price agreed to be paid by the husband for an outstanding title thereto.[2]

SALE UNDER TRUST DEED: *On credit.*

Where a deed of trust authorizes a sale upon default of payment of the money secured thereby, for cash, and the purchaser does not pay cash, but gives his note for the entire amount of his bid; whatever may be said as to the power of the trustee to give time on the sum due to him,[3]

[1]See Austin *v.* Underwood, 37 Ill., 438; Magee *v.* Magee, 51 id., 500; Eyster v. Hatheway, 50 id., 521; Allen *v.* Hawley, 66 id., 164; Bush *v.* Scott, 76 id., 524.

[2]See Eyster *v.* Hatheway, 50 Ill., 521.

[3]See Waterman *v.* Spaulding, 51 Ill., 425; Burr *v.* Borden, 61 id., 389.

he being the owner of the indebtedness secured by the trust deed, he has no right to give any time for the payment of the surplus.

SAME:

Nor in such case is an offer by the trustee to pay the surplus to the debtor on the condition that he would surrender the possession of the land to the purchaser, in any sense a compliance with the terms of the deed of trust He has no power to impose new terms and conditions, or to alter or vary those contained in the deed.

It may be that, should the trustee make an unconditional tender of the surplus to the debtor, in apt time, a court of equity might not be inclined to set aside the sale because the purchaser was not required to pay the money, if the transaction appears to be *bona fide* and free from other objections.

PURCHASER: *At trust sale, bound to see that precedent conditions are complied with.*

An immediate purchaser on credit at a sale under a trust deed cannot protect himself by insisting that he was a purchaser in good faith without notice that the deed only authorized a sale for cash; but must be held to see that all precedent conditions of the sale up to the execution of the deed to himself are complied with by the trustee.

With a remote purchaser it seems that the case is different.

APPEAL from Circuit Court of *Fulton* County.

Bill in chancery filed by appellant against appellees alleging in substance the following state of facts: That on March 26, 1853, the premises in question were conveyed to complainant by Harvey L. Ross and wife by deed with full covenants of warranty, the consideration therefor being $550, a portion of which was paid, and the remainder of which, secured by mortgage on the premises, was paid in full August 3, 1854; the continued occupancy of the premises, as a homestead, by complainant and his family since the time of the purchase; that after the said $550 had been fully paid, said Ross, by means of representations to complainant,—who was alleged to be ignorant, unlearned, etc.,—that he, complainant, would otherwise be put off from the land by an alleged owner of a paramount patent title, procured said complainant, for the purpose of buying in said patent title, on April 24, 1856, to execute to him, Ross, two $100 notes, bearing interest at six per cent., and to mature respectively in one and two years from date, which, it was alleged, were so executed by complainant, solely in consideration

of the title bond hereinafter mentioned, and in ignorance of Ross's liability to respond to complainant in damages for any such eviction, or that such title, if acquired by Ross, would enure to and become vested in the complainant. The bill also alleges the execution by Ross to complainant of a title bond to quit-claim the said premises to complainant on his paying said notes and the taxes on the premises; the payment of all taxes thereon and a part of said notes; the non-delivery or tender by Ross of the deed stipulated for in said bond; that in April, 1858, complainant,—his wife not joining therein,—supposing that he was only executing a mortgage, was through misrepresentation by Ross, procured to secure the rest of said $200 by trust deed on said premises, in which the homestead right was not relinquished, and for which, it was alleged, Ross's promise to buy in said outstanding title furnished the sole consideration.

The bill also alleges a sale of the premises by Ross under said trust deed, for non-payment of the remainder of said notes, to Ezra Dilworth, and the execution of an insufficient deed to the purchaser therefor, the nature of which sale is sufficiently stated by the court; the pendency of an action of ejectment against complainant for the recovery of said land, instituted in the name of Dilworth, but, as it is alleged, for the benefit of Ross; the making by complainant of permanent improvements on the premises, worth $800; and that the premises are now worth from $1,000 to $1,500. The bill seeks in the alternative the cancellation of said notes, or a redemption from the said trust deed; the preservation of a homestead right in the premises; an injunction against the further prosecution of said action of ejectment, and the execution of another deed under said trust sale, and also prays general relief.

The answers of the defendants so far as material to a full understanding of the case, are sufficiently stated by the court.

The court below dismissed the bill.

Judd, *Boyd* and *James*, for appellant. *Ross*, *Tipton* and *Winter*, for appellees.

*Walker, C. J. The purchase of the outstanding [*254]

title seems to have formed a part of the consideration of the debt secured by the deed of trust. The bill alleges that it formed the consideration of that entire debt, but the answer sets up the fact that one hundred, of the two hundred dollars, which appellant had agreed to pay towards the purchase of the outstanding title, had not been paid. That for the hundred dollars first falling due, appellant had given his two notes of fifty-three dollars each to appellee Ross. That one of these notes had been paid, and that appellee Ross had assigned and transferred the other. The bill also alleges that the note for one hundred and twenty-four dollars was for a portion of this two hundred dollars, for the purchase of the outstanding title. But the answer of Ross states that the remaining one hundred dollars of that purchase, with its accruing interest, together with a small note which he held for goods purchased by appellant, constituted the consideration of the note. The bill calls for the an-
[*255] swer to be under oath, and so far * as it is responsive to the bill, it must be taken as true, inasmuch as it is not contradicted by evidence.

The note for goods embraced in, and forming a part of this note, to that extent, was beyond all question a consideration. And we have no hesitation in saying that the purchase of the outstanding title, whether perfect or imperfect, if not induced by fraud, was a sufficient consideration for the remainder. It is a maxim of universal application, "that ignorance of law excuses no one." Appellant, then, cannot be heard to say, that he was ignorant that under the law a subsequently acquired title, by Ross, would, under his former covenants, inure to the benefit of appellant. The answer of appellee Ross clearly and unequivocally denies that there was any fraudulent means used to induce appellant to purchase this outstanding title, or that Ross urged or even requested appellant to purchase, but, on the contrary, that the purchase was made at the urgent solicitation of appellant; that Ross made the purchase, and with the previous understanding and agreement that appellant should refund two hundred dollars of the four hundred dollars of purchase-money. And this allegation, responsive to the bill, is

uncontradicted by any evidence in the record. If this be true, and it must be so considered, upon what principle of justice or fairness can it be said, that because that title inured to his benefit, he will not pay the portion he agreed to pay before the purchase was made. Is he now to be permitted to escape payment, and leave Ross the whole burthen, when Ross remonstrated and advised against the purchase?

Suppose this title to have been paramount, and that under the covenants contained in Ross' deed to appellant upon its purchase, it would pass by the force of these covenants to appellant's benefit, it could not be said to form no consideration for the notes given on its purchase by appellant. The utmost extent of Ross' liability under those covenants, would be the purchase-money with interest, and, possibly, an attorney's fee in defending an ejectment suit for possession. Yet the premises may have been, as alleged in the bill, worth, with their improvements, double that sum or more. This, then, would have formed *a strong inducement for the pur- [*256] chase of the outstanding title by appellant. Its purchase, if paramount, would have been a protection to him of all of the value of the premises beyond that portion covered by Ross' covenants.

In the case of *McKinley* v. *Watkins*, 13 Ill. 144, it was held, that the compromise of a doubtful right is a sufficient consideration for a promise; and that it is immaterial on whose side the right ultimately proves to be, as it must be on one side or the other. Then, if it is conceded that it is doubtful whether this outstanding title was paramount, or whether Ross' covenants would have covered the value of the land, still, as a compromise between appellant and Ross, it would have been a sufficient consideration for the note.

Or, suppose appellant was doubtful of Ross' ability to respond to his covenants, that would have formed a sufficient consideration for the note. Even if it were conceded that this outstanding title was worthless, yet it seems that appellant did not so regard it, as his fears were excited, and he was solicitous, and even urgent, to procure it, to avoid uncertainty and trouble,

if not positive loss. When he entered into the agreement with Ross for its purchase, he was willing to give two hundred dollars to have all of those doubts set at rest, and this constituted a sufficient consideration, as Ross resorted to no unfair or fraudulent means to excite his fears or create those doubts. Nor does the fact that Ross has not executed the quitclaim deed constitute a failure of consideration, inasmuch as he was not bound to do so until the two hundred dollars were paid, which is admitted not to have been paid in full. Nor was Ross in default in not making or tendering such a deed, as appellant was bound to pay, or offer to pay, before he had a right to demand the deed. For these reasons, we are unable to perceive that the note and deed of trust should be canceled.

The next question presented by the record is, whether the note secured by the deed of trust is purchase-money of the homestead of appellant. He, with his family, at the time of the purchase, resided, and still resides, upon the premises. We have seen that all but a small portion of this note was [*257] given for *this outstanding title. If appellant had not been holding under a prior acquired title, this question would hardly have been raised. And yet there is nothing in this record from which it can be inferred that the outstanding title was not paramount.

But was the wife estopped to show that she or her husband held the paramount title when the purchase was made of Ross? This depends upon the construction to be given to the act creating the exemption.

The design of the framers of the homestead law manifestly was, to secure a home to the wife and children of the debtor. It was for their protection, more than his. But the title being usually vested in the husband, he must be treated as acting, at least to some extent, as their trustee for the protection of this right which has been cast by the law upon the wife and children. And by virtue of his relation to their rights, he is necessarily vested with the power to perform all acts necessary to secure the title, and thus effectuate the design of the statute. He is, therefore, authorized, when necessary, to purchase an outstanding

title for the purpose of securing the enjoyment of the right. And when he has made such a purchase, it will be presumed to have been necessary; but this presumption may be rebutted by the wife, upon showing that she or her husband owned the paramount title when the outstanding title was acquired.

If the wife shall show that the real title was so held at the time the outstanding title was obtained, then the consideration agreed to be paid will not be regarded as purchase-money, so as to subject the land to its payment. On the contrary, if the wife fail to show that the paramount title was already held, then it must be considered that the money agreed to be paid for the subsequently acquired title is purchase-money within the statute. The husband being the head of the family, the presumption is that he acts for their benefit when he acquires or perfects a title to the homestead. When already in possession under a defective title, he may, with or without the consent of the wife, acquire an outstanding title on credit, and the husband cannot, but the wife may, deny that it was paramount. And until it appears that *such a title was not acquired, [*258] the consideration agreed to be paid will be treated as purchase-money.

The wife in this case was a necessary party to the bill. She should have been before the court that her rights might have been acted upon. If before the court and it appeared that this outstanding title was paramount, then the court would decree a sale to enforce the payment of the purchase money, or if, on the contrary, it was worthless, then to enjoin all proceedings to deprive her of the homestead to the extent of one thousand dollars.

We now come to the question of the validity of the sale under the deed of trust. The deed authorized Ross to sell upon default of payment of the money, after giving the prescribed notice, for cash, to the highest bidder. The answers of both defendants admit that it was not sold for cash, but that the purchaser gave his note for the entire amount for which the land was sold. Whatever may be said of the power of Ross to give time on the sum due to him, there can be no pretense that he

had the right to give any time for the payment of the surplus. As to that portion of the purchase-money he could not release the purchaser, nor could it be discharged in any other mode, or in anything else, than by the payment of the money at the time of the sale. Appellant had conferred no such power by the deed of trust, and he cannot be required to receive Dilworth's note instead of money, nor can he be delayed in the receipt of the surplus over the payment of the debt secured by the trust deed, until Dilworth shall pay his note to Ross. Nor can he be compelled to assume the hazard, however remote, of Ross' insolvency, or to submit to delay in the receipt of the money. He, when the deed of trust was executed, provided for the immediate payment to him of the surplus, but this sale, if sustained, would defeat that provision.

Nor was the offer of Ross to pay the surplus to appellant, on the condition that he would surrender the possession of the land to the purchaser, in any sense a compliance with the terms of the deed of trust. He had no power to impose new terms and conditions, or to alter or vary those contained in the deed. [*259] *All of his power was derived from the deed, and all acts outside of and beyond its provisions were void. Such a condition was in violation of his duty as a trustee. Under the provisions contained in the deed, the purchaser would be left to his ordinary remedies for the recovery of possession. It may be, that had Ross made an unconditional tender of the surplus to appellant, in apt time, that a court of equity might not have been inclined to set aside the sale because the purchaser was not required to pay the money, if the transaction appeared to be *bona fide*, and free from other objections.

In this case Dilworth cannot protect himself by insisting that he was a purchaser in good faith, without notice. He was bound at his peril to examine the title he was purchasing, and if he did so, he found that Ross was dealing with a trust fund. The notice of the sale should have disclosed that fact, and if so, it gave him that notice. Upon discovering that it was a trust fund, he was bound to see that at least all of the conditions of the trust deed, up to the execution of the deed to himself, were

complied with and performed by the trustees; and when he became a purchaser upon time, he became a party to the violation of the condition upon which the sale could alone be made. Being chargeable with notice, he cannot evade the effect of the irregularities attending the sale. With a remote purchaser it is believed to be different, but the immediate grantee, under the trustee's sale, must be held to see that all precedent conditions of the sale are complied with by the trustee. For these various reasons the sale should have been set aside.

The decree of the court below is reversed, and the cause remanded, with leave to the complainant to amend his bill, and the defendants to file answer to such amendment, and to both parties to take evidence in the cause; and if the court shall find that the note was given for the purchase-money of the paramount title, in accordance with the views herein expressed, that a decree be entered for a sale of the land; if, however, it shall appear not to have been purchase-money, that a decree be entered for the payment of such sum as may be found due, and order its payment on a day to be named in the decree, and on *default of such payment, that the master pro- [*260] ceed, in the manner prescribed by the statute, to ascertain whether the land is worth more than one thousand dollars, and, if so, to subject the overplus to sale, as required by the homestead law.

Decree reversed.

The Heirs-at-law of Joseph Vanmeter *v.* The Administrator and Heirs of John Love.

Heirs: *Liability of for ancestor's debts.*[1]

The liability of heirs for a debt of their ancestor, both in law and in equity, is to the extent of the full amount which came to them by descent, and a decree finding them so liable, should, where the amount in their hands exceeds the debt claimed, be against them jointly for the whole amount

[1]See Baker *v.* Hunt, 40 Ill., 264; Bishop *v.* O'Connor, 69 id., 431; Forman *v.* Stickney, 77 id., 575.

of the debt, and not against them severally according to their respective shares in their ancestor's estate. The decree where there are several defendants should however provide that neither of the defendants be subjected to a greater liability than to the extent of the estate which came to him.

Error to Circuit Court of *Greene* county.

Bill in equity filed by plaintiffs in error against defendants in error, for an account of moneys alleged to have been received by defendants' ancestor, as complainants' guardian, the defendants, as is alleged, having at the filing of the bill, $5,000 in their possession paid them out of the personal assets of their ancestor.

The decree below was for the complainants according to their respective proportions, and against each of the defendants individually and severally, for one-fifth of the respective sums due to complainants, and awarded to complainants several executions therefor.

D. A. and *T. W. Smith*, for plaintiffs in error.

[*261] *Breese, J. The decree in this case, instead of being several against the defendants should have been joint for the whole debt proved to be due the heirs of Vanmeter. The liability of Love's heirs for the debts of their ancestor, both in law and in equity, is to the extent of the full amount which came to them by descent. The decree should have been against them jointly for the whole amount, otherwise, if any one of the heirs be insolvent, the heirs of Vanmeter would lose the amount decreed against such insolvent. *Cogwell's Heirs* v. *Lyon*, 3 J. J. Marshall, 39.

The data being before us by which a proper decree can be entered, we will direct that the decree of the Circuit Court be reversed, and the following decree entered in the cause. This court being satisfied in the premises, considers and adjudges that the defendants are indebted to the plaintiffs as fol-

[*262] lows: To Etna *J. Vanmeter, Isaac J. Vanmeter, and Martha J. Vanmeter, the sum of one hundred and thirty-eight $\frac{32}{100}$ dollars; to Isaac Vanmeter, one hundred and

three $\frac{7}{100}$ dollars; to Amasa Vanmeter, sixty-nine $\frac{62}{100}$ dollars; and to John Vanmeter, thirty-nine $\frac{90}{100}$ dollars; amounting in all to the sum of three hundred and fifty-one $\frac{41}{100}$ dollars. It is therefore ordered, adjudged and decreed by the court, that the said plaintiffs have and recover from the said defendants, heirs-at-law of John Love, the said sum of money with six per cent. per annum interest thereon from the 27th of November, 1861, as also their costs, both in this court and in the court below, provided, however, that neither of the said defendants, heirs-at-law as aforesaid, be subjected to a greater liability in this case than to the extent of nine hundred and ninety-eight dollars.

Decree reversed.

Harrison Dills, impleaded, &c., *v.* Thomas Jasper. The Quincy English and German Seminary, impleaded, &c. *v.* Thomas Jasper.

Master's Sales: *Practice as to and liability of bidder thereat; report of bids.*

A master in chancery exposing property for sale, should receive bids for it, and report the largest one to the court for its approval[1]. While such is the correct practice, it is not intended to say that if not followed the sale would be held void.

Same: *Requiring deposits.*

If the order upon which the master acts contains especial directions in regard to requiring a deposit, they should be followed; but in case no such directions are given, the master may, in his discretion, require a part or the whole of a bid to be deposited with him; or he may entirely dispense with such deposit.

Same: *Retraction of bid.*

A bidder is not allowed to retract his bid after its acceptance by the master, if it is approved by the court within a reasonable time; but a bid with or without a deposit, although it is accepted by the master, does not become an absolute contract until it is approved by the court.

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[1]See, however, Comstock *v.* Purple, 49 Ill., 158, where the cases are collected and considered, and it is said that the case of Dills *v.* Jasper is not considered in harmony with the previous decisions of the court or with the practice in this State.

SAME: *Effect of bid.*

The bidder at such sale merely agrees to purchase the property upon the terms named by him, if the same are approved by the court; and until the bid is reported and the report is confirmed, the sale is incomplete, and the bidder is under no obligation to complete the purchase.

SAME: *Practice in this country.*

In this country the master usually requires the amount of the bid to be deposited with him at the time of its acceptance, or immediately thereafter; and on failure to do so, the master may reject the bid and may again expose the property for sale; or he may report the bid to the court, together with the failure of the bidder to make a deposit.

SAME: *Master not to reject an accepted bid.*

The master should not take the responsibility of rejecting a bid after it has been once accepted by him, where there is danger of loss to the parties in so doing, because he may render himself liable for it.

SAME: *Remedy to enforce payment of bid.*

After the court has approved of the bid it may summarily require the bidder to pay the amount thereof, or it may order the property to be resold at the bidder's risk and expense; and if upon a resale, it does not bring the amount of the bidder's liability, the court may summarily enforce the payment of the difference.

SAME: *Effect of approval of resale.*

Where a bid is accepted by the master, but is not reported to or approved by the court, but upon the failure of the bidder to comply with the terms of the sale, the master resells the property upon his own responsibility for a less sum; the report of this sale to the court and its approval thereof, is a rejection of the former bid, and puts an end to the bidder's liability thereon.

APPEAL from Circuit Court of *Adams* County.

Bill in equity filed by Jasper, the appellee, for the forclosure of a certain mortgage executed by the Quincy English and German Seminary to James F. Jaquess, and by him assigned to said Jasper.

The questions for determination arose upon two similar petitions filed November 14, 1863, by appellants, the petition on behalf of the said Seminary being as follows:

"The petition and motion of the president and trustees of the Quincy English and German Seminary, defendants, showeth that, as appears by the master's report of sale herein [filed November 14, 1863], and as the facts are, James F. Jaquess, one of the defendants who is named in said cause, and a party to

the record herein, and also named in the decree rendered herein at the October Term, A. D. 1862, and filed in this court on 20th November, 1862, did on the 15th day of August, 1863, by and through his authorized agent, William Marsh, Esq., bid off and purchase the premises described in the aforesaid bills and said decree, to-wit: [describing the premises] at a public sale thereof, made by the master in chancery in this court, under and in pursuance and as directed by said decree, said bid and purchase being for the sum of twenty-two thousand dollars, and accepted by said master. Your petitioner states and shows, that from thence hitherto said James F. Jaquess, his said agent and his attorneys, and every other person for him, have wholly failed and neglected and refused to pay any money on said purchase and bid. Your petitioners state that subsequent to said bid and purchase and failure to pay, and on the 23d day of October, A. D. 1863, the said master in chancery, at the request of Messrs. Skinner & Marsh, solicitors for complainant, made a second sale of said premises to Porter Smith, for the sum of fifteen thousand six hundred dollars, as stated in the said master's report.

"Your petitioners now state and charge, that upon the aforesaid state of facts, and by reason of said bid and purchase of said James F. Jaquess, and his failure to comply therewith, and to pay his said bid of $22,000, and said subsequent resale of said premises, if confirmed at said reduced price of $15,600, your petitioners, a corporation created by and acting under a charter and laws passed and granted by the State of Illinois, have or will lose the sum of six thousand four hundred dollars, the difference between the bids at said sales. Your petitioners have no adequate, and, indeed practically, no remedy at law against said Jaquess for damages arising to them by reason of the difference in the sums so bid at respective sales made by said master in chancery under said decree; and your petitioners now ask that said Jaquess, who now claims to be entitled to some portion of said $15,600, the proceeds of said last sale, be held in these causes by proper decree, to compensate and pay to your petitioners the difference occasioned by his failure to comply with his bid at said first sale,

and that said sum of money arising out of second sale, if it is confirmed by this court, remaining after paying costs herein, the sum or sums of money due to Harrison Dills, the sum or sums of money due said Jasper, Root, Jansen, Smith and Dickhut, and said Willey and said Eull, as provided by the aforesaid decree, be retained by this court to meet the difference between said sales by said master, instead of being paid to said Jaquess as claimed, and when so retained, paid over to petitioners or to whomsoever, except said Jaquess, may by decree in these causes be found to be entitled thereto. Your petitioners state that said Jaquess has, so far as they know, and as they believe, no property tangible to execution, or out of which he could be made to respond in damages for the loss occasioned by his failure to complete his said bid and purchase, and that they believe said Jaquess to be insolvent; and your petitioners pray as hereinbefore set forth, and for such other and further relief as may be equitable."

The court below denied the said petitions and confirmed the sale.

F. V. Marcy and *Grimshaw & Williams*, for Appellants. *Skinner & Marsh*, for Appellee.

[*272] *Beckwith, J. A master in chancery exposing property for sale, should receive bids for it, and report the largest one to the court for its approval. While such is the correct practice, we do not intend to say that if it is not followed we should hold the sale void. If the order upon which he acts contains especial directions in regard to requiring a deposit, they should be followed; but in case no such directions are given, the master may, in his discretion, require a part or the whole of a bid to be deposited with him; or he may entirely dispense with such deposit. A bidder is not allowed to retract his bid after its acceptance by the master, if it is approved by the court within a reasonable time; but a bid with or without a deposit, although it is accepted by the master, does not become an absolute contract until it is approved by the court. The bidder at such a sale merely agrees to purchase the property upon the terms named by him if the same are approved by

the court; and until the bid is reported and the report is confirmed, the sale is incomplete, and the bidder is under no obligation to complete the purchase. In this country the master usually requires the amount of the bid to be deposited with him at the time of its acceptance, or immediately thereafter; and on failure to do so the master may reject the bid and may again expose the property for sale; or he may report the bid to the court, together with *the failure of the bidder to [*273] make a deposit. The master should not take the responsibility of rejecting a bid after it has been once accepted by him, where there is danger of loss to the parties in so doing, because he may render himself liable for it.

After the court has approved of the bid, it may summarily require the bidder to pay the amount thereof, or it may order the property to be resold at the bidder's risk and expense; and if, upon a resale, it does not bring the amount of the bidder's liability the court may summarily enforce the payment of the difference. Although the bid of Jaquess was accepted by the master, it was not reported or approved by the court. The resale of the property by the master upon his own responsibility, the report of such sale to the court, and its approval thereof, was a rejection of the bid of Jaquess, and put an end to his liability thereon.

Judgment affirmed.

William J. Gregg *v.* John Crabtree.

Costs: *Sheriff's fees for mileage.*

Under section 11 of the Act of 1849 (Scates' Comp. 513),—providing that it shall be the duty of the sheriff entitled to mileage under said act, to indorse on each writ, summons, subpœna, or other process that he may execute, the distance he may travel to execute the same, etc.,—the clerk may not tax as sheriff's fees a sum claimed for mileage, when the distance traveled is not specified in his return.

Same: *Taxation of.*

The law has imposed upon the clerk the duty of taxing the costs in all cases in court, and in so doing he must be governed by the statute. He must pass upon the legality of the various items charged, and will not be warranted in allowing more than the statute has fixed, nor for charges not returned in pursuance of the requirements of the statute.

ERROR to Circuit Court of *Edgar* County.

The case is sufficiently stated by the court.

N. M. Broadwell, for plaintiff in error. *A. Green*, for defendant in error.

[*274] *WALKER, C. J. This record presents the question whether the clerk may tax as sheriff's fees a sum claimed for mileage, when the distance traveled is not specified in his return. By section 11 of the act of 1849 (Scates' Comp. 513), it is enacted, that "It shall be the duty of each sheriff [*275] entitled to mileage under this act, to *indorse on each writ, summons, subpœna or other process that he may execute, the distance he may travel to execute the same, ascertaining the distance and the charge properly allowable therefor, in conformity with the foregoing regulations." This requirement is positive and unconditional in its terms. And it was evidently the design of the law makers to give the person chargeable with the payment explicit information of what the various items with which he was charged consisted. But the statute has positively required that the act shall be done, and there is no other authority that can dispense with its performance.

By the 28th section of the cost act of 1845, the clerk is required to make and set down a fee-bill in each case, after each term of court, in a book to be kept for that purpose, including the costs of the sheriff and other officers. This provision seems to require something more than merely copying the various items of costs into a book. He is required to make, as well as set down, a fee-bill. In making a fee-bill, he can only allow, or set down, legal charges, whether of his own or of other officers. When he sees that charges are made for services never rendered, or for more than the statute has allowed, or when they are returned contrary to the requirements of the statute, he should reject and disallow them. The law has imposed upon the clerk the duty of taxing the costs in all cases in court, and in doing so he must be governed by the statute. He must pass upon the legality of the various items charged, and will not be

warranted in allowing more than the statute has fixed, nor for charges not returned in pursuance of the requirements of the statute. In this case, the sheriff having failed to specify in his return the number of miles traveled in serving the process, the clerk, in making the fee-bill, should have rejected the charge. And the court below did right in quashing the fee-bill and replevin bond. The judgment is affirmed.

Judgment affirmed.

William Schirmer *v.* The People of the State of Illinois.

Records: *What is a record or not, open to evidence.*

Whether an instrument offered in evidence in a cause as a record, is a record or not, is always open to inquiry. Anything produced as a record may be shown to be forged or altered. A record is understood to be conclusive evidence, but what is or is not a record, is matter of evidence and may be proved like other facts.

Same.

If words have been struck out of a record so as to render it erroneous, witnesses may be examined to show such words were improperly struck out; but not to falsify the record by showing that an alteration whereby the record was made correct, was improperly made.

Same: *In criminal cases.*

The clerk is not required to make a complete record in a criminal case. He takes daily minutes of the proceedings, and at his leisure enters them in proper form in the order book, which with the files are the record of the cause.

Same: *Transcripts in criminal cases.*

The clerk makes out transcripts of the record in criminal causes, for the Supreme Court, from the entries on his minutes and order book, and from the files in the cause.

Same: *Record in criminal cases need not be made during the term.*

These entries by the act of 1859 (Sess. Laws, 130), the clerk is required to make, before the final adjournment of the court at each term, or as soon thereafter as practicable; and it is not requisite to the validity of the record that they be made during the term at which the trial was had.

Same: *Effect of transcript.*

Where the record sent up by the clerk of the Circuit Court is certified under the seal of the court to be a true and full copy of the proceedings in

the cause, and it is not shown by evidence that it is not, it must be taken to be the record in the cause and imports verity.[1]

JURY: *Objections* to *irregularity in impaneling, when to be taken.*[2]

Where there was no challenge to the array and no objection made before trial on account of any irregularity in impaneling the petit jury, it is too late to make the objection upon error, that the record does not show that the jury was legally impaneled.

CRIMINAL LAW: *Presence of prisoner during his trial;*[3] *presumption.*

Where from the record no interval appears between the arraignment, trial, verdict and judgment in a criminal case, it will be presumed from the fact that the arraignment involves the personal presence of the accused, that he remained in court the whole time, including the moment when sentence was passed by the court.

SAME:

Where the fact of the prisoner's presence can, by fair intendment, be collected from the record, that is sufficient.

ERROR to Circuit Court of *Randolph* County.

The plaintiff in error was upon trial upon an indictment for murder, convicted of manslaughter.

The Clerk of the Circuit Court, in the original transcript, in referring to the proceedings in the cause used the following words: "And the following is a copy of the proceedings and order made out by me after the adjournment of the Circuit Court and the expiration of the term at which said defendant was tried, in accordance with what has been the established and usual practice in this office, to wit:" &c.

The transcript of the record returned by the Clerk of the Circuit Court to the writ of *certiorari* issued upon an alleged diminution of the record, in not showing the return of the indictment into open court by the grand jury, or its indorsement as a true bill, is as follows:

"RANDOLPH COUNTY CIRCUIT COURT,
September Term, A. D. 1863.

"At a Circuit Court begun and held at the Court House in

[1]See Chicago, B. & Q. R. R. Co. *v.* Lee, 68 Ill., 576; Moss *v.* McCall, 75 id. 190.

[2]See Stone *v.* The People, 2 Scam. 326; Gropp *v.* The People, 67 Ill. 154.

[3]See Holliday *v.* The People, 4 Gilm. 111, holding that the verdict may be received in prisoner's absence in misdemeanor cases; see, also, City of Bloomington *v.* Heiland, 67 Ill., 278.

the city of Chester, in and for the county of Randolph, State of Illinois, on Monday, the fourteenth day of September, in the year of our Lord one thousand eight hundred and sixty-three. Present [the circuit judge, etc.].

"John Campbell, sheriff of said county, returned into court the names of the following persons selected by the County Court of said County, to serve as a grand jury at this term of said court to wit: * * * * * * *. And upon the calling said grand jury, each of said persons respectively answered to their names, whereupon the court appointed said Jonathan Chesnutwood foreman, and the said jury was duly impaneled and sworn as a grand inquest for the people of the State of Illinois, to inquire for the body of the county, &c.; and after receiving their charge from the court, retired to their room to consider of their presentments; Edward Burchire being sworn as attending officer.

"Randolph County Circuit Court; September, A. D. 1863.

"September Term, 1863, of the Randolph Circuit Court. The grand jury is organized this 14th day of September, 1863, by appointing J. Chesnutwood foreman of the grand jury.

"The grand jury for their first report into open court, this 15th day of September, report as true bills of indictment the following bills, into open court, in words and figures following:

"The People *v.* William Schirmer, indicted for murder." [Setting out the indictment.] The indorsement upon the indictment and the remainder of the transcript are as follows:

"The People
v.
"William Schirmer.
"Indictment for murder.
"A true bill.
"J. Chesnutwood, *Foreman.*"

"Witnesses, * * * * * *.
"Filed Sept. 15th, 1863.
"S. St. Vrain, *Cl'k.*"

"Randolph County Circuit Court,
September Term, A. D. 1863.

September 17th, 1863.

"The People of the State of Illinois
v.
"William Schirmer. } Indictment for murder.

"And now on this day comes the people by Watts, O'Melveney, Johnson and J. B. Underwood, and the defendant by Snyder and Barnum, and the defendant having been furnished with a copy of the indictment and list of the regular panel of the jurors, &c., the defendant is arraigned and enters the plea of not guilty; whereupon the trial commences, and the regular panel of the jury being exhausted, the sheriff of said county is ordered to summon from the bystanders six jurors, &c., which is done, and the names of the so summoned jurors given to defendant's attorney. Whereupon came the jurors of the jury selected in this cause to wit: * * * * * twelve good and lawful men, who, being elected, tried and duly sworn a true verdict to render in said cause, &c. And the said jury, after hearing the evidence and arguments of counsel in said cause, and after retiring to consider of their verdict, returned into court the following verdict, September 18th, 1863: 'We, the jury, find the defendant guilty of manslaughter, and fix the term of his confinement in the penitentiary for and during his natural life.' Whereupon, the court, being fully advised of and concerning said case, verdict, evidence, &c., doth order and adjudge that said William Schirmer be sentenced to the penitentiary of the State of Illinois, for the space and term of his natural life at hard labor, except one day of the time, which is to be solitary confinement in said penitentiary; and that the sheriff of Randolph county see that this order be executed, &c., and that said people have their costs," etc.

"State of Illinois,
Randolph County. } ss.

"I, S. St. Vrain, clerk of the Circuit Court, within and for the county and State aforesaid, do hereby certify the foregoing

to be a full, true and complete copy of the proceedings in the Circuit Court in the case of The People of the State of Illinois *v.* William Schirmer, as appears of record and on the files in my office.

"In testimony whereof, I have hereunto subscribed my hand and affixed the official seal of my office, at the city of Chester, Illinois, this 18th day of November, A. D. 1863.

[SEAL.] "S. ST. VRAIN, Clerk."

The questions raised upon error are sufficiently stated by the court.

Thomas G. Allen, for plaintiff in error. *J. B. White*, State's attorney, for defendants in error.

*BREESE, J. The only question made in this case, is [*281] on the record itself. The plaintiff in error insists that it is not a record for reasons which he assigns. The first record was made out by the clerk of the Circuit Court, October 21, 1863, and very inartificially. It contained no *placita* and was wanting in important formal parts. It was, however, certified by the clerk to contain "a full and true history of the proceedings in the trial of said cause, *The People of the State of Illinois* v. *William Schirmer*, which appear of record as is stated in the foregoing copy in my office."

On *certiorari*, on behalf of the people alleging a diminution of the record, another record is sent up, which the clerk certifies to be "a full, true and complete copy of the proceedings in the Circuit Court, in the case of *The People of the State of Illinois* v. *William Schirmer*, as appears of record and on the files in my office." This is dated November 18, 1863, and is under the seal of the court.

This amended record, the plaintiff's counsel moved [282] the court to strike from the files, for the reason that there was nothing on its face warranting its reception and consideration by this court as a record, or any part of a record, of the proceedings in the Randolph Circuit Court.

This objection seems to include all made by the counsel for the plaintiff in error, and disposing of it will dispose, substan-

tially, of all. The cases to which counsel has referred, are all cases wherein some instrument has been offered in evidence in a cause as a record. It is correctly said in those cases, whether the instrument offered is a record or not, is always open to inquiry. *Brier* v. *Woodbury*, 1 Pick. 362. It is there said that it cannot be doubted that anything produced as a record may be shown to be forged or altered; if it were not so, great mischief might arise. A record is understood to be conclusive evidence, but what is or is not a record, is matter of evidence and may be proved like other facts.

And if words have been struck out of a record so as to render it erroneous, witnesses may be examined to show such words were improperly struck out; but not to falsify the record by showing that an alteration whereby the record was made correct, was improperly made. *Dickson* v. *Fishers*, 1 Bl. 664; *S. C.*, 4 Burrows, 2267; *Adams* v. *Betz*, 1 Watts, 425.

The plaintiff's counsel presents his own affidavit in support of his objections, in which he states he examined, on the 21st of October, 1863, the record book of the Circuit Court of Randolph county, and that there was not at that time any such record made and entered in that record book, or in any other book in the office of the clerk of that court, as the clerk has certified in his return to the *certiorari*.[1]

This may all be true, as the clerk is not required to make a complete record in a criminal case. He makes out his transcripts for this court from the entries on his minutes and order book, and from the files in the cause. He takes daily minutes of the proceedings, and at his leisure, enters them in proper form in the order book, which, with the files, are the record of the cause. These entries by the act of 1859 (Sess. Laws, [*283] *130), the clerk is required to make, before the final adjournment of the court at each term, or as soon thereafter as practicable. It is quite probable, when, on the 21st of October, the counsel inspected the record or order book, the entries had not been made.

[1]It also appears that the proceedings were not entered of record by the clerk until after said writ of *certiorari* was served.

The record sent up by the clerk, is certified under the seal of the court, and his oath of office, to be a true and full copy of the proceedings in the cause, and it is not shown by any evidence that it is not. Unassailed, it must be taken to be the record in the cause of the conviction of the plaintiff in error, and imports verity.

As to the contents of the record, it contains the *placitum*, recites the impaneling of a grand jury, the appointment of a foreman, the charge of the court, the retiring of the body to consider of presentments, and under the charge of a sworn officer. It further recites in regular order, the return of the grand jury into open court, with certain bills of indictment found by them as "true bills," among which is an indictment in the name of *The People of the State of Illinois* v. *William Schirmer*, for murder. Then follows the indictment, the arraignment, the plea of not guilty, the impaneling of the traverse jury, the verdict and the judgment.[1]

We are at a loss to perceive in what essentials this record is deficient. It is insisted by the plaintiff in error that it does not affirmatively appear the indictment was returned into open court by the grand jury.[2] We think it does so appear beyond controversy or question. It is further insisted the record does not show that the indictment was indorsed a "true bill" and signed by the foreman. The record does show this substantially.

It is further insisted the record does not show that the petit jury was legally impaneled. There was no challenge to the array, and no objection made before trial on account of any irregularity in this respect, if there was any. It is now too late to make the objection, if it existed. §§ 162, 163, Crim. Code; Scates' Comp. 403.

The sixth and seventh objections have no foundation.[3] The record is as full on the points made as there is any necessity to

[1]See McKinney *v.* The People, 2 Gilm. 540.

[2]See Rainey *v.* The People, 3 Gilm. 71.

[3]The sixth objected that the record did not properly show that the defendant was legally tried by a jury of twelve men; the seventh, that it did not appear from the record that the verdict was entered of record.

[*284] *make it. The verdict of the jury follows the trial in regular order, and is so entered of record.

The eighth objection is, that the record does not show affirmatively that the defendant was present in court at the time the verdict was rendered, and at the time the judgment and sentence was pronounced. That he was personally present was shown by his arraignment, for that involves his personal appearance. No interval appears between the arraignment, trial, verdict and judgment, and the presumption, therefore, must be, the prisoner remained in court the whole time. The whole proceedings seem to have been very expeditious, and in the consecutive and continuous order in which they are stated in the record, they necessarily imply his personal presence during the whole time, including the moment when sentence was passed by the court. *State* v. *Craton*, 6 Iredell, 164. The fact of the prisoner's presence can, by fair intendment, be collected from the record, and that is sufficient. *West* v. *The State*, 2 N. J. 212; *State of Iowa* v. *Stiefle*, 13 Iowa, 603.

We do not think any one of the objections are sustained.

As to the finding of the jury, we can only say we have nothing before us to test its propriety. We can imagine it was a case amounting to murder, but from some extenuating circumstances or horror of the death penalty, the jury were induced to find it manslaughter, and fix the highest punishment known to the law.

Perceiving no errors in the record, and believing that to be wanting in no essential to a perfect record, we affirm the judgment.

Judgment affirmed.

Philip Myers *v.* Mason M. Wright.

Chancery Pleading: *Demurrer.*

The allegations of a bill in chancery are admitted by a demurrer thereto.[1]

Promissory Notes: *Assignment must be signed.*

A written order, without a signature thereto, indorsed upon a promissory

[1] See People *v.* Hatch, *ante*, p. 15.

note, to pay to a certain person named in the order, does not of itself show that such person has any interest in the note.[1]

PARTIES: *To foreclosure bill.*

All the persons entitled to the whole mortgage money must be made parties to a bill of foreclosure.

Where, therefore, a bill was filed to foreclose for the amount due upon two of the three notes secured by a mortgage, the third not yet due, being held by a third party other than complainant, it was *held* that the holder of the third note was a necessary party.

APPEAL from Circuit Court of *Ford* county.

The facts are sufficiently stated by the court.

E. S. Terry and *L. Weldon* for appellant. *A. E. & O. F. Harmon* for appellee.

*BECKWITH, J. This was a bill in chancery to foreclose [*285] a mortgage executed by Philip Myers and wife to Squire Cunningham to secure the payment of three promissory notes of Myers to Cunningham, dated September 1, 1859: one for $300, payable in one year with interest; one for $355.78, payable in two years with interest, and the other for $194.22, payable three years from date with interest at ten per cent., payable half yearly in advance. The bill alleges that the first note should have been for $350, but was drawn for $300 by mistake, and that the complainant is the assignee of the first and second notes, which are as exhibits made a part of the bill. Upon the back of the first note there are two orders without signature; one in favor of David Patent and the other in favor of Solomon Wilson. Upon the same note there is an indorsement of it to the complainant. The bill was filed November 15, 1861, before the third note became due, and it prays that an account may be taken of the amount due upon the first and second notes, and a decree for payment of the same and a sale of the mortgaged premises. *There is no allegation in the bill [*286] that the third note has been paid or in any manner satisfied or discharged. The defendant, Myers, interposed a demurrer specifically alleging that Patent, Wilson and Cunningham

[1] See Herring *v.* Woodhull, 29 Ill., 92; Walker *v.* Krebaum, 67 id. 252.

were necessary parties, which was overruled and a decree rendered for the amount due upon the first and second notes. The bill alleges that the sums specified in these two notes are due to the complainant. The allegations of the bill are admitted by the demurrer. The notes were in the complainant's possession under apparently valid assignments, and the orders without signature upon the back of the first note, do not of themselves show that Patent and Wilson had any interest therein. The defendant by his demurrer admits that they have no interest in the notes. In this respect we think the demurrer was correctly overruled. But it appears from the bill that Cunningham, as the holder of the third note, was jointly interested with the complainant in the debt secured by the mortgage, and it is a well settled rule that all the persons entitled to the whole mortgage money must be made parties to a bill of foreclosure. 2 Barb. Ch. Pr. 174; 1 Dan. Ch. Pr. 260; Story's Eq. Pl. § 201.

The decree of the court below must therefore be reversed, and the cause remanded.

Decree reversed.

Wilmerth Hawes *v.* Abraham Hawes.

Chancery Pleading: *Time and place in bill for divorce.*

Where in a bill for a divorce on the ground of adultery, the adultery was alleged to have been committed in 1860, in the county of Vermillion, with one Augustus Leseure, it was *held* that so far as the venue was concerned, the allegation was sufficiently definite; that the time might have been more specific, but being alleged to have been committed before the commencement of the suit, it was sufficient.

Amendment: *Of sheriff's return after error brought.*

Where after transcript of the record filed in the Supreme Court, upon which error was assigned that the summons appeared to have been served before the date of its issue, and after service of the *scire facias* from the Supreme Court, the defendant in error, complainant below, by motion in the court below procured the allowance of an amendment of the return of the summons by the sheriff, showing that it was in fact served after the date of its issue, and brought such amendment before the Supreme Court by supplemental record: ***Held,*** that the error was thereby cured.[1]

[1]Toledo, P. & W. R'w'y Co. *v.* Butler, 53 Ill., 323.

CHANCERY PRACTICE: *Preserving the evidence in the record in divorce cases.*[1]
It is not necessary in a proceeding for a divorce, when the bill is taken for confessed, that the oral proof or evidence on which the court acted, should be preserved in the record; it is sufficient that the record shows proof was heard sustaining the allegations of the bill.

ERROR to Circuit Court of *Vermillion* county.

Bill for a divorce filed by defendant in error against plaintiff in error.

In this cause after the plaintiff in error had filed a transcript of the record in the appellate court, upon which error was assigned that the summons appeared to have been served before the date of its issue, and after the service of *scire facias* from the Supreme Court upon defendant in error (complainant below), the defendant in error by motion in the court below procured the allowance of an amendment of the return of the summons by the sheriff, showing when it was in fact served, and brought such amendment up to the Supreme Court by supplemental record.

The remaining errors assigned are sufficiently stated by the court.

Moore & Greene for appellant. *L. Weldon*, for the appellee.

BREESE, J. The errors assigned on this record are [288] that the bill is too vague and indefinite; that the writ appears to have been served before the date of its issue, and that the court passed the decree without hearing proof, and because the evidence, if any was taken, is not preserved in the record.

The bill was in chancery for a divorce, and alleges the adultery to have been committed in 1860, in the county of Vermillion, and at sundry times since, with one Agustus Leseure. So far *as the venue is concerned, that is [*289] sufficiently definite. In an indictment for murder it would be only necessary to allege that the felonious act was done in the county. The time might have been more specific, but it is alleged that it was before the commencement of the suit.

[1]See Waugh *v.* Robbins, *ante*, 181; Mason *v.* Bair, *ante*, 194; Moore *v.* Titman, *post*, 358.

The supplemental record shows that the date of the return of the summons should have been February 4th, and not January 4th, and it was so amended by the sheriff who served it.

The record shows that the bill was taken for confessed, and the cause submitted on the bill and "oral proof," and the court finds the facts, as charged, to be true. We have repeatedly decided that it is not necessary in a proceeding for a divorce, when the bill is taken for confessed, that the oral proof or evidence on which the court acted should be preserved in the record; it is sufficient that the record shows proof was heard sustaining the allegations of the bill. *Shillinger* v. *Shillinger*, 14 Ill. 147; *Davis* v. *Davis*, 30 id. 180.

There being no errors apparent to us in this record, the decree must be affirmed.

Decree affirmed.

Illinois Central Railroad Company *v.* Elijah W. Swearingen.

Railroads: *Duty as to fencing, release of by landowner.*

Under the act of 1855 (Scates' Comp. 953), which imposes upon railroad companies the duty of erecting and maintaining fences along their roads, but permits them by contract with the owner of the adjoining land, to absolve themselves from its performance by agreement with the owner that he shall assume it,—this duty is not transferred from the company to the landowner, simply because the company employs him as their agent to construct the fence. The statute only contemplates the release of the company when the duty is assumed by the landowner.

Same: *Diligence in repairing fence.*

Where such fence has been sufficient, and from accident or wrong over which the road has no control, it becomes insufficient to turn stock, the railroad company has a reasonable time within which to repair its fence. It is not required that the company should have a patrol at all times, night and day, passing along its road to see the condition of the fence. If this is done daily, and it shall at once, when informed of its insufficient condition, make the necessary repairs, it should not be held liable for damage to stock done while the fence is temporarily out of repair.[1] Illinois Cent. R. R. Co. *v* .Dickerson, 27 Ill., 55, approved.

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[1]S. C. 47 Ill., 206; Chicago & N. W. R'w'y Co. *v.* Barrie, 55 id., 226.

SAME.

The road must be held to a high degree of diligence in the performance of this duty, but not to an impossible or unreasonable extent.[1] (In Illinois Cent. R. R. Co. *v.* Dickerson, 27 Ill. 55, reasonable diligence is said to be all the law requires.)

ACTIONS: *Case against railroads for killing stock, a transitory action; act of* 1853.

An action on the case against a railroad for killing stock escaping upon its track, by reason of the company's failure to keep the adjoining fence in repair, is transitory and not local, either by the common law or the statute. The act of 1853 (Sess. Laws, 65), only relates to actions at law or suits in chancery, where service could not be had by summons, in which cases it authorized publication instead of actual service. The 6th section of that act confined the bringing of such suits to the county in which the cause of action occurred. This is the scope of that act, which was not intended to apply to cases where service could be had.

APPEAL from Circuit Court of *De Witt* county.

Action on the case brought in De Witt county by defendant in error against plaintiff in error for running over with its trains and killing three of plaintiff's horses, which, as was alleged, by reason of the non-repair of the company's fences, had escaped from their pasture adjoining the road, upon the company's track, one of them being killed in McLean and the others in De Witt county.

The pleadings are sufficiently stated by the court.

The horses were killed, as it appears, one on Saturday night and the others the next Monday morning. The fence, through which they escaped was in proper repair Saturday forenoon, and when found broken on Monday, was repaired temporarily with the pieces thereof, and about a week thereafter with new materials.

The instructions asked by the defendant and referred to in the opinion are as follows:

"(4.) That the defendant, after they have built a good and sufficient fence through a farm, and it is blown down, burnt down, or thrown down by trespassers, the defendants have a reasonable time to repair their fence, and that they are not responsible for any damages which may ensue until such reasonable time has elapsed.

[1]See note 1 *supra.*

"(5.) That if the jury believe from the evidence that the railroad had a good fence on the Saturday, at 11½ o'clock A. M., before horses were killed, and that it was a good and sufficient fence on Monday morning next afterwards, and that the defendant's agent, whose duty it was, saw this fence at both of said times above specified, that is evidence tending to show that defendant used due diligence.

"(6.) That if the jury believe from the evidence that defendant had a good and sufficient fence on Saturday, September 11, 1860, and that it was broken down by trespassers, or burned down or blown down without fault of defendant, and that Swearingen's horse got through this fence before the defendants had a reasonable time to repair the fence, then they will find for defendant.

"(7.) The court instruct the jury that the plaintiff can only recover for stock killed in this action in De Witt county."

The assignments of error are sufficiently stated by the court.

Moore & Greene, for appellant. *L. Weldon*, for appellee.

[*292] *WALKER, C. J. It is insisted that appellee was not entitled to recover because he averred in his declaration that he had not, as the proprietor of the lands, erected, or agreed to erect, the fence required by the act of 1855 (Scates' Comp. 953), when the proof shows that he did erect the fence. It also appears that the company fully admitted and recognized their liability to erect and maintain this fence, when they employed appellee, for them and with their materials furnished for the purpose, to erect the fence, and for which they paid him the sum agreed between them. Is this such an agreement as the statute contemplates shall release the road from its liability and impose it upon the owner of the adjoining land? We [*293] think not. The act imposes the duty upon the *company, but at the same time permits them, by contract with the owner, to absolve themselves from its performance, by agreement with the owner that he shall assume it.

It cannot be imagined that it was the intention of the law makers to transfer this duty from the company to the land own-

er, simply because the company employed him as their agent or servant to construct the fence. The statute only contemplates the release of the company when the duty is assumed by the land owner, and in this case it is perfectly apparent that when he was employed to build this fence he did not intend, nor did either party suppose, that he was taking upon himself such a duty. It might as well be contended that because a hand in the employment of the company under their direction, and in discharging their duty, had built the fence, and afterwards became the owner, that the duty was transferred from the company to him. It is not probable that it ever occurred to appellee that it could be imagined that he had assumed this duty, until he heard it claimed on the trial below, or to the company and its agents until they began to prepare for the defense of this suit. The pleas of appellant, to which demurrers were sustained, only relied upon this fact as a defense, and were, therefore, insufficient, and the demurrers were properly sustained to them.

It is likewise insisted that the court erred in refusing to give appellant's last four instructions. The first of which asserts that the company, having built a good and sufficient fence, if it was blown down or thrown down by trespassers, and loss thereby ensues, before a reasonable time had elapsed for its repair, that the company are not responsible for damages thus occasioned. This instruction, like the sixth, asserts that where the fence has been sufficient, and from accident or wrong over which the road has no control, it becomes insufficient to turn stock, they have a reasonable time within which to repair their fence. This is manifestly true, as it is not required that the company should have a patrol at all times, night and day, passing along their road to see the condition of the fence. If this is done daily, and they shall at once, when informed of its insufficient condition, make the necessary repairs, they should not be held liable. *This was the rule adopted in [*294] the case of *The Central Railroad Co.* v. *Dickerson*, 27 Ill. 55, and the instructions numbered four and six should have been given.

Under these instructions, it would have been for the jury to consider, in the light of all the circumstances appearing in the case, whether reasonable care had been used to keep up the fence. Or if it had been injured, reasonable efforts had been used to repair the same. They, as practical men, must determine this question. And the road must be held to a high degree of diligence in the performance of this duty, but not to an impossible or unreasonable extent.

Whilst the fifth instruction stated the law correctly, it would have been better had it have been qualified so as to inform the jury, that while the evidence tended to prove due diligence, it was not conclusive. Properly understood by the jury, it is free from objection; but if they understood that it could not be rebutted by other evidence, or that they could not weigh it as other evidence, then it would mislead, and would have been improper.

The seventh instruction was properly refused. This action is transitory, and not local, either by the common law or the statute. The act of 1853 (Sess. Laws, p. 65) only relates to actions at law or suits in chancery, where service could not be had by summons. It, in such cases, authorized publication instead of actual service. And the sixth section of that act confined the bringing of such suits to the county in which the cause of action accrued. This is the scope of that act. It was not intended to apply to cases where service could be had. The judgment of the court below must be reversed, and the cause remanded.

Judgment reversed.

Andrew Christy *v.* Lucy Ogle's Executors.

Covenant against Incumbrances: *How broken.*

Where a devisee of land conveys the same in fee by deed containing a covenant against incumbrances, and as to a life estate in the premises, the grantor's interest is, under the will, inalienable, this life estate is an incumbrance subsisting in the grantor against the deed, and the covenant is broken instantly.

FAILURE OF CONSIDERATION: *Note given for land.*

Where a note is given in consideration of the conveyance of the entire estate in land in fee, the conveyance containing a covenant against incumbrances, if the land is incumbered by an inalienable life estate in the grantor, there is a failure of consideration to the extent of the value of such life estate.

RECOUPMENT: *Of damages on breach of covenant against incumbrances.*

Or perhaps to state the case more accurately, if there has been a breach of a covenant against incumbrances in the deed for which the note was given, then the maker of the note has a right to recoup the amount of the damages which he has sustained by reason of such breach, which are the value of the estate for the time during which he was kept out of the enjoyment by reason of the incumbrance.[1]

SAME: *Of taxes paid.*

The taxes paid by him previous to the time when he obtained possession of the land, should also be allowed.

SET-OFF: *Of costs.*

The costs incurred by the maker of a note given for land in the prosecution of an unsuccessful lawsuit against a third party for the recovery of the estate, cannot be set off against the note in an action thereon.

APPEAL from Circuit Court of *St Clair* county.

Assumpsit by the executors of Lucy Ogle, deceased, against A. Christy, upon a certain written instrument, which is as follows:

"$3,500. BELLEVILLE, June 12, A. D. 1854.

"Four years after date I promise to pay Lucy Ogle, or order, three thousand five hundred dollars on condition that she, by her last will and testament, devise to me the real estate situate in St. Clair county, which is described in a certain deed by her to me, bearing date June 12, A. D. 1854.

"A. CHRISTY."

The remaining facts are sufficiently stated by the court.

J. Baker, for appellant. *Underwood & Noetling*, for appellee.

*CATON, C. J.[2] The deed for which it is stipulated [*297]

[1] Schuchmann *v.* Knoebel, 27 Ill., 175; McDowell *v.* Milroy, 69 id., 498.

[2] This is the only opinion delivered by Caton, C. J., at the January Term, 1864, he having resigned January 9, of that year.

this note was given, is in the usual form, and contains a covenant of general warranty, and also a covenant against incumbrances. The deed professes to convey the premises presently, and is absolute. The grantor held the premises under the will of her late husband. And we have decided under the peculiar wording of that will that she had an inalienable life estate in the premises, which did not pass by the deed;[1] and it is now insisted by the maker of the note, who is the grantee in the deed, that the consideration of the note has failed to the extent of the value of such life estate.

Two questions arise here: First, was the covenant against incumbrances broken? and second, if it was, then was there a partial failure of the consideration? It seems impossible to answer either of these questions in the negative. The deed purported to take effect immediately. It professed to convey an estate immediately, and would have conveyed it had the grantor been capable of conveying such an estate. This she did not and could not do. As to the life estate, the deed was as inoperative as if it had been vested in a third person. Had this life estate been vested in a third person it would have been an incumbrance, and the covenant against incumbrances [*298] would *have been broken instantly. Upon this point there is, and can be, no controversy. Is it any different because she held the life estate? Clearly not. The effect and consequences must be precisely the same in either case. Here was the incumbrance of the life estate still subsisting against the deed, which she did not and could not convey by it, and so, necessarily, the covenant was broken. Counsel made the point, though he could have been hardly serious in it, that the covenant was inoperative until the deed took effect as a conveyance, which he said was at the time of the death of the grantor. These very covenants were inserted to meet the contingency, that the deed might not take effect according to its purport. Suppose a deed should never take effect, as a conveyance, for the want of

[1]See Pulliam *v.* Ogle, 27 Ill., 189; Pulliam *v.* Christy, 19 id. 331; Christy *v.* Pulliam, 17 id. 59, for the previous litigation concerning the premises.

an estate in the grantor upon which it could operate, would it be contended that the covenants could never take effect?

If the consideration of the note was the entire estate, and it was incumbered by this life estate, then the consideration has failed to the value of the estate which he did not and could not enjoy; or, perhaps, to state the case more accurately, if there has been a breach of a covenant in the deed for which the note was given, then the defendant has a right to recoup the amount of the damages which he has sustained by reason of such breach. That was the value of the estate for the time during which he was kept out of the enjoyment by reason of the incumbrance.

The costs incurred in the prosecution of an unsuccessful lawsuit for the recovery of the estate, of course, cannot be set off against the note. It has no connection with it.

The taxes paid previous to the time when the defendant obtained possession should also be allowed.

The judgment is reversed and the cause remanded.

Judgment reversed.

Edward L. Henrickson *v.* Harry Reinback and Louis Reinback.

Arbitration and Award: *Award liberally construed.*[1]

An award being the judgment of a tribunal of the parties' own choosing, should be liberally construed to sustain it, if it does not lack two essential properties, namely, certainty and finality.

Same: *Finality.*

An award to be valid must make a final disposition of the matters submitted.[2]

Same: *Degree of certainty required.*

This certainty is judged of only according to a common intent, consistent with fair and reasonable presumption.[3]

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[1]See Gerrish *v.* Ayers, 3 Scam., 245; Ross *v.* Watt, 16 Ill., 99; Merritt *v.* Merritt, 11 id., 565; McDonald *v.* Arnout, 14 id., 58; Root *v.* Renwick, 15 id., 461.

[2]See Ingraham *v.* Whitmore, 75 Ill., 24.

[3]See Whittemore *v.* Moran, 14 Ill., 392; Howard *v.* Babcock, 21 id., 259; Burrows *v.* Guthrie, 61 id., 70; Ingraham *v.* Whitmore, 75 id., 24.

SAME:

Courts will not suffer an award to be disturbed, which is so far certain as from the nature of the subject of it, could be reasonably expected; and when the directions of the arbitrators, though not decidedly certain upon the face of the award, can with tolerable ease, be reduced to a certainty, as by reference to any written document, or the inspection of any particular thing, house or land, an award will not be on such ground impeachable.

SAME: *Certainty and finality.*

Where the parties to an arbitration were doing business as partners under two firm names, and, upon a submission of disputes respecting their accounts with, and interest in said firms, an award was made that one of said partners pay to said firms a specified sum, and that the parties be entitled to the proceeds of all uncollected and outstanding assets of said firms in equal amounts, and that the costs of arbitration be equally divided between the parties, it was *held* that this award fulfilled the conditions of certainty to a common intent, and finality.

PARTNERSHIP: *Presumption as to interest of the partners.*

The presumption, in the absence of evidence to the contrary, is that partners are equally interested in the proceeds of the partnership.

PLEADING: *General demurrer to whole declaration where one assignment of breach is good.*

The several breaches assigned in a declaration upon a penal bond are analagous to several counts in a declaration, and if one count or one breach be good, a general demurrer to the whole declaration will not be sustained.[1]

SAME: *Assignment of breach in action upon arbitration bond*

An assignment of a breach in an action upon an arbitration bond, which negatives the requirements of the award, will be good.

ERROR to Circuit Court of *Morgan* County.

Debt by Edward L. Henrickson against Harry Reinback, as principal, and Louis Reinback, as surety, upon an arbitration bond in the penalty of $5,000, given upon a submission by Edward L. Henrickson and Harry Reinback of disputes respecting their accounts with and interest in the firms Henrickson &

[1]Lusk *v.* Cook, Breese, 84; Cowles *v.* Litchfield, 2 Scam. 356; Israel *v.* Reynolds, 11 Ill. 218; Governor *v.* Ridgway, 12 id. 14; Walton *v.* Stevenson, 14 id. 77; Anderson *v.* Richards, 22 id. 217; Tomlin *v.* T & P. R. R. Co., 23 id. 429; Barber *v.* Whitney, 29 id. 439; Stacey *v.* Baker, 1 Scam. 417; Prather *v.* Vineyard, 4 Gilm. 40; Stout *v.* Whitney, 12 Ill. 218; Nickerson *v.* Sheldon, 33 id. 372; Farmers & M. Ins. Co. *v.* Wenz, 63 id. 116.

Reinback, and Reinback & Van Winkle, under which names they were engaged in business as partners. The award made upon said submission was, that said Harry Reinback do account to and pay to the firms of Henrickson & Reinback and Reinback & Van Winkle, the sum of $1,296.90, and that the parties be entitled to the proceeds of all uncollected and outstanding assets of said firms in equal amounts, and that the cost of the arbitration be equally divided between the parties."

The breaches assigned were as follows:—"Yet the said Harry Reinback, though often requested, has not nor would account and pay to the aforesaid firms of Henrickson & Reinback and Reinback & Van Winkle, nor account to and pay to said plaintiff the aforesaid sum of $1,296.90, nor any part thereof, and hath not nor would give nor pay to said plaintiff, nor allow him to receive one-half of the proceeds of all uncollected and out-standing assets of said firms of Henrickson & Reinback and Reinback and Van Winkle, nor any part thereof, and hath not nor would pay one-half the costs of the aforesaid arbitration, nor any part thereof, but so to do the said defendant, Harry Reinback, hath hitherto wholly neglected and refused, and still doth refuse; and the said plaintiff further avers, that the said defendant, Harry Reinback, since the making the aforesaid award, and in violation of the terms thereof, has, of the proceeds of the assets of the said firms, outstanding and uncollected at the time of the making said award, received and converted to his own use a large amount, to wit, the sum of $2,000; and the said plaintiff further avers, that since the making of the aforesaid award, and by reason of the failure of the said Harry Reinback to keep and perform the same, he, the said plaintiff, has been forced and obliged to pay, upon demands against the aforesaid firms of Henrickson & Reinback and Reinback & Van Winkle, a large sum and large sums of money, amounting in the aggregate to the sum of, to wit, $2,000, by reason whereof," etc.

A demurrer was sustained to the plaintiff's declaration, assigning as grounds of demurrer, the uncertainty of said award; the claim of plaintiff to the exclusive right to an account for

and payment of said sum of $1,296.90; and the plaintiff's claim of $2,000 damages, besides said sum of $1,296.90.

H. B. McClure and *C. Epler*, for plaintiff in error. *D. A. & T. W. Smith*, for defendant in error.

[*302] *Breese, J. It is, we believe, a principle generally admitted, that an award, being the judgment of a tribunal of the parties' own choosing, should be liberally construed to sustain it, if it does not lack two essential properties, namely, certainty and finality. This certainty is judged of only according to a common intent, consistent with fair and reasonable presumption. *Purdy* v. *Delavan*, 1 Caines (N. Y.), 304.

It is also held that courts will not suffer an award to be disturbed which is so far certain as from the nature of the subject of it could be reasonably expected; and when the directions of the arbitrators, though not decidedly certain upon the face of the award, can, with tolerable ease, be reduced to a certainty, as by reference to any written document, or the inspection of any particular thing, house or land, an award will not be on such ground impeachable. Caldwell on Arbitration, 251.

[303*] *As to finality, the award must make a final disposition of the matters submitted.

The declaration in this case avers that the parties to the arbitration were partners in trade, and differences having arisen between them, an arbitration was agreed upon, and the bond in suit executed, which was lost. By the loss of the bond, the terms of the submission are not before us, but from the allegations in the declaration we can readily understand that the partnership rights and liabilities were alone submitted to the arbitrators. Does the award settle those rights and liabilites with sufficient certainty? The arbitrators, after hearing the testimony, and upon due consideration thereof, award that Reinback account to and pay to the firms of Henrickson & Reinback, and Reinback & Van Winkle, the sum of twelve hundred and ninety-six $\frac{90}{100}$ dollars; that the parties be entitled to the proceeds of all uncollected and outstanding assets of

those firms in equal amounts, and that the cost of arbitration be equally divided between the parties.

We think this award fulfills the conditions of certainty to a common intent, and finality. It was a difference among partners which was submitted, and the presumption is, each was entitled to equal portions of the proceeds—that they were equally interested. *Farr* v. *Johnson*, 25 Ill. 522. In that case the award made reference to an account, and it was held the account might be examined to sustain the award.

Now, the presumption being that, as partners, they were equally entitled to the proceeds of the partnership, and in equal parts to the amount found to be due from Reinback, the award is relieved from all uncertainty.

It is also final, because the award settles forever their respective rights and claims, and can be pleaded to any action brought for a settlement and account. That is the purport and clear intendment of the finding of the arbitrators.

As to the pleadings, the several breaches assigned are analogous to several counts in a declaration, and if one count be good a general demurrer will not be sustained. The breaches for the non-payment of twelve hundred and ninety-six $\frac{90}{100}$ dollars, *for non-payment of the costs, and of one- [*304] half of the moneys collected by Reinback, are well assigned. They negative the requirements of the award. The first breach is, in substance, the defendant did not pay the $1,296.90 to the firms, nor did he pay it to the plaintiff, or any part of it.

We are of opinion judgment on the demurrer should have been for the plaintiff. The Circuit Court having adjudged differently, the judgment must be reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

Judgment reversed.

The Great Western Railroad Company of 1859 *v.* James Geddis.

Negligence: *Liability of railroad companies for.*

Railroad companies are liable for injuries to persons or property when willfully done or resulting from gross neglect of duty. To free itself from liability the company in case of injury, must discharge every duty imposed by law. It must use all reasonable means to prevent injury, and its omission will create liability, unless the injured party has, by his negligence, contributed in some degree to the injury.

Same: *Omission to ring bell or sound whistle—running over stock.*

Where an animal was killed by an engine at a road crossing, and at a place where the statute required a bell to be rung or a whistle sounded, neither of which was done, and the jury find that the animal was killed by reason of a failure to perform this duty, the railroad company will be liable therefor.[1]

Same: *Omission to ring bell &c.; injury to a person.*

Where a railroad company fails to ring a bell or sound a whistle when approaching a road crossing, and there is a collision with a person, there can be no doubt that it results from this neglect. In such a case the sound of the bell or of the whistle would give sufficient and timely notice of the approaching danger, and in case of its omission, the presumption would be that the person would have regarded the warning, if it had been given as required by the statute; and in such a case of omission, the company would be held responsible for all resulting damages.

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[1]See Chicago & R. I. R. R. Co. *v.* Hutchins, 34 Ill. 108; Toledo, W. & W. R. R. Co. *v.* Fergusson, 42 id. 449; Toledo, P. & W. R'w'y Co. *v.* Foster, 43 id. 415.

To the point that the failure to ring the bell or sound the whistle of an engine is not of itself such negligence as to warrant a recovery for damage to stock upon the track; but that the injury must be shown to be the result of such failure, see Ind. & St. L. R. R. Co. *v.* Blackman, 63 Ill., 117; Chicago & A. R. R. Co. *v.* McDaniels, id. 122; Toledo, W. & W. R'w'y Co. *v.* Jones, 76 id. 311.

See also, Chicago, B. & Q. R. R. Co. *v.* Bradfield, 63 Ill. 220; Chicago, B & Q. R. R. *v.* VanPatten, 64 id. 510; Peoria, P. & J. R. R. Co. *v.* Siltman, 67, id. 72; Chicago, B. & Q. R. R. Co. *v.* Lee, 68 id. 576; Chicago, B. & Q. R. R. Co. *v.* Notzki, 66 id. 455; Ill. Cent. R. R. Co. *v.* Benton, 69 id. 174.

See, however, Chicago & A. R. R. Co. *v.* Elmore, 67 id. 176, and cases cited in note 1 *post*, 307.

The Great Western Railroad Company *v.* Geddis.

APPEAL from Circuit Court of *Macon* County.

Case brought by defendant in error against plaintiff in error for negligence in omitting to ring a bell or sound a whistle before coming to a road crossing, whereby plaintiff's mare was run over by defendant's locomotive and killed. The judgment below was for the plaintiff.

Nelson and *Roby*, for appellant. *B. F. Smith* for the appellee.

*WALKER, C. J. The record in this case shows that ap- [*305]
pellee's mare was killed by an engine on appellant's road, at a public road crossing. There was some conflict as to whether the bell was rung for the distance required by the law, before reaching the road crossing at which the animal was killed. A witness, standing at the time near the place, and having a full view of the occurrence, and looking at the train as it passed, is positive that the bell was not rung when the crossing was reached. A witness who was on the train at the time, is of the same opinion, and another person, *also on the [*306]
train, is of the opinion the bell was not rung at any time, and believes that if it had been, he would have heard it. On the contrary, the fireman swears that he commenced ringing the bell more than eighty rods before coming to the highway.

The question as to the weight of testimony, and which was to be believed and which to be rejected, was fairly before the jury, and they have given credence to appellee's witnesses. In doing so, we are not prepared to say that they were not warranted in that conclusion. These witnesses all saw the animal, and their attention was given particularly to the occurrence, and we may reasonably conclude, that if the bell had been rung, they must have heard it. The fact that two of them observed that the bell began to ring after the engine had struck the mare, strengthens this supposition. Had the witnesses not given their especial attention to the occurrence, it might have been doubtful, but it is not probable that they could have been mistaken under the circumstances. We are, therefore, of the opinion, that the jury

were warranted in believing appellee's witnesses, rather than those of appellants.

The animal was killed at a road crossing, and at a place where the statute requires a bell to be rung or a whistle sounded. There is no pretense that the latter was done, and the jury have found that the bell was not rung. Then does the neglect of a duty specifically and positively required by the statute create a liability for damages sustained at the time it was neglected in connection with the business in which it is required? Had there been a collision with a person instead of an animal, there would be no doubt that it resulted from this neglect. In such a case the sound of the bell or of the whistle would give sufficient and timely notice of the approaching danger, and in case of its omission, the presumption would be that the person would have regarded the warning, if it had been given as required by the statute, and in such a case of omission, the company would be held responsible for all resulting damages.

The statute has declared that in addition to a fine of fifty dollars, the company shall be liable for all damages sustained by reason of such neglect. In this case the jury have [*307] found *that the animal was killed by reason of a failure to perform this duty. This, like all other questions of fact, was for their determination, and we are not prepared to say that such was not the case.

But be that as it may, such bodies are liable for injuries to persons or property when willfully done or resulting from gross neglect of duty. To free themselves from liability, the company, in case of injury, must discharge every duty imposed by law. They must use all reasonable means to prevent injury, and its omission will create liability unless the injured party has, by his negligence, contributed in some degree to the injury. In this case appellants failed to do what was expressly required by the statute, and while running the train, and with their engine, the animal was killed when they were in gross neglect of duty. And it must be held to create a liability for this injury.[1] The

[1] Ill. Cent. R. R. Co. *v.* Gillis, 68 Ill., 317; Galena, &c., U. R. R. Co. *v.*

duty imposed is easily performed, is not attended with increased expense, and it has been required by the law for wise and salutary purposes, and the courts have no power to dispense with its performance.

It was, however, insisted that this case falls within the rule adopted in the cases of *Illinois Central Railroad* v. *Phelps*, 29 Ill., 447, and *Illinois Central Railroad* v. *Goodwin*, 30 Ill., 117. On examination it will be seen that there is a broad difference between these cases and the one under consideration. It was there held that the company was under no obligation to ring a bell or sound a whistle at the place where the injury occurred. Nor in those cases did any omission of duty appear. In this case, on the contrary, the company failed to comply with a positive duty imposed by statute. Those cases depend upon different principles, and do not control this, which is within the rule that gross negligence creates a liability for damages resulting from injury.

No error is perceived in this record for which the judgment of the court below should be reversed, and it is therefore affirmed.

Judgment affirmed.

Jacob Knoebel *v.* Frederick Kircher.

Special Plea: *Amounting to general issue bad on demurrer.*[1]

A special plea, which is simply a traverse of a portion of the facts which the plaintiff is bound to prove in order to establish a *prima facie* right to recover under his declaration, is bad on demurrer as amounting to the general issue.

Guaranty: *Release of one of several makers of note.*

Where, by the mutual consent of all the parties to a promissory note, including the guarantor, the name of one of the makers is erased from the note, the original guaranty of payment of the note will remain in full force, without any new promise on the part of the guarantor.

Loomis, 13 id., 549; St. Louis, I. & C. R. R. Co. *v.* Terhune, 50 id., 151; Chicago & A. R. R. Co. *v.* Elmore, 67 id., 176; Ind. & St. L. R. R. Co. *v.* Peyton, 76 id., 340.

[1]See Cook *v.* Scott, 1 Gilm., 333; Abrams *v.* Pomeroy, 13 Ill., 133; Strader *v.* Snyder, 67 id., 404; White *v.* Clayes, 32 id., 325.

Knoebel *v.* Kircher.

PLEADING: *Count upon guaranty; surplusage.*

Where a count upon a guaranty of payment of a promissory note set forth the making of the note, the guaranty of the same by the defendant, the erasure of the name of one of the makers of the note therefrom by the mutual consent of all the parties, and then averred that the defendant in consideration of such erasure verbally promised that he would guarantee the payment of the note, and that his original guaranty of the same should remain in full force, it was held that the last allegation was clearly surplusage, and that a plea that this verbal promise was not in writing was bad for immateriality.

SAME: *Plea must not relate to surplusage.*

A plea should not answer an averment of the declaration which is mere surplusage, and if it does, it will be bad for immateriality.

ESTOPPEL: *In pais; declarations.*

Estoppels *in pais* are to prevent injuries from acts and representations which have been acted upon. A declaration to constitute an estoppel must be one the injurious effects of which might and ought to have been foreseen. It must be acted upon in good faith, and the person acting upon it must have changed his situation so that injury would result to him, if the party making the declaration were allowed to retract it.[1]

SAME: *Of guarantor to retract consent to discharge of one of two makers.*

Where the two makers of a promissory note went together to the guarantor of payment thereof and stated to him that one of them desired to be discharged from liability thereon, and asked him if he was willing that the name of such maker should be erased from the note; and the guarantor declared to them that he was perfectly willing it should be done; and after obtaining his assent the maker who was not to be discharged went immediately to the payee and informed him of what had transpired between the guarantor and the makers, and thereupon the payee caused the name of the other maker to be erased from the note: *Held*, in an action upon the guaranty, that while the discharge of such maker without the consent of the guarantor would have discharged the guarantor from liability, it did not necessarily follow that the consent necessary to continue his liability must be formally made the object of a contract between him and the holder of the note, or that it should be communicated to the latter by the former in person or by his authorized agent. It being evident that the guarantor knew that his declarations made to the makers, would be communicated to the payee, and they having been made with a view of influencing the payee's action and having a tendency

[1]See Baker *v.* Pratt, 15 Ill., 568; Smith *v.* Newton, 38 id., 230; The People *v.* Brown, 67 id., 435 (estoppel not applicable to the State); Winchell *v.* Edwards, 57 id., 41; Tucker *v.* Conwell, 67 id., 552.

As to the application of the doctrine of estoppel to infants and married women, see Ewell's Lead. Cases, 219 *et seq.*, 310 *et seq.*

to mislead him, and he having been in fact misled by them, in case they should not be held a sufficient expression of the guarantor's assent to continue his liability, the guarantor ought not to be permitted to assert that his own deliberate declarations were not a sufficient authority for action, to the injury of one who, under such circumstances, acted upon them in good faith.

WITNESSES: *Interest.*[1]

The maker of a promissory note is a competent witness for the payee in an action to charge the guarantor.

APPEAL from Circuit Court of *St. Clair* county.

Assumpsit by appellee against appellant upon a guaranty by appellant, of a joint and several promissory note, originally executed by George Bressler and Charles Fischer to the appellee, but from which Fischer's name was erased, which note was indorsed as follows: "I guarantee the payment of the within note. Jacob Knoebel."

The third count of plaintiff's declaration was as follows:— "And for that whereas also heretofore, to wit, on the 6th day of December, 1858, at Belleville, to wit, at the county of St. Clair aforesaid, in consideration of $1,500, then loaned to them by plaintiff, one George Bressler and one Charles Fischer made their certain other promissory note in writing of that date, by which they then and there jointly and severally promised to pay, twelve months after the date thereof, to the said plaintiff or order, the sum of fifteen hundred dollars, for borrowed money, with interest at the rate of ten per cent. per annum, for value received, and the said defendant, then and there, and for the consideration aforesaid, promised the said plaintiff to guarantee the payment of the said promissory note, and the said defendant then and there did guarantee the payment of the said promissory note, by writing his name on the back of the said promissory note, and then and there delivering the same, with his name so written on the back thereof, to the plaintiff. And afterwards, to wit, on the day and year aforesaid, at, &c., aforesaid, by agreement of the plaintiff, the de-

[1]Interest is no longer a disqualification; but only goes to the credibility of the witness. Rev. Stat. 1874, 488.

fendant, said Bressler and said Fischer, the name of said Fischer was struck out and erased from said note, and the defendant, in consideration (among other things) of the prejudice thereby accruing to the plaintiff, and of the benefit thereby accruing to said Fischer, then and there agreed with the plaintiff, before and at the time said Fischer's name was so struck out and erased from said note, that he, the defendant, would still continue to guarantee the payment of said note as fully and effectually as in the said original instance. And the said defendant then and there, for the consideration last aforesaid, adopted his signature upon said note aforesaid, and agreed with plaintiff that it should stand as a renewed guarantee upon said note, after the erasure of said Fischer's name therefrom, by means whereof the defendant then and there became liable to pay the sum of money specified in the said note, according to the tenor and effect thereof, and being so liable, the defendant afterwards, to wit, on the day and year aforesaid, at, &c., aforesaid, undertoook and faithfully promised the plaintiff to pay him the money specified in said note, according to the tenor and effect thereof, when thereunto afterwards requested."

The fourth count besides stating the guarranty in substance, as aforesaid, states that Fischer's name was by mutual consent of plaintiff, defendant, Bressler and Fischer, erased from the note, and that defendant, in consideration of said erasure, verbally promised the plaintiff to guarantee the payment of the note, and agreed with plaintiff that said original guaranty should remain in full effect.

The fifth count states the guaranty in substance, as aforesaid, and that the defendant in consideration that plaintiff at defendant's request (with Bressler's consent) consented that Fischer's name be so erased, promised the plaintiff, to continue to guarantee the payment of the note according to its tenor and effect, and by virtue of said original guaranty.

The defendant's second plea was in substance, that after the execution of the note by Bressler and Fischer, and after defendant's putting his name thereon and its delivery to plaintiff,

the plaintiff caused Fischer's name to be erased, and discharged him, Fischer, from liability thereon, without defendant's knowledge or authority.

The remaining pleadings and the facts appearing in evidence are sufficiently stated by the court.

The judgment below was for plaintiff, and the errors assigned relate to the sustaining of demurrers to defendant's second and third pleas, and to the competency of Bressler as a witness for plaintiff.

W. H. Underwood and *George Trumbull* for appellant.
J. Baker for appellee.

* Beckwith, J. This was an action of assumpsit upon [313*] a guaranty of the appellant, of a promissory note made by George Bressler and Charles Fischer, payable to the appellee, but from which Fischer's name had been erased by the consent of all parties. The declaration contained five counts, the first two of which were abandoned. The appellant pleaded the general issue, accompanied with an affidavit of its truth and two special pleas. To the second and third pleas a special demurrer was interposed and sustained. The second plea is simply a traverse of a portion of the facts which the plaintiff was bound to prove, in order to establish a *prima facie* right to recover under his declaration. It is well settled that such a plea is bad as amounting to the general issue. The third plea is, that the promise alleged in the fourth count of the declaration was not in writing, and therefore void. The demurrer to this plea was properly sustained. The count sets forth all the facts necessary to constitute a legal liability on the part of the defendant: the making of the note, the guaranty of the same by the defendant, the erasure of Fischer's name therefrom by the *mutual* consent of all parties, and then avers that the defendant, in consideration of the erasure of Fischer's name, verbally promised that he *would guaranty the payment of the note; and that his [*314] original guaranty of the same should remain in full force. The last allegation is clearly surplusage, and the plea that this verbal promise was not in writing, was bad for immateriality. On

the trial in the court below, it appeared in evidence that Bressler and Fischer, the makers of the note, were copartners, and, as such, had borrowed the money of appellee for which the note was given. The appellant guaranteed the payment of the note before the money was obtained or the note delivered. Afterwards a controversy arose between Bressler and Fischer, and they dissolved their copartnership and made a settlement of their business, by which Bressler was to retain the assets of the firm and pay the note in question; and as a practical mode of discharging Fischer from his liability thereon, it was proposed that his signature should be erased. They understood that it was necessary for them to obtain the consent of appellant in order to have the erasure made, and they went together to see him for that purpose. They stated to appellant that they had dissolved their copartnership and settled their business; that Bressler was to retain the assets and pay the note, and that Fischer desired to be discharged from liability thereon, and asked appellant if he was willing that Fischer's name should be erased from the note. The appellant declared to them that he was perfectly willing it should be done. It is evident that appellant knew the object and purpose of requesting his assent, and he gave it with a full knowledge that it would or might be acted upon. After obtaining the assent of appellant, Bressler went immediately to appellee and informed him of what had transpired between appellant, Fischer and himself; and thereupon appellee caused Fischer's name to be erased from the note. It was urged that the erasure of Fischer's name from the note rendered it a new contract between appellee and Bressler, and that appellant could not be held liable thereon without a new contract to that effect between appellee and himself. It is undoubtedly true that the discharge of Fischer, without appellant's consent, would have discharged him from liability, but it does not necessarily follow that the consent necessary to [*315] * continue his liability must be formally made the subject of a contract between him and the holder of the note, or that it should be communicated to the latter by the former, in person, or by his authorized agent. It is not necessary for us to define

the precise nature of the contract after the erasure of Fischer's name therefrom. He was undoubtedly discharged from liability by that act, and the sole question is, whether appellant was also discharged. It is not contended that appellant would have been discharged if he had expressly authorized Bressler to assent to the erasure of Fischer's name, but in the absence of such authority it is claimed that appellee acted at his peril. It is evident that appellant knew that his declarations made to Bressler and Fischer would be communicated to appellee. They were made with a view of influencing his action, and had a tendency to mislead him, and he was in fact misled by them, if they were not a sufficient expression of appellant's assent to continue his liability. The law requires of every man circumspection and good faith when he makes declarations upon which he knows others may act to their prejudice; and appellant was not at liberty by his declarations to induce appellee to believe that he consented to Fischer's discharge, when he must have known that such belief would influence the conduct of appellee, if he was not willing the belief thus created should be acted upon. He ought not now to be permitted to assert that his own deliberate declarations were not a sufficient authority for action, to the injury of those who, under such circumstances, acted upon them in good faith. Estoppels *in pais* are to prevent injuries from acts and representations which have been acted upon. A declaration to constitute an estoppel must be one the injurious influence of which might and ought to have been foreseen. It must be acted upon in good faith, and the person acting upon it must have changed his situation so that injury would result to him if the party making the declaration were allowed to retract it. In the present case, we think that the injurious influence of the declarations of appellant were foreseen by him when he made them. They were acted upon by the appellee, and injury would * result to him [*316] were appellant allowed to retract. Upon the trial in the court below, Bressler was called as a witness by appellee. If he had any interest in the suit it was against the party calling him. The witness was liable, at all events, for the amount of

the debt, and to him it was not material whether that liability was to appellee or appellant. If the party by whom he was called was successful, there might have been a further liability against him for costs, but not otherwise; and we know of no rule of law which prevents the payee of a note from calling the maker to charge the guarantor.

Judgment affirmed.

Francis Keys, impleaded, &c., *v.* Oakley V. Test.

Estoppel in pais: *To set up title to land.*

Where the owner of land sells the same to another by parol, who pays value therefor, goes into possession and makes improvements, and such purchaser subsequently, with the knowledge and at the instance of the original owner — who, at the time, disclaims all title to it in himself and says he has sold it to such purchaser — sells the same to a third party, such original owner will by his acts and declarations, and in the absence of fraud, be estopped from thereafter setting up his title.[1]

Statute of Frauds: *Part performance.*

Where land is sold by parol for a valuable consideration paid, possession taken under the sale, and valuable and lasting improvements made, this is sufficient to take the case out of the operation of the Statute of Frauds, and entitles the purchaser by parol to a conveyance.[2]

Specific Performance: *Parol contract to convey land.*

The *bona fide* assignee for value of one who is entitled to a specific performance of a parol contract to convey land, by reason of part performance, is in the same position as his assignor.

Notice: *Possession of land is notice of claim thereto.*

The open and notorious possession of land is sufficient to put subsequent purchasers on inquiry, and operates as notice to them of a claim to the land.[3]

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[1]See Knoebel *v.* Kircher, *ante*, 308; Cochran *v.* Harrow, 22 Ill., 345; Smith *v.* Newton, 38 id., 230; Winchell *v.* Edwards, 57 id., 41; Tucker *v.* Conwell, 67 id., 552; Anderson *v.* Armstead, 69 id., 452.

[2]See Mason *v.* Bair, *ante*, 194.

[3]See Dyer *v.* Martin, 4 Scam., 147; Brown *v.* Gaffney, 28 Ill., 150; Williams *v.* Brown, 14 id., 201; Davis *v.* Hopkins, 15 id., 519; Prettyman *v.* Wilkey, 19 id., 241; Truesdale *v.* Ford. 37 id., 210; Reeves *v.* Ayers, 38 id., 418; DeWolf *v.* Pratt, 42 id., 200; Warren *v.* Richmond, 53 id., 52; Doolittle *v.* Cook, 75 id., 354; Franz *v.* Orton, id., 100; Smith *v.* Jackson, 76 id., 254.

BONA FIDE PURCHASER: *Consideration.*

A subsequent purchaser setting up a claim to be a *bona fide* purchaser. must allege and show a consideration actually paid.[1]

APPEAL from Circuit Court of *Adams* County.

Bill in equity filed by appellee against Nimrod B. McPherson, Charles W. Troy and Francis Keys, for the purpose of enforcing a conveyance by said Keys to complainant of the land in question, and to restrain proceedings to recover possession thereof. The nature of complainant's case is sufficiently stated by the court. The defendant, Keys, claimed to be a *bona fide* purchaser from Troy, to whom, as was alleged, Nimrod B. McPherson conveyed the premises for a valuable consideration, by a deed duly recorded. Said Keys also alleged the Statute of Frauds as a defense by reason of the sale by Nimrod B. McPherson to Benjamin McPherson having been by parol.

The decree below was for the complainant.

Grimshaw & Williams, for appellant. *Skinner & Marsh*, for appellee.

*BREESE, J. The evidence in this record establishes [*319] beyond a reasonable doubt the fact of a *bona fide* sale for a valuable consideration paid, and possession immediately taken thereof, of the farm of Nimrod McPherson, to his father Benjamin McPherson, and of the subsequent sale by Benjamin, with the assent and partial procurement of Nimrod, to one Hummer, who paid full value for it, and went into possession, claiming it as his own by this purchase. Hummer remained on the premises, so claiming, about eighteen months, and sold it for value to the complainant Test, who went into possession and made valuable and lasting improvements thereon. The sale by Benjamin to Hummer was with the knowledge, and, from the testimony of Brewer, at the instance of Nimrod, who

[1]See Moshier *v.* Knox College, 32 Ill., 155; Metropolitan Bank *v.* Godfrey, 23 Ill., 606; Kiser *v.* Hueston, 38 id., 252; DeWolf *v.* Pratt, 42 id., 210; Powell *v.* Jeffries, 4 Scam., 390. Otherwise as to personal property, O'Neil *v.* Orr 4 id., 1.

at the time disclaimed all title to it in himself, and said he had sold it to his father Benjamin. In equity he is estopped from setting up his title now. He has by his own declarations and acts induced the purchase from Benjamin, and he cannot now in the absence of all *fraud*, be allowed to allege against them.

It is very clear Benjamin McPherson could have compelled a deed under this proof from Nimrod, and his *bona fide* assignee for value ought to be in the same position. We are satisfied, from the testimony of the two Matthews, Brewer and Boggess, that here was a fair sale for a valuable consideration of this property, possession taken and lasting improvements made which, under repeated decisions of this court, are sufficient to take the case, and do take it out of the operation of the statute of frauds and perjuries, however much we may regret courts have reached such a conclusion. *Ramsey* v. *Liston*, 25 Ill. 114; *Stevens* v. *Wheeler*, id. 300; *Blunt* v. *Tomlin*, 27 id. 93. The open and notorious possession by the complainant of this land was sufficient to put subsequent purchasers on in-
[*320] quiry, and *operates as notice to them of a claim to the land. The case of *Doyle* v. *Teas*, 4 Scam. 202, is full on this point.

The purchasers under Nimrod, after his sale to his father of the premises, claim to be *bona fide* purchasers. To make them such they should allege and show a consideration actually paid. This they have not done. *Brown* v. *Welch*, 18 Ill. 343.

We perceive no error in the decree, and therefore affirm the same.

Decree affirmed.

George Owen *v.* William Thomas.

Lost Deeds: *Proof of execution of.*[1]

Where oral evidence of the contents of a lost deed was admitted, and the witness stated that, as agent of the grantors named in the deed, he sold the premises to R., and delivered to him a deed of a certain date

[1]See Mariner *v.* Saunders, 5 Gilm., 113.

for the land, purporting to convey the fee simple title and properly acknowledged; that R. took possession of the land, and cut a considerable quantity of timber on the same; but the witness did not state by whom the deed was signed as grantors, whether they signed it in person or by attorney, or whether it was in their handwriting, or even that he knew their signatures: *Held* that its execution was not sufficiently proved. The opinion of the witness that the deed purported to convey a fee simple title was not sufficient to dispense with other evidence of its validity.

ONUS PROBANDI: *In action on covenant of warranty.*[1]

Where in an action of covenant for a breach of covenants of warranty, the breaches assigned were that defendant had not the title to the land attempted to be conveyed; that the legal and paramount title at the time the deed was made, was in R. and that plaintiff could not obtain possession of the land; and the defendant pleaded that at that time the fee simple was not in R. but was in defendant, and that he had effectually conveyed the same to the plaintiff: *Held*, that defendant by his plea took upon himself the burthen of proof that he conveyed the fee simple title to the plaintiff.

COVENANT OF WARRANTY: *No action lies upon, till eviction.*

The grantee of land in possession under a deed with a covenant of warranty, cannot, till evicted by legal proceedings, or until he yields to a paramount title, maintain an action upon such covenant.[2]

AGREED CASE from Circuit Court of *Morgan* county:

Action of covenant by Thomas against Owen, all the matters connected with which necessary to the full understanding of the case are sufficiently stated by the Court.

D. A. & T. W. Smith, for George Owen. *William Thomas*, in person.

*WALKER, C. J. This was an action of covenant, on [*325] a deed containing covenants for title, for a quarter section of land. The breaches assigned are, that defendant and his wife neither had title to the land attempted to be conveyed; that at the time the deed was made the legal title was in James Robertson and others, whose title and right to possession was superior and paramount to that conveyed by defendant, and that

[1]See Wheeler *v.* Reed, 36 Ill., 81; Baker *v.* Hunt, 40 id., 264.

[2]See Beebe *v.* Swartwout, 3 Gilm., 79; Bostwick *v.* Williams, 36 Ill. 65.

plaintiff could not obtain possession of the land. Defendant filed a plea that, at the time the conveyance was made, the fee simple was not in any of the persons named in the declaration but was in the defendant, and that he and his wife had well, truly and effectually conveyed the same to plaintiff. On this plea issue was joined, and a trial was had, resulting in a judgment in favor of plaintiff below, to reverse which, defendant below brings the case to this court, and assigns various errors.

The whole controversy in this case arises upon the proof of the loss and contents of a deed alleged to have been executed by James Robertson and others to one Joseph Rafferty. It appears from the evidence that the son of the defendant below on two different occasions went to Carlinville and made search in the recorder's office for the deed or its entry upon the record, but was unable to find it. He also saw the father-in-law and brother-in-law of Rafferty, from whom he learned that Rafferty had gone south, and was at one time in the southern army, but whether he was alive they were not informed. Plaintiff in error filed an affidavit in which he states substantially the [*326] same facts in *reference to the search for the deed as testified to by his son, and that there are no means known to him by which the deed or a certified copy of the record of the same can be adduced in evidence on the trial. On this preliminary evidence of the search, Chestnut was admitted as a witness and permitted to testify in reference to the contents of the deed. He stated that previous to the 21st of May, 1853, he, as agent of Robertson and the other grantors named in the deed, sold the premises to Rafferty; that subsequently he delivered a deed of that date for the land, purporting to convey the fee simple title, properly acknowledged; that Camp, Robertson, Boyd, Newbold and Taylor were trustees of the United States Bank of Pennsylvania; that Rafferty took possession of the land, and cut a considerable quantity of timber on the same.

Does this evidence show sufficient search for the deed? It seems to be abundantly proved that it was not recorded in the proper office. But beyond this no other search was made. It

is true, that the father-in-law and brother-in-law were seen, and inquiry was made of them as to where Rafferty might be found. But upon learning that he was in Texas, no further effort was made to communicate with him and to procure the deed, or obtain information as to where it could be found. It is true that owing to the insurrectionary conditon of Texas a messenger could not have gone to him.

Even if this shows a proper search, to authorize the introduction of oral evidence of the contents of the deed, its execution is not sufficiently proved. The witness gives the date of the instrument, but fails to state by whom it was signed as grantors, whether they signed it in person or by attorney, or whether it was in their handwriting, or even that he knew their signatures. This, at least, must be shown to establish the fact that it was a valid, operative instrument. And in this case that fact does not appear. Nor in his opinion that it purported to convey a fee simple title sufficient to dispense with other evidence of its validity.

Plaintiff in error conveyed with a covenant of warranty, and by his plea, he took upon himself the burthen of proof, that he *conveyed the fee simple title to defendant in [*327] error. By failing to produce, or prove the contents of the deed from the trustees of the bank to Rafferty, his grantor, he has failed to sustain his plea, and to show that he has answered his covenant. If defendant in error were compelled to prosecute or defend his title, we think the evidence in reference to this deed would be insufficient to establish title in him. Plaintiff in error has not kept and performed his covenant unless he has conveyed such a title as will hold the property.

If the grantee had been in possession, until evicted by legal proceedings, or until he might yield to a paramount title, this action could not be maintained. There is no plea denying the averment in the declaration that defendant was unable to obtain possession by reason of the insufficiency of the title, and that he was not in possession. Nor does the evidence show any possession. The issue was made and tried whether plaintiff in error had conveyed the title to the land by his deed to defendant

in error. No error is perceived in this record, and the judgment of the court below is affirmed.

Judgment affirmed.

Cyrus H. McCormick *v.* George H. Evans, Jr.

Payment: *Presumption of, from lapse of time.*[1]

Where more than twenty years have elapsed from the time when money becomes due under a contract for the sale of land, the law presumes its payment.

Equitable Title: *A defense under Statute of Limitations.*

B., the owner of the patent title to land, contracted to convey the same to P. & W. upon payment of a certain sum, part of which was to be paid down, and the remainder to be paid in one year from date. P. deeded to W., and W. to G. W. also contracted to furnish G. with a clear chain of patent title from the patentee to himself, including a deed from B. to W. & P., and P.'s deed to W. of the land in question, described, however, in said contract as, being in range *two* west instead of *three* west, where it was actually situated. G. assigned this contract to E., who went into possession claiming title thereto, and resided thereon over seven years: *Held*, That, when aided by the presumption of payment of the money due from P. & W. to B. upon their contract of purchase, and since the mistake in description of the premises was one which a court of equity could correct upon a proper application, E. had under the assignment from G. such an equitable title as would have been enforced in a court of equity, such an one as constituted a defense under the Statute of Limitations.

Acknowledgment: *In other States, when sufficient proof of execution.*

Where a certified copy of a contract to make title to land, from the recorder's office, purported to have been acknowledged before the first judge of Schenectady county, New York; but it did not appear that he was authorized by the laws of New York to take acknowledgments of deeds, or that he was a judge before whom the laws of this State ever authorized such acknowledgments to be taken, and it did not appear that he was a judge of a Supreme, Superior, or Circuit Court, or of a court of record: *Held*, That the execution of the contract was not sufficiently proved.

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[1]See Langworthy's Heirs *v.* Baker, 23 Ill., 484.

EVIDENCE: *Acknowledgment necessary to render certified copies from the record, admissible as.*[1]

A contract to make title to land may be recorded without any acknowledgment or proof of execution whatever, but a certified copy of the record is not evidence until the instrument is acknowledged or proved as the law requires.

ERROR to Circuit Court of *Adams* County.

Ejectment by plaintiff in error against defendant in error, the facts relating to which are sufficiently stated by the court.

Skinner & Marsh, for plaintiff in error. *Grimshaw & Williams*, for defendant in error.

*BECKWITH, J. This was an action of ejectment for [*328] an undivided one-half of the northwest quarter of section two, township five, south of range three west, in Pike county.

On the trial, the plaintiff adduced a regular chain of title from the United States to John Broderick, and from John Broderick to himself. The defendant set up a connected title in equity, *deducible of record, from John Brod- [*329] erick to George Evans, *Senior*, and his seven years' possession by actual residence thereon, under whom the defendant claimed possession. In support of this defense, was adduced in evidence an agreement between John Broderick and Esau Pickerell and John M. Walker, dated the 19th July, 1838, by which instrument Broderick agreed to convey to Pickerkell and Walker the land in question, together with other lands, upon the payment of the sum of five hundred and fourteen dollars; two hundred and fourteen dollars of which was to be paid upon the execution of the contract, and the remaining three hundred dollars in one year from that date; which agreement was recorded the 9th November, 1838.

The defendant also introduced in evidence a deed from Pickerell to Walker, dated 12th October, 1840; and a deed from Walker to one Philip Greeno, dated 11th February, 1846. The

[1]See Reed *v.* Kemp, 16 Ill., 446.

defendant further read in evidence a contract between Walker and Greeno, dated 18th June, 1850, by which Walker agreed to furnish Greeno with a clear chain of patent title from the patentee to himself, including a deed from Broderick to Walker and Pickerell, and Pickerell's deed to Walker of the northwest quarter of section two, township five south, in range *two* west; and an assignment of this contract by Greeno to George Evans, *Senior*, without date. It did not distinctly appear at what time this assignment was delivered; but it appeared that George Evans, *Senior*, had, since the year 1850, resided upon the premises, and claimed title thereto under the title papers read in evidence by the defendant. At the commencement of this suit, more than twenty years had elapsed from the time when the money became due from Pickerel and Walker to Broderick, under the agreement of 19th July, 1838; and after that lapse of time, the law presumes its payment. 1 Phil. Ev. 676.

The title set up by the defendant, aided by the presumption of payment of the money due from Pickerell and Walker to Broderick, would be regular to Philip Greeno, if sufficiently proven; but the contract between him and Walker, under which George Evans, *Senior*, derives title, describes a quarter section in range *two* west, instead of range *three* [*330] west; and the contract *between Broderick and Pickerel and Walker was not sufficiently proven. It is insisted by the defendant that the description, "two west," in the contract between Walker and Greeno, was a clerical mistake, and although the evidence presented by the record is not, as it would seem, as satisfactory as it might have been, we should not be disposed to disturb the finding of the court below on that ground. The mistake is one which a court of equity would correct upon a proper application. We are of the opinion that George Evans, *Senior*, had, under the assignment from Greeno, such an equitable title as would have been enforced in a court of equity; such an one as constituted a defense under our statute of limitations; and that the possession from the time the assignment was delivered was such as the statute requires.

We are, however, obliged to reverse the judgment of the

court below, for the reason that the contract between Broderick and Pickerel and Walker was not sufficiently proven. A certified copy of it from the recorder's office was read in evidence; from which, it purported to have been acknowledged before the first judge of Schenectady county, in the State of New York. It does not appear that he was authorized by the laws of New York to take acknowledgments of deeds, or that he was a judge before whom our laws ever authorized such acknowledgments to be taken. It does not appear that he was a judge of a Supreme, Superior, or Circuit Court, or of a court of record. The contract might be recorded without any acknowledgment or proof of execution whatever, but a certified copy of the record was not evidence until the instrument was acknowledged or proven as the law requires.

The judgment is reversed and the cause remanded.

Judgment reversed.

David Gochenour *v.* Albert Mowry.

Decree of Foreclosure: *Not to be personal against subsequent incumbrancers.*[1]

A decree for the foreclosure of a mortgage against the mortgagor and subsequent incumbrancers, should not be personal for the payment of the amount found due, against all the defendants, but the personal decree should be restricted to the mortgagor, the real debtor.

But where it was decreed that the mortgage be foreclosed and that "the defendants" pay the amount found due within twenty days, and in default thereof that the premises be sold, the decree was regarded as in effect an alternative one, and not personal as to subsequent incumbrancers; that, if the money was not paid by the time limited, then the premises should be sold, giving the option to the subsequent incumbrancers or claimants to pay the money or suffer the property to go to sale.

Estoppel: *Inuring of subsequently acquired title.*

Where a mortgage contains covenants of general warranty, a title subsequently acquired by the mortgagor will inure by estoppel to the benefit of the mortgagee, or his assignee.

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[1]See Snell *v.* Stanley, 58 Ill. 31.

SAME:

A subsequent purchaser from the mortgagor under his after acquired title is also estopped, if he had notice.

And this is so even though the mortgagor procures such title to be conveyed directly to such purchaser, and not intermediately, through the mortgagor.

ERROR to Circuit Court of *Hancock* county.

Bill in equity filed by defendant in error against J. B. Barr, the plaintiff in error, and others, to foreclose a certain mortgage, containing full covenants, executed by said Barr to one Allen, and duly recorded, and by said Allen, together with the note which it secured, after maturity assigned to complainant. Barr, after executing said mortgage, purchased from one Cassingham, another title to the land mortgaged and in fraud of the mortgage procured the same to be conveyed by Cassingham to Gochenour, who took with notice, and, as was alleged, paid nothing for such title. The Court below found Gochenour's interest subject to the mortgage, and decreed a foreclosure, payment by the defendants within twenty days, of the amount due, and in default of payment, a sale of the premises.

W. H. Manier for plaintiff in error. *Warren & Wheat* and *G. Edmunds, Jr.*, for defendant in error.

[*333] *BREESE, J. The record in this case presents these questions: First, does an after acquired title by a mortgagor inure to the benefit of the mortgagee who has taken his mortgage with covenants of warranty; and second, is the decree in the case in proper form.

As to the second point, it is insisted the decree is for the payment of the money due by the mortgagors, by all the defendants, in other words that it is a decree against the defendants personally, for which an action of debt would lie. If this was so, the decree would be modified so as to restrict it to the mortgagor, the real debtor. But we regard the decree as, in effect, an alternative one; that if the money is not paid by the time limited, then the premises shall be sold, giving the option to

the subsequent incumbrancers or claimants to pay the money or suffer the property to go to sale.

Upon the other point, we understand the doctrine to be, if a conveyance be with general warranty, the subsequent title acquired by the grantor will inure by estoppel to the benefit of the grantee, and this for the purpose of avoiding circuity of action.[1] *McCracken* v. *Wright*, 14 Johns., 194; *Kiny* v. *Gilson*, 32 Ill., 348. And a subsequent purchaser from the mortgagor under his after acquired title is also estopped, if he had notice. *Somes, Administrator*, v. *Skinner*, 3 Pick., 58; *Wark* v. *Willard*, 13 N. H., 389; *Jones et al.* v. *King*, 25 Ill., 388.

In this case the plaintiff in error had notice of Barr's deed with covenants of warranty to Allen, and he held the title purchased of Cassingham by Barr, and paid for with Barr's money, as *the mere trustee of Barr. Mowry, the [*334] assignee of Allen of the mortgage, must be entitled to the benefits of all the covenants contained in Barr's deed to him, and Barr, and those claiming under him or for him, are estopped by his covenants. It was a fair contract between Barr and Allen, which they had a right to make, and Allen's assignee is, in equity, entitled to the benefit of it.

The judgment is affirmed.

Judgment affirmed.

Perley B. Whipple *et al. v.* Abram F. Pope.

Assignments for the Benefit of Creditors: *Construction of.*

In the construction of assignments for the benefit of creditors, the court should not give an unreasonable construction to the language to render the instrument void. It cannot be presumed that it was the design of the grantor to defraud his creditors. Such an intention must appear from the deed itself or from other evidence. And when two constructions may be given to the language, the court should adopt that which will uphold rather than defeat the instrument. Since assignments are allowed to be made, they must have applied to them the same reason-

[1] Jones *v.* King, 25 Ill., 383.

able and fair rules of construction which are adopted in ascertaining the meaning of other instruments.

SAME: *Authorizing sales on credit.*

Where the language in a deed of trust for the benefit of creditors by necessary intendment confers the power to sell on credit, it avoids the deed, as tending to hinder and delay creditors.[1]

SAME:

Where the provision in question authorized the trustees "to collect and dispose of said property and effects on such terms and in such manner as they, the said trustees, may think best for the interest of the parties concerned:"[2] *Held*, that this did not authorize a sale on credit, nor render the deed invalid. In the connection in which employed the language "on such terms and in such manner," mean that the trustees might sell at private or public sale, in packages, or by the single article, in large or small quantities, by sample or on examination; or that they might bring on the sale at a longer or shorter period from the time of the assignment.

SAME: *Clauses defining responsibility of assignees.*

Where the deed contained a clause providing that the assignees should be "responsible only for their actual benefits and willful or neglectful defaults," it was *held* that, as this language only expressed the legal liability of the assignees, it did not invalidate the deed.

SAME:

A provision which imposes duties beyond, or only those the law will require, does not affect the validity of such an instrument; but anything which dispenses with the observance of those required by the law will not be sanctioned.

ERROR to Circuit Court of *Macoupin* County.

Bill in equity filed by defendant in error against plaintiffs in error for the purpose of setting aside a certain deed of trust, the provisions of which in question, are stated by the court. The decree below was for complainant.

Levi Davis, for plaintiffs in error. *Hay & Cullom*, for defendant in error.

[*336] *WALKER, C. J. This bill was filed for the purpose of setting aside a deed of trust transferring property for

[1]See Pierce *v.* Brewster, 32 Ill., 268. Such a clause is good as between assignor and assignee. Chickering *v.* Raymond, 15 id. 364.

[2]See Pierce *v.* Brewster, (*supra*); Sackett *v.* Mansfield, 26 Ill., 21.

the benefit of creditors. It is insisted that the deed contains provisions which, as to the creditors, render it void. The first of the provisions is this: "To collect and dispose of said property and effects on such terms and in such manner as they, the said trustees, may think best for the interest of the parties concerned." If this language in a deed of trust by necessary intendment confers the power to sell on credit, then it avoids the deed, as tending to hinder and delay creditors. The language employed, and objected to, in this deed of assignment, and discussed and passed upon in the case of *Kellogg* v. *Slauson*, 1 Kern. 302, in the Court of Appeals of New York, was almost identical with this, and yet the deed was held sufficient. The courts of that State have, in their more recent decisions, shown but little favor to such instruments, which renders the authority the more valuable. Some of their lower courts have announced a contrary rule, but this decision of the court of last resort in that State must be taken as the law of that jurisdiction.

Other courts have adopted the same rule. *Nye* v. *Vanhuson*, 6 Mich. 346. In the case of *Kellogg* v. *Slauson* the court decide that authority to sell on such "terms and conditions" as they might deem for the best interests of the parties concerned, did *not authorize a sale on credit. These cases [*337] seem to be conclusive of this. Nor have we been referred to any case, decided by a court of last resort, which announces a different rule, or held that such language avoids the deed.

When this language is considered, it does not seem necessarily to imply a power to sell on credit. The language "on such terms and manner" has a more comprehensive meaning. They, in the connection in which they are here employed, mean that the trustees might sell at private or public sale, in packages or by the single article, in large or small quantities, by sample or on examination. Or that they might bring on the sale at a longer or shorter period from the time of the assignment. As the law prohibits a person making an assignment for the benefit of his creditors from authorizing a sale on credit, we should not give an unreasonable construction to the language to render the

instrument void. We cannot presume that it was the design of the grantor to defraud his creditors. Such an intention must appear from the deed itself, or from other evidence. And when two constructions may be given to the language, we should adopt that which will uphold rather than defeat the instrument. Fraud is not inferred except from evidence, and to defeat this deed we would have to infer a fraudulent design without testimony. Since assignments are allowed to be made they must have applied to them the same reasonable and fair rules of construction which are adopted in ascertaining the meaning of other instruments. We will not presume that the parties designed to violate the law, and it does not appear to have been done by this provision.

The other clause, which it is insisted vitiates the deed, is that the assignees shall be "responsible only for their actual benefits and willful or neglectful defaults." This language only expresses the legal liability of the assignees. If the deed had contained no provision in reference to their duties, the law would have imposed precisely the same and no more. Every abuse of the trust reposed must be either willful or negligent. No other kind of default could occur. A provision which imposes duties beyond, or only those the law will require, [*338] does not affect the *validity of such an instrument; but anything which dispenses with the observance of those required by the law will not be sanctioned. But this provision does not have that effect. It neither increases nor diminishes the liability of the trustees, and was, therefore, not improper. We are unable to perceive that the deed of assignment is for any reason fraudulent or void, and the decree of the court below must be reversed and the cause remanded.

Decree reversed.

Breese, J. I consider the provision in this deed, that "the assignees shall be responsible only for actual benefits and willful or neglectful defaults," takes the case out of the operation of the principle decided in *McIntire* v. *Benson*, 20 Ill., 500, and *Robinson* v. *Nye*, 21 id., 592. In those cases the

stipulations were for responsibility only against *willful* defaults, and the deeds were held fraudulent and void.

In *Brown* v. *Parkhurst*, 24 id., 257, we held that a deed of assignment which authorized a sale of the property, either at public or private sale, on a credit, was fraudulent and void, as tending to delay creditors.

In *Sackett* v. *Mansfield*, 26 id., 21, the stipulation in the deed was like the one in this case, and then it was held that such a stipulation contained nothing more than the law would imply, and that it could not be construed to authorize a sale on credit. We say in that case that the true test of the validity of such deeds is, that wherever the law would imply a discretion, such discretion may be given in the deed. To the same effect is *Finley* v. *Dickerson et al.*, 29 id., 9.

I concur in reversing the decree.

James Brown, impleaded, &c., *v.* Johan Metz.

Presumption: *Of identity of person from identity of name.*

Where a conveyance of land is made to one bearing the same name as a prior owner and grantor thereof, in the absence of evidence to the contrary, he will be presumed to be the same person.

Covenants of Warranty: *Run with the land.*[1]

A covenant of warranty passes with the seizin of the land until a breach thereof. And a conveyance by the covenantee in trust to secure a debt, and a sale and conveyance by the trustee to a third party will pass the covenant from the grantor to the trustee and from the trustee to the purchaser at the trust sale.

Same: *Extinguished by reconveyance to covenantor before breach.*

But where A conveyed land with a general covenant of warranty, to B, who executed a deed of trust to secure the purchase money to C, who under the power of sale therein contained upon default in payment and before a breach of A's covenant of warranty, sold and conveyed the premises to A, who by quit claim deed again conveyed the same to B, it was *held*, that A, having before any breach of his covenant become re-invested with the seizin which he conveyed and which he covenanted to warrant and defend, his obligation in this regard was extinguished.

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[1]See Claycomb *v.* Munger, 51, Ill., 373; Wead *v.* Larkin, 54, id., 489.

The estate granted by A ceased upon the reconveyance, and the covenant attendant upon the estate, and only co-extensive with that, was extinguished when the estate ceased.

SAME: *Not revived by subsequent conveyance.*

A subsequent conveyance of the premises by a covenantor who, before any breach of his covenant, has become reinvested with the seizin which he previously conveyed and covenanted to warrant, does not revive his obligation upon such covenant. There is in such case no liability resting upon him, unless there is a new warranty or covenants, whereby he enters into a new obligation.

ASSIGNMENT: *Effect of to obligor.*

The law does not allow persons to become assignees of their own obligations, and when an obligation is transferred to an obligor by an instrument in the form of an assignment, instead of taking effect as such, it operates as an extinction of the obligor's liability.

APPEAL from Circuit Court of *Adams* county.

Action of covenant by appellee against appellant and others. The nature of the case is sufficiently stated by the court.

Skinner & Marsh, for appellant. *Browning & Bushnell*, for appellee.

[*342] *BECKWITH, J. On the 26th day of March, 1857, James Brown, James R. W. Hinchman and John S. Loomis conveyed two lots of land to Anton J. Lubbe by deed containing a general covenant of warranty. On the same day Lubbe conveyed the premises, in fee, to Newton Flagg in trust to secure the payment of Lubbe's two promissory notes for $1,076, payable to Brown, Hinchman and Loomis, with a power of sale in default of payment. Under this power of sale, Flagg, on the 23d of March, 1859, sold and conveyed the premises to James Brown; who, on the 28th of the same month, conveyed the same by quitclaim deed to Anton J. Lubbe; who, on the 30th of April, 1862, conveyed the same by quitclaim deed to the appellee. On the 13th of October, 1856, Hinchman and Loomis executed a mortgage of the premises to Calvin H. Chadsey; and the appellee alleges that he has been evicted by the foreclosure of this mortgage. The suit is brought by the appellee against Brown, Hinchman and Loomis for the recovery of damages,

sustained by an alleged breach of their covenant of warranty occasioned by the eviction. Hinchman and Loomis were not served with process. The covenant of warranty passed with the seizin of the land, from Lubbe to Flagg, and from him to James Brown. The James Brown to whom Flagg conveyed will be presumed to be the person who by that name executed the conveyance to Lubbe. 2 Phil. Ev. 508; *Sewell v. Evans*, 4 Q. B. 626; *Roden v. Hyde*, id. 629; *Simpson v. Dinsmore*, 9 M. & W. 47. The appellant having, before any breach of his covenant, become reinvested with the seizin which he conveyed and which he covenanted to warrant and defend, his obligation in this regard was extinguished. The estate granted by him ceased upon the reconveyance, and the covenant attendant upon the estate, and only co-extensive with that, was extinguished when the estate ceased. The law does not allow persons to become assignees of their own obligations, and when an obligation is transferred to an obligor by an *instrument [*343] in the form of an assignment, instead of taking effect as such it operates as an extinction of the obligor's liability. The liability of a covenantor upon the covenant of warranty now in use is, in many respects, the same that it was under the old charter of warranty, out of which the nature and incidents of the present covenant are derived. The acts which extinguished the liability of the warrantor under the old charter of warranty, should have the same effect in regard to the present covenant of that description. The rule in regard to the extinction of the liability of a covenantor to warrant and defend the title to realty does not differ from that which obtains respecting other obligations.

Notes, bonds, and all obligations, when assigned to the obligor, are extinguished by operation of law. Coke, in his commentaries upon Littleton, says, (*vide* sec. 743): "When the warrantor takes back an estate as large as that which he had made, the warranty is defeated; because he cannot warrant land to himself, nor be an assignee of himself." Littleton and his illustrious commentator give numerous instances of the extinction

of covenants by a reconveyance of the estate to the warrantor. 1 Shep. Touch. 201; Platt on Cov. 585.

The person seized of the estate conveyed, always had the power to release the covenantor, or warrantor, from his liability before the covenant or warranty was broken. As the covenant, or warranty, ran with the land until a breach, the reconveyance of the land before that time to the covenantor, or warrantor, transferred to him the covenant or warranty, without liability upon it to any one. There was no reason for keeping the obligation in force after that time. The covenant was designed to secure an indemnity to the grantee, and to those claiming under him, in case he, or they, were deprived of the estate; and when the estate was reconveyed to the grantor before any loss was sustained, the purpose for which the covenant was used, was consummated. Inasmuch as a formal release could not be executed by the covenantor to himself, the law made a reconveyance (under such circumstances) operate as a release. A subsequent conveyance of the premises did not revive the [*344] obligation. Such *a conveyance was made either with or without warranty or covenants, at the will of the grantor; and there was no liability resting on him, unless there was a new warranty or covenants, whereby he entered into a new obligation. Inasmuch as Hinchman and Loomis are not in court, it is unnecessary to define their rights or liabilities. We are of the opinion that Brown's liability was extinguished; and the judgment against him is reversed and the cause remanded.

Judgment reversed.

Samuel P. Hodgen *v.* Robert B. Latham.

Witnesses. *Interest.*[1]

In an action for corn sold and delivered, the fact that a witness for the plaintiff was at one time the owner of the corn in question, and sold it

[1]Interest is no longer a disqualification, but only goes to the credibility of the witnesses. Rev. Stat. 1874, 488.

to the plaintiff, to whom he was indebted, and by whom he was to be credited with what the plaintiff sold it for, does not render the witness interested in the event of the suit.

PAYMENT: *By banker's draft.*[1]

Where a creditor receives from his debtor a draft drawn by a banker in favor of the creditor, with the understanding that it is accepted in payment only on the condition that it can be made available by him, and such draft is not paid, this does not constitute a payment, notwithstanding the fact that the debtor gives the banker his individual check for such draft, which is charged to him upon the settlement of his bank account.

INSTRUCTIONS: *Must be based on evidence.*

It is not error to refuse an instruction where there is no evidence upon which to base it.[2]

SAME:

It is not an error to refuse an instruction which has no relation to the case.

APPEAL from Circuit Court of *Logan* county.

Assumpsit by Robert B. Latham against Sam'l P. Hodgen, for corn sold and delivered.

The draft of $338.88, referred to by the court, was drawn by Dustin & Music upon Hoffman & Gelpcke, of Chicago, and was made payable to Latham's order. This draft was drawn by Dustin & Music as an accommodation to Hodgen, who represented to them that the sum of $1,000 had been placed by him to their credit with said Hoffman & Gelpcke; and at the time it was drawn Hodgen delivered them his check for $338.88, and also gave Latham another check on Dustin & Music for the remainder of the $1,000, which two checks were, upon the settlement of Hodgen's bank account, charged to Hodgen, and the $1,000 deposited by him with Hoffman& Gelpcke was placed to his credit. The draft for $338.88 was protested for non-payment, and the amount of the other check given Latham was

[1]See, generally, Dedman *v.* Williams, 1 Scam., 154; Magee *v.* Carmach, 13 Ill., 289; Ralston *v.* Wood, 15 id., 159; Smalley *v.* Edey, 19 id., 207; Stevens *v.* Bradley, 22 id., 244; Prettyman *v.* Barnard, 37 id., 105; Leake *v.* Browne, 43 id., 372; Heartt *v.* Rhodes, 66 id., 351; Tucker *v.* Conwell, 67 id., 552; Gage *v.* Lewis, 68 id., 604; Dempster *v.* West, 69 id., 613.

[2]To the point that instructions should not be mere abstract propositions, but must be founded upon evidence, see New England F. & M. Ins. Co. *v.*

never drawn by him, as he had agreed to receive thereon only such funds as could be used by him at Springfield to pay a debt owed by him, which were not furnished. The remaining facts are sufficiently stated by the court.

The court instructed the jury, on behalf of the plaintiff, as follows:

1. "If the jury believe, &c., that the plaintiff sold corn to the defendant, they will find for plaintiff, unless they believe further, from the evidence, that the defendant has paid for the same.

2. "If the jury believe, &c., that the defendant gave a draft or drafts to the plaintiff, or to any one for him, in part or full payment for said corn, and that said draft or drafts were accepted by the plaintiff upon the condition that he could use it or them to pay his debts, then they will find for plaintiff, unless they believe the plaintiff did or could have used said draft or drafts in the payment of his debts; if they further believe that said draft or drafts have been returned or offered to be returned to defendant, and that plaintiff did not receive any money on such draft or drafts."

The defendant requested the court to charge as follows, which was refused:

Wetmore, 32 Ill., 221; Lawrence *v.* Jarvis, id., 305; Wallace *v.* Wren, id., 146; Atkinson *v.* Lester, 1 Scam., 407; Cummings *v.* McKinney, 4 id., 58; Wilcox *v.* Kinzie, 3 id., 218; Nealy *v.* Brown, 1 Gilm., 10; Hessing *v.* McCloskey, 37 Ill., 341; Mason *v.* Jones, 36 id., 212; Chicago & Gt. E. R. R. Co. *v.* Fox, 41 id., 106: Nichols *v.* Mercer, 44 id., 250; Leake *v.* Brown, 43 id., 373: Prescott *v.* Maxwell, 48 id., 82; Hamilton *v.* Singer Manfg. Co., 54 id., 370; Sprague *v.* Hazenwinkle, 53 id., 419; Oxley *v.* Storer, 54 id., 159; Weaver *v.* Rylander, 55 id., 529; Cossitt *v.* Hobbs, 56 id., 231; Holcomb *v.* Davis, 56 id., 413. Means *v.* Lawrence, 61 id., 137; Mitchell *v.* Fond du Lac, 61 id., 174; Toledo, P. & W. R'y Co. *v.* Ingraham, 58 id., 120; St. Louis, A. & T. H. R. R. Co. *v.* Manly, 58 id., 300; Illinois Cent. R. R. Co., *v.* Benton, 69 id., 174; Owend *v.* Murphy, 69 id., 337; American *v.* Rimpert, 75 id., 228; Andreas *v.* Ketcham, 77 id., 377; Reinbach *v.* Crabtree, id., 182; Wenger *v.* Calder, 78 id., 375; Trustees *v.* Misenheimer, id., 22; Nichols *v.* Bradsby, id., 44; Plummer *v.* Rigdon, id., 222; Straus *v.* Minzesheimer, id., 492.

But where there is any evidence, however slight, it is sufficient to sustain an instruction upon the hypothetical case it tends to prove. Chicago *v.* Scholten, 75 Ill., 468.

1. "The court instructs the jury, that if they believe, &c., that Hodgen had deposited money with Hoffman & Gelpcke, to Dustin & Music's credit, that afterwards Hodgen gave Latham checks on Dustin & Music, that these checks went into the bank of Dustin & Music and were charged to Hodgen, then Hodgen should be credited with the amount of said checks in this action.

2. "That if the jury believe, &c., that when Latham took the two checks from Hodgen, on Dustin & Music, as payment of $1,000, if he could get the right kind of currency, and Latham, with this agreement, took the checks, passed them to Dustin & Music, and the checks were charged to Hodgen, that is a payment by Hodgen to Latham of the amount in said checks.

3. "That if the jury believe, &c., that Hodgen deposited with Hoffman & Gelpcke $1,000, to the credit of Dustin & Music, and Dustin & Music gave Hodgen credit for the amount so deposited, then that is a deposit with Dustin & Music, by Hodgen."

*Breese J. This was an action of assumpsit for a [*347] quantity of corn sold and delivered, and verdict and judgment for the plaintiff. The pleas were, the general issue, payment and tender of part. A motion for a new trial and in arrest of judgment was overruled, an appeal taken and the following errors assigned: First. In allowing Wyatt's testimony to go to the jury. Second. In not requiring plaintiff Latham to surrender at the trial certain *checks given [*348] in part payment of the corn. Third. In refusing the instructions asked by defendant. Fourth. In giving the instructions asked by plaintiff. And fifth. In refusing a new trial.

It was objected to Wyatt's testimony that he was an interested witness. Although he was at one time the owner of the corn, and sold it to Latham, and for the value of which Latham was to give him a credit on his indebtedness to him,[1] he was

[1]It appears that he was indebted to Latham at the time the corn was sold by him to Latham, and was to be credited for what Latham got therefor.

not thereby interested in the event of the suit. It made no difference to him how the verdict might go, Latham was bound to give him the credit. In fact, Latham had given him credit for it as Wyatt states. We cannot perceive in what respect he was interested so as to exclude his evidence. The price of the corn was established by the testimony of Ryan.

Upon the second point it is very evident the arrangement made by the defendant through the banking house of Dustin & Music, by which to pay the plaintiff for the corn, was an arrangement in which the defendant was the active participant, the plaintiff being entirely passive, only desirous of procuring such funds from the defendant, by any arrangement he might make, as would pay his own debts. This very check or draft for three hundred and thirty-eight $\frac{88}{100}$ dollars, was taken by the defendant himself to Lacy, to pay a debt plaintiff owed Lacy's client, and was accepted only on the condition that it could be applied in that way. It could not be so applied, and was delivered upon the trial to be canceled. The whole arrangement about the drafts was made by the defendant and for his accommodation, and proved fruitless for the purposes intended. It is very certain plaintiff has not been paid for the corn, nor, in our judgment, does he appear to have done any act or entered into any arrangement which, in law, can or ought to preclude him from recovering the price agreed. The defendant was at liberty to settle his bank account with Dustin & Music as he pleased, without prejudicing the plaintiff's rights.

As to the first instruction asked by defendant, and refused, we think it was correctly disposed of by the court, because it does not follow that the amount of the checks should be [*349] charged *against the plaintiff if they were charged against the defendant at the banking house, as it is not apparent in any part of the testimony that the plaintiff has ever had the benefit of them or any credit for them, or that they ever came to his use. The draft for $338.88 was brought to Lacy by Hodgen himself, he well knowing the understanding and arrangement about them. And so of the second refused instruction, there is no evidence

that plaintiff took the checks at all for any purpose. The arrangement about them was made and consummated with defendant and the bankers, and solely for his accommodation, the plaintiff to have the benefit of them, if they could be made available, and not to be held responsible otherwise. We cannot perceive the relation the third instruction bears to the case, so as to affect the plaintiff. If defendant has these deposits with these banking houses, he can appropriate them.

The instructions given by the court on behalf of the plaintiff were such as the case required, and we approve them. The whole evidence in the case fully supports the verdict, and a new trial was properly refused. The Judgment must be affirmed.

Judgment affirmed.

Matthew McClurken *v.* John E. Detrich and Andrew Bardus.

Wagers upon Result of Elections: *Voting of presidential electors, an election.*

The casting of their votes for President of the United States, by the presidential electors of this state, is an election held under the laws of this State (Rev. Stat. 1845, 214); and a wager upon the result of the electoral vote of this State is a bet upon the result of an election within the meaning of the Statute (Rev. Stat., 1845, 224), and prohibited by the law.[1]

Specific Performance: *Of a wager.*

A Court of equity will not decree the specific performance of a wager on the result of the vote of the presidential electors of this State, such a wager being prohibited by law.

Error to Circuit Court of *Randolph* county.

Bill in equity filed by plaintiff in error against defendants in error, the nature of which is sufficiently stated by the court.

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[1]See Adams *v.* Wooldridge, 3 Scam., 255; Shirley *v.* Howard, 53 Ill., 455; Guyman *v.* Burlingame, 36 id., 201; Merchants' Savings, Loan and Trust Co. *v.* Goodrich, 75 id., 554.

As to betting upon elections held in other States, see Morgan *v.* Pettit, 3 Scam., 529; Smith *v.* Smith, 21 Ill., 244; Gregory *v.* King, 58 id., 169.

J. B. Underwood, for plaintiff in error. *Underwood & Noetling*, for defendants in error.

[*351] *WALKER, C. J. This was a bill filed for the specific performance of a wager on the electoral vote of this State at the presidential election in 1860. The bill alleges, and the answer admits, that Bardus authorized Detrich to assign and transfer to plaintiff in error twenty shares of stock held by Bardus in the "Sparta Steam Flouring Mill Company," in the event that the electoral vote of Illinois should be cast for Abraham Lincoln, for president of the United States, and that on the 4th day of December, 1860, the electoral vote was cast for him. A demand of the transfer of the shares of stock was made and refused. The consideration for the agreement was, that if Stephen A. Douglas received the electoral vote of the State, plaintiff in error was to transfer to Bardus a like number of shares of stock in the same company. On the hearing the court below dismissed the bill, and decreed the payment of the costs by plaintiff in error. He brings the cause to this court, and urges a reversal of that decree.

It will be perceived that the question presented is, whether this wager is prohibited by the statute against betting on elections; and if not, whether it contravenes good morals and sound policy. If it is prohibited by either, then the court must leave the parties where it finds them. It is enacted by the fifty-second section of the act regulating elections (R. S. 224), that if any person shall bet or wager any money or valuable thing upon the result of any election held under the Constitution or laws of this State, or shall so bet or wager upon the number of votes which may be given to any one or more persons at any election held as aforesaid, or upon who will receive the greatest number of votes at any election, such person shall be liable to indictment, and upon conviction shall be fined any sum not exceeding one thousand dollars.

[*352] *This was clearly a bet, on one side, that Mr. Lincoln would receive the whole number of the electoral votes in this State, and, on the other, that Mr. Douglas would receive

them. This, then, was a bet upon the result of the electoral vote of this State. If, then, this election was held under the Constitution or laws of this State, it falls within the prohibition of the first clause of that section. The first three sections of the election law of 1845, provide for the choice of electors to vote for president and vice president of the United States; also for the return of the canvass of the vote, the granting of certificates of election to the candidates for electors. The fourth section provides that the electors who shall be choosen shall meet at the seat of government of the State, at the time appointed by the United States, and give their votes in the mode therein provided, and to perform such duties as may be required by law. This is manifestly an election by the persons chosen by the people to cast the electoral vote of the State, and it is required to be held by the laws of this State. And when they voted for Mr. Lincoln, that was the result of that election. We have seen that this election was held under the laws of this State, and this was a bet upon the result of that election, and was prohibited by the law. See *Gordon* v. *Casey*, 23 Ill., 71; and *Stephens* v. *Sharpe*, 26 id., 404. This wager being in contravention of this positive enactment, the court did right in dismissing the bill, and the decree must be affirmed.

Decree affirmed.

W B. Quigley and Andrew Donnan *v.* The Executrix of David Spear, dec'd.

Assessment of Damages: *Without a jury, in Circuit Court of Logan county.*

The Circuit Court of Logan County, which is one of the counties comprised within the eighth judicial circuit mentioned in the act of Feb. 11, 1857, (Sess. Laws, 13), is, under said act, authorized, where interlocutory judgment has been given upon default, in actions upon contract where damages are unliquidated, to assess the damages without the intervention of a jury.

Error to Circuit Court of *Logan* County, which by section 1, of the act of February 11, 1857, (Sess. Laws, 13), is one of the counties composing the eighth judicial circuit.

Quigley *v.* Spear.

Assumpsit brought in September, 1861, by the testator of defendant in error against plaintiffs in error upon the following written instrument:

"It is agreed between W. B. Quigley and A. Donnan of one part, and David Spear of the other part, that when Henry Jordan pays his note, given to said Spear, indorsed by said Spear, for five thousand five hundred dollars, payable two years after date, with ten per cent. interest from date, payable annually, and dated Springfield, Ill., August, 1857, which note is held by said Quigley & Donnan, that then said Quigley & Donnan are to pay to said Spear five hundred dollars, or the amount received over five thousand if not five hundred dollars.

W. B. QUIGLEY,
ANDREW DONNAN."

Damages were assessed by the court without a jury upon the default of the defendants, and judgment entered therefor; and the question for determination upon error is whether under said act the damages were properly assessed without a jury.

Stuart, Edwards & Brown, for plaintiffs in error.

[*354] *Beckwith, J. Section 4 of the act of February 11, 1857 (Sess. Laws, p. 13), provides "that in all suits at "common law in the Circuit Courts of said circuit where interlocutory judgments shall be given upon the default of any "defendant, and the action is founded upon contract, whether "such contract be in writing or otherwise, and the damages are "unliquidated and do not rest in computation, the said court "may, in its discretion, without the intervention or impaneling "of a jury, hear evidence and assess damages and enter final "judgment therefor."

The Circuit Court of Logan county was one of the courts mentioned in the act, and the court below heard the evidence, assessed the damages, and rendered final judgment therefor as it was authorized to do by the act.

Judgment affirmed.

Reuben Miller *v.* William H. Young's Administrator.

Patents: *Novelty and Utility.*

Under the act of Congress of August 20, 1842, it is essential to the validity of a patent for a design, that it should be a new and original one, but the law does not require that it should be useful.

Fraudulent Misrepresentations: *Matters of opinion.*[1]

A sale of a patent right will not be set aside on the ground of fraudulent misrepresentations as to the durability and probable sale of the patented articles, since such representations are mere matters of opinion.

Error to Circuit Court of *Logan* County.

Young filed his bill against Miller, in the Logan Circuit Court, A. D. 1854, to set aside a conveyance and rescind a contract for the sale of a patent right. The allegations of the bill are substantially as follows: That in the year 1853, Miller, who represented himself as the duly authorized agent of Henry R. Flinchbaugh, who was the owner of a patent cast iron cemetery tomb, and that he was the owner of said patent right to the State of Michigan; that said Miller made false and fraudulent representations concerning the durability, cost and usefulness of said cast iron tomb; that he falsely and fraudulently represented said patent to be for a cast iron tomb, and covering the right to use cast iron for such purpose; that said patent was only for a design for a certain combination of ornaments for a cast iron tomb; that Young, through such representations, was induced by Miller to purchase said pretended patent for the State of Michigan; that in payment for the same, Young conveyed to Miller 160 acres of land in Logan county. The allegation then is, that there was fraud and misrepresentation; that the patent was worthless; that it was not an invention within the meaning of the patent laws, because it was not new and original, and because it was of no utility, &c.

[1]See Douglass *v.* Littler, 58 Ill., 342; Warren *v.* Doolittle, 61 id., 171; Fisher *v.* Dillon, 62 id., 379; Shackelton *v.* Lawrence, 65 id., 175; White *v.* Sutherland, 64 id., 181; Tuck *v.* Downing, 76 id., 71.

The answer of the defendant is substantially as follows: admits the sale of the patent as stated; admits making the representations charged, but alleges they were only matters of opinion; denies the fraud charged; and to which there was a replication.

The report of the cause, when formerly before this court, will be found in 23 Ill., 453, 455, where the decree of the court below dismissing the bill, was reversed and the cause remanded with leave to complainant to amend his bill, making Flinchbaugh a party, and offering to reconvey the title to the patent, which amendments having been made and the bill taken *pro confesso* as to Flinchbaugh, and a decree entered against Miller for a rescission and a reconveyance, the cause is again brought up on error by Miller, who alleges that the decree is not supported by the evidence; while on the other hand the decree is sought to be supported by defendant in error on the ground of the invalidity of the patent for lack of novelty in the design, and fraudulent misrepresentations by Miller, the nature of which is sufficiently stated by the court.

W. H. Herndon, for plaintiff in error. *C. M. Morrison*, for defendant in error.

[*356] *Beckwith, J. In 1851 one Flinchbaugh obtained letters patent for a design for the form and ornamental part of a cast iron cemetery tomb, and the appellant, as his agent, sold to the appellee's testator the right secured by the letters patent for the State of Michigan, and he brought the present suit to set aside the sale on the ground of fraud. It appears from the evidence that the appellee's testator inspected the letters patent before making the purchase, and was fully aware of the nature of the right which he bought. Designs for any impression, or to be placed on any article of manufacture in marble or other material, or for any new shape or [*357] configuration of any article of manufacture, *are patentable under the act of congress of August 20, 1842. It is essential to the validity of a patent for a design, that it should be a new and an original one, but the law does not require that it should be useful. The bill alleges that the patent

was void, but the only allegation in that regard necessary to be noticed, is the one stating that the design is not a novel one. The letters patent are not in evidence, and we do not know what particular design was patented. We are unable to determine whether it was a design for an impression, or for an ornament, or some other design. We are not informed whether the claim of the patentee was for an entirely new device in all its parts, or for some new configuration of old devices, so as to make a new design, and there is no evidence before us of the shape or configuration of the cast iron tomb mentioned in the letters patent. There is some evidence in the record that most of the ornaments in the design were not new and original ones, but it is impossible for us, without knowing what was patented, to adjudge the letters patent void for want of novelty in the design, or in the shape or configuration of the tomb. The bill further alleges that cast iron tombs made according to the design were not as durable, saleable, and could not be manufactured as cheaply as the appellant represented. The representations as to the durability and probable sale of the tombs were evidently mere matters of opinion. The cost of their manufacture to a great degree depends upon the number made from the same pattern. If a large number of tombs were cast from one pattern, the representations of the appellant would be substantially true, and it is evident that his representations in regard to the cost were made with reference to making the tombs in that manner. The bill alleges a misrepresentation in regard to the extent of sales previously made in other parts of the country, but the evidence does not sustain the allegation. The decree of the court below will be reversed, and the bill dismissed.

Decree reversed.

Joshua J. Moore and Wife *v.* George Titman.

Chancery Pleading: *Execution of mortgage, how alleged.*

The allegation in a foreclosure bill that defendant and his wife "made, executed, acknowledged and delivered a certain deed of mortgage," is a sufficient allegation that it was properly made and valid in its operation.

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SAME: *Exhibits; effect of reference to, in the bill.*

Where a mortgage, the due execution of which, it is insisted, is not sufficiently alleged in a foreclosure bill, is referred to in the bill, as an exhibit, that has the same effect as if copied at large into the bill, and the court will refer to the exhibit to see if it appears to have been properly executed.

SAME: *Allegation of interest of mortgagor's wife; exhibits.*

Where it is objected to a foreclosure bill, that the bill fails to show what interest the mortgagor's wife, who is a party to the suit, had in the premises and conveyed by the mortgage, and the mortgage is made an exhibit and referred to in the bill, the court will refer to the mortgage and ascertain her interest, and the allegation in that respect will be sufficient.

ACKNOWLEDGMENT OF DEEDS: *Certificate of, under act of* 1853.

Where the certificate of acknowledgment attached to a mortgage appearing to have been executed by Joshua J. Moore and Ann A. Moore, after certifying to their appearance and acknowledgment of the same as their voluntary act and deed, proceeded as follows: "And Ann A. Moore, wife of the said Joshua J. Moore, having been by me made acquainted with the contents of the said deed, and having been by me examined separate and apart from her husband, acknowledged that she had executed the same and relinquished her dower of the premises therein conveyed, voluntarily, freely, and without any compulsion of her said husband:" *Held*, that the certificate was in compliance with section 1, of the act of 1853 (Scates' Comp. 966), and was sufficient as to Mrs. M.'s execution of the deed. [The right of homestead was not, however, released thereby.]

SEAL: *Effect of reference to, in testing clause of official certificate.*

Where in the body of his certificate of acknowledgment of a mortgage, as appeared from a copy, made an exhibit with the bill, the notary public before whom it was acknowledged described himself as notary public, and following his signature he designated himself as notary public, and a seal was annexed; but in the testing clause to the certificate he said: "Given under my hand and seal:" *Held*, that if when the instrument was produced, it appeared that it was his official seal which was annexed, that would be sufficient, as the seal imports verity, and that the act is official and not individual.

SAME: *Presumption as to representation thereof in transcript.*

Inasmuch as the clerk, in making a transcript of the record of the court below for the Supreme Court, is unable to transcribe a literal copy of the seal attached to a certificate of acknowledgment purporting to have been made by a notary public, it will be presumed that the representation "[Seal]," attached to the copy of the certificate, is of the official and not the private seal of the officer certifying thereto; and this is so, notwithstanding the testing clause says, "Given under my hand and seal."

SAME: *Official seal and not the private seal must be attached to certificate of acknowledgment.*

It seems that, if only the private seal of a notary public is affixed to the certificate of acknowledgment of a deed taken by him, the certificate of acknowledgment will be insufficient.

DEFAULT: *Admits acknowledgment of mortgage in process of foreclosure.*

Where in a foreclosure bill the acknowledgment of the mortgage is alleged, and a copy of the mortgage is referred to as an exhibit, the sufficiency of the acknowledgment is admitted by a default, notwithstanding in the testing clause of his certificate of acknowledgment the notary says, "Given under my hand and seal."

CHANCERY PRACTICE: *Hearing of bills taken pro confesso.*[1]

Where a hearing is had on the bill, *pro confesso* order, exhibits and other proofs, the presumption is that the court had all the evidence that was necessary to sustain the decree. Indeed, the bill having been taken as confessed, proof beyond the exhibits and *pro confesso* order is unnecessary.

SAME: *In such case no evidence is necessary.*

It is, according to the uniform practice, entirely discretionary with the court whether it will hear any evidence on a bill taken as confessed, the examination of the exhibits to a foreclosure bill, in such a case, not being to establish the truth of the allegations of the bill, but simply to ascertain the sum due, upon which to base the decree. It is not, therefore, a valid objection to the decree on a foreclosure bill taken *pro confesso*, that the master's report is not sufficient to support the decree.

SAME: *Notice to appear before master on a reference.*

In cases where a default has been taken and a reference is made to a master to ascertain the amount due upon the mortgage in process of foreclosure, and report to the court, no notice to the defendant to appear before the master in the reference is necessary. It is only in contested cases, where a reference is made to report evidence, or to hear proofs and report facts, that the rule is applicable.

The defendant has a right, however, where the bill is taken as confessed, to appear before the master on the reference, if he thinks proper; or he may file exceptions and resist the approval of the master's report of his computation.

SAME: *Master's report; notice of sale; proof that sale was made as required by the decree.*

It is not necessary that the master, in his report of a sale made under a

[1]See Smith *v.* Trimble, 27 Ill., 152; Harmon *v.* Campbell, 30 id., 25; Sullivan *v.* Sullivan, 42 id., 316; Cronan *v.* Frizell, id., 319; Benneson *v.* Bill, 62 id., 408; VanValkenburg *v.* Trustees, 66 id., 103; Gault *v.* Hoagland, 25 id., 266; Stevens *v.* Bichnell, 27 id., 444; Boston *v.* Nichols, 47 id., 353.

decree of foreclosure of a mortgage, should set out the notice of sale, but on an application for its confirmation it is necessary that the court should be satisfied that the sale has been made in accordance with the requirements of the decree.

Where the master reports that he has given the notice required by the decree, until rebutted or at least objected to before approval, it will be held sufficient. Dow *v.* Seely, 29 Ill., 495, approved.

SAME: *Not necessary to preserve the evidence heard upon confirming the master's report of sale.*[1]

It is not necessary, on a motion to vacate a master's sale under a decree for the foreclosure of a mortgage, that in order to sustain the sale, the evidence that notice of the sale was given in accordance with the requirements of the decree, should be preserved in the record, unless the confirmation is resisted and it is desired by one of the parties. The report of the sale having been approved, the presumption is that the court had sufficient evidence to warrant the order of confirmation.

SAME: *Master's report of sale; failure to file at first term after the sale.*

It is not a sufficient ground for vacating a master's sale under a decree for the foreclosure of a mortgage, that the master's report of the sale was not filed for more than a year after the sale was made. Notwithstanding it was his duty to report at the first term after the sale occurred, a neglect of that duty could not be a reason for setting aside the sale, when either party might have compelled him to make his report.

SAME: *Master may be ruled to make report of sale.*

If the master neglects to report a sale made by him under a decree of foreclosure, at the first term after the sale occurred, he may on the application of either party be compelled by rule to file his report.

SAME: *Time allowed to pay amount found due by decree of foreclosure.*[2]

Where a decree for the foreclosure of a mortgage allowed ten days within which to pay the money due before a sale was required; but the decree required four weeks' notice of the sale after the expiration of the time allowed for payment, and then the sale was subject to redemption by the mortgagor for twelve months; and eighty-seven days in fact elapsed after the decree was rendered before the sale was made, it was *held*, that, no hardship being perceived, exceptions to the limited time allowed for payment would not be sustained; but had the sale been without redemption, in view of the sum required to be paid ($3,933.30), it would have been otherwise.

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[1]See Waugh *v.* Robbins, *ante*, 181, and cases cited in note; also, Moss *v.* McCall, 75 Ill., 190.

[2]See Bush *v.* Connelly, *post*, 447; Farrell *v.* Parlier, 50 Ill., 274; Moore *v.* Bracken, 27 id., 23; Mills *v.* Heeney, 35 id., 173; Cronan *v.* Frizell, 42 id., 319.

HOMESTEAD RIGHT: *Not barred by default in a foreclosure suit.*

The right secured by the homestead act can only be lost by release or abandonment in the mode pointed out by statute. A mere failure to claim the right by answer or cross-bill in a suit to foreclose a mortgage wherein the right is not released, will not have the effect to bar the right, or be considered as a relinquishment of the benefits of the statute. A decree by default and a sale thereunder will not operate to bar the right.[1]

SAME: *How made available.*

If the right exists, not being released by the mortgage, and the property is still occupied as a homestead by the persons entitled to claim the benefit, it may be set up as a defence to defeat a decree, if the property is worth no more than one thousand dollars.

Or a bill may be filed to impeach a decree of foreclosure in such case.[2]

SAME: *When decree will not be vacated.*

But where on a motion to vacate a decree *pro confesso* for the foreclosure of a mortgage, and the master's sale thereunder, the premises appear from the affidavit of the defendant, used as the basis of the motion, to be worth a much larger sum than $1,000; while the fact that the premises are subject to the homestead exemption in part, will entitle the mortgagor to claim its benefits, yet it will not authorize the court to open the decree.

SAME: *Motion to vacate sale.*

Where the master proceeds to execute the decree, he must, like a sheriff under an execution, ascertain whether the homestead right exists. If so, he must proceed in the manner pointed out in the statute, to make the sale under the decree.

And if he fails to do so, the defendant may, after the coming in of the report, enter his motion to set aside the sale. Upon that motion the court will hear the evidence of the parties and determine the question whether the right exists, and if so, set aside the sale.[3]

SAME: *Motion to vacate sale where the right has been allowed by the master.*

If the master shall allow the right, and make the sale in accordance with the statute, and the complainant shall deny the existence of the right, he may, upon the coming in of the report, move to set aside the sale, and the court will hear the evidence and determine the question and decree accordingly.

SAME: *Not claimed before decree, treated like an execution.*

When the right has not been claimed before decree entered, it will be

[1] Mooers *v.* Dixon, 35 Ill., 208; Silsbe *v.* Lucas, 36 id., 462.

[2] See Booker *v.* Anderson, 35 Ill., 66; Allen *v.* Hawley, 66 id., 164; Mix *v.* King, id., 145; Linton *v.* Quimby, 57 id., 271.

[3] See Wing *v.* Cropper, 35 Ill., 256.

treated in the hands of the master like an execution at law in the hands of the sheriff.[1]

Error to Circuit Court of *Fulton* county.

The case is sufficiently stated by the court.

Wead & Powell and *Browning & Bushnell*, for plaintiffs in error. *Ross, Tipton & Winter*, and *Hay & Cullom*, for the defendant in error.

[*364] *Walker, C. J. This bill was filed by defendant in error against plaintiff in error and his wife, to foreclose a mortgage executed by them. Process was served upon them, they entered their appearance at the return term, and obtained an extension of time to answer for sixty days. At the next term, having failed to answer, a default was entered and the bill taken as confessed; the case was referred to the master to ascertain the amount and report to the court. His report was filed and approved, a decree for the payment of the money within ten days was entered, and on default of payment, that the master sell the mortgaged premises after giving four weeks' notice. A sale was made subject to redemption, which was reported to the court. Upon the coming in of this report, plaintiff in error entered a motion to set aside the decree and sale,[2] which was overruled, and the sale confirmed. To reverse the decree in this case and set aside the sale, this writ of error is prosecuted.

Exceptions are taken to the sufficiency of the allegations of the bill. It is insisted that the allegation that plaintiff in error and his wife "made, executed, acknowledged and delivered a certain deed of mortgage," does not imply that it was *duly* executed and became a *valid* mortgage. We think the allegation is sufficient, and can only be construed to mean that it was properly made and valid in its operation. But if this were not so, the instrument is referred to as an exhibit, which has the same effect as if copied at large into the bill. The court will refer to

[1]Cummings *v.* Burleson, 78 Ill. 281.

[2]The affidavit of plaintiff in error used as the basis of this motion, claimed a homestead right in the premises, and alleged a sale in disregard of that right. It also alleged that the value of the premises was $10,000.

the exhibit to see if it sufficiently appears to have been so executed.

It is again urged that the bill fails to show what interest the wife had in the premises, and conveyed by the mortgage. As *it is, by reference, made a part of the bill, upon in- [*365] spection, we find, in the body of the instrument, that she purports to convey all of her interest, and in the acknowledgment, she relinguishes her dower in the premises. From the instrument, as a part of the bill, it appears that it was a dower interest. This allegation is sufficiently made, and this was admitted by the decree *pro confesso*.

Several objections are taken to the certificate [1] of acknowledgment of the deed. It appears substantially, that Mrs. Moore acknowledged the deed freely and voluntarily; that the officer made her acquainted with the contents of the mortgage, and that he examined her separate and apart from her husband. This is in compliance with the act of 1853, section 1. Scates' Comp. 966. The certificate also states that she relinquished her right of dower in the premises. And the certificate must be held sufficient as to Mrs. Moore's execution of the deed.

It is insisted that the notary public before whom the mortgage was acknowledged, failed to affix his official seal. It

[1] This certificate is as follows:

"STATE OF ILLINOIS, }
FULTON COUNTY. }

"I, Sands N. Bond, a notary public for Canton, and for said county, do certify that on this day, appeared before me, Joshua J. Moore and Ann A. Moore, whose names appear subscribed to the foregoing deed of conveyance, and who are personally known to me to be the identical persons whose names are subscribed to said, and as having executed the same and acknowledged that they had executed the same as their voluntary act and deed for the uses and purposes therein expressed. And Ann A. Moore, wife of the said Joshua J. Moore, having been by me made acquainted with the contents of the said deed, and having been by me examined separate and apart from her husband, acknowledged that she had executed the same and relinquished her dower to the premises therein conveyed, voluntarily, freely and without any compulsion of her said husband.

"Given under my hand and seal at Canton, this fourteenth day of August, 1858. "SANDS N. BOND,

[SEAL.] "Notary Public for Canton, Illinois."

appears that in the body of his certificate he describes himself as notary public, and following his signature he designates himself as notary public, and a seal is annexed. It is true, that in the testing clause to the certificate he says: "Given under my hand and seal." If, when the instrument was produced, it appeared that it was his official seal which was annexed, that would be sufficient, as the seal imports verity, and that the act is official and not individual. Inasmuch as the clerk, in making the transcript, is unable to transcribe a literal copy of the seal, we must suppose that the representation is of his official and not his private seal. Again, the default admits that the mortgage was made and acknowedged. If only the private seal of the officer had been affixed, the acknowledgment would have been insufficient, and the instrument would not have been sufficiently acknowledged. It would only have been an attempt at an acknowledgment; but by the default the sufficiency of the acknowledgment was admitted.

It is again urged, that the special master's report is not sufficient to support the decree. We do not deem it impor-
[*366] tant *whether it was or not, inasmuch as there was a hearing on the bill, *pro confesso* order, exhibits and other proofs. The presumption would be that on the hearing the court had all the evidence that was necessary to sustain the decree. Indeed, the bill having been taken as confessed, proof beyond the exhibits and *pro confesso* order was unnecessary. It was, according to the uniform practice, entirely discretionary with the court whether it would hear any evidence on a bill taken as confessed, the examination of the exhibits in such a case not being to establish the truth of the allegations of the bill, but simply to ascertain the sum due, upon which to base the decree. There is no force in this objection.

An exception is taken, that notice was not given to plaintiffs to appear before the master on the reference. In cases where a default has been taken and a reference is made, such a notice is not required. It is only in contested cases, where a reference is made, to report evidence, or to hear proofs and report facts,

that the rule is applicable. It is true, the parties being in court, they have the right in a case where the bill is taken as confessed to appear before the master on a reference if they think proper. But in such a case the practice does not require notice ; or upon the master's making the report of his computation, the defendant may, if he choose, file exceptions and resist its approval.

Did the court below err in overruling the motion to set aside the sale, and in rendering a decree confirming it? It is urged that the master, in conducting the sale, did not conform to the decree under which he acted. He reports that he had given the notice required by the decree. It was not necessary that he should set out the notice in his report, but on an application for its confirmation it was necessary that the court should be satisfied that the sale had been made in accordance with the requirements of the decree. Nor is it necessary, on such a motion, that evidence of that fact should be preserved in the record, unless the confirmation is resisted and it is desired by one of the parties. The presumption is, that the court below had sufficient evidence to warrant the order of confirmation. In the case of *Dow* v. *Seely*, 29 Ill., 495, this court said, that we are inclined *to think that such a report, made by [*367] the master, was sufficient. And upon further and more mature reflection, we are disposed to adhere to that rule. Until rebutted, or at least objected to before approval, it will be held sufficient.

Exceptions are taken because the master's report of the sale was not filed for more than a year after the sale was made. We are unable to see how this could have affected the rights of plaintiff in error. If he desired to redeem from the sale, a certificate of the sale was no doubt filed in the recorder's office, and it would have afforded all the information necessary for that purpose. It must be presumed that he was cognizant of the sale, as it is not probable an event of such importance to his interest could have transpired, when he was a party to the suit by service, without his knowing when it was made. If he desired to ascertain whether the sale was properly made, he could, at any intervening term, have, by applying for a rule

upon the master, compelled the report to have been filed. That officer is the agent of the law, and not of either of the parties, and one party has the same power as the other to compel him to perform his duty, by application to the court of which he is an officer. Notwithstanding it was his duty to report at the first term after the sale occurred, a neglect of that duty could not be a reason for setting aside the sale, when either party might have compelled him to make his report.

Exceptions are also taken to the limited time within which plaintiff in error was required to pay the money before a sale was required. The time allowed was ten days. No sale could have been made until the expiration of thirty-eight days, as the decree required four weeks' notice after the expiration of the time allowed for payment, and then the sale was subject to redemption for twelve months by plaintiff in error. Eighty-seven days elapsed after the decree was rendered and before the sale was made. In this no hardship is perceived; but had the sale been without redemption, in view of the *sum*[1] required to be paid, it would have been otherwise. There is no force in this objection.

In this case the homestead exemption was not released [*368] in the *mortgage. If it then existed and continued until the time of the foreclosure, it was not cut off by the decree or subsequent sale. If that right existed, not being released by the mortgage, and the property still being occupied as the homestead by the persons entitled to claim the benefit, it might be set up as a defense to defeat a decree, if the property was worth no more than one thousand dollars. *Cassell* v. *Ross*, *ante*, p. 244. Or a bill might be filed to impeach a decree of foreclosure in such a case. *Hoskins* v. *Litchfield*, 31 Ill., 137. In this last case the decree of sale and all proceedings under it, were set aside on motion, but it was stipulated that the defendant should have the same relief on his affidavits and motion which he might be entitled to on the facts disclosed if a proper bill had been filed. It was, therefore, treated as an original bill to vacate the decree.

[1]$3,933.30.

To give effect to the homestead act according to the design of its framers, the right can only be lost by release or abandonment in the mode pointed out in the statute. A mere failure to claim the right by answer or cross-bill, will not have the effect to bar the right, or be considered as a relinquishment of the benefits of the statute. To give a decree by default such an effect, would be to enable the husband to frustrate the design of the statute. It would enable him by indirection to release the homestead, independent of the action of the wife, when he could not do so in any direct mode. The act has expressly required the wife to join in the deed to have such an effect.

But in this case the premises appear, from the affidavit of plaintiff in error, to be worth a much larger sum than one thousand dollars. His affidavit shows that the premises, when the mortgage was executed, were the homestead of the mortgagor's, and continued so up to the time of sale and the entry of the motion to set it aside. Uncontradicted, that affidavit *prima facie* shows that the plaintiffs in error were entitled to the benefits of the act, and there was no opposing proof. In such a case, whilst the fact that the premises are subject to the homestead exemption in part, will entitle the mortgagors to claim its benefits, yet it will not authorize the court to open the decree. Where the *master proceeds to execute the decree, he must, like [*369] a sheriff under an execution, ascertain whether the homestead right exists. If so, he must proceed in the manner pointed out in the statute, to make the sale under the decree. And if he fail to do so, the defendant may, after the coming in of the report, enter his motion to set aside the sale. Upon that motion the court will hear the evidence of the parties and determine the question of whether the right exists, and if so set aside the sale.

If the master shall allow the right, and make the sale in accordance with the statute, and the complainant shall deny the existence of the right, he may, upon the coming in of the report, move to set aside the sale, and the court will hear the evidence and determine the question and decree accordingly. When the right has not been claimed before decree entered, it

will be treated in the hands of the master like an execution at law in the hands of the sheriff. In this case the homestead was not set apart to the plaintiffs in error as required by the statute, and the sale should have been set aside, unless the affidavit filed in support of the motion had been overcome by opposing evidence. The decree approving of the master's report and affirming the sale, must be reversed, and the cause is remanded, with directions to the court below to hear the evidence whether a right to claim the homestead exemption existed, and if so, to set aside the sale; but if not, then to approve the master's report and confirm the sale.

Decree reversed.

John C. Jacobs *v.* William Rice.

Curtesy[1] Initiate: *Holder of, has right of possession.*

The holder of an estate by the curtesy initiate has the right of possession during his life, and he may commence suit and recover possession in the same manner that other tenants for life recover possession of their estates.

Same: *May be aliened.*

The estate by the curtesy initiate may be sold and conveyed in the manner that other life estates are.

Statute of Limitations: *Applicable to curtesy initiate.*

The statute of limitations has the same application to the estate by the curtesy initiate that it has to other estates of that nature.

Same: *Act of* 1839 *operates to transfer the title.*

Where possession is taken of land by a party under color of title acquired in good faith, who, for seven successive years resides on the premises and pays all taxes assessed thereon, the life estate of a tenant by the curtesy initiate in the premises will by the operation of the statute become vested in the party so in possession, who will hold it in the same manner and with the same rights that he would have had if the tenant by

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[1] The estate by curtesy has been abolished by statute. Rev. Stat. 1874, 423.

As to the effect upon the estate by curtesy, of the act of 1861, see Beach *v.* Miller, 51 Ill., 206; Cole *v.* Van Riper, 44 id., 58; Noble *v.* McFarland, 51 id., 227; Clark *v.* Thompson, 47 id., 25.

See, generally, as to the interest of the husband in his wife's land at common law, Ewell's Lead. Cases, 475, 478, *et seq.*, and cases cited.

curtesy initiate had conveyed the same to him. The remedy for its recovery by such tenant and his grantee, is not only barred, but the title is transferred when the remedy ceases.

CURTESY INITIATE: *Conveyance of remainder.*

Where the tenant by curtesy initiate, whose title has become barred by the entry of another into possession of the premises under color of title acquired in good faith, followed by residence thereon for seven years and payment of all taxes assessed thereon, joins with his wife in a conveyance of the premises to another, the grantee becomes the owner of the remainder; and when the life estate ceases he will be entitled to possession, and may recover it from one wrongfully withholding it.

APPEAL from Circuit Court of *Morgan* county.

Ejectment by appellant against appellee.

The case is sufficiently stated by the court.

The judgment below was for the defendant; and the points for determination relate to the nature of appellant's estate, and the effect upon it of the statute of limitations.

D. A. & T. W. Smith, for appellant. *H. B. McClure,* for appellee.

BECKWITH, J. Cornelius Pointer died in 1833, leav- [371] ing Matilda Jane one of his heirs. She married John G. Dustin in 1844, and children of the marriage were born alive. Dustin and wife conveyed the premises in controversy to the appellant, on the 29th day of December, 1862. The appellee entered into possession in 1852, under color of title acquired in good faith; and from that time until the commencement of this suit in 1863, has resided on the premises and paid all taxes assessed thereon. Dustin became invested with a life-estate in the premises by the curtesy initiate. He had the right of possession during his life; and he might have commenced suit, and recovered possession in the same manner that *other* tenants for life recover possession of *their* estates. The estate of Dustin was one that might have been sold and conveyed in the same manner that other life-estates are.

The statute of limitations has the same application to it that it has to other estates of that nature. *Shortall v. Hinckley,* 31 Ill., 219.

By its operation the life-estate of Dustin was vested in the appellee, and he now holds it in the same manner and with the same rights that he would have had if Dustin had conveyed the same to him. The remedy for its recovery, by Dustin and his grantee, was not only barred, but the title was transferred when the remedy ceased. 3 Black. Com. 196; *School District No.* 4. v. *Benson*, 31 Maine, 384; *Armstrong* v. *Risteau*, 5 Md. 256; *Blair* v. *Smith*, 16 Miss. 273; 2 Wash. 492; [*372] *Steele* v. **Johnson*, 4 Allen, 425; *The Incorporated Irish Society* v. *Richards*, 4 Irish Eq. 177; *Scott* v. *Nixon*, 3 Den. & War. 388; *Parker* v. *Southwick*, 6 Watts, 378.

The appellant is the owner of the remainder, and when the life-estate ceases he will be entitled to possession, and may recover it from those who wrongfully withhold it. *Gregg* v. *Tesson*, 1 Black 156; *Shortall* v. *Hinckley*, 31 Ill. 219.

The judgment of the court below is affirmed.

Judgment affirmed.

Charles O. Nickerson *et al. v.* Eli Sheldon.

Demurrer: *To whole declaration containing the common counts.*[1]

Where, in an action of assumpsit, the declaration counts specially upon a promissory note and also contains the common counts, and a general demurrer to the whole declaration is interposed; if the common counts are good the demurrer will be overruled, whatever may be the character of the special count.

Evidence: *Promissory note admissible under common counts.*

A promissory note is evidence under the common counts in assumpsit, on the assessment of damages, without proving any consideration.

Promissory Notes: *Provision for attorney's fee.*[2]

A promissory note in the usual form is not by the addition of this clause: "We further agree, that if the above note is not paid without suit, to pay ten dollars in addition to the above for attorney's fee," thereby rendered non-negotiable under the statute.

Appeal from Circuit Court of *Fulton* county.

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[1] See Henrickson *v.* Reinback, *ante*, 299 and note.

[2] See Nickerson *v.* Babcock, 29 Ill., 497.

Assumpsit by appellee, as the indorsee of an alleged negotiable promissory note, against appellants as the makers thereof.

The case is sufficiently stated by the court.

S. P. Shope, for appellants. *G. Barrere*, for appellee.

Breese, J. This was an action of assumpsit brought [373] on a promissory note. The declaration counts specially on the note, and contains the common counts for money lent and advanced, had and received, paid, laid out and expended, and for goods and lands sold to the defendants by the plaintiff.

To the declaration a general demurrer was interposed, on which the court gave judgment for the plaintiff and assessed the damages.

We see no error in the proceedings of any character. The common counts being good, whatever may be the character of *the special count, the demurrer had to be over- [*374] ruled. The note was evidence under the common counts in the assessment of damages, without proving any consideration. *Bilderback* v. *Burlingame*, 27 Ill. 342.

But it is objected that the note sued upon was not negotiable under the statute. This objection is predicated on this clause in the instrument: "We further agree, that if the above note is not paid without suit, to pay ten dollars in addition to the above for attorney's fees."

It is said this undertaking destroys the instrument as a promissory note, since it requires extrinsic evidence to show that the note was not paid without suit, and the case of *Lowe* v. *Bliss et al.*, 24 Ill., 168, is referred to in support of the objection. In that case, the note was for a sum of money payable at the Kankakee Bank, Kankakee, Illinois, value received, with current rate of exchange on New York. This stipulation for current rate of exchange on New York made the amount due by the note uncertain, and so deprived it of its negotiability. But the amount due by this note is absolutely certain, and it possesses all the requisites of a negotiable instrument under the statute. *Stewart et al.* v. *Smith*, 28 Ill., 397. There is no uncertainty

as to the precise sum of money to be paid on the maturity of the note. *Houghton et al.* v. *Francis*, 29 id., 244.

The plaintiff does not declare for the ten dollars, nor was it allowed to him in the assessment of damages. He recovered only the principal and interest due upon the note.

There being no error in the record, the judgment must be affirmed.

Judgment affirmed.

CHARLES O. NICKERSON *et al.*, *v.* AMOS C. BABCOCK.

BREESE, J. This case is the same in all essential particulars as the foregoing, and the judgment is affirmed.

Judgment affirmed.

JOHN W. PULLIAM *v.* NARCISSE PENSONEAU.

MISTAKE IN AN AWARD: *Reformation of, in equity.*[1]

A court of equity will afford relief against a mistake in an award as well as in other cases, when the facts disclosed require the relief. But it will never be done in a case where there is doubt or uncertainty. It is only in cases of clear and unquestionable mistake, that a court of equity will interpose to reform the award or to set it aside.

SAME: *The mistake must be that of all the arbitrators.*

To entitle a party to such relief, the mistake must have been that of all the arbitrators, and not a part of them only. If the mistake were not mutual on the part of all the arbitrators, when reformed it would still not be the award of each of them.

SAME.

The reformation of awards for mistake is usual only when the mistake occurs in making a draft of the award; though it may be made even in the finding of the award, where the arbitrators all concur that there was a mistake and agree as to what it was; but in the absence of such concurrent testimony, courts will not interfere.

AWARD: *Conclusive upon the parties.*

The conclusion at which arbitrators arrive is the judgment of the court of

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[1]As to awards not being impeachable at law for mistake, see Howell *v.* Howell, 26 Ill., 460; Cottle *v.* McWhorter, 13 id., 454; Smith *v.* Douglass, 16 id., 34; Newlan *v.* Dunham, 60 id., 233.

the parties own choosing. And in most respects it is similar to other judgments. It is conclusive upon the parties, both as to the law and the facts.

WITNESSES: *Arbitrators incompetent to impeach their award.*[1]

As a general rule, arbitrators will not be permitted to give evidence to impeach their award; though there is an exception to the rule in the case of fraud.

An exception has also been allowed to establish a mistake in the award.

ERROR to Circuit Court of *St. Clair* County.

The case is sufficiently stated by the court.

J. B. Underwood, for plaintiff in error. *W. H. Underwood*, for defendant in error.

*WALKER, J. This was a bill filed to reform an [*376] award for an alleged mistake *of arbitrators. It [*377] alleges that the arbitrators by mistake omitted to allow complainant a credit of over five hundred dollars, to which he was entitled, which they intended and supposed they had allowed. The answer denies that any mistake was made, and insists that the amount claimed to have been omitted through mistake was unjust. Hughs, one of the arbitrators, testifies that they agreed to allow the account, but by being mislaid it was overlooked and was not taken into the calculation or deducted from defendant's account; that the arbitrators allowed him two thousand dollars, for which he had been credited, and that he would not have agreed to or signed the award had he known that these items had been omitted. Dauth testifies that several thousand dollars was claimed by each party on the trial before the arbitrators; that they could learn but little from the sworn statements of the parties; that when they came to decide the matter, their opinion was that they knew no more about the matter than when they commenced the trial; that Hughs made the motion to find the award as it was rendered; that an attempt was made to make a computation, but they were unable to arrive at a satisfactory conclusion; that all of the items presented were considered,

[1]See Claycomb *v.* Butler, 36 Ill., 100; Tucker *v.* Page, 69 id., 179.

and he knows of no item which was left out. If the items claimed in the bill were produced, an equal amount was produced by the other side.

Rittenhouse testifies that he thought the items claimed were included in his computation, but when he examined his figures the next day, he found that they had been omitted; that he would not have signed the award had he discovered the omission before it was done. He also states that defendant had admitted the correctness of the account. On the hearing in the court below, a decree was rendered dismissing the bill, and for costs against complainant. To reverse that decree this writ of error is prosecuted.

It is undeniably true that a court of equity will afford relief against a mistake in an award as well as in other cases, when the facts disclosed require the relief. But it will never be done in a case where there is doubt or uncertainty. It is only in cases of clear and unquestionable mistake that a court [378] of equity will *interpose to reform the award or set it aside. *Williams* v. *Warren*, 21 Ill. 541. Again, to entitle a party to such relief, it is necessary that the mistake should be that of all of the arbitrators, and not a part of them. *Stone* v. *Atwood*, 28 Ill. 30. If the mistake were not mutual on the part of all the arbitrators, when reformed it would still not be the award of each of them. If any mistake was made, it was not that of Dauth, as he denies that there was a mistake.

The reformation of awards for mistake is usual only when the mistake occurs in making a draft of the award. The conclusion at which arbitrators arrive is the judgment of the court of the parties' own choosing. And in most respects it is similar to other judgments. It is conclusive upon the parties, both as to the law and facts. A mistake in either is not usually corrected by the courts, any more than in case of judgments or decrees after they have been signed and entered of record. But in favor of awards an exception has obtained, when a mistake in the draft of the award, or even in the finding of the award where the arbitrators all concur that there was a mistake, and

agree as to what it was; but in the absence of such concurrent testimony, courts will not interfere.

As a general rule, arbitrators will not be permitted to give evidence to impeach their award; to this rule there is an exception in cases of fraud (Greenl. Ev. § 249; *Spruck* v. *Crook*, 19 Ill. 415), and an exception has been allowed to establish a mistake in the award. But in this case, the arbitrators do not say, that in determining the rights of the parties, they agreed to allow this sum to complainant. Two of them say that, by mistake, it was not taken into the computation, whilst the other thinks that it was embraced and passed upon, and overcome by allowance of items on the other side. It appears that all of the arbitrators do not concur that a mistake was made. The evidence failing to bring this case within the rules, the court below acted properly in dismissing the bill, and the decree must be affirmed.

Decree affirmed.

Anne McKean Kerr *et al. v.* William Swallow.

Pleading: *Plea construed to be that of all the defendants.*

Where a suit is commenced by attachment against several defendants, which is levied upon property, but not personally served; and the defendants are brought into court by publication, and file a plea of the general issue in the usual form, giving the title of the cause, and then stating: "And the said defendants come and defend the wrong, &c.," and there is nothing in the previous proceedings by which the word "defendants" can be limited to a less number than all of them, the plea must be *held* to be that of all the defendants.

Judgments—Variance: *Between title of judgment and prior proceedings.*

Where in the title of a cause upon the judgment record, the name "Anne" was spelled "Anna," but the judgment was rendered against the defendants in the suit, and said defendant's christian name was spelled "Anne" in the proceedings prior to the judgment, it was *held* that the variance was not material.[1]

[1] See Fink *v.* Disbrow, 69 Ill., 76.

JUDGMENTS: *In personam in attachment suits.*[1]

After appearance and plea in bar in a suit commenced by attachment, without personal service, the defendants being brought in by publication notice, the suit is one *in personam*, and a judgment against the defendants *in personam* may properly be rendered.

EXECUTION: *When special execution may be issued.*

As the property attached in an action commenced by attachment where there is no personal service of process, but the defendants are notified by publication, is not released by the defendants' appearance, a special execution may properly be issued, although the award of execution is general only.

ERROR to Circuit Court of *Sangamon* county.

Assumpsit commenced by attachment, by defendant in error against plaintiffs in error, the writ being levied, and the defendants brought in by publication without personal service. Judgment was rendered in the court below against the "defendants," with an award of execution, upon their failure to replead, the plea (referred to by the court) filed by them having been declared insufficient and a repleader ordered. The property levied upon was sold under a special execution issued upon said judgment. The remaining facts are sufficiently stated by the court.

The assignments of error relate to the variance referred to by the court; and to the rendition of a judgment *in personam* and general award of execution.

James C. Conkling for the plaintiffs in error. *S. M. Cullom* for the defendant in error.

[*380] * BECKWITH, J. This was a suit by attachment against Anne McKean Kerr, and others. The declaration was in assumpsit, and the names of the parties therein are identical with those in the writ. The plea was the general issue, in the usual form. It gives the title of the cause, and then says: "And the said defendants come and defend the wrong, &c."

[1] See Swift *v.* Lee, 65 Ill., 336; Frink *v.* King, 3 Scam., 145; Conn *v.* Caldwell, 1 Gilm., 531; Young *v.* Campbell, 5 Gilm., 80; Clymore *v.* Williams, 77 Ill., 618.

There is nothing in the previous proceedings by which the word "defendants" can be limited to a less number than all of them, and the plea must be held to be that of all the defendants. In the title of the cause upon the judgment record, the name Anne is spelled Anna, but the judgment was rendered against the defendants in the suit. The variance was not material. After appearance and plea the suit was one *in personam*, and the judgment against the defendants *in personam* was properly rendered. As the property attached was not released by the defendants' appearance, a special *execution might [*381] properly issue. There is no error in the record, and the the judgment is affirmed.

Judgment affirmed.

Great Western Railroad Company of 1859 *v.* The City of Decatur.

Practice at Law: *Objections to character of proof not to be taken for the first time on error.*

Where in an action brought against a railroad company for a violation of an ordinance prohibiting the permitting locomotives and cars to stand or remain on a traveled railroad crossing used by teams and travel, passing and repassing, to the hindrance and detention of the same, no point was made in the court below as to the street in question not being a traveled railroad crossing used by teams and travel, the witnesses speaking of it as such, and it being taken for granted: *Held*, that it was too late to make the objection on error.

Railroads: *Liability under ordinance prohibiting the obstruction of railroad crossings.*[1]

Where in an action brought against a railroad company for a violation of an ordinance prohibiting the permitting locomotives and cars to stand or remain on a traveled railroad crossing used by teams and travel, passing and repassing, to the hindrance and detention of the same, the evidence showed that there were cars standing on the track on both sides of the street, and extending into the street some distance, so that there were not more than ten or twelve feet left in the middle of the street for teams to pass through, between the cars; that a gentle team might

[1]See Illinois Cent. R. R. Co. *v.* City of Galena, 40 Ill., 345

have passed through this opening between the cars in safety, but it would have been dangerous to attempt to drive a "scary" team through; and that during a portion of the time there was a car standing on another switch opposite said vacant space and some ten or twelve feet distant, and that a team might have gone through between the cars by turning; and the detention of one team and the necessity occasioned that it should take another route by reason of the cars obstructing the road, was proved: *Held*, that the railroad company was properly convicted; that the traveling public had a right to have their public and used crossings free and clear of obstructions, and not be crowded into a narrow space of twelve feet or less, through which none but a gentle team could pass in safety.

ERROR to Circuit Court of *Macon* county.

The case is sufficiently stated by the court.

Nelson & Roby, for plaintiffs in error. *A. B. Bunn*, for defendant in error.

[*382] *BREESE, J. This was an action brought by the city of Decatur against the Great Western Railroad Company of 1859, for a violation of the following ordinance: Sec. 2. No railroad engine, machine, car or cars, shall be permitted to stand or remain on a traveled railroad crossing used by teams and travel, passing and repassing, to the hindrance and detention of the same at any time, under a penalty of twenty-five dollars for each period of fifteen minutes of such detention or hindrance.

The action was brought before a justice of the peace, on the complaint of Henry Churchman, and taken by appeal to the Circuit Court, where a judgment was entered against the company for twenty-five dollars and costs.

The proof in the cause, as appears by the bill of exceptions, was, that on or about the ninth day of October, 1863, the prosecutor, Churchman, passed over the railroad where it crosses Morgan street, in the city of Decatur, on his way to dinner, about twelve o'clock M.; at that time there were cars standing on the track on both sides of the street, and extending on to the street some distance, so that there was not more than ten or twelve feet left in the middle of the street for teams to

pass through between the cars; that on his return from dinner one hour or an hour and a half afterwards, the cars were still standing in the same position; that he stopped at Haworth's warehouse, south of the railroad, and while there, a team drove up to within eighty feet of the railroad; was a man in the wagon; he did not get out, nor appear to have any business at the warehouse; he stopped some fifteen minutes, turned and went west on another street parallel with the railroad.

Another witness stated, a gentle team might have passed through this opening between the cars, but it would have been dangerous to attempt to drive a scary team through; that about half-past one or two o'clock in the afternoon of the ninth of October, he noticed a team drive up opposite the warehouse some eighty feet from the railroad, and corroborates the statement of Churchman as to what he did. This witness states the *cars remained on the track as stated, until [*383] three or four o'clock in the evening; they were standing on the Haworth switch, which was south of the main track. There was another switch called the Martin switch, north of the main track, passing across Morgan street; that during a portion of the afternoon of that day there was a car standing on the Martin switch, immediately north of and opposite the vacant space on the Haworth switch; that the switches were ten or twelve feet apart, and that a team might have gone through between the cars by turning.

It is now assigned for error, that the court found that Morgan street was a traveled railroad crossing used by teams and travel, in finding that any hindrance and detention to teams and travel was occasioned by any obstruction, in finding that a detention of fifteen minutes occurred, and in rendering judgment against the defendant.

No point was made in the court below as to Morgan street being a traveled railroad crossing used by teams and travel. The witnesses spoke of it as such, and no proof of dedication was necessary. Had that objection been made, the proof might have been supplied. It is too late to make it here. It was taken for granted on the trial below.

The detention of one team fifteen minutes or more, and the necessity occasioned that it should take another route, by reason of the cars obstructing the road, is abundantly proved. The traveling public cannot be put in peril by such negligence as is shown on the part of the railroad. They have a right to have their public and used crossings free and clear of obstructions, and not be crowded into a narrow space of twelve feet or less, through which none but a gentle team could pass in safety.

The design of the ordinance was a good one, and it ought to be upheld. These companies have, or might have, space enough in which to do all their business, without encroaching upon the rights of the public, and when they do encroach, they ought to be held to a strict accountability

We think the court found correctly on the proof, and we affirm the judgment.

Judgment affirmed.

John Stewart *et al. v.* George Peters.

Appeals from Justices' Courts. *By one of several defendants; process to other defendants; when to be tried.*

Under the statute (Rev. Stat. 1845, ch. 59, sec. 64, p. 324), providing that when an appeal is taken by one of several parties, from a judgment of a justice of the peace, the clerk of the Circuit Court shall issue a summons against the other parties, notifying them of the appeal, and requiring them to appear and abide by and perform the judgment of the court in the premises; which is required to be served as other process issued in appeal cases; and in case it is not served, the cause shall stand continued at the first term, but shall be tried at the second term,—where an appeal is taken by one of several defendants, all of whom were served with process in the justice's court, and no steps are taken to procure a service of process from the Circuit Court on the other defendants, who do not enter their appearance on the appeal, it is error to try the cause at the first term.[1]

Judgments: *On joint liability must be against all or none.*[2]

Where, in an action upon a joint liability, the defendants are all served

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[1] See Walter *v.* Bierman, 59 Ill., 186.

[2] See Kimmel *v.* Shultz, Breese, 169; McConnel *v.* Swailes, 2 Scam., 571;

with process in the justice's court, and an appeal is taken by one of the defendants, the judgment in the Circuit Court must be against all or none of the defendants.

APPEAL from Circuit Court of *St. Clair* County.

The case is sufficiently stated by the court.

W. H. Underwood, for appellant. *J. B. Underwood*, for appellee.

*WALKER C. J. This was an action originally com- [*384] menced before a justice of the peace by appellee on a note which purported to have been executed by George C. Stout & Co. The summons was against Stout, Stewart and Shortridge, all of whom were served with process. But on the trial a judgment was only recovered against the two last named defendants, who interposed the defense that they had not executed the note; but no judgment was rendered against Stout, although he made no defense to the action. Stewart appealed to the Circuit Court where, on a trial *of the [385*] cause, the judgment of the justice of the peace was affirmed. But no steps seem to have been taken to procure service on Stout or Shortridge, nor does it appear that they entered their appearance on the appeal. It is assigned for error that they were not made parties to the appeal, and that judgment should not have been rendered until they were in court by service or otherwise.

The sixty-fourth section of the act relative to justices of the peace provides, that when an appeal is taken, by one of several parties, from a judgment of a justice of the peace, the clerk of the Circuit Court shall issue a summons against the other parties, notifying them of the appeal, and requiring them to ap-

Fuller *v.* Robb, 26 Ill., 246; Fender *v.* Stiles, 31 id., 460; Russel *v.* Hogan, 1 Scam., 552; Gribbin *v.* Thompson, 28 Ill., 61; Faulk *v.* Kellums, 54 id., 189; Briggs *v.* Adams, 31 id., 486; Morrow *v.* The People, 25 id., 330; Griffith *v.* Furry, 30 id., 252; Flake *v.* Carson, *post*, 518; Barbour *v.* White, 37 id., 164; Garretson *v.* Strawn, 54 id., 402; Gould *v.* Sternburg, 69 id., 531.

Rev. Stat. 1845, 413, sec. 6; id., 1874, 776, sec. 10; id., 620, sec. 3.

pear and abide by and perform the judgment of the court in the premises; which is required to be served as other process issued in appeal cases; and in case it is not served the cause shall stand continued at the first term, but shall be tried at the second term. This section confers the power to render the same judgment as though all parties to the judgment had joined in the appeal. The appeal in this case falls within, and must be governed by, the provisions of this section. Only one of the defendants appealed, and the clerk should have issued a summons for the others. Until they were in court by actual or constructive notice, the case did not stand for trial. If service could not have been obtained on Stewart and Shortridge, or a return of not found, and a continuance of the cause until the next term, it was error to try the case.

This was a joint liability, and the defendants had all been served in the justice's court, and the judgment should have been against all or none. To render a judgment against all it was necessary that all of the defendants should have been in court, by service or appearance, as they had all been served in the justice's court. The judgment of the court below is reversed and the cause is remanded.

Judgment reversed.

Reuben Miller *v.* N. M. Whittaker.[1]

Practice in Supreme Court: *What the transcript must contain.*

It is the duty of a party bringing a case before the Supreme Court by appeal or writ of error, to have a transcript of so much of the record certified to the Supreme Court as will enable it to determine whether the errors of which he complains have intervened or not.

The pleadings in every case must be contained in the transcript.

Same: *Where the answer is omitted.*

Where a defendant in chancery brought error, and alleged as error that the bill was not supported by the evidence, and the record contained a transcript of the bill, certain depositions, and the decree, but none of the defendant's answer, it was *held*, that, since the court did not know

[1] See S. C. 23 Ill., 453.

what allegations of the bill were admitted, or what denied, with no knowledge of the contents of the answer, it could not say that the allegations of the bill were not admitted, and the decree below was affirmed.

CHANCERY PRACTICE: *When plaintiff need not require defendant to file new answer.*

Where, after a defendant has filed his answer, the bill is amended by making a new party, against whom a decree *pro confesso* is rendered; and the cause is set down for a hearing upon the bill, answer, replication, etc., by the consent of the defendant, he can not be heard to complain that he was not required to file a new answer upon the amendment of the bill. He was at liberty to file a new answer, but the complainant was not obliged to require him to do so.

ERROR to Circuit Court of *Logan* County.

The case is sufficiently stated by the Court.

It was alleged as error, that upon the amendment of the bill the defendant was not required to file a new answer; and that the bill was not sustained by the evidence.

W. H. Herndon, for plaintiff in error. *J. C. Conkling*, for defendant in error.

*BECKWITH J. This was a bill in chancery brought [*387] to rescind a sale of a patent right, upon the ground of fraud, and intoxication of the vendee. A decree was rendered in the court below in accordance with the prayer of the bill, from which one of the defendants appealed. It is the duty of a party bringing a case before us, by appeal or writ of error, to have a transcript of so much of the record certified to this court as will enable us to determine whether the errors of which he complains have intervened or not. We are not at liberty to guess at the contents of the record of the court below, or of any part of it. The record in the present case contains a transcript of the bill, certain depositions, and the decree, but none of Miller's answer. We do not know what allegations of the bill were admitted, or what were denied, and with no knowledge of the contents of the answer, we are unable to say that the allegations of the bill were not admitted. The pleadings in every case must be brought before us. After Miller had filed his answer, the bill was amended by making

Flinchbaugh a party, against whom a decree *pro confesso* was rendered. The cause was set down for a hearing upon [*388] the bill, answer, replication, &c., by the consent *of the appellant, and he cannot now be heard to complain that he was not required to file a new answer. He was at liberty to file a new answer, but the complainant was not obliged to require him to do so. 1 Daniel's Ch. Pr. 468. As no error is shown by the record, the decree of the court below is affirmed.

Decree affirmed.

Usher F. Linder *v.* Margaret F. Monroe *et al.*, Executors of Byrd Monroe, Deceased.

Pleading: *What is a sufficient profert.*

Where profert of letters testamentary was made in the following form: "And the said plaintiffs bring into court here the letters showing their qualifications as executors," it was *held* that this was a sufficient profert.

Judgment: *Must not exceed the ad damnum; remittitur.*

A plaintiff can not recover a greater sum as damages than he has laid in his declaration.[1]

But he may remit the excess and have judgment for the balance.[2]

Same: *When excess is to be remitted.*[3]

Where in an action of assumpsit the *remittitur* of the excess of damages over the sum laid in the declaration, was made in the court below, after their assessment by the clerk upon a default, and judgment for the sum reported by him, and execution was awarded for the balance, it was *held* that the *remittitur* was in apt time.

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[1]Oakes *v.* Ward, 19 Ill., 46; Brown *v.* Smith, 24 id., 196; Rives *v.* Kumpler, 27 id., 291; Kelly *v.* National Bank, 64 id., 541.

[2]See Gillet *v.* Stone, 1 Scam., 539.

[3]See Russell *v.* Hubbard, 59 Ill., 335; Buckles *v.* Northern Bank, 63 id., 268.

As to an informal entry of a *remittitur*, see McCausland *v.* Wonderly, 56 Ill., 410; Rothgerber *v.* Wonderly, 66 id., 390.

As to *remittitur* in the Supreme Court, see Dowling *v.* Stewart, 3 Scam., 193; Fournier *v.* Faggott, id., 347; Chenot *v.* Lefevre, 3 Gilm., 637; Breese *v.* Becker, 51 id., 82; Welsh *v.* Johnson, 76 id., 295; Cheney *v.* City National Bank, 77 id., 562; Nixon *v.* Halley, 78 id., 611.

SAME: *Should not be entered in figures.*

The amount for which the judgment of a court is rendered, should not be entered in figures, but should in all cases be written out with letters.

SAME: *Correction and entry of in Supreme Court.*[1]

Where the damages are assessed in the court below for a sum in excess of the *ad damnum*, and as to such excess a *remittitur* is filed by the plaintiff, but the judgment is finally entered for a sum in excess of the remainder, upon error brought, since the Supreme Court has before it in the record the *data* from which a correct judgment can be entered, a judgment will be entered in the Supreme Court for the sum remaining after the *remittitur* was entered.

ERROR to Circuit Court of *Coles* county.

Assumpsit by defendants in error against plaintiff in error, the *ad damnum* clause of plaintiff's declaration being for $300.

The profert of the letters testamentary referred to by the court, was as follows: "And the said plaintiffs bring into court here the letters showing their qualifications as executors."

The *remittitur* of damages in excess of the *ad damnum* was made after their assessment by the clerk upon a default, and judgment for the sum reported by him; and execution was awarded for the remainder.

The remaining facts are sufficiently stated by the court.

The assignments of errors were (1) the omission of plaintiffs to make profert of their letters testamentary; (2) that the judgment was too large; (3) its entry in figures.

McLain & St. John, for plaintiff in error. *John Schofield* and *Ficklin & Moore*, for defendants in error.

*BREESE, J. We do not consider any of the errors as- [*389]
signed on this record appear upon it, nor are the positions assumed by the plaintiff in error, tenable.

The declaration pursues the form of the most approved precedents, and the plaintiffs therein make profert of the letters testamentary in the usual form.

[1]See Pearsons *v.* Bailey, 1 Scam., 507; Telfer *v.* Hoskins, 32 Ill., 165; Prince *v.* Lamb, Breese, 378; Boyle *v.* Carter, 24 Ill., 49; Peck *v.* Stevens, 5 Gilm., 127; Wilmans *v.* Bank of Illinois, 1 id., 667.

The rule is, undoubtedly, that a party cannot recover a greater sum as damages than he has laid in his declaration, but it is equally true that he may remit the excess and have judgment for the balance. The remittitur in this case was in apt time, and the amount remaining is the limit of the recovery.

It seems to be admitted on both sides, and so the record indicates, that the sum of one hundred and fifty $\frac{22}{100}$ dollars was the amount remitted. If this be so, then the residue would be two hundred and forty-three $\frac{79}{100}$ dollars, and not two [*390] *hundred and seventy-three $\frac{56}{100}$ dollars, for which the judgment was rendered; consequently, the judgment is for a sum to large, and must be reversed, but as we have the *data* before us by which a correct judgment can be entered, a judgment will be entered here for the sum remaining after the remittitur was entered, which is two hundred and forty-three dollars and seventy-nine cents.

For this sum the plaintiff below is entitled to judgment. The plaintiff in error will recover his costs.

We may remark here, that amounts should not, in the judgment of a court, be entered in figures, but in all cases by letters. There is no safety in using figures for such purpose, as practiced in this case. It is not to be tolerated.

Judgment reversed.

Nelson (a mulatto) *v.* The People of the State of Illinois.

Constitutional Law: *The choice of means to carry out an authorized end belongs to the legislature.*

Where the constitution provides that the general assembly shall pass laws for a certain purpose, but fails to specify the mode by which the proposed end shall be effectuated, it devolves upon the legislature to choose such means as will attain the end; and in doing so they are the sole judges as to the proper means to be employed, and are subject to no limitations other than such as are contained in the constitutions of the State and United States governments.

SAME: *Slavery or involuntary servitude.*

The act of Feb. 12, 1853, to prevent negroes and mulattoes from emigrating into this State, and which makes the same a misdemeanor punishable by fine, and authorizes a sale of the prisoner to any person who will pay the fine and costs for the shortest period, and authorizes the purchaser to compel the prisoner to work for and serve out his time, does not reduce the person convicted to slavery; but is a mode of punishment not prohibited by section 16, art. 13, of the constitution of 1848, which declares that "there shall be neither slavery nor involuntary servitude in this State except as a punishment for crime whereof the party shall have been duly convicted." The State has the power to define offenses and prescribe the punishment, and the exercise of such power cannot be inquired into by a court of justice. In the rightful exercise of this power, the legislature declared the emigration of persons of color to and their settlement in this State, an offense, and declared the punishment; and the courts are not authorized to say that such an act is not a crime, or that the mode of punishing it is improper.

SAME: *Prohibition of persons of color from emigrating to or settling in this State.*

Under art. 14, constitution 1848, which declared "that the General Assembly shall, at its first session under the amended constitution, pass such laws as will effectually prohibit free persons of color from emigrating to or settling in this State, and to prevent the owners of slaves from bringing them into the State for the purpose of setting them free," the State may prohibit slaves from coming to or settling in the State, and if they violate the prohibition they may be punished therefor. The provisions of the act of Feb. 12, 1853, to carry said constitutional provision into effect, and which applied to both bond and free persons of color, were only reasonable police regulations, adopted for the protection of the inhabitants of the State against a class of persons supposed to be injurious to the community.

SAME: *Relation of act of* 1853 *to the fugitive slave law.*

Congress has the exclusive right to provide by enactment for carrying into effect the provisions of the national constitution, requiring the return of fugitives from justice and labor; and State legislatures have no power to adopt any measure which may hinder or obstruct the enforcement of the act of Congress on that subject.

But the placing the slave in the custody of the purchaser for a limited period, as authorized by the act of Feb. 12, 1853, did not have that effect, as the custody was declared to be subject to the act of Congress.

Nor did the requirement that the owner shall pay all reasonable costs incurred in the apprehension and keeping of his slave. But when the act declared that he should pay the remainder of the fine imposed by said act, it would seem that such a provision might obstruct or hinder the execution of the act of Congress.

Nor had the General Assembly the power to prescribe a different tribunal for the purpose of ascertaining whether the fugitive was a slave, from that created by Congress.

Although the 8th section of the act of Feb. 12, 1853, providing for the making proof of right to the prisoner, as a slave, before the justice of the peace, and requiring the payment of the remainder of the fine before allowing the owner to remove the slave, may be repugnant to the act of Congress, still the remaining portions of the law not subject to these objections, and not violative of the national or State constitutions, may be enforced.

SAME: *Rule of construction where only part of an act is unconstitutional.*

If portions of an act are constitutional, and a portion is not, such parts as are free from the objection may be executed and enforced, whilst the obnoxious provisions will be disregarded.

ERROR to Circuit Court of *Adams* County.

The case is sufficiently stated by the court.

Grimshaw & Williams, for plaintiff in error. *J. B. White*, State's Attorney, for defendant in error.

[*392] *WALKER, C. J. This was a prosecution under the act of the 12th of February, 1853, to prevent negroes and mulattoes emigrating into this State. The third section of the act declares, that if any negro or mulatto, bond or free, shall come into this State, and remain ten days, with the evident intention of residing in the same, such negro or mulatto shall be deemed guilty of a high misdemeanor, and for the first offense shall be fined the sum of fifty dollars, to be recovered before any justice of the peace of the county where such negro or mulatto shall be found. It also directs that the proceedings shall be in the name of the people, and a trial by a jury of twelve men.

The fourth section declares, that if such negro or mulatto shall be found guilty, and the fine assessed be not forthwith paid to the justice before whom the proceedings shall be had, it shall be the duty of the justice of the peace to commit the negro or mulatto to the custody of the sheriff, or otherwise keep him, her or them, in custody; and the justice of the peace is required forthwith to advertise the negro or mulatto, by

posting up notices in at least three of the most public places in his district, for ten *days, and, on the day and [*393] at the place named in the notice, the justice shall, at public auction, proceed to sell such negro or mulatto to any person who will pay the fine and costs for the shortest period. And the power is conferred upon the purchaser to compel such negro or mulatto to work for and serve out the time, and he is required to furnish such negro or mulatto with comfortable food, clothing and lodging during the servitude.

This proceeding was had under these provisions, and resulted in a conviction of the accused and the entry of a fine. From the judgment of the justice of the peace an appeal was taken to the Circuit Court, where a trial was had, resulting in a conviction and the imposition of a fine; to reverse which, the cause is brought to this court. It is insisted, as a ground of reversal, that the law is repugnant to our State Constitution, the Constitution of the United States, and to the fugitive slave law. The sufficiency of the evidence to sustain the verdict is not questioned on the argument.

Article XIV of our Constitution declares, "that the general assembly shall, at its first session under the amended Constitution, pass such laws as will effectually prohibit free persons of color from emigrating to or settling in this State, and to prevent the owners of slaves from bringing them into the State for the purpose of setting them free." It is obvious that a portion of the provisions of this act are designed as a compliance with this constitutional requirement.

The Constitution having failed to specify the mode by which such persons shall be effectually prevented from emigrating to or settling within this State, it of necessity devolves upon the general assembly to choose such means as will attain the end. And in doing so, they must be held to be the sole judges as to the proper means to be employed. They have the discretion, subject to the control of neither of the other departments of government. The only limitation of their power is the Constitutions of the general and State governments. If not restricted by either of those instruments, their power has no

limitation. And to determine that question, a resort must be had to the provisions of those fundamental laws.

[*394] *It is first insisted that this enactment is violative of the 16th section of article XIII of our Constitution. It declares that "there shall be neither slavery nor involuntary servitude in this State, except as a punishment for crime whereof the party shall have been duly convicted." In the case of *Eells* v. *The People*, 4 Scam. 498, it was said, that a State has the power to define offenses and prescribe the punishment, and that the exercise on such powers cannot be inquired into by a court of justice. In the rightful exercise of this power, the legislature has declared the emigration of persons of color to, and their settlement in, this State as an offense, and has declared the punishment. The courts are not authorized to say that such an act is not a crime, or that the mode of punishing it is improper. Nor have they the right to determine that the best mode of enforcing this constitutional provision was by some other mode than by punishing the act as a crime.

Having declared it an offense, the punishment by involuntary servitude, provided by the act, is not unusual, but is one of the common means resorted to, to punish offenses, as the State penitentiary, and the various houses of correction in our State, fully attest. Our legislature, at an early period in our history, as have the legislative bodies in perhaps a majority of the States, declared that vagrancy in any of its citizens is a crime, punished by sale and involuntary servitude, in the same manner as the offense created by this statute. And we have yet to learn that the constitutionality of that law has ever been questioned. We have no hesitation in holding that the legislature were not prohibited by this clause of the Constitution from enforcing the provision prohibiting persons of color from coming to and settling in the State. This does not reduce the person convicted to slavery, but it is a mode of punishment not prohibited by the 16th section of article XIII of the Constitution.

Under this proceeding, the person convicted and sold is only reduced for a limited period to the condition of an apprentice.

He is bound to the faithful service of his master during the period of his apprenticeship. The laws of all States of the Union authorize the relation of master and apprentice, and yet it has *not been regarded as involuntary servitude with- [*395] in the meaning of our Constitution and others with similar provisions. It may be said, however, that the relation of master and apprentice is based upon contract; but, until of a certain age, the apprentice has no power to enter into the agreement, which is made by another for him, and not at all times by a parent or even a guardian, as the power to act for the minor is conferred upon officers of the law. And yet the servitude, although involuntary in such cases, has never been, so far as we can learn, regarded as violative of this provision of the Constitution. In all of these cases, as well as those under this enactment, the master only has the right to the labor and service for a limited period.

We have seen that the legislature has declared that the emigration of such persons to and settlement in the State is declared to be an offense. And the statute has made ample provisions that it shall only be punished upon the party being duly convicted thereof. This is also in strict compliance with the Constitution. We are, for these reasons, unable to perceive that this enactment is in conflict with this section of the fundamental law.

It is again urged, that this enactment is in violation of the fourth article of the Constitution of the United States. It declares that "the citizens of each State shall be entitled to all privileges and immunities of citizens of the several States." In reference to this provision, it is only necessary to say that this record contains no evidence that the plaintiff in error is a citizen of any State. When that shall appear it will be time to discuss the question.

It is also insisted, that the provisions of this second section of the act apply to both bond and free persons of color, whilst article XIV of our Constitution refers alone to free persons of that description. In the case of *Eells* v. *The People*, it was held that the police power of the State embraces the authority

over the whole of the internal affairs of the State, in its civil and criminal polity, and that it has the power to prevent the introduction of negro slaves into the State, and to punish those of its citizens who introduce them. It was likewise held that such a law was not in conflict with the third paragraph of sec-
[*396] tion *2 of article IV of the Constitution of the United States. That case was removed to the Supreme court of the United States, where it was affirmed. If, then, the State may prohibit the introduction of slaves, and punish those who introduce them, it follows that the State may, by the exercise of the same power, prohibit the slaves from coming to or settling in the State, and if they violate the prohibition they may be punished therefor. The decision of the case of *Eells* v. *The People*, it is true, was made under the old Constitution, but the provisions of that instrument on this question were the same as the new one, except article XIV, which contains no provision prohibiting the exercise of the power. The provisions under consideration are only a reasonable police regulation, adopted for the protection of the inhabitants of the State against a class of persons which are supposed to be injurious to our community

It is likewise insisted that the provisions of the 8th section of this act are in conflict with the act of Congress, providing for the return of fugitives from justice and labor. That section declares that if after the arrest of such person, any person shall claim the negro or mulatto as a slave, the owner or his agent shall have the right, by giving reasonable notice to the officer or person having the custody of such negro or mulatto, to appear before the justice of the peace, before whom such negro or mulatto had been arrested, and may there prove his or her right to the custody of such person as a slave, and if the justice of the peace shall, from the evidence, be satisfied that the claimant is entitled to the same, in accordance with the laws of the United States passed upon the subject, he shall, upon the owner or agent paying all costs up to the time of claiming such negro or mulatto, and the costs of proving the same, and also any balance of the fine remaining unpaid give to the

owner or agent a certificate of such facts, and the owner or agent shall have the right to remove such slave out of the State. These provisions, it is claimed, hinder and delay the execution of the fugitive slave law, and operate as an obstruction to the assertion of the rights of the owner.

It has been held that Congress has the exclusive right to *provide, by enactment, for carrying [397*] into effect the provisions of the national Constitution, requiring the return of fugitives from justice and labor. And it has likewise been held that State legislatures have no power to adopt any measure which may hinder or obstruct the enforcement of the act of Congress on that subject. Then does this provision have that effect? The placing the slave in the custody of the purchaser for the limited period, does not, as the custody is declared to be subject to the act of congress. Nor does the requirement that the owner shall pay all reasonable costs incurred in the apprehension and keeping of his slave. But when it declares that he shall pay the remainder of the fine, it would seem that such a provision may obstruct or hinder the execution of the act of Congress. It imposes terms, conditions and burthens, additional and repugnant to that act. Nor have the general assembly the power to prescribe a different tribunal for the purpose of ascertaining whether the fugutive is a slave from that created by congress.

But if these provisions are violative of the act of congress, the question does not arise in this case. When the master shall apply for his slave the question will arise, but he has not, so far as this record discloses, made such an application. Although the eighth section of the act under consideration may be repugnant to the act of congress, still, the remaining portions of the law, not subject to the objection, and not violative of the national or State Constitutions, may be enforced. If portions of an act are constitutional, and a portion is not, such parts as are free from the objection may be executed and enforced, whilst the obnoxious provisions will be disregarded. The provisions under which these proceedings were had, violate no provision

of the State or national Constitutions, or any enactment of congress, and they warranted the judgment of the court below.

The fourteenth article of the Constitution, was separately submitted to the people for adoption or rejection. After a full consideration of its provisions, the voters of the State sanctioned it by a majority of many thousand. Having thus become a part of the fundamental law of the State, the members of the general assembly, under their oaths to support [*398] that instrument, had no *choice but to give effect to its provisions, and when they have done so, it is for the courts to enforce the enactment according to its spirit, unless prohibited by the Constitution itself. If the provisions of the law are not deemed, by the people, the best calculated to attain the end, it is with them, through their representatives to make the change. Or if the constitutional provision itself is deemed wrong, the people have the means of repealing or amending the article. But so long as it is a part of the fundamental law of the State, it must be enforced according to its spirit and true meaning. The judgment of the court below must be affirmed.

Judgment affirmed.

Beckwith, J.. dissented.

W. H. Happy *et al. v.* Joseph Morton *et al.*

Trusts, *of a religious nature; equitable jurisdiction over perversions of.*[1]

Courts of equity will exert their powers to prevent a misuse or an abuse of charitable trusts, and especially trusts of a religious nature, by trustees or by a majority of a society having possession of the trust property; but in all cases the trust and the abuse of it must be clearly established in accordance with the rules by which courts are governed in administering justice.

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[1] See First Cong. Church *v.* Stewart, 43 Ill., 81; Brunnenmeyer *v.* Buhre, 32 id., 183; Lawson *v.* Kolbenson, 61 id., 405; Nelson *v.* Benson, 69 id., 27.

As to title to church property in case of schism, see Ferraria *v.* Vasconcellos, 23 Ill., 456; S. C., 27 id., 238; 31 id., 26; Nicolls *v.* Rugg, 47 id., 47;

SAME: *Where the perversion is a departure from tenets of founder; tenets and specific departure must be stated; perversion must be substantial.*

If the alleged abuse is a departure from the tenets of the founders of a charity, their particular tenets must be stated, that it may appear from what tenets the alleged wrongdoers have departed. In like manner it must be stated in what the alleged departure consists. Courts of equity do not interfere on account of inaccuracies of expression or inappropriate figures of speech, nor for departures from mathematical exactness in the language employed in inculcating the tenets of donors. There must be a real and substantial departure from the purposes of the trust, such an one as amounts to a perversion of it, to authorize the exercise of equitable jurisdiction in granting relief.

RELIGIOUS CORPORATIONS: *Effect of incorporation upon individual rights.*

An organization under the statute by a majority of an incorporated religious society, operates as a transfer of the rights and interests of individual members to the corporation thereby created; but an organization in opposition to the majority creates a new society, and has no effect upon individual rights and interests in the old one.

EVIDENCE: *Historical facts; opinions as to departures from the faith of a religious denomination.*

Courts are frequently required to ascertain facts from history, but then they consult its authentic sources, and ascertain such facts from them, and not from the opinions of witnesses. The mere opinions of witnesses are not admissible as evidence of historical facts.

Where, therefore, the question at issue related to an alleged departure from the true standard of faith of a religious denomination by the minister and his adherents, it was *held*, that in determining the question, the mere opinions of witnesses, however honestly entertained, could not be considered, but facts must be shown from which the court could arrive at a conclusion of its own; and where the alleged departure on the part of the minister consists in the alleged preaching of doctrines contrary to those of the society when it was formed, the court should be exceedingly careful in giving a construction to a few detached sentences expressed in highly figurative language, and ought not to interpret

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Lawson *v.* Kolbenson, 61 id., 405; Nelson *v.* Benson, 69 id., 27; as to what is a schism.

As to injoining a minister from officiating as such, see Independent Presb. Church *v.* Proctor, 66 Ill., 11; First Cong. Church *v.* Stewart, 43 id., 81; as to injoining the action of ecclesiastical courts, see Chase *v.* Cheney, 58 Ill., 509.

For quite a full collection of authorities upon the subject of Religious Societies and Church Corporations in Ohio, but in which principles of more or less general application are stated, see 12 Am. Law Reg. (N. S.), 201, 329, 537.

them as inculcating a doctrine contrary to the faith of the society, if they are susceptible of any other meaning.

CHANCERY PLEADINGS: *How construed.*

Where a bill is filed to prevent the perversion of a trust, it will be intended that everything has been lawful and consistent with the trust, which is not expressly shown on the bill to have been unlawful or inconsistent with it.

APPEAL from Circuit Court of *Morgan* county.

Bill in chancery filed by appellees against appellants.

The case is sufficiently stated by the court. The decree below was for complainants.

I. J. Ketchum and *D. A. & T. W. Smith*, for appellants. *Morrison & Epler* and *S. T. Logan*, for appellees.

[*405] *BECKWITH, J. In the year 1832 a religious society was formed at Jacksonville, called by its members the Church of Christ, and the association has been maintained from that time to the present, during which the number of its members has largely increased, and many of them have departed this life. It was never organized under our statute providing for the incorporation of religious societies. The society elected its own preachers and officers, and was the sole judge of their qualifications, and was not subordinate to any other society or ecclesiastical body, but in every respect an independent [*406] association, subject to no authoritative *discipline or reproof except such as might be self-imposed. In the year 1835 its members and others favorable to its prosperity, contributed the sum of two hundred and fifty dollars for the purchase of a lot of ground on which to erect a house for public worship. The purchase was made and the land conveyed to certain persons by name for the use of the so-called Church of Christ. A house of worship was erected thereon by the members of the society, which remained there and was used by them for several years. In the year 1850 the society purchased another lot of ground adjoining the one which they first purchased, which was also conveyed to certain persons by name for the use of the so-called Church of Christ. The society disposed

of a part of the lands thus purchased, and upon the remainder erected a new house of public worship, the old one being removed. The land purchased in 1850 and the new house of worship were also paid for by contributions from members of the society and others favorable to its prosperity.

About the first of September, 1857, the Rev. Walter J. Russell commenced preaching to the society, and he continued his ministrations, under yearly elections, up to the time of his death, which took place in 1863, since the commencement of this suit. In August, 1860, a minority of the society, composed of the complainants and those whom they represent, organized a new society, under the statute providing for the incorporation of religious societies. The members of the new society thereafter declined to attend the meetings of the old one, alleging that the Rev. Mr. Russell and a majority of its members had departed from the faith held by the society when it was formed. After various unsuccessful efforts to reconcile the differences between the parties, the complainants, as trustees of the new society, composed of a minority of the old one, filed a bill in chancery against the Rev. Mr. Russell and certain persons representing the majority, alleging that he preached, and the majority of the old society sustained him in preaching, doctrines contrary to those of the society when it was formed, and when said property was acquired, thereby diverting its use from the purpose for which it was donated, and praying for its surrender to the complainants,* and that the defendants might be restrained [*407] from disturbing them in its use and occupation. Two amendments were subsequently made to the bill, more specifically setting forth the faith of the society and the alleged departures from it, which will be more particularly noticed hereafter. No critical examination of the jurisdiction of courts of equity over charitable trusts is necessary to dispose of the present case, and only some well established general principles will be referred to. Courts of equity will exert their powers to prevent a misuse or an abuse of charitable trusts, and especially trusts of a religious nature, by trustees or by a majority of a

society having possession of the trust property; but in all cases the trust and the abuse of it must be clearly established in accordance with the rules by which courts are governed in administering justice. If the alleged abuse is a departure from the tenets of the founders of a charity, their particular tenets must be stated, that it may appear from what tenets the alleged wrongdoers have departed. In like manner it must be stated in what the alleged departure consists. Courts of equity do not interfere on account of inaccuracies of expression or inappropriate figures of speech, nor for departures from mathematical exactness in the language employed in inculcating the tenets of donors. There must be a real and substantial departure from the purposes of the trust, such an one as amounts to a perversion of it, to authorize the exercise of equitable jurisdiction in granting relief. Taking these well established rules as our guide, we are required to dismiss from our consideration a large portion of the voluminous record in this case. The original bill alleges that the property in question was purchased for the purpose and with the intention of erecting thereon a suitable building for the use of the society called the Church of Christ, in which to worship Almighty God according to the teachings of the Christian or Reform Church; but it does not allege what the teachings of the Christian or Reform Church were, nor in what particulars these teachings had been departed from.

It is true, the bill alleges that the society at Jacksonville, from its original organization, continued for a time in har-
[*408] mony *and union with all the brotherhood of the Christian church through the United States as to theological views and teachings, and as to church government and discipline, but it does not allege what the theological views and teachings of the brotherhood throughout the United States were, nor any trust that the worship in the church at Jacksonville should continue in harmony and union with such views and teachings, nor in what particulars such views and teachings have been departed from. An elemental principle of pleading requires us to intend everything to have been lawful and consistent with the trust,

which is not expressly shown on the bill to have been unlawful or inconsistent with it. *Foss* v. *Harbottle*, 2 Hare, 502. The defects of the original bill were attempted to be supplied by two amendments, which allege that the society at Jacksonville was founded and established upon certain doctrines specifically set forth, which were held by its members when the property in question was purchased. For convenience, we shall state these alleged doctrines in a numerical order: First, that the Bible, and the Bible alone, is the only sufficient rule of faith and practice, and the only allowable creed. Second, that the word of God, as therein contained and set forth is the sword of the spirit, through which the Spirit of God operates in the conviction and conversion of sinners and preparing them to believe and obey the gospel and for fellowship in the church after obedience. That men on reading the gospel, or hearing it proclaimed, are able to believe in its precepts and obey its commands, and are under obligation so to do; and that no person has any right to wait for or expect the Spirit of God to operate on his mind or heart by special operation or direct action other than through the word, to produce in him faith or repentance, or a disposition to obey. Third, that the gospel as it was written by the prophets, apostles and evangelists, constitutes the rule of faith and practice; that all are bound to believe and obey it as written, and that no part of it nor any of its precepts, injunctions, revelations or promises are to be enlarged or diminished, altered, varied, explained or interpreted by any supposed revelation made at any time since to the individual *or to any other, by a direct operation of the Holy [*409] Spirit on the mind or heart of any individual or any supposed inner light, or promptings of any agency acting internally, or invisibly and inaudibly. Fourth, that the Bible alone is the only and all sufficient rule of faith and practice, and is to be taught as it was written, and is not to be endangered by permitting it to be expounded, added to, diminished, interpreted, perverted, or in anywise altered by or in consequence of any inward impressions or delusive imaginings of excited emotions or supposed communications from invisible or in-

audible sources, or assumptions of direct revelations from the spirit of God. Fifth, that the society had always, prior to the Rev. Mr. Russell's ministrations, rejected the mourner's bench as a mere human device and mischievous in its tendency; but it is not alleged that its rejection was to be taught as an article of faith, nor that such a bench was ever used in the church, nor that the teachings of Mr. Russell were in favor of the use of one. The allegations of the second amendment, so far as it is material to notice them, consist of alleged remarks of Mr. Russell in private conversation between himself and two other gentlemen, which are not alleged to be a part of his teachings to the society, and which we are therefore required to intend were not a part of them, and that they in no way affected the use of the property in in question. These are the only specific allegations in regard to the faith of the society, and whether consistent with each other or not are to be taken as a whole, and when so considered we are asked to declare that the teachings of the Rev. Mr. Russell were a substantial departure from such alleged faith. No departure whatever is alleged from the first article of the faith, nor any substantial departure from the fifth article, as we have enumerated them. We are required to take the allegations of the bill as the standard of faith, and the specific teachings of Mr. Russell as the evidence of departure, and in determining the questions thus presented for our consideration we cannot consider the mere opinions of witnesses. They may have had in their minds an entirely different standard of faith from the one alleged in the bill, or they may not have properly [*410] construed the language employed by Mr. *Russell. We cannot judicially declare that the alleged departure has taken place from such opinions, however honestly entertained. We must have facts from which we can arrive at a conclusion of our own. A striking illustration of the necessity of adhering to this rule is presented in considering the alleged departure from the second article of the society's faith. The allegations of the bill in regard to it do not assert that the society held that the Holy Spirit is not ever personally present to the minds and hearts of men, but that the spirit has no special operation or direct action

upon them other than through the word. By the rules of construction governing us we are to intend that the society admitted the general operation and indirect action of the spirit, independent of the word. The term "word" is an ellipsis of the term "word of God," a figure of speech used to denote the books of the Old and New Testaments. It is evident that the language of those books has no meaning except as it represents ideas. As originally written in the Hebrew and Greek, they have no meaning and convey no ideas to those entirely unacquainted with those languages. The allegation of the bill that the word of God is the sword of the spirit we understand to mean the ideas which it represents are the sword; and the allegation that the spirit operates through the word of God, we understand to mean that the spirit operates through the ideas which the word of God represents. The bill does not allege the society held that the word of God produces or is of itself sufficient to produce faith, repentance and a disposition to obey, independent of the influence of the spirit; and as we are required to construe its allegations, it admits that the Holy Spirit is a *separate* and independent agency or power operating upon men's minds and hearts to produce those results, but limits the channel through which its special operation or direct action takes place, to the ideas represented by the written word, held and comprehended by men. It asserts the society held that no such action or operation takes place until the mind becomes possessed to some extent of the ideas represented by the written word; and it admits that when the mind has to some extent become possessed of such ideas, that the Holy
Spirit has a special operation and direct action through [411] them. We understand that the Rev. Mr. Russell was preaching to and teaching men and women who, from their earliest infancy, had more or less knowledge of the written word. They had to a greater or less extent become possessed of the ideas represented by it. His teachings do not inculcate the doctrine that the Holy Spirit specially and directly operates upon the minds and hearts of men who had never heard of the written word and had no ideas concerning it. His language

was not addressed to or used with reference to that class of men. From the bill, then, we understand the society held as a fundamental doctrine that the Holy Spirit, in its special operation and direct action upon men's minds and hearts, operates and acts only through those ideas represented by the written word which are held and comprehended by men; not otherwise defining the time, manner or extent of its action in producing faith, repentance and a disposition to obey. The teachings of the Rev. Mr. Russell, where his language is construed with reference to the class of persons to whom it was addressed, are not inconsistent with the faith of the society as alleged in the bill. He taught that the Holy Spirit had a special and direct action upon the minds and hearts of men, producing with and through the ideas represented by the written word, faith, repentance and a disposition to obey. We have not undertaken to define the true faith of the complainants. We state it as they have stated it in their bill, construing its allegations as we are required to construe them, and before this court can declare the teachings of the Rev. Mr. Russell in this regard an abuse of the trust in question, the complainants must show a distinction between such teachings and their standard of faith, so that a difference can be perceived. The witnesses, when they speak of a departure from the faith of the society in this regard, have no reference to the standard of faith alleged in the bill as we construe its allegations, but refer to their own ideas of the faith, and then give their opinions that the teachings of Mr. Russell were a departure from such ideas. Similar considerations apply with equal force to the alleged departure from the third article of the society's faith, alleged to be that no [*412] part of the *Bible, nor any of its precepts, injunctions, revelations or promises are to be enlarged or diminished, altered, amended, varied, explained or interpreted by any supposed operation of the Holy Spirit upon the minds or hearts of men, but it is not alleged that the Rev. Mr. Russell ever assumed to enlarge, diminish, alter, amend, vary, explain or interpret any part of the Bible, or any of its precepts, injunctions, revelations or promises by any such means. It is, however,

asserted that he taught that others might do so, contrary to the third article, and in express violation of the fourth article, requiring the opposite doctrine to be taught. The evidence of the teachings of Mr. Russell in this regard are certain extracts from his writings set forth in the bill, the meaning of which the defendants say is misunderstood and grossly perverted. The defendants emphatically deny that any such doctrine as the complainants deduce from these extracts has ever been held or taught. We are required to scrutinize the language employed and define its true meaning. Our experience admonishes us that we should be exceedingly careful in giving a construction to a few detached sentences expressed in highly figurative language, and we ought not to interpret them as inculcating a doctrine contrary to the faith of the society, if they are susceptible of any other meaning. The language employed by Mr. Russell does not necessarily mean that the truths of God's holy word, which are unalterable and unchangeable, were to be altered, diminished, amended or varied by His Holy Spirit. He was speaking of the influence of the Holy Spirit in removing error and prejudice from men's minds, and in inclining their perverse hearts to love and obey the Savior. He taught that when the mental blindness occasioned by error and prejudice was removed, that his hearers could more clearly realize that which they intellectually apprehended and understood before; that when the heart was sincerely inclined to love and obey the Savior its emotions were changed, which gave rise to new thoughts and expressions corresponding to such a change, and he brought his congregation to seek divine assistance in the removal of those errors and prejudices, and to incline their affections to love and obey their Lord and Savior. We are unable to *perceive that their teachings necessarily inculcate the [*430] doctrine that God's holy word is to be expounded, enlarged or explained contrary to the faith of the society, and it is worthy of remark that no one of the thirteen reverend gentlemen who were examined as witnesses in this case, familiar as they were with the extracts in question, and many of whom heard the discourses from which they are taken when they were delivered,

ever considered them as inculcating a doctrine which was departure from the third and fourth articles of the faith of the society. A departure which was not noticed by any of the congregation could not have been a very serious one. The language used by Mr. Russell is highly figurative, but it is susceptible of an interpretation consistent with the faith of the society; and it would be manifestly unjust to construe it as meaning something different from what his congregation understood it to mean when it was used.

Another insurmountable objection to granting the relief sought by the complainants, is their want of title to or interest in the trust property. The bill is brought in behalf of a corporation which never had any right to or interest in the property. The members of the new society may have had individual rights and interests when it was organized under the statute, but their individual rights and interests did not pass to the corporation and cannot be asserted by it. An organization, under the statute, by a majority of a society, operates as a transfer of the rights and interests of individual members to the corporation thereby created, but an organization in opposition to the majority creates a new society, and has no effect upon individual rights and interests in the old one.

Notwithstanding these objections to granting the relief sought by the complainants, we have carefully examined the evidence with reference to the true faith of the society at Jacksonville when the property in question was purchased. The only witness for the complainants who professes to have any actual knowledge in regard to it, is John T. Jones. The other witnesses for the complainants have given their opinions in regard to the historical fact. Courts are frequently required to ascertain [*414] facts *from history, but they consult its authentic sources, and ascertain such facts from them, and not from the opinions of witnesses. The mere opinions of witnesses are not admissible as evidence of historical facts. No one of the complainants' witnesses, except Mr. Jones, had any knowledge of the faith of the society when it was organized, nor for nineteen to twenty-five years afterwards. In the year

1832, most of them were children, from six to sixteen years of age. Two of the witnesses examined by the defendants were members of the society at the time of its organization, or from about that time; another has been a member since the year 1839, and another a minister of the denomination for upwards of thirty years. From the testimony of those witnesses who were acquainted with the faith of the society when it was organized, it appears that prior to that time there were two societies in Jacksonville—one called the Christian Church, holding the views advocated by Barton W. Stone, and the other called the Reformers, holding the views advocated by Alexander Campbell. The views held by these two societies were different in some particulars, and the same differences existed between them as now exist between the parties to the present controversy. The views of the one society were then esteemed to be directly opposed to those of the other. These two societies united, with the understanding that the members should tolerate each other's views. All parties understood that the society thus formed was not to have any creed, written or unwritten, other than the Bible, which it was claimed was so clear and explicit in its meaning, in all essential matters, as not to require any interpretation. There is no evidence that the society agreed to any particular view of the operation of the Holy Spirit, and from the circumstances under which the two then existing societies united in forming a new one, it is evident it was understood that no particular view on that subject should be considered as an article of faith. Historically, we know that the distinguishing feature of the sect was the rejection of all human creeds. Its members held that a sincere belief in Jesus as the Christ, the Son of God, was the only faith which could be lawfully demanded in order to admission to christian privileges *and church fellowship, and the only creed to which [*415] any one could be justly called upon to subscribe. All other creeds and confessions were repudiated, as without divine authority, and mere inventions of men. We also know, from the published writings of leading members of the sect, that no theories in regard to the particular mode in which either the

word or the spirit accomplished the divine purpose were regarded as articles of faith. They were considered as matters of opinion about which men might differ without any just cause or occasion of disunion. It was urged in argument that the Rev. Mr. Russell had insisted upon his peculiar views to the exclusion of those opposed to them; and that such exclusive inculcation of his views was intolerance towards those who entertained different views. The bill does not allege any breach of trust on that ground, nor any facts requiring an investigation of that subject. The Rev. Mr. Russell was not required to preach doctrines which he did not believe to be true; and the majority of his congregation were not required to vacate the common place of worship in order that some one might preach to the minority in accordance with their views. Mr. Russell considered his views essential, and undoubtedly he told his congregation that he so considered them, but they were not made a test of church membership or fellowship. We are not informed how often nor of the manner in which Mr. Russell expressed his views, further than that he entertained and expressed certain opinions differing from those of the minority. It does not appear that any member was ever reproved for not entertaining the views of the majority, and it would illy enforce the spirit of toleration existing when the society was formed to deprive the majority of their interest in the trust property, for not holding and expressing opinions in accordance with those of the minority. We are unable to perceive any substantial merits in the complainants' case, and the decree of the court below will be reversed and the bill dismissed.

Decree reversed.

Calvin D. Caldwell *v.* City of Alton.

Corporations: *Have no powers but those specifically conferred.*[1]

A corporation, public or private, possesses and can exercise no other powers than those specifically conferred by the act creating it, or such as are incidental or necessary to carry into effect the purposes for which it was created.

Municipal Corporations: *Power to establish and regulate markets.*

The power to establish and regulate markets includes the power to purchase the site and the erection of the necessary buildings and stalls upon it, and, when provided, to adopt such rules in regard to it, and to the business to be there transacted, as may be deemed reasonable and just.

Same: *Regulations of markets; restraint of trade.*

Such regulations as the city authorities may adopt in regard to them should have, and generally have, reference to the preservation of peace and good order and the health of the city. They should be of a police and sanitary character, and an attempt, by color of regulations, to restrain trade, is an abuse of this power.

Same.

Where the limits of the market are specially defined in the ordinance, and embrace but a portion of the city, the regulations prescribed for it can only operate within those limits, and cannot, under the power to establish and regulate markets, be made to extend throughout the city.

Same: *Restraint of trade.*[2]

Where, therefore, the Common Council of a city, under the pretext of regulating a market, passed an ordinance prohibiting, during market hours, the sale of vegetables outside of the limits of the market, it was *held*, that as to the defendant who was a regular dealer in family groceries outside of the market limits, the sale of vegetables being a part of his calling, such a regulation was in restraint of trade and void.

Same: *Hawkers and peddlers.*

The power to restrain hawkers and peddlers from using the streets of a city for purposes of traffic has nothing to do with the power to regulate a

[1]See Trustees *v.* McConnel, 12 Ill., 138; Betts *v.* Menard, Breese, 395; Town of Petersburg *v.* Metzker, 21 Ill., 205; Fitch *v.* Pincknard, 4 Scam., 69; Ill. Conf. Female College *v.* Cooper, 25 Ill., 148; Metropolitan Bank *v.* Godfrey, 23 id., 602; Chicago *v.* Rumpff, 45 id., 90; The People *v.* Chicago Board of Trade, id., 112; Mix *v.* Ross, 57 id., 121; Bissell *v.* City of Kankakee, 64 id., 249; Sherlock *v.* Village of Winetka, 68 id., 530.

[2]See Chicago *v.* Rumpff, 45 Ill., 90; City of Bloomington *v.* Wahl, 46 id., 489; Tugman *v.* Chicago, 78 id., 405.

market occupying but a small portion of the city. That may be arranged under the power to prevent nuisances.

Appeal from City Court of *Alton.*

The case is sufficiently stated by the court.

J. H. Yager, for appellant. *A. H. Gambrill*, for appellee.

[*418] *Breese J. This case comes before this court on the following agreed state of facts: That the charter of the city of Alton provides that its common council shall have the power to establish and regulate markets; that the council did, in pursuance of this provision, pass an ordinance prohibiting, during market hours, the sale of vegetables outside of the limits of the market; that the plaintiff in error sold vegetables at his store and regular place of business during market hours, the store being beyond and outside the limits of the market; that the plaintiff in error was, at the time of so selling, a regular merchant or dealer in family groceries in the city of Alton, and that the vegetables were sold at his store; and it was further agreed that such sale was contrary to the provisions of the ordinance.

On these facts the court below found for the city, and the record is brought here, where it is insisted by the plaintiff in error that the common council has not the power, under the city charter, to pass the ordinance in question, and that the same is in restraint of trade, and void.

The city contends that the ordinance is not in restraint of trade, but is reasonable and proper, as being in regulation of trade, and that the council had ample power to pass it.

It is a principle, everywhere recognized, that a corporation, public or private, possesses and can exercise no other powers than those specifically conferred by the act creating it, or such as are incidental or necessary to carry into effect the purposes for which it was created. *Trustees* v. *McConnel*, 12 Ill., 140; 2 Kent Com. 298; *McIntire* v. *Preston*, 5 Gilm. 60; *Firemen's Ins. Co.* v. *Ely*, 2 Cow. 709; Ang. & A. on Corp. 85.

The power, therefore, to establish and regulate markets, includes the power to purchase the site and the erection of the necessary buildings and stalls upon it, and, when provided, to *adopt such rules in regard to it, and to the [*419] business to be there transacted, as may be deemed reasonable and just.

A market, says Blackstone (2 Com. 37), is a franchise or liberty derived from the crown, or in some cases held by prescription, which presupposes a grant, and may be granted to a public body or to a private person.

It is a designated place in a town or city to which all persons can repair who wish to buy or sell articles there exposed for sale, and in some cities they are known by the articles there exposed to sale. They have been found to be a public convenience when properly regulated. Such regulations as the city authorities may adopt in regard to them should have, and generally have, reference to the preservation of peace and good order and the health of the city. They should be of a police and sanitary character, and an attempt, by color of regulations, to restrain trade, is an abuse of the power. As the limits of this market are specially defined in the ordinance, and embrace but a portion of the city, the regulations prescribed for it can only operate within those limits. They could not, under this power, be made to extend throughout the city but must be confined within the market limits. The facts in this case show that the plaintiff was a regular merchant, doing business in the city outside of the market limits; consequently this regulation could not affect him.

When a market is established under such a power, and its limits defined, it might be admitted the power of the council over it to prescribe regulations to operate within those limits was plenary, but under such a power the regulations could not be made to embrace the whole city.

The power to restrain hawkers and peddlers from using the streets of a city for purposes of traffic has nothing to do with the power to regulate a market occupying but a small portion

of the city. That may be arranged under the power to prevent nuisances.

If the city can, by ordinance, restrain a merchant from selling his goods outside of the market limits during a portion of each day, it might, with the same propriety, require all flour to be sold on a particular lot, all high wines on another, [*420] and vegetables *and grain on another. No one will deny such regulations would be in restraint of trade, and therefore void.

The argument of the defendant in error, that the health of the city might be prejudiced by keeping on hand for sale decaying vegetables, is met by the consideration that the city council have abundant power, by section nine of the charter, to provide by ordinance against this.

We have examined the cases referred to by the counsel for the city, and cannot perceive that any one of them has a direct bearing on, or application to this case.

The case in 33 Penn. St. 202, was an application for an injunction to prevent the city authorities from demolishing the public market houses on High street, and building others by which a large debt would be entailed on the city. The court decided it was competent for the legislature to bestow upon the authorities of the city this power, and in the opinion, Chief Justice Black, by whom it was delivered, takes occasion to descant on the necessity and convenience of markets, without, however, expressing any opinion how far the power to regulate them extended. The point before us was not in this case. The case in 7 Iowa, 104, is like this, with this difference: there, the public market was not confined to a specified district, as here. The court was not unanimous, and the majority base the opinion on *Black et al* v. *Seabury*, 8 Johns. 418, and *Village of Buffalo* v. *Webster*, 10 Wend. 100.

The case in 8 Johns. was a case of hawking—peddling meat out of a wagon—and the ordinance under which the defendant was convicted expressly prohibited hawking about any kind of beef, pork, &c., but the person wishing to sell the same was required to repair to the public market house, and there expose.

the same for sale. The act of the legislature in this case provided that the trustees of the village might establish such rules and regulations as they might from time to time deem proper, and such in particular as are "relative to public markets" within the said village, and relative to stands.

The case in 10 Wend. 100, was also a case of "hawking about meats within the bounds of the corporation."

*The case in 11 Rich. 551, merely decides that an or- [*421] dinance prohibiting the sale of butcher's meat within the corporate limits of a town, except at the public market, is not in restraint, but in regulation of trade.

The case in 30 Ala. 540, decides that an ordinance prohibiting "all hawking and peddling about the streets of the city, of meat, game, poultry, vegetables, or any other article of commodity usually sold or vended in the market," is not unreasonable, unconstitutional, or against common right.

If we were disposed to accord in the conclusion to which the court arrived in this case, it is not the case before us. The defendant, in the case we are considering, was a regular merchant and trader in the city of Alton, the sale of vegetables being a part of his calling. He did not do business within the limits of the market, but outside thereof, and, it seems to us, was protected by the general laws of the State in the unmolested pursuit of that business, and we think the power does not exist in the city council to restrain him in his lawful trade under the pretext of regulating a market, within the bounds of which he did not transact his business. Such a regulation is in restraint of trade, unreasonable and unjust.

For the reasons given, the judgment must be reversed.

Judgment reversed.

John Crabtree *v.* Thomas L. and Benajah Rowand, adm'rs of Edward Rowand, dec'd.

Settlement of Accounts: *Giving a note, not evidence of.*[1]

The giving of a note, although it is evidence for the consideration of the jury, and is to be weighed in the light of all the surrounding circumstances,—is not, of itself, unexplained, evidence of a settlement of all demands between the parties to such an instrument, anterior to the date of the note. Ankeny *v.* Pierce, Breese (Beecher's) 289, followed.

Appeal from Circuit Court of *Edgar* County.

Suit brought by appellant against appellees for labor, &c., alleged to have been done for their intestate, taken by appeal to the circuit court where judgment was rendered for defendants, and thence appealed to the Supreme Court.

The case is sufficiently stated by the court.

John Scholfield for appellant. *James A. Eads*, for the appellees.

[*423] *Walker, C. J. The assignment of errors in this case questions the correctness of the third instruction given for the defendant below. It is this: "The taking of a note by a party, is evidence of itself, unexplained, of a settlement of all accounts existing between them at the time such note may be given, proper for the consideration of the jury." This instruction presents the question whether the giving a note, of itself, unexplained, is evidence of a settlement of all demands between the parties to such an instrument. We think it is not such evidence. That it is evidence for the consideration of the jury, and is to be weighed in the light of all the surrounding circumstances, is undeniably true; but the simple fact that a note was given, cannot be regarded as proving such a settlement. Inferences and conclusions are drawn from facts proved to exist,

[1]See White *v.* Jones, 38 Ill., 160; Rayborn *v.* Day, 27 id., 46; Archibald *v.* Argall, 53 id., 307; Wickenkamp *v.* Wickenkamp, 77 id., 92; see, also, Hodgen *v.* Latham, *ante*, 344; McConnell *v.* Stellinius, 2 Gilm. 707.

because other facts are known usually to attend the facts proved. If the general course of the business of the country was such that a note was never given, or was not usually given, except on a full settlement of all existing accounts between the parties, then the instruction would have been correct. But we know that such is not the business usage of the country.

This rule was announced in the case of *Ankeny* v. *Pierce*, Breese, 226.[1] The court in that case say, it is safer to require a party who resists a demand upon the ground that it has been paid, to prove in what manner it has been paid. And that *slight evidence would, doubtless, be sufficient in [*424] such a case, to warrant a jury in presuming that the account was settled when the note was executed, but without any proof of a settlement of accounts it is presuming too much to justify the court in deciding that the execution of a note is evidence of a settlement of all accounts between the parties. This decision has not been disturbed, and has been acted upon since it was announced as the correct rule. Nor is any reason perceived why we should change a rule so long acquiesced in simply to make it conform to more recent decisions of courts of other States. It seems to us to be based upon reason, well calculated to promote justice, and no necessity exists for a change of the rule. The opposite rule would work hardship, if not manifest injustice, in many cases. This instruction was well calculated to mislead the jury, and for aught we can see, may have have produced the verdict on the trial below. The judgment is therefore reversed and the cause remanded.

Judgment reversed.

[1]Beecher's Breese, 289.

Charles W. Weston *et al. v.* Henry C. Myers.

Contracts: *In violation of statute; instruments intended as a circulating medium.*[1]

Where an army sutler issued a large number of printed instruments in the following form:

"Good for 50 Cents,

"H. C. Myers, Sut.,"

which were indorsed in the handwriting of the sutler, "H. C. M.," and in the military camp, where they were issued, were current as money; and said sutler received value for them from the persons to whom they were originally issued: *Held*, in an action thereon by parties who had received them from persons other than the sutler, in the usual course of business, for goods sold and delivered, that since they were not intended as a general circulating medium to mingle with the currency of the country, they were not within the meaning of the statute (Scates' Comp., 120; see, also, Rev. Stat. 1845, 175; Rev. Stat. 1874, 360), prohibiting the issuing, uttering, &c., of any bill of credit, promissory note, &c., (other than the bills or notes of the banks of this State), to be used as a general circulating medium, as or in lieu of money, &c., and hence were not void.

Same: *Printed signatures to due bills.*

Where an army sutler issued for value printed instruments in the following form: "Good for 50 cents, H. C. Myers, Sut.," it was considered that, by issuing the instruments for value, he had adopted the printed signature thereon as his own, and became thereby bound in the same manner as if it had been written by himself.

Same: *Signatures in general.*

It makes no difference, so far as the defendant's liability upon a contract is concerned, whether he wrote his name in script or Roman letters, or whether such letters were made with a pen or with type, or whether he printed, engraved, photographed or lithographed them, so long as he has adopted and issued the signature as his own. If he has issued an instrument with an adopted signature, for value, he is estopped from denying its validity.

Due Bills: *Negotiable.*[2]

A due bill, under our statute, is assignable in the same manner as a promissory note.

[1] See Gibbons *v.* The People, *post*, 442.

[2] See Stewart *v.* Smith, 28 Ill., 397; Bilderdock *v.* Burlingame, 27 id., 338.

Weston *v.* Myers.

NEGOTIABLE INSTRUMENTS: *Filling blanks in.*

A *bona fide* holder of a promissory note, or due-bill, in which the name of the payee has not been inserted, has the right to fill up the blank left for the payee's name, with that of an indorser.

It is reasonable to infer an authority from the maker, who has issued a note or due-bill, for value (wherein no payee is named, and which is endorsed by the maker), to fill up the blank with the name of the maker, so as to make it an instrument payable to his own order.[1]

Where, therefore, printed due-bills in the following form: "Good for 50 cents, H. C. Myers, Sut.," and indorsed in the handwriting of defendant, "H. C. M.," were issued for value, it was *held* that plaintiffs had a right to fill up the printed instruments, by inserting the words "to myself or order," after the words "good for 50 cents."

SAME: *Filling blank indorsements.*[2]

Holders for value of due-bills indorsed in blank have a right to fill out the blank indorsements with direction to pay the sums mentioned in the instruments to themselves.

SAME: *Filling blanks a mere matter of form.*

The filling up of blanks for the name of the payee in a negotiable instrument and a blank indorsement by the payee, is a mere matter of form, and may be dispensed with altogether.

INDORSEMENT: *By use of initials.*

Printed due-bills were indorsed in the handwriting of the defendant, "H. C. M.," and it was *held* that this was a sufficient indorsement, it being used as a substitute for his name, with the intention to bind himself thereby.

ERROR to Circuit Court of *Sangamon* county.

The case is sufficiently stated by the court.

E. L. Gross and *E. B. Herndon* for plaintiffs in error. *J. E. Rosette, Hay & Cullom*, and *W. E. Herndon*, for defendant in error.

*BECKWITH, J. This is an action to recover the sums [*431] of money specified in a large number of printed instruments in the following form:

[1] See Smith *v.* Bridges, Breese, 18; Mayo *v.* Chenoweth, id., 200.

[2] See Parks *v.* Brown, 16 Ill., 454; Webster *v.* Cobb, 17 id., 459; Hance *v.* Miller, 21 id., 636; Wilder *v.* DeWolf, 24 id., 190; Blatchford *v.* Milliken, 35 id., 434; Allen *v.* Coffil, 42 id., 293; Croskey *v.* Skinner, 44 id., 321; Maxwell *v.* Vansant, 46 id., 58; Palmer *v.* Marshall, 60 id., 289.

"Good for 50 cents.

"H. C. Myers, Sut."

and were indorsed, in the handwriting of the defendant, "H. C. M." The plaintiffs proved the signature of the defendant on the back of each of the instruments; that they were issued by the defendant, and that he received value for them from the person to whom they were originally issued. It also appeared in evidence that the plaintiffs received these instruments in the usual course of business for goods sold and delivered, from persons other than the defendant, and that before the commencement of this suit they presented them to the defendant, and demanded payment, which was refused.[1] On the trial the court below excluded the instruments from the consideration of the jury. The exclusion of these instruments as evidence is sought to be sustained on two grounds:

First. That the instruments were intended to be used as a general circulating medium in violation of the statute and of public policy, and are therefore void.

Second. That no payee is named in the instruments, and, consequently, no action will lie thereon in the name of the plaintiffs.

The statute to which reference is made (Scates' Comp. 120) forbids "any person to emit, issue, utter or pay out, pass or receive in payment, any bill of credit, bond, promissory note, bill of exchange, order, draft, certificate of deposit, written instrument, &c., to be used as a general circulating medium, as, or in lieu of money or other currency, or intended by the makers thereof to be so used, other than the bills or notes of the banks of this State.

There can be no just pretense in this case that these instruments were intended as a general circulating medium to mingle with the currency of the country. They were not [*432] issued to be *used as a general circulating medium, and are not, therefore, within the meaning of the statute. The defendant, by issuing the instruments for value,

[1] It appears that payment was refused except in goods. It also appeared that in camp they were current as money.

adopted the printed signature thereon as his own, and became thereby bound in the same manner, as if it had been written by himself. He thereby asserted to whomever might receive the instruments that the signature was binding upon him, and he is not at liberty now to retract the assertion. We think it makes no difference, so far as the defendant's liability is concerned, whether he wrote his name in *script* or Roman letters, or whether such letters were made with a pen or with type, or whether he printed, engraved, photographed or lithographed them, so long as he adopted and issued the signature as his own. It is true, that a written signature in script, may be a safer mode of subscribing one's name, but where a party has adopted a signature made in any other mode, and has issued an instrument with such adopted signature, for value, he is estopped from denying its validity.

A *bona fide* holder of a promissory note, or due-bill, in which the name of the payee has not been inserted, has the right to fill up the blank left for the payee's name, with that of an indorser. It is reasonable to infer an authority from the maker who has issued a note or due-bill, for value (wherein no payee is named, and which is indorsed by the maker), to fill up the blank with the name of the maker, so as to make it an instrument payable to his own order. *Laurence* v. *Mabry*, 2 Dev. 473; Story on Prom. Notes, § 39; *White* v. *Ver. & Mass. R. R. Co.* 21 How. 575; 1 Pars. on Notes and Bills, 33.

We think the plaintiffs had a right to fill up the printed instruments, by inserting the words "to myself or order" after the words "good for 50 cents." A due-bill, under our statute, is assignable in the same manner as a promissory note. In *Brown* v. *Butcher's, &c., Bank*, 6 Hill, 443, it was held that a person may become bound by any mark or designation he thinks proper to adopt, provided it was used as a substitute for his name, and he intended to bind himself thereby. In that case the indorsement of the defendant was the figures 1, 2 and 8, written in pencil by him; and although it appeared that he could *write, the indorsement was held to be [*433] sufficient. In *Geary* v. *Physic*, 5 B. & C. 234, Lord

TENTERDEN said, the law of merchants requires, only, that an indorsement of bills of exchange should be in writing without specifying the manner in which the writing is to be made. In *Merchants' Bank* v. *Spicer*, 6, Wend. 443, a check was indorsed by the defendant with his initials "P. W. S.," and it was regarded as sufficient. See also *Palmer* v. *Stevens*, 1 Denio, 471. We think the indorsement of these instruments was sufficient. The plaintiffs had a right to fill out the blank indorsements with a direction to pay the sums mentioned in the instruments to themselves. The instruments when filled up according to the plaintiffs' legal right, would have been valid obligations in form against the defendant. The filling up of the blanks was a mere matter of form, and might have been dispensed with altogether. *Gillham* v. *State Bank of Illinois*, 2 Scam. 247.

We were referred in argument to *Brown* v. *Gilman*, 13 Mass. 158, and other cases, but we think they are not applicable, for the reason that, at common law under which they arose, due-bills were not assignable as they are under our statute. The instruments in those cases could not be made assignable, and were therefore held to be only evidence of an indebtedness between the original parties. The court below erred in excluding the instruments, and its judgment must therefore be reversed and the cause remanded.

Judgment reversed.

SEBASTIAN REICHART *v.* MICHAEL FELPS *et al.*

CONFIRMATION OF TITLE: *By Governor of Northwest Territory under the acts of Congress; effect of.*

Where the Governor of the Northwest Territory, in pursuance of the acts of Congress of June 20th, and August 28th, 1788, and the instructions to said governor of August 20th, of the same year, issued an instrument containing words of confirmation of the title to certain land, the effect of such writing was a declaration by the United States through their

authorized agent, that they had no claim to the said land. It was not a grant by the United States, because the title was not in them. One of the objects of the acts of Congress and instructions to the governor was to ascertain the public lands, to find out what portion of the domain ceded by Virginia [one of the conditions of the cession being that the inhabitants of the country should have their possessions and titles confirmed to them,] passed by the cession, and that was ascertained by first establishing the claims of the settlers; the residuum only belonged to the government, subject to be held or otherwise disposed of by them.

SAME: *Congress no power to annul through a board of revision.*

Congress had no power to organize, years after those titles and possessions were confirmed by the governor, a board of revision to nullify them. The confirmees ought not to be required, twenty years after they had made their proofs before the governor, and he had acted on them, to produce them again; and justice requires that the official written declaration by the governor that the government had no title to the land claimed, acquiesced in by the government, should protect the confirmee and those claiming under him.

SAME: *Governor's Confirmation need not be sealed.*

It is not a matter of any importance whether the governor's act of confirmation assumed the form of a patent or of a deed under seal or not. Under the acts of Congress conferring this power upon the governor, he was not required to issue a patent or execute a deed under seal. Any written evidence, if it amounted to no more than an entry made by him in a memorandum book, would, it seems, have been a sufficient execution of the power under the law.

APPEAL from Circuit court of *St. Clair* county.

The facts are sufficiently stated by the court.

W. H. Underwood, for appellants. *Geo. Trumbull*, for appellee.

*BREESE, J. This was an action of ejectment for cer- [*438]
tain lands lying in the county of St. Clair. The plaintiff and appellant claimed title by virtue of two patents issued by the United States, one in 1838 and the other in 1853. The defendants were in possession, claiming the premises through their ancestor, George Lunceford, who claimed the same by deed from Nicholas Jarrot, bearing *date January 22, [*439]
1801. Jarrot derived his title as assignee of Phillip Engle, from a confirmation by Governor St. Clair to him, dated

February 12, 1799. The question for us to determine, is, what is the effect of the governor's confirmation of 1799?[1]

The answer will be found in the very able and elaborate opinion of this court, pronounced more than thirty years ago, in this same case, by Justice Lockwood, and which received the concurrence of the bar and the country at the time it was delivered, and has never been, to our knowledge, called in question. The case in which the opinion was delivered was in name of *John Doe ex dem. of Moore and others, heirs-at-law of George Lunceford*, v. *Hill*, and reported in Breese's Reports, 304, 2d ed.

[1]The confirmation in question was as follows:—

"Territory of the United States, northwest of the Ohio. *Arthur St. Clair*, governor of the territory of the United States northwest of the Ohio, to all persons who shall see these presents, greeting:

"KNOW YE, that in pursuance of the acts of Congress of the 20th of June, and 28th of August, 1788, and the instructions to the governor of the said territory, of the 20th of August of the same year, the titles and possessions of the French and Canadian inhabitants, and other settlers in the Illinois country, and at St. Vincennes, on the Wabash, the claims to which have been by them presented, have been duly examined into, and Nicholas Jarrot lays claim to a certain tract or parcel of land, lying and being in the county of St. Clair, and bounded in manner following to wit [describing it], to which, for anything appearing to the contrary, he is rightfully entitled, as assignee of Philip Engel. Now, to the end that the said Nicholas Jarrot, his heirs and assigns, may be forever quieted in the same, I do, by virtue of the acts and instructions of Congress, before mentioned, confirm unto Nicholas Jarrot, his heirs and assigns, the above described tract or parcel of land, lying and being in the county of St. Clair, and containing 778 acres and 131 perches, together with all and singular the appurtenances whatsoever, to the said described tract or parcel of land with the appurtenances, to him, the said Nicholas Jarrot, to have and to hold, to the only proper use of the said Nicholas Jarrot, his heirs and assigns, forever; saving, however, to all and every person, their rights to the same or any part thereof, in law or equity, prior to those on which the claim of the said Nicholas is founded.

"In testimony whereof, I have hereunto set my hand, and caused the seal of the territory to be affixed, at Cincinnati, in the county of Hamilton, on the 12th day of February, A. D., 1799, and of the Independence of the United States the 23d.

"ARTHUR ST. CLAIR.

"Registered: *Wm. H. Harrison*, secretary of the territory. Recorded 19th October, 1804."

We do not perceive any fact in the present case which was not, in that case, calculated to produce a result different from the one there announced. It is true, in that case no objection was made that the patent from the governor wanted a seal. We do not consider it of any importance whatever, whether the governor's act of confirmation assumed the form of a patent or of a deed under seal. Under the acts of congress giving this power to the governor, he was not required to issue a patent or execute a deed under seal. Any written evidence, if it amounted to no more than an entry made by him in a memorandum book, of his act of confirmation, would have been a sufficient execution of the power under the law. The governor, however, issued an instrument of writing to the confirmee in the form of a patent, containing words of confirmation with express reference to the acts of congress of 20th of June, and 28th of August, 1788. The effect of this writing is a declaration by the United States, through their authorized agent, that they had no claim to the land. It was not a grant by the United States, because the title was not in them. One of the objects of the acts of congress and instructions to the governor, was to ascertain the public lands, to find out what portion of the domain ceded by Virginia passed by the cession, and that was easily ascertained, by first establishing the claims of the settlers; the residuum only belonged to the government, subject to be held or otherwise disposed of by them.

*The opinion in the case in Breese is so full and satis- [*440] factory on all the questions raised in this case, we are content to refer to that, and make it the basis of our opinion. We agree with the court that congress had no power to organize, years after those titles and possessions were confirmed by the governor, a board of revision to nullify them. Why should the confirmees be required, twenty years after they had made their proofs before the governor, and he had acted on them, to produce them again? In most cases it would be impossible, by reason of death, removal, or other casualties. Justice requires that his official written declaration that the government had no title to the land claimed, and acquiesced in

by the government, should protect the confirmee and those claiming under him.

So well satisfied with the decision in this case which we have adopted was the congress of the United States, that an act was passed restoring to the purchasers from them the money they had paid for this land. The act will be found among the private acts passed August 15th, 1849, in vol. 6 of U. S. Statutes at Large. The judgment is affirmed.

Judgment affirmed.

Catharine H. Pope *v.* Robert North.

Writ of Error: *Who may maintain.*[1]

Where a bill to foreclose a mortgage executed by husband and wife, was filed against them both; but no summons was issued or service had upon either, but the husband filed his answer admitting the allegations of the bill, and a decree was rendered ordering the payment of the amount found due, and in default of payment that the mortgaged premises be sold; and no default was taken against the wife, nor was there anything in the record after the bill was filed, to indicate that it was intended to take any steps against her, or in any manner to pass upon her rights: *Held*, that, although she would have been a proper party to the suit, yet as she had suffered no injury, and was not in fact a party to the suit, she had no right to maintain a writ of error, or to complain of the decree.

Foreclosure Decree: *Does not bind a married woman not in court.*[2]

Where a foreclosure bill is filed against husband and wife, but no process is ever issued or service had on either, but the husband files his answer admitting the allegations of the bill, and a decree is rendered for the payment of the money and on default thereof for a sale of the premises; but the wife is not in court nor is the decree against her nor does it in terms or by implication foreclose her rights; her situation after the sale thereunder will be precisely the same, as if the proceeding had never been taken to foreclose and sell the premises. She may institute proceedings to redeem at the present or in the future, or for the recovery of her rights, precisely as she could have done had the suit not been brought.

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[1]See Fish *v.* Cleland, *ante*, 238.

[2]See Ohling *v.* Luitjens, 32 Ill., 23; Hurd *v.* Case, id., 45; Jackson *v.* Warren, id., 331; Dunlop *v.* Wilson, id., 517; Cutler *v.* Jones, 52 id., 84; Jenneson *v.* Jenneson, 66 id., 259.

ERROR to Circuit Court of *Christian* county.

The case is sufficiently stated by the court.

John E. Rosette, for plaintiff in error. *Stuart, Edwards & Brown*, for defendant in error.

*WALKER, C. J. This was a suit in chancery to fore- [*441]
close a mortgage executed by plaintiff in error and her husband. The bill was exhibited against both of them, but no summons was issued or service had, but the husband of plaintiff in error filed his answer confessing the truth of the allegations of the bill. A decree was rendered ordering the payment of the money, and in default of payment, that the mortgaged premises be sold. No default was taken against plaintiff in error, nor is there anything in the record, after the bill was filed, to indicate that it was intended to take any steps against her, or in any manner to pass upon or affect her rights. She was not in court by service or otherwise, nor is the decree against her, nor does it in terms or by implication foreclose her rights in the premises. Although she was a
*proper party to the suit, as she has suffered no injury, [*442]
and was in fact not a party to the suit, she has no right to complain of the decree. Had the decree been against her, or had her equity of redemption been foreclosed or otherwise affected, it would have been different. Her situation since the sale is precisely the same as if the proceeding had never been taken to foreclose and sell the premises.

She may institute proceedings now or in the future to redeem her interest, or for the recovery of her rights, precisely as she could have done had the suit not been brought. If she is the owner of the fee she can file a bill to redeem at any time. If her interest is a contingent dower estate, dependent on the death of her husband, at his death, if she survives him, she may then redeem that interest. But not having been made a party to this suit in the court below, she has no right to maintain this writ, and there is no error in this record of which she has a right to complain. The decree of the court is therefore affirmed.

Decree affirmed.

Robert Gibbons *v.* The People of the State of Illinois.

Gaming: *Statute against, how construed.*

Although the rule that a penal statute cannot be extended by construction, is adhered to, still the statute against gaming (Rev. Stat. 1845, p. 174, sec. 130) should receive such a construction as when practically applied will tend to suppress the evil prohibited.

Same: *Under what circumstances written instruments are things of value.*

Under section 130, chap 30, Rev. Stat. 1845, which makes it a penal offense for any person to play for money, or other valuable thing, at any game with cards, dice, checks, or at billiards, the offense may be committed by gaming for checks, notes, or instruments, understood by the parties to represent value, and by virtue of which the winner can in fact without any violation of law obtain value, whether they are collectible by law or not, and even though they are intrinsically valueless.

Same.

Where, therefore, the gaming was for an instrument in the following form:

"25. 25.

"Redeemable in currency in sums of one dollar.

C. A. Bradshaw.

"25. 25."

No. 111.

Indorsed: "C. A. B.,"

which instrument, with others like it, was issued to circulate generally as money, and did so circulate, and was redeemed in currency when presented with others in sums of one dollar; but the issue of which was not authorized by law: *Held*, that, although there was no legal obligation to pay such instrument, yet being understood to represent value, and as the winner could in fact without any violation of the law obtain value therefor, the offense of gaming was committed;—and this whether said instrument was within the prohibition of the act of Feb. 10, 1853, relative to banks or not.[1]

Same.

All notes, bills, bonds, contracts, &c., made for a gaming consideration are void, and cannot be legally enforced. Still, it seems that gaming for any of these would be in violation of the statute.

Error to Circuit Court of *Clark* county.

[1]See Weston *v.* Myers, *ante*, 424.

The case is sufficiently stated by the court.

John Scholfield for plaintiff in error. *J. B. White*, State's attorney, for defendant in error.

Beckwith, J. The plaintiff in error was indicted [445] for playing a game of billiards for checks and promissory notes, payable and redeemable in currency, by one Cyrus A. Bradshaw, which the indictment alleges were articles and things of value. He was convicted in the court below of the offense with which he was charged; and no question is raised as to the correctness of his conviction, except it is insisted that the article or thing for which the game was played, was not one of value, within the meaning of the one hundred and thirtieth section of chapter thirty of the Revised Statutes of 1845, under which the conviction was had. The section of the statute alluded to, makes it a penal offense for any person to play for money, or other valuable thing, at any game with cards, dice, checks, or at billiards. Scates' Comp., 396. It was admitted in the court below that the plaintiff in error played a game of billiards for an instrument, partly written and partly printed, signed, indorsed and issued by C. A. Bradshaw, for the sum of twenty-five cents, and which purported upon its face to be redeemable by him in currency, in sums of one dollar.[1] And it was also admitted that such instrument and many others of a like description, were issued by Bradshaw, to circulate generally as, and in lieu of money and other currency; that they did so circulate, and were redeemed in currency when presented to him in sums of one dollar, for that purpose. Bradshaw was not authorized to issue said instrument by any act of the legislature of this State.

Under these circumstances we are required to determine

[1]The form of the instrument was as follows:

"25. 25.

"Redeemable in currency in sums of one dollar.

"C. A. BRADSHAW.

"25. No. 111. 25."

Indorsed: "C. A. B."

whether the instrument mentioned is an article or thing of value within the meaning of the statute to which we have referred. The object of the statute was to prevent the destructive vice of gambling, and while we adhere to the well established rule that a penal statute cannot be extended by construction, we are not to be unmindful of the true intent and meaning of the legislature. The statute should receive such a [*446] *construction as when practically applied will tend to suppress the evil prohibited, and we are not required by any rule of construction to limit its meaning to articles and things of intrinsic value. The articles or things played for may be intrinsically valueless, but if they are understood to represent value, and are such that the winner can, in fact, without any violation of the law, obtain value for them, we think that they are within the letter and spirit of the statute. Checks or counters are intrinsically valueless. There is no legal obligation to pay value for them, but if they are understood by the parties to represent value, and the winner can, in fact, obtain value for them, we think gaming for them is in effect gambling for things of value. Not unfrequently keepers of gaming establishments exchange these checks or counters for money, and redeem them from the holder in money. The gaming is done exclusively with them as the representatives of money. There is no obligation to pay money for them; they cannot be circulated as money; they are intrinsically worthless, but the holder can in fact obtain money for them, and this is so understood by the parties gaming with them. This mode of gaming is as much a violation of the statute as if money was used instead of its representative. It has been urged that the winner could not circulate instruments like the one in question as money, without subjecting himself to a penalty under the act of February 10th, 1853, relative to banks; but he incurs no penalty under that act for winning such instruments at a game, and he might present them to the person by whom they were issued for redemption, and receive their representative value and incur no no penalty. The legislature has prohibited the circulation of *bank* bills of a denomination less than five dollars, not issued by

the banks of this State, but it was not thereby intended to legalize gaming in such bills. All notes, bills, bonds, contracts, &c., made for a gaming consideration are void, and cannot be legally enforced. They are as entirely valueless as checks or counters, and still we suppose that gaming for any of these would be in violation of the statute. In the present case we do not deem it necessary to express an opinion as to whether instruments *like the one in question are within the provis- [*447] ions of the act of February 10th, 1853, as we think gaming for them is a violation of the law, whether within the prohibitions of that act or not. This court held in *Gutchins* v. *The People*, 21 Ill. 642, that an indictment could not be sustained for altering and passing a forged *bank* bill of a denomination less than five dollars, purporting to have been issued by a bank not incorporated under the laws of this State, which charged an intent to defraud an individual. The gist of the alleged offense in that case was an intent to defraud the person to whom the bill was passed, and the court held that he could not be defrauded by receiving a bill which he knew he had no right to receive. It was like an indictment for selling counterfeit money to a person knowing it to be counterfeit, with an intent to defraud such person. We think the principle of that case is not applicable to the present one. The gist of the offense in the present case is a violation of public morals, and the offense may be committed by gaming for checks, notes or instruments, understood by the parties to represent value, and by virtue of which the winner can in fact obtain value, whether they are collectible by law or not.

Judgment affirmed.

Jacob A. Bush *et al. v.* Nancy Connelly *et. al.*, heirs of David J. Connelly, deceased.

Parties Plaintiff: *To bill to enforce mechanics' lien.*

A bill for the enforcement of a mechanics' lien cannot be maintained by

several complainants jointly, unless all the complainants are jointly interested and jointly entitled to a lien on the premises.[1]

SAME: *Same.*

Where, therefore, it appeared from the bill that complainants had no community of interest in the subject matter of the suit, their interests having been severed by a settlement of the building accounts, and the indebtedness distributed among the several members of the complainants' firm, and two separate notes executed, one to two of the partners, and one to the remaining partner, for the respective amounts due: *Held*, That they were two separate and independent claims, and should have been sued for separately.

ALLEGATA ET PROBATA: *Must agree.*[2]

The allegations and proofs must agree; a party can not make one case by his pleading and another by his evidence, and recover.

SAME.

An allegation in a bill to enforce a mechanics' lien, that the work was to be paid for when fully completed, will not be supported by proof that it was to be paid for by a certain day named.

DECREE: *To enforce mechanics' lien; time allowed before sale.*

Under the mechanics' lien law, when there is no redemption from a sale, the sale should not be ordered at a shorter period than ninety days, in analogy to the life of an execution.[3]

ERROR to Circuit Court of *Coles* county.

Bill in chancery for the enforcement of a mechanics' lien, filed by plaintiffs in error, a firm composed of J. A. Bush, Geo. Benhart and J. S. Eller, and styled Bush & Benhart, against defendants in error.

The bill alleged, among other things not necessary to be stated, the execution of one note for $131.71, by defendant's ancestor to Eller, one of the complainants, upon a settlement between the parties, and, upon the occasion of a subsequent settlement, the execution of another note for $89 by said deceased to said Bush & Benhart the other two members of the firm.

The court below at the May term, 1862, decreed for the com-

[1]See Roberts *v.* Gates, 64 Ill., 374.

[2]See Fish *v.* Cleland, *ante*, 238.

[3]See Moore *v.* Titman, *ante*, 358; Kinzey *v.* Thomas, 28 Ill., 502; Claycomb *v.* Cecil, 27 id., 497; Rowley *v.* James, 31 id., 298; Mills *v.* Heeney, 35 id., 173; James *v.* Hambleton, 42 id., 308.

plainants; but at the October term, 1862, entered the following order:—

"Ordered by the court, that the decree of sale of last term be set aside, the same having been entered from a misapprehension of the facts by the court, who having been of counsel for defendants was induced to withdraw his resistance to a decree being rendered by the statements of the counsel for the complainants. As understood by the court, his clients had no further interest in the matter, the property having been sold and passed into other hands.

"It is, therefore, ordered and decreed by the court, that the costs of setting aside proceedings and decree of last term be paid by adult defendants, and that said cause be continued, with leave to answer by next term of court," &c.

The remaining facts are sufficiently stated by the court.

Error was brought by complainants who questioned the validity of said last mentioned order; and cross errors were assigned by defendants, the nature of which sufficiently appear in the opinion of the court.

C. M. McLain, for plaintiff in error. *John Scholfield* and *Ficklin & Moore*, for defendants in error.

*Breese J. Without passing upon the propriety of [*451] setting aside a decree duly entered at one time, on the mere motion of the court at a subsequent term, it is sufficient to a proper disposition of the case to say, that the original decree is in several respects erroneous, and should be reversed.

In the first place, the complainants by their own showing have no community of interest in the subject matter of the suit. Their interests have been severed by the settlement of the building accounts, and the indebtedness distributed among the contractors, and separate notes executed to the separate parties for the respective amounts due. By the complainants' own showing, Eller has no interest in the note executed to Bush & Benhart, nor have they any interest in the note executed to Eller. They are separate and independent claims, and should have

been sued for separately. No joint interest is shown, and consequently, the demurrer should have been sustained. *Sutherland et al.* v. *Ryerson*, 24 Ill., 517. The parties here do not show they are jointly entitled to a lien on the premises, but the contrary.

In the next place, the contract for joiners' work as alleged is different from the contract proved. It is alleged in the petition that the work was to be paid for when fully completed, whereas the proof is, it was to be paid for by the twenty-seventh of December, 1858, as recited in the decree. It is a set-
[*452] tled rule in all *cases, that the allegations and proofs must agree; a party cannot make one case by his pleading and another by his evidence, and recover. *Rowan* v. *Bowles et al.*, 21 Ill., 17, and cases there cited.

In the last place, the decree is erroneous, because it directs a sale of the premises in thirty days. This court has repeatedly held, that under the mechanics' lien law when there is no redemption from a sale, less than ninety days should not be prescribed for the sale, in analogy to the life of an execution. In the case of *Link* v. *Architectural Iron Works*, 24 Ill., 553, this court said: "In no case should the sale be ordered at a shorter period than the lifetime of an execution at law." The same rule is furnished in *Strawn* v. *Cogswell*, 28 id., 457.

The decree is reversed and the bill dismissed, and the defendants' abstract to be taxed as costs against the complainants and plaintiffs in error.

Decree reversed.

Hugh M. Alwood *v.* Henry Mansfield.

Distress Warrant: *Need not describe the demised premises.*

According to the most approved precedents of distress warrants no description of the demised premises therein is necessary. It is surplusage to insert such a description in the warrant, and whether correct or not, if inserted, can make no difference.

SAME: *Practice under.*

Proceedings by distress warrant for the collection of rent are not governed by the practice affecting ordinary trials at law. The statute has only brought the landlord's right to sell the property distrained, under the control of the court, but has not made the proceeding an original action. It originates as it did before, from the action of the landlord, and under his authority is the levy made, and not under a process of the court. But after it progresses to that stage, it is transferred to the court for the single purpose of ascertaining whether the relation of landlord and tenant exists, and what sum was due for rent when the goods were seized.

SAME: *Lease need not be filed.*

It is not necessary that a copy of the lease or any other instrument shall be filed with the warrant, or before the trial.

SAME: *No declaration necessary.*

Nor is the proceeding required to be tried on pleadings; and hence no declaration is necessary to a trial.

SAME: *Defense that tenant failed to obtain possession.*[1]

Where it is shown on such a proceeding that the tenant was in possession and cultivating a portion of the lands described in the lease, and it also appears that the part occupied was the only improved portion of the land, this evidence will justify a finding that the tenant had been admitted to all the possession of which the property was capable.

If the tenant failed to obtain possession of any portion of the premises, he could, no doubt show that fact, and rebut the presumption that, having entered under the lease, he acquired possession of the whole premises.

SAME: *No judgment authorized;*[2] *special execution.*

The statute has not authorized the court to render judgment in such a proceeding, but simply to enter the finding of the jury on the record, and certify the amount found to be due, with the costs, to the officer or other person making the distress, which becomes his authority to make sale of the goods distrained.

Where, therefore, a recovery was had and a regular judgment rendered, awarding an order to the sheriff to sell the property, it was *held* that in so far as a special execution or the order for the sale of the property, was awarded, the judgment was erroneous and must be reversed.

SAME: *Verdict.*

Where the finding of the jury found a specific sum due; but found it as damages, instead of calling it rent due, it was *held* that merely calling the sum due, damages, could not vitiate the verdict, which was sufficient to sustain a proper order.

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[1] As to recoupment of damages sustained by tenant, see Lynch *v.* Baldwin, 69 Ill., 210.

[2] See Storing *v.* Onley, 44 Ill., 123; Kruse *v.* Kruse, 68 id., 188.

SUPREME COURT PRACTICE: *Entry of verdict in Supreme Court, in proceedings under a distress warrant.*

Where upon error to review the proceedings under a distress warrant, it appeared that the verdict of the jury in question was substantially sufficient and would sustain a proper order in the case, it was ordered that the finding of the jury be entered upon the records of the Supreme Court, and that the clerk of said court certify the amount found due, to the sheriff of the proper county, so that he might, under the statute, proceed to sell the property distrained, or so much thereof as might be necessary to pay the sum found due, and the costs of the Circuit Court.[1]

LANDLORD AND TENANT: *Tenant estopped to deny landlord's title.*

A tenant by accepting a lease and becoming a tenant, admits the title of his landlord, and thereby precludes himself from disputing it.

ERROR to Circuit Court of *Mason* county.

The distress warrant in question in this cause was as follows:

"To the sheriff of Mason county, Illinois, my bailiff, greeting: distrain of the goods and chattels of Hugh M. Alwood, sufficient to make the sum of four hundred dollars, being the rent for one year, expiring on the 15th day of November instant, on the following described real estate, situated in the county of Mason, in the State of Illinois, to wit: The S. E. qr. of sec. No. 8; the S. hf. of sec. 27; the N. hf. of sec. 34, the N. E. qr. of sec. 33, and the N. W. qr. of the S. W. qr. of sec. 34, all in T. 23 N. of R. 6 W. of 3d. P. M., and make return hereof with an inventory of the property distrained to the clerk of the Circuit Court of said Mason county, and this shall be your warrant. Dated November 17, 1862.

"H. MANSFIELD."

The remainder of the case is sufficiently stated in the opinion, except the first, second and third instructions, requested by the defendant, and refused by the court, which were in substance:

1. That, if the jury found that the lease described more

[1] In Storing *v.* Onley, 44 Ill., 123, the court say that it is the better practice in such cases to reverse the judgment and remand the cause with instructions to the circuit court to enter a final order in conformity with the statute.

land than was described in said warrant of distress, they should find for defendant.

2. That it was the law, that unless the landlord sued for the rent of all the land demised to the tenant (if they find all the land to have been demised *en masse* for $400), and that he seeks a recovery of rent for a portion of the demised land, and not the whole, then the jury will find for defendant.

3. That unless the jury find that the landlord put the defendant in possession of the whole of the lands described in the lease, they should find for defendant.

Lyman Lacy, for plaintiff in error. *H. M. Wead*, for defendant in error.

*Walker, C. J. This was a proceeding to collect [*456] rent in arrear by a distress warrant. The warrant was issued by defendant in error against plaintiff in error, and it was returned into the Mason Circuit Court. Under the provisions of the act of 1841 the court below proceeded to ascertain the amount due, which was found to be the sum of four hundred dollars. Upon this finding the court rendered a judgment for the amount and for costs, and made a special order that the sheriff sell the property distrained, or so much as might be required to satisfy the judgment. The cause is brought to this court for the purpose of reversing that judgment.

The first error assigned questions the correctness of the decision of the court below in overruling the motion to dismiss the proceeding. The ground of the motion to dismiss was that the distress warrant was insufficient because it required the bailiff to collect all of the rent for the use of only a part of the land embraced in the lease. The court overruled the motion, and exceptions were taken and preserved in the record by plaintiff in error. It will be observed, that the motion to dismiss only points out, as a defect in the warrant, that it requires the bailiff to collect all of the rent for only a part of the land leased. On this motion there was no evidence from which the court could *determine what land had been leased, or upon [*457]

what lands rent had accrued. Even if it had been necessary to describe the leased premises in the warrant, a defective description could not be taken advantage of by a motion at this stage of the proceeding. But according to the most approved precedents no description of the premises is necessary. It was surplusage to insert a description of the demised premises in the warrant, and whether correct or not could make no difference.

It is again urged that the court erred in refusing to continue the cause because there was not filed a copy of the instrument sued upon, ten days before the term. In the case of *Sketoe* v. *Ellis*, 14 Ill. 75, it was said that it was not the intention of the legislature further to interfere with the common law right of the landlord to distrain for rent in arrear, than to require him, before he can sell the property distrained, to bring the tenant into court, establish his right to make the distress and have the amount assessed. That the court in its action has only to inquire whether the relation of landlord and tenant exists between the parties, and if so, to ascertain the amount of rent due when the distress was made. These were held to be the only questions that could properly arise on the trial, and no other transactions between the parties can be taken into consideration. That neither party can introduce a demand against the other not arising alone out of the relation of landlord and tenant.

It will be observed, from what was there said, that this proceeding is not governed by the practice affecting ordinary trials at law. The statute has only brought the landlord's right to sell the property distrained under the control of the court, but has not made the proceeding an original action. It originates, as it did before, from the action of the landlord, and under his authority is the levy made, and not under a process of the court. But after it progresses to that stage, it is transferred to the court for the single purpose of ascertaining whether the relation of landlord and tenant exists, and what sum was due for rent when the goods were seized. The act has not required that a copy of the lease or any other instru-

ment shall be filed with the warrant, or before the trial. The act does not provide that the *cause shall progress [*458] and be tried as in other causes originating in the Circuit Court, when the warrant is returned there; nor does it require it to be tried on pleadings. Every case tried in the Circuit Court is not necessarily governed in all respects by the practice act, as appeals are tried in a summary manner without pleadings, and are not, in all respects, governed by the practice act, and for the reason that the statute does not require it. So of this proceeding, neither pleadings nor conformity to the practice act are required. A copy of the lease was not required to be filed in this case. Nor was a declaration necessary to a trial.[1]

It is, again, insisted that the evidence fails to show that plaintiff in error was let into possession of the demised premises. It does show that he was in possession and cultivating a portion of the lands described in the lease. It also appears that the part which he and his sisters occupied was the only improved portion of the land. From this evidence, the jury were justified in finding that plaintiff in error had been admitted to all the possession of which the property was capable. If he failed to obtain possession of any portion of the premises, he could, no doubt, have shown that fact and have rebutted the presumption that, having entered under the lease, he had acquired possession of the whole of the premises. No objection is perceived to the finding of the jury on this ground.

From the views already presented, it will be perceived that the first and second instructions asked by plaintiff in error were properly refused. By accepting the lease and becoming a tenant, plaintiff in error admitted the title of his landlord, and thereby precluded himself from disputing it. The conclusion then follows, that third instruction was properly refused.

[1]The question whether a declaration was necessary was directly raised by the third assignment of error.

It is, lastly, insisted that the court below erred in rendering a judgment on the finding of the jury. The statute has not authorized the court to render judgment, but simply to enter the finding of the jury on the record, and certify the amount found to be due, with the costs, to the officer or other person making the distress, which becomes his authority to make sale of the goods distrained. In this case a recovery is had and a regular judgment is rendered, awarding an order on the [*459] sheriff *to sell the property. In so far as a special execution was awarded, or the order for the sale of the property was awarded, the judgment is erroneous, and must be reversed.

It is urged that the finding of the jury is insufficient to authorize this court to enter the proper order. It finds a specific sum due; but it is found as damages, instead of calling it rent due. If a defect, this can only be as to the form, and not as to the substance. We see, from the evidence in the case, that the only claim was for rent in arrear, and the merely calling the sum found to be due, damages, cannot vitiate the verdict. We are, therefore, of the opinion that it is substantially sufficient, and may well sustain a proper order in such a case. It is, therefore, ordered by this court, that the finding of the jury be entered upon the records of this court; and it is further ordered, that the clerk of this court certify the amount found to be due, to the Sheriff of Mason county, so that he may, under the statute, proceed to sell the property distrained, or so much thereof as may be necessary to pay the sum found to be due, and the costs of the Circuit Court.

Judgment reversed.

Rufus Haywood, impleaded, &c. *v.* Wm. E. McCrory.

Attachment: *Affidavit for; nature of indebtedness.*

Where an affidavit for a writ of attachment stated that the defendant was indebted to the plaintiff in the sum of $4,500, for which he had given

his note, it was *held* that this was a sufficient description of the nature of the indebtedness.[1]

SAME: *When may be issued to foreign counties.*

Before writs of attachment can be issued to counties, other than that wherein the suit is brought, the suit must be commenced in a proper county. Levy upon property or service must be made upon one or more of the defendants in such county, or no jurisdiction will be acquired.

SAME: *Same.*

Where, in an action *in personam* against Bane, and by attachment against Haywood, a summons to Bane was issued to the sheriff of Coles county where the suit was brought, and was duly served, and writs of attachment against Haywood were issued on the same day to the counties of Coles, Knox and Cook, and the writ issued against Haywood to Coles county was returned without service upon either person or property; but property was levied upon under the writs issued to Knox and Cook counties: *Held* that the Circuit Court of Coles county acquired jurisdiction by means of the residence of and service of process upon Bane in that county.

SAME: *Certificate of publication of notice.*

A certificate of the publication of a notice of the pendency of a suit in attachment, which does not purport to be made by the printer or publisher of any newspaper, will be insufficient.[2]

SAME: *Same.*

The certificate of publication of a notice of pendency of suit in attachment should state the date of the last paper containing the notice, a copy of which is appended to the certificate.

SAME: *A proper notice by publication must appear affirmatively.*[3]

In suits by attachment where there is no personal service upon the defendant, in order to sustain a judgment the record must show affirmatively that the prerequisite of the statute in regard to notice by publication, was complied with.

ERROR to Circuit Court of *Coles* County.

Assumpsit by defendant in error against plaintiff in error and William C. Bane.

The nature of the case is sufficiently stated by the court, except the certificate of publication which is as follows:

"We hereby certify that the above notice has been published

[1]See Phelps *v.* Young, Breese, 327.

[2]See Haywood *v.* Collins, 60 Ill., 328.

[3]See Cariker *v.* Anderson, 27 Ill., 358; Donlin *v.* Hetlinger, 57 id., 348.

in the Courier, a weekly newspaper, published in Coles county, Ill., six successive weeks, commencing on the 1st day of August, 1860.

"Oct. 1, 1860. W. HARR & SON."

The assignments of error question (1) the sufficiency of the affidavit for the attachment; (2) the jurisdiction of the Circuit Court of Coles county over the property levied upon under the writs issued to Knox and Cook counties; (3) the sufficiency of said certificate of publication.

J. I. Bennett, for plaintiff in error. *J. Scholfield*, and *Ficklin & Moore*, for defendant in error.

[*462] *Beckwith, J. This was a suit *in personam* against William C. Bane, and by attachment against Rufus Haywood, the plaintiff in error. The affidavit upon which process issued, stated that the defendants below were indebted to the plaintiff below, in the sum of forty-five hundred dollars, for which they had given their note; and that the plaintiff in error was not a resident of the State.

[463*] * It is assigned for error, that the affidavit does not sufficiently describe the nature of the indebtedness. The statute does not require the nature of the indebtedness to be described with any degree of particularity. The affidavit states the nature and amount of the indebtedness; and that is all that the law requires to be stated in regard to it.

A summons to Bane was issued to the sheriff of the county where the suit was brought, and was duly served. Writs of attachment against the plaintiff in error were issued to the counties of Coles, Knox and Cook. No property was attached upon the writ issued to Coles county, and the sheriff returned the same *non est inventus* as to plaintiff in error. Property was levied upon under the writs issued to Knox and Cook counties. The Circuit Court of Coles county acquired jurisdiction by means of the residence of, and service of process upon Bane, in that county.

So long as he remained in that county he was not liable to be

sued in any other county in the State. The present suit could not have been brought in either Knox or Cook county. Proceedings against Haywood in either of them, would have been irregular, without obtaining jurisdiction as to Bane. Before writs of attachment can be issued to counties, other than that wherein the suit is brought, the suit must be commenced in a proper county. Levy upon property or service must be made upon one or more of the defendants in such county, or no jurisdiction will be acquired. *Fuller* v. *Langford*, 31 Ill., 248; *Hinman* v. *Rushmore*, 27 Ill., 509. This suit having been properly commenced in Coles county, writs of attachment against the plaintiff in error were properly issued to other counties in the State. The commencement of the suit was the issuing of the summons for Bane, and a proper affidavit and bond having been filed, the writs of attachment against Haywood were properly issued, on the same day that the summons was issued.

The record of the judgment fails to show that notice was given of the pendency of the suit as is required by the statute; and the certificate of publication on file is not such an one as the statute requires. It does not purport to be made by the printer or publisher of any newspaper; *nor does [*464] it state the date of the last paper containing the notice, a copy of which is appended to the certificate. In suits by attachment where there is no personal service upon the defendant, in order to sustain a judgment the record must show affirmatively that the prerequisite of the statute in regard to notice by publication was complied with. As the record in this respect is defective, the judgment of the court below is reversed, and the cause remanded.

Judgment reversed.

James Downs *v.* William B. Jackson.

Partners: *Exoneration and Contribution.*

The liability of copartners for partnership debts is a joint one, and it is the duty of each partner to exonerate the others from his proportion of it. No act falling short of a complete exoneration of the one party and his property from so much of the liability as he is entitled to be exonerated from, will operate as a discharge of the other party from his obligation in that regard.

Same: *Same.*

Where, therefore, lands belonging to two partners severally were sold *en masse* upon an execution issued on a judgment against both the partners for a firm debt, and one of the partners redeemed from the sale by paying the purchaser the amount of his bid with interest, for which he was given a receipt upon the back of the certificate of sale, it was *held* that such sale *en masse* did not discharge any part of the property sold, nor the parties from their respective duties, and that the party so redeeming might maintain a bill for a contribution, and was entitled to a decree for one-half the sum paid by him with interest from the time of payment.

Held, also, that, although such sale might have been irregular, and for that reason might have been set aside, still, as setting aside the sale would have revived the debt, there was no reason for requiring the complainant in order to entitle himself to a contribution, to make the charge upon his property a personal debt against the defendant and himself, before satisfying it.

Held, also, that although the statute providing a mode of evidencing a redemption, might be enforced by an appropriate remedy, still the lands having been discharged from the sale by the purchaser's accepting the redemption money, a compliance with its provisions was not a condition precedent to the assertion of complainant's right to a contribution.

Redemption: *Where lands owned by partners severally are sold en masse.*[1]

Where lands belonging to two partners severally are sold *en masse* upon an execution issued upon a judgment against both for a firm debt, neither party can obtain a discharge of his property without paying the whole amount of the purchase money and interest; and each of them has the same right after the sale, within the time allowed by law, to redeem the lands for that purpose (thereby perfecting his right to a contribution from the other partner), as he had before that time to pay the debt to discharge himself from personal liability.

Equitable set-off: *Cross-demands.*

It is well settled that courts of equity will not set off mere cross-demands.

[1] See Darley *v.* Davis, 69 Ill., 134; Hawkins *v.* Vineyard, 14 id., 26.

SAME: *Same.*

Where, upon a bill filed by one partner against his co-partner for a contribution of a moiety of a sum paid by him to redeem from a sale *en masse* of lands owned by them severally, upon execution issued upon a judgment rendered against them both after the dissolution of the firm, and for a set-off of the sum so paid to redeem against the amount due upon notes given by the complainant to the other partner upon the dissolution of the firm and the purchase by complainant of his partner's interest in certain firm property: *Held*, that, there being no proof of the insolvency of the defendant, nor any special equity requiring the set-off to be made, and there being no understanding that one demand should be set off against the other, they were mere cross-demands, and, though complainant was entitled to contribution, the set-off was not allowed. The demand of the complainant in such case was a legal one, and might have been set off at law in an action upon the notes.

ERROR to Circuit Court of *Shelby* county.

Bill in chancery filed by plaintiff in error against defendant in error, the nature and objects of which are sufficiently stated by the court. The court below dismissed the bill.

Henry & Read, for plaintiff in error. *S. W. Moulton*, for defendant in error.

BECKWITH, J. This was a bill in chancery for con- [470] tribution and a set-off. The parties were partners sharing profits and losses equally in the manufacture and sale of furniture for one year, ending November 22, 1860, when the copartnership was dissolved, and the plaintiff in error bought the interest of the defendant in error in certain furniture belonging to the firm, and gave his notes therefor; a part of which were paid, but upon the remainder there was due at the commence- ment of the suit about two *hundred dollars. At the [*471] time of said dissolution, the firm was indebted to Roundy, Chabin & Co., in the sum of about four hundred dollars, upon which indebtedness a judgment was rendered in April, 1861. An execution was afterwards issued thereon and satisfied by a sale *en masse* of certain lands belonging to the parties severally. On the 1st day of January, 1862, the plaintiff in error redeemed from the sale by paying to the purchaser

the amount of his bid with interest, for which he gave a receipt upon the back of the certificate of sale which he delivered to the plaintiff in error. In the spring of 1863, the parties had a settlement of all their copartnership matters except the claim of the plaintiff in error to be repaid one-half of the amount paid by him to redeem said lands, and the balance due upon said notes. The plaintiff in error by the present suit seeks contribution for a moiety of the sum paid by him, and a set-off of the same against the amount due upon his notes. The liability of the parties to Roundy, Chabin & Co., was a joint one, and it was the duty of each party to exonerate the other from a moiety of it. No act falling short of a complete exoneration of the one party and his property from so much of the liability as he was entitled to be exonerated from, will operate as a discharge of the other party from his obligation in that regard. The sale *en masse* of the lands of the defendant in error with those of the plaintiff in error did not discharge any part of the property sold, nor the parties from their respective duties. Neither party could obtain a discharge of his property without paying the whole amount of the purchase-money and interest, and each of them had the same right after the sale, within the time allowed by law, to redeem the lands for that purpose, as he had before that time to pay the debt to discharge himself from personal liability. The sale may have been irregular, and for that reason might have been set aside, but setting aside the sale would have revived the debt, and we are unable to discover any satisfactory reason for requiring the plaintiff in error to make the charge upon his property a personal debt against the defendant in error and himself, before satisfying it. The law does not require acts to be done, where there is no con-
[*472] ceivable object to be gained *by doing them. In the present case, the right to contribution is founded upon the duty of exoneration. The plaintiff in error has been compelled to pay money to exonerate his property from a liability; a moiety of which he ought to have been exonerated from by the defendant in error. The lands were discharged from the sale by the purchasers accepting the redemption money. The

statute providing a mode of evidencing the redemption, may be enforced by an appropriate remedy, but a compliance with its provisions is not a condition precedent to the assertion of the right of plaintiff in error to contribution. The court below should have rendered a decree in favor of the plaintiff in error for the one-half of the sums paid by him, with interest thereon from the time of its payment. The plaintiff in error was not entitled to the set-off claimed by the bill. There was no proof of the insolvency of the defendant in error, nor of any special equity requiring the set-off to be made. The demands were not necessarily connected with each other; that of the plaintiff in error arose out of the contract of partnership; that of the defendant in error from the sale of certain furniture, and there was no understanding between the parties that the one demand should be set off against the other. They were mere cross-demands. The obligation of the plaintiff in error was to pay his notes when they became due, without reference to the affairs of the partnership, and there is no equity shown for blending the two matters together, contrary to the agreement of the parties. The demand of the plaintiff in error was a legal one, and might have been set off at law, in action upon the notes. (Coll. on Part. § 288.) It is well settled that courts of equity will not set off mere cross-demands. *Ranson* v. *Samuel*, 1 Craig and Phil., 161.

The decree of the court below will be reversed and the cause remanded.

Decree reversed.

Alexander J. Hawk *et al. v.* Richard H. Ridgway.

Instructions: *Should not assume that the jury will find for a certain party.*

An instruction which assumes that the jury will find for a certain party, is erroneous.

Same: *Same.*

Where an instruction informed the jury that in making up their verdict,

they were authorized to take into consideration the pecuniary circumstances of defendants and their ability to pay the verdict that might be rendered against them, it was *held* to be erroneous in that it assumed a verdict for the plaintiff, and took from the jury the question whether defendants were guilty of the trespasses charged.

EXEMPLARY DAMAGES: *In trespass.*

In the action of trespass, the question whether it was wantonly or willfully committed, is important to be considered in measuring the damages. Where the wrong is wanton, or it is willful, the jury are authorized to give an amount of damages beyond the actual injury sustained, as a punishment, and to preserve the public tranquillity.[1]

SAME.

But when the wrong-doer acts in good faith, with honest intentions, and with prudence and proper caution, and he invades the rights of others so as to render himself liable to the action, punative or exemplary damages are improper.[2]

SAME: *Question of aggravation for the jury.*

If no aggravating circumstances appear in the evidence, vindictive damages should not be given. Whether the trespass was committed under circumstances of aggravation, is a question for the consideration of the jury; and the court should not by an instruction requiring them to assess vindictive damages, take it from their consideration.

FALSE IMPRISONMENT.

In order to constitute a false imprisonment, it is not necessary that the defendants use violence, or lay hands on plaintiff or confine him in any jail or prison, but it will suffice if the defendants at any place or time in any manner restrain the plaintiff of his liberty, or detain him in any manner from going where he wishes, or prevent him from doing what he desires.

APPEAL from Circuit Court of *Morgan* County.

[1]To the point, that exemplary damages may be given where the act complained of is accompanied with either gross fraud, malice, violence, oppression, or wanton recklessness, see generally, Chicago *v.* Martin, 49 Ill., 241; Chicago *v.* Langlass, 52 id., 256; City of Decatur *v.* Fisher, 53 id., 407; Toledo. P. & W. R. R. Co. *v.* Patterson, 63 id., 307; Drohn *v.* Brewer, 77 id., 280; Peoria Bridge Association *v.* Loomis, 20 id., 235; Williams *v.* Reil, 20 id., 147; Bull *v.* Griswold, 19 id., 631; Johnson *v.* Camp, 51 id., 219; Donnelly *v.* Harris, 41 id., 126; Reeder *v.* Purdy, 48 id., 261; Reno *v.* Wilson, 49 id., 95; Farwell *v.* Warren, 51 id., 468; Jasper *v.* Purnell, 67 id., 358.

[2]See Gray *v.* Waterman, 40 Ill., 523; Johnson *v.* Jones, 44 id., 142; Pierce *v.* Millay, id., 189, and the cases cited in note (1) *supra.*

Trespass for an alleged false imprisonment, brought by appellee against appellants.

The court instructed the jury for the plaintiff:

1. That if they believed from, &c., that the defendants followed the plaintiff to Springfield, or any other place, took him into their custody and there kept him, and brought him to Jacksonville, and offered to deliver him into the sheriff's custody then they were guilty as charged in plaintiff's declaration, and the jury should find for the plaintiff in such sum as under the circumstances proved they might think him entitled to, not exceeding two thousand dollars.

2. That in making up their verdict they were authorized to take into consideration the pecuniary circumstances of the defendants, and their ability to pay such verdict, not exceeding two thousand dollars, as might be rendered against them, and this the jury must gather from the proof before them.

3. That in order to sustain a charge for false imprisonment it was not necessary for the plaintiff to show that the defendants used violence, or laid hands on him, or shut him up in any jail or prison, but it was sufficient to show that the defendants, at any place or time, in any manner restrained the plaintiff of his liberty, or detained him in any manner from going where he wished, or prevented him from doing what he desired; and if they believed that such facts had been proved in this case, then they were authorized to find for plaintiff any verdict they thought proper, not exceeding two thousand dollars.

The jury found for the plaintiff with $450 damages.

Morrison & Epler, *H. B. McClure*, and *Knapp & Burr*, for appellants. *M. McConnel*, for appellee.

* Walker, C. J. It is insisted that the court erred in [*475] giving appellee's instructions. No objection is perceived to the first and third of these instructions as given. The second, however, is wrong, as it assumes that the jury will find a verdict for appellee. It informs the jury, that in making up their verdict, they are authorized to take into consideration the pecuniary circumstances of appellants, and their ability to

pay the verdict that might be rendered against them. This instruction takes from the jury the question whether appellants were guilty of the trespasses charged, and deprives them of the right to pass upon the evidence and determine the great and essential question presented by the issue in the case. It was calculated to mislead the jury, and may have produced that effect. It should, therefore, have been refused or modified before it was given, so as to have left the question of whether appellants were guilty of the trespasses to the jury.

In the action of trespass, the question of whether it was wantonly or willfully committed, is important to be considered in measuring the damages. Where the wrong is wanton, or it is willful, the jury are authorized to give an amount of damages beyond the actual injury sustained, as a punishment, and to preserve the public tranquillity. *Foot* v. *Nichols*, 28 Ill., 486. But when the wrongdoer acts in good faith, with honest intentions, and with prudence and proper caution, and he shall invade the rights of others so as to render himself liable to the action, preventive [punative] or exemplary damages are improper. If no aggravating circumstances appear in the evidence, then vindictive damages should not be given. Whether the trespass is committed under circumstances of aggravation, is a question for the consideration of the jury. If this instruction [*476] was *understood by the jury, as it most likely was, as requiring them to assess vindictive damages, as it took from their consideration all question of aggravation, we think that it virtually told them that they should find such damages. That question should have been left to their determination.

For these reasons the judgment of the court below must be reversed, and the cause remanded.

Judgment reversed.

Henrichsen & Rothschild *v.* Mudd & Hughes.

Notice of Defense Filed with General Issue: *Stricken from the files for inconsistency, indefiniteness and uncertainty.*

Where a notice filed with the general issue in an action of assumpsit alleged "that one Grubb was a partner with the plaintiffs in the transactions and causes of action sued upon, and should have been a party defendant herein," it was *held*, that it was properly stricken from the files as inconsistent; and besides, not giving the christian name of Grubb, it was too indefinite and uncertain as a notice.

Non-joinder: *Of a necessary party plaintiff in assumpsit, shown under general issue.*

The non-joinder, as plaintiff, of a person who is a partner of the plaintiff in an action of assumpsit, may be shown under the general issue.

Trial by Court without a Jury: *Presumption of consent to.*[1]

Where the record shows that the parties to a cause were present at the trial, and no objection was made to the trial of the cause by the court, without a jury, their consent must be presumed.

Judgment: *What a sufficient, in assumpsit.*

Where, upon the trial of an action of assumpsit by the court, without a jury, the court found the defendants "indebted" to the plaintiffs in a certain sum; and it was therefore adjudged that the plaintiffs have and recover from the defendants that sum, "as aforesaid, likewise their costs, &c., and that they have execution therefor:" *Held*, that the judgment was not objectionable as being a judgment in debt, and not a judgment in assumpsit, but was a sufficient judgment in assumpsit.

Error to Circuit Court of *Logan* county.

Assumpsit by defendants in error, against plaintiffs in error.

The case is sufficiently stated by the court except as to the judgment, which is as follows:—

"This day came the parties, and on motion of the plaintiffs, the plea of the defendants as to the partnership of A. O. Grubb with the plaintiffs, is stricken from the docket. And now this cause coming on for trial, and the court after hearing the evidence, is fully advised in the premises and satisfied that the said defendants, Henrichsen & Rothschild, are justly indebted to

[1] See Archer *v.* Spillman, 1 Scam., 553; Updike *v.* Armstrong, 3 id., 564; Ware *v.* Nottinger, 35 Ill., 375.

the plaintiffs in the sum of three hundred and forty-two $\frac{87}{100}$ dollars. It is therefore ordered and adjudged by the court, that the plaintiffs have and recover from the said defendants, Henrichsen & Rothschild, the sum of three hundred and forty-two $\frac{87}{100}$ dollars, as aforesaid, likewise their costs and charges by them in this behalf expended, and that they have execution therefor."

Stuart, Edwards & Brown, for plaintiffs in error, *Hay & Cullom*, for defendants in error.

[*479] *Breese, J. This was an action of assumpsit on an account for goods, wares and merchandise sold and delivered. The plea was the general issue with a notice, in substance, of payment of the whole amount due, except the sum of twenty-five $\frac{61}{100}$ dollars, and that they will prove on the trial "that one Grubb was a partner with the plaintiffs in the transaction and causes of action sued upon, and should have been a party defendant herein."

The record shows that at the April Term, 1862, the parties being present, on motion of the plaintiffs "the plea of the defendants, as to the partnership of A. O. Grubb with the plaintiffs," was stricken from the files, and the court, after [*480] hearing the *evidence, find that the defendants were indebted to the plaintiffs in the sum of three hundred and forty-two $\frac{87}{100}$ dollars, for which sum judgment was entered, together with the costs.

The objections are: That the court struck out so much of the notice as referred to the partnership of Grubb; second, That the court had no right to try the cause without a jury except by consent, and that consent should appear on the record; and last, The judgment is not a judgment in an action of assumpsit, but in debt.

The record nowhere shows a plea by the defendants that Grubb was a partner of plaintiffs. The notice makes that point, but at the same time, it is alleged in it, he should have been a party defendant. It is so inconsistent, it might well

have been stricken from the files for that cause alone, and besides, it does not give the christian or baptismal name of Grubb, and is, therefore, too indefinite and uncertain as a notice.

But striking it from the files, did not prejudice the defendants, as they could have shown the fact under the general issue. A notice was not necessary for such purpose. 1. Ch. Pl. 476; *Baker* v. *Jewell*, 6 Mass. 660; *Converse* v. *Symones*, 10 id, 377; *Wilsford* v. *Wood*, 1 Esp. 178.

The record shows the parties were present, and no objection was made to the trial of the cause by the court. Their consent must be presumed. *Benjamin* v. *Babcock*, 11 Ill. 28.

As to the form of the judgment, we perceive no objection to it. The judgment is for a certain sum of money in dollars, being the amount of indebtedness found by the court. The word "debt" is not found in the entry of the judgment. In the case of *Foster* v. *Jared*, 12 Ill. 451, where, in an action of assumpsit, the entry was, "It is considered by the court that the said plaintiff have and recover of the defendant the sum of one hundred and eight dollars and fifty cents *debt*, together with his costs, &c. It was held that this was not technically, a judgment in debt. The word "debt," does not, of itself make a judgment in debt, without it, the entry would have none of the distinctive features of a judgment in debt, and there would be no pretense for insisting that it was not a good *judgment in assumpsit. The word must be [*481] considered as surplusage, &c.

There certainly can be no pretense here that this is not a judgment in assumpsit, the term *debt* not being found in it. There being no such errors as have been assigned the judgment must be affirmed.

Judgment affirmed.

Jesse Funk *v.* James McReynolds' Adm'rs.

Mortgagor's Equity of Redemption: *Sale of mortgagor's equity on execution against the mortgagor.*

The sale of an equity of redemption upon execution, other than for the debt secured by mortgage upon the premises, vests the estate sold in the purchaser, subject to the payment of the mortgage debt.

Same: *Mortgagor subrogated to rights of mortgagee, if the mortgage debt is collected out of his other property.*

The purchaser is not allowed to take and hold the entire interest in the land, since he purchased and paid only the value of the equity of redemption. If payment of the mortgage debt is enforced (under such circumstances) from other property of the mortgagor, he will be subrogated to all the rights of the mortgagee, so as to enable him to indemnify himself out of the mortgaged premises.

Same: *Sale of, on execution for the mortgage debt; mortgagor's interest subject to execution, how ascertained.*

Where a sale of the mortgagor's equity of redemption is made upon execution for the whole or a part of the mortgage debt, it seems that such sale will be held invalid. The laws of this State, respecting sales under foreclosure of mortgages, were designed to secure to mortgagors the value of their property over and above the mortgage debt, and a sale upon execution for the whole or a part of the same debt, would defeat the policy of the law, and utterly destroy the value of all equity of redemption.

The interest of a mortgagor subject to a sale upon execution, is ascertained by deducting the amount of the mortgage debt from the value of his property, and a sale of the residuary interest to discharge the debt so deducted would never give to the mortgagor the value of his property over and above the incumbrance.

Same: *Effect of sale of part of the mortgaged premises under a judgment for part of the mortgage debt, where the sale is not attacked; whether purchase at execution sale, an extinguishment of residue of mortgage debt; effect of judgment without sale; priorities; apportionment of incumbrance among owners of separate parcels.*

Where ten notes, secured upon real estate, were executed and made payable one each year for ten successive years, and the two first maturing were assigned by the mortgagee to M., who reduced the first to judgment and sold a portion of the mortgaged premises thereunder for the amount of the execution and costs, himself becoming the purchaser, and on the same day that M. received his sheriff's deed therefor, six other of said notes were assigned to him by the mortgagee, including the two last maturing: *Held*, on a bill filed by F., the assignee of one, and of a judgment upon another, of the intermediate notes of the series, the mortgagor be-

ing made a party, and neither M. nor the mortgagor nor mortgagee questioning the validity of the sale under said execution, that such execution sale must be considered valid until its validity was controverted in some appropriate manner, and so considering it, the judgment in favor of M. was satisfied by his own act and no longer a lien upon the premises; that M. acquired the property subject to the payment of a *pro rata* share of so much of the mortgage debt as the sale left unsatisfied; that there being no evidence of any intention on the part of M. to cancel the seven other notes, held by him, or to discharge his lien upon the residue of the property, and it being for his interest to keep the notes in force to preserve his lien upon the residue of the property mortgaged, equity would consider them as subsisting and a lien upon the mortgaged premises, as well as the judgment and note assigned to complainant, and that the holders of the same were entitled to a priority in their payment according to the order of their maturity, the judgment assigned to complainant taking the place of the note upon which it was rendered.

Held, also, that as between parties claiming under the mortgagor and M., respectively, if the property was more than sufficient to satisfy the liens, equity would apportion the incumbrance between the parties ratably, according to the value of the parcels they held respectively.

Error to Circuit Court of *Piatt* County.

Foreclosure bill filed by plaintiff in error, as assignee of the judgment of $504.23 recovered in Sept. 1859 by John A. Brittenham, and of the note maturing April 1, 1863, (more particularly described by the court in their opinion,) against Asher W. Tinder, mortgagor, Daniel Kelley, — to whom the premises were, Sept. 21, 1860, conveyed by said Tinder, — and the administrators and unknown heirs of James McReynolds, deceased.

The circumstances attending the execution of the notes and mortgage, their assignment, &c., are fully stated by the court, and need not here be repeated.

A cross-bill was filed by McReynolds' administrators for a foreclosure to enforce payment of the notes assigned to their intestate and then due to and held by them; and also an answer to the original bill by Allen McReynolds, as heir of said James McReynolds.

"On this 10th day of October, A. D. 1863, being the 6th day of the said term, this cause came on to be heard upon complainant's amended bill, the answer of Jacob Piatt and

McReynolds, and replication of complainant, and the cross-bill of said Jacob Piatt and Allen McReynolds, as administrators of James McReynolds, deceased, and the answer of Jesse Funk, complainant, thereto, and replication.

"And it appearing to the court that the said Asher W. Tinder, Daniel Kelley, Jesse Bush and John S. Madden have been duly served with process in this cause, and that publication of notice of the pendency of this cause has been made as required by the statute to all of the non-resident defendants to this cause, and the said Asher W. Tinder, Daniel Kelley, Jesse Bush, John S. Madden, and the unknown heirs and devisees of James McReynolds, having been three times solemnly called and came not, the said amended bill of the said complainant, and the said cross-bill, are taken for confessed against them.

"And it further appearing to the court that the said Asher W. Tinder did on the first day of November, 1855, execute and deliver to John A Brittenham ten several promissory notes for land purchased of him, and to secure the payment of said notes made and delivered to said Brittenham a mortgage on the said lands, to wit: Part of the W. ½ of the S. E. ¼ and E. ½ of the S. W. ¼ of section No. 31, township 19 north, range six E., third P. M., commencing at the S. E. corner of said section 31; thence north 82 degrees 50 minutes E. 83 poles; thence N. 13 degrees E. 46 poles; thence S. 82 degrees 50 minutes W. 57⅔ poles; thence S. 13 degrees W. 36 poles; thence N. 82 degrees 50 minutes 57⅔ poles; thence S. 13 degrees W. 46 poles; thence N. 82 degrees 50 minutes E. 19⅓ poles to the beginning, containing eight acres. Also commencing at the southeast corner of the above described tract, thence N. 82 degrees 50 minutes E. 12½ poles; thence N. 13 E. 46 poles; thence S. 80 degrees 50 minutes W. 12½ poles; thence S. 13 E. 46 poles; thence S. 13 W. 46 poles to the place of beginning, containing three acres. Also the W. ½ of the S. W. ¼ of section 16, 80 acres; the S. ½ of section 17, 320 acres; the N. E. ¼ of section 20, 160 acres, and the W. ½ of the N. W. ¼ of section 21, 80 acres, all in township 18 N., R. 6 E., third P. M., containing in all

651 acres. That said notes respectively, by their respective tenor and effects, became due and payable on the first day of April, in the years 1857, 1858, 1859, 1860, 1861, 1862, 1863, 1864, 1865 and 1866, bearing interest at six per cent., payable annually in advance; that one year's interest had been paid by the said Asher W. Tinder to the said John A. Brittenham in advance; that after the execution and delivery of said notes and mortgages by the said Asher W. Tinder to the said John A. Brittenham, he the said Brittenham, to wit: On the 14th day of April, 1856, for a valuable consideration, assigned the said first note falling due on the first day of April, 1857 and 1858, to the said James McReynolds, since deceased; that after said first note became due, the said James McReynolds sued the said Asher W. Tinder on the same, and obtained a judgment at law in the Piatt county Circuit Court against said Tinder, at the April, 1857, Term thereof, for the sum of $1,087.33, being the amount of said note and the interest on the same, and costs of suit; that the said James McReynolds afterwards sued out of the clerk's office of said court an execution on said judgment, and caused the same to be levied on the W ½ of the S. W. ¼ of section 16, 80 acres; the S. ½ of section 17, 220 acres; the N. E. ½ of section 20, 160, and the W. ½ of the N. W. ¼ of section 21, 80 acres, all in township No. 18 north, range 6 E., third P. M., containing 640 acres in all, and being all of the lands mentioned in said mortgage, except eight and three acre pieces above described, and caused the land so levied upon to be sold at sheriff's sale by the sheriff of Piatt county, Illinois, on the 13th day of October, 1857; that the said James McReynolds became the purchaser of all of said land so levied on at such sheriff's sale, for the amount of his judgment at law, and the interest and costs which had accrued on the same; that none of said land was ever redeemed from said sale, and that on the 29th day of August, 1859, the said James McReynolds took a sheriff's deed for all of the land so sold.

"And it further appearing to the court, that on the 29th day of August, 1859, the said John A. Brittenham for a valuable

consideration assigned the notes described in said mortgage, and due respectively on the first day of April, 1860, 1861, 1862, 1864, 1865 and 1866, to the said James McReynolds, and that the said James McReynolds died intestate on or about the 31st day of May, A. D., 1862, and that the said Allen McReynolds and Jacob Piatt, complainants in the cross-bill in this cause filed, are his legally appointed and acting administrators, and that they now hold, as a part of the personal assets of the estate of the said James McReynolds, in their characters as such administrators, the said notes falling due on the first day of April, 1858, 1860, 1861, 1862, 1864, 1865 and 1866, and that the same are unpaid.

"And it further appearing to the court, that on the 24th day of January, A. D., 1861, the said John A. Brittenham assigned for a valuable consideration to Jesse Funk, the complainant in the original bill filed in this cause, the judgment which the said John A. Brittenham had obtained against the said Asher W. Tinder on the note due April 1st, 1859, and also the note in mortgage mentioned, falling due April 1st, 1863.

"And it further appearing to the court that the interest on all of said notes for one year had been paid by the said Asher W. Tinder, to the said John A. Brittenham; and that the sum of $689.50 had been paid by the said Asher W. Tinder, to the said John A. Brittenham, on the said note, falling due April 1st, 1859; and that the said John A. Brittenham obtained a judgment at law against the said Asher W. Tinder, in the September, 1859, Term of the Piatt Circuit Court for the balance due on said note, falling due April 1st, 1859, to wit: $504.23; that the said judgment still remains due, unpaid and unsatisfied, and the said John A. Brittenham had assigned his interest and title in and to said judgment at law to the said Jesse Funk, complainant in the original amended bill in this cause filed; and that the said Asher W. Tinder, on or about the 21st day of September, 1860, deeded all of the lands mortgaged to the said Daniel Kelly. *It is ordered by the court* that this cause be referred to the master in chancery, with instructions from the court to take an account of the amount due to the said Allen

McReynolds and Jacob Piatt, as administrators of James McReynolds, upon all of the said notes which have been assigned to James McReynolds by the said John A. Brittenham, including the note upon which judgment at law was obtained, and land sold by the said James McReynolds during his lifetime, to wit: on the notes falling due respectively on the first day of April, 1857, 1858, 1860, 1861 and 1862, and also to find the amount due Jesse Funk, complainant in original bill, on the notes falling due respectively on the 1st day of April, 1859 and 1863, including the unpaid principal and interest on said notes, and excluding all costs made in suits at law on the same. And the said master in chancery having taken the accounts under the instructions of the court, and reported as follows, to wit:

'Monticello, Piatt county, Illinois, October 9th, 1863. To the Hon. C. EMMERSON, Judge of the Piatt county Circuit Court. 'The undersigned master in chancery, of Piatt county Illinois, to whom was referred for calculation the notes in the case of *Jesse Funk* v. *A. W. Tinder et al.*, chancery case No. 59, on the docket at the September Term, 1863, would beg leave to report that he finds the following amount due and unpaid, viz.:

'To Jesse Funk, on note due April 1st, 1859, ...	$526 58
" " " " " " " " 1863, ...	1,416 60
	$1,943 13

'To Estate of James McReynolds, deceased.

'On note due 1st April, 1857,.....	$1,416 60
" " " " 1858,.....	1,416 60
" " " " 1860,.....	1,416 60
" " " " 1861,.....	1,416 60
" " " " 1862,.....	1,416 60
	$7,083 00
'Oct. 9th, 1863, total amount due on said notes,	$9,026 13

'There are three notes not yet due, of which I have not taken any account, and having fully reported, would ask to be discharged with my charges. Fees $5.

A. G. BOYER, *M. C.*'

"Which said report is approved by the court.

"*It is therefore ordered, adjudged and decreed* by the court, that the said Asher W. Tinder, Daniel Kelly, Jesse Bush, John S. Madden, and the unknown heirs of James McReynolds, pay to Allen McReynolds and Jacob Piatt, administrators of James McReynolds, deceased, complainants in cross-bill, the sum of $7,083.00, with six per cent. interest thereon from this date, together with their costs in this cause, within thirty days from this date, and to Jesse Funk, complainant in original amended bill, the sum of $1,943.13, with six per cent. interest thereon from the date of this decree till paid, together with his costs in this cause within thirty days from this date.

It is further decreed by the court, that if default be made in the payment of the sums aforesaid, that the master in chancery for Piatt county, Illinois, sell the lands mentioned in said mortgage, at the north door of the court house in Monticello in said county, at public sale for cash to the highest bidder, after having given at least thirty days' notice of the time, place, and terms of said sale by posting notices thereof in four public places in said county; and out of the proceeds of said sale he pay first the costs of this case and of the sale; and second to Allen McReynolds and Jacob Piatt, administrators of James McReynolds, deceased, on the said note falling due April 1st, 1857, the sum of $1,416.60; on the note falling due April 1st, 1858, the sum of $1,416.60; and third to Jesse Funk, on the note falling due April 1st, 1859, the sum of $526.53; and fourth to said Allen McReynolds and Jacob Piatt, on the note falling due April 1st, 1860, the sum of $1,416.60; on the note falling due April 1st, 1862, the sum of $1,416.60; and fifth to Jesse Funk, on the note falling due April 1st, 1863, the sum of $1,416.60; holding the overplus, if any, subject to the further order of this court; and that he report his action to this court."

The errors assigned were:

1. In decreeing in accordance with the prayer of the cross-bill.

2. In granting a foreclosure as to the note maturing April 1, 1857, which it was insisted was paid by the sale of the land on execution.

3. In decreeing that any of the notes held by defendants should be paid prior to those of complainant.

4. In not decreeing, as prayed in the original bill, that the notes held by the complainant therein be paid, and a foreclosure had to enforce such payment.

W. E. Lodge, for plaintiff in error. *Charles Watts*, for defendants in error.

*Beckwith, J. On the 1st of November, 1855, Asher [*495] W. Tinder made his ten promissory notes for $1,000 each, payable to John A. Brittenham or order, on the 1st day of April in the years from 1857 to 1866, inclusive, with interest annually in advance, and also executed a mortgage deed of several tracts of land to secure payment of the same. The first year's interest upon the notes was paid in advance. On the 14th of April, 1856, Brittenham sold and transferred to James McReynolds the notes falling due on the 1st day of April in the years 1857 and 1858. McReynolds sued Tinder, declaring upon the note due 1st April, 1857, and at the April Term, 1857, of the Circuit Court for Piatt county, recovered judgment thereon for $1,087 $\frac{33}{100}$ damages and costs. Afterwards, McReynolds sued out an execution upon the judgment, and caused the same to be levied upon the premises mortgaged, excepting eleven acres thereof. The premises levied upon were sold by the sheriff to McReynolds, on the 13th of October, 1857, for the amount of the execution and costs. None of the lands sold were redeemed; and on the 29th August, 1859, the sheriff conveyed the same to McReynolds. On the 29th August, 1859, Brittenham sold and transferred to McReynolds the notes falling due on the 1st day of April in the years 1860, 1861, 1862, 1864, 1865 and 1866, which are now held by his administrators. In September, 1859, Brittenham recovered a judgment against Tinder for $504 $\frac{23}{100}$, the balance then due on the note falling due 1st April, 1859, and on the 24th January, 1861, assigned this judgment and the note falling due 1st April, 1863, to the plaintiff in error.

The sale of an equity of redemption upon execution, other than for the debt secured by mortgage upon the premises, vests the estate sold in the purchaser, subject to the payment of the mortgage debt. It is necessarily made for so much less than the property would have sold for had it been unincumbered. The debtor is thereby divested of property apparently sufficient to satisfy the indebtedness secured by the mortgage; and he has a right to demand its application upon the liability. The purchaser is not allowed to take and hold the entire interest in the land, since he purchased, and paid only the value of [*496] the equity of redemption. If *payment of the mortgage debt is enforced (under such circumstances) from other property of the mortgagor, he will be subrogated to all the rights of the mortgagee, so as to enable him to indemnify himself out of the mortgaged premises.

The application of these well settled rules prevents any injustice to the mortgagor, the mortgagee, or the purchaser. Where such a sale is made upon execution for the whole or a part of the mortgage debt, great difficulties occur in adjusting the rights of parties. In some instances such sales have been held to be void. *Goring's Executor* v. *Shreve*, 7 Dana, 64; *Swigest* v. *Thomas*, id. 220; *Bronson* v. *Robinson*, 4 B. Mon. 142; *Waller* v. *Tate*, id. 529; *Atkins* v. *Sawyer*, 1 Pick. 351; *Washburn* v. *Goodwin*, 17 Pick. 137; *Camp* v. *Coxe*, 1 Dev. and Bat. 52; *Powell* v. *Williams*, 14 Ala. 476; *Baldwin* v. *Jenkins*, 23 Miss. (1 Cush.), 206.

The law will not suffer a debtor to be divested of his property for the purpose, nominally, of discharging his liabilities, when the manner in which it is sought to be done nowise tends to accomplish that end. It provides appropriate modes for subjecting the property of debtors to the payment of their debts, and it is no hardship upon creditors to require them to pursue those modes. While justice requires that creditors shall have their just dues, it forbids unjust and unnecessarily oppressive modes of obtaining them. The laws of this State, regarding sales under foreclosure of mortgages, were designed to secure to mortgagors the value of their property over and above the

mortgage debt, and a sale upon execution for the whole or a part of the same debt would defeat the policy of the law, and utterly destroy the value of an equity of redemption.

The interest of a mortgagor subject to a sale upon execution, is ascertained by deducting the amount of the mortgage debt from the value of his property and a sale of the residuary interest to discharge the debt so deducted would never give to the mortgagor the value of his property over and above the incumbrance. In the case under consideration, McReynolds did not pay anything for the equity of redemption conveyed to him. He acquired the value of the property over and above *the mortgage debt, by merely *canceling* a portion [*497] of the same. To illustrate: Property worth $5,000 may be mortgaged for only $1,000; now if the equity of redemption is exposed for sale, upon an execution, for the mortgage debt, and the mortgagee becomes the purchaser for $1,000, he would take the property for his debt and deprive the mortgagor of the benefits that might accrue to him if the property were sold in a proper manner to satisfy the indebtedness.

But whatever effect the sale under the execution in favor of McReynolds had upon the rights of Tinder, inasmuch as he is now in court and does not question its validity, or justice, we are not called upon to interfere in his behalf. McReynolds, Brittenham, Tinder, or those claiming under them, have never questioned the validity of the sale; and we are not required to assert rights for parties which they do not assert for themselves. Considering, as we must, the sale to be a valid one, until its validity is controverted in some appropriate manner, we are of the opinion that McReynolds acquired the property subject to the payment of a *pro rata* share of so much of the mortgage debt, as the sale left unsatisfied. The law will not consider the note held by McReynolds, and which fell due April 1, 1858, and the six notes, subsequently acquired by him, extinguished. The whole of the property mortgaged was not sold under the execution in favor of McReynolds, and it was for his interest to keep the notes in force, to preserve his lien upon the residue of the property mortgaged. There is no evidence of any intention on

the part of McReynolds to cancel them, or to discharge his lien upon the residue of the property; and as no intention of that kind was manifested, equity will consider the notes as subsisting, or as extinguished, as may be most conducive to his interests,[1] *Campbell* v. *Carter*, 14 Ill., 286. The seven notes held by the representatives of McReynolds are a lien upon the mortgaged premises, as well as the judgment and note assigned to the plaintiff in error, and the holders of the same are entitled to a priority in their payment, according to the order of their [*498] maturity;[2] the judgment in favor of *Brittenham taking the place of the note upon which it was rendered. *Vansant* v. *Allmon*, 23 Ill., 30.

The judgment in favor of McReynolds was satisfied by his own act, and it is no longer a lien upon the premises. The persons claiming under McReynolds hold the equity of redemption acquired by him, in lieu of so much of the mortgage debt as was canceled. The position of these parties is one chosen by McReynolds, and so long as he and they abide by it, none of them can complain of the consequences. The property, after the liens thereon are discharged, belongs to them, and they have no right to retain Tinder's equity of redemption with its benefits, and receive that which was surrendered to him for it. The parties claiming under Tinder and McReynolds, respectively, are entitled to have the mortgaged property, if it should be more than sufficient to discharge the liens, exhausted for that purpose ratably, according to the value of the several parcels. McReynolds was under no obligation to entirely disincumber the land sold to Kelley; nor was Tinder or Kelley under any obligation regarding them other than such as the law imposed upon them. Under such circumstances, if the property is more than sufficient to satisfy the liens, equity will apportion the incumbrance between the parties ratably, according to the value of the parcels they hold respectively. The decree of the court below is reversed, and the cause is remanded for further proceedings not inconsistent with this opinion.

Decree reversed.

[1]See Edgerton *v.* Young, 43 Ill., 464.

[2]See Gardner *v.* Diedricks, 41 Ill., 158; Walker *v.* Dement, 42 id., 272.

Henry O. Goodrich *v.* Hanson and Pearson.

Evidence: *Depositions taken in a prior suit, when admissible in the second suit between the same parties in interest.*[1]

Where property was placed by the principal in the hands of an agent, and while so held a replevin suit was instituted by a third party against the agent for its recovery, in which the agent took the deposition of a witness, of the taking of which the plaintiff in replevin was notified and attended and cross-examined the witness; and afterwards the replevin suit being dismissed, the agent's principal brought trover against the plaintiff in replevin for such property, in which the question was the same as in the replevin suit, viz.: whether the property belonged to the plaintiff in trover or the plaintiff in replevin, upon which question the said deposition was taken: *Held*, that although the parties to the two suits were not nominally the same upon the record, they were the same in interest, and the witness having meanwhile died, his deposition was admissible for the plaintiff in the action of trover. (The introduction of the deposition was also objected to by the defendant, because defendant had no notice, before the commencement of the trial, of plaintiff's intention to offer it in evidence; and because the deposition was taken *de bene esse* only; but these objections were not considered by the court, and it would seem were not regarded as tenable.)

Former Recovery: *In favor of agent, when pleadable in bar by principal.*

Where an action of replevin is brought by a third party against an agent, —a mere naked bailee of the property, —who pleads property in his principal, and a verdict is found thereon for the agent, who restores the property to his principal; such a finding will, as it seems, bar a recovery in a second action therefor brought by the plaintiff in replevin against the principal.

Agency: *Acts of agent binding upon principal.*

The acts of an agent within the scope of his authority, are binding upon the principal.

Same: *Agent authorized to defend an action of replevin against him for principal's property.*

When property is intrusted by a principal to his agent—a mere naked bailee —and the same is replevied from him by a third party, the defense of the suit, and the taking of a deposition in support of a plea of property in his principal, are clearly within the power of the agent.

Witnesses: *Disqualification on account of interest.*

Where in an action of replevin against an agent in possession of the prop-

[1]See Doyle *v.* Wiley, 15 Ill., 576; McConnell *v.* Smith, 23 id., 612; S. C. 27 id., 232.

erty of his principal, it was objected that the vendor of defendant's principal who was offered as a witness for defendant in support of his plea of property in his principal, was interested in the event of the suit, on the ground that he purchased the property in question for the plaintiff in replevin, and as his agent, with his funds, and that he was not the owner when he sold to defendant; *Held*, that, if this was true, his interest would be equally balanced between the parties, and hence he would be a competent witness.

SAME: *Release of interest how proved.*

It is competent for a witness to prove a release of his interest by parol, when the question arises on his examination in chief, although the release may be in writing.

PRACTICE: *Objections to competency of witnesses; when to be taken.*[1]

An objection to the competency of a witness on the ground of interest, whose deposition is taken for use in a cause, must, where the party against whom it is taken is present when it is taken and has the opportunity of having the objection noted, in order to be available, be taken and noted when the deposition is taken. The objection comes too late, when made in the circuit court for the first time.

SAME: *Objection to leading questions; when to be taken.*

So, the objection that questions propounded to a witness whose deposition is being taken, are leading, must be made and noted when the question is propounded to the witness; and by failing to object at that time, the right to raise the question in the circuit court will be waived.

SAME: *General rule as to when technical objections to depositions must be taken.*[1]

A party has no right to be by and permit his adversary to take evidence without objection, and when it is offered to be read, then for the first time to raise mere technical objections, calculated to produce costs and delay.

If, however, the party against whom the deposition is intended to be used is not present when it is taken the rule would not apply; but only in cases where he is present and has the opportunity of having the objections noted.

ERROR to Circuit Court of *Shelby* county.

Trover for two mules, brought by plaintiff in error against defendants in error.

The case is sufficiently stated by the court.

[1]See Frink *v.* McClung, 4 Gilm., 569; Moshier *v.* Knox College, 32 Ill., 155; Lockwood *v.* Mills, 39 id., 602; Phy *v.* Clark, 35 id., 377; Cooke *v.* Orne, 37 id., 186; Swift *v.* Castle, 23 id., 209; Fash *v.* Blake, 38 id., 363; Corgan *v.* Anderson, 30 id., 95; Thomas *v.* Dunaway, 30 id., 373.

Henry & Read, for plaintiff in error. *S. W. Moulton*, for defendants in error.

*Walker, C. J. Was there such a privity between [*507] Hammer and Goodrich as authorized the depositions and proceedings in the replevin suit to be read in evidence in this case? It appears that Goodrich placed the mules in the hands of Hammer as his agent, and whilst they were so held, Pearson instituted a replevin suit against Hammer for their recovery. Hammer took the deposition of Whitsit, from whom both parties to this suit claim to derive title to the mules, to be read in evidence on the trial of the replevin suit. Pearson had due notice of the time and place of taking this deposition. The suit was dismissed, and Whitsit died after his deposition was taken. Afterwards, plaintiff in error brought this suit to recover the value of the mules, and on the trial below offered to read the proceedings and the depositions of Whitsit in the replevin suit as evidence in this case, but it was rejected by the court below, which decision of the court is, amongst others, assigned for error.[1]

In affirmance of the judgment it is urged that this evidence is incompetent, because the parties to the two actions were not the same, nor the issues the same. It will be perceived that the question in both cases was the ownership of the property in controversy. In the replevin suit defendants in error sued to recover the property, and Hammer plead property in plaintiff in error. That issue directly presented the question, whether property belonged to plaintiff or defendants in error. And the deposition of Whitsit was taken to prove the truth of that plea. It is then seen that, under this issue in the replevin suit, the question was the same, and between the same parties, as in this

[1] The objections made by defendants to the plaintiff's reading in evidence the pleadings and proceedings in said replevin suit, were, (1) because said action was not between the same parties as this suit; (2) because no notice was given defendants before the trial commenced, of the plaintiff's intention to read said deposition in evidence; (3) because Whitsit was disqualified by reason of interest in the event of the suit; and (4) because Whitsit's deposition was only taken *de bene esse*.

suit. It appears that Hammer was merely the naked bailee of plaintiff in error, and had that issue been tried and found [*508] in *favor of Hammer, it would have been conclusive upon all parties to that suit. Had such a finding resulted from a trial, and Hammer had restored the property to plaintiff in error, it would have barred a recovery by defendants in error of this property from plaintiff in error.

Hammer being the naked bailee of plaintiff in error, that created a direct privity of title between them. When such a relation is shown, the acts of the agent, within the scope of his authority, are binding upon his principal. In this case the taking of the deposition and the defense of the suit was clearly within the power of the agent. It is true that all the parties to the two suits are not, nominally, the same upon the record, yet they are the same in interest. We are, therefore, of the opinion that this deposition fell within the rule laid down in *Wade* v. *King*, 19 Ill., 301, and it should have been admitted in evidence. Defendants were notified and attended, and cross-examined the witness in taking the deposition, and having had every opportunity to ascertain the truth of his evidence, it is not perceived that any possible injury can result from its being read in this case.

It was also objected that Whitsit was interested in the event of the replevin suit, and that his evidence was therefore not admissible. It is claimed that he purchased the mules for the defendants in error, and as their agent, with their funds, and that he was not the owner of the property at the time he sold it to plaintiff in error. If this is true it would leave his interest equally balanced between the parties. If plaintiff in error should succeed in recovering the value of the property, it would leave his representatives liable to defendants in error, and if they succeed, it would leave them liable to plaintiff in error on the implied warranty of title which enters into all sales of personalty, unless provided against when the sale is made.

But in his deposition he testifies that he was released by plaintiff in error. It is, however, urged that the release should

have been produced, and could not be proved by verbal testimony. In the case of *Ault* v. *Rawson*, 14 Ill., 484, it was held that it was competent for a witness to prove a release of his interest on *his *voir dire*. No reason is perceived [*509] why the same thing may not be done when the question arises on his examination in chief. When the deposition was taken, defendants in error were present, but they made no objection on the ground of interest. The question was asked by the opposite party, and defendants made no objection to its being answered. By failing to object at the time, when the opposite party could have had the opportunity of obviating the objection, they waived the right to raise the question in the Circuit Court. To permit the question to be raised on the trial, would be to give an unfair advantage to the party resisting the introduction of the evidence. To have been available, the objection should have been made and noted when the deposition was taken. Even if this witness had been incompetent on account of his interest, the objection comes too late when made in the Circuit Court for the first time.

It is not material to determine whether the questions were leading, as no such objection was noted when the questions were propounded to the witness. If the objection had then been made, it would have afforded the opposite party the opportunity of removing the objection by reconstructing the interrogatory. A party has no right to lie by and permit his adversary to take evidence, without objection, and when it is offered to be read, then for the first time to raise mere technical objections, calculated to produce costs and delay. Such a practice would not tend in the slightest degree to promote justice. If the witness might be led in giving his evidence, it is no hardship to require the opposite party to object, at the time, to the mode of examination adopted. If, however, the party against whom the deposition is intended to be used is not present when it is taken, the rule would not apply. But only in cases where he is present and has the opportunity of having the objection noted. For the reasons here given, the judgment of the court below is reversed and the cause remanded.

Judgment reversed.

Harvey Lightner *v.* John Steinagel, Garnishee of Richard A. Unger and William Hunicke.

Garnishment: *Of money in the custody of the law.*

Whenever an official holds money or property merely as the agent of the law, he cannot be subject to garnishee process in respect thereof; but if anything arises to change this relation from an official obligation to a personal liability, then he would become amenable to this process.[1]

Same: *Redemption money in hands of sheriff.*

Money in the hands of the sheriff paid to him on the redemption of land sold by him on execution, is received by him and is in his custody as an officer of the law, and he is not subject to garnishee process in respect thereof.

Error to Circuit Court of *Adams* county.

The case is sufficiently stated by the court.

Browning & Bushnell, for plaintiff in error. *Buckley, Wentworth* and *Marcy*, for defendants in error.

[*513] *Breese J. The question presented by this record is, is a sheriff, under the attachment laws of this State, liable to a garnishee process, for moneys in his hands collected as sheriff?

The merits of the question can be fully ascertained by [*514] the *instructions asked on both sides, and the disposal of them by the court.

The plaintiff asked the court to give the following instructions:

"If the jury believe, from the evidence in this case, that the writ of attachment issued in this case was duly served on John Steinagel, as garnishee herein, before the said Richard A. Unger assigned and delivered to the said Charles S. Lips the certificate of purchase, mentioned in the answer of said Steinagel, filed herein, they will find a verdict for the plaintiff.

[1] See Weaver *v.* Davis, 47 Ill., 235 (special master in chancery held subject to garnishee process); Millison *v.* Fisk, 43 id., 112; Bivens *v.* Harper, 59 id., 21.

Municipal corporations not subject to garnishee process. Merwin *v.* Chicago, 45 Ill., 133; Triebel *v.* Colburn, 64 id., 376; see, also, Millison *v.* Fisk, and Bivens *v.* Harper, *supra.*

"If the jury believe, from the evidence in this case, that the said Richard A. Unger assigned and delivered to the said Charles S. Lips the certificate of purchase mentioned in the answer of said Steinagel, garnishee herein, before the writ of attachment issued in this case was served on the said John Steinagel, as such garnishee, yet, if they also believe, from said evidence, that the said Unger so assigned said certificate of purchase to said Lips, without any good or valuable consideration whatever therefor, they will in that case find a verdict for the plaintiff.

"That even if the jury believe, from the evidence in this case, that the said Robert Barth paid to the said John Steinagel, then sheriff of Adams county, at the time of said payment, the moneys in question in this case as judgment debtor to redeem from the sale mentioned in the said Steinagel's answer herein, and within twelve months from the time of said sale, under the laws of Illinois, still such payment to said Steinagel, while sheriff, as aforesaid, would not prevent the said moneys or the avails thereof from being legally liable to be garnisheed in the hands of said Steinagel by the plaintiff or any attaching creditor of said Unger, provided the said moneys or the avails thereof in the hands of the said Steinagel belonged to said Unger at the time the said Steinagel was summoned as a garnishee in this case, and if the jury believe, from the evidence in this case, that at the time the said Steinagel was summoned as a garnishee in this case, he had in his hands the said money or the avails thereof for the said Unger, and that the same or the avails thereof belonged to said Unger, they will find a verdict for the plaintiff."

*The defendant asked the following: [*515]

"At the instance of the garnishee, John Steinagel, the court instructs the jury that, under the laws of this State, money paid to and received by a sheriff, in his official capacity as such sheriff, for the purpose of redeeming land from sale on execution, is not liable, while in the hands of such sheriff, to any process of garnishment, and if the jury believe, from the evidence in this case, that the money, in respect to which the garnishee,

John Steinagel, has been garnisheed in this suit, was paid said Steinagel, as sheriff of Adams county, Illinois, by one Robert Barth, for the purpose of redeeming a tract of land in said county from a sale thereof, as the property of said Barth, made by a former sheriff of said county, on an execution against said Barth and one Anglerodt, and that said Steinagel, at the time of receiving said money, was sheriff of said Adams county, and received said redemption money as redemption money for the redeeming of said tract of land from the said sale on execution, they will find the issue for the garnishee."

The instructions asked by the plaintiff were refused and that asked by the defendant was given, and on this ruling the errors are assigned.

The money in the hands of the sheriff, was money paid him on the redemption of certain lands which he had sold on an execution.

This court has decided, in *Reddick* v. *Smith*, 3 Scam., 451, that money in the hands of a sheriff, collected on execution, cannot be attached as the property of the plaintiff in the execution, because the money is in the custody of the law, and subject to the control of the court from which the execution issues; and because, to allow it to be done, might bring different tribunals into collision and cause much embarrassment to officers concerned in the execution of final process. The same doctrine is held in the case of *Wilder* v. *Bailey*, 3 Mass., 289; in *Dawson* v. *Holcomb*, 1 Ohio, 275; and *Ross* v. *Clark*, 1 Dallas, 354; *Marvin* v. *Hawley*, 9 Mo., 382. The specific money in the hands of the sheriff is held, in these cases, not to be the property of the plaintiff in the execution until paid over to him.

[*516] *In *Pierce* v. *Carlton*, 12 Ill., 358, this court recognized the doctrine of these cases, but held, that a surplus remaining in the hands of the sheriff, after satisfying the plaintiff's execution, was liable to the garnishee process. And the reason given is, when the amount due on the judgment is returned into court, or paid over to the plaintiff, the execution has accomplished its office, and, if there is a surplus, it is the duty

of the officer to pay it over to the defendant. It is not strictly in the custody of the law, but the officers hold it as so much money had and received for the use of the defendant. The same doctrine was held in the case of *Jaquet's Administrators* v. *Palmer*, 2 Harring. (Del.), 144; *King* v. *Moore*, 6 Ala., 160; *Tucker* v. *Atkinson*, 1 Humph. (Tenn.), 300; *Watson* v. *Todd*, 5 Mass. 271; *Crane* v. *Freese*, 1 Harris. (N. J.), 305; *Hulbert* v. *Hicks*, 17 Vt., 193; *Woodbridge* v. *Morse*, 5 N. H., 519; *Fieldhouse* v. *Craft*, 4 East, 510; *Clymer* v. *Willis*, 3 Cal., 363; *Fish* v. *Milln*, 5 Bibb, 311; *Dubois* v. *Dubois*, 6 Cow., 494.

It is contended by the plaintiff in error, that this case of *Pierce* v. *Carlton* is authority for the instructions asked for by him, and supports the views he has addressed to the court, and this, because the sheriff is not required to bring the redemption money into court, and that it is in no sense in the custody of the law, nor has the court any control over it in his hands, nor can different courts be brought into collision in respect to it, nor, if garnisheed, can any delay or inconvenience be thereby created in the settlement by any officer under final process. It is said the sole duty of the officer is to pay the money over to the purchaser.

In this argument the fact seems to be lost sight of that the sheriff receives this money as an officer of the law, and is amenable to the law to account for it. His authority to receive it is derived directly from the statute. He is the mere agent of the law discharging a duty and a trust which arise alone from the statute, and not from any contract with or trust reposed by the judgment debtor or any of the parties to the judgment or sale. As to this money, the sheriff is amenable to the summary jurisdiction of the court, and on a proper case made there, may *be required to produce the [*517] money in court. His duty in regard to the receipt of money on the redemption of land sold by him on an execution arises out of the execution, and until he has discharged it in all its parts, and in its whole extent, he must be held to be under the control of the court. It is not like the case where he has

collected of a defendant more money than the execution demanded. There, in such case, as was held in *Pierce* v. *Carlton*, the money belonged to the defendant, which the sheriff was bound to pay over to him immediately. Here, the money is subject to the final disposition of the court out of which the execution issued.

We think the true rule in such cases is, that where the sheriff derives his authority from the law, he must exercise it according to the rules of law. So situated, public policy requires he should not be charged on garnishee process in respect of any money or property held by him in virtue of that authority; as such, it is in the custody of the law. Drake on Attach. 506, ch. 21, and cases cited.

From the authorities we deduce the principle, that whenever an official holds money merely as the agent of the law, he cannot be subject to the process; but if anything arises to change this relation from an official obligation to a personal liability, then he would become amenable to this process.

In every view we have been able to take of this case, we can see nothing which should render the sheriff amenable to this process. The money was in the custody of the law, and no demand of it was ever made by the party entitled. The sheriff was but in the discharge of his duty in holding it. The Circuit Court properly instructed the jury on all the points made, and its judgment must be affirmed.

Judgment affirmed.

William Flake *v.* John B. Carson.

Judgment: *In assumpsit; must be against all the defendants or none.*[1]

Where there is an appearance by both the defendants in an action of assumpsit, the judgment should be against both or neither.

[1]See Stewart *v.* Peters, *ante*, 384.

APPEARANCE: *What amounts to.*[1]

Where in an action of assumpsit against two defendants, only one of whom was served with process, only the defendant served pleaded to the action; and the record recited that the defendants on two occasions, in the February Term, 1862, and June term, 1863, moved to suppress certain depositions, and at the latter term entered their motion for a continuance of the cause; and at the September Term, 1863, the record recited that the parties by their attorney waived a jury and put themselves on the court for trial; and it also recited among the entries on the following day that "the parties herein appearing on yesterday by their attorneys," &c.: *Held*, that this amounted to an appearance by both parties, and it was error to render judgment only against the party served

SAME.

When a party appears for a specific purpose, or to show that he is not properly before the court, he should so restrict his motion. If he makes several motions in the cause, not limiting his appearance to a specific purpose, he will be held to have appeared generally for all purposes.

INTEREST: *On open accounts.*

By our statute interest is not chargeable in an open account when it has not been liquidated and a balance agreed upon.

ERROR to Circuit Court of *Fulton* County.

The case is sufficiently stated by the court.

Judd, Boyd & James, for plaintiff in error. *Ross, Tipton & Winter*, for defendant in error.

*BREESE, J. This was an action of assumpsit for [*525] goods, wares and merchandise sold and delivered, for money, and on an account stated, and for interest, against the plaintiff in error impleaded with William Martin as partners. Flake was alone served with process, and he pleaded to the action, and judgment was rendered against him alone.

It is insisted by the plaintiff in error that as the record shows an appearance by both defendants, the judgment should have been against both or neither. This is the rule as we

[1]See Kerr *v.* Swallow, *ante*, 379; Clemson *v.* State Bank, 1 Scam., 45; Johnson *v.* Buell, 26 Ill., 66; Klemm *v.* Dewes, 28 id., 317; Gardner *v.* Hall 29 id., 277; Kenyon *v.* Shreck, 52 id., 382; Sullivan *v.* Sullivan, 42 id., 315: Miles *v.* Goodwin, 35 id., 53; Humphrey *v.* Newhall, 48 id., 116.

understand it. *Fuller* v. *Robb et al*, 26 Ill. 248, and cases cited.

But what is the evidence of this appearance by both defendants, one of them alone having pleaded?

The record recites that the defendants entered their motion to suppress a certain deposition at the February Term, 1862; that at the June Term, 1863, they entered their motion to suppress a certain other deposition, and at the same term entered their motion for a continuance of the cause. [*526] At the September Term, *1863, the record recites that the parties by their attorneys waived a jury and put themselves on the court for trial; and it also recites among the entries of the following day that "the parties herein appearing on yesterday by their attorneys," &c.

On the strength of the cases of *Frazier* v. *Resor et al.*, 23 Ill. 89, and *Abbott* v. *Semple*, 25 id. 107, we are compelled to hold there was an appearance by both parties. In the last case we said, when a party appears for a specific purpose, as to show that he is not properly before the court, he should so restrict his motion. If he makes several motions in the cause, not limiting his appearance to a specific purpose, he will be held to have appeared generally for all purposes.

An objection is made as to the allowance of interest. We do not see the propriety of the charge for interest. By our statute interest is not chargeable on an open account when it has not been liquidated and a balance agreed upon. This account has never been adjusted, but remained open, some items in it being denied.

It would seem also, from the testimony of Eichelberger and Sheaver, that some mistake has been made in the credits entered upon the accounts. If the defendants are not precluded by the admissions made in another cause which was dismissed, they are certainly entitled to larger credits than have been given them. As to the controversy about the gunny bags, it is clear the price of them was deducted from the proceeds of the corn.

The judgment is reversed and the cause remanded.

Judgment reversed.

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The law does not allow persons to become assignees of their own obligations, and when an obligation is transferred to an obligor by an instrument in the form of an assignment, instead of taking effect as such, it operates as an extinction of the obligor's liability. *Brown* v. *Metz*, 339

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ASSIGNMENTS FOR THE BENEFIT OF CREDITORS.

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In the construction of assignments for the benefit of creditors, the court should not give an unreasonable construction to the language to render the instrument void. It cannot be presumed that it was the design of the grantor to defraud his creditors. Such an intention must appear from the deed itself or from other evidence. And when two constructions may be given to the language, the court should adopt that which will uphold rather than defeat the instrument. Since assignments are allowed to be made, they must have applied to them the same reasonable and fair rules of construction which are adopted in ascertaining the meaning of other instruments. *Whipple* v. *Pope*, 334

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Where the language in a deed of trust for the benefit of creditors by necessary intendment confers the power to sell on credit, it avoids the deed, as tending to hinder and delay creditors. Id., 334

Where the provision in question authorized the trustees "to collect and dispose of said property and effects on such terms and in such manner as they, the said trustees, may think best for the interest of the parties concerned:" *Held*, that this did not authorize a sale on credit, nor render the deed invalid. In the connection in which employed the language "on such terms and in such manner," mean that the trustees might sell at private or public sale, in packages, or by the single article, in large or small quantities, by sample or on examination; or that they might bring on the sale at a longer or shorter period from the time of the aesignment. Id., 334

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The removal by the owner of the lower story, of a partition wall in a building, supporting the upper stories, is such an invasion of the rights of the owner of such upper stories, as will support an action without showing special damages. The law infers damages from every infringement of a right. The right infringed is property, and for its invasion nominal damages may be recovered. *McConnel* v. *Kibbe*, 175

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In the action of trespass, the question whether it was wantonly or willfully committed, is important to be considered in measuring the damages. Where the wrong is wanton, or it is willful, the jury are authorized to give an amount of damages beyond the actual injury sustained, as a punishment, and to preserve the public tranquillity. *Hawk* v. *Ridgway*, 473

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Where possession is taken of land by a party under color of the title acquired in good faith, who, for seven successive years resides on the premises and pays all taxes assessed thereon, the life estate of a tenant by the curtesy initiate in the premises will by the operation of the statute become vested in the party so in possession, who will hold it in the same manner and with the same rights that he would have had if the tenant by curtesy initiate had conveyed the same to him. The remedy for its recovery by such tenant and his grantee, is not only barred, but the title is transferred when the remedy ceases. Id., 370

In case of continuing injury.

The Statute of Limitations, in the case of a continuing injury, bars the recovery of all damages, whether nominal or substantial, those inferred by law and special, which were sustained prior to the time within which the law requires an action for their recovery to be brought. *McConnel* v. *Kibbe*, 175

How pleaded.

Where the original wrong is not of itself actionable without special damage, a plea of not guilty within five years is not a good plea, for the reason that the action is not for the wrongful act, but solely for the consequences of it; and it is no answer to the declaration to plead not guilty of the wrongful act within the period of limitation. Id., 175

But where the original wrong is itself actionable, and the action is brought solely for the wrongful act, such a plea is good, as it is a complete answer to the declaration. Id., 175

STATUTE OF LIMITATIONS.

New assignment.

Where an action is brought for removing a partition wall, with continuing special damages alleged as matter of aggravation, and the original wrongful act was done more than five years before suit brought, and the defendant pleads not guilty within five years, the plaintiff may upon new assignment recover such damages as have been sustained by him within the five years preceding suit. *McConnel* v. *Kibbe*, 175

Where in such case the plaintiff replied that the cause of action accrued within five years, upon which issue was taken, although this was not in form a new assignment, it was *held* that after issue joined it should have been treated as such. Id., 175

See Equitable Title; Estoppel; Pleading at Law.

STEP-FATHER.

See Domestic Relations.

SUBROGATION.

See Mortgage.

TIME.

Mode of computing.

The correct mode of computing time, where an act is to be performed within a particular time after a specified day, is to exclude the specified day and to include that upon which the act is to be performed. *People* v. *Hatch*; *Same* v. *Dubois*, 9

See Statutes.

TITLE.

See Confirmation of Title; Equitable Title; Estoppel.

TRANSCRIPTS.

See Records; Seal; Practice in Supreme Court.

TRUSTS.

Of a religious nature; equitable jurisdiction over perversions of.

Courts of equity will exert their powers to prevent a misuse or an abuse of charitable trusts, and especially trusts of a religious nature, by trustees or by a majority of a society having possession of the trust property; but in all cases the trust and the abuse of it must be clearly established in accordance with the rules by which courts are governed in administering justice. *Happy* v. *Morton*, 398

Where the perversion is a departure from tenets of founder; tenets and specific departure must be stated; perversion must be substantial.

If the alleged abuse is a departure from the tenets of the founders of a charity, their particular tenets must be stated, that it may appear from what tenets the alleged wrongdoers have departed. In like manner it must be stated in what the alleged departure consists. Courts of equity do not interfere on account of inaccuracies of expression or inappropriate figures of speech, nor for departures from mathematical exactness in the language employed in inculcating the tenets of donors. There 400

WAGERS.

See SPECIFIC PERFORMANCE.

WASTE.

WITNESSES.