REPORTS

OF

CASES AT LAW AND IN CHANCERY

ARGUED AND DETERMINED IN THE

SUPREME COURT OF ILLINOIS.

By NORMAN L. FREEMAN,
COUNSELOR AT LAW.

VOLUME XLI.

CONTAINING A PART OF THE CASES DECIDED AT THE APRIL TERM, 1868.

CHICAGO:
PUBLISHED BY CALLAGHAN & COMPANY.
1868.

JUSTICES OF THE SUPREME COURT

DURING THE TIME OF THESE REPORTS.

HON. PINKNEY H. WALKER, CHIEF JUSTICE.

HON. SIDNEY BREESE,
HON. CHARLES B. LAWRENCE, } JUSTICES.

TABLE OF CASES

REPORTED IN THIS VOLUME.

A.

PAGE

Ames et al. *v.* Carlton..... 261
Atkins et al. *ads.* Hughes 213

B.

Babcock *ads.* Cleary 271
Baer et al. *ads.* City of Chicago.. 306
Bailey *v.* West 290
Banister *ads.* Ingersoll..... 388
Bathrick *ads.* Dunning..... 425
Baumgarten *ads.* Commissioners of Highways..... 254
Beckert et al. *ads.* Kuchenbeiser et al..... 172
Beckwith *ads.* Messervey..... 452
Bell *v.* Farrar 400
Bennett et al. *v.* Matson..... 332
Blackstone et al. *ads.* Wilborn... 264
Board of Supervisors of Livingston County *v.* Henneberry..... 179
Borschenious *v.* The People 236
Bowen et al. *v.* Schuler 192
Bowman *v.* Wood 203
Boynton *v.* Robb et al..... 349
Brackett *ads.* Cox..... 222
Bright et al. *v.* Bright 97
Brown *v.* Hurd et al..... 121
Brown *ads.* Hurd et al..... 125
Brown et al. *ads.* Russell..... 183
Bruns et al. *ads.* Miller et al. 293
Butcher et al. *ads.* Mallett..... 382
Butterfield et al. *ads.* Shepard ... 76

C.

Campbell et al. *v.* McCahan et al. 45
——— *v.* The State..... 454
Carlton *ads.* Ames et al..... 261
Catholic Bishop of Chicago *ads.* Chiniquy 148
Chicago, City of, *v.* Baer et al. ... 306

PAGE

Chicago, City of, *ads.* Henchey, Admx. 136
Chicago and Great Eastern Railway Co. *v.* Fox et al..... 106
Chicago and Rock Island Railroad Co. *v.* Crandall 234
Child *v.* Gratiot 357
Chiniquy *v.* Catholic Bishop of Chicago 148
Chittenden *v.* Evans 251
Cleary *v.* Babcock 271
Coburn *v.* Tyler..... 354
Commissioners of Highways *v.* Baumgarten 254
——— *ads.* Mack..... 378
Cook *ads.* Stout et al..... 447
Cook et al. *v.* Yarwood..... 115
Cornwells & Elliott *v.* Krengel & Seiferd 394
Coughlan et al. *ads.* Hough 130
Cox *v.* Brackett 222
Crandall *ads.* Chicago and Rock Island Railroad Co..... 234
Cushman et al. *ads.* King 31

D.

Daggett *v.* Gage..... 465
Davis et al. *v.* Taylor 405
Deininger et al. *v.* McConnel . 227
Degan et al. *v.* Singer..... 28
Dickey *v.* McDonnell..... 62
Diederichs *ads.* Gardner..... 158
Dole et al. *v.* Olmstead et al..... 344
Donnelly *v.* Harris et al. 126
Dunning *v.* Bathrick..... 425

E.

Ellett *v.* Tyler 449
Emmert *ads.* Town of Harlem... 319

PAGE

Esty *v.* Snyder 363
Eubanks *v.* The People 486
Evans *ads.* Chittenden 251
——— *ads.* Swartwout..... 376

F.

Farrar *ads.* Bell 400
First National Bank of Chicago *v.* Pettit & Smith 492
Fox et al. *ads.* Chicago and Great Eastern Railway Co..... 106
Freeport, Town of, *v.* Board of Supervisors 495

G.

Gage *ads.* Daggett..... 465
Gardner *v.* Diederichs..... 158
Gellatly *ads.* Steele..... 39
Gratiot *ads.* Child 357
Great Western Oil Co. *ads.* Stone 85

H.

Harbison *v.* Houghton 522
——— *v.* Shook 141
Harding *v.* Larkin et al..... 413
Harlem, Town of, *v.* Emmert 319
Harris et al. *ads.* Donnelly 126
Hartrunft *ads.* Yundt 9
Harvey *ads.* The People ex rel. Miller 277
Haskin *v.* Haskin..... 197
Heald et al. *ads.* McNab..... 326
Henchey, Admx., *v.* City of Chicago 136
Henneberry *ads.* Board of Supervisors of Livingston County ... 179
Hough *v.* Coughlan et al..... 130
Houghton *ads.* Harbison 522
Hoyt et al. *v.* Lock..... 119
Hughes *v.* Atkins et al..... 213
Hurd et al. *v.* Brown..... 125
——— *ads.* ——— 121

I.

Illinois, State of, *ads.* Campbell et al..... 454
Illinois Central Railroad Co. *v.* Waters..... 73
Ingersoll *v.* Banister..... 388

J.

Jones *v.* Nellis..... 482

K.

Kime *v.* Kime 397

PAGE

King *v.* Cushman et al..... 31
Krengel & Seiferd *ads.* Cornwells & Elliott..... 394
Kuchenbeiser et al. *v.* Beckert et al..... 172

L.

Larkin et al. *ads.* Harding..... 413
Lassen *v.* Mitchell 101
Leach *v.* Pine et al..... 65
Lock *ads.* Hoyt et al..... 119

M.

Mack *v.* Commissioners of Highways 378
Magee *ads.* Rosenthal, Admr..... 370
Maison et al. *ads.* Pollock et al... 516
Mallett *v.* Butcher et al..... 382
Marple et al. *v.* Scott et al..... 50
Matson *ads.* Bennett et al..... 332
Matteson *v.* Thomas et al..... 110
McCahan et al. *ads.* Campbell et al. 45
McCarthy *v.* Mooney..... 300
McClannon *ads.* Toledo, Peoria and Warsaw Railway Co..... 238
McConnel *ads.* Deininger et al ... 227
McCormick *v.* Moss et al..... 352
——— *ads.* Trustees of Schools.. 323
McDermaid et al. *v.* Russell..... 489
McDonnell *ads.* Dickey..... 62
McKibben et al. *v.* Newell..... 461
McNab *v.* Heald et al..... 326
Mears *v.* Nichols..... 207
Merchants' Saving, Loan and Trust Co. *ads.* Wood & Co..... 267
Merritt *v.* Simpson et al..... 391
Messervey *v.* Beckwith..... 452
Miller *ads.* The People ex rel. Burnap 277
Miller et al. *v.* Bruns et al..... 293
Mines *v.* Moore 273
Mitchell *ads.* Lassen 101
——— *ads.* Reese..... 365
Mooney *ads.* McCarthey 300
Moore *ads.* Mines..... 273
Morgan et al. *v.* Peet..... 347
Moss et al. *ads.* McCormick..... 352

N.

Nattinger *v.* Ware..... 245
Nellis *ads.* Jones..... 482

PAGE

Nelson *v.* Oren 18
Nevins *v.* City of Peoria 502
Newell *ads.* McKibben et al 461
Nichols *ads.* Mears 207

O.

O'Brien et al. *ads.* People 303
——— *v.* ——— 456
Olmstead et al. *ads.* Dole et al.... 344
Oren *ads.* Nelson 18

P.

Peet *ads.* Morgan et al 347
People *ads.* Borschenious 236
——— *ads.* Eubanks 486
——— *v.* O'Brien et al 303
——— *ads.* ——— 456
People ex rel. Miller *v.* Harvey .. 277
——— ex rel. Burnap *v.* Miller .. 277
Peoria, City of, *ads.* Nevins 502
Peoria, Marine and Fire Ins. Co. *ads.* Schmidt et al 295
Pettit & Smith *ads.* First National Bank of Chicago 492
Pine et al. *ads.* Leach 65
Pollock et al. *v.* Maison et al..... 516
Potter et al. *v.* Potter et al 80
Powell *v.* Rich 466
Purdy *ads.* Reeder et al..... 279
Purdy et ux. *ads.* ——— 279

R.

Reeder et al. *v.* Purdy..... 279
——— *v.* Purdy et ux..... 279
Reese *v.* Mitchell 365
Rich *ads.* Powell..... 466
Richardson et al. *v.* Thompson et al..... 202
Robb et al. *ads.* Boynton 349
Rosenthal, Admr., *v.* Magee..... 370
Rosenthal et al. *ads.* Tilden et al. 385
Roth *v.* Smith..... 314
Russell *v.* Brown et al..... 183
——— *ads.* McDermaid et al..... 489

S.

Schmidt et al. *v.* Peoria Marine and Fire Ins. Co..... 295
Schuler *ads.* Bowen et al 192
Scott et al. *ads.* Marple et al..... 50
Shepard *v.* Butterfield et al..... 76
Shook *ads.* Harbison..... 141
Simpson et al. *ads.* Merritt..... 391

PAGE

Singer *ads.* Degan et al 28
Smith *ads.* Roth..... 314
Snyder *ads.* Esty 363
Southerland *ads.* Wiley et al 25
Steele *v.* Gellatly 39
Stephenson County, Supervisors of, *ads.* Town of Freeport 495
Stone *v.* Great Western Oil Co... 85
Stout et al *v.* Cook..... 447
Supervisors of Livingston Co. *v.* Henneberry..... 180
Swartwout *v.* Evans 376
Sweeney *ads.* Toledo, Peoria and Warsaw Railway Co..... 226

T.

Taylor *ads.* Davis et al 405
Thomas et al. *ads.* Matteson 110
Thomas *v.* Wiggers..... 470
Thompson et al. *ads.* Richardson et al..... 202
Tilden et al. *v.* Rosenthal et al. . 385
Tinney *v.* Wolston et al..... 215
Toledo, Peoria and Warsaw Railway Co. *v.* McClannon 238
——— *v.* Sweeney..... 226
Trustees of Schools *v.* McCormick et al..... 323
Tyler *ads.* Coburn 354
——— *ads.* Ellett..... 449

W.

Ware *ads.* Nattinger..... 245
Waters *ads.* Illinois Central Railroad Co..... 73
Watson *v.* Woolverton 241
Weaver *ads.* White et al..... 409
Welborn *v.* Blackstone et al..... 264
West *ads.* Bailey..... 290
White et al. *v.* Weaver..... 409
Wiggers *ads.* Thomas..... 470
Wiley et al. *v.* Southerland..... 25
Wolston et al. *ads.* Tinney..... 215
Wood *ads.* Bowman 203
Wood & Co. *v.* Merchants' Saving, Loan and Trust Co..... 267
Woolverton *ads.* Watson..... 241

Y.

Yarwood *ads.* Cook et al..... 115
Yundt *v.* Hartrunft..... 9

CASES

IN THE

SUPREME COURT

OF

ILLINOIS.

THIRD GRAND DIVISION.

APRIL TERM, 1866.

ALLEN C. YUNDT

v.

ABRAHAM HARTRUNFT.

1. EVIDENCE—*affidavit for change of venue.* An affidavit for a change of venue because of the prejudice of the judge or the inhabitants of a county against a defendant, is not evidence to prove any issue in the case in which it is made, and should not be read in evidence to the jury.

2. TRESPASS VI ET ARMIS—*for criminal conversation.* Where a defendant has debauched the wife of the plaintiff, the right of action of the latter is complete, and a recovery by him is not defeated by her death before action brought. It is unlike a battery, slander, or other injury personal to the wife.

3. SAME—*grounds of recovery.* While the loss of service of the wife or daughter is the alleged ground of recovery, the injury to the family in its reputation, the mental anguish and distress which necessarily attend the transaction are the real causes for the recovery. The law does not limit the recovery to the precise amount of pecuniary loss sustained, but allows a recovery for injury to family reputation. Although absent from home, the husband did not cease to be entitled to his wife's services in the nurture of his children, as well as to a virtuous example to them by her.

Syllabus. Statement of the case.

4. INSTRUCTIONS. Although an instruction may be erroneous, yet, if other instructions given so explain it that it could not mislead the jury, the judgment will not be reversed because it was given.

5. Instructions which assume disputed facts to be true, and then inform the jury what they prove, invade the province of the jury, who have the sole right of determining these questions. The court must determine what evidence shall be admitted as tending to prove the issue, and leave the jury to determine its weight from all of the circumstances in evidence before them.

6. EVIDENCE — *admissions and explanations.* An instruction which informs the jury that they are not bound to believe an explanation made by a party at the time, and in connection with an admission, if from all the circumstances they are not satisfied of its truth, is proper, but would be perhaps more accurate if it so left the entire admission and explanation.

7. WITNESS — *his credibility.* An instruction which informs the jury, that, if they believe a witness has knowingly testified falsely upon any one material point, they may disregard his whole testimony, is inaccurate, and should be modified so as to only do so when the evidence of the witness is uncorroborated by other evidence.

8. EXEMPLARY DAMAGES — *when recoverable.* An instruction which informs the jury, that, if plaintiff placed his business in the hands of the defendant before he left, and defendant took advantage of the position thus given him to seduce plaintiff's wife, and did so, then they might give exemplary damages, is not erroneous in a case of this character, when damages may be recovered beyond the actual loss in money or service.

9. DAMAGES — *matter of aggravation.* In an action of this character, where loss of service of the wife is alleged in aggravation of damages, there should be no recovery on that ground unless such loss of service is proved.

APPEAL from the Circuit Court of Kane county.

This was an action of trespass *vi et armis*, brought by Abraham Hartrunft, in the Superior Court of Chicago, against Allen C. Yundt. The declaration counts for the seduction of plaintiff's wife by defendant. The plea of not guilty was filed. Afterward the venue was changed to the Kane Circuit Court.

A trial was had by the court and jury, which resulted in a verdict against defendant, and the jury assessed the damages at the sum of $5,000. A motion for a new trial was entered, but was overruled by the court, and judgment was rendered upon the verdict. Defendant brings the case to this court on appeal, and asks a reversal on various grounds. The facts

necessary to an understanding of the case appear in the opinion of the court.

Messrs. MILLER, VAN ARMAN & LEWIS, for the appellant.

Messrs. HURD, BOOTH & KREAMER, for the appellee.

MR. CHIEF JUSTICE WALKER delivered the opinion of the Court:

This was an action of trespass *vi et armis*, commenced in the Superior Court of Chicago by appellee against appellant, for seducing and debauching his wife. The case was taken by a change of venue to the Kane Circuit Court. A trial was afterward had in that court by a jury, which resulted in a verdict in favor of appellee for the sum of $5,000. A motion for a new trial was entered, which was overruled by the court, and judgment rendered on the verdict. And the cause is brought to this court by appeal, and various errors are assigned upon the record. But appellant's counsel have confined their argument principally to the overruling of the motion for a new trial and the questions involved in that motion.

It is first urged that the court below erred in permitting appellee to read the affidavit made by appellant for a change of venue. We are entirely at a loss to see that this affidavit was, for any purpose, evidence on the trial; and why it should have been offered or admitted, we do not perceive. It did not, so far as we can see, tend in any degree to prove any issue in the case. Being wholly irrelevant, it should have been rejected. If not calculated to prejudice the jury, it was calculated to incumber the issues and the record with irrelevant matter.

It appears from the evidence, that appellee and his wife were married, in the State of Pennsylvania, some time previous to their removal to this State. It also appears, that he went to California, some time in the year 1862, leaving his wife and children in Illinois. He returned to this State in the summer of 1864. The criminal conversation with appellee's wife is

alleged to have taken place while he was absent in California. Appellant urges that appellee and his wife had permanently separated, and that appellee had deserted her. This was a question for the determination of the jury from all of the evidence in the case; and, inasmuch as the case will be submitted to another jury, it would be improper for us to express any opinion on the weight of evidence on this question.

It was again insisted, that, even if appellant was guilty, the suit should have been brought during the life-time of appellee's wife, to enable him to recover; that, by delaying to bring the suit until after her death, a recovery was thereby barred. If appellant seduced the wife of appellee, his right of recovery became complete at the time the injury was inflicted; and, the right to recover damages commensurate to the injury having then vested, we are aware of no principle of law which divested the right by the death of his wife. Had he or appellant died, then the suit could not have been sustained by or against their representatives; but we are aware of no case which holds, that the death of the wife defeats a recovery by the husband for damages he has sustained by debauching her, or that a father or a master is barred from recovering for debauching a daughter or servant because they had subsequently died but before a recovery was had. This suit is not for the injury to the wife, like a battery or slander of the wife.

In this class of cases, the loss of services may be the alleged injury, but the injury to the character of the family is the real ground of recovery when the cause of action relates to the wife or daughter. The degradation which ensues, the distress and mental anguish which necessarily follow, are the real causes of recovery. It has not been the policy of the law to confine the recovery by the injured party to the precise amount of money which he has proved he has lost by the deprivation of labor ensuing from the injury. But the law has, in a more just spirit, allowed a recovery for injury to family reputation and anguish growing out of the injury. Nor is it true, that, because appellee was absent from home, he therefore could have sustained no loss of service by reason of his wife being

debauched. He had a right to her services in the nurture of his children, as well as a virtuous example to them by her. He had the right to the teachings of a virtuous and not of a depraved mother to his children. If he intrusted their care to a virtuous and undefiled mother, and appellant corrupted and debased her, he thereby became liable to appellee for the neglect to her family and her example to her children. And the circumstance that his wife died did not deprive him of his right of recovery.

We now come to consider the instructions given for appellee, and to which objections were made. The first instruction is this: "If the jury find the marriage and cohabitation of plaintiff with his wife, and the seduction of the latter by defendant, then they must find a verdict for plaintiff." Appellant was urging as a defense the abandonment of his wife by appellee, and that question was before the jury to be determined on the evidence. This instruction ignored that question. It should have been modified so as to have left it to the jury for determination. But the second and third of his instructions explain the first so that it could not have misled the jury. The judgment would not be reversed, therefore, because this instruction was not modified.

It is also insisted that the following instructions given for appellee were erroneous, and must have misled the jury:

6. "If the jury believe from the evidence that the defendant visited the plaintiff's wife in the day-time and evenings during the spring and summer before she went to Pennsylvania, and that such visits were so frequent as to cause remark, and that he accompanied her to Chicago, stopped at the same hotel with her, and visited her in her room at the hotel at an unusual hour of the night, and after her children had retired, and kissed her on her departure for the East, and that upon her return he met her in Chicago, and upon his so meeting her he kissed her, waited upon her to the cars, this is evidence from which the jury may find the improper and criminal intimacy of the defendant."

6½. "The jury are further instructed, that, if they believe from the evidence that the defendant Yundt visited the plaintiff's wife in the evening or night after her return from Pennsylvania, and while she lived in the Ackerman house, and while he was so visiting her she went up stairs and brought down a bed, and upon her retiring carried her hoop skirts in her hand, this is evidence from which the jury may find improper and criminal intimacy of the defendant with the plaintiff's wife."

8. "And if the jury believe from the evidence, that, during the last sickness of Mrs. Hartrunft the defendant (Yundt) visited her, and while there got under the bed to conceal his presence there, and afterward went in the night to Mrs. Hartrunft's house and took the dead child and carried it away and buried it in his own yard, concealing the place of its burial by a covering of sticks, this is also evidence from which the jury may find improper and criminal intimacy between the defendant and the plaintiff's wife, and that he was the father of the child."

These instructions are erroneous, because the court, in them, assumes, that, as a matter of law, the facts stated in these several instructions proved the guilt of appellant. That was a question of fact and one within the province of the jury and not of the court. It was for the court to admit all proper evidence when offered, but the jury have the sole right, and it was also their duty, to consider it in the light of all the circumstances, and to say whether it proved appellant's guilt. By these instructions, the court select a few isolated facts in the case, and assume that they are true, and inform the jury that they prove or tend to prove appellant's guilt. In doing so, the court invaded the province of the jury. It was for them and not the court to say what the evidence was and what it proved.

As a matter of law, the conclusions announced by the court in these instructions do not follow. It might be that the facts stated in either or all of these instructions were, literally, true, and still it might be that appellant was innocent of the

debauchery charged. Cases might be imagined where all of these things might have been done, and still appellant not be guilty. Nor is it sufficient to say, when considered in connection with the other circumstances of the case, it was morally impossible for appellant to have been innocent. That was the very question to try which the jury had been impaneled. But to sustain the instructions we are asked to examine the evidence to see whether appellant was not guilty. We can only examine them with reference to the facts upon which they are based, and these facts, in the light of some circumstances, might prove his guilt, and under other circumstances, would not prove it. That was for the determination of the jury, and they should have been left to decide it. The court can only admit such evidence as tends to prove the issue, and must then leave it to the jury to say whether or not it accomplishes the purpose. The court, therefore, erred in giving these instructions.

Appellant also objected to the giving of appellee's ninth instruction. It is this: "The jury are instructed, that, although the confession of Yundt, to the witness Hunt, should all be taken together, they are not bound to believe that portion of what he said intended as a justification or excuse for his conduct, if they are not satisfied of its truth under all the circumstances in evidence." This instruction very properly left the jury to consider the entire admission, and to give weight to so much of it only as they believed to be true. They are told that it should all be taken together, and be considered in reference to all the circumstances of the case. As a general rule, solemn admission made in view of all the facts connected with the admission, is of the most convincing character, when sufficiently proved. But they may be made under circumstances which show that the party making them acted under misapprehension of the facts, and that the admissions were not true. And so of declarations connected with admissions. They are for the consideration of the jury, who, as intelligent, practical men, can give them the weight to which they are properly entitled. It would, perhaps, have been more nearly

accurate to have left the entire admission to the jury as the instruction left the explanations.

The tenth instruction given for appellee was, likewise, objected to by appellant. It was this:

"If the jury believe from the evidence that the witness Mr. Calkin has knowingly testified falsely upon any one point or fact material to the issue, they may reject the whole of his testimony.

"If the jury believe from the evidence that the witness Mrs. Calkin has knowingly testified falsely upon any fact or point material to the issue, they may reject the whole of her testimony.

"If the jury believe from the evidence that David Stricker has knowingly testified falsely upon any one point or fact material to the issue, they may reject the whole of his testimony."

This instruction does not state the law accurately. It may happen that a witness may knowingly swear falsely to a material fact, and yet the remainder of his testimony may be strongly corroborated by other evidence. When that is the case it is not true that the jury are at liberty to reject that portion of his evidence. It is true, that, when a witness has knowingly and corruptly testified falsely to a material fact, the jury are authorized to disregard all of his evidence, unless it is sustained by corroborating evidence. This instruction should therefore have been so modified as to have announced this rule.

This instruction was also given and excepted to at the time:

"If the jury believe from the evidence, that the plaintiff is entitled to recover, and if they further believe that the plaintiff put his business into the hands of the defendant when he went to California in the year 1862, and that the defendant took advantage of his situation for the purpose of gaining access to, and seducing, the wife of the plaintiff; and, if the jury further believe from the evidence, that the defendant did, under these

circumstances, commit adultery with the wife of the plaintiff, they have a right to give exemplary damages to the plaintiff not exceeding the amount claimed in the declaration."

The whole theory of this action proceeds upon the ground that it is for a recovery of damages beyond the pecuniary loss actually sustained. And if the jury found the facts supposed in this instruction, they would then be authorized to give damages over and above such as were proved to have accrued to appellee. And, in finding such damages, they would of course consider all of the evidence, and determine what was proper in view of the whole case. This instruction was therefore not improperly given.

After a careful examination of all the instructions, we perceive no error in giving the others asked by the appellee. But it is insisted that the court erred in refusing this instruction, asked by appellant:

"That, if, from the evidence, the jury believe, that, at the time of the alleged criminal intercourse between the defendant and plaintiff's wife, the plaintiff was living in the State of California, separated from his wife, and that no pregnancy resulted from such criminal intercourse, and that no physical injury whatever to the wife, or loss of her service or assistance to the husband was occasioned by or resulted from such criminal intercourse, then the jury ought not to allow the plaintiff damages on account of loss of such service or assistance."

This action does not proceed upon the theory of the loss of services of the wife. It is for the injury the husband sustains by the dishonor of his bed; the alienation of his wife's affections; the destruction of his domestic comfort, and the suspicion cast upon the legitimacy of her offspring. 2 Starkie's Ev. 440. The actions of trespass and case are concurrent remedies for this injury. And Chitty, in his work on pleadings, says that though it had been usual to sue in case, it is considered preferable to declare in trespass. But in either form of action, loss of service may be averred in aggravation of dam-

ages. And being averred, a failure to prove actual loss of service would not defeat a right of recovery. 1 Chit. Pl. 167. That is only alleged as aggravation and does not affect the question one way or the other. When loss of service is claimed, damages should not be given therefor unless it is proved. And whether there is such proof is a question for the jury to determine. This instruction should, therefore, have been given.

As the case will be submitted to another jury, we deem it improper to discuss the question whether the damages are excessive. In this class of cases courts seldom interpose, and only where it appears that the jury have been actuated by gross prejudice, misconduct, or a reckless disregard to the evidence and rights of the parties.

For the various errors above indicated, the judgment of the court below must be reversed and the cause remanded.

Judgment reversed.

JOHN NELSON
v.
OLE M. OREN.

1. DEPENDENT AND INDEPENDENT COVENANTS—*construction of assignment of a lease.* An assignment of a lease was as follows: "In consideration of fifty dollars to me in hand paid, I hereby assign, transfer and set over to O. M. Oren, his heirs or assigns, all my right, title and interest to and in the within lease, and the term therein contained, with all the privileges and conditions that I have therein, and I do hereby agree to deliver up possession of the within premises to said Oren on the 1st day of May, 1864." *Held*, that this was not one entire covenant conditioned for the delivery of possession on the day named, with a forfeiture of the fifty dollars, if it was not done, but the sum paid was the consideration for the unexpired term and the possession.

2. So for the time the assignee was kept out of possession after the day fixed, he could recover damages against his assignor, but he could not recover back the whole consideration paid, because the agreement to deliver possession on a certain day constituted only a part of that consideration.

3. Where a covenant goes only to part of the consideration on both sides, and a breach of such covenant may be paid for in damages, it is an independent covenant, and an action may be maintained for a breach of the covenant on the part of the defendant without averring performance in the declaration.

4. TENDER—*when it must be kept good.* A tender of money by a party who has broken his covenant, to avail him in an action brought for such breach, must be kept good by bringing the money into court.

APPEAL from the Recorder's Court of the City of Chicago; the Hon. EVERT VAN BUREN, Judge, presiding.

The opinion of the court contains a sufficient statement of the case.

Mr. JOHN LYLE KING, for the appellant.

Nelson assigned to Oren the unexpired term of a lease, as follows:

"In consideration of fifty dollars, to me in hand paid, I hereby assign, transfer and set over to O. M. Oren, his heirs or assigns, all my right, title and interest to and in the within lease, and the term therein contained, with all the privileges and conditions that I have therein, and I do hereby agree to deliver up possession of the within premises to said Oren on the first day of May, A. D. 1864. Witness my hand and seal this 21st of March, A. D., 1864."

On the 1st May, Nelson was unable to give possession, but, within four or five days, or a week of that time, tendered possession and key of the premises, and also the sum of eight dollars and thirty-three cents, as damages to Oren, both of which the latter refused to accept, and then, afterward, under a new lease, direct from the original lessor, Oren took possession of the premises. This suit was then commenced, and the damage alleged in the declaration is, that the premises were adapted to and hired by Oren for carrying on his business of boot and shoe making therein, and by reason of not getting the same on the 1st May, he was put to trouble and deprived of profits that would otherwise have accrued.

The court, on this state of facts, treated the assignment as one entire covenant conditioned for delivery of possession on the precise day, and the damages as liquidated. This was clearly erroneous in both respects. The assignment or transfer was one thing, and delivery of possession another. What was the consideration, $50, paid to Nelson for? Was it for the term *and* possession on first of May, or, was it alone, as treated by the court, for delivery of possession?

Nelson, on the 21st March, parted with his whole estate and interest in the land, and the same passed to, vested in and was completely acquired by Oren at that time. There was an absolute transfer of the term that was a present, substantial, legal, definite and valuable interest and property in Oren, and, in his hands, was assignable and liable to execution, and wholly independent of possession. The term was the substantial part of the consideration, with right of entry *in futuro*, at least it was a material part of the consideration. That being so, the agreement for possession cannot be regarded as a condition. Part of the consideration was already executed, and for breach of the agreement, as to possession, Oren had only his remedy to recover damages in not having received the whole consideration. But the court virtually held that delivery of possession on first of May was a condition precedent to Nelson's right to the $50 which was paid in great part or partly for the assignment of the term already vested, previously in March.

The rule really applicable to the case is the third one laid down by Serjeant Williams in his celebrated note to *Pordage* v. *Cole*, 1 Wms. Saunders 310, thus: "Where a covenant goes only to the part of the consideration on both sides, and a breach of such covenant may be paid for in damages, it is an independent covenant, and an action may be maintained for a breach of the covenant on the part of the defendant, without averring performance in the declaration."

The well known case of *Boon* v. *Eyre*, 1 H. Black. 273, note, is the leading one on this point, in which Lord MANSFELD laid down the law as above. As was remarked in *Fothergill* v. *Walton*, 8 Taunt. 576 (4 E. C. L. R. p. 210),—itself a

case in point,—the doctrine in *Boon* v. *Eyre* "has all the weight which some of the greatest names in Westminster hall can give it." See also *Campbell* v. *Jones*, 6 T. R. 570; *Kingston* v. *Preston*, Doug. 690; *Carpenter, assignee of Thomas Cresswell, a bankrupt*, v. *H. R. Cresswell*, 4 Bing. 409 (15 E. C. L. R. p. 22); 2 Parsons on Cont. (5th ed.) p. 528 and note (*r*) and cases there cited.

In this case, the covenant to deliver possession goes only to a part of the consideration; the breach of it may be paid for in damages and the remedy is by action.

Mr. JUSTICE BREESE delivered the opinion of the Court:

This was an action of covenant by the assignee of a lease against the assignor, brought in the Recorder's Court of the city of Chicago, and a judgment recovered against the assignor of fifty dollars and costs. To reverse this judgment, the cause is brought here by appeal.

The case was, that appellant had leased a lot in Chicago, of one Gillmore, for one year, from April 1, 1861, to April 1, 1862, with the privilege of four years extension on the terms and conditions stated in the lease. There was also a covenant not to assign the lease without the written assent of the lessor first had. On the 24th of March, 1864, the lessee, with the assent of the lessor, assigned the lease, in consideration of fifty dollars, to appellee, and agreed, in his writing of assignment, to deliver up the possession of the premises to appellee on the first day of May, 1864. It seems the premises were, at the time of the assignment of the lease, occupied by a barber. On the application and demand by appellee of appellant for possession, on the first day of May, he replied, "I can't give it, the barber is still there." The barber did not leave until five or six days after the first day of May. Prior to this time, appellee occupied premises rented of one Geist, at fifteen dollars per month, and after the first day of May, he continued the occupancy five or six days, for which he paid Geist five dollars.

Appellee, failing to get possession on the first of May, went to Gillmore, the owner, and made an arrangement by which

appellee took the possession from Gillmore, he giving appellee a lease directly from himself, under which appellee went into possession. Gillmore got the key from appellant, after the barber left, and gave it to appellee, and he then took possession.

The day the barber moved out, appellant went to the shop where appellee, who is a shoemaker, was working, and told appellee the barber had moved out, and offered appellee the key of the premises, and told him he could now have the house. At the same time, he offered appellee eight dollars and thirty-three cents, both which appellee declined to receive, saying, he had demanded the delivery of the premises on the first of May, according to the contract, and it having been refused, he would not then accept it. Two or three days after this, appellee moved into the premises, and occupied them under this new lease from Gillmore. It was admitted the money was tendered in discharge of the damages sustained from the failure to give possession on the first of May.

The assignment by appellant to the appellee was as follows: "In consideration of fifty dollars to me in hand paid, I hereby assign, transfer and set over to O. M. Oren, his heirs or assigns, all my right, title and interest to and in the within lease, and the term therein contained, with all the privileges and conditions that I have therein, and I do hereby agree to deliver up possession of the within premises to said Oren on the first day of May, 1864. Witness," etc, March 21, 1864.

On the same day, Gillmore, the owner, indorsed his assent to the assignment on the lease, so that it is a fair presumption, the term had been extended four years from the first of April, 1862.

The first question is, what is the nature of this assignment, is it one entire covenant conditioned for the delivery of possession on the day named in it, with a forfeiture of fifty dollars, if it is not done?

It would seem the most reasonable interpretation of the language used, to hold, that fifty dollars was the consideration for the unexpired term and the possession. The language is, "in

consideration of fifty dollars I assign," etc., with an additional undertaking that he will deliver the possession on the first day of May.

An important part of the consideration was executed by the transfer of the term; the remaining part was not, and for that breach appellee had a right to recover damages. We do not consider that delivery of possession, under a fair construction of this covenant, was a condition precedent to the right of appellant to recover for the unexpired term. That would seem to be the most important part of the contract, and where a covenant goes only to part of the consideration on both sides, and a breach of such covenant may be paid for in damages, it is an independent covenant, and an action may be maintained for a breach of the covenant on the part of the defendant without averring performance in the declaration. This is a rule laid down by Lord MANSFIELD in the case of *Boon* v. *Eyre*, 1 Black. 273.

The case was, where A, by deed conveyed to B the equity of redemption of a plantation in the West Indias, together with the stock of negroes upon it, in consideration of five hundred pounds, and an annuity of one hundred and sixty pounds for life, and covenanted he had a good title to the plantation, was lawfully possessed of the negroes, and B should quietly enjoy, and B covenanted that if A well and truly performed all and every thing contained on his part to be performed, he would pay the annuity. In an action by A against B on this covenant, the breach assigned was, the non-payment of the annuity. The plea was that A was not at the time legally possessed of the negroes on the plantation, and so he had not a good title to convey. The Court of King's Bench, on a demurrer, held the plea to be ill, and added, that, if such plea were allowed, any one negro not being the property of A would defeat the action. The whole consideration of the covenant on the part of B, the purchaser, to pay the money, was the conveyance by A, the seller, to him of the equity of redemption of the plantation, *and also* the stock of negroes upon it. The excuse for non-payment of the money was that A had broken

his covenant as to part of the consideration, namely, the stock of negroes. But as it appeared that A had conveyed the equity of redemption to B, and so had in part executed his covenant, it would be unreasonable that B should keep the plantation, and yet refuse payment because A had not a good title to the negroes. Besides, the damages sustained by the parties would be unequal, if A's covenant was held to be a condition precedent, for A on the one side would lose the consideration money of the sale, but B's damage on the other hand, might consist perhaps in the loss of a few negroes.

This is the case before us. The whole consideration on the part of the appellee in paying this fifty dollars, was the assignment to him, of the unexpired term in these premises, and the delivery of possession by a specified day. It would be unreasonable then, as appellant had conveyed the term, that appellee should keep it and recover back the money he had paid, because appellant did not give him possession on the day And the damages sustained by these parties would be unequal, if putting in possession was held to be a condition precedent, for the appellant on the one side, would lose the consideration money of the sale if this judgment stands, while appellee's damage consists in being kept out of possession a few days only. The covenant to put the appellee in possession was an independent covenant, the breach of which could be compensated in damages.

The court below considered it a condition precedent, hence the finding.

Whether the amount tendered as damages for the delay in delivering possession was ample or not, we are not informed by the testimony in the cause; nor if it was, could the appellant avail of it, as he has not kept the tender good by bringing the money into court. We are satisfied on reason and authority, that the measure of appellee's recovery was the value of the possession of the premises for the few days he was deprived of the possession, and not the amount he paid for the term, *and* the delivery of the possession.

The justice and law of the case is, we think, that, as the

appellant has broken but one of the covenants, he should only pay the damages occasioned by that breach.

The finding of the court, that these covenants were mutual and dependent, was erroneous. The judgment must be reversed and the cause remanded.

Judgment reversed.

JAMES M. WILEY *et al.*
v.
JAMES A. SOUTHERLAND.

1. PAROL EVIDENCE—*contradicting the record of a judgment.* The date of a judgment is as material as any other portion of it, and can no more be contradicted by parol evidence than the amount or character of the judgment.

2. So, where a party against whom a judgment has been rendered by a justice of the peace, on a garnishee process, sought to enjoin the collection of the judgment, upon the alleged ground, that, while upon its face it purported to have been rendered on the same day the defendant therein answered, yet in fact it was not entered until long afterward, whereby he lost his opportunity of appeal, and by such delay the justice had lost his jurisdiction,—it was *held*, the record must be taken as speaking the absolute truth as to the date of the entry, and could not be contradicted by parol in that regard.

WRIT OF ERROR to the Circuit Court of Peoria county; the Hon. M. WILLIAMSON, Judge, presiding.

The opinion states the case.

Messrs. O'BRIEN & CRATTY and Messrs. JOHNSON & HOPKINS, for the plaintiff in error.

Mr. A. MCCOY, for the defendant in error.

Mr. JUSTICE LAWRENCE delivered the opinion of the Court:

This was a bill in chancery brought by Southerland against Wiley, to enjoin the collection of a judgment rendered against the former on a garnishee process issued at the suit of Wiley,

before a justice of the peace. On the hearing below, the injunction was made perpetual.

The ground upon which it is sought to sustain the injunction is, that the judgment, although purporting on its face to have been rendered on the same day that Southerland answered the garnishee process, was not in fact entered until long afterward, whereby Southerland lost his opportunity of appeal, and when it was in fact entered by the magistrate, he had lost his jurisdiction.

In the case of *Garfield* v. *Douglass*, 22 Ill. 102, parol evidence was offered to show that a judgment in bar before a justice, had been originally entered as a judgment of nonsuit, and afterward altered by the justice. The evidence was held inadmissible and the court said: "The record or entry of the justice is higher and more trustworthy that any parol evidence can be. If one record is open to be questioned by parol evidence, then another may be, and all security and confidence in the stability of records are gone. If the justice corruptly, or from improper motives, changed the original entry made by him, he may be prosecuted both civilly and criminally, but the record must stand as the solemn truth, attesting beyond controversy what the judgment was which the justice pronounced. This is not like the case supposed of an alteration made by another. This would be a forgery and not a record at all, and might as well be shown of a record in this court as of that."

The case at bar clearly falls within the principle here laid down. It is not pretended that the entry of the judgment was not made by the magistrate, but it is insisted that he affixed to it a false date. The date of the judgment is as material as any other portion of it, and can no more be contradicted by parol evidence than the amount or character of the judgment.

If a controversy should arise as to when the lien of a judgment in the Circuit Court attached upon real estate, it certainly would not be claimed that parol evidence was admissible to show that the court had really rendered the judgment on a day different from that named in the record. It is one of the fundamental principles of the law, that a record must be taken

as speaking the absolute truth. Rare cases of hardship may arise under the inflexibility of this rule, but it is, nevertheless, better that the rule should remain inflexible, rather than rights and titles established by judicial proceedings should be set adrift upon the uncertain sea of parol testimony. The immense evils of such a practice will at once occur to the mind of every lawyer. The case of *Haven* v. *Green*, 26 Ill. 254, referred to by counsel for defendant in error, is not inconsistent with these principles. That case merely decided, that a discrepancy between the date of the judgment on a magistrate's docket, and the date of that recited in the appeal bond, might be explained by parol, and that it might be shown in what suit the appeal bond had, in fact, been given. It was not sought to impeach the judgment.

In the case before us, the copy from the magistrate's docket, which the witness Worthington swears he made, itself shows a perfect judgment with the proper date, by considering the judgment and the memorandum as to the answer of the garnishee as one entry, and bearing the same date, which it would be proper to do. If, then, parol testimony were admissible, the complainant's case would stand solely upon the evidence, that the magistrate stated orally, subsequently to the date of the judgment, that he held the case under advisement, and had rendered no judgment. Even if the date of a judgment could be impeached by parol in any mode, it is palpable that the verbal statements of a justice, as to what he has or has not done, could not be received in evidence against other persons for the purpose of contradicting the official entries on his docket. The decree must be reversed, and the bill dismissed.

Decree reversed.

SOLOMON DEGAN *et al.*
v.
FRANCIS SINGER.

1. PARTNERSHIP — *plea in abatement — non-assumpsit.* Where three persons are sued as partners, and two of them file a plea in abatement denying the partnership with the other, and admitting it as between themselves, and the third files the general issue, he thereby admits the partnership, but the admission does not affect the issue presented by the other two.

2. SAME — *plea of — declarations of one defendant — instructions.* The admissions of the defendant who filed the plea of the general issue are binding upon himself, but not upon the other defendants. They can only be bound by their own acts and declarations. Such declarations of the defendant, who had admitted the partnership, are not evidence against the others, whether supported or not by other evidence; and it is error to instruct that they are. Had the statement been made in the presence of the others, and they had not contradicted it, it would then have been for the jury to determine whether it bound the others.

APPEAL from the Circuit Court of La Salle county; the Hon. SIDNEY W. HARRIS, Judge, presiding.

This was an action of assumpsit brought by Francis Singer, in the La Salle Circuit Court, to the June Term, 1865, against Solomon Degan, Jacob Degan and Samuel Degan. The declaration complains of defendants as partners, and as such purchased of him seventeen head of cattle, at eight cents per pound, live weight, delivered at Chicago, and to be paid for on delivery. Plaintiff avers that he was ready, willing, and offered to deliver them on the 31st of March, 1865, the time specified, at Chicago, but defendants would not receive or pay for them. There were other counts which varied the statement of the agreement.

Samuel Degan filed the general issue, and Solomon and Jacob filed a plea in abatement, denying that they were partners with Samuel, but admitting they were as between themselves. Issues were formed on these pleas.

At the November Term, 1865, a trial was had before the court and a jury. On the trial plaintiff offered the statements

and admissions of Samuel to prove the partnership of all three, to which the other defendants objected, but the evidence was admitted, and an exception taken. The court also instructed the jury that his admissions, if supported by other evidence might be considered in determining the question of partnership as laid in the declaration.

The jury found the issues for the plaintiff, and assessed his damages at the sum of $325. Defendants entered a motion for a new trial, which was overruled by the court, and judgment was rendered on the verdict. Defendants appealed and bring the case to this court and ask a reversal of the judgment.

MR. GEORGE C. CAMPBELL, for the appellants.

MESSRS. BUSHNELL & AVERY, for the appellee.

MR. CHIEF JUSTICE WALKER delivered the opinion of the Court:

This was an action of assumpsit, brought by Francis Singer against Solomon Degan, Jacob Degan and Samuel Degan, as partners, to recover damages on the breach of a contract for the purchase of seventeen head of cattle. It is claimed that they purchased the cattle at eight cents per pound, live weight, in Chicago, to be paid on delivery, but that when appellant offered to deliver the cattle, appellee refused to receive and pay for them, whereby appellee sustained damage.

Samuel Degan pleaded the general issue. Solomon and Jacob pleaded, in abatement, that they were not partners with Samuel, but were partners as between themselves, under the name of Sol. Degan & Brother. Appellee filed a replication, that they were partners with Samuel; and on this, issue was joined. A trial was had by the court and a jury, resulting in a verdict in favor of plaintiff for the sum of $325, upon which, after overruling a motion for a new trial, judgment was rendered. To reverse which this appeal is prosecuted.

The first question presented is, whether the court below admitted improper evidence. It is insisted that the statements

and admissions of Samuel Degan were not admissible under the issues as they were presented for trial. He, by filing the general issue, admitted the partnership so as to bind him, but the issue was whether the others were partners. And it is manifest that his admissions could not prove a partnership against the other defendants, any more than he could thrust himself upon them and become a partner against their will. His declarations were of course binding upon him, but not upon the other defendants. To bind them so as to affect their rights, we must look to their acts and declarations, and not those of other persons. Under these issues, the declarations of Samuel were not, of and within themselves, admissible in evidence.

It then follows, that the tenth and thirteenth modified instructions were improperly given for appellants. These declarations were not evidence, whether supported or unsupported by other testimony. If there was other evidence of a partnership, it should have been left to the jury as evidence. It is true, that, where such declarations are made in the presence of a person sought to be held as a partner, and they are not denied or contradicted, the fact that they were not becomes evidence for the consideration of a jury. But not because the admission was made by the party making the statement, but because it was not denied by the party against whom it was made. If Samuel Degan stated in the presence of his brothers that he was their partner, and they failed to contradict the statement, such fact should have been left to the jury, to determine whether their silence amounted, under the circumstances, to an admission by them, and, if such were the case, the jury might have been so informed.

The judgment of the court below must be reversed and the cause remanded.

Judgment reversed.

CLAUDIUS B. KING
v.
WILLIAM H. W. CUSHMAN *et al.*

1. SALE *of a mortgagee's interest in land, under execution — what will pass thereby.* Under the statute which declares that all interest of a judgment debtor, as mortgagee or mortgagor of land, shall be subject to sale on execution, no lien attaches to the notes secured by the mortgage held by such mortgagee, nor will the notes pass to the purchaser under a sale of the mortgagee's interest in the premises on execution.

2. EXECUTION SALES — *whether title passes by a sale on a day different from that fixed in the notice.* Where land is sold on execution, on a day prior to that specified in the notice of the sale, no title will pass to the purchaser at the sale, or to any subsequent grantee, if they have notice of the irregularity.

3. NOTICE — *who is chargeable with notice.* If the purchaser in such case is the plaintiff in the execution, he is chargeable with notice of such irregularity.

4. TRUSTEE — *buying in an outstanding title.* A court of equity, independent of any agreement, will consider money advanced by a trustee, to purchase in an outstanding title, as an advance for the benefit of his *cestui que trust*, and not for his own use, giving him a lien on the property, until he is reimbursed the advancement.

5. USURY — *when availing as a defense.* Where a party loans money to another at a usurious rate of interest, for the purpose of enabling the borrower to pay another debt which he owes, and for greater security to the lender the note and mortgage given to secure the prior debt are transferred to him, he cannot evade the effect of the usury laws upon the contract of loan which is tainted with usury, although the securities which were thus transferred to him were free from such taint.

APPEAL from the Circuit Court of La Salle county; the Hon. MADISON E. HOLLISTER, Judge, presiding.

This was a suit in chancery, instituted in the court below by Claudius B. King, against William H. W. Cushman, Hervey King and Samuel B. Gridley.

The facts of the case, so far as they are necessary to an understanding of the questions decided by the court, are as follows: On the 2d of December, 1858, the complainant, Claudius B. King, being indebted to Hunt, Osborne and Bacon, severally, in the aggregate sum of $3,524.44, borrowed

from the defendant Cushman that amount for the purpose of taking up the notes held by those creditors, representing their several claims; and gave to Cushman his two notes, one for $3,850, payable in one year, with interest at ten per cent, and a small note for $24.74. The latter note was paid. The consideration for the note for $3,850 was $3,500, the residue, $350, being for interest.

The notes held by Hunt, Osborne and Bacon, and the mortgages given to secure them, were transferred to Cushman as security to him for the loan to King; and, for further security, King executed to Samuel B. Gridley a deed of trust, and also assigned to Cushman certain notes, amounting to $5,000, and a mortgage which was given to secure them, by Hervey King to the complainant.

While Cushman held these notes and the mortgage given by Hervey King, he obtained from Joseph O. Glover, for the consideration of $800, a quitclaim deed for the premises named in that mortgage, Glover having purchased them under an execution issued on a judgment in his favor against Claudius B. King and Hervey King, after the mortgage from Hervey King to Claudius was executed.

It appears that this sale under Glover's execution was made two days before the day fixed in the notice of the sale, and of this irregularity Cushman had notice when he took the deed from Glover. The deed from Glover to Cushman was executed under an agreement between Cushman and the Kings, for the protection of the securities held by Cushman and for the benefit of the Kings, the money being advanced by Cushman.

The complainant, Claudius B. King, seeks by this bill to compel Cushman to take the principal sum loaned by him to the complainant, $3,500, deducting $300 which he had already paid, with interest at six per cent, and to surrender to the complainant the securities which he had given him.

The court decreed that complainant pay to Cushman the sum of $3,500, the actual amount loaned, with interest at six per cent, less the sum of $300 previously paid, within twenty days after the entry of the decree; and that thereupon Cush-

man should surrender to complainant the notes and mortgages assigned to him by Hunt, Bacon and Osborne; that Gridley, the trustee, release to complainant all interest acquired by the deed of trust; but the court decreed that the title to the mortgage made by Hervey King to Claudius B. King was divested from the said Claudius, and vested in said Glover, and by virtue of the conveyance from Glover to Cushman became vested in the latter.

The complainant brings the case to this court by appeal, and insists that the latter clause of the decree is erroneous; that Cushman advanced the money to buy in the outstanding title to the Hervey King mortgage, or to the premises named in that mortgage, as trustee for the Kings, and to protect the securities held by Cushman, and, on payment of the debt intended to be thus secured, that title should be surrendered; and, moreover, that neither Glover nor Cushman took any title, by reason of the irregularity in the execution sale, of which they both had notice.

The appellee Cushman assigns a cross error; that the transfer of the Hunt, Bacon and Osborn notes and mortgages to him entitles him to the proceeds of those securities, although the amount would exceed the sum loaned to Claudius B. King, with legal interest, and those securities, being free from any taint of usury, could not be affected by a subsequent usurious contract between King and Cushman.

Messrs. LELAND & BLANCHARD, for the appellant.

Claudius B. King had no such interest in the real estate described in the mortgage as would make the purchaser at the sale on execution the owner of the notes secured by the mortgage. It is difficult to tell what the legislature really meant by the interest of the defendant, as mortgagee, in section one of chapter 57 (Purple's Stat. p. 642); but it seems to us it did not mean that a judgment became a lien upon the interest of the payee in a note of hand, though secured by mortgage; otherwise no person would be safe in buying a title, even before maturity, because there might be a mortgage securing it, and a judgment against the mortgagee, which was a lien upon it.

The mortgage is a mere incident to the note (*Sargent* v. *Howe et al.*, 21 Ill. 149); and an assignment of the note passes the mortgage as an incident.

The legislature must have meant, that, if the mortgagee had taken possession under his mortgage, or had taken some steps whereby he had acquired some interest in the real estate, by decree of foreclosure or otherwise, that interest might be sold on execution. It cannot be that the notes of hand passed by the sheriff's deed to Glover, and by the latter to Cushman, under the description of the premises named in the mortgage. But the title did not pass to Glover, because he was, as plaintiff in the execution, chargeable with constructive notice of the defect in the sale; nor to Cushman, because he had actual notice thereof. Inasmuch, however, as the two Kings also knew of it, they should pay Cushman the $800 he had advanced, with their consent, to remove a cloud upon the title to the property which he held as security, and the interest thereon, at six per cent.

Moreover, it was expressly agreed that the $800 was an advance by Cushman, as trustee, for his *cestuis que trust*, and he has merely a lien for it upon the property of the *cestuis que trust* in his hands.

Though there were no agreement at all, a court of equity will never allow a trustee to purchase in such an outstanding title for his own use, but will consider money so expended as an advance, to be repaid by the *cestui que trust*, if the latter desires to avail himself of the benefit of the purchase, and the trustee cannot speculate for his own benefit. The amount actually paid, not the face of the Glover judgment, is the true amount.

The following authorities, and many others, directly or indirectly support these two positions. It seems to us that the questions are really ones about which there is no room for debate, no conflict of authority. *Boyd* v. *Hawkins*, 2 Dev. Ch. 195; *McClanahan* v. *Henderson*, 2 A. K. M. 388; *Van Epps* v. *Van Epps*, 9 Paige Ch. 237; *Green* v. *Winter*, 1 Johns. Ch. 27; *Hawley* v. *Mancius*, 7 id. 174; *In the matter of Oakley*, 2 Edw. Ch. 478; *Platt* v. *Oliver*, 2 McLean, 267; *Orleans*

v. *Torrey*, 7 Hill, 260; *Slade* v. *Van Vechten*, 11 Paige, 21; *Pratt* v. *Thornton*, 28 Maine (15 Shep.) 355; *Crutchfield* v. *Haynes*, 14 Ala. 49; *Spindler* v. *Atkinson*, 3 Md. 409; *Lenox* v. *Notrebe*, and *Hailton* v. *Notrebe*, 1 Hemp. C. C. 251; *Jewett* v. *Miller*, 10 N. Y. (6 Seld.) 402; *Brantly* v. *Kee*, 5 Jones' Eq. (N. C.) 332; *Voris* v. *Thomas*, 12 Ill. 442; *Thorp et al.* v. *McCullom*, 1 Gilm. 625; *Pensonneau* v. *Blakely*, 14 Ill. 16; *Wickliff* v. *Robinson*, 18 id. 146; *Switzer* v. *Skiles*, 3 Gilm. 529; *Hitchcock* v. *Watson*, 18 Ill. 289; *Robbins* v. *Butler et al.*, 24 id. 432.

Mr. GEORGE C. CAMPBELL, for the appellee, Cushman, upon the cross error assigned, contends, that, whatever may be the finding as to the question of usury upon the $3,850 note, Cushman is now entitled to collect the amount due upon the Hunt, Bacon and Osborn notes, which amount to more than the $3,500 with six per cent, and that there is nothing in the agreement between King and Cushman as to the $3,580 note that in any way invalidates the antecedent notes and mortgages, or that can prevent Cushman from collecting their full amount.

A debt contracted on lawful interest is not avoided by a subsequent agreement to pay usury thereon. *Carson* v. *Ingalls*, 33 Barb. 657; *Bush* v. *Livingston*, 2 Cai. C. 66; *Pearsoll* v. *Kingsland*, 3 Edw. Ch. 195; *Lovett* v. *Dimond*, 4 id. 22; *Wells* v. *Chapman*, 13 Barb. 561; *Crane* v. *Hubbell*, 7 Paige, 413; *Judd* v. *Leiber*, 8 id. 548; *Swartwout* v. *Payne*, 19 Johns. 294; 4 Sand. Ch. 312; *Colyer* v. *Neville*, 3 Dev. 30; *McInhill* v. *Daggett*, 1 Branch, 356; *Parker* v. *Canson*, 2 Gr. 372; *Mitchell* v. *Colton*, 2 Fla. 136; *Troutman* v. *Barnett*, 9 Ga. 30; *Bagly* v. *Finn*, 1 Ohio, 409; *Pollard* v. *Bailors*, 6 Mumf. 434.

Mr. JUSTICE BREESE delivered the opinion of the Court:

The principal objection made by appellant, to the decree of the Circuit Court, is directed to the last clause of it. After decreeing that the appellant pay to appellee the sum of thirty-five hundred dollars, with interest from December 2, 1858, at

six per cent per annum, less the sum of three hundred dollars paid on the 20th of April, 1858, within twenty days from the entry of the decree; and that thereupon appellee surrender to appellant the notes and mortgages assigned to him by Hunt, Osborn and Bacon; and that Samuel B. Gridley convey to complainant, by deed of release, all interest acquired by him under a certain deed of trust,— it was further decreed that the title to the mortgage made by Hervey King and wife, to Claudius B. King and wife, be divested from them, and vested in Joseph O. Glover, and by virtue of his conveyance to Cushman, to become vested in Cushman. This is the objectionable clause of the decree, and to understand the force of the objection, some facts must be stated.

Joseph O. Glover, on the 16th of October, 1858, had purchased, on an execution which issued on a judgment he had recovered against King and Brother, certain town lots in Ottawa. King and Brother were Claudius B. and Hervey King, and the lots were described as lot 2 in block 53, and lots 1, 2 and 3, in block 54 in the State's addition, the fee of which was in Hervey King. On these lots, Hervey King had, in May, 1857, executed a mortgage to Claudius, to secure five notes, each of one thousand dollars, payable in one, two, three, four and five years, with interest at ten per centum per annum. This mortgage at the time of the negotiations with Cushman, Claudius King assigned to Cushman and the notes also, as part security for the loan of thirty-five hundred dollars.

The sale of the lots to Glover was made by the sheriff on the 16th of October, 1858, when by the published notice it should have taken place on the 18th of that month. Appellant and appellee and Glover were cognizant of this fact, and had full notice of this irregularity. It was arranged between the Kings and Cushman on the 24th of May, 1863, Glover having obtained a sheriff's deed for the lots, that Cushman, to protect the securities given to him, and for the benefit of appellant and Hervey King, should buy Glover's title thus acquired; which he did, by the payment of eight hundred dollars, he, Cushman, taking the conveyance to himself.

Cushman now claims, that, by this purchase from Glover of his title acquired at the sale under the execution upon his judgment, he also acquired the notes and mortgage given to Claudius B. King by Hervey King, to pay which these lots were pledged.

How this can be, we are at a loss to understand, and have not been able to appreciate the argument of appellee's counsel in this behalf. He quotes a part of the first section of chapter 57, in relation to judgments and executions, in support of his proposition.

This section, after declaring what shall be subject to execution, provides, in the last clause, which he cites, as follows: "The term 'real estate,' in this section, shall be construed to include all interest of the defendant, or any person to his use, held or claimed by virtue of any deed, bond, covenant or otherwise, for a conveyance, or as mortgagee or mortgagor of land in fee, for life or for years." Scates' Comp. 603.

This simply means, as we understand it, by this expanded phraseology, that equitable interests or estates may be sold under execution. When Glover obtained his judgment against Claudius and Hervey King, the first named was mortgagee of the premises, of which the last named was the mortgagor. This statute was passed to enable a judgment creditor to sell upon execution the respective interests of the parties thus situated. The mortgage, as this court has repeatedly decided, was a mere incident of the note, and the statute could not mean, that the judgment should be a lien upon the note secured by the mortgage. It has never been understood, in such case, that notes so secured passed, by the sheriff's deed of the property pledged for their payment, to the purchaser of the property. We cannot perceive how the sale to Glover, under his judgment against Claudius and Hervey King, passed the interest in the notes which Claudius assigned to Cushman, nor the mortgage either. No lien attached to the notes. Glover's judgment was only $1,000, and the notes were for $5,000, which might be collected out of property of Hervey King, the maker, other than the lots. It would be unreasonable to *hold*,

they passed to Glover for $800, the sum at which he bid off the lots.

But no title really passed to Glover by his purchase at the sale, nor to Cushman by his purchase from Glover; for it is shown, Cushman had notice of the irregularity, and Glover, as plaintiff, was chargeable with notice, and the Kings knew it also; and, with the knowledge, the weight of the testimony clearly is, that the money paid by Cushman for this interest was as a trustee for the Kings, and for their benefit. A court of equity, independent of any agreement, would consider money advanced by a trustee, to purchase in an outstanding title, as an advance for the benefit of his *cestui que trust*, and not for his own use, giving him a lien on the property, until he was re-imbursed the advancement. The cases of *Thorp et al.* v. *McCullom*, 1 Gilm. 625; *Pensonneau* v. *Blakely*, 14 id. 16; *Wickliff* v. *Robinson*, 18 id. 146; *Hitchcock* v. *Watson*, id. 289, and *Robbins* v. *Butler*, 24 id. 432, cited by appellant's counsel, fully established the principle.

After the best consideration we have been enabled to give to this case, we have arrived at the conclusions above stated. Cushman must surrender those notes and sureties pledged to him by King, on the payment by appellant to him of the sum of $3,500, and interest at ten per cent per annum from the time it was received; and also the sum of $800 advanced by Cushman to purchase in Glover's title, and interest thereon at ten per cent per annum from the time Cushman made the advancement. We say ten per cent, because it appears that was the interest agreed upon for the money loaned, and we regard this advancement as so much money loaned.

The cross error assigned by appellee is not tenable. The proof is quite strong, that the mortgages given by King to Hunt, Bacon and Osborn, were paid by King, through checks on Cushman, the fund being provided by Cushman at a usurious rate of interest, and of which Cushman took an assignment to himself. The weight of evidence is, that the $350 was for usurious interest, and ought not to be allowed.

We have looked into the cases of *Carson and Hard* v. *Ingalls*,

33 Barb. 657, and *Bush* v. *Livingston*, 2 Caines' Cases, 66, cited by appellee. The first case decides, when a bond is executed in pursuance of an agreement between the parties, void for usury, but which bond is given, not for money loaned at the time when either the bond or the agreement was made, or subsequently, but for a sum of money which had been advanced to the obligor, or to his firm, previous to the making of the agreement, it is not affected or rendered invalid by the usurious character of the agreement, especially when the agreement itself, on its face, shows that the money for which the bond was given was not loaned under or in pursuance of the agreement. The case in 2 Caines is of like import, and differs essentially from the facts here. The notes and mortgages, when executed to Hunt and the others, were not tainted with usury; it was the loan of the money from Cushman to discharge them that bears the taint, and the defense of usury is leveled at this transaction altogether.

For the reasons given, we are of opinion, the decree should be so modified as to require Cushman to surrender up the securities he obtained from Claudius King, which were a lien on the lots bought of Glover, on his making the payments as above directed, and that appellee Cushman pay the costs of this court.

Decree modified.

HARRIET STEELE
v.
ADA B. GELLATLY.

1. DOWER—*limitation act of* 1839. It was held in *Owen* v. *Peacock*, 38 Ill. 33, that where the statute of limitations of 1839 had run against a widow, after she had become *discovert*, and counting the seven years from the time her right of action for her dower had accrued, the statute could be set up as a bar.

2. But the statute does not commence to run against the right of dower until a right of action therefor has accrued to the claimant, which cannot be until she becomes discovert. During the life-time of the husband, the wife

has an inchoate right of dower, but this inchoate right cannot be asserted against an adverse possession until it has become consummate by the death of the husband.

3. The act is one of limitation, and, like all other acts of limitation, is not to take effect until the period of limitation has run, and is not to be construed as having commenced to run as against any claim or estate until such claim or estate can be lawfully asserted in the courts.

4. SAME — *laches of the husband.* Nor can the widow's right of dower be affected by the *laches* of the husband in permitting an adverse possession to exist during a period of seven years in his life-time, for the law protects the right of dower against the acts or *laches* of the husband.

5. LIMITATION ACT OF 1839 — *its constitutionality.* The constitutionality of the act of 1839, as a limitation law, is re-affirmed in this case.

APPEAL from the Circuit Court of Cook county; the Hon. ERASTUS S. WILLIAMS, Judge, presiding.

The opinion of the court contains a statement of the case.

Mr. J. W. WAUGHOP, for the appellant.

Messrs. SCAMMON, MCCAGG & FULLER, for the appellee.

Mr. JUSTICE LAWRENCE delivered the opinion of the Court:

This was a petition for dower heard upon the following agreed state of facts, and a decree was entered *pro forma* for the defendant.

"That the petitioner was married to Ashbell Steele, at Rochester, in the State of New York, in the year A. D. 1827, when she was eighteen years of age; that they lived and cohabited together, and were known and recognized in said county of Cook as husband and wife, for about thirty years. That said Ashbell Steele died in said county of Cook, in the month of September, A. D. 1861, and that the said petitioner has continued to reside in said county of Cook ever since.

"That, on the 25th day of August, A. D. 1834, the said Ashbell Steele became seized and possessed of an estate of inheritance, in the law, in fee simple, of, to and in the

premises described in the petition filed in this cause by the petitioner, and in which she therein claims dower.

"It appears of record in said county, that, on the 8th day of June, 1835, said Ashbell Steele, and his wife, the petitioner in this suit, joined in a deed to Horatio J. Lawrence, as it seems, intending to convey said lot, but described it as in block 35 instead of block 34. But the certificate of acknowledgment of said deed does not state that the contents of said deed were made known to her, nor does said certificate state that she relinquished her dower in said premises.

"That Ada B. Gellatly, then Ada White, now wife of Francis Gellatly, one of the defendants in this cause, acquired a claim and color of title in good faith to said premises, by deed on the 28th day of October, A. D. 1855, under which she has been in the actual possession of said premises, and has paid all the taxes assessed on said premises, ever since she so acquired a claim and color of title.

"That the buildings now on said premises, were erected thereon by the said Ada B. Gellatly, within the last six years in place of other buildings, which were standing on said premises, at the time she acquired her claim and color of title to said lot."

We decided at the April Term, 1865, in the case of *Owen* v. *Peacock*, 38 Ill. 33, that, where the statute of limitations of 1839 run against a widow after she had become *discovert*, and counting the seven years from the time her right of action for her dower had accrued, the statute could be set up as a bar. We entertain no doubt as to the correctness of that decision, but the question presented by the record before us is widely different. In this case the husband of the petitioner had not been dead seven years at the filing of the petition, and the statute therefore had not run from the time such an interest had vested in the petitioner as could be asserted by action. It is, however, insisted that the terms of our peculiar limitation law are of a character to bar her claim.

We freely concede the language may be so interpreted, and

we are disposed to give to that law as large an operation as can be constitutionally given, and the legislature intended it to receive. It was in that view we held the widow to be barred in *Owen* v. *Peacock*. A right of dower has not been ordinarily considered as falling within the operation of the usual limitation laws; but we held in that case, that statutes of limitation belonged to a species of legislation peculiarly local in its character, to be established by each State according to its emergencies, and that if a State thought proper to pass a law applicable in its terms to a right of dower, there was no reason why the courts should not apply it to a right of that nature resting in action merely, as well as to a determinate and vested estate. But we were only considering cases, like the one before us, where the statute had run after the right of action accrued, and, although that opinion, being still in manuscript and not before the writer of this, cannot be quoted *verbatim*, he is under the impression that it is carefully limited to cases of the character then before the court.

But, while we still hold that there is no reason why a claim to dower should not be held subject to the statutory limitation, as well as any other species of estate, if the language of the law clearly embraces it, yet we cannot suppose the legislature intended such claim should be barred before the widow had had the opportunity of asserting it, and if they had so intended their act would have been void. But no such intention is to be imputed to them. However comprehensive may be the language of an act of limitation, we think no case in this country is to be found where the courts have held that the act begins to run, or can begin to run, until there is some person in being by whom an action can be brought. So decided have the courts been upon this point, that, although it is a general rule, when the statute has once begun to run, it shall continue to run in spite of supervening disabilities, yet, in the case of *Jackson* v. *Johnson*, 5 Cowen, 74, the court held that the statute, having commenced to run, actually ceased during the period when the person having the right had no legal power to enforce it. This question is, of course, wholly distinct from that of

mere disabilities. Whether married women, or infants, or any other class of persons having an estate, shall be considered as under disabilities, and, therefore, excused from bringing suit, or what period of time shall be allowed them after such dis abilities are removed, are, undoubtedly, questions for the legis lature, and the courts have only to obey its behests. But the case we are considering is not one of technical disabilities in the ordinary sense of that term, where the persons having the right have also the legal power to assert it in the courts, but are excused on account of infancy or coverture, but it is one where the claim sought to be barred has been in such a position that it could not be asserted by any one. If a claim of this character could be barred, it would be simple confiscation, without crime, fault or *laches*, on the part of the owner, and we cannot suppose the legislature so intended.

As to the constitutionality of the law of 1839, it has been several times before the court, and we are not disposed to re-open the question. It has been held constitutional to the extent that it can be fairly applied as a limitation law, and no further. To this ruling we adhere, and as it has been for some years a rule of property, under which titles have been bought and sold, it would be most unwise to disturb it. It is urged by the counsel for defendant in error, that even limitation laws, while acting professedly upon the remedy, practically transfer the title. This is true, but this result is only consequential, and only follows after the law has run its course as a strict bar of the remedy. An illustration of this doctrine is afforded in the case of *Paullin* v. *Hale*, decided at the present term of court (40 Ill. 274), in which, while adhering fully to the former decision, that the mere payment of taxes unaccompanied at any time by possession, cannot be made available as an offensive title, we hold that, when a person has paid the taxes under color of title for a period of seven years, and then takes possession so as to be in a position where he can set up the statute as a bar to the paramount title, he may oust the owner of even the paramount title, if he afterward enters when the possession is temporarily vacant. This decision is in strict harmony with the former

rulings of this court, and with the rulings of all courts upon the ordinary acts of limitation. But the difference between this practical consequence of an act of limitation, and a construction which would divest a title before the statute had come into its legitimate action as a bar to an existing remedy which the owner of the outstanding right had negligently refused to apply, is too wide and too palpable to need discussion. It was precisely to the extent that the act might seem, by its comprehensive language, to do this, that this court held it to be unconstitutional.

The act then is one of limitation, and like all other acts of limitation is not to take effect until the period of limitation has run, and is not to be construed as having commenced to run as against any claim or estate until such claim or estate can be lawfully asserted in the courts.

For example, suppose A is tenant for life with remainder in fee to B, and C enters adversely under color of title and pays the taxes for seven years. The tenant for life would be barred, but can there be any doubt but that after his death the remainder-man might bring his action and recover? To hold otherwise would be to divest his estate without *laches* on his part, as he could not bring suit during the existence of the tenant for life. This principle is directly settled in the case of *Higgins* v. *Crosby*, 40 Ill. 260, decided at the present term of this court. As against the estate in remainder, the statute does not begin to run until after the death of the tenant for life, and it must run its full period before that estate is barred. The case before us is not dissimilar in principle.

When the defendant in this record commenced his adverse possession and payment of taxes, the petitioner had an inchoate right of dower. It was a right carefully guarded by our laws, and placed beyond the power of the husband to alien or impair by his contracts, or to forfeit by his *laches*. To such an extent has this court held an inchoate right of dower to be a vested interest in land, that, in the case of *Russell* v. *Rumsey*, 35 Ill. 362, it was decided that the legislature had not power to divest it by a retrospective enactment. But this inchoate right could

not be asserted against the adverse possession, until it had become consummate by the death of the husband. The wife was precisely in the position of a remainder-man. Nor can it be urged that she is barred by the laches of her husband, because that would be permitting the husband to cut off his wife's dower by conveying his land and giving possession to the purchaser, provided the husband should survive for seven years. To permit this would be against the whole policy of our law in regard to dower, and a violation of its express provisions which carefully place it beyond the husband's reach. The right to dower in the wife was an interest in the land wholly distinct from the estate of the husband, and incapable of assertion in the courts until the death of the husband. As against this claim, the statute would not begin to run until a right of action accrued, and would not be a bar until the period of seven years had expired.

Judgment reversed.

ALEXANDER CAMPBELL *et al.*

v.

JOHN K. MCCAHAN *et al.*

1. SUMMONS — *return — decree.* It is sufficient evidence that a summons was returned "not found," if it appears to have been so found in the decree; and that establishes the jurisdiction of the court over non-residents if the notice and publication are regular, and conform to the statute.

2. AFFIDAVIT *of non-residence — when it must be filed.* An affidavit of the non-residence of defendants to a bill in equity, made twenty days before the bill is filed, is not made in a reasonable time before the suit is brought, where the complainant resides and makes the affidavit in an adjoining county, and fails to confer jurisdiction. Where a complainant resides in the county in which suit is brought, he will be allowed less time than where he lives in another or distant county or in another State; but, while a reasonable time will be allowed for the purpose, there should be no unnecessary delay.

3. JURISDICTION *of the person and subject-matter.* A judicial sentence to be binding must be based on jurisdiction of the person and of the subject-matter. If either is wanting the whole proceeding is *coram non judice*, and may be questioned in either a direct or collateral proceeding; the decree in such a case

being void, all acts performed under it are void, and all rights flowing from it are of the same character.

4. SAME — *cloud on title.* A decree rendered without jurisdiction, upon which a sale of property is made or title conveyed to complainant, creates such a cloud on the title of the owner as authorizes a court of equity to take jurisdiction for its removal, notwithstanding it could not be insisted on to defeat a recovery by the owner in an action at law.

5. DECREE — *parties and privies.* Where the court, without jurisdiction of the person of the defendant, decrees the conveyance of property from the defendants in that proceeding to complainant, and he receives the deed, he thereby acquires no title, nor can he confer any on a grantee, as he is chargeable with notice of the want of jurisdiction.

APPEAL from the Circuit Court of Bureau county; the Hon. MADISON E. HOLLISTER, Judge, presiding.

This was a bill in equity, brought by John K. McCahan, John Dreswell, John K. McCahan, Jr., Thomas S. McCahan, Mary Buoy and James K. Morehead, in the Bureau Circuit Court, against Alexander Campbell and S. J. Greenwood. The object of the bill was to cancel a decree and the proceedings under it, obtained by Campbell at a previous term of the court against complainants, by which they were required to convey to Campbell, on an alleged purchase by him of John McCahan deceased, under whom complainants in this suit claim title to the premises.

They allege fraud and a want of due and proper service, and that such a sale was never made, and pray that the decree be annulled and the conveyance under it be set aside. Answers were filed and a hearing had, when the Circuit Court rendered a decree canceling the former decree, and declaring complainants to be invested with the title.

To reverse that decree defendants bring the case to this court by appeal, and insist that the court below erred in rendering this decree.

Mr. J. I. TAYLOR, for the appellants.

Messrs. ECKELS & KYLE, for the appellees.

Mr. CHIEF JUSTICE WALKER delivered the opinion of the Court:

It is insisted that, in the former suit, to reverse the decree in which this proceeding is instituted, the court did not have jurisdiction of the person of the defendants. If this be true, then the decree is a nullity, binding on no one, and may be attacked in any proceeding, whether direct or collateral. It is first urged in support of the proposition, that no summons in the case was returned "not found," as to the defendants. But the decree in that case expressly finds that there was such a return, and that is held to be evidence of a compliance with the requirements of the statute in such cases, and that it confers jurisdiction, where the statute has been conformed to in other respects. *Goudy* v. *Hall*, 30 Ill. 116; *Rivard* v. *Gardner*, 39 id., 125. Again, that suit was brought in July, 1857, and the proceeding was governed by the act of February of that year, which declares that it shall not be necessary for a summons to issue, to be served or returned, when the defendants are non-residents, and there shall be proper publication. And there is no dispute that the defendants were non-residents; so that in any event there is no force in this objection.

It is likewise insisted that the affidavit to prove the non-residence of the defendants, upon which the order of publication was made, was insufficient, having been sworn to twenty days before the bill was filed and the order of publication made. And for that reason, the clerk was not authorized to make the order on such affidavits. Also, that it fails to prove that defendants were non-residents when the bill was filed. The eighth section of the chapter entitled "Chancery," under which this proceeding was had, is silent as to the time when the affidavit must be made. Whether simultaneously with the the order of publication, or prior to the making of the order, is not declared. It simply provided that whenever any complainant shall file the requisite affidavit in the office of the clerk of the court in which the suit is pending, he shall cause publication to be made.

This, then, involves the necessity of giving a construction to this clause of the section. In terms, it only requires the suit to be pending to authorize the proper affidavit to be filed, and the order and publication to be made. The object which the legislature had in view, when ascertained, must be regarded and carried into effect. Our courts being powerless to send their process beyond the limits of the State, and the legislature being unable to confer the power, to prevent a failure of justice in many cases, it became necessary that some species of constructive notice should be adopted, that the property of persons beyond the limits of the State might be rendered amenable to the process of our courts, and justice thus administered to our citizens having demands against non-residents. Hence the adoption of this provision, which was designed, so far as may be necessary, to take the place of actual service. And to give effect to that intention, the act must receive a fair and reasonable construction.

This law being remedial in its character, it must, according to the canons of interpretation, be liberally construed, so as to promote the remedy sought. It would, therefore, seem, under a liberal construction, not to be essential that the affidavit should be sworn to, and the order of publication made simultaneously with the filing of the bill. It would be sufficient if filed in a reasonable time. If the affidavit were made years or even months before the order of publication, the time would be unreasonable. It may be difficult to determine what is a reasonable time within which the affidavit must be filed after it is sworn to; but that must depend on the circumstances of each case. Where the person making the affidavit resides in the county in which the suit is pending, a shorter delay would be allowed than where he resided and made the affidavit in a different but adjoining county, and, in the latter, less than if he resided and swears to the facts in another State. In such a case, a reasonable time would be allowed within which to transmit the affidavit to the place where it is to be used.

If both acts are required to be performed, in all cases, on the same day, it would, in practice, work great inconvenience in

many instances, and in some, great injustice. Nor is it believed that this section has, in practice, received so strict a construction; as it is believed that reasonable time has generally been allowed to file the affidavit after it has been made. But it seems obvious that twenty days is an unreasonable time to be allowed to transmit such an instrument from an adjoining county. A few days, at most, with slight effort, is only required for such a purpose. Allowing for the irregularity of the post, or delays of messengers sent for the purpose, no such a period of time could be required, and where it has occurred, it indicates either a want of effort in sending it, or inattention in filing it with the clerk. This affidavit, then, was made too long before it was filed, to authorize the publication, and the law not having been complied with in this respect, the publication was unwarranted, and being so, it failed to give the court jurisdiction of the person of the defendants.

The jurisdiction of both the subject-matter and of the person is essential to the validity and binding force of a judicial sentence. If either of these jurisdictional facts is wanting, then the sentence or decree of the court is void. In such a case, the whole proceeding is *coram non judice;* and it may be successfully resisted in that or any other court, in a direct or collateral proceeding. Nor can the fact that the clerk or the court adopted other requisites or conditions than those required by the law, in the least relieve the case of its defects. Other requirements than those imposed by the law cannot be substituted. The court was powerless, until the defendants were duly served with process, or brought into court by proper publication, to render any decree that would bind either the defendants or their property. The decree being void, all acts performed under it, and all rights claimed as flowing from it, are equally void and inoperative. And in this case defendants could show that the decree was void in a court of law, as well as in equity; but, inasmuch as it operates as a cloud on their title, it is proper that a court of equity should take jurisdiction of the case to remove it, and free their title from suspicion.

Nor is Greenwood in any better position than was his grantor

when he received his mortgage. He is chargeable with notice of this defect in Campbell's title. The law presumes, that every man examines title to real estate before purchasing or receiving a mortgage. If he did so in this case, he must have seen, that the affidavit was made twenty days before the order of publication; and, Campbell failing to obtain the title held by the defendants, Greenwood acquired no interest in the premises by his mortgage. Campbell having no title, he could convey none to Greenwood. It then follows that this mortgage failed to become a lien upon the land, and, like the decree, cannot be upheld.

The judgment of the court below must therefore be affirmed.

Decree affirmed.

DAVID MARPLE *et al.*

v.

ELLEN V. SCOTT *et al.*

1. SWORN ANSWER IN CHANCERY—*when to be taken as true.* Where the answer of a defendant in chancery is required to be under oath, so far as it is responsive to the bill and fairly meets the allegations of the complainant, it must be received as true, unless it is disproved by evidence amounting to the testimony of two witnesses.

2. INCUMBRANCE—*what constitutes.* An adverse equitable claim to land is not considered an incumbrance.

3 REPLICATION IN CHANCERY—*admissibility of evidence when there is no replication.* While it would be proper, in default of a replication to an answer, to set down the cause for hearing on bill and answer, taking the answer as true, and excluding all evidence, unless it may be matter of record to which the answer refers, yet where the defendant treats the cause as at issue, joins in taking depositions, and consents to set the cause down for hearing on bill, answer, exhibits and depositions, and the cause is heard accordingly, he cannot, on error, invoke the statute in his favor and insist that the proofs shall not be considered.

APPEAL from the Circuit Court of Bureau county; the Hon. MADISON E. HOLLISTER, Judge, presiding.

The opinion of the court contains a statement of the case.

Messrs. KENDALL & IDE, for the appellants.

Messrs. STIPP & GIBON, for the appellee.

Mr. JUSTICE BREESE delivered the opinion of the Court:

Appellants Nelson and Delia Maria, his wife, commenced an action of ejectment in the Bureau Circuit Court against the appellees, to recover the possession of lots four and five in block one, in the town of Sheffield in Bureau county, claiming the premises as the fee simple estate of Delia Maria Nelson.

Pending this action, Ellen V. Scott, the widow, and Franklin L. and Edith L. Scott, infant children of George M. Scott, deceased, filed their bill to restrain the plaintiffs from prosecuting the suit, and for a perpetual injunction, alleging that George M. Scott, in the year 1854, purchased these lots of the Sheffield Mining and Transportation company, paying therefor part in cash, and giving his notes for the balance, and receiving of the company title bonds for the lots, covenanting to make deeds on payment of the notes.

They allege that Scott neglected to put these bonds on record, and either re-delivered them to the company on making a contract with one Eben Boyden, or lost them. It is further alleged that Scott paid the company the notes and had them canceled.

The contract with Eben Boyden is alleged to have been of this nature: That after Scott paid the notes he borrowed of Boyden about one hundred dollars, and arranged with Boyden and the company that they should make a deed to Boyden for the lots, he to hold them as security for the money borrowed, and that Boyden should execute to Scott a bond for a deed on payment of the money borrowed and the interest agreed upon.

It is then alleged, that, in pursuance of this arrangement, the company executed "a written instrument" for the lots to Boy-

den, which has not been recorded, and is alleged to be in the possession of Boyden or of the company.

It is further alleged, that Boyden executed a title bond to Scott for the lots, a copy of which is annexed to the bill; that Boyden used a blank bond, such as used by the company, at the foot of which are the words "Secretary of S. M. and T. Co.," over which Boyden wrote his name; that he was not secretary, and that two days prior to the date of the bond, when this arrangement was perfected, Scott executed to Boyden his note for $153.21, with ten per cent interest after maturity, which sum it is alleged was the consideration for the lots, and it is also alleged, that the note was misdated as being made in 1857, when the true date was 1856. In March, 1857, it is alleged, it was agreed between Scott and Boyden, that the time of payment of this note should be extended six months upon the consideration that Scott should execute to Boyden his note for twenty dollars, for which sum Boyden should hold the lots as security; this note was made, a copy of which is attached to the bill, the signature of Scott being torn off, as alleged, on its payment.

It is further alleged, that Scott paid the first mentioned note to Boyden, and demanded of him a deed, which Boyden refused to execute, claiming that the interest was not all paid, which Scott refused to pay, being usurious interest, but, subsequently, and before Boyden conveyed away the legal title, Scott tendered to him the whole amount of the usurious interest, and demanded a deed, which Boyden refused to execute, and also refused to surrender the note.

The bill then alleges, that Marple, one of the appellants, bought these lots of Boyden, with full knowledge of the equities of Scott, he being apprised, before his purchase, of the transactions between Scott and Boyden, and with the knowledge that Scott was the equitable owner of the premises — that the sale was made by Boyden to Marple, for the purpose of defrauding Scott of his property in the lots. It is then alleged, that a deed was made by the company to Marple at the instance of Boyden, on the 19th of August, 1859; that Boyden

redelivered or destroyed the deed to him which the company had executed, and that the agent of the company, who executed the deed, knew at the time the rights of Scott in the premises.

It is further alleged, that, on October 29, 1860, Marple conveyed these lots to David P. Nelson, he, Nelson, knowing the rights of Scott in the premises before, and at the time of the conveyance,—knowing that the equitable title thereto was in Scott; that Nelson, on the same day, executed a mortgage on the lots to Marple, which Marple foreclosed in the Circuit Court and purchased in the premises.

It is then alleged, that, on the 7th of September, 1861, Nelson, and his wife, Delia Maria, conveyed the lots to Julia Ann Davis; and, on the 25th of October thereafter, she conveyed them, with her husband, Jacob N. Davis, to Delia Maria Nelson, one of the plaintiffs, with the purpose, as complainant Ellen V. Scott alleges, of defrauding George M. Scott, and were so made that the title might pass through persons having no notice of Scott's equities.

It is then alleged, that all these conveyances were made in the life-time of Scott, and that Scott, since his purchase, had been in possession of and greatly improved the lots, they constituting his homestead.

Answers were required of the defendants, under oath; and the prayer was, that Nelson and wife be enjoined from further prosecuting the ejectment suit until the further order of the court, and that, upon the final hearing, the injunction be made perpetual, and that Nelson and wife be required to make a proper conveyance of the lots to complainants, and for general relief.

The bond exhibited with the bill was from Eben Boyden to G. M. Scott in the penal sum of sixteen hundred dollars, reciting an agreement to sell these lots to Scott, on condition that Scott shall pay Boyden one hundred and fifty-three dollars, as follows: note dated January 15, 1857 (1856), for $153.21, with interest at ten per cent after due, and shall pay all taxes on the lots; then Boyden shall execute and deliver a good and sufficient deed to Scott for the lots; with a further stipulation,

that, on failure to pay the note at maturity, the contract should be null and void, and Scott should yield possession of the lots to Boyden on receiving ten days' notice to quit. The note for twenty dollars is also made an exhibit. It is without signature, and payable to Boyden; and contains an agreement that Boyden shall hold security on the lot and house for which Scott held his bond, when a certain note was paid that Boyden held against Scott, and that he, Scott, was not entitled to a deed until that note was paid.

Marple put in his separate answer under oath, admitting that complainants were the widow and minor children of George M. Scott, deceased, who died intestate; but denying all the allegations in the bill which relate to the purchase by Scott of the lots of the company, and the alleged transactions between the company and Scott, the giving the title bond and notes and the payment by Scott to the company, and his being entitled to a deed from the company; and denies all the allegations relating to the transactions with Boyden, and of the alleged arrangement between the company and Scott and Boyden, and all other matters, facts and circumstances connected therewith; and avers he never had any knowledge of the truth thereof, and never had any information thereof, and then only by hearsay, long after his rights had accrued to the lots, excepting, however, that he knew the bare fact that a deed had been made of the lots and delivered by the company to Boyden, conveying the title to the lots to Boyden, but had no knowledge or information of the attendant circumstances.

He admits the purchase by him of the lots from Boyden, and the execution of a deed therefor by Boyden to him, and that he purchased the property as a dwelling to live in with his family, and was to pay $500 therefor by executing his note for that amount. This bargain was in August, 1858; and Boyden was then in the actual possession of the lots, having a tenant residing thereon, and who had resided thereon a long time prior thereto, paying rent to Boyden, and Boyden at the time claimed to be the owner in fee simple of the premises having a deed for them from the company. He avers he purchased

the premises in good faith and for the consideration of $500, and, on the execution of his note for that amount, Boyden executed a deed for the premises; that, about two months after receiving the deed, he and his family went into possession of the lots and continued to live thereon about one year. About the 10th of August, 1859, while he was occupying the lots, Boyden proposed that he should redeliver to him, Boyden, the deed which he had executed, and receive a deed from the mining company; giving, as a reason, that the deed of the company to him was not recorded, nor was the deed from Boyden to Marple recorded, and therefore the expense would be less by taking a deed direct from the company; to which proposition Marple assented, in good faith, as he says, and that he did deliver the deed to Boyden on that day; which deed, together with the deed from the mining company to Boyden, was destroyed by Boyden, and a new deed made out by the company directly to Marple, conveying these lots, by direction of Boyden and with the consent of the company. This deed bears date August 10, 1859, and was delivered to Marple on that day, and filed for record on the 21st of March, 1860, and duly recorded.

The answer further alleges, that, at the time he purchased the premises from Boyden in 1858, and received the deed from Boyden, and prior thereto, he had no knowledge, notice, or information, either actual or constructive, of Scott's alleged equities, if any such ever existed; that he acquired his right to the premises in good faith, and for a valuable consideration, and without notice of any other claim than that Boyden owned the premises, and without any notice that Scott claimed any interest therein; nor had he, at the time of receiving the deed from the company, or prior thereto, any knowledge of the dealings of Scott with the company, or that Scott was entitled to a deed from Boyden; but he charges, that he is informed, if any such matters existed between Scott and Boyden, they were fully settled by them, long before he, Scott, relinquished to Boyden all claims on the lots to Boyden, and that, at the time he, Marple, took possession, Scott was not in this State,

and Boyden was in the possession of the premises, claiming to be the owner. Marple also denies all knowledge, on the part of Nelson, of those equities of Scott, and avers, when he conveyed to Nelson, he, Marple, was in the exclusive possession of the premises, having a tenant on them for more than a year before he conveyed to Nelson, without interference from Scott or any one else; that Nelson engaged to pay him $800 for the property, a part of which was paid down, and note and mortgage taken for the balance of $100, the mortgage foreclosed, and the premises bought in by him, Marple, and the same was not redeemed. Marple denies all knowledge of conveyances, subsequent to his deed to Nelson, knows nothing of the possession of the premises by Scott, but avers, that, for a long time prior to the purchase from Boyden, Scott was not in possession, but the possession was in Boyden, and since the purchase they have been in possession of Marple for two years, and so remained up to the time when Julia Ann Davis received her deed, and, while she with her husband was moving into the premises, Scott and complainants took forcible possession of them, without the consent or license of Marple or any of his grantees. It is also averred, that nearly all the improvements on the premises were made by Boyden and Marple, while they respectively owned the premises, he, Marple, having applied more than $300 to such improvements. He also avers, that the records of Bureau county contained no evidence of any such contracts or bond as set out in the bill, when he obtained his title, that he relies upon the deed made by the company to Boyden, and the conveyance of Boyden to him as well as on the deed from the company direct to himself, as evidence of his title to the lots.

The joint and several answer of the Nelsons alleges ignorance of all the matters in the bill, and neither admits nor denies the purchase of the lots by Marple of Boyden, — he being ignorant of the transaction, — but sets up the deed from the company to Marple of the 10th of August, 1859, denies all knowledge of the equities set up in the bill, and that Julia Ann Davis had no knowledge of these equities, either at the time or prior to the conveyance to him; and that all the conveyances were

made and accepted without notice of any of these equities, and upon a valuable consideration. The dates of the recording the several deeds are averred, and when they were filed for record no such bonds and contracts as set forth in the bill were on record — denies all knowledge of possession by Scott at any time, but avers possession in Marple, and also avers the forcible entry in the night-time by Scott into the premises, when Davis was preparing to move into them. This answer was also put in under oath.

No replications were filed to either of the answers, but much testimony was taken by both parties without objection, and the cause heard on the bill, answers, and exhibits, and depositions.

The court entered a decree for the complainants, and found that Scott, in his life-time, purchased lot four from the mining company, and lot five from the grantees of that company, and held title bonds from the mining company which were not recorded; that Scott paid the entire purchase-money for the lots; that the arrangement between Scott and Boyden amounted to a mortgage; that Boyden refused to make a deed to Scott; that Marple purchased the lots of Boyden with knowledge of Scott's equities; that the transfers from the Nelsons to Julia Ann Davis, and from her to Delia Maria Nelson, were made for the purpose of avoiding and defeating the equities of Scott and the complainants; that the complainants are in possession of the lots; and that the allegations are true; and decreed that the injunction be made perpetual, and required Nelson to convey the premises to the heirs of Scott within ten days, and that defendants pay the costs.

Marple brings the case here by appeal, and assigns various errors. No appearance is entered by appellee, or brief filed, and no question of law raised and discussed.

The case is submitted on the evidence, which we have carefully examined and considered.

The whole case turns upon notice to Marple and his grantees of these equities set up by the complainants. The answers were called for on oath, and all the defendants aver on oath that they had no knowledge of these equities when they pur-

chased or prior thereto. Are the answers of either one of the defendants disproved by the testimony of two witnesses, or of one witness and corroborating circumstances?

There can be no doubt, from the testimony of H. C. Porter, the secretary of the mining company, that the payment by Boyden of the notes held by this company for the purchase-money of these lots, was made by Boyden for the benefit of Scott, and that he, Boyden, on taking the deed from the company for the lots, became the trustee for Scott for the title. In equity, Boyden could have been compelled to convey to Scott on his refunding to Boyden the money received of him. But another arrangement was entered into, which was, the execution by Boyden to Scott of the title bond dated January 17, 1857. It is under this bond the equities of complainants arise. It seems, from the testimony of Hartley, the first witness examined on the part of complainants, that he became the assignee of this bond on his sale to Scott of a horse, and as indemnity for signing a note to one Fulk as security for Scott, and which Scott had given to Fulk, with the understanding, when Scott paid for the horse and paid the note to Fulk, he should surrender the bond to Scott, it being assigned as collateral merely, and also surrender the possession of the premises to Scott, they being in Hartley's possession, on the transfer of the bond; and he put Albert Boyden in possession, who was to pay the rent in repairs on the house. Albert Boyden was to hold the premises until the rent at four dollars per month should re-imburse him for the repairs. Hartley surrendered the bond to Scott or to Mrs. Scott. This lease to Albert Boyden was verbal only, and Eben Boyden was present when this arrangement was made, and claimed to be the owner of the premises, and said he could defeat Hartley in a court of law, as his papers were not recorded. In a conversation, about this time, between Eben Boyden and Scott, Boyden contended that Scott owed him seventy dollars on the lots, but Scott insisted he owed him but forty dollars, and said he would pay him. This was soon after the transfer of the bond to Hartley, which was on the 14th of March, 1857.

To prove notice by Marple of Scott's claim, Albert G. Scott deposed, on the part of the complainants, in answer to the interrogatory if he had ever heard Marple say any thing in connection with the purchase of lots four and five in block one, that he heard Marple say he had bought the Scott property of Eben Boyden,—said he had a warranty deed from Boyden, and considered that good. This conversation was on the day Marple purchased the lots. On being asked by Scott if he had a good title, he replied that he had a warranty deed, and considered that good. This conversation was the last of July or first of August, 1859, and Marple was then living in the town of Gold. Albert Boyden was then living on the premises in controversy.

For the purpose of showing knowledge on the part of Nelson and wife of the claim of Scott, Allen S. Lathrop deposed, on behalf of complainants, that he heard Nelson say he had traded with Marple for a couple of town lots, with a house on one of them, in Sheffield, occupied by Mrs. Fellows. This was in the morning of the day he was to go to Sheffield to have the writings made. Nelson said he had given Marple eighty acres of timbered land and a wagon, horse, harness, buffalo skin and whip, and two hundred dollars, and received a cow in addition from Marple. Nelson then told him of some incumbrances on the lots, but don't recollect that Scott's name was mentioned, but "it was somebody and old Mr. Boyden that had a hand in it." He did not state the nature of the incumbrances, but this witness told him he would never get possession of the place or receive a dollar back he had paid. To this, Nelson replied, if he did not get the property Marple was good to him; that he ran no risk in that respect. This witness does not recollect that the name of Scott was mentioned, but it is his impression that the name of Scott was mentioned, for it run in his mind "that it was the father of that Scott (A. G. Scott) that was here to-night." Had known Nelson about two months prior to this conversation, and he had lived in Bureau county about that length of time. Heard Nelson say he had sold the premises to Davis, which sale took place nearly a year after

Nelson purchased of Marple. This witness is not sure that this conversation occurred on the day Nelson went to Sheffield to close the bargain.

This is all the testimony in the record going to show knowledge on the part of Marple or of Nelson of any equity in Scott. The rule is well established, that, where the answer of a defendant in chancery is required to be under oath, so far as it is responsive to the bill and fairly meets the allegations of the complainant, it must be received as true unless it is disproved by evidence amounting to the testimony of two witnesses. *Stouffer* v. *Machen*, 16 Ill. 553.

The evidence of A. G. Scott may raise a presumption of knowledge on the part of Marple that George M. Scott had, at some time, a claim of some kind on these premises, inasmuch as it was spoken of as "the Scott property," but the evidence is not of that positive and conclusive character which is required to overcome a sworn answer in chancery. There is no circumstance in the case connected with this testimony strong enough to bring home a knowledge of Scott's equity to Marple, and thus overcome his sworn answer. He swears positively, that, at the time he purchased the premises from Boyden, in 1858, and received his deed from Boyden, and prior thereto, he had no knowledge, notice or information, either actual or constructive, of Scott's alleged equities; that he acquired his rights in good faith, and for a valuable consideration, without notice of any other claim than that Boyden owned the premises, and without any notice that Scott claimed any interest therein; that Scott was not in the State, and Boyden was then in the possession of the premises. The mere declaration that he had purchased the Scott property, and made to a party having no interest in the subject, cannot, unattended by other circumstances, outweigh this sworn answer of the defendant Marple.

The same may be said of knowledge on the part of Nelson. The testimony of Lathrop amounts to but little. It is quite insufficient to overcome Nelson's answer, which is as positive as Marple's. In that conversation, incumbrances on the prop-

erty were alone spoken of, and an adverse equitable claim is not considered an incumbrance. No claim of Scott to the premises was spoken of, and the only visible incumbrance on them was the possession of Mrs. Fellows, if that could be deemed an incumbrance. The testimony by which to charge Nelson with this knowledge is very weak, and too vague, shadowy and indefinite to prevail against his answer.

A careful consideration of the testimony has not led us to the same conclusion to which the Circuit Court arrived. We find the transaction between Eben Boyden and Marple to have been a fair one, and that the consideration was fully paid by Marple to Boyden, who held the legal title, and that Marple entered into possession of the premises, and so remained for a year or more, when he sold them for a valuable consideration paid to Nelson, neither of these parties having any actual or constructive notice of the equities, if any existed, of complainant's ancestor, George M. Scott.

We have refrained from any comments on the testimony of Niles, a witness on behalf of the defendants, who deposed to a settlement in February, 1857, between Boyden and Scott, of all their business matters pertaining to these premises, for the reason, that it has not seemed to us necessary to cumber this opinion with that testimony, no sufficient proof of knowledge of any equity in Scott having been established against Marple or Nelson.

It was insisted by the counsel for the plaintiffs in error, that, inasmuch as no replication had been put in to their sworn answers, no evidence of any kind could be received by the court.

The statute provides, that, in default of filing a replication, the cause may be set for hearing upon the bill and answer, in which case the answer shall be taken as true, and no evidence shall be received, unless it may be matter of record to which the answer refers. Scates' Comp. 142.

It would have been undoubtedly proper and in strict accordance with the statute so to have set down this case, had not the defendants treated the cause as at issue, and joined in taking

the depositions of the several witnesses, and consenting to set down the cause for hearing on bill, answer, exhibit and depositions. To this they have assented, and cannot now invoke this statute in their favor.

For the reasons we have given, the decree of the Circuit Court must be reversed and the cause remanded.

Decree reversed.

CHARLOTTE A. DICKEY
v.
JOHN MCDONNELL.

1. ASSAULT AND BATTERY — RAPE — *what circumstances control the rule as to damages.* Although a woman may suspect that the advances of a man are prompted by improper motives, and still willingly accompanies him, and refuses to yield to his wishes only from mercenary motives, these facts do not justify him in resorting to violence and threats to induce her consent.

2. Neither could the previous violence be justified on the ground of ultimate assent to sexual intercourse.

3. If such ultimate assent should be freely given, and not induced by any previous violence, or threats, or fear, then such intercourse should not be made the basis of damages, but the right of action for the previous violence would remain.

4. If, however, the ultimate assent should not be freely given, but yielded only as a consequence of the preceding violence or force, then such sexual intercourse should be regarded as a part of the assault, and a ground of exemplary damages.

APPEAL from the Circuit Court of Cook county; the Hon. ERASTUS S. WILLIAMS, Judge, presiding.

This was an action of trespass for an alleged assault and battery, brought in the court below by Charlotte A. Dickey against John McDonnell. A trial resulted in a verdict and judgment in favor of the defendant. The plaintiff brings the cause to this court by appeal.

The only question considered by the court is in reference to the propriety of an instruction given on behalf of the defendant, and which is set forth in the opinion of the court.

Messrs. BELLOWS, BALLARD & ABERCROMBIE, for the appellant.

Messrs. MILLER, VAN ARMAN & LEWIS, for the appellee.

Mr. JUSTICE LAWRENCE delivered the opinion of the Court:

This was an action for assault and battery, the plaintiff also alleging that the defendant attempted to commit a rape upon her. Upon the trial the respective parties were sworn by consent, and the evidence was very contradictory. We do not propose to express any opinion upon it, nor to allude to it further than may be necessary, in order to show the objectionable character of one of the instructions. On motion of the defendant, the court gave the following instruction:

"If the jury believe from the evidence that the plaintiff, on the evening of the day of the alleged assault, willingly rode with the defendant in his carriage, that the motive of the defendant was to have sexual connection with the plaintiff, and that the plaintiff understood or suspected this to be his motive, and after discovering this still freely and voluntarily consented to ride with him until they had reached a secluded place, and that she freely and voluntarily alighted from said carriage, and that the resistance she made to defendant's advances was either feigned or made for the purpose of extorting money from the defendant, and that the plaintiff ultimately voluntarily assented to defendant's advances, then the jury should find for the defendant."

The plaintiff testified that the defendant threw her upon the ground, put his knees on her stomach, choked her, and threatened her, and that she nearly fainted. This testimony is to some extent corroborated by that of plaintiff's sister, who testified that on the next day plaintiff's body was covered with bruises. We do not assert that this evidence was true, but it

was for the jury to pass upon that question; and let us suppose they believed it to be true. The proposition then enunciated in this instruction, when considered upon the hypothesis that the jury should prefer to believe the plaintiff rather than the defendant, is, that, if the plaintiff, when she went to drive with the defendant, suspected that his object was to have sexual intercourse with her, and if she freely alighted from the carriage, and if her resistance was feigned, or made to extort money, and if she ultimately consented, then the verdict must be for the defendant, although such ultimate consent may have been preceded by a process of choking and threatening, in order to bring the plaintiff into a consenting mood. This is certainly not the law. It matters not how suspicious the plaintiff was or had reason to be, of the intent of the defendant; it matters not whether her resistance was feigned or real, to preserve her purity, or to sell her virtue on her own terms and at her own price; it matters not whether she finally assented to the sexual connection,—still, if that assent was preceded by brutal violence administered for the purpose of overcoming her resistance, then for such violence the defendant must be made to answer. It certainly cannot be contended, because a woman would sell her person for one hundred dollars, and would resist with all her physical force any attempt to take possession of her except upon these terms, that, therefore, violence may be lawfully used to overcome her; and if, after such violence had been sufficiently used, she should yield to her pursuer, that this ultimate assent would condone all previous illegality and outrage. Even the poor prostitute must be shielded by the law from violence, and, however low may be the motive of her refusal, we are not aware that it would be lawful to extort her consent by choking her, or that the violence could be justified on the ground that her refusal sprang from mercenary motives.

Neither could the previous violence be justified on the ground of ultimate assent to sexual intercourse. It is true, if such ultimate assent should be freely given, and not induced by any previous violence or threats or fear, then such intercourse

should not be made the basis of damages, but the right of action for the previous violence would clearly remain. If, however, the ultimate assent should not be freely given, but yielded only as a consequence of the preceding violence or force, then such sexual intercourse should be regarded by the jury as a part of the assault, and a ground of exemplary damages. But if, on the other hand, in the case at bar, all the acts of the plaintiff were freely assented to by the defendant, then, it is almost needless to say, he must go free from even nominal damages. The judgment is reversed, and the cause remanded.

Judgment reversed.

Dissenting opinion of Mr. JUSTICE BREESE:

I do not concur in this opinion, for the reason that the plaintiff has no merits. Such as they are, they were fully disclosed to the jury by the testimony of the parties concerned, and the jury have found against the plaintiff on her own evidence. I doubt if a case can be found in the books, where a plaintiff, not having a meritorious cause of action, having failed to obtain a verdict, a new trial has been granted. In my opinion, the record shows that justice was done, and if the instruction was erroneous, we have often said a verdict should not be set aside if the record shows justice was done.

ALONZO LEACH
v.
CHARLES N. PINE *et al.*

1. EXECUTION—*lien—levy.* The rule is unquestionable, that executions placed in the hands of a sheriff become liens on the personal property of the defendant in the county, in the order in which they were received, and these liens are perfected by a levy on such property; other parties could not, under junior executions and liens, by obtaining possession of the property from the

Statement of the case.

custody of the sheriff by fraud, force or otherwise, obtain a priority of right to have their executions satisfied.

2. SAME — *tacking a junior to a prior execution.* Where a sheriff has a number of executions in his hands becoming a lien at different times, and the holder of one of the junior executions purchases two executions, being the first lien on the property, they have no right to tack their junior execution to the oldest execution, and have both satisfied to the exclusion of executions which are intermediate liens; but all should be satisfied in the order in which they became liens.

3. SAME — *levy — possession of property levied upon.* Where a sheriff has in his hands an execution, and levies upon personal property and reduces it to possession, it is then in the custody of the law, and it is not essential to the lien of other executions in his hands, or subsequently received, that they should be formally levied. The payment of the execution under which the levy was made would not affect the liens of the other executions; nor would another officer be authorized to take the property out of the hands of the sheriff to satisfy an execution in his hands. It would be the duty of the sheriff in such a case to retain and sell the property to satisfy such liens. The execution first coming to hand authorizes the seizure of the property, which creates the levy, and while it remains in his possession he is unable to seize it again.

4. LEVY — *property taken from the sheriff by another officer.* Where a sheriff has levied an execution and reduced the property to his possession, and the custodian into whose hands he has placed it, by collusion with another officer, surrenders it to him without the authority of the sheriff or plaintiffs in the executions in his hands, could not affect the liens of the executions in the hands of the sheriff.

5. DECREE — *satisfaction of execution liens.* It is error to decree a satisfaction of a junior execution, out of a fund produced by a sale of property upon which elder executions were prior liens, and to leave these prior liens unsatisfied.

WRIT OF ERROR to the Circuit Court of Will county; the Hon. S. W. HARRIS, Judge, presiding.

This was a bill in equity filed by Alonzo Leach, in the Will Circuit Court, against Charles N. Pine, Joel George, John H. Quinn, Cephas H. Norton, Albert Jewett and Benjamin C. Busley. Subsequently the bill was amended. The bill was to subject a stock of hardware to sale on executions in the hands of complainant against J. H. Mills who had assigned the property for the benefit of his creditors, and to settle the rights of a

number of persons severally claiming to have superior liens on the property.

The property was sold under a stipulation of the parties that the fund should abide a final determination of the suit and be distributed under the decree thus rendered. Other parties filed their bill against the parties to this suit and others, claiming the proceeds of the sale. These suits were consolidated, answers filed and a hearing was had and the money decreed to Norton, Jewett and Busley. To reverse the decree this writ of error is prosecuted.

The facts of the case are stated in the opinion of the court.

Mr. H. SNAPP and Mr. R. E. BARBER, for the plaintiff in error.

Mr. J. H. KNOWLTON, for the defendants in error.

Mr. CHIEF JUSTICE WALKER delivered the opinion of the Court:

Some time in the early part of February, 1859, J. H. Mills, who was then engaged in the business of merchandising, in the city of Joliet, made an assignment of his stock and assets, to J. H. Quinn and Joel George, for the benefit of his creditors. On the 10th day of February, 1859, Norton, Jewett and Busley recovered a judgment in the United States Circuit Court for the Northern District of Illinois, for the sum of $2,451.00, and an execution was issued to the United States Marshall. They, on the 14th day of February, filed their bill in chancery in the District Court, in aid of their execution, making Quinn and George defendants, setting up the levy, and alleging that the transfer by Mills to the assignees was fraudulent, praying that the assignment might be held to be fraudulent, and the property sold to satisfy their execution. This bill was afterward dismissed.

Alonzo Leach, the sheriff of Will county, on the 23d day of February, 1859, filed a bill of complaint against Charles N. Pine, Joel George, John H. Quinn, Cephas H. Norton, Albert

Jewett and Benjamin C. Busley. On the 21st of March following, by leave of court he filed an amended bill. The bill and amended bill allege that he, as sheriff of Will county, by virtue of several executions against Mills, levied upon a stock of hardware, on the third day of February, 1859, and took the same into possession. The bill alleges that Charles H. Pine, in the absence of complainant, fraudulently obtained possession of the goods; that, by virtue of such executions and levies, he, as sheriff of Will county, had advertised the goods for sale; that Norton, Jewett and Busley, in violation of an injunction granted under the original bill, had commenced a suit in replevin in the Circuit Court of the United States, to recover the possession of the goods; and that one Boyer and Bushnell had taken forcible possession of the stock of hardware, and deprived complainant of possession, and prayed a further injunction, which was granted.

Afterward, the parties entered into a stipulation, that the goods be sold, and, on a final determination of the matter, the proceeds of the sale be distributed according to the rights of the parties. Norton, Jewett and Busley then filed their bill in chancery in the Will Circuit Court, against Mills, the debtor, Leach, the sheriff, the assignees, Henry K. Stevens, Elizabeth Mills, B. U. Sharp, George Allen, George N. Sharp and S. O. Simonds, creditors. By these two bills, all of the parties in interest were before the court. And by a subsequent stipulation the two cases were consolidated. And Norton having in the meantime died, an order was made that the suit progress in the name of the survivors.

On the hearing, it appeared that S. O. Simonds, on the 19th day of January, 1859, issued an execution on a judgment for $315 and costs, which he had recovered in the Cook County Court of Common Pleas, against Mills, and directed to the sheriff of Will county, and which came to his hands and was levied on the goods in controversy on the 20th day of that month. Also another execution from the same court for the sum of $150.57 and costs, directed to and received by the sheriff of Will county, which came to hand on the 21st of

January, 1859, and was on the same day levied on the same stock of goods, and another from the same court, directed to and received by the same sheriff on the same day and levied on the same goods, for the sum of $83.14 and costs. And he on the same day received and levied on the same goods another execution from the same court, for two hundred and twenty-one dollars and seventy-five cents and costs. All of these executions were in favor of Sharp, and Sharp and Allen, and against Mills.

Also another execution in favor of Elizabeth Mills and against John H. Mills, on a judgment recovered in the same court, for the sum of $1,325, dated January 19, 1859, and which came to the hands of Leach as sheriff, on the 3d day of February, 1859, and was levied on this stock of hardware on that day. Likewise, another execution on a judgment recovered in the Will Circuit Court for $344.43 and costs, in favor of Henry K. Stevens and against Mills, which came to the hands of the sheriff and was levied on the stock of hardware on the 3d day of February, 1859. It appears from the evidence that these several levies were never released, set aside or discharged.

On the hearing, the court below decreed that the money in the hands of the sheriff be paid to Norton, Jewett and Busley, and that the sheriff deliver over to them all or any lands or securities for the payment of money, given or executed for the purchase of property at the sale. And the case is now brought to this court and a reversal is asked on several grounds, the principal of which is that the decree is inequitable and unsupported by the evidence.

The proposition will not be questioned, that all executions coming to the hands of the sheriff became liens on this property in the order in which they were received, and it is equally true, that, by the various levies made by the sheriff, these liens were perfected and fully consummated, as against all other subsequent liens whether by execution or otherwise. When the sheriff completed his levies by seizing the property and reducing it to possession, other parties having junior executions

and liens could not gain a preference by obtaining possession by force, by fraud, or, in fact, by any means except on the abandonment of the former levies, or by such liens being satisfied and discharged. The executions, then, in this case, became liens in the order in which they came to the hands of the sheriff. And it appears that the execution of Norton, Jewett and Busley was last delivered to the officer to execute, and the lien created by it was junior to all of the others. But it is insisted that the sheriff, after it was levied, abandoned the prior levies made by him, and that Norton, Jewett and Busley's execution thereby became preferred to the others. We will proceed to examine that question, as upon it the whole controversy turns.

The testimony of Smith and Bushnell seems to establish the fact that there was, when they first called on Leach, two executions in his hands, one in favor of Smith and Goodell and the other in favor of the Merchants and Drovers' bank, and both of them levied. Also, that there were other executions in his hands, but which, as they testify, the sheriff said were not levied. They further testify that Bushnell purchased the first two executions and had them assigned. Bushnell says they amounted to about six hundred dollars. He further states that Leach said he was not going to levy the other executions, as if the assignment was valid there was nothing to levy upon, and if it was not, they were liens upon the property. Opposed to this is the affidavit of Leach, his deputy, and of Mills that these executions were levied, and the indorsements on the executions show that they were levied, perhaps, as early as this conversation occurred.

While the purchaser of the Smith and Goodell and the Merchants and Drovers' bank executions was substituted to the prior lien created by their levy on the goods, he did not have the right to tack to these executions that of Norton, Jewett and Busley and cut off the prior liens of the other executions to that of the lien of Norton, Jewett and Busley.

When a sheriff has in his hands an execution, and levies upon property and reduces it into possession, he then has it in the

custody of the law, and it is not essential to the lien of other executions in his hands at the time, or subsequently received, that they should be levied. The discharge of such a levy by the plaintiff in execution, or by the payment of the execution by the defendant, would not, in the least, change the liens of the executions in the hands of the sheriff and not levied, nor would it authorize the defendant to resume possession of the property levied upon, nor would it authorize another officer having a junior execution to take the property out of the hands of the sheriff to satisfy his execution. But, in such a case, it would be the duty of the sheriff to retain the property under the liens of the other executions, and he may indorse a levy on them if he choose, and should sell the property to satisfy such liens. The first execution justifies the seizure of the property, and, when satisfied or otherwise discharged, the subsequent executions authorize and require him to retain and sell it for their satisfaction. Having already seized the property when he made the levy, he is unable to do so again while it is in his possession. And the seizing of the property and reducing it to possession is the levy, and the execution authorizes and requires it, and the indorsement is only the evidence of the fact.

It is clear, from the evidence of Smith and Bushnell, that the levy had been made, and that the sheriff was then in the possession of the property, and that other executions were then in his hands which he claimed were also a lien on the property, subject to the executions under which it had been seized. And we infer from the record, although the case has not been prepared so as to leave it without doubt, that these executions were those levied on the 19th and 20th of January and the 3d of February. If so, nothing that was subsequently done could in any manner have changed or defeated the lien that was created by placing them in the hands of the sheriff.

The obtaining possession under the execution in favor of Norton, Jewett and Busley, whether by fraud on the part of Bushnell, or by collusion of the custodian and the assignees with the marshal could not, without the assent of the sheriff or of

the several plaintiffs in execution, in the slightest degree prejudice the liens of these execution creditors. And there is no pretense that the sheriff voluntarily parted with the possession of the property, and, in the absence of all evidence, we will not conclude that he voluntarily rendered himself liable for the amount of these several executions by parting with property held for their satisfaction. Nor is there any evidence in the record from which it may be inferred, that any of the judgment creditors released their liens under their executions.

The evidence seems to be abundant, that the judgment in favor of Elizabeth Mills was fraudulent, and, if so, the execution would also be void and of no effect. The court, therefore, did right in excluding it from all participation in the fund. But the decree was erroneous in preferring the execution of Norton, Jewett and Busley to the others.

Upon this record, it would have been proper, if set up by the pleadings, that the assignee of the executions in favor of Smith and Goodell and the Merchants and Drovers' bank, if still unpaid, should have been first satisfied out of the fund as a first lien; then to have paid the other executions in favor of Simonds, Sharp & Allen, and Stephens, in the hands of the sheriff, excluding the execution in favor of Elizabeth Mills, in the order in which they came to his hands; and, lastly, the remainder of the fund, if not more than necessary for the purpose, to the execution in favor of Jewett and Busley, survivors, etc.; and, if any surplus, to pay it to the assignees.

No question arises on the assignment, as the property was sold and a distribution was to be made by the terms of the stipulation of the parties. It was a technical error, but perhaps not such as to require a reversal, that the decree was in favor of Norton, who was dead. It was an inadvertence not likely to again occur. The decree is reversed and the cause remanded.

Decree reversed.

Syllabus. Statement of the case.

THE ILLINOIS CENTRAL RAILROAD COMPANY
v.
NELSON T. WATERS.

1. CARRIERS—*liability for damages by reason of delay in transportation—duty of the shipper.* Where a lot of cattle is placed in cars provided for them by a railroad company, for transportation, in time for the next regular cattle train, the station agent of the company at the place of shipment having knowledge of the fact, it is the duty of the company to carry the cattle by the next train, and by their neglect so to do they will be liable for whatever damage may result to the cattle by reason of the delay.

2. Where the train which should have taken the cattle, passed the station at which they were waiting between ten and eleven o'clock at night, and the owner allowed the cattle to remain in the cars until nine o'clock the next morning before he took them out, he was not chargeable with any want of proper diligence in removing them. It was not his duty, although he did not then intend to allow the company to complete the carriage, at once, upon the passing of the train at such an hour in the night, to take the cattle out of the cars to prevent injury to them by being thus confined.

3. MEASURE OF DAMAGES *in such a case.* The damages resulting to cattle from being confined in cars an improper length of time, are matter, in a great degree, of opinion. The fact that the cattle were without food, under circumstances where the owner could not properly be expected to provide it, is a proper element to enter into the calculation of damages.

APPEAL from the Circuit Court of Iroquois county; the Hon. CHARLES R. STARR, Judge, presiding.

This was an action on the case brought in the court below by Nelson T. Waters, against the Illinois Central Railroad Company, as a common carrier, for injury to a lot of cattle, resulting from delay in transportation.

A trial resulted in a verdict in favor of the plaintiff for $290, and judgment was entered accordingly, from which the company took this appeal.

So much of the case as is necessary to an understanding of the questions decided, will be found in the opinion of the court.

Messrs. WOOD & LONG and Mr. GEORGE C. CAMPBELL, for the appellant.

Mr. T. LYLE DICKEY, for the appellee.

Mr. JUSTICE BREESE delivered the opinion of the Court:

This was an action on the case brought in the Iroquois Circuit Court by Nelson T. Waters, against the Illinois Central Railroad company, as a common carrier, for neglecting to carry forty-four head of cattle from Loda to Chicago, and detaining them in the cars on the track at Loda one night.

The proof shows, the cattle were put on the cars in time for the regular night train, with the knowledge of the station agent; and that, soon after they were put on, two cattle trains of defendants passed the station without stopping to take those cars. This was between ten and eleven o'clock at night.

The cattle remained on the cars all night, when plaintiff took them out and drove them home.

They were considerably injured by remaining in the cars, the extent of which was left to the jury, on the evidence.

The only question is one of damages. The appellants make the point, that, after the trains had passed without taking the plaintiff's cattle, he should *then* have unloaded them if it was the intention of the owner not to allow appellants to complete the carriage, and the company would have been liable only for the expenses of loading and unloading, which would have been about twelve dollars, and for such other damages as the cattle might have sustained, and that there was nothing to prevent the unloading "except simply to help roll the cars along to the shute," and if this had been done the cattle would have suffered no appreciable damage, and by not doing this the appellee was guilty of negligence. The appellants press this point with apparent earnestness and confidence, but we are unable to discover its force.

It is rather too much for a railroad company, whose agent has neglected his duty, which it appears this agent did, by not signaling the cars to stop, to require a shipper of cattle, who has done all his duty by placing them on the cars, to unload them, and hunt a place to keep them securely, at eleven o'clock at night. The shipper was bound to no such diligence. When

the cattle were placed on the cars provided for them, it was the duty of the company to carry them by the first train, as they were in time for it. The agent did not signal the train to stop, and the shipper was constrained to leave his cattle all night in the cars, and until nine o'clock the next morning, by which they suffered very considerable damage, as they came out "jammed, lank and rough, and one steer had a horn knocked off." They were fat cattle, and all of them were more or less bruised, and had no food on the cars. It was testified that cattle standing that length of time in cars, would, generally, shrink one hundred pounds a head. The weather was warm for the season. One witness states they were damaged eight dollars a head, and were worth less because they were lank, and their hair looked rough and was rubbed off of some of them. They were intended for the Chicago market, and were worth then from eighty-five to ninety dollars a head.

It seems, from the testimony, that, on failure of the company to carry these cattle, the owner drove them to Chicago, and three days after they reached there, they looked rough, as though they had been badly treated. It may not, perhaps, be entirely proper to charge all this against the appellants, as the owner may have misused them, but the presumption is, as he was about to expose them in the greatest cattle market of the West, he took special pains to make them saleable and give them a good appearance.

That they were deteriorated very considerably on the cars, there can be no question. The damages were a matter, in a great degree, of opinion. The jury have found in accordance with such opinions as were given to them by the several witnesses.

As to certain questions put to some of the witnesses, and their answers, to which objection is made, that of Wardell was competent. The damage was matter of opinion, and the fact the cattle were without food, was, under the circumstances, a proper element to enter into the calculation, for the reason the owner could not have provided food for them, as he could not have the remotest idea the cattle would be delayed all night,

after being delivered to a railroad company, whose zeal, promptness and fidelity are so proverbial. Their exposure without food was, therefore, properly chargeable to the company.

Railroad companies, exercising the great powers they do, and enjoying such valuable privileges as have been conferred upon them, are bound to respond, by providing the most ample accommodations for the public, and by discharging every duty imposed on them, with fidelity and dispatch. A failure in this, necessarily must subject the companies to such damages as parties contracting with them sustain thereby.

Perceiving no error in the record, the judgment is affirmed.

Judgment affirmed.

BOHAN S. SHEPARD
v.
PHILANDER BUTTERFIELD *et al.*

1. EVIDENCE—*in suit on replevin bond—admissibility.* Where, upon a nonsuit being entered in an action of replevin, the court ordered a return of the property and assessed damages for its detention, evidence of such assessment cannot be given in a subsequent action on the replevin bond. The bond does not require the payment of such an assessment.

2. While, under the general breach assigned upon the bond, evidence of damages suffered by the detention prior to the order of *retorno habendo,* would be admissible, yet it must be evidence of what the damages in fact were, without any reference to the former assessment.

3. The plaintiff in the action on the bond is at liberty to go into the question of damages for the detention, but he is not obliged to do so. He may abide by the first assessment, and take a verdict in the pending suit merely for the value of the property.

4. ACTION ON REPLEVIN BOND—*effect of recovery of damages for detention on the former assessment.* If the plaintiff in the action on the bond does in fact offer evidence upon the damages for the detention of the property, the verdict and judgment in that case, when paid, will be a bar to the collection of damages under the former assessment.

5. EVIDENCE *to show what was litigated in another suit—when admissible.* If the record in the suit on the bond shows that a recovery was had for

damages, the record cannot be controverted, and a pleading in another action which alleges to the contrary is bad on demurrer.

6. But it not appearing by the record whether the question of damages for the detention was litigated in that case, or whether the recovery was only for the value of the property, the parties can show in a subsequent suit, by parol evidence, what causes of action were in fact litigated.

7. EXECUTION—*on a judgment for damages in an action of replevin.* An execution can issue on an assessment of damages upon the dismissal of an action of replevin.

APPEAL from the Circuit Court of Cook county; the Hon. ERASTUS S. WILLIAMS, Judge, presiding.

The opinion states the case.

Mr. F. H. KALES, for the appellant.

Mr. OBADIAH JACKSON, for the appellees.

Mr. JUSTICE LAWRENCE delivered the opinion of the Court:

Shepard replevied a canal-boat from Butterfield and Adams, and, suffering nonsuit, the court ordered a return of the property, and assessed $800 damages for its detention. Subsequently, Butterfield and Adams brought suit in the name of the sheriff, on the replevin bond, and recovered a judgment for $1,200 damages, which was paid. Execution was not taken out within the year on the judgment for $800, and a *sci. fa.* is now brought to revive it. The defendant, in his third plea, sets up the suit on the replevin bond, and avers, that, in the declaration in that suit, the plaintiffs, for breach of the condition of the bond, alleged "that said Shepard had not prosecuted his said replevin suit to effect, but had suffered a nonsuit therein, and that said Shepard had not at any time paid to said Butterfield, or to said Adams, the said sum of $800, or any part thereof so as aforesaid adjudged to them by the court. The plea further alleges that the plaintiff in the suit on the bond, recovered the said sum of $800, assessed as damages in the replevin suit. The plaintiffs replied, thirdly, to this plea, that, on the trial of the suit on the replevin bond, all evidence

touching the $800 was excluded by the court; and, fourthly, that the $800 mentioned in the *sci. fa.* was not in fact recovered in the suit on the bond. These replications, on demurrer, were held good.

It is objected by the appellant, to these replications, that they seek to contradict the record by parol evidence. It is urged that the declaration, in the action on the replevin bond, shows the damages for the detention to have been litigated in that suit. This, however, is a misconception. This question may have been litigated, but this fact does not appear from the record. The averment in the declaration that Shepard had not paid the said assessment of $800, showed no breach of the bond, and was mere unmeaning surplusage. The bond did not require the payment of such assessment, nor could any evidence in regard to it have been admitted on the trial, without violating the plainest principles of law. The security on the bond was no party to that assessment. As against him it was wholly inoperative. While, under the general breach assigned upon the bond, evidence of damages suffered by the detention prior to the order of *retorno habendo*, would have been admissible, yet it must have been evidence of what the damages in fact were, without any reference to the former assessment. But while the plaintiff was at liberty to go into that question, he was not obliged to do so. He was at liberty to abide by the first assessment, and take a verdict in the pending suit merely for the value of the property. If he did in fact offer evidence upon the damages, the verdict and judgment in that case, when paid, would undoubtedly be a bar to this *scire facias*.

The defendant in his plea avers that the plaintiff did recover in that suit the said sum of $800, and this averment is traversed by the replications. If it appeared by the record that such recovery was had, we should hold, as insisted by the defendant, that the record could not be controverted. But it does not so appear. As already stated, the averment in the declaration, that the $800 had not been paid, did not show a

breach of the bond sued upon, nor was such averment in any way material.

Whether the question of damages for the detention was litigated in that case, or whether the recovery was only for the value of the canal-boat, is a question of fact not settled by the record. It is like a declaration in assumpsit with only the common counts. In such cases, the parties can show, in a subsequent suit, by parol evidence, what causes of action were in fact litigated. *Phillips* v. *Burch*, 16 Johns. 139; *Standish* v. *Parker*, 2 Pick. 20, and note; *Parker* v. *Thompson*, 3 id. 429. As already stated, in the suit on the replevin bond, the assessment of $800 would not have been competent evidence. The only proper evidence was the value of the boat, and the actual damages for the detention, independently of what the damages had been assessed at, in dismissing the replevin. But the plaintiff was not obliged to go into the question of damages. He had the right to proceed for the value of the boat, and, as to the damages, abide by the former assessment. Whether the damages were then litigated, is open to proof. The case of *Van Vechten* v. *Troy*, 2 Johns. 228, is directly in point. That was an action of trespass for injury to two horses, the trespass upon one of them having been committed on one day, and that upon the other on another day. On the trial, the court compelled the plaintiff to elect for which trespass he would proceed. He did so, and recovered a verdict for the value of one horse. His executors afterward brought a suit for the trespass to the other horse. The defendant pleaded the former recovery, and the plaintiff replied the above facts. The defendant demurred to the replication, as in the case at bar. The court, KENT, Ch. J., held the replication in substance good, and say, "a recovery in a former action, apparently for the same cause, is only *prima facie* evidence that the subsequent demand has been tried, but is not conclusive." See also *Seddon* v. *Talpot*, 6 Term, 607, and numerous other cases cited in the note to the case in 2 Pick. *ubi supra*. So in this case. The plaintiff could not legally have given the assessment in evidence in the suit on the bond. He might have

offered other evidence as to the damages, but the question of damages was not necessarily, and at most only apparently, involved in that suit. That record is only *prima facie* evidence, and the replications to the plea are good.

It is also urged that an execution cannot issue on an assessment for damages upon the dismissal of the replevin. The statute authorizes a judgment upon the assessment, and the execution follows as a necessary incident. To make an assessment, and give no means of collecting it, would be but an idle ceremony, not contemplated by the statute.

Judgment affirmed.

JAMES M. POTTER *et al.*
v.
JOHN POTTER *et al.*

1. CHANCERY — *bill to impeach a will — evidence.* On the trial of an issue of fact under a bill to impeach a will, it is not error to permit defendant to read the original affidavit filed on the proof of a will in the probate court. And an objection that the original and not a copy of the affidavit was read to the jury comes too late when made for the first time in this court.

2. EVIDENCE — *sufficient to establish a will.* Where the evidence shows that a will was reduced to writing under the dictation of the testator, was signed by him as written at his request, and he made his mark, and is attested by two witnesses as required by the statute, by signing their names in his presence, and they swear that they believe he was of sound mind and memory at the time, and that the will was read to testator before it was executed, *held*, that it is a compliance with the statute, and sustains the verdict of a jury finding in favor of the validity of the will.

3. INSTRUCTIONS — *not calculated to mislead.* An instruction which omits to inform the jury that it is necessary that the witnesses should attest the will in the presence of the testator, where there is no conflict of evidence on that question, and the subscribing witnesses swear that they attested in the presence of deceased, is not calculated to mislead the jury, as it is not error for which a reversal will be had. This is especially true where the jury are so informed by another instruction which is given.

4. SAME — *burden of proof.* An instruction which informs the jury that it devolved upon those seeking to impeach the will to prove that it was not

Statement of the case.

read to testator before he signed it, is inaccurate, as in such a case as this those affirming the validity of the will must prove it, but where there is no conflict of evidence on the question and the proof is clear and satisfactory that it was so read to him, and those contesting the validity of the will have mani festly not been prejudiced by the instruction, the verdict of the jury will no be disturbed. Had there been a conflict of evidence it would have been other wise.

WRIT OF ERROR to the Circuit Court of Woodford county; the Hon. S. L. RICHMOND, Judge, presiding.

This was a suit in chancery commenced by James M. Potter, Ephraim Potter, Mary Spicer, William Potter, Sterling Potter and William Potter, to the April Term, 1864, of the Woodford Circuit Court, against John Potter, William Potter, Albert Potter, Sereney Warner, Sinford Warner, Martha Warner, Joseph B. Warner, Catharine Harner, James Harner, Albert Potter and Marian Potter. The bill charges that the will to impeach which it was filed was procured to be made by the devisees and legatees named therein.

The defendants answered, admitting the execution of the will, but denying all fraud, conspiracy and undue influence, and insisting upon its validity,—that it was legally executed and made by testator of his own free will and accord.

A replication was filed, and an issue of fact was formed, whether the instrument was the last will and testament of deceased. A trial was had by the court and a jury, who, after hearing the evidence, and being instructed by the court, found this verdict: "We, the jury, find the will in controversy to be the last will and testament of Ephraim Potter, deceased." Complainants entered a motion for a new trial, which the court overruled, and rendered a decree dismissing the bill, to reverse which they prosecute this writ of error.

Messrs. CLARK & CHRISTIAN, for the plaintiffs in error.

Mr. A. E. STEVENSON and Mr. JOHN BURNS, for the defendants in error.

Mr. CHIEF JUSTICE WALKER delivered the opinion of the Court:

This was a suit in chancery, commenced by plaintiffs in error, in the Woodford Circuit Court, against defendants in error, for the purpose of setting aside and canceling a will under which defendants claimed to hold certain real estate described in the bill. It appears that Ephraim Potter, on the 11th day of December, 1860, executed an instrument in writing purporting to be his last will and testament. That he died in January, 1861, leaving complainants and defendants as his heirs at law. By that instrument he divided his real estate, and bequeathed his personal property to his widow and to a portion of his heirs, who were made defendants to this bill. The bill alleges, that the will was not dictated or written by deceased, but was dictated in part by Abram Potter, by J. A. Hays, and in part by Elizabeth Potter, his widow, and still another portion by Marian Potter. That Abram, Marian and Elizabeth entered into a conspiracy to have the will drawn as it now appears, and thus to obtain the property to the exclusion of complainants. That deceased did not sign the will, or cause it to be signed, nor did he acknowledge it to be his will, or request any person to attest it as a witness. That Elizabeth, Abram and Marian Potter exercised an undue influence over deceased in his life-time to procure the execution of the will, and that it was made under such influence. The will was probated in the County Court, and L. P. Heriford was duly appointed executor of the will, and was acting as such when the bill was filed.

Defendants filed their answer, in which they allege, that the will is in due form of law; that decedent procured the same to be drafted; that he executed it, and that it was duly witnessed by J. A. Hays and W. H. Cummings; that they attested it at his request, in his presence, and in the presence of each other; that deceased was illiterate and unable to write, but executed it by making his mark. They deny all conspiracy, and all fraud and undue influence, but insist that it was made of the free will of deceased. They deny that any of them

dictated the will or any portion thereof. They allege that testator caused his name to be signed to the will, after which he made his mark. A replication was filed to the answer, and an issue of fact was formed and submitted to a jury, who found in favor of defendants, and thereupon the court below dismissed the bill.

On the hearing, the court admitted the original affidavit of the proof of the execution of the will, which was filed in the County Court, as evidence to the jury. It is insisted that in this the court erred, as a certified copy, and not the original, is evidence. The paper was proved by the clerk of that court to be the original, on file in his office. It does not appear that this objection was urged on the trial below, and it comes too late when made for the first time in this court. This is of that class of objections which is merely technical, and if the original was not evidence, the objection should have been specifically made, as it could have been readily removed, and the party offering it have the benefit of the paper as evidence. *Cross* v. *Bryant*, 2 Scam. 36; *Sargent* v. *Kellogg*, 5 Gilm. 281; *Swift* v. *Whitney*, 20 Ill. 144; *Russell* v. *Whitesides*, 4 Scam. 11. The statute has made a certified copy of the affidavit evidence, but the original could prove no more or less than a copy; and, unless an objection was made that it was the original, and not a copy, when it was offered, there was no error in admitting it. The objection, however, was general, and we must presume it was intended to apply to its relevancy to the issue.

The objection that testator was incapable of making a valid will, by reason of imbecility of mind, was abandoned on the trial below. And, from an attentive examination of all the evidence in the case, we think it sustains the verdict of the jury in finding that the will was duly executed. The evidence abundantly shows that it was reduced to writing under the dictation of testator, and was signed by him. There can be no question that his name was written to the will at his request, and that he made his mark to it for the purpose of executing and publishing it as his will. And it was attested by two witnesses, as the statute requires, who signed their

names in his presence, and they swear that they believe he was of sound mind and memory at the time. It also appears that the will was read to him before it was executed; and he dictated its terms and provisions. And in all this the statute seems to have been fully, if not literally, complied with in all of its requirements, and unless fraud appears, it must be held as a valid and binding instrument. The question of fraud was presented to and passed upon by the jury, and we think the evidence sustains the verdict by which the jury have found that it was not made or procured by fraud, or under undue influence exercised on testator by any person.

It is, however, insisted, that the ninth and thirteenth instructions, given for the defendants, were erroneous, and may have misled the jury. The ninth, in specifying the statutory requirements, necessary to a valid execution of a will, omits to inform the jury that it was requisite that the witnesses should attest the will in the presence of the testator. To have rendered this instruction precisely accurate, this should have been stated; but, as there was no conflict of evidence on that question, and as the witnesses called by plaintiffs in error stated that they did sign it in testator's presence, we do not see that the jury could have been misled. It did no injury to complainants, and, unless we can see that a party has, or at least may have, sustained some injury by an erroneous instruction, we should not reverse for that reason. But the fourth of complainants' instructions fully instructs the jury on this, as well as all other statutory requirements.

The jury are informed, by the thirteenth instruction given for defendants, that it was not necessary for them to prove that the will was read to testator, but it devolved upon complainants to prove that it was not read to him. In the case of *Rigg* v. *Wilton*, 13 Ill. 15, this court adopted the construction given to the Kentucky statute from which ours was copied, as given by the Court of Appeals in that State. It was held, that, on the trial of the issue under the statute, the burden of proof is on the party affirming the execution and validity of the will. And the party is bound to prove affirmatively, that the con-

tested paper is the last will and testament of the testator. In a bill of this character it is necessary, the will must be probated anew, as though it was for the first time presented for proof. But in this case there was no conflict in the testimony that the will was read to testator before he executed it. And although the instruction may not have been accurate, still with clear, positive, uncontradicted evidence, that the will was read to him, complainants could not have suffered any wrong by the giving of this instruction. Had there been any conflict in the evidence then it would have been otherwise. We therefore perceive no such error in this record as requires a reversal of the decree, and it must be affirmed.

Decree affirmed.

ANDROS B. STONE

v.

THE GREAT WESTERN OIL COMPANY.

1. BURDEN OF PROOF—*in suit by a corporation—under plea of nul tiel corporation.* In a suit by a corporation upon a call on a subscription to the capital stock of the company, under the issue on the plea of *nul tiel corporation,* the *onus* is upon the plaintiff to prove its corporate existence.

2. CORPORATION *under the general law—proof of its corporate existence—what is sufficient.* Where the corporation claims to have organized under the general law of 1857, authorizing "the formation of corporations for manufacturing purposes," it is not necessary to the proof of its corporate existence, under the plea of *nul tiel corporation,* that it should appear, the duplicate of the writing by which the association was constituted was filed in the office of the secretary of State, as required by the act.

3. SAME—*whether filing the duplicate is necessary.* It has been *held,* that such a requirement is directory only, and the omission to file the duplicate would not defeat the organization.

4. SAME—*in what proceeding such an omission might be availing.* It has also been *held,* that, when a company had taken all the steps to be incorporated under the general law of 1849, but had omitted to file the certificate of incorporation in the office of the secretary of State, such a non-compliance with the statute might sustain a *quo warranto* on behalf of the people and oust the cor-

porators from the exercise of their franchise, but it does not necessarily follow that it is not, as to third persons, a corporation.

5. PRACTICE — *when the specific objection to evidence must be stated on the trial.* If an objection to evidence which can be obviated by further proof, be not specifically made on the trial, it will not avail as a ground for reversing the judgment.

6. So in a suit by a corporation, under a plea of *nul tiel corporation,* the plaintiff offered in evidence a paper purporting to be a license, such as is required by the general law under which the plaintiff claimed to have become incorporated, but such paper was without signature or seal, it being agreed by the parties that the proper clerk, whose testimony was waived, would swear that a license issued in the form of the copy thus offered. The defendant made no specific objection, but a general one only, to the paper. It was *held,* the specific objection should have been made, as the original might have been produced or its absence accounted for.

7. SUBSCRIPTION *to stock — calls thereon — when legally made.* Where the contract of subscription to the stock of a company which is to be incorporated under the general law, provides for the payment of calls thereon "in conformity with the general incorporating law of the State, and the by-laws of the company made under the same," the amount for which a call may be made will not necessarily be controlled by the general law, if the by-laws prescribe a different rule in that regard.

8. SAME — *when the party upon whom a call is made is estopped from questioning its regularity.* Even where a call on such a subscription is improperly made for the whole amount, the party upon whom the call is made ought to be estopped from objecting to the irregularity by the fact that he was a director in the company, and co-operated with the other directors in making the order, and also participated in a prior meeting of the stockholders at which the directors were instructed to make the order for such call.

9. SAME — *of the consideration and whether there is a promise.* A subscription to the stock of a company in contemplation of its becoming incorporated, to accomplish any legitimate object, is a valid contract between the parties, supported by a sufficient consideration.

APPEAL from the Superior Court of Chicago; the Hon. VAN H. HIGGINS, Judge, presiding.

This was an action of assumpsit brought in the court below by the Great Western Oil company against Andros B. Stone, to recover the amount of a call on the subscription of the defendant to the capital stock of the company, in contemplation of its becoming incorporated under the act of February

18, 1857, authorizing "the formation of corporations for manufacturing, mining, mechanical or chemical purposes."

The defendant pleaded the general issue and *nul tiel corporation.* The cause was tried before the court without a jury.

The plaintiffs, to support the issue on their part, gave in evidence the contract of subscription, as follows:

"GREAT WESTERN OIL COMPANY, CHICAGO, ILL.

"CAPITAL STOCK, $200,000.

"We, the subscribers, agree to take the number of shares of capital stock in the Great Western Oil company set opposite our names, respectively, and to pay the calls upon the same in conformity with the general incorporating law of the State of Illinois, and the by-laws of the company made under the same:

B. F. Pond, fourteen hundred shares, March 15, 1857.
Geo. Griswold, by B. F. Pond, eighty shares.
J. S. Holbrook, five shares.
James M. Mosley, five shares.
Edward Leonard, by N. F. Curryll, five shares.
N. F. Curryll, five shares.
S. L. Foster, ten shares.
James L. Lamb, thirty shares.
J. Condit Smith, by B. F. Pond, forty shares.
Henry Smith, Chicago, forty shares, April 3d, 1857.
A. B. Stone, Chicago, twenty shares."

Also, a certain certificate filed with the clerk of the Circuit Court of Cook county, as follows:

"These presents certify, that Henry Smith, Andros B. Stone, James L. Lamb, Barrizillia F. Pond, together with others, are desirous of founding an incorporated company under and by virtue of an act of the legislature of Illinois, entitled 'An act to authorize the formation of corporations for manufacturing, mining, mechanical and chemical purposes,' approved February 18, 1857. Said incorporated company to be named the 'Great Western Oil Company,' to be engaged in the man-

ufacture of oil, with a capital stock of two hundred thousand dollars, divided into two thousand shares of one hundred dollars each, and to continue in existence for fifty years from the date of this certificate; the operations of the said company to be carried on in the city of Chicago, Cook county, Illinois, and its board of directors to consist of seven members, and for the first year to be composed of the following named persons: Henry Smith, Andros B. Stone, James L. Lamb, John Evans, Benjamin F. Carver, John C. Smith and Barrizillia F. Pond.

"The subscribers therefore pray that a license may issue according to law.

"CHICAGO, April 2, 1857.

(Signed) "HENRY SMITH,
"B. F. POND,
"A. B. STONE,
"JAMES L. LAMB."

"STATE OF ILLINOIS, } ss.
"COOK COUNTY, }

"On the second day of April, in the year of our Lord one thousand eight hundred and fifty-seven, personally appeared before me, Gideon W. Davenport, notary public, in and for the city of Chicago, in the county of Cook, and State of Illinois, the above named Henry Smith, Andros B. Stone, James L. Lamb, Barrizillia F. Pond, known to me, and who subscribed the foregoing certificate, and acknowledged that they executed and subscribed the said certificate freely and voluntarily, for the uses and purposes therein set forth.

"Witness my hand and notarial seal, the day and year above written.

"GIDEON W. DAVENPORT,
[SEAL.] "*Notary Public.*"

Plaintiff then offered in evidence, and asked to read to the court, a certain paper in writing, purporting to be a license. The circumstances under which this paper was offered in evidence, as stated by the judge who tried the cause, were these:

"The counsel for the plaintiff held in his hands a certificate and form of license, without signature or seal. The attorney agreed to dispense with the testimony of the clerk of the Circuit Court, in regard to the filing of the certificate, and, I understood it, in regard to issuing of the license in the form which was then presented by the plaintiff's attorney. The attorneys agreed to waive the testimony of the clerk of the Circuit Court, and admitted that the clerk would swear that the certificate was duly filed at the date that it purported to be filed, and that thereupon a license issued in the form of the copy presented to the court. No objection then being made for want of a seal, or any other specific objection, but a general one only, the court admitted the testimony."

To this ruling the defendant excepted. Thereupon plaintiff's counsel read said paper, which is in words and figures following, to wit:

"Whereas, in conformity with the provisions of an act of the legislature of Illinois, entitled, 'An act to authorize the formation of corporations for manufacturing, mining, mechanical, and chemical purposes,' approved February 18, 1857, a certificate, duly executed and acknowledged by Henry Smith, Barizzillia F. Pond, Andros B. Stone, and James L. Lamb, according to the provisions of said act, has been this day filed in the office of the clerk of the Cook county Circuit Court, and a duplicate thereof filed in the office of the secretary of State:

Now, therefore, under and by virtue of the authority in and by said act granted and conferred, I, William L. Church, clerk of the said Cook county Circuit Court, do hereby by these presents, license and empower the said Henry Smith, Barrizillia F. Pond, Andros B. Stone, James L. Lamb, and others who may be associated with them, to organize an incorporated company in conformity with the provisions of said act, to be named the 'Great Western Oil Company,' to be engaged in the manufacture and sale of oil, with a capital stock of two hundred thousand dollars, divided into two thousand shares of one hundred dollars each, and to continue in existence fifty years from the

date of said certificate, to wit: the second day of April, in the year one thousand eight hundred and fifty-seven. The operations of said company to be carried on in the city of Chicago, Cook county, Illinois, and its board of directors to consist of seven members, who for the first year shall be, Henry Smith, Andros B. Stone, James L. Lamb, Benjamin F. Carver, John Evans, John C. Smith, and Barrizillia F. Pond.

"In testimony whereof, I have hereunto set my hand and the seal of the said Cook county Circuit Court, this third day of April, in the year of our Lord one thousand eight hundred and fifty-seven."

It was admitted that the file dates marked on said certificate, and on the paper writing last mentioned, are the correct dates on which the said certificate and paper writing were filed.

Matthew Taylor testified on behalf of the plaintiff: Was in the employment of plaintiff since April 2, 1857, down to April 10, 1858, in Chicago, as secretary and treasurer of the company; defendant, Stone, was present at all the meetings of directors and stockholders during the time I was secretary, which were held at the office of the company in Chicago, April 2, 1857, April 3, 1857, April 4, 1857, July 3, 1857, April 7, 1858, April 8, 1858, April 13, 1858; I cannot say what was said by defendant, and refer to the "book of records" for what was done; I cannot say that the defendant, Stone, wrote any letter or letters in respect to his subscription as secretary of the company; I wrote him on the 14th of November, 1857, touching his subscription, a copy of which is as follows:

"14 Nov. 7.

"A. B. STONE, Esq.:

"*Dear Sir*—You are hereby notified that the balance of your subscription to the stock of the Great Western Oil company, amounting to fifteen hundred dollars, is past due.

"Immediate payment is respectfully requested.

"By order of the president.

"MATT. TAYLOR, *Secretary*."

Statement of the case.

Defendant made payments of money to plaintiff as follows: June 16, 1857, $250; June 22, 1857, $350; and it appears, from the cash book in my handwriting, that defendant made further payments as follows: April 18, 1858, $103.48; May 1, 1850, $200; Oct. 11, 1858, $26.95; all of which sums were paid on account of defendant's subscription to the capital stock of the company; the defendant was kept thoroughly advised by me, either orally or in writing, of the condition of the plaintiff's affairs, and of the action of the board of directors, he being present at all the meetings; I gave notice of calls of stock subscription, both orally and in writing, repeatedly; a preliminary meeting of the proposed stockholders was held April 2, 1857, when a form of application for the license was submitted to the meeting. A meeting of the same persons was held April 3, 1857; a license which had been obtained and submitted, and by-laws adopted and officers elected and resolutions adopted.

I heard conversations with defendant touching his subscription on several occasions at Chicago, during the year 1857, after the organization of the company, April 3, 1857, the substance of which conversations was, that it was necessary that he should pay up his subscription without delay, and he said he would do so as soon as he possibly could.

Defendant acted as vice-president of said company, but I do not now remember any particular or definite act which he did in such capacity.

It was then proven, that, at a regular meeting of the board of directors, the following resolution was adopted:

"*Resolved*, That all unpaid stock subscriptions be paid in to the treasurer of this company on or before the first day of May next, and that the secretary of the company be instructed to communicate a copy of this resolution to the delinquent stockholders."

It was here admitted, that defendant was present and took part in many, if not all of the meetings of the directors of the company, and in the meeting which passed the said resolution.

James Clapp, who had been the secretary and treasurer of the company since April 10, 1858, testified, that he gave notice to the defendant on the 13th of April, 1858, of the adoption of the foregoing resolution, and requested him to pay the balance of his subscription; that there had been no change of officers since 1858, and that no payment had been made by defendant since that time; that the balance due by defendant on April 18, 1858, was $1,169.57.

Upon this evidence the court found the issues for the plaintiff, and assessed the damages at $1,169.57, and entered a judgment accordingly, from which the defendant took this appeal.

Messrs. MONROE & MCKINNON, for the appellant.

Messrs. GOOKINS & ROBERTS, for the appellee.

Mr. JUSTICE BREESE delivered the opinion of the Court:

The questions raised on this record by appellant are: First that the plaintiffs did not, under the plea of *nul tiel* corporation, establish their corporate existence by showing a strict compliance with the provisions of the statute; second, if the defendant was liable to pay calls made upon him, those calls must be made in conformity with the statute, and one call only, and that for the whole amount due on the stock subscription, is not sufficient; and third, that the paper declared on shows on its face that it was without consideration, and shows no promise.

In support of the first point, appellant insists that the plea of *nul tiel* corporation, put the *onus* of proving the corporate existence of the plaintiffs on them, and the fact must be established by showing a strict compliance with the statute.

It seems this was a corporation formed under the general law, entitled "An act to authorize the formation of corporations for manufacturing, mining, mechanical or chemical purposes," approved February 18, 1857.

The *onus* was certainly on the plaintiffs to establish their corporate character, and we think they have removed the burden by the proof.

The main objection taken by appellant to the proof is, that the proposed associates did not file in the office of the secre- y of State a certificate in writing as required by the first section of that act. There are two requirements specified in that section, the first that the writing by which the association shall be constituted, shall be signed and acknowledged before some officer competent to take the acknowledgment of deeds, and shall be filed in the office of the clerk of the Circuit Court, in the county in which the business is to be carried on, and *also* in the office of the secretary of State.

The third section provides, when the certificate shall have been filed with the clerk of the court, and a duplicate thereof filed in the office of the secretary of State, the clerk shall issue a license to the persons who shall have signed and acknowledged the same, on the reception of which they and their successors shall be a body politic and corporate in fact and in name, by the name stated in such certificate, and by that name shall have succession, and be capable of suing or being sued in any court of law or equity of this State. Scates' Comp. 762.

There was no direct proof that a duplicate of this certificate was filed in the office of the secretary of State, but on the presumption that every public officer performs the duties enjoined on him by law, it is a fair inference from the fact that the clerk issued the required license, for the law declares a license shall issue only when the duplicate is filed in the secretary's office, but in the case of *Cross* v. *Pinckneyville Mill Co.*, 17 Ill. 54, this court held that requirement to be directory only, and the omission to file the duplicate would not defeat the organization.

In *Marsh* v. *Astoria Lodge*, 27 Ill. 421, it was held, that an organization in fact, and user under it, was sufficient to show a corporation *de facto*, under the plea of *nul tiel* corporation,

although there might have been irregularities or omissions in the first instance.

In *Prest. and Trustees of Mendota* v. *Thompson*, 20 Ill. 197, it was said that to prove the existence of a corporation, it was sufficient to produce the charter and prove acts done under it and in conformity with it.

In *Baker et al.* v. *The Admr. of Backus*, 32 Ill. 79, it was held when a company had taken all other steps to be incorporated under the general law of 1849, but had omitted to file the certificate of incorporation in the office of the secretary of State, such a non-compliance with the statute might sustain a *quo warranto* on behalf of the people, and oust the corporators from the exercise of their franchise, but it does not necessarily follow that it is not, as to third persons, a corporation; and in the same case, it was said, the allegation that a company, claiming to have been incorporated and acting as such, has never been legally organized as a corporation, or has never existed as such, can be ascertained in no other way than by a direct proceeding by *scire facias*, or by information in the nature of a *quo warranto* in a court of law. The first is proper when there is a legally existing body capable of acting, but who have been guilty of an abuse of the power intrusted to them; and the latter, by *quo warranto*, when there is a body corporate *de facto* who take upon themselves to act as a body corporate, but from some defect in their constitution, they cannot legally exercise the power they affect to use. See also *Tarbell* v. *Page*, 24 Ill. 46.

These references dispose of the objection to the proof of a corporation.

The objection to the evidence itself was not well taken. When the license was offered in evidence, it was treated as the original. No specific objection was made to it. Had it not been so treated, the original might have been produced or its absence accounted for.

It has been so often *held*, by this court, that objection to evidence must be specific, that it has become the doctrine of this court. The rule is, that the party making the objections

must point out specifically, those insisted on, and thereby put the adverse party on his guard and afford him an opportunity to obviate them. *Sargeant* v. *Kellogg*, 5 Gilm. 273; *Swift* v. *Whitney*, 20 Ill. 144; *Buntain* v. *Bailey*, 27 id. 410, and in *Conway* v. *Case*, 22 id. 127, and in *Davis* v. *Ransom*, 26 id. 100, this court said, parties should make specific objections in the Circuit Court to the introduction of evidence, if the propriety of its introduction is to be questioned in this court, and in the case of *Gilham* v. *State Bank*, 2 Scam. 248, it was *held*, if an objection which can be obviated by further proof, be not taken, or is not insisted on at the trial, it will not be received as the ground for a motion for a new trial. There having been no specific objection to this paper purporting to be a license, it was properly in evidence, and operated to the same extent, as proof, that a charter of incorporation would operate.

The next point made by appellant is, that there was no legal call for the subscription of stock made on him, — that, by the instrument on which the suit is brought, he agreed to pay calls in conformity with the general incorporation law above cited, the eight section of which provides that all subscriptions to such stock shall be payable in such sums and at such times as the board of directors may require, and that one call for the whole amount of the subscription is not conformable to the law. It will be seen by reference to the subscription paper, that appellant agreed to do something more in this respect. He agreed to pay the calls upon the stock not only in conformity with this law, but also in conformity with the by-laws of the company.

We do not know what the by-laws of the company were on this subject of calls, but it is not a forced presumption that they authorized this call, for the officers of such companies are presumed to act, if not in obedience, certainly not in hostility to their own laws. But whether this presumption be indulged or not is not material, since the secretary of the company, Mr. Taylor, proved that appellant paid assessments prior to the call set out in the declaration, and that he gave notice of calls of stock subscription both orally and in writing repeatedly.

Appellant's original subscription was for twenty shares, at one hundred dollars each, making two thousand dollars.

The recovery against him amounts to eleven hundred and sixty-nine dollars fifty-seven cents, so that the inference is irresistible that he paid the difference between these sums, as calls before suit brought, and, in truth, it is so established by the testimony of Taylor and Clapp who acted as secretary and treasurer of the company. And the evidence shows that appellant was present at the meeting of April 10, 1858, when this call was made, that he had notice of it, and made no objections. This is not like the case of *Spangler* v. *N. Ill. & S. Ind. R. R. Co.*, 28 Ill. 278, for the reason, in that case, by the contract of subscription, Spangler was to pay only in certain proportions. In this case the appellant was to pay according to the general law and the by-laws of the company, of which he was vice-president. By the general law, section 8, it is provided that the subscriptions to stock shall be payable in such sums and at such times as the board of directors may require, and the declaration alleges that they did by vote require the balance of all subscriptions due to be paid by a certain day.

But, as contended by appellee, if, in this case, the stock had been ordered to be paid wholly under one call, appellant ought to be estopped from objecting to the irregularity, as he co-operated with the other directors in making the order and also participated in the meeting of the stockholders a few days before, at which the directors were instructed to make the order for this call. These facts were not in Spangler's case.

The case of *Erie and W. Plank-road Co.* v. *Brown*, 25 Penn. 156, is on the point here discussed.

The remaining objection, that the subscription paper shows on its face no consideration and no promise, and therefore not affording a ground of recovery, is answered by the numerous cases decided by this court. *Robertson* v. *March et al.*, 3 Scam. 198; *Cross* v. *Pinckneyville Mill Co.*, *supra*; *Tonica and Petersburgh R. R. Co.* v. *McNeely, Admr.*, 21 Ill. 71; *Prior et al.* v. *Cain*, 25 Ill. 292; *Griswold* v. *Trustees, etc.*, 26 id. 41.

These cases show that such subscriptions are binding, and can be recovered by actions at law.

There being no error in the record, the judgment is affirmed.

Judgment affirmed.

KESIA BRIGHT *et al.*

v.

ALFRED BRIGHT.

1. PARENT AND CHILD—*parol promise by the former to convey land to the latter—whether it can be enforced—statute of frauds.* A parol promise by a father to his son, to convey to him a tract of land if the latter would take possession and improve it, would undoubtedly be enforced in a court of equity if the promissee, relying upon it, has entered and expended money. It would substantially, in such event, be a promise resting upon a valuable consideration.

2. But, as in the case of any other parol contract for the conveyance of land, before a court of equity will decree a conveyance, such a performance must be shown as will take the case out of the statute of frauds.

WRIT OF ERROR to the Circuit Court of Tazewell county; the Hon. S. L. RICHMOND, Judge, presiding.

This was a bill in chancery exhibited in the court below by Alfred Bright against Kesia Bright, the widow, and Harvey Bright and others, the children and co-heirs at law, with the complainant, of Caleb Bright, deceased.

The bill alleges, that, in February, A. D. 1861, Caleb Bright, father of complainant, was the owner in fee simple of the north-east quarter of the north-west quarter of section two, in township twenty-three north, of range three, west of the third principal meridian, and the west part of the north half of the northwest quarter of section three, same town and range, all in Tazewell county, Illinois; and, while so possessed of said real estate, proposed to complainant, if he would go into possession of the same, and make improvements thereon, he, the said Caleb Bright, would convey the said real estate to

complainant, by a good and sufficient deed of conveyance; that on or about February 1, A. D. 1861, complainant took possession of said real estate at request of his said father, and made thereon permanent and valuable improvements; that at the time of making said improvements, complainant, not having sufficient money to accomplish that object, borrowed one hundred and seventeen dollars of his said father, and paid the same to the administrator of his said father's estate, after his death; and that complainant has possessed and cultivated said real estate, and is still in possession of the same; that since his possession and occupancy of said real estate, as aforesaid, the said Caleb Bright departed this life, leaving at his decease the defendants as his representatives.

The prayer of the bill is, that a conveyance of the land be decreed to the complainant.

Such proceedings were had that a decree was entered, granting the prayer in the bill.

Thereupon the defendants sued out this writ of error. The questions arising under the assignment of errors are, first, whether the promise was of such character that it can be enforced in a court of equity; and, second, whether the proof sustains the allegation in the bill that the complainant took possession of the land and expended money thereon.

Mr. C. A. ROBERTS and Mr. N. W. GREEN, for the plaintiffs in error, contended that the proof did not sustain the allegations in the bill, which sets up a contract to convey to complainant the land in question, in consideration that he should take possession of the same and make improvements thereon; nothing but an unexecuted parol gift of real estate is established in this case, and that by *parol admissions* of Caleb Bright, the father of complainant.

"Parol admissions of a party are only competent evidence of those facts which may lawfully be established by parol evidence." 1 Greenleaf's Ev. 256; *Jenner* v. *Joliffe*, 6 Johns. 9.

"A gift of real estate cannot be presumed from a delivery of possession, without a deed of conveyance." 1 Rich. Ch.

271. "A parol gift of land is inoperative, though possession is delivered to the donee." *Caldwell* v. *Williams*, 1 Bailey Ch. 175; *Ridley* v. *M'Nairy*, 2 Humph. 174; *Rucker* v. *Abell*, 8 B. Mon. 566; *Hugus* v. *Walker*, 12 Penn. (2 Jones) 173.

But giving the complainant the benefit of his construction of the transaction, and calling it a parol contract instead of a gift, and admitting that taking possession under a parol contract is such a partial performance as avoids the statute of frauds, then there remains, as alleged in this bill, the further consideration of making improvements upon the land, which he fails to prove was done by him.

Messrs. COOPER & MOSS, for the defendant in error.

The proofs fully sustain the bill.

"It has been settled that, where a parol agreement is proved, under which one of the parties has taken possession, and made valuable improvements, such agreement shall be carried into effect. We see no material difference between a sale and a gift, as it would be a fraud in a parent, to make a gift which he knew to be void, and thus entice his child into the expenditure of money and labor, of which he meant to benefit himself." *Lessee of Tyler* v. *Eckhart*, 1 Binn. 378.

Ford v. *Ellingwood*, 3 Metc. (Ky.) 359; *Haines* v. *Haines*, 6 Md. 435, in which last named case the court says: "To constitute a valuable consideration, it is not necessary that money be paid." "If it be expended on the property, on the faith of the contract, it is sufficient." And again: "It is impossible to examine the testimony in this case, without coming to the conclusion that the agreement between Nathan Haines, father of appellee, and his son Mordecai, was, that the latter was to have the farm on condition that he worked it." So also in *Young* v. *Glendenning*, 6 Watts, 509, where it is held, that encouragement to go on with improvements *under an expectation of conveyance* is sufficient ground for enforcing the execution of a deed for the land. And in Atherly on Marriage Settlements, as quoted by the court in *Cox* v. *Spring*, 6 Md.

287, it is said: "If a man voluntarily does an imperfect act, it seems reasonable to leave its completion to his own discretion, and not to enforce it, when he may have strong reasons for altering his intentions. But when he dies without indicating a change, it is presumed he has made none, and in such case it is proper, generally speaking, to enforce the agreement against the heir at law." The application of this reasonable doctrine to the case before the court, will be apparent when it is remembered that among the last utterances of Caleb Bright were, that he had given Alfred this land, and intended to make him a deed for it.

The authorities cited for plaintiffs in error, so far as we have examined them, seem not to meet this case. *Rucker* v. *Abell*, 8 B. Mon. 566, is a case between a claimant under a parol gift and creditors. The father being heavily in debt when he made the deed, the court held it to be in fraud of creditors. *Ridley* v. *McNairy*, 2 Humph. 174, is a case of parol promise to make a gift, and rests on the construction of a special statute, as will be seen by reference to the case. And *Hugus* v. *Walker*, 12 Penn. 173, the only other of these authorities which we have had an opportunity to examine, will not be found adverse to defendant in error. It was a case of conflicting proofs, and really turns on the point, that the evidence against the gift is stronger than that for it.

Mr. JUSTICE LAWRENCE delivered the opinion of the Court:

This was a bill in chancery, brought by Alfred Bright, against the co-heirs of his father, some of whom were infants, for the purpose of having vested in himself the legal title of a tract of land, of which his father died seized. The bill alleges that the latter, in his life-time, made a parol promise to complainant to deed him the land, if complainant would take possession and improve it. A parol promise of this character would, undoubtedly, be enforced in a court of equity, if the promisee, relying upon it, has entered and expended money. It would substantially, in such event, be a promise resting

upon a valuable consideration. But, as in the case of any other parol contract for the conveyance of land, before a court of equity will decree a conveyance, such a performance must be shown as will take the case out of the statute of frauds. In the record before us, we find no evidence that the complainant has ever made any improvements, or in any way incurred expenditure in consequence of such parol promise. It simply appears that he took possession. The bill alleges that he made permanent and valuable improvements, and being, in this most material respect, wholly unsustained by the evidence, the decree of the Circuit Court must be reversed and the cause remanded.

Decree reversed.

N. P. LASSEN
v.
EDWARD W. MITCHELL.

1. PLEADINGS — *proof of averment.* It is a well established rule that all material averments in a declaration must be proved to sustain a verdict. The omission of an averment may, in some instances, be cured by a verdict, but where an averment is made material to a recovery, and the evidence is preserved in the record, from which it appears the averment was not sustained, no such intendment can be made.

2. SAME — *averment and proof.* Where it is averred in the declaration that the plaintiff was ready and willing to perform his part of the contract, and he proceeds, for a breach of the contract by the defendant, to recover, he must prove a readiness and willingness to perform on his part. On the purchase of grain, to be delivered by a specified day, unless sooner demanded, it is as much the duty of the seller to deliver on the day, as for the other to receive and pay the contract price. A notice that plaintiff was ready to deliver, may prove that he was willing, but not that he was prepared with the grain and able to perform his part of the contract.

3. CONTRACT — *rescission of.* Where a seller, before the time expires for the delivery of the grain sold, notifies the purchaser that, unless he places in his hands a deposit to cover a decline in the price of the grain, he will sell it, and afterward does sell it, and notifies the buyer of the fact, he thereby rescinds the contract, and cannot afterward renew it, without the concurrence

of the purchaser. If he rescinded the contract without a sufficient cause, he released the other party, but, even if he had a sufficient cause, he could not recover more than he lost on the sale of the grain.

WRIT OF ERROR to the Superior Court of Chicago.

This was an action of assumpsit, by Edward W. Mitchell, in the Superior Court of Chicago, to the May Term, 1865, against N. P. Lassen. The declaration contained six special counts, and the common counts for goods sold, and the money counts and an account stated. The special counts proceed for a breach of a contract for the purchase by defendant of ten thousand bushels of number one oats, at sixty-one cents per bushel, to be delivered at any time during the month of March, 1865, upon any day of that month when requested by defendant, and to be paid for on delivery. Plaintiff avers that he was at all times ready and willing to deliver the oats to the defendant, and to receive the pay for the same; but that the defendant did not demand the same or pay the money therefor. The contract set out in each special count is varied in the statement, but is in substance the same.

Defendant filed the plea of *non-assumpsit*, upon which an issue was formed. A trial was had at the October Term, 1865, by the court and a jury. It appeared on the trial that the parties entered into the contract as set out in the declaration. Plaintiff, on the 31st day of March, 1865, wrote a letter to the agent of defendant, who had made the purchase, and had it placed in the letter-box of his office, notifying him that he had called to deliver the oats under the contract, and requested him to receive them.

It also appears that a week or ten days after the contract, plaintiff, in consequence of a decline in the price of oats, called upon the agent of defendant to put up a margin, which he declined to do, insisting that the contract did not require it; when plaintiff notified him if he failed to do so he would sell the oats. He seems, afterward, to have informed the agent that he had sold them at fifty-eight cents per bushel.

The evidence fails to show that there was any agreement

that if oats declined, defendant should deposit funds with plaintiff to secure him against loss. And the evidence fails to show that plaintiff had the quantity or quality of oats ready for delivery on the last day of March. The jury, after hearing the evidence and receiving the instructions of the court, found the issues for the plaintiff, and assessed the damages at $2,000.

Defendant thereupon entered a motion for a new trial, which the court overruled, and then rendered judgment on the verdict. And he brings the case to this court on error, and asks a reversal of the judgment.

Messrs. HERVEY, ANTHONY & GALT, for the plaintiff in error.

Messrs. WARD & STANFORD, for the defendant in error.

Mr. CHIEF JUSTICE WALKER delivered the opinion of the Court:

This was an action of assumpsit brought by Edward W. Mitchell, in the Superior Court of Chicago, against N. P. Lassen. It is averred, in the first count of the declaration, that defendant, on the 3d day of March, 1865, purchased of plaintiff ten thousand bushels of number one oats, at sixty-one cents per bushel, to be delivered in Chicago, by the latter to the former, during that month, and on any day thereof when the defendant might request, and to be paid for on delivery. It is averred that plaintiff was at all times ready, during the month, after making the contract, to deliver the oats and to receive payment; but that defendant would not, nor did he, on any day during the month, request a delivery, nor did he offer to receive or pay for the same, but neglected and refused. The other special counts are the same in substance, except in so far as they vary the statement of the terms of the contract. The declaration also contained the usual common counts.

The general issue was filed, and a trial was had by the court and a jury, resulting in a verdict in favor of plaintiff for $2,000. A motion for a new trial was overruled and judgment rendered on the verdict. The cause is brought to this court for a reversal on a writ of error.

We only propose to consider the assignment of error which questions the sufficiency of the evidence to sustain the verdict. It is a familiar rule, that the allegations and proof must correspond, to sustain a recovery. This being true, every material averment in the declaration must be proved, or a recovery cannot be had. If, as a general rule, the declaration contains a material averment, the omission of which would render it obnoxious to a general demurrer, the averment must be proved. Although in some cases, after verdict, it will be intended, the necessary proof was made, although the averment was omitted. But where the averment is made, and the evidence is preserved in the record, and it appears that the fact was not proved, the verdict cannot be sustained, and the judgment will be reversed.

This declaration avers, that defendant in error was ready and willing to perform his part of the agreement, but there is no evidence of the fact. Defendant in error was not entitled to recover, unless he was ready and willing to perform on his part. In the case of *Hungate* v. *Rankin*, 20 Ill. 639, it was said, that plaintiff could not recover unless he had performed his part of the contract, or was ready and willing to perform within the time limited by the agreement. And the cases of *Greenup* v. *Stoker*, 3 Gilm. 213, and 1 Saunders, 33, are referred to in support of the doctrine. This is believed to be the uniform rule, and we regard it as the settled law of this court.

In this case, defendant in error had all of the month of March, after the contract was made, to deliver the oats, unless they were sooner demanded. He was as much bound to deliver as the other party was to pay for them when delivered. The obligations to deliver on one side and pay for them on the other, were mutual and dependent. And the attorney who drafted the declaration evidently so understood the law, or he would have omitted the averment of readiness to perform by the plaintiff below.

It is true, the evidence shows, that he wrote a note to the person who acted as the agent of defendant below, on the last day of March, saying that he was ready to deliver the oats.

But his mere statement did not prove the fact. For aught that appears, he may not have owned a bushel of oats at the time. The delivery of the note may have been evidence of an offer to deliver, if it had appeared that he was able to deliver, but no kind of an offer could dispense with a readiness to perform. Had he owned the property, a willingness to perform might have been inferred, unless rebutted by other evidence. But, having failed to prove that he owned the oats, the offer could avail nothing, and he could not recover.

Again, it appears from the evidence, that, a few days after the sale was made, and oats had commenced to decline, he demanded of the agent of plaintiff in error, that a margin should be put up to cover the decline in price. When this was refused, upon the ground, that, by the terms of the agreement, he was not entitled to a margin, he stated that he would sell the oats unless a margin was put up. It was not put up, and defendant in error afterward informed the agent that he had sold the oats at fifty-eight cents per bushel. If he previously sold the oats and notified the other party, it was, it seems to us, a rescission of the contract. The other party had a right to take him at his word, and we are aware of no rule of law which authorized him at the end of the time, on his own motion, to renew the agreement.

If he rescinded the contract without a sufficient cause, he was entitled to recover nothing. And if he was not entitled to a margin, then a decline in the price of oats would not authorize a rescission. But, if he had the right to rescind, we are at a loss to see upon what principle he could recover more than he lost on the sale he then made. That was but three cents on the bushel according to his own statement, while the jury have, it seems, allowed for twenty cents less per bushel. If he rescinded the contract when the other party was not in default, then he could recover no damages, as the wrong was his own.

The judgment of the court below must be reversed and the cause remanded.

Judgment reversed.

THE CHICAGO AND GREAT EASTERN RAILWAY COMPANY
v.
HARRY FOX *et al.*

1. INSTRUCTIONS — *must be based on the evidence.* It is error to give instructions when there is no evidence on which to base them.

2. NEW TRIAL — *verdict against the evidence.* When there is no evidence to support a verdict, a new trial will be granted.

3. AGENCY — *party dealing with another as agent of a third person, must know his authority.* An agent of a railway company applied to the owner of a dredging and pile driving machine, for an estimate of the cost of certain work the company proposed to have done. The owner of the machine said he would send him a proposition, and did, soon after, send a proposition in writing to the agent of the company, stating the terms upon which the machine could be had. To this proposition no reply was made, but, in about two weeks thereafter, a third person came to the owner of the machine, representing, as the latter alleges, that he came on behalf of the company, and procured the machine and crew belonging thereto, to be sent to do the work spoken of. In point of fact the person who obtained the machine was not an agent of the company but a contractor who had engaged to do the work for the company. It was *held,* the company was not liable to the owner of the machine for the work done therewith; it was his fault that he did not ascertain who was to be responsible.

APPEAL from the Circuit Court of Cook county; the Hon. ERASTUS S. WILLIAMS, Judge, presiding.

The opinion of the court contains a statement of the case.

Mr. E. WALKER, for the appellant.

Messrs. FULLER & SHEPARD, for the appellees.

Mr. JUSTICE BREESE delivered the opinion of the Court:

This was an action of assumpsit on the common counts and on an account stated, brought in the Cook Circuit Court, by Harry Fox and William B. Howard against The Chicago and Great Eastern Railway company, and a verdict for plaintiff. A motion for a new trial was overruled and exception

taken. Judgment was rendered on the verdict, to reverse which this appeal is taken.

It appears that plaintiffs were engaged in the business of dredging, pile-driving, etc., when, about October 4, 1865, Mr. Hudson, the assistant superintendent of defendants came to plaintiffs' office to get them to estimate the cost of driving a pile bridge at Mud lake, and also for driving piles for the purpose of extending the abutment across the Illinois and Michigan canal where their road crossed it. The superintendent went with the agent of the plaintiffs to look at the work. The superintendent then asked the agent to give him an estimate for what plaintiffs would do the work, when the agent told him he would give him a proposition on the next day, and on that day he sent the following, which was left at defendants' office:

"CHICAGO, 5th October, 1865.

"CHAS. H. HUDSON, Esq., Asst. Supt. C. and G. E. R. R.: Dear sir, — The work you require to be done at Mud lake and the canal is of such a nature that we prefer to let you have a pile-driver and crew by the day at the rate of fifty dollars; time to reckon from the date the machine leaves until she is returned, you to pay the cost of moving the machine from place to place. FOX & HOWARD."

To this proposition, Hudson made no reply.

About two weeks after this, a man, named Vosburgh, came for the pile-driver, saying, he had come from this railroad company, and kept it seventeen days working at Mud lake and the canal, and some extra work was done with it on Sundays.

Plaintiffs' agent was never at the work while it was progressing, but when the work was done, and no one came around to settle for it, he went to the railroad office to get the pay, when he was told that the company had nothing to do with it, as Vosburgh had the contract, and he must pay.

The agent told Hudson that Vosburgh was a stranger to him, and to the plaintiffs, and that they had not looked to him but to the company. Hudson then said the company owed Vos-

burgh, and if the plaintiffs could get an order from him, they would pay it. An order was procured from Vosburgh, but when, is not shown, at any rate, it was not paid by the company, as they had paid Vosburgh before his order was presented, all but one hundred and thirty-nine dollars, and for that amount the company was willing and prepared to accept the order. Hudson had no power to make contracts but to procure estimates for work.

Plaintiffs' proposition of October 5th was never accepted by the company, and they let the work to Vosburgh, who, on his own responsibility, procured the machine from the plaintiffs.

The above is the material part of the evidence, and on it, the plaintiffs asked these instructions, which were given, and exceptions taken by the defendant.

1. "If one sees another doing work for him beneficial in its nature, and has reasons to believe that the party doing the work supposes that he is doing the work for the party who receives the benefit thereof, and by his agent overlooks the work as it progresses, and does not interfere to forbid it, and does no act to undeceive the party so doing the work, the work itself being necessary and useful, and appropriates the work to his own use, he is liable on an implied promise to pay the value of the work, unless an express contract exists in the premises."

2. "Although the jury may believe from the evidence that Vosburgh actually contracted with the Chicago and Great Eastern Railway company to do the work in question, yet, if they further believe from the evidence, that Fox and Howard did the work in question upon the belief honestly entertained on their part that they were doing the same for the Chicago and Great Eastern Railway company, and without any knowledge or reason to suspect or believe that Vosburgh had contracted to do the same, and that they would not have done said work for said Vosburgh himself; and if the jury further believe from the evidence that the Chicago and Great Eastern Railway company knew, before said Fox and Howard com-

menced said work, that, when they so commenced said work, they did so upon the belief aforesaid, and in ignorance of Vosburgh's real connection therewith, and would not have done said work for said Vosburgh himself, and went on and completed it under such misapprehension, and that said railway company did not, before said work was commenced or done, inform said Fox and Howard of the actual state of the case, but purposely permitted them to do the work under the circumstances aforesaid, and then took possession of and enjoyed and are enjoying the benefits of said aforesaid work,— then the plaintiffs are entitled to recover such sum as the jury further believe from the evidence such work was reasonably worth."

The objection to these instructions is very obvious. There is no evidence on which to base them. No such case, as stated in them, was made out by the proof, and it was the fault of plaintiffs, when they let Vosburgh have the machine, that they did not satisfy themselves fully on the point of who was to be responsible. They had warning that their proposition had not been accepted, as two weeks had elapsed and the company had made no reply to it. It was their business to know to whom they were to look, when they permitted Vosburgh to take the machine.

On a careful examination of the record, we cannot find a particle of evidence going to sustain the verdict. At "first blush," the injustice of it is apparent.

There being no evidence to support the verdict, it should have been set aside on defendant's motion, and a new trial awarded.

For refusing to do so, the judgment is reversed and the cause remanded.

Judgment reversed.

Syllabus.

JESSE MATTESON
v.
E. W. THOMAS *et al.*

1. MORTGAGEE — *subsequent purchaser — subrogation.* Where a mortgagee obtains a judgment of foreclosure by *scire facias,* and one of several subsequent purchasers from the mortgagor pays the judgment, equity will thereupon work a subrogation of such purchaser to the rights of the mortgagee, so far as may be necessary to enable the former to compel contribution from persons liable thereto, and this right of subrogation will accrue immediately upon payment of the judgment, independently of any assignment thereof.

2. SAME — *of the right of the subsequent purchaser to demand an assignment.* The subsequent purchaser, in proposing to pay the judgment of foreclosure, has no right to demand an assignment of the judgment by the mortgagee to him; and if he makes a tender of the money upon condition that an assignment shall be made, his tender will not avail him in taking away the right of the mortgagee to proceed to a sale under his judgment.

3. PRIOR MORTGAGEE *and subsequent purchasers — rights of the parties where the premises are held by different purchasers.* The rule that, where there are several subsequent purchasers of premises which have been previously mortgaged, the different parcels shall be made liable to the prior lien in the inverse order of their alienation, is never applied to the injury of an innocent mortgagee.

4. SAME — *and herein, of the application of the recording act as to a prior incumbrancer.* Before a prior mortgagee can be required to shape his action in the collection of his debt, in reference to the subsequent order of alienation, he must have actual notice of what that order is, and not merely the constructive notice derived from the registry of the deeds made by the mortgagor subsequent to the mortgage. The prior mortgagee is not within the purview of the registry laws, and such registry is not even constructive notice to him, and cannot affect his prior lien.

5. SAME — *at what time the notice should be given to the prior mortgagee.* One of several subsequent purchasers desiring the prior mortgagee to act with reference to the subsequent order of alienation, should give him notice of the facts in proper time, and request him to sell accordingly. If he is not a party to the proceedings for foreclosure, and is given no opportunity there to present his equities, he may file a bill against the mortgagee and the other subsequent purchasers, staying the sale until the respective equities can be adjusted. But he cannot remain passive until the sale has been made and then assert his rights against the mortgagee in view of facts of which the latter had no knowledge.

6. RIGHT OF CONTRIBUTION — *as between different subsequent purchasers.* Where a mortgagor sells the mortgaged premises in parcels to different persons subsequent to the mortgage, the rule that the several parcels are liable to the mortgage debt in the inverse order of their alienation, will apply to the several purchasers where there is nothing to the contrary in their contracts of purchase; and, if the mortgagee subjects them to the satisfaction of his debt in a different order, a right to contribution exists as between the subsequent purchasers, according to the rule of their liability.

7. SAME — *whether such right to contribution is affected by releases given by the mortgagee after the debt is paid.* Should some of the subsequent purchasers pay in *pro rata* proportions a part of the mortgage debt, and after a sale under foreclosure of other parcels of the premises in satisfaction of the balance due, the mortgagee gives releases to those purchasers who had paid, such releases cannot affect any rights of contribution that grew out of the sale.

8. BILL TO REDEEM — *when it will not lie — of the right of redemption under foreclosure by scire facias.* A foreclosure by *scire facias* cuts off the right of redemption from the mortgage on the part of subsequent purchasers or incumbrancers.

9. In such cases there is, after the sheriff's sale, only the statutory right of redemption, as in other sheriff's sales.

APPEAL from the Superior Court of Chicago.

The opinion of the court contains a statement of the case.

Mr. J. S. PAGE and Mr. J. H. KNOWLTON, for the appellant.

Mr. GEORGE SCOVILLE, for the appellees.

Mr. JUSTICE LAWRENCE delivered the opinion of the Court:

On the 8th of September, 1861, one Hiram H. Scoville mortgaged three hundred and twenty acres of land to E. W. Thomas, the appellee, to secure the payment of sixty-four hundred dollars. The land was subsequently sold by Scoville, to various persons, in five different parcels, and Thomas, the mortgagee, received from the owners of all the parcels, except a fifty-four acre tract and a forty acre tract, their *pro rata* share, amounting to twenty dollars per acre. He executed and left with an agent formal releases to be delivered to them as soon as he should settle with the owners of the other parcels.

In October, 1861, there still remained due $2,070.90, and at that time he obtained judgment by *scire facias* for that sum on his mortgage. On the 4th of December, 1861, he sold, under execution, the fifty-four acre tract, for $1,600, and the forty acre tract in two parcels of twenty acres each, lying in different quarter sections, the first for $300, and the second for $231.30, the different parcels being bid off for the benefit of Thomas, to whom the certificates were assigned by the nominal purchaser, and to whom the sheriff afterward made a deed. On the day of the sale, Matteson, the complainant, claiming to own the fifty-four acre tract, by his attorney and agent, tendered to Thomas the balance due him, on condition that Thomas would assign to him the judgment. This Thomas refused to do, and the sale proceeded. On the 4th day of December, 1862, being the last day of the year of redemption, Matteson filed this bill, praying that the sale of the fifty-four acre tract be set aside, or that he be permitted to redeem. The court below, on final hearing, dismissed the bill.

In this state of facts, we are asked to set aside the sheriff's sale. We cannot do so, unless Thomas, in enforcing the lien of his mortgage and acquiring an absolute title, has transgressed some principle of law. But in what respect has he done so? The complainant insists that when payment was offered on condition that Thomas would assign the judgment he had no right to refuse to assign, and it is urged that the law itself, upon payment, would have worked an equitable assignment. This being true, no formal assignment was necessary, and Matteson cannot object that none was made. Equity would indeed have worked a subrogation of Matteson to the rights of Thomas, so far as might be necessary to enable Matteson to compel contribution from persons liable thereto. This was all he was entitled to do, and for this purpose a formal assignment was wholly needless. His rights in this respect, whatever they may have been, would have accrued immediately upon payment of the judgment and independently of any assignment.

As Matteson made no unconditional tender, what had Thomas

the right to do? Clearly to proceed with his sale, and offer, first, either the fifty-four acre tract or the two twenty acre tracts as he should deem proper. It is insisted by the appellant, that, in cases of this character, the different parcels should be made liable in the inverse order of their alienation. We have so decided at the present term in the case of *Iglehart* v. *Crane and Wesson*, but the principle has no application under the pleadings and proofs in the case before us. This rule is never applied to the injury of an innocent mortgagee. Before he can be required to shape his action in reference to the subsequent order of alienation, he must have actual notice of what that order is, and not merely the constructive notice derived from the registry of deeds made by the mortgagor subsequent to the mortgage. Such registry is not even constructive notice to him, and cannot affect his prior lien. He is under no obligation to search the records to ascertain what the mortgagor may have done subsequent to the making and recording of his mortgage. *Stuyvesant* v. *Howe*, 1 Sand. Ch. 426; *King* v. *Mc Vickar*, 3 id. 192; *Blair* v. *Ward*, 2 Stockt. (N. J.) 119

The prior mortgagee is not within the purview of the registry laws which, by their terms, and by every reasonable rule of construction, refer to subsequent purchasers and creditors. In the cases above cited, it is held, that a mortgagee is not required, before releasing a part of the mortgaged premises, to search the record for subsequent conveyances, and that subsequent purchasers, wishing to protect themselves, must bring home actual notice to the mortgagee. The same principle is held, as to subsequent judgment creditors, by Chancellor KENT, in *Cheesebrough* v. *Millard*, 1 J. C. 414.

In the present case, Matteson cannot ask that this sale be set aside on the ground that the different parcels were not sold in the inverse order of their alienation, because there is no proof that Thomas knew what that order was. Matteson should have informed him of the facts and have requested him thus to sell. Or, as he was not a party to the *scire facias*, and had had no opportunity of presenting his equities in court, he might have filed a bill in chancery against the mortgagee and the subse-

quent purchasers, staying the sale until the respective equities could be adjusted. But he cannot remain passive until the sale has been made, and then ask the court to set it aside because the mortgagee acted without reference to a state of facts of which he had no knowledge, and as to which the complainant had ample opportunity to inform him but neglected so to do.

It is urged in the argument, that the mortgagee had no right to release a part of the land on the payment of twenty dollars per acre, and then subject the residue to the payment of a greater sum; but the proof shows that he did not release before the sale. He simply received what was considered the *pro rata* portion of several parcels sold, and agreed to release on receiving the residue from the other owners, and the releases were left in the custody of his agent, to be delivered when the debt should be paid, and they were not delivered until after the sale. The sale itself operated as an extinguishment of the lien, and the subsequent delivery of the releases was unimportant, and cannot affect any rights of contribution that grew out of the sale.

We can discover no wrongful act in all the proceedings of the mortgagee to enforce his lien, and we see no ground on which we can now interfere to set aside the sale.

Neither is there any ground for allowing redemption. This court has several times decided that a foreclosure by *scire facias* cuts off the right of redemption from the mortgage on the part of subsequent purchasers or incumbrancers. *Chickering* v. *Failes*, 26 Ill. 517; *State Bank* v. *Wilson*, 4 Gilm. 58. In such cases there is, after the sheriff's sale, only the statutory right of redemption as in other sheriff's sales, and of this right this complainant neglected to avail himself.

But, while we see no ground for allowing redemption, there may be a right to contribution. There are some facts in the record which would indicate that each parcel was sold by the mortgagor, subject to its *pro rata* share of the mortgage. If that was not so, then the parcels last sold should first be made to pay the mortgage, to the extent of their value. It may be

that they have already done so. The present bill was not brought for contribution, and there is not enough in this record to enable us to say upon what grounds it should be adjusted, or even that the right to contribution exists. We will, however, so far modify the decree of the court below that the bill will stand dismissed, without prejudice, leaving the complainant at liberty to file a bill for contribution unembarrassed by this proceeding. The costs of this court will be taxed against the appellant.

Decree modified.

ALBERT COOK and B. C. BROWNELL
v.
JAMES R. YARWOOD.

1. PLEA IN ABATEMENT— *requisites of the affidavit in support thereof.* It is not essential that the affidavit in support of a plea in abatement should be entitled in the cause, when the plea, which is properly entitled, and the affidavit, are written upon the same piece of paper, and the paper shows upon its face to what suit it belongs.

2. SAME—*plea in abatement filed after another in abatement.* After defendant has filed a plea in abatement of the action, which has been disposed of by the court, it is irregular to file another plea of the same character, and it may be stricken from the files.

APPEAL from the Circuit Court of De Kalb county; the Hon. THEODORE D. MURPHY, Judge, presiding.

This was an action of assumpsit, brought by James R. Yarwood, in the court of Common Pleas of the city of Elgin, in Kane county, in which a writ of attachment was sued out against Albert Cook and B. C. Brownell. A declaration, in the usual form, was filed.

The venue of the cause was afterward changed to De Kalb county. Cook then filed a plea in abatement, which the court, on motion, struck from the files. Brownell also filed a plea in

abatement of misnomer, and misjoinder and nonjoinder of parties. Cook filed another plea in abatement, similar to his first, except it obviated the objections taken to the former. The court, on motion, also struck this plea from the files.

Cook thereupon filed the general issue, upon which a trial was had by the court and a jury, resulting in a verdict in favor of plaintiff for $210. Defendants entered a motion for a new trial, which being overruled, judgment was rendered on the verdict; to reverse which, defendants prosecute an appeal and bring the record to this court.

Mr. CHAS. WHEATON, for the appellants.

Mr. SILVANUS WILCOX, for the appellee.

Mr. CHIEF JUSTICE WALKER delivered the opinion of the Court:

This was an action of assumpsit, commenced by James R. Yarwood, in the Court of Common Pleas of the city of Elgin, at the January Term, 1864, against Albert Cook and B. C. Brownell. An affidavit was filed, stating that defendants are indebted to plaintiff in the sum of $350 for work and labor, and that Brownell is a non-resident of the State, and that defendants are about to remove their personal property from this State to the injury of plaintiff. A writ of attachment was issued and levied on the property of defendants. A declaration was filed in assumpsit on the common counts.

Before any general appearance was entered by Cook, he filed the following plea in abatement:

Court of Common Pleas of the City of Elgin, January Term, A. D. 1864.

STATE OF ILLINOIS,
KANE COUNTY, CITY OF ELGIN, } *ss.*

JAMES R. YARWOOD
v.
ALBERT COOK and B. C. BROWNELL.

And the said Albert Cook, defendant in this suit, by Wheaton, his attorney, comes and defends the wrong and injury, when,

etc., and prays judgment of the writ of attachment of the plaintiff in this suit, and that the same may be quashed, because he says that he, the said defendant, at the time of the commencement of this suit, and the suing out said writ of attachment by the said plaintiff, and the making and filing the affidavit in this suit for said writ of attachment was not about to remove his personal property from this State to the injury of the said plaintiff, and this he prays may be inquired of by the country, etc.

CHAS. WHEATON, *Att'y for Deft. Cook.*

STATE OF ILLINOIS,
KANE COUNTY, CITY OF ELGIN, } *ss.*

Albert Cook, the above named defendant, being first duly sworn, on his oath says that the above plea is true in substance and matter of fact.

ALBERT COOK.

Subscribed and sworn to before me,
this 19th day of April, A. D. 1864.

R. W. PADELFORD, *Clerk.*

The venue was afterward changed to the De Kalb Circuit Court. Brownell also filed a plea in abatement, of a misjoinder and non-joinder of parties. Plaintiff below moved the court to strike the plea in abatement filed by Cook, from the files, because the affidavit to the plea was insufficient. The court sustained the motion. Cook then, without leave, filed another plea in abatement, the same as the former, except, at the head of the affidavit was the title of the cause. On motion of plaintiff below, this plea was also stricken from the files. Cook then filed the general issue, and a trial was had before the court and a jury, resulting in a verdict in favor of plaintiff in the sum of $210. A motion for a new trial was entered and overruled, and judgment rendered on the verdict. And Cook brings the case to this court by appeal, and seeks to reverse the judgment on the ground that the court erred in striking his plea from the files.

Opinion of the Court.

The only objection urged to the plea, is that the affidavit supporting its truth, does not have at its head, the title of the cause. A plea in abatement must be certain to every intent in particular, and if it fails in this requirement, it is insufficient. The oath as embodied in the record, seems to have been on the same paper with the plea. The plea is properly entitled, of the court, the parties to the suit, with the venue of the suit, and the jurat follows under the plea. Affiant states "that the above plea is true in substance and in matter of fact." Then follows the clerk's file, in which he says, "Plea of Cook in abatement, April 19, 1864." From all of these circumstances, we are convinced that both were on one piece of paper, and it is embodied in the record as such.

The object of entitling all pleas, whether in abatement or in bar, as well as other papers, is that it may be certainly known to what case they properly belong. And when that unmistakably appears from the paper itself, the reason of the rule is answered. The title of the case and of the court appears at the head of this plea, with the jurat underwritten and referring to the plea. Had the name of the parties to the suit been referred to in the plea, it would have been no more certain than it is as presented in the record. We are, therefore, of the opinion, that this plea was sufficient and should not have been stricken from the files.

After a defendant has filed a plea in abatement in a cause, and that has been disposed of, the rules of practice preclude him from filing another of the same character. He may afterward file pleas in bar but not in abatement. Appellant, therefore, had no right to file an amended plea in abatement after the first was stricken from the files. The court below, then, committed no error in striking it from the files.

But, for the error in striking the first plea in abatement from files, the judgment must be reversed and the cause remanded, with leave to appellee to reply to that plea and for a new trial.

Judgment reversed.

WILLIAM H. HOYT *et al.*

v.

JOHN LOCK.

1. CONTRIBUTION — *as between the several makers of a note.* When one of several makers of a note pays the note, he can compel, by suit, his co-makers to contribute their proportion.

2. EVIDENCE — *under the general issue.* In an action by one of several makers of a note, who claims to have paid the note, against his co-makers for contribution, a special plea setting up that after the note was given, it was agreed between the owner of the note and the makers, that a part of the makers should pay one-half the note, and the others the remaining half, and the party thus paying his share to be discharged from further liability, and that the note was paid according to such agreement, was held bad as amounting only to the general issue.

WRIT OF ERROR to the Circuit Court of Marshall county; the Hon. SAMUEL L. RICHMOND, Judge, presiding.

The opinion of the court states the case.

Messrs. BURNS & CUMMINS, for the plaintiffs in error.

Messrs. BANGS & SHAW, for the defendant in error.

Mr. JUSTICE BREESE delivered the opinion of the Court:

This was an action of assumpsit in the Marshall Circuit Court, brought by John Lock against William H. Hoyt and Matthew Hoyt, impleaded with Ellen Manning and William L. Manning. The declaration was for goods, wares and merchandise sold and delivered, and the money counts. William H. Hoyt pleaded the general issue and two special pleas, both of which alleged an agreement between William and Matthew Hoyt and Ellen Hoyt and John Lock, as makers, and Erastus Wright as payee of the note, that William Hoyt should pay half the note, and the other makers the remaining half, and that each party should, thereupon, be discharged from further liability on the note; that William Hoyt paid his share, and

the other makers the residue which was accepted by Wright in discharge of the note. A demurrer was put in to these pleas, on the ground that they amounted to the general issue, which the court sustained to the third plea and overruled as to the second. A replication was filed to the second plea, setting up the fact that William H. and Matthew Hoyt and John Lock were not principals in the note, but that William H., Ellen and Matthew Hoyt were the principals, and Lock and Petrie were sureties; and, further, that there was no agreement for a release as set forth in that plea, and issue to the country. Matthew Hoyt filed the plea of the general issue and statute of frauds and perjuries, but it is not necessary to notice more particularly the pleadings. The cause was tried by the court, and a verdict and judgment for the plaintiff, Lock.

The main facts are substantially as follows: One Erastus Wright sold lot 27 in the town of Henry to William H. Hoyt and George L. Hoyt, for $500. George L. Hoyt died leaving the note unpaid, and the parties having charge of his estate wanted to sell the land to pay debts, and Wright took the note of William H., Ellen and Matthew Hoyt, and John Lock and James Petrie for $500 payable in one year. It was a joint note. Judgment was obtained on it, after which Wright agreed with Ellen Hoyt and John Lock, that, if they would pay half the note, he would look to William H. Hoyt for the residue, to which they agreed, Lock promising to pay it out of the estate, saying that he had money in his hands belonging to the estate, and was owing the estate. Wright made the same arrangement afterward with William H. Hoyt to pay the other half, he (Wright) agreeing to look to the others for the balance, to which Hoyt agreed, and he did, from time to time, make payments as agreed. The whole amount of the note, it appears, was made out of a sale on execution of Lock's land, which he redeemed. This suit is really a suit for contribution. The third plea amounted to the general issue, and the demurrer was properly sustained to it. As to the facts stated in the second plea, they are not material under this aspect of the case; for it is well settled doctrine, when one of the makers of

a note pays the note, he can compel by suit his co-makers to contribute their proportion. The note was given in order that the title might be divested out of Wright and be made available as assets to pay the debts of George L. Hoyt. Lock was bound to pay the whole note, notwithstanding the agreement with Wright, and he has paid it; and the other parties, for whose benefit he signed the note, and eventually paid it, are bound to contribute their proportion to him, which proportion the court found to be $418.59. We perceive no error in the finding, and must affirm the judgment.

Judgment affirmed.

ANDREW J. BROWN
v.
HARVEY B. HURD *et al.*

1. WITNESSES — *competency — whether one partner may testify against a copartner.* Where a member of a firm has taken, by agreement with his copartners, all the partnership debts, and assumed all the partnership liabilities he is a competent witness in behalf of a creditor of the firm in a suit against himself and other persons sued as his copartners, to prove, under an issue involving that question, that his co-defendants were liable with him. This rule was laid down in *Bell* v. *Thompson*, 34 Ill. 529, it being considered that his ultimate liability for the entire debt, relieved the witness of any disqualifying interest in the result of the suit.

2. But, if the effect of his testimony is to transfer a portion of his own admitted liability to his co-defendants against whom he is called to testify, and against whom no liability is shown except by the aid of his testimony, then he would be incompetent, because he would be swearing in his own interest.

3. The interest of the witness thus situated to fix the liability of his codefendants to contribution, is not balanced by the consideration, that, by testifying in their favor, he might defeat a recovery in the present action, under the rule that, in a suit against several, a recovery must be had against all or none; because, his own liability being admitted, should he go clear of the present action upon the ground his co-defendants were not liable, it would be with the certainty that the entire debt would fall upon him.

Opinion of the Court.

4. FORMER DECISIONS. The cases of *Crook* v. *Taylor*, 12 Ill. 355, and *Hurd* v. *Brown*, 25 Ill. 616, are in conflict as regards the rule on the subject. But the rule laid down in the latter case is considered the better rule, and is in harmony with *Bell* v. *Thompson*, *supra*.

5. EFFECT OF THE ACT OF 1861, *allowing parties to be called as witnesses.* Nor is the rule above announced, as to competency, at all affected by the act of 1861, allowing parties to be called as witnesses. The object of that act was to remove the common law disqualifications arising from being a party to the record, and to authorize one party to call the other to testify against his own interest.

6. But it was never intended to remove the common law disqualification arising from the interest of the witness in the result of the suit, when called to testify in behalf of that interest and without the consent of the person against whom he might be called.

WRIT OF ERROR to the Superior Court of Chicago; the Hon. VAN H. HIGGINS, Judge, presiding.

This was an action of assumpsit brought in the court below, by Andrew J. Brown, against Harvey B. Hurd and others, upon a promissory note. A trial resulted in a judgment in favor of the defendants. The cause is brought to this court by the plaintiff on writ of error.

The opinion of the court contains a statement of the case.

Mr. W. T. BURGESS and Mr. ANDREW J. BROWN, for the plaintiff in error.

Messrs. HURD, BOOTH & KREAMER, for the defendants in error.

Mr. JUSTICE LAWRENCE delivered the opinion of the Court:

This was an action of assumpsit brought by Brown, against Hurd, Dunlap and Colburn, upon a promissory note, signed "Dunlap, Wright & Co." Dunlap and Colburn were defaulted for want of a plea. Hurd, by a plea verified by affidavit, denied the execution of the note. On the trial, the plaintiff, having first filed an affidavit showing that he had no other witness by whom he could make the proof, offered to prove by

Dunlap and Colburn, two of the defendants, that Hurd had authorized them to execute the note in controversy for himself and them. This evidence was objected to by Hurd, on the ground that the witnesses were incompetent, and the objection was sustained by the court. This case was argued at the April Term, 1864, and decided, but a rehearing was afterward granted, and the case is again before us. The only question presented is upon the competency of these witnesses.

On this subject, the rulings of this court have not been wholly uniform. In *Crook* v. *Taylor*, 12 Ill. 355, it was held, that a partner, who is not joined as a defendant, may be called as a witness by the plaintiff, to prove the cause of action against the partner sued. But in *Hurd* v. *Brown*, 25 Ill. 616, which seems to have been a suit upon the same note before us in the present record, the court held that these witnesses — Dunlop and Colburn — were not competent, because by their testimony they would transfer one-third of the liability upon this note from themselves to Hurd. These two decisions are in conflict. Next comes the case of *Bell* v. *Thompson*, 34 Ill. 529, in which it is said the rule laid down in *Brown* v. *Hurd* should be so far modified as not to exclude the testimony of parties who are not disqualified by interest; and in that case it was held, that a defendant could testify against his copartners, because it appeared that the witness had taken the assets of the firm, and assumed its liabilities, and had therefore no right of contribution as against his co-defendants. This is in fact the principle laid down in *Hurd* v. *Brown*, *ubi supra*, and there is no conflict between these two cases. In *Hurd* v. *Brown*, the witness was held disqualified, because, by his testimony, he would transfer to another a part of the liability admitted to rest upon himself; and, in *Bell* v. *Thompson*, he was held qualified because his evidence would not have that effect. These two cases recognize the same rule, and it is clear and of easy application.

If the witness, by an arrangement between himself and his partners, as in *Bell* v. *Thompson*, is ultimately liable for the whole debt, he is a competent witness. It matters not to him whether he pays the debt to the creditor of the firm, or whether

the firm pays it, and he re-imburses the firm. But, if the effect of his testimony is to transfer a portion of his admitted liability to persons against whom no liability is shown, except by aid of his testimony, then he would be clearly incompetent, because he would be swearing in his own interest. This is the rule established by the current of authorities. *Brown* v. *Brown*, 4 Taunt. 752; *Ripley* v. *Thompson*, 12 Moore, 55; *Marshall* v. *Thrakill*, 12 Ohio, 275; *Marquand* v. *Webb*, 16 Johns. 89; *Purviance* v. *Dryden*, 3 S. & R. 402; *Columbian Man. Co.* v. *Dutch*, 13 Pick. 125; *Davis & Nizzel* v. *Sanford*, 18 Geo. 289; *The State* v. *Pinman*, 2 Dessaussure, 1.

The case of *Hurd* v. *Brown*, 25 Ill. 616, is, of itself, decisive of this case. These identical witnesses are held incompetent in that case, which was a suit against Hurd alone, upon grounds applicable to this case at bar. But it is urged, that, in the present cases, Dunlap and Colburn are parties defendant, and that their evidence is admissible under the act of 1861, allowing parties to be called as witnesses. To thus hold, would be to misapprehend the object of that statute. Its object clearly was to remove the common law disqualifications arising from being a party to the record, and to authorize one party to call the other to testify against his own interest. But it certainly was never intended to remove the common law disqualification arising from the interest of the witness in the result of the suit, when called to testify in behalf of that interest, and without the consent of the person against whom he might be called. There is nothing whatever in the act indicating an intention to make such a radical change in the common law. Under this statute, a party may be called without his own consent and against his own interest; but, if he would have been disqualified on the ground of interest by the common law, had he not been a party to the record, the fact that he is a party cannot be considered as restoring that competency.

It is urged that the interest of these witnesses was to testify in favor of their co-defendant, and thus defeat a recovery in the present suit, not only against him, but against themselves. The case of *Pike* v. *Steele*, 2 Adolph. & Ellis (N. S.) 733, is cited

in support of this view. In that case the defendant who was offered as a witness, had been defaulted, and Lord DENMAN, in giving his opinion, which is very meagre, says, "the defendant, after suffering judgment by default, may have little ground for expecting that he will ultimately escape the consequences of a joint liability; but his conduct, even in that respect, might admit of explanation. He might say that it occurred through an oversight." This reasoning, and his Lordship's decision, proceed upon the ground that the defaulted defendant may not be in fact liable, and that, if he can succeed in defeating the existing action he may successfully defend a future action brought against himself. Whatever force there may be in this reasoning, it has no application to the case at bar. The liability of Dunlap & Colburn does not rest solely on their failure to plead. It appears positively by their own testimony, and they had even given a power of attorney to confess a judgment against themselves upon the note. There can be no shadow of doubt as to their liability, and, as a verdict and judgment against the defendants would fix the liability of Hurd to contribution, it seems indisputable that their interest requires such a judgment to be pronounced, rather than that they should go clear of the present action with the certainty that thereby the entire debt will fall upon themselves. We do not consider this case as falling within *Pike* v. *Steele*, and moreover Lord DENMAN'S decision is wholly at variance with the English and American cases above cited.

Judgment affirmed.

HARVEY B. HURD *et al.*

v.

ANDREW J. BROWN.

WRIT OF ERROR to the Superior Court of Chicago; the Hon. VAN H. HIGGINS, Judge, presiding.

Messrs. HURD, BOOTH & KREAMER, for the plaintiffs in error

Mr. W. T. BURGESS, for the defendant in error.

Mr. JUSTICE LAWRENCE: The same question in regard to the admissibility of witnesses is presented in this case as in the preceding case of *Brown* v. *Hurd*, decided at the present term of the court. The same facts are presented by this record, the parties being reversed. We held, in that case, that the parties who had been defaulted were not competent witnesses to charge the defendant as a copartner.

We so hold in this case. The judgment is reversed and the cause remanded.

Judgment reversed.

BERNARD DONNELLY
v.
ROBERT HARRIS *et al.*

1. DAMAGES — *mitigation of exemplary.* While words spoken do not constitute a defense for an assault or an imprisonment, nor even a ground for mitigating or reducing the damages actually sustained by the defendant, and it is error to so instruct the jury, still they may be considered for the purpose of mitigating exemplary damages, together with all of the surrounding circumstances.

2. MALICE — *damages.* Where the evidence shows malice on the part of defendant, and his conduct is wanton and atrocious, the law authorizes a jury to assess punitive damages as a punishment. And the provoking language must be direct and apply to the defendant, before he can insist that it shall mitigate punitive damages, and even then he must not have acted beyond reason and simply relied upon the provocation as an excuse for atrocious and outrageous injury to plaintiff.

3. INSTRUCTIONS — *vindictive damages.* When the court has correctly instructed the jury, that, if the evidence warrants it, they may give vindictive damages, it is erroneous to instruct for the defendants that they can only give such damages as the plaintiff has proved; such an instruction is calculated to mislead, as it implies that no damages can be allowed, actual or vindictive, unless the amount is proved, while it is the province of the jury to fix the damages in view of all of the circumstances appearing in evidence.

APPEAL from the Circuit Court of Jo Daviess county; the Hon. BENJAMIN R. SHELDON, Judge, presiding.

Statement of the case.

This was an action of trespass *vi et armis* and for false imprisonment, brought by Bernard Donnelly, in the Jo Daviess Circuit Court, to the March Term, 1862, against Robert S. Harris, Daniel S. Harris and John C. Hawkins. The declaration contained two counts, one for a false imprisonment and the other for an assault and beating of plaintiff. Defendants filed a plea of not guilty.

On the trial, it appeared that plaintiff and defendants got into an altercation near the recruiting office, in Galena. That it originated in reference to the alleged failure of some volunteers to obtain their bounties. The dispute seems to have been between plaintiff and one McMaster, when Robert S. Harris struck plaintiff several blows, from the effects of which he seems to have bled pretty freely. Witnesses state that plaintiff had said nothing to Harris when he struck him.

It appears, that plaintiff was taken to the common jail of the county by Hawkins, without warrant or mittimus, and was confined there, being locked up at night in the felons' cell and permitted to occupy the hall during the day, from the 11th of August, 1862, until the 1st of September following. He was then taken to Chicago and confined in Camp Douglas as a prisoner about two or three months.

The jury found the issues for the plaintiff, and assessed the damages at $50; and he thereupon moved the court to set aside the verdict and grant a new trial, because it was too small, because the jury found against the instructions, and because the court misdirected the jury. The court overruled the motion and rendered judgment on the verdict, from which plaintiff appeals to this court and asks a reversal of the judgment.

Mr. L. SHISSLER and Mr. D. SHEEAN, for the appellant.

Messrs. GLOVER, COOK & CAMPBELL, for the appellees.

Mr. CHIEF JUSTICE WALKER delivered the opinion of the Court:

It is insisted that the court below erred in modifying plaintiff's fifth instruction before it was given. As asked, it was this:

"The jury are instructed that words spoken are no justification for blows, and that the words proved to have been spoken, are no justification for the arrest and imprisonment of the plaintiff."

The court modified the instruction as follows: "but they may be considered by the jury in mitigation of damages," and gave it as so modified.

Had this modification been limited to exemplary damages it would have been correct, but it may well have been understood by the jury as applying to actual damages, and they would thus have been misled. To allow them the effect to mitigate actual damages would be virtually to allow them to be used as a defense. To say they constitute no defense, and then say they may mitigate all but nominal damages, would, we think, be doing by indirection what has been prohibited from being done directly. To give to words this effect would be to abrogate, in effect, one of the most firmly established rules of the law.

The rule, as we understand it, is, that words do not justify an assault or false imprisonment, nor will they in such cases mitigate the actual damages, but they may, with all of the surrounding circumstances, be considered on the question of vindictive damages. As they depend upon the wanton conduct of the defendant, it is proper, that every circumstance, immediately connected with the transaction, should be considered in determining whether the defendant should be punished, by inflicting damages beyond the injury actually received by the plaintiff. It is only by considering what was said and done at the time that the *animus* of the defendant can be known. If the language employed was not calculated to provoke and excite passion, then the jury should, in considering the question of vindictive damages, give it no weight. Or, if the injury was great and the conduct of defendant atrocious and without

reason, then the language of plaintiff should have but little weight in fixing vindictive damages. On the other hand, if the language was grossly insulting, and well calculated to create an uncontrollable degree of passion, and defendant acted under its influence, and only as a reasonable man would do under high excitement, a jury would not likely give vindictive damages.

When the evidence shows deliberate malice, a vindictive spirit, or a reckless disregard for the personal security of another, and the person committing the wrong does so to gratify his malice, the law has always authorized a jury to give smart-money, as a kind of punishment for the aggravated wrong. But, when it is without malice, and it is not wanton and reckless, but is produced under highly provoking language, the law will not imply such malice as requires to be punished with vindictive damages. But this must be understood with some limitation, because, if the wrong is carried to an excess, and is greatly disproportioned to the provocation, and beyond what a prudent man would have done, then it would manifest such malice as would require punishment by imposing smart-money. And the provocation of the plaintiff must be direct, and must immediately concern the defendant, to authorize it to be considered even in mitigating vindictive damages. When a battery is justified as being in self-defense, if it appears that it was carried beyond reason, the defendant is held liable, as though he had made the first assault. So with insulting or abusive words, while they may repel the presumption of malice, still, if the defendant exceeds the bounds of reason, and thereby manifests a wicked spirit, by excessive injury or imprisonment, the provoking language would not mitigate punitive damages. The modification was therefore erroneous.

By the first of plaintiff's instructions, the jury were informed that it was within the province of the jury to give exemplary damages. But for the defendant the court gave this instruction: "If the jury should find the defendants, or either of them, guilty, they can only assess such damages as the plaintiff has proved against the defendant, or defendants, found guilty."

This instruction may have been considered by the jury as in conflict with the first of plaintiff's instructions, which had stated the law correctly. This latter instruction may have led the jury to suppose they could not give exemplary damages, no matter how vindictive, reckless and atrocious the conduct of the defendant, unless there was proof of such damages. Whether such damages should be given is a question for the consideration of the jury, and not for the court.

That was a question for their consideration, and it should have been left to them. When the jury can see, from the whole case, that a defendant was actuated by malevolence, a reckless and wanton disregard for the rights of the plaintiff, they should give vindictive damages. These two instructions being in conflict, the jury were not instructed as to the law of the case, but were left to choose either of the conflicting propositions. The plaintiff had the right to have the law correctly stated to them. It is not in our power to say that the jury were not misled by these repugnant instructions, and the probability is, that they were, as in their efforts to reconcile them, they would naturally suppose that punitive damages were matter of proof, which is not the law.

The judgment of the court below is reversed and the cause remanded.

Judgment reversed.

DAVID L. HOUGH
v.
MICHAEL COUGHLAN *et al.*

1. SPECIFIC PERFORMANCE — *discretion of the court.* It is an established doctrine in chancery, that an application for a decree of specific performance is addressed to the sound legal discretion of the court, and a decree does not follow as matter of course, because a legal contract is shown to exist.

2. So, where a long period of time has elapsed, courts will be cautious in enforcing a specific performance.

Statement of the case.

3. RIGHT TO SPECIFIC PERFORMANCE DEFEATED — *lapse of time, contract disclaimed, adverse possession, improvements.* And, where a bond was made in 1849, assigned to the complainant twelve years afterward, during which time the assignor repeatedly disclaimed all interest in the land, and during the last eight years of which the grantees of the person who made the bond were in actual possession, cultivating it and making valuable improvements on it, all with the knowledge of both assignor and assignee, a specific performance was refused.

4. Under such circumstances, all parties interested were bound to take notice of a possession so notorious and visible, and they must be charged with all legal and equitable claims of the occupants.

5. DELAY — *its effect.* It is the settled doctrine that great delay of either party, unexplained, in not performing a contract, or in not prosecuting his rights under it, constitute such *laches* as to amount, for the purpose of specific performance, to an abandonment of the contract, and equity will afford no aid.

6. So, where an action for title under a bond was delayed for more than twelve years after the alleged purchase, and the delay was not accounted for, and during all that time the land was in the notorious occupancy of parties claiming title, by deed, of record, and who had made valuable improvements, and no claim under the bond had been asserted, a bill for specific performance was properly dismissed.

7. POSSESSION AND IMPROVEMENT — *title aided by.* Where, under a title of record, a party converts wild land into a productive farm, by expending labor and money, and makes it a home, and all this with the knowledge of one holding a bond for title, who stands by in silence for twelve years, *held*, that equity would not take such property under such circumstances, from the occupants, even by a decree which required them to be re-imbursed for the improvements.

APPEAL from the Circuit Court of Lee county; the Hon. W. W. HEATON, Judge, presiding.

This was a bill in chancery, filed by David L. Hough in the Circuit Court of La Salle county, and on a change of venue sent to the Circuit Court of Lee county, where it was heard and determined. The prayer of the bill was for specific performance of a contract to convey land. On a final hearing the bill was dismissed, and this appeal is taken to reverse that decision.

The bond on which the bill is founded, was made 2d October, 1849, by Michael Coughlan to Timothy Horgan, for the consideration of $88.57½. It was assigned to D. L. Hough on the 25th January, 1862. The bill was filed 27th August, 1862.

The answer alleges, that the bond was never delivered; that the consideration for it was never paid; that the possession of the bond was obtained by fraud and without payment; that Hough has no interest in the premises except as an attorney to prosecute for Horgan and receive one-half that may be realized, and that the assignment was taken with notice of the rights of the defendants. The answer then alleges title in the defendants through a warranty deed, dated 21st April, 1851, from Michael Coughlan, for a valuable consideration, possession since that time, cultivation and improvements. Denies the right to a specific performance after so great a lapse of time and under the circumstances.

Mr. G. S. ELDRIDGE, for the appellant.

1. *Laches* can only be insisted upon where the complainant seeks to be relieved from a contract, with which he has failed to comply.

2. The appellees are not in a condition to set up *laches* by the appellant, for they have no rights. It does not appear that they ever paid a dollar for the land.

3. A party will not be estopped by a declaration made to a stranger which was never communicated to or influenced the party setting up the estoppel. *Dezell* v. *Odell*, 3 Hill (N Y.), 224; *Massure* v. *Noble*, 11 Ill. 531, and authorities there cited; *Lawrence* v. *Brown*, 1 Seld. 401; *Thomas* v. *Bowman*, 29 Ill. 429; *Jackson* v. *Brinkerhoof*, 3 Johns. Ch. 101; 7 Barb. 649; 5 id. 375.

Mr. OLIVER C. GRAY, for the appellees.

1. Declarations in disparagement of the title of the declarant bind those in privity with the party making them. 1 Greenl. Ev. § 109, 188.

2. The assignee is bound by the previous admissions of his assignor, and occupies his position. So where he acquires title with notice of the true state of that of the assignor, or purchases a stale demand, or one tainted with suspicion. 1 Greenl.

Ev. § 190; 1 Phil. Ev. 332; 8 Geo. 61; 18 Miss. (3 Bennett) 405; 12 Ired. 247; 34 Maine, 386; 5 Rich. Eq. 128; 27 Ala. 10, 314, 706; 25 id. 415; 20 Penn. 295.

3. The visible possession of premises charges a purchaser with notice of all the equitable claims of the occupants, and those under whom they hold. *Brown et al.* v. *Gaffney*, 28 Ill. 150.

4. Hough is precluded by lapse of time and adverse possession. *Smith* v. *Clay*, Ambler, 645; 10 Peters, 222; 2 Jac. & Walker, 138; 9 Wheat. 497; 10 id. 168; 1 Sugd. on Vendors, 341; 3 Peters, 66; 6 id. 52; 5 id. 490; 7 J. C. 122; 10 Wheat. 150, 174; 9 Peters, 416. Especially when unexplained. 17 Ves. 88, 89, 96; 1 J. & W. 62, 63, and note; 1 J. C. 47, 354; 3 id. 218, 586; 5 id. 187; Story's Eq. Pl. § 756 a; 1 Story's Eq. Jur. § 64 a, and cases there cited. See, also, *Anderson* v. *Frye*, 18 Ill. 95; *Dickerman et al.* v. *Burgess et al.*, 20 id. 276.

5. All bills in equity which seek to disturb long possession deserve the utmost discouragement. 1 Atk. 467; Story's Eq. Pl. § 813, and cases there cited.

6. Contracts will not always be specifically enforced; the court will use a discretion. *Lear* v. *Chouteau et al.*, 23 Ill. 39; *Stone* v. *Pratt*, 25 id. 25; 1 Sugd. on Vendors, 341.

7. One who looks on and permits a purchase and improvements without making known his claim, shall not be permitted to assert it afterward. *Cochran* v. *Harrow*, 22 Ill. 349.

Mr. JUSTICE BREESE delivered the opinion of the Court:

This was a bill in chancery, exhibited in the La Salle Circuit Court, by David L. Hough against Michael Coughlan and others, for the specific performance of the contract therein set forth, to convey a certain tract of land. The venue was changed to Lee county, where a decree passed dismissing complainant's bill.

To reverse this decree, the record is brought here by appeal, and various errors assigned.

We have deemed it necessary to consider but two points made, as they seem to be decisive of the case.

It is the established doctrine in chancery, that applications of this kind are addressed to the sound legal discretion of the court, and it is not a matter of course that a specific performance will be decreed because a legal contract is shown to exist (*Frisby* v. *Balance*, 4 Scam. 287); and, where a long period has elapsed, courts will be cautious in enforcing a specific performance. *Rector* v. *Rector*, 3 Gilm. 105.

In this case, it appears, that the bond under which appellant sets up his equity, was executed to Horgan on the second of October, 1849, and was assigned to complainant on the 25th of January, 1862, more than twelve years after the execution of the bond.

It is in proof also, that Horgan, before the alleged assignment, repeatedly disclaimed all interest in the land, and that, as early as 1853, the land was in the actual possession of Coughlan's grantees, or of those claiming under him; that they cultivated it, and made valuable improvements on it, with the knowledge of Horgan and appellant, long prior to his assignment to appellant. The possession was so notorious and visible, that all parties interested were bound to take notice of it, and they must be charged with all legal and equitable claims of the occupants. *Brown et al.* v. *Gaffney et al.*, 28 Ill. 149.

Another point made against appellant is, the unexplained *laches* of Horgan.

It is the settled doctrine of courts of equity in England, and of this court, that great delay of either party unexplained, in not performing the terms of a contract, or in not prosecuting his rights under it, by filing a bill, or in not prosecuting his suit with diligence when instituted, constitute such *laches* as would forbid the interference of a court of equity, and so amount, for the purpose of specific performance, to an abandonment, on his part, of the contract. Fry on Specific Performance, 218.

This text is supported by *Mackreth* v. *Marlar*, 1 Cox's Ch. C. 259, decided by Lord KENYON, and the doctrine is sanctioned

by numerous subsequent cases. The leading case is *Milward* v. *The Earl Thanet*, 5 Vesey, 720, in which Lord ALVANLEY said, a party cannot call upon a court of equity for a specific performance unless he has shown himself ready, desirous, prompt and eager. The case of *Marquis of Hertford* v. *Boore*, 5 Ves. 719, is to the same effect, and so is *Eaton* v. *Lyon*, 3 id. 690, and many others which might be cited. From these, and kindred cases, has been eliminated the doctrine that a court of equity will give no aid to a party who has been guilty of gross laches, not satisfactorily explained. Horgan's delay in prosecuting an action for the title more than twelve years after his alleged purchase, is wholly unaccounted for, and must be referred to the repeated disclaimers made by him prior to his assignment, that he had paid nothing for the land and had no interest in it. During all this time, the land was in the visible, open and notorious occupancy of parties claiming title to it, and who had made valuable improvements thereon, and a deed for it on the records of the county. It is inconceivable, if Horgan believed he had an equity, that he would not have asserted it in some mode, or made some effort to that end.

We see nothing in this case which would justify this court, in the exercise of a sound legal discretion, to decree a specific performance of the contract with Horgan, and thus deprive the appellees of valuable property, made so by their own labor and expenditures of money. They have converted wild land into a productive farm and made of it a home, and all this with the knowledge of appellant and of his grantor. Great, then, would be the injustice, under the circumstances developed in this case, to take this from them, even though a decree might be passed requiring appellant to re-imburse them for the improvements. We place our decision on the ground of this notorious occupancy, and the gross *laches* in the party who assigned to appellant. We cannot see any thing in the case demanding the interposition of a court of equity.

The decree of the Circuit Court must be affirmed.

Decree affirmed.

HONORA HENCHEY, Administratrix,
v.
THE CITY OF CHICAGO.

1. PRACTICE — *dismissing a suit upon stipulation, in the absence of the opposing counsel.* The better practice is, not to dismiss a suit in the Circuit Court in the absence of the plaintiff's counsel, upon motion of defendant's counsel based upon a stipulation to that effect, signed by the plaintiff in person; yet the appellate court will not set aside the action of the court below allowing such motion, merely for that reason, and in the absence of proof, that the stipulation was fraudulently or improperly obtained.

2. ADMINISTRATOR — *of his power to compromise and stipulate to dismiss a suit brought to recover damages for the death of intestate caused by the negligence of defendant.* An administrator having instituted suit, under the act of 1853, to recover damages in respect to the death of the intestate, alleged to have been caused by the neglect or default of the defendant, has the legal right to control the prosecution and disposition of the suit. So he has the power to stipulate for the dismissal of the cause, upon a settlement with the defendant by which he received even less than the amount claimed in his declaration.

3. ATTORNEY'S LIEN *upon a claim for unliquidated damages before judgment — control of the client over his own case.* An attorney's lien for his fees does not attach to a claim for unliquidated damages prior to the judgment.

4. So, where an administrator has instituted suit to recover damages in respect of the death of his intestate, alleged to have been caused by the neglect of the defendant, the attorney who brought the suit has no lien on the cause for his fees, so as to deprive the plaintiff of the power to settle the action before judgment in such manner as he may deem proper.

WRIT OF ERROR to the Circuit Court of Cook county; the Hon. ERASTUS S. WILLIAMS, Judge, presiding.

This was an action of trespass on the case brought in the court below by Honora Henchey, as administratrix of the estate of John Henchey, deceased, against the city of Chicago, to recover damages for causing the death of the said John Henchey.

It is alleged in the declaration, that, on the night of the 29th of July, 1863, the draw-bridge across the south branch of the Chicago river, in the city of Chicago, known as the "Polk

Street bridge," was carelessly left open, without any lights or other warning to travelers, or any guards or barriers to prevent persons being about to cross the bridge from walking or falling off from the same into the river; and, that, by reason thereof, and without any fault or negligence on his part, the said John walked or fell off from the bridge into the river and was drowned.

On the first day of February following, this suit was instituted by the plaintiff, "who sues as well for herself, being the widow of the said John Henchey, as also for the use and benefit together with herself, of William Henchey, Sarah Henchey, Kate Henchey, and Bridget Henchey, children and heirs at law of said John Henchey, and next of kin of him said John Henchey."

Damages were laid at five thousand dollars.

It appears, that, on the second day of May after the suit was brought, the defendant's counsel appeared in court, and, in the absence of the plaintiff and her counsel, entered his motion that the suit be dismissed, the motion being based upon the following stipulation:

"It is hereby stipulated and agreed, by and between the parties to the above entitled suit, now pending in the Circuit Court of Cook county, Illinois, that the same shall be dismissed at the present term of the said court, at the costs of defendant, the same having been fully settled by agreement between said parties.

"Executed in the presence of

"CHARLES TUNNICLIFF,

"MALCOLM MCDONALD.

"HONORA HENCHEY,

"*Administratrix of the goods and chattels of John Henchey, deceased.*

"S. S. HAYES, *City Comptroller of Chicago.*"

The motion was allowed, and the following order of dismissal was entered of record:

"By the written stipulation of the said parties, filed herein, and on motion, it is ordered that said *suit be dismissed out of this court*, with costs to be taxed, and the same is hereby dismissed accordingly."

On the 3d of May, the plaintiff moved the court to set aside the order dismissing the cause, and, in support of the motion, presented several affidavits, which it is not necessary to set forth in full. The principal grounds urged in support of the plaintiff's motion are as follows:

1. That it was contrary to the practice of the court to dismiss a suit upon such a stipulation, upon the motion of defendant's counsel in the absence of the plaintiff's counsel.

2. That improper and fraudulent means were resorted to in obtaining an unfair compromise with the plaintiff, without the advice and in the absence of her attorney.

3. That the plaintiff had no power to make the stipulation by which the suit was dismissed.

4. The attorney for the plaintiff insists that he had an attorney's lien on the claim for damages which could not be defeated by the act of his client.

The amount paid to the plaintiff by the defendant in compromise of the suit, is shown in the following receipt:

"CHICAGO, April 29, 1864.

"Received of the city of Chicago, the sum of one thousand and sixty dollars in full settlement and satisfaction of all damages claimed or sought to be recovered by me in a certain suit now pending in the Circuit Court of Cook county, Illinois, wherein I, Honora Henchey, administratrix of the goods, chattels and credits which were of John Henchey, late of said county of Cook, deceased, is plaintiff, and the said city of Chicago is defendant.

"HONORA HENCHEY, [SEAL.]
"*Administratrix of the goods and chattels of John Henchey, deceased.*"

And at the time of making the settlement the plaintiff executed the following instrument:

"Know all men by these presents, that I, Honora Henchey, administratrix of all and singular the goods, chattels, and effects which were of John Henchey, deceased, for and in consideration of the sum of one thousand and sixty dollars to me in hand paid, the receipt of which is hereby acknowledged, have remised, released and forever discharged the city of Chicago, and by these presents do, for myself, my heirs, executors and administrators, and for the next of kin of said John Henchey, deceased, remise, release and forever discharge the said city of Chicago of and from all and all manner of actions, causes of actions, suits, debts, dues, sums of money, controversies, damages, claims and demands whatsoever, in law or in equity, which I ever had or may have against the said city of Chicago, in my own right, or as administratrix as aforesaid.

"In witness whereof I have hereto set my hand and affixed my seal, the 29th day of April, 1864.

"HONORA HENCHEY, [SEAL.]

"*Administratrix of the goods and chattels of John Henchey deceased.*"

The court overruled the plaintiff's motion to set aside the order of dismissal, and thereupon she sued out this writ of error for the purpose of reviewing the action of the court in that regard.

Mr. H. T. STEELE, for the plaintiff in error.

Mr. FRANCIS ADAMS, for the defendant in error.

Mr. JUSTICE LAWRENCE delivered the opinion of the Court:

Although the better practice undoubtedly is, not to dismiss a suit in the absence of plaintiff's counsel, upon motion of defendant's counsel based upon a stipulation to that effect, signed by the plaintiff in person, yet we cannot set aside the action of the court merely for that reason, and in the absence of proof that the stipulation was fraudulently or improperly obtained. After an attentive examination of the affidavits filed in this case, we cannot see that the officers of the city

resorted to fraud, misrepresentation, or illegal means of any sort, in making the compromise. Some of them may have plied the plaintiff with arguments to an extent from which a high-minded man would have shrunk in any controversy he might have with a woman, but mere violations of good taste or scrupulous propriety are not within our jurisdiction.

Neither can we agree with appellant's counsel in the position that the plaintiff had no power to make the stipulation by which the suit was dismissed. The statute vested in her, as administratrix, the right of action and the legal title to whatever damages were recoverable. This, of necessity, gave her the legal right to control the prosecution and disposition of the suit, as an administrator has in other cases. Whether the children who, with herself, were interested in the distribution of whatever damages might have been recovered, can call her to account for any error of judgment she may have committed in making this settlement, is a question to be decided when they make the attempt. The application to set aside the order of dismissal is not made in their behalf, but in her own. For aught that appears they are satisfied with the settlement, and she is certainly concluded by it. It is not pretended that there was any collusion between her and the city to defraud the children, or that she was not acting in the utmost good faith in regard to their interests. Had collusion for this purpose been shown, a different question would have been presented.

The counsel for appellant also insists that he had an attorney's lien on the claim for damages which could not be defeated by the act of his client, and which gave him a right to prosecute the suit to judgment. The extent of an attorney's lien is not very well defined, and the cases in the New York Reports are especially conflicting. We are not, however, inclined to *hold*, that the lien attaches to a claim for unliquidated damages prior to the judgment.

In *Gitchel* v. *Clark*, 5 Mass. 309, on an application similar to the present, the court, refusing the motion, said, "before judgment it was very clear the plaintiff might settle the action and discharge the defendant, without or against the consent of

his attorney, who had no lien on the cause for his fees." A similar rule is laid down in *Foot* v. *Tewksbury*, 2 Vt. 97; *Shank* v. *Shoemaker*, 18 N. Y. 489, and *Sweet* v. *Bartlett*, 4 Sanf. 66, and we regard it as by far the sounder principle. To hold that the lien attaches to a claim for unliquidated damages before judgment would embarrass parties in all attempts to settle their suits amicably, and thereby greatly tend to prevent a result always held to be desirable. Especially would this be the case under a system of practice like ours, where the compensation of attorneys is not fixed by law. Under such a rule, attorneys, by making a demand for unreasonable fees, would be able to prevent a settlement whenever they should desire. Highly as we think of our profession, we do not deem it desirable that they should thus be able to control the most important interests of their clients, independently of the wishes of the latter. It is better that clients should be at liberty to adjust their difficulties if they can. In the particular case before us, we have no doubt it would be most equitable to allow the lien. But we cannot establish the rule in reference to the merits of a particular case. "Hard cases make bad law." We think such an application of the lien as is here asked would be against the current of authorities and the general interests of society.

Judgment affirmed.

JESSE S. HARBISON
v.
DYKEMAN SHOOK.

1. SLANDER — *charge of perjury and false swearing.* At the common law it was necessary, to sustain an action of slander for being charged with perjury, that the oath to which the charge related should have been material to some issue, in a judicial proceeding, and must have been false, but under our statute it is made slander to untruly charge another with swearing falsely, or having sworn falsely, and it is unnecessary to aver or prove that the oath charged to be false was material, or that it was in a judicial proceeding.

Statement of the case.

2. VARIANCE — *waiver.* A variance between the allegations and proofs may be waived by stipulation.

3. EVIDENCE — *of good character, when admissible.* Until the character of plaintiff, in action for the defamation, is attacked, he has no right to introduce evidence of his good character. But when defendant files a plea of justification, and attempts to establish its truth, that is such an attack upon plaintiff's character as authorizes him to introduce evidence of good character.

4. VARIANCE — *averment and proof.* When the averment in the language was that "Old Dykeman Shook swore, etc.," and the evidence was that defendant said that "Old man Shook" swore, etc., *held,* not to be a variance, as the substance of the charge was proved.

5. INSTRUCTIONS. It was not error for the court below to charge the jury, that it did not matter whether the defendant commenced the conversations, in which he used the language, or whether or not he was angry at the time.

6. PLEADING — *justification — proof.* Under a plea of justification, that defendant did wickedly, willfully and corruptly swear falsely in a matter in a certain suit named, and thus committed perjury, defendant must sustain his plea, by proof, that plaintiff did commit perjury, as alleged in the plea, and this, too, although the action be under the statute. The proof must be as broad as the allegation in the plea.

7. PLEA OF JUSTIFICATION — *when an aggravation.* Where a party files a plea of justification, when he has no intention or expectation of proving its truth, it amounts to a republication of the slander, and is an aggravation which the jury may consider in forming their verdict, and it was not error to so instruct the jury.

8. DAMAGES — *in slander.* Nor is it error to instruct the jury that they may take into consideration the pecuniary circumstances and standing of the defendant, as well as the character of plaintiff, also that they might consider the fact that the slander was reiterated at different times and to different persons, and that he had endeavored to have plaintiff indicted, in fixing damages; and that they could give exemplary damages.

9. NEW TRIAL — *verdict contrary to evidence.* A verdict will not be set aside because it is contrary to the evidence, unless it is so strongly against the evidence as to be unsupported by it.

WRIT OF ERROR to the Circuit Court of Rock Island county; the HON. IRA O. WILKINSON, Judge, presiding.

This was an action on the case for slander, brought by Dykeman Shook, in the Henderson Circuit Court, against Jesse S. Harbison. The declaration contained a number of counts, charging that defendant had accused plaintiff of having com-

mitted perjury, while others averred that he had charged him with having sworn falsely.

To the declaration, the defendant pleaded not guilty, and also a plea of justification. In the latter he avers that plaintiff did wickedly, willfully, corruptly swear falsely to a certain matter in a suit, and thereby committed perjury. This plea gives the particulars of time, place and circumstance, and is to the whole declaration. To it there was a replication, and issues were formed.

A trial was had by the court and a jury, in the Rock Island Circuit Court, to which the cause had been removed by a change of venue. There were a number of witnesses examined on the trial, and the speaking of slanderous language was proved, but most of it was variant from that set out in the declaration, but a portion was as laid in a part of the counts.

On the trial it was agreed by counsel that the suit of G. S. Munduff against Harbison, was pending in the Henderson Circuit Court, and that plaintiff was duly sworn and testified as a witness in that case, and if it appeared that he was called as a witness by defendant, no advantage should be taken of the averment in the plea of justification that he was called by the plaintiff.

After hearing the evidence and receiving the instructions of the court, the jury found the issues for plaintiff and assessed the damages at $768.08. Defendant thereupon entered a motion for a new trial, which the court overruled, and rendered a judgment on the verdict, to reverse which this writ of error is prosecuted.

Mr. J. W. DAVIDSON, for the plaintiff in error.

Mr. C. BLANCHARD, for the defendant in error.

Mr. CHIEF JUSTICE WALKER delivered the opinion of the Court:

This was an action on the case for slander, brought by Dykeman Shook, in the Henderson Circuit Court, against Jesse S.

Harbison. The venue was afterward changed to Rock Island county, where a trial was had by the court and a jury, which resulted in a verdict in favor of plaintiff for $767.08; a motion for a new trial was entered and overruled by the court, and a judgment rendered on the verdict.

The declaration contains nine counts, in which it is averred, that plaintiff in error, falsely, wickedly and maliciously spoke of the plaintiff below, that, in a certain trial pending in the Henderson Circuit Court, he had sworn falsely. The language is differently stated in the various counts; the first five of which aver that plaintiff in error intended to charge defendant in error with having committed willful and corrupt perjury. The last four aver that he intended to charge him with swearing falsely. Plaintiff in error interposed the plea of the general issue, and a plea of justification, upon which the trial was had.

It is insisted, that all of the counts of the declaration, are framed under the common law, and that it was incumbent on defendant in error to prove the materiality of the evidence alleged to have been false. This may be true under the first five counts as they proceed for a common law slander, but as to the other counts, they seem to have been framed under our statute, and consequently are not governed by the common law rule, that to establish a slander it is necessary that the evidence charged to be false was material to the issue. The statute declares, that it shall be slander for one person to charge another with swearing falsely, or of having sworn falsely. And under the statute it is held to be unnecessary to aver or prove, that the evidence or oath charged to be false was material, or that the oath was in a judicial proceeding. *Sanford* v. *Gaddis*, 13 Ill. 329.

It is insisted, that there was a variance between the averments in the declaration that defendant in error testified in a case in which G. S. Munduff was plaintiff, and James Harbison was defendant, and the evidence which shows that both James and William B. Harbison were defendants. If such a variance exists, it was waived by the stipulation of counsel,

which is embodied in the bill of exceptions, which admits the suit pending, as averred in the declaration.

It is likewise insisted, that the court erred in permitting defendant in error to introduce evidence of his good character, when there had been none given to impeach it. In slander, the rule is, that the plaintiff has no right to introduce evidence of character until it is attacked by the defendant. If the defendant simply files the general issue, and refrains from giving evidence of the previous bad character of the plaintiff, in mitigation of damages, under the current of the authorities, plaintiff could not go into evidence of his previous good character. But, when the defendant interposes a plea of justification, and introduces evidence in its support, that constitutes such an attack as will justify plaintiff in calling witnesses to sustain his character. In this case such a plea was filed, and an effort was made to prove it, and that fully warranted the introduction of such evidence by defendant in error. In admitting this evidence there was no error.

It is also insisted, that the court below erred in refusing to exclude the evidence of all the witnesses, except that of Thompson, upon the ground of variance. The ground urged as a variance is, that they stated that plaintiff in error applied the language to "Old man Shook," and did not designate him by his christian name. In a portion of the counts, the averment is, that the language was spoken of and concerning "Dykeman Shook," and in others, "Old Dykeman Shook." It is a rule of evidence in this action, that the proof of equivalent words will not sustain the averment. But plaintiff is not required to prove all of the words set out in the declaration, although he must prove enough of them to establish the substance of the charge. The omission to prove any portion of them, so as to change the sense or import of the charge, would be a variance. In this case, the omission to prove the christian name of defendant in error, in no wise changed the import of the charge. That part of the language served only as a means of pointing to the person of whom the language was spoken. It served to designate the person against whom the charge was made; and it

was for the jury to say whether the portion proved showed that the language related to defendant in error. If so, then enough of the words were proved to make out the charge. If it appeared that "Old Dykeman Shook" and "Old Shook" related to and was the same person spoken of, then the charge was, in that respect, proved.

It is again urged, that the court below erred, by instructing the jury, that it could not matter whether or not the plaintiff in error commenced the various conversations in which he used the language, or that he was angry at the time, unless it was produced by the act of the defendant in error, and that these acts could not be considered in mitigation of damages, and that express malice need not be proved, as the law implied malice unless the charge was true. We see no objection to this instruction. It cannot matter who begins a conversation in which an individual is slandered. Nor can it be said, that the injury to plaintiff's character is any the less because a party unprovoked by another, permits himself to become angry when he makes the defamatory charges. If such were to be allowed as a justification, or mitigation even, all that a person would have to do would be to work himself into a rage of anger, slander another and then escape liability for his wanton, malicious, wicked detraction of plaintiff's character. The law has afforded no such immunity.

There can be no objection to the second instruction, as the words are made actionable by the statute; and a portion of the counts of the declaration are under the statute, although it is not referred to by the pleader. But that was unnecessary to give them that character.

The plea of justification avers, that defendant in error did wickedly, willfully and corruptly swear falsely to a certain matter in a suit between Munduff and Harbison, and that he committed willful and corrupt perjury. To sustain this plea, therefore, it was essential that he should have proved that defendant in error did commit perjury. It may be that he undertook more by his plea than was required, as under the counts on the statute it was only necessary to have averred and

proved that he had sworn falsely, to have established a justification. But, having averred that he was guilty of perjury, he was bound to prove it to sustain his plea, and not only so, but by the same measure of proof which it would have required to have convicted of perjury. It therefore follows that the fourth instruction was correct and properly given.

As to the fifth instruction, we see no objection. It informs the jury, that, if plantiff in error did not expect in good faith to prove the plea of justification, it was a republication of the slander, and an aggravation which the jury might take into consideration in fixing the amount of damages, if they believed that plaintiff in error had uttered the words. In the case of *Sloan* v. *Petrie*, 15 Ill. 425, this was held to be the law, and that it was a question for the determination of the jury whether the plea was filed in good faith. There was therefore no error in giving this instruction.

The jury were informed by the sixth instruction, that they might take into consideration the pecuniary circumstances and standing of defendant below, as well as the character of plaintiff, in estimating the damages, and that they might consider the reiteration of the slander at different times and to different persons, as well as any effort to have defendant indicted, in fixing damages, and that they had the right to give exemplary damages. We perceive no error in this instruction. It states the law of the case correctly, and it could not have misled the jury.

Nor can we say that the finding was not supported by the evidence. The issues were fairly presented under the instructions, and the jury were warranted in finding the verdict.

Upon this record we discover no error, and the judgment of the court below must therefore be affirmed.

Judgment affirmed.

Syllabus.

CHARLES CHINIQUY *et al.*
v.
THE CATHOLIC BISHOP OF CHICAGO.

1. ACKNOWLEDGMENT OF DEEDS—*requisites of the certificate.* The certificate of acknowledgment of a deed purported to have been made by the clerk of the County Court, and was formal in all respects except in the omission in the caption or margin, of the name of the county. The certificate concluded thus: "Given under my hand and seal of said court, this 12th day of July, A. D. 1851," with the delineation of a seal containing the words "Will County Seal." *Held,* the omission of the name of the county in the caption was a mere informality which did not vitiate the certificate, it appearing sufficiently that the acknowledgment was taken by a proper officer of Will county.

2. NAMES—*variance therein.* In making out his chain of title in ejectment, the plaintiff gave in evidence a deed to *Mitchell Allen* and a deed from *Micheal Allaine,* insisting the names represented the same person. It was *held,* there was no variance. The names were French names, and the difference in spelling *Mitchell* and *Micheal* would result from giving the name the English or the French pronunciation. The names *Allan* and *Allaine* are *idem sonans.*

3. In the same chain of title there was a deed to *Otaine Allaine* and a deed from *Antoine Allain,* claimed to be to and from the same person, and it was held, there was not a fatal variance. These names were also French, and it was presumed there was proof below that *Antoine* took by a misnomer and conveyed by his right name.

4. In the use of foreign names in this country, courts should be slow to pronounce that a variance, unless it is palpable, which may only be a misspelling or a mispronunciation by persons ignorant of the language in which the name is written.

5. DESCRIPTION *of premises in a deed.* The description of land in a deed was as follows: "Being part of the south half of the south half of the south-east quarter of section number four, township number twenty-nine north, range twelve west of the 2d P. M., beginning at the north-west corner, thence south twenty-six rods, thence east sixty-one and one-half rods, thence north twenty-six rods, thence west to place of beginning, containing ten acres more or less." On objection that the place of beginning was uncertain, it was held the description was sufficient.

6. EVIDENCE—*in ejectment.* It is not competent, in an action of ejectment, to show who paid the consideration money on the conveyance of the premises to the plaintiff, with the view to establish a trust. In this action the legal title must prevail against every equity.

7. CONVEYANCE *to one for the use and benefit of another—right of the cestui que trust, at law.* In the premises of a deed, the party of the second part, to whom the grant was made, was described as follows: "The Right Rev. James

Statement of the case.

Oliver Vandervald, Bishop of Chicago, and his successor and successors in office, in trust for the use and benefit of the Catholic population of the parish of St. Anne, in the county of Iroquois, State of Illinois, party of the second part." *Held*, that the naming of the *cestuis que trust* in the premises, with the bishop as the party of the second part, did not operate to make them the grantees of the title equally with the bishop. The legal title vested in the bishop for their use.

8. CATHOLIC BISHOP OF CHICAGO, *as a corporation sole — requirements of the law creating such corporation.* Under the law constituting the Catholic bishop of Chicago a corporation sole, his titles to real estate do not become forfeited by reason of his omission to file for record a statement of his appointment under his hand and seal and verified by his affidavit, within three months after the act became a law, nor is the performance of that requirement of the act a prerequisite to the organization of such corporation.

9. EJECTMENT — *against whom the action will lie — who is an occupant within the meaning of the ejectment law.* Persons who are in possession of land merely as the servants or employees of the party claiming title adversely, are not occupants of the land, within the meaning of the ejectment law, and an action of ejectment cannot be maintained against them.

10. So a clergyman who preaches on Sunday, or any other day of the week, in a church edifice, under the direction and employment of a religious corporation, is not liable to an action of ejectment, and to be mulcted in costs, at the suit of a person claiming the title against the corporation.

11. CORPORATION — *its organization — in what proceeding it can be inquired into.* Where an action of ejectment is brought in the name of a party, as a corporation, matters relating to the organization of such corporation cannot be inquired into in such action. In a direct proceeding by *quo warranto*, proofs relating to its organization might be required.

APPEAL from the Circuit Court of Kankakee county; the Hon. CHARLES R. STARR, Judge, presiding.

This was an action of ejectment commenced in the court below, by the Catholic Bishop of Chicago, against Charles Chiniquy, Achilee Chiniquy, Augustine Fouche, Pierie Morais, Gustave Demars, Lewis Mercier and Abram Peltier, a trial of which resulted in a verdict and judgment for the plaintiff. The cause is brought to this court for review by the defendants.

Among other questions arising upon the record, is one in regard to the validity of the deed from Antoine Allain and wife to the plaintiff. The portions of that deed to which objection is taken, are as follows: "This indenture made this

twenty-sixth day of March, in the year of our Lord one thousand eight hundred and fifty-two, between Antoine Allain and Marcelline Allain, his wife, of the county of Iroquois, State of Illinois, party of the first part, and the Right Rev. James Oliver Vandervald, Bishop of Chicago, and his successor and successors in office, in trust for the use and benefit of the Catholic population of the parish of St. Anne, in the county of Iroquois, State of Illinois, party of the second part," then follows the grant to "the said party of the second part, his successors and assigns forever." The question presented is, whether the naming of the "Catholic population of the parish of St. Anne," in the premises of the deed, with the bishop, as party of the second part, constituted them the grantees in the deed equally with him, so as to vest in them the legal title.

The facts upon which the other questions in the case arise are sufficiently stated in the opinion of the court.

Mr. WALTER B. SCATES, and Messrs. GLOVER, COOK & CAMPBELL, for the appellants.

Messrs. ARRINGTON & DENT and Messrs. MOORE & CAULFIELD, for the appellee.

Mr. JUSTICE BREESE delivered the opinion of the Court:

The Catholic bishop of Chicago brought his action of ejectment in the Circuit Court of Kankakee county against Charles Chiniquy and others, to recover the possession of part of the south half of the south half of the south-east quarter of section four (4), in town twenty-nine (29), range twelve (12), west of the second principal meridian, in the county of Kankakee.

The defendants pleaded the general issue and also a plea denying they were in possession of the premises, and there was a verdict and judgment for the plaintiff, to reverse which the defendants have appealed to this court.

The record shows, that the south-east quarter of section four was patented by the United States to George W. Cassidy.

By deed dated July 12, 1851, Cassidy and wife conveyed the land to one Mitchell Allen.

One *Michael Allain* conveyed the south half of the south half of this quarter, on which are the premises in controversy, to one *Otaine Allaine.* One *Antoine Allain* and Marcellain Allain, his wife, conveyed ten acres of the same to the Right Reverend James Oliver Vandervald, Bishop of Chicago, and his successors in office, by metes and bounds, in trust for the use and benefit of the Catholic population in the parish of St. Anne, in the county of Iroquois. Thus was deraigned the title of the plaintiff.

It was stipulated on the trial of the issues, that there was at St. Anne, an incorporation of a religious society, by the name of the Christian Catholic Church at St. Anne, incorporated under the general law of this State. That said society is a Protestant religious association, not in communion with the Roman Catholic Church, or having any connection therewith. That the defendant, Charles Chiniquy, for the last five years has been the minister of said religious society, incorporated as aforesaid, and regularly officiated in the building which stands upon the premises in controversy, and continuing to, up to the present time; that prior to April 11th, 1864, for the preceding five years, he kept a stable on a portion of the premises sought to be recovered, and kept his horses and stock there in said stable; that prior to the commencement of this action he removed his stable and stock off of the said premises. That the other defendants are the trustees of said society, with the exception of Gustave Demars, and that the said trustees have the control of said premises, and employed the said Chiniquy as the minister of said church, and Gustave Demars as a teacher, and that he has taught a school in said building, from a time prior to the commencement of this suit until now, and that such possession and control of said trustees, is adverse to the plaintiff, and that the possession and control of said Chiniquy and said Demars (if any) is under said trustees, and is also adverse to the plaintiff.

There was no evidence of title in the defendants, to the

premises in question, except the possession mentioned in the stipulation.

The jury, under instructions from the court, found a verdict in due form for the plaintiff, on which the court rendered judgment, to reverse which the defendants prosecute this appeal, and have assigned the following errors: The court erred in admitting improper evidence offered by said plaintiff in the court below; in refusing to admit proper evidence offered by defendants; in giving to the jury the instructions asked by said plaintiffs, and each of them; in refusing to give the instructions asked by said defendants, and each of them; in overruling the motion for a new trial, and in rendering judgment in manner and form aforesaid.

Various points are made by appellants, on this assignment of errors, the most material of which we will notice.

The defendants objected to the admission of the deed in evidence, of Cassidy the patentee, to Mitchell Allen, for the reason, there was no acknowledgment of its execution, and the same was not proved.

The defect, in the acknowledgment, consists in the omission, in the caption, of the name of the county. It purports to have been taken by Oscar L. Hawley, clerk of the County Court, and is formal in all respects save this omission. The conclusion of the certificate of acknowledgment is as follows: "Given under my hand, and seal of said court, this 12th day of July, A. D. 1851," with the delineation of a seal containing the words, "Will county seal." It must be admitted that this acknowledgment is informal, but it is nothing more.

It is perfectly certain the deed was acknowledged before the county clerk of Will county, and it is so attested under the seal of that county. Naming the county in the margin would scarcely make it more certain. We do not think any appeal to the confirmatory act of 1853, is necessary to sustain this certificate, as the fact is patent by it, that the acknowledgment was taken by a proper officer of Will county.

It is next objected, that as this conveyance by Cassidy and wife is to Mitchell Allen, he only, and not Micheal Allaine,

could convey the premises described in it; and the same objection is made to the deed from Micheal Allaine to Otaine Allaine, and from Antoine Allaine to the plaintiff in the action. The objection, as appears by the record, was, "that the name of the grantee in the first deed and of the grantor in the second deed was not the same; and the name of the grantee in the second deed and grantor in the third was not the same. Some evidence was introduced by plaintiff, tending to show that the name was French, and was variously spelled and pronounced, which was objected to by the defendants; whereupon the deeds were handed to the court for inspection. The court held there was no variance which should exclude them from the jury, and permitted them to be read to the jury, as showing a chain of title."

We do not profess to be skilled in the French language, but, from our slight knowledge of it, we are satisfied the names of the parties to the second and third deeds are French names. Being such, when pronounced by one familiar only with English names, he would give them an English pronunciation, and thus convert, by the simple act of pronunciation, "Micheal Allaine" into "Mitchell Allen;" and a Frenchman pronouncing the name of Mitchell Allen, would pronounce it as Micheal Allaine, since the pronunciation of the French *prænomen* "Micheal" is "Meshale," quite like the English name "Mitchell," while Allen and Allaine are *idem sonans*, or so nearly so as not to constitute a variance.

So with the name "Otaine Allaine." This is evidently a French name, and it is apparent Antoine Allaine took under it, for he made the deed to the plaintiff. He took the premises by a misnomer, but conveyed them by his right name. Of this there is no question. What evidence was before the court on this point, we are not apprised, but we are bound to suppose it was sufficient to satisfy the court there was no variance.

When we consider the great influx of foreign population into our country, and the great difficulty existing on the part of those courts as well as the people generally, who are not famil-

iar with the language of the country from which it comes, to understand the names, whether written or spoken, by which they are severally distinguished, we should be slow to pronounce that a variance in the name of any one of them, unless it is palpable, which may only be a misspelling or a mispronunciation of it, and that by persons ignorant of the language in which the name is written. Apart from any suggestion of fraud or personation of another, which is not claimed in this case, it is evident under Cassidy's deed, Micheal Allaine took and held the premises unquestioned by any one, and under his deed to Otaine Allaine, Antoine Allaine took and held in the same way, his right being unchallenged, and he conveyed them by that name to the plaintiff in the ejectment.

We cannot think, under the circumstances, there was such a variance in the names in these deeds, as to exclude them as evidence, and the more especially in this case, since by the import of the stipulation in it, the defendants claim whatever title they may have, under the same deeds. This appears from the record, for that shows that "Antoine Allaine was introduced as a witness by the defendants, who offered to prove by him that the consideration of twenty-five dollars named in the deed to the plaintiff, was not paid by him, but by the defendants; and they also offered to prove by this witness that he refused to execute a deed to the bishop for the use of the religious society or congregation of Roman Catholics of St. Anne, but executed the deed in evidence instead of such deed which was furnished to him to execute. The defendants also offered to prove, that, at the time this deed was made, the defendants were members of the Catholic church of St. Anne, but the court refused to permit the defendants to make such proof."

It is next objected that this deed from Antoine Allaine to the plaintiff is void for the uncertainty in the description of the piece of land conveyed.

The description in the deeds, in the declaration, in the verdict of the jury, and in the judgment of the court, is one and

the same, and it is as follows: "Being part of the south half of the south half of the south-east quarter of section number four, township number twenty-nine north range twelve west, of the 2d P. M., beginning at the north-west corner, thence south twenty-six rods, thence east sixty-one and one-half rods, thence north twenty-six rods, thence west to place of beginning, containing ten acres, more or less."

It is said the place of beginning is uncertain. We do not so think. The land out of which this parcel is to be taken is described as the south half of the south half of the south-east quarter, which would contain, by government survey, forty acres. It is out of this forty acre tract the ten acres are to be taken, and the beginning corner of the survey is the north-west corner of this forty-acre tract, which is the south half of the south half of the quarter section.

This is the tract described as the tract out of which the ten acres are to be taken, by beginning the survey at its north-west corner. This seems to us quite plain.

It is next objected that the court rejected evidence to show who paid the consideration money for this piece of land.

We are not of opinion that proof to establish a trust could be gone into in this action to any greater extent than the deed itself might disclose, and, therefore, it was wholly immaterial who paid the consideration. That may be the subject of future inquiry by a court of chancery. It is sufficient for this action, that, by the deed of Antoine Allaine, the plaintiff was vested with the legal title, and being so vested, it must, at law, prevail against all and every equity.

We do not appreciate the force of the objection under the fourth point made by appellant's counsel. It is this: "Where a grantee is omitted in the premises of a deed, the grant is void for uncertainty." But the name of the grantee is not omitted in the premises of this deed. We suppose the counsel means to say, that, inasmuch as the Catholic population of the parish of St. Anne are named in the premises, with the plaintiff as the party of the second part, they became the grantees of the title equally with the bishop. As we construe the deed, the

grant is made to the bishop of Chicago, and his successors in office. He and they take, by the terms of the deed, the legal title, and are the party of the second part, but they take it in trust for the use and benefit of the Catholic population of the parish of St. Anne, in the county of Iroquois. The plaintiff, and his successors in office, are the trustees for this population, for whose use and benefit he now holds it, and on his removal or death, his successor will hold it, for the same use and benefit, and this, independent of any statute. But, by the act of February 24, 1845, the legal title, and an estate in fee simple, were vested in the plaintiff, and his successors in office forever, and in no other person or persons. Scates' Comp. 984.

Whatever, then, may be the rights of these beneficiaries under this deed, they cannot be asserted in a court of law, and cannot prevail against the legal title.

The fifth point made by appellants has no force, since, so far as this grant is concerned, the plaintiff had no predecessor in office, and, of course, there could be no release. This grant is made directly to James Oliver Vandervald, bishop of Chicago, and the suit is brought by the Catholic bishop of Chicago, as a corporation sole, so erected and constituted by the act of February 20, 1861. By section four of that act, it is provided, that real estate intended to be vested by the act of 1845 above cited shall vest in the Catholic bishop of Chicago, and likewise, that gifts, grants, deeds, etc., heretofore made to any bishop shall be construed as conveying the property to such person as the Catholic bishop of Chicago, and that the title shall vest in this corporation sole. Private Laws, 1861, p. 78.

Although this act required the Catholic bishop of Chicago, within six months after his appointment to office, to file for record a statement of his appointment, under his hand and corporate seal, and verified by his affidavit, and that the then Catholic bishop of Chicago should comply with such requisition within three months after the act became a law, it nowhere declares his titles shall be forfeited if he does not do these things, nor do we conceive the last provision was designed as a prerequisite to the organization of the corporation of which

he was the head. In this action, these matters cannot be inquired into. On a direct proceeding by *quo warranto*, such proof might be demanded, and, in its absence, the corporation might be dissolved. It cannot be assailed in this collateral proceeding.

It is also objected, that the instructions given on behalf of the plaintiff were improper, and should have been refused, and those given as asked by the defendants.

We have examined carefully, the instructions for the plaintiff, and find no substantial objection to them.

As to the defendants' instructions, we are of opinion they were all properly refused, except the last, which should have been given. It is as follows:

"The court instructs the jury for the defendants, that, if they believe from the evidence, that, at the time of the commencement of this suit, Charles Chiniquy and Gustave Demars only occupied the premises for the purposes of a minister to conduct public worship, and as a school teacher, and that they so occupied the premises in the employ of the society or corporation known as the Christian Catholic church at St. Anne, and under their direction, and had no other nor further possession or control of the premises, and that the trustees of said corporation or society had the actual possession of the property, then the plaintiff can not recover in this suit against Chiniquy and Gustave Demars."

This instruction excludes the idea that Charles Chiniquy and Gustave Demars were in possession of the premises as tenants of the trustees, but is drawn on the hypothesis that they were merely their servants or employees performing their daily or weekly tasks upon the premises, and not the occupants in the sense of the ejectment law. It puts a case which, if believed by the jury, would no more render Chiniquy and Demars liable to an action of ejectment, than would be the cashier and teller of a bank, if a suit was brought against the banking corporation to recover possession of the banking house. It surely cannot be said, that a clergyman who preaches on Sunday, or any

other day of the week, in a church edifice, under the direction and employment of a religious corporation, is liable to an action of ejectment, and to be mulcted in costs at the suit of a person claiming the title against the corporation. Nor is the hypothesis on which this instruction is drawn excluded by the stipulation in the cause, for that does not admit possession by Chiniquy and Demars. It is only on the ground that they are in possession, that such possession is admitted to be adverse to the plaintiff, leaving the question of possession debatable. The facts do not show it existed in them, but in the trustees by whom they were employed. As well might the claimant of a farm, bring his action against the men employed to cultivate the farm by the occupant in adverse possession. The action would not lie against such employees, they not being occupants in the sense of the ejectment law.

Refusing to give this instruction was error, and for the error the judgment must be reversed and the cause remanded.

Judgment reversed.

RANSOM GARDNER
v.
ROBERT DIEDERICHS.

1. PRIORITY OF LIEN — *as between several notes secured by the same mortgage, and maturing at different times.* It has been held, that, where several notes are secured by a mortgage, in the absence of any special provision to the contrary, the notes are entitled to payment from the proceeds of the mortgage in the order of their maturity.

2. This ruling rests upon the fact, that the holder of the note first maturing, without being vested with any special equity by reason of the capacity in which he holds the paper, as assignor, for instance, may foreclose for non-payment, without waiting for the succeeding notes to mature. The power to do this implies a priority of lien in the notes first falling due.

3. This principle is applied in this case, where a deed of trust was given to secure several notes, falling due at different times and payable to different persons.

4. But where the interest on the notes last maturing is payable annually, the installments of such interest as may fall due at the same time the notes

Syllabus.

first maturing became due, will be placed on an equal footing with them in respect to payment out of the proceeds of the mortgage.

5. CONSTRUCTION *of a trust-deed — as to the time of the maturity of notes secured by it.* Where a deed of trust, which is given to secure several notes, payable at different times and to different persons, simply authorizes the trustee, "in case of default in the payment of said notes, or any part thereof, or the interest accruing thereon," to sell "the premises, or any part thereof," and apply the proceeds to the payment of "the amount due on said notes," and to render the overplus, if any, to the grantor, it will not be construed as meaning that, in the event of a sale on the falling due of the notes first maturing, all the notes shall be deemed to be due; but the notes will be held to mature in the order and at the times specified on their face, and subject to the principle that the notes first maturing have a priority of lien on the trust fund.

6. DISPOSITION OF THE OVERPLUS — *where there is a sale before all the notes become due.* Whether a court of chancery would protect the holder of the notes which were not due at the time of a sale under the deed of trust, by staying the payment of the surplus fund to the grantor till security could be given that it would be held subject to the lien, the court do not decide; but, at all events, the trustee would not, under such a deed of trust as is mentioned, have the right to apply the surplus on debts not due, nor would a court of chancery compel him to do so.

7. CONTRIBUTION *as between tenants in common, for repairs and improvements.* One tenant in common can make another, at common law, contribute to such repairs to a house or mill as are necessary to its preservation or use Beyond that the right to contribution has not ordinarily been carried.

8. IMPROVEMENTS AND TAXES — *how compensated — as between two mortgagees, or tenants in common.* The owner in fee of one-half of a mill property, executed a deed of trust thereon to secure debts owing to two persons, severally, one of the creditors being the owner of the other half, who, after the execution of the deed of trust, went into possession and run the mill and made valuable improvements thereon and paid taxes. On a bill filed by the other creditor to foreclose the deed of trust, it was held, that, while the party thus making the improvements might not be able to maintain a bill for contribution against the other *cestui que trust* for more than the repairs necessary to preserve the property, yet, as the estate of the grantor in the deed of trust was to be sold, it was but equitable, that, so far as the price which it might bring at the sale should be enhanced by the improvements, the party making them should be refunded, and he should also be allowed for taxes.

9. RENTS AND PROFITS — *as between the same.* And as against the sums so allowed for improvements and taxes, he should be charged reasonable rents and profits upon one-half the mill, independently of his improvements.

10. PRIORITY *of the claim for improvements.* The amount found due for improvements would be first paid out of the proceeds of the sale under the foreclosure of the deed of trust, and then the notes secured thereby, in their proper order.

Statement of the case.

APPEAL from the Circuit Court of Grundy county; the Hon. JESSE O. NORTON, Judge, presiding.

On the 24th of February, 1860, I. B. Hymer & Co., a firm consisting of Isaac B. Hymer and Addison Weeks, being indebted to Robert Diederichs and Ransom Gardner, severally, executed to the former their two promissory notes for the sum of $1,200 each, one payable one year and the other eighteen months after date, and to Gardner their two other notes, one for the sum of $1,500, payable two years from date, and the other for $1,800, payable two years and six months from date; all the notes bearing interest at ten per cent, payable annually.

On the same day, Hymer and Weeks and their wives, for the purpose of securing those notes, conveyed to a trustee an undivided one-half interest in certain real estate, situate in the town of Minooka, in Grundy county. The trust-deed was as follows:

"This indenture *Witnesseth*, that Isaac B. Hymer and Permelia L., his wife, and Addison Weeks, Eva L., his wife, of Chicago, Cook county, Illinois, grantors herein, in consideration of the indebtedness hereinafter mentioned, and one ($1) dollar to them paid by Sylvester Lind, of Chicago, Cook county, Illinois, grantee, the receipt whereof is hereby acknowledged, do hereby grant, bargain, sell, remise, release and convey unto the said grantee the following described lots, or parcels of land, situate in the county of Grundy and State of Illinois, to wit: The undivided half of village lots number three (3) and four (4), in block number ten (10), in village Minooka, in said county of Grundy, situated in section number one (1), town number thirty-four (34), to have and to hold the same, with all the privileges thereunto or in anywise appertaining, and all the estate, right, title, interest, claim or demand, in and to the same, either now or which may be hereafter acquired, unto the said grantee, his heirs and assigns in trust, nevertheless, for the following purposes: Whereas, the said grantor herein is justly indebted upon four certain promissory notes, bearing even date herewith, payable two of them to the order of Robert Diederichs, for the sum of twelve

hundred dollars each, with interest at ten per cent, payable annually at the bank of J. M. Adsit, Chicago, Illinois, one due in one year and the other in eighteen months from the date thereof, with exchange on New York city. And two of said notes being payable to the order of Ransom Gardner, one for fifteen hundred dollars, due two years from date with interest annually at ten per cent, and one note for eighteen hundred dollars due two years and six months from date, with interest at ten per cent, payable annually; all of said notes being signed by said grantors under their firm name of I. B. Hymer & Co. Now, in case of default in the payment of said notes, or any part thereof, or the interest accruing thereon, according to the tenor and effect thereof, or in the payment of any taxes or assessments, ordinary or special, which may be levied or assessed against said premises during the continuance hereof, on the application of the legal holders of said notes, or of either of them, the said grantee, Sylvester Lind (full power being hereby given), or his legal representatives, after having advertised such sale thirty days in a newspaper published in said Grundy county, or by posting up written or printed notices in four (4) public places in the county where said premises are situate (personal notice being hereby expressly waived), shall sell the said premises, or any part thereof, and all the right and equity of redemption of the said grantors, their heirs, executors, administrators, or assigns, therein at public vendue, to the highest bidder, for cash, at the court-house door in said Grundy county, at the time appointed in said advertisement; or may adjourn the sale from time to time at discretion, and as the attorney of the said grantors, for such purpose hereby constituted irrevocable, or in the name of the said grantee or his legal representatives, shall execute and deliver to the purchaser or purchasers thereof deeds for the conveyance in fee of the premises sold, and shall apply the proceeds of sale, 1. To the payment of expenses for advertising, selling and conveying as aforesaid, including attorney's fees; 2. The amount due on said notes; 3. Rendering the overplus, if any there be, to the said grantors or their legal representatives, at

the office of the said grantee in Chicago, Illinois; and it shall not be the duty of the purchaser to see to the application of the purchase-money: *Provided*, that the said grantors and their heirs and assigns may hold and enjoy said premises and the rents, issues and profits thereof until default shall be made as aforesaid, and, that, when the said notes and all expenses accruing hereby shall be fully paid, the said grantee, Sylvester Lind, or his legal representatives, shall reconvey all the estate acquired hereby in the said premises, or any part thereof, then remaining unsold, to (and at the cost of) the said grantors or their heirs or assigns; and the said Hymer & Weeks, grantors, covenant with the said grantee and his legal representatives and assigns, that they are seized in fee of the said premises and have good right to convey the same in form aforesaid; that they are free from all liens or incumbrances of whatever name or nature, and that they will warrant and defend the same against all claims whatsoever, and will pay all taxes or assessments levied or assessed on the said premises, or any part thereof, during the continuance hereof, and pay the same ten days before the day of sale therefor.

"Witness the hand and seal of the said grantors, this 24th day of February, 1860."

At the time of the making of this deed of trust, there was a flouring-mill on the premises embraced therein, nearly completed.

The said Gardner was the owner in fee of the other half of the property, and soon after the execution of the deed of trust he went into possession, made valuable improvements thereon, and put the mill in operation, and paid the taxes on the property.

On the 1st day of March, 1861, the notes secured by the deed of trust remaining unpaid, Diederichs exhibited his bill in chancery in the court below, praying a foreclosure of the deed of trust, making the grantors in the deed and Gardner parties defendant. Diederichs claims that he has a priority of lien on the trust fund for the payment of his notes, by reason of their maturing prior to those given to Gardner.

Statement of the case.

Gardner, on the contrary, insists, that, by the terms of the deed of trust, properly construed, in the event of a sale of the property, all the notes should be deemed to be due, and entitled to payment out of the proceeds of the sale *pro rata.*

Gardner also filed a cross-bill, setting up a claim for the value of the improvements he had made on the premises and the taxes paid thereon, insisting such claim was prior in point of right to the notes secured by the deed.

Upon the hearing the court decreed that Gardner's cross-bill be dismissed, and, the master having reported the amount due to Diederichs and Gardner, respectively, the court further decreed as follows:

"And it appearing to said court, that there was due to said complainant, Robert Diederichs, at the date of said report, for principal and interest on the notes payable to him, mentioned in said original bill of complaint and secured as herein stated by the trust-deed in said original bill described, the sum of three thousand three hundred sixty $\frac{72}{100}$ dollars, and that there was at the date of said report due, to the defendant Gardner, for principal and interest on the notes payable to him, mentioned in said original bill and secured in like manner by said trust-deed, the sum of four thousand six hundred and eighty and $\frac{4}{100}$ dollars; and it further appearing to the court, that there is due to the said defendant Gardner the further sum of fifty-five $\frac{74}{100}$ dollars, moneys by him paid since the date of said trust-deed as taxes upon the property conveyed by the same; the respective counsel for the several parties hereto in open court agreeing and consenting that the amount paid for such taxes may be made a prior charge upon said property, and it further appearing to the court, that the two notes and the interest thereon, mentioned in said original bill and made payable to said complainant Diederichs are entitled to a priority of payment over those also mentioned in said original bill, made payable to the defendant Gardner." Decree provides after payment of costs, etc., for application of proceeds of sale between the parties as aforesaid.

From that decree Gardner took this appeal. The questions arising on the assignment of errors, are, first, were the notes first maturing entitled to the priority in payment which was given them in the decree? second, and, if that be so, should not the annual interest upon the Gardner notes which became due on the maturity of the first of the Diederichs notes, have been placed on an equal footing therewith? and, third, as to the correct rule in relation to compensation to Gardner for the improvements made by him on the property conveyed by the trust-deed.

Mr. GEORGE C. CAMPBELL, for the appellant.

The rule is recognized, as laid down in *Vansant* v. *Allmon*, 23 Ill. 35, and *Frink* v. *McReynolds*, 33 id. 486, that, where several notes, payable at different times, are secured by a mortgage, in the absence of any special provision to the contrary, the notes are entitled to payment in the order of their maturity. But of course the parties are competent to stipulate that all of the notes shall be paid *pro rata* upon sale of the property, and where they do so stipulate the court will not by construction make a new contract for the parties. 2 Pars. on Con. 500; Chit. on Con. 74.

The trust-deed in this case does, I think, stipulate that the notes shall be paid *pro rata*.

The clause expressing the intention of the grantor is as follows:

"Now in case of default *in the payment of said notes or any part thereof, or the interest accruing thereon, or in the payment of any taxes assessed, etc.*, on application of the legal holders of said notes or *of either of them*, the said grantee shall sell, etc., and shall apply the proceeds of sale, first, to the payment of advertising, selling, etc; second, the amount due on said notes; and third, rendering the overplus, if any there be, to the grantors."

The interest upon *all* of the notes is payable annually, and at the end of the first year there would come due to Diederichs

1st note for.....	$1,200
Interest on both notes, ...	240
	$1,440

And to Gardner, interest on his two notes, $330.

And, if either of these amounts, or any part of either, should be unpaid, then Gardner or Diederichs might apply to trustee and have him sell and pay all of the notes; that is, on such default all of the notes were to be treated as due, and were to be paid together. So too, if, before any of the notes or interest became due, there should be taxes assessed against the property and not paid by mortgagor, then, upon application of either Gardner or Diederichs, all of the property should be sold and all of the notes paid; that is, upon the happening of this neglect to pay taxes, all of the notes should be put upon the same basis, — should all be treated as due and all be paid. If, by the tenor of the notes, they had all fallen due upon the same day, there could of course be no priority. It is otherwise when by the terms of the mortgage a provision is made, that, upon the happening of some event, they shall all be treated as due. It is just as much the contract of the parties when expressed by the terms of the trust-deed as by the terms of the notes.

The provision in the deed, that, upon sale, the trustee shall pay the notes and render the overplus, if any, to the grantor, excludes the idea that only one note shall be paid, or that only those then payable by their terms shall be paid; for, if such were the case, the property might be sold for more than the amount then payable by the terms of the notes themselves, and the overplus would have to be rendered to the mortgagor, and the security of the subsequent notes would be entirely gone, for there is no redemption under sale on the deed. The provision, that, upon default of payment of notes or any part thereof, either party may apply and have a sale, also excludes the idea that only the notes then payable by their terms shall be paid.

It was also erroneous to dismiss the cross-bill of Gardner. He was, upon the evidence, entitled to a decree, that the amount expended by him for repairs and permanent improvements should be a lien upon the premises prior to the trust-deed. The possession of Gardner and the improvements made by him were open and notorious, and in law gave him a lien prior to that of the trust-deed. The parties for whose use the trust-deed was made have the same rights and are bound by the same equities as their grantor.

And, where one tenant in common puts permanent improvements upon the estate, at the request, or with the consent, or within the knowledge, of his co-tenant, he not objecting, the co-tenant must contribute to the payment, and the amount is a lien upon the estate. 4 Bouvier's Institutes, 247; Coke upon Littleton, 200 b; Bac. Abr. Joint Tenants, L. F. N. B., 127 a; 2 Fonblanque Eq., b. 2, ch. 4, § 2 g; *Lake* v. *Gibson*, 3 P. Williams, 158; *Town* v. *Needham*, 3 Paige, 545.

And it is natural equity, that, where a possessor of property in good faith puts permanent improvements thereon, he should be entitled to payment, and have a lien on the property therefor. Willard's Eq. 311; *Putnam* v. *Ritchie*, 6 Paige, 404; *Bright* v. *Boyd*, 1 Story, 478; 2 Story's Eq. Jur. § 799 and note.

Messrs. TYLER & HIBBARD, for the appellee.

The trust-deed having been given to secure two sets of notes falling due at different times, those to Diederichs first, and those to Gardner last, in case of resort to trust property to pay them, those to Diederichs must be first paid in full. What the notes on their face indicate follows from a proper construction of the trust-deed itself.

It has been held in numerous cases, that, where a mortgage has been given to secure several notes falling due at various times, and the notes are assigned to different holders, the one first maturing is to be first paid out of the mortgage property; the mortgage as to the several notes, being equivalent to so many successive mortgages. *Sargent* v. *Howe*, 21 Ill. 148;

Vansant v. *Allmon*, 23 id. 30; *Wood* v. *Trask*, 7 Wis. 566; *State Bank* v. *Tweedy*, 8 Blackf. 447; *Guathmeys* v. *Ragland*, 1 Rand. (Va.) 466; *Hough* v. *Osborne*, 7 Ind. 140.

But it is contended by the appellant, that, by the terms of the trust-deed, on a default in the payment of the notes secured by it, or either of them, they were at once to become due, and thenceforward to stand on the same footing as if originally made payable on the same day. It is observable from the language of the deed, however, that such was not its scope. It provided, that, in case of default of payment, "on the application of the legal holders of the said notes, or of either of them, the said grantee, Sylvester Lind, * * * shall sell the said premises * * * and shall apply the proceeds of sale to the payment of, first, the expenses of advertising, etc., * * * second, the amount due on said notes, rendering the overplus," etc. Not a word is said here about the notes becoming due, but merely that, if a default and sale under the power in the deed should take place, the trustee might retain the money necessary to pay all the notes, and render the overplus to the grantor in the deed. That this is the proper construction of the power in the deed, has been expressly ruled in a case similar in its terms. *Holden* v. *Gilbert*, 7 Paige, 208.

The priority of the notes of the appellee follows, also, from the well-settled rule, that a mortgage given to secure separate debts due to several persons is several in its nature, as much so as if several instruments had been simultaneously executed. *Thayer* v. *Campbell*, 9 Mo. 280; *Burnett* v. *Pratt*, 22 Pick. 556; *Eccleston* v. *Clipsham*, 1 Saund. 280.

The claim made by Gardner for repairs and improvements is against both Diederichs, as co-mortgagee, and Hymer & Co., as mortgagors, and asserts a prior right to be paid to the extent of the whole property. It is evident that Diederichs is in no worse position than are Hymer & Co., with respect to such claim. How, then, does the claim stand as against Hymer & Co., the mortgagors? Gardner may be supposed to have been in possession of the mortgaged premises, under a contract with the mortgagors, and not as mortgagee, in which case Hymer &

Co. would not be liable to account for repairs and improvements. Fisher on Mort. 333–338.

If Gardner be supposed to have been in possession under his mortgage, how then did he stand related to the mortgagors in reference to repairs and improvements? The rule as to repairs is, that a mortgagee in possession is not only authorized, but bound to make such repairs as are necessary to keep the property up to the condition it was in when he took possession, natural wear and tear excepted, and that he will be allowed therefor. *Smith* v. *Sinclair*, 5 Gilm. 108; *McConnell* v. *Holobush*, 11 Ill. 70; *Bradley* v. *Snyder*, 14 id. 263; *McCumber* v *Gilman*, 15 id. 381; *Benedict* v. *Gilman*, 4 Paige, 58; *Exton* v. *Greaves*, 1 Vern. 138; *Talbott* v. *Braddill*, id. 183; *Russell* v. *Blake*, 2 Pick. 505; *More* v. *Cable*, 1 Johns. Ch. 385.

The general rule as to improvements is, that no allowance is made for them. Thus, in the following cases, a claim for improvements made by mortgagee in possession was disallowed. *Smith* v. *Sinclair*, 5 Gil. 108; *Russell* v. *Blake*, 2 Pick. 505; *Quin* v. *Britain*, 1 Hoff. Ch. 353; *Clark* v. *Smith*, Saxton's Ch. (N. J.) 121; *Dougherty* v. *McColgan*, 6 Gill. & J. 275; *Bell* v. *Mayor*, 10 Paige, 49; *Moore* v. *Cable*, 1 Johns. Ch. 385.

Claims for improvements, however, have been allowed in certain cases, by way of exception to the general rule. KENT says: "But lasting improvements have been allowed in England, under peculiar circumstances, and they have been sometimes allowed and sometimes disallowed in this country." 4 Com. 167.

All the cases I have been able to find, in which such a claim has been allowed, including those cited by Kent in support of the above position, are the following: *Exton* v. *Greaves*, 1 Vernon, 138; *Talbott* v. *Braddill*, id. 183; *Quarrell* v. *Beckford*, 1 Mad. Ch. 151; *Norton* v. *Cooper*, 39 Eng. L. & Eq. 130; *Conway's Exrs.* v. *Alexander*, 7 Cranch, 218; *Ford* v. *Philpot*, 5 Har. & J. 312; *Cummings* v. *Noyes*, 10 Mass. 433, as cited and explained in *Russell* v. *Blake*, 2 Pick. 505.

In relation to all of the above cases, except that from 7 Cranch, which has no apparent bearing on the case, the allow-

ance for improvements was made under the following circumstances: The mortgagee in possession had made the improvements under a *bona fide* belief that he had a full and perfect title, either under a decree of foreclosure, or under a purchase of the equity of redemption, at sheriff's sale — proceedings which were afterward held to be erroneous. The courts, under those peculiar circumstances, did not allow the mortgagors to redeem without paying for the improvements.

In two cases, in Illinois, this court has recognized the same distinction, and, it being doubtful what the facts were, has referred the cases to a master in chancery, to inquire into the circumstances under which the improvements were made, intimating a purpose to allow for the improvements, if made in good faith, under a belief that the title of the mortgagees was good. *McConnel* v. *Holobush*, 11 Ill. 70; *McCumber* v. *Gilman*, 15 id. 381. Under no circumstances, however, will an allowance be made for improvements, unless they were judiciously made. It is a matter of discretion with the court, and not of strict right. *McConnel* v. *Holobush*, 11 Ill. 70; *McCumber* v. *Gilman*, 15 id. 381.

Gardner, going into possession, we will still suppose, as mortgagee, is liable to the mortgagors for a reasonable rent of the premises. He must account for the rents and profits actually received, or which might have been received by reasonable care and prudence. *McConnel* v. *Holobush*, 11 Ill. 70; *Van Buren* v. *Olmsted*, 5 Paige, 9.

Out of the rents and profits a mortgagee is bound to keep the estate in repair. It is, perhaps, also his duty, out of the rents, to pay the taxes. As to the latter, see *McCumber* v. *Gilman*, 15 Ill. 381; *Foure* v. *Winans*, 1 Hop. Ch. 283; *Clark* v. *Smith*, 1 Saxton's Ch. 121.

Mr. JUSTICE LAWRENCE delivered the opinion of the Court:

The notes to Diederichs and those to Gardner were secured by the same deed of trust, those to Diederichs falling due in twelve and eighteen months, those to Gardner in twenty-four

and thirty months. But the interest on all the notes was payable annually. It has already been decided by this court, that, where several notes are secured by a mortgage, in the absence of any special provision to the contrary, the notes are entitled to payment from the proceeds of the mortgage in the order of their maturity. *Vansant* v. *Allmon*, 23 Ill. 35.

In that case the note in controversy had been assigned, but the decision was not placed on any special equity acquired by the assignee. It rests upon the fact that the holder of the note first maturing may foreclose upon non-payment without waiting for the succeeding notes to mature. *Sargent* v. *Howe*, 21 Ill. 148.

The power to do this implies a priority of lien in the notes first falling due. This deed of trust does not provide, that, in the event of sale, all the notes shall be deemed to be due. It simply authorizes the trustee, in case of default, to sell, and out of the proceeds pay the amount due.

The counsel for plaintiff in error urges, that, unless, all the notes could be considered as due in case of sale, then the holder of the notes not due would lose the benefit of the security, even if there should be a surplus fund, as the trustee is directed to render the surplus to the grantor. Whether a court of chancery would relieve against this hardship by staying the payment of the surplus fund, till security could be given that it would be held subject to the lien, it is not now necessary to inquire. For the purposes of the present case it is sufficient to say that the trustee would not, under this deed of trust, have the right to apply the surplus on debts not due, nor would a court of chancery compel him to do so. Courts do not make contracts for parties, nor require them to pay their debts before they have agreed to pay them. The prudent method in taking securities of this kind is to provide against all these contingencies by the express provisions of the deed.

There is, however, according to the principles here laid down, an error in the decree. The interest on the Gardner notes was payable annually, and fell due at the same time with the first note to Diederichs. The decree should have directed this inter-

est for the first year, amounting to $330, and the amount of the first Diederichs' note to be paid *pro rata*, and next the second Diederichs' note, which matured in eighteen months, and thirdly the Gardner notes.

Gardner has been in possession of the mill, and made valuable improvements thereon since the execution of the deed of trust; and as the deed of trust covered only an undivided half of the mill, while he was himself the owner in fee of the other half, he claims to have made these improvements as tenant in com mon, and to have a lien on the entire premises for the amount expended, which should take precedence of the deed of trust.

One tenant in common can make another, at common law, contribute to such repairs to a house or mill, as are necessary to its preservation or use. 4 Kent, 370. Beyond that the right to compel contribution has not ordinarily been carried; but the case before us falls within the principle of *Louvalle* v. *Menard*, 1 Gilm. 45. There the estate held in common had been sold under a proceeding in partition, and before the distribution of the money, the complainants filed their bill, alleging the erection, by their ancestor, of valuable improvements upon the land, in consequence of which it brought an enhanced price, and praying, that, in the distribution of the fund, they should be allowed for these improvements, so far as they had increased the sum brought by the property at the sale. The court held this was equitable, and remanded the case in order that proof might be taken upon this point. So in the case before us, although Gardner might not be able to maintain a bill for contribution against Diederichs for more than the repairs necessary to preserve the property, yet as the estate of Hymer & Co. is to be sold, it is but equitable, that, so far as the price which it brings at the sale shall be enhanced by the improvements for which Gardner has paid, he should be refunded. He should also be allowed for taxes, and as against these sums, should be charged reasonable rents and profits upon one-half the mill, independently of his improvements. These can be ascertained by determining, first, the value of the mill after completion, and what would have been a reasonable rent for it,

and, secondly, the value at the time the mortgage was made, and fixing the rent in proportion to the value at the date of the mortgage and after completion. Before these inquiries are made, however, the estate of Hymer & Co. in the mill should be sold according to the provisions of the deed of trust, and the money brought into court. The price it shall bring will serve as a basis for these inquiries. What it would have brought, independently of the improvements made by Gardner, cannot, of course, be ascertained with exactness, but the court will be able to render a decree that will do substantial justice to all parties. The amount found due for improvements will be first paid, and then the notes in the order above directed. The cause is remanded for further proceedings.

Decree reversed.

ADAM KUCHENBEISER *et al.*
v.
CHARLES BECKERT *et al.*

1. CHANCERY—*prayer of relief—informality.* Where the prayer for relief in a bill is good in substance but informal, it should be taken advantage of by demurrer, and the informality is waived by answer; otherwise where it is substantially defective, so that it does not appear what relief is sought.

2. SAME—*bill to impeach a decree rendered against a minor defendant.* Where a decree in chancery has been rendered against a minor defendant, he is entitled to his day in court, whether the right is expressly reserved in the decree or not, and he may, even during his minority, by his next friend or guardian, file an original bill to impeach the decree, either for fraud or for error appearing on its face.

3. LIMITATION—*within what time such a bill must be filed.* The remedy by such a bill would be barred, however, by delay in filing it after the infant defendant has attained his majority, for the period which bars a writ of error.

4. MISTAKE—*degree of proof required.* A deed should be reformed in its terms by a court of chancery, for an alleged mistake therein, only upon strong and satisfactory evidence.

WRIT OF ERROR to the Superior Court of Chicago.

This was a suit in chancery commenced by Adam Kuchenbeiser, Elizabeth Kuchenbeiser, and Henry May, who sues by his next friend, Conrad Weisgerber, in the Superior Court of Chicago, against Charles Beckert, Elizabeth Beckert and Peter Hoffman. The bill was filed to impeach and set aside a decree rendered in a former proceeding, in the Cook County Court of Common Pleas, wherein the same property was involved and the same persons were parties. The bill alleges that the former decree was obtained, divesting complainants of their title to real estate in the city, by fraud, and that it was erroneous.

It appears that Henry May was a minor when this bill was filed, and he sues by his next friend. The cause was heard in the court below on the bill, answer, exhibits and proofs, and the court refused the relief and rendered a decree dismissing the bill. To reverse that decree, complainants bring the record to this court on error. The facts appear sufficiently in the opinion of the court for a proper understanding of the case.

Mr. SIMEON W. KING, for the plaintiffs in error.

Messrs. GOODRICH, FARWELL & SMITH, for the defendants in error.

Mr. CHIEF JUSTICE WALKER delivered the opinion of the Court:

This was a suit in chancery brought by plaintiffs in error, in the court below, against defendants in error, to impeach a decree previously rendered by the Cook County Court of Common Pleas, between the same parties, and involving the same matters of litigation. Also to reform a deed made for the premises under the decree then rendered. It appears from the record, that Elizabeth Kuchenbeiser and Henry May are the children and heirs of Lorenzo May, deceased; that Elizabeth has intermarried with Adam Kuchenbeiser, and that Henry is a minor. That the father of complainants, in the

year 1847, purchased of William E. Janes and William B. Ogden, who were the agents of Stephen F. Gale, the lots in dispute, each of which contained one acre of ground. May, at the time, received a written contract for a conveyance upon the payment of $475, a portion of which he paid at the time, and gave his four notes for $50 each, payable yearly. That he paid, in 1849, $63.12 on the unpaid portion of the purchase-money.

On the 15th day of August, 1849, May died intestate, leaving, surviving him, Elizabeth, his widow, and their children, Elizabeth, Jacob and Henry May, who were minors. That, previous to his death, he had erected a dwelling-house on lot twenty-one, and inclosed both lots, and, with his wife and children, resided upon and occupied the lots at the time of his death. That the rights and interest of May in the premises descended to his children, subject to the payment of the unpaid balance of $150 of the purchase-money. May's widow and children continued to occupy the lots after his death, and about nine months after that time the widow intermarried with defendant, Charles Beckert, who continued to occupy the house and premises.

Afterward, the contract was declared forfeited for non-payment of the purchase-money, but, at the same time, a written memorandum was indorsed upon the contract, stating that it was proposed to convey lot twenty to the heirs of May, subject to the life lease of the north half of lot twenty-one to E. Zimmer, which was then contracted to Charles Beckert, when the latter lot should be paid for by him. It appears that Mrs. Zimmer, the mother of Mrs. Beckert, had furnished money to May in his life-time to pay on the purchase, and it was desired to secure her such an interest in the premises as would afford her a home during the remainder of her life.

Afterward, on the 30th day of November, 1850, in pursuance to the memorandum indorsed on the original contract, Ogden executed a contract to Beckert, for the conveyance of lot 21, which is proved to have been then worth one thousand dollars, on the payment of $173, the balance of the purchase-

money due on May's contract, to Mrs. Beckert, or some one in trust for her. He, at the same time, as attorney in fact for Gale, conveyed lot twenty to the heirs of May, with a life lease to Mrs. Zimmer on the north half of that lot.

About the 9th of March, 1852, Beckert and wife, who had, it appears, received moneys from Mrs. Zimmer at different times, entered into a written contract with her, by which they bound themselves to board, and supply with fuel, stove, room and nursing, etc., to her, so long as she should live, and the better to secure the undertaking agreed, that a clause should be inserted in the deed for lot 21 when made, that she should have the right to her bed, a place for it, and the right to enter into the house and occupy it in peace and quiet so long as she should live, and authorized Ogden to insert such a provision in the deed. A further agreement was afterward, on the 13th day of June, 1855, entered into by the parties, by which it was stipulated that the former agreement was to be considered as fulfilled, in consideration that Beckert had built a dwelling-house for Mrs. Zimmer on the north half of lot 20, and a further stipulation was then made, to support her, and in case of sickness to reinstate her in her room, and provide her every comfort when sick, or too old and feeble to care for herself. This latter agreement contained a provision, that lot 21 should be conveyed to John B. Gerard, in trust for Elizabeth Beckert, for the support of herself and husband during their lives, in remainder to the heirs of May, with conditions for protecting the interests of Mrs. Zimmer, and the right to sell, change or reinvest as provided in the deed.

Beckert paid the balance of the purchase-money, and Ogden caused a deed to be made for lot 21, in conformity with the agreement, which bears date the 27th day of November, 1855. Afterward, on the 29th day of June, 1857, Beckert and wife filed a bill in the Cook County Court of Common Pleas, in which they allege that the deed was made through mistake and misapprehension of its effect by them. They allege that the clause in the deed giving them a life estate and in remainder in fee to May's heirs should not have been inserted, but that it

should have been in trust in fee to Mrs. Beckert; and that they understood the deed to have been so made, and with that understanding they had sold a portion of the lot. They prayed that the deed might be reformed. On a hearing in that case the court granted the relief, and the deed was reformed according to the prayer.

The bill in this case is filed to impeach and reverse that decree, and alleges that it was rendered on insufficient proof, and that Beckert and wife fraudulently used the forms of law to deprive plaintiffs in error of their rights in the property, and prays for a restoration of rights, under the deed to Gerard, and that he hold the property in trust according to the terms of that deed, with remainder over to them. That, on the hearing of the former cause, the court was misled and induced to make the decree by the false pretenses of Beckert and wife; and that their fraudulent acts in procuring the decree entitles them to have it reversed, canceled, annulled, and made void and of no effect.

It is insisted by defendants in error, that this bill is defective in the prayer. It is certainly inartificially and informally drawn. It is so much so, that it would have been subject to a demurrer had one been interposed. The bill alleges that the decree was procured by fraud, and it states that it should be set aside, canceled and held to be void by the court, and proceeds, "as your orator and oratrix prays may be done." It thus clearly appears that relief was sought, and it informally asks for the desired relief. By answering, defendants waived this formal objection, and it is now too late to raise it for the first time in this court. Had the objection been taken on the hearing, the court would have permitted the prayer to have been amended; but it would have been otherwise had the bill been defective in substance, as that could have been urged at any stage of the proceeding. Or, had there been no prayer, or had it failed to appear what relief was sought, or had it even been doubtful, a different question would have been presented.

It was urged, that the trial was had and the decree executed and carried into effect so long since, that it should not now be disturbed. This would be unquestionably true, had the parties

all been adults, when the decree was rendered, or had the period elapsed, which bars a writ of error, after the minors had become of age. But under our practice a minor defendant to a bill is entitled to his day in court, whether it is expressly reserved by the decree or not, and he may at any time during his minority, by his next friend or guardian, file an original bill to impeach a decree against him. *Loyd* v. *Malone*, 23 Ill. 43. It was held, in that case, that such a bill might be filed to impeach a decree for fraud, or even for error appearing in the former decree. With that rule we are satisfied, and have no disposition to limit or qualify its application in practice. And, as it appears that Henry May was, at the time this bill was brought, still a minor, as well as at the time the former decree was rendered, he, therefore, had the right to file a bill to impeach that decree for fraud, or even for an error appearing on face of the decree.

Treating this bill, as we think we should, as an original bill to impeach the former decree, were complainants entitled to the relief sought? It is manifest, from the evidence upon which that decree was rendered, that it fails to authorize the decree. After the forfeiture of the first agreement for a conveyance, the new agreement then entered into provided that lot twenty-one should be conveyed to the trustee for the support of Beckert and wife during their lives, with remainder in fee to the children of May. And the deed was executed and received in conformity with that agreement, and the evidence of the trustee wholly fails to prove any mistake. If his evidence is considered without reference to the deed as proof in the case, we do not see that it would authorize a decree on the written agreement for a deed as it was reformed by the court, and when a deed is produced duly executed, and received by the grantees, it should require strong and satisfactory evidence to authorize any reformation or change in its terms.

Gerard, in his evidence, and the former decree was based upon it, does not distinctly say that there was a mistake in drafting the deed, or in drawing the contract under which it was made. He says, that there were many conversations in

reference to the matter; and it was understood that May's heirs were to have lot twenty, and Beckert was to pay for twenty-one, but it was to be conveyed in trust for Mrs. Beckert, and revert to Charles Beckert at the death of his wife, charged with the support of Mrs. Zimmer. That Ogden drew the agreement quickly, and that was his impression at the time he testified; that Ogden, by mistake, wrote "heirs of Lorenzo May," instead of the "heirs of Charles Beckert." It is almost impossible to conceive how such a mistake could have occurred, and not have been detected, either when the agreement was written or the deed was made. It seems to us that Ogden, Gerard or Beckert must have discovered the mistake, had one occurred. The execution of the deed with that clause in it, and its reception by the grantee, is almost conclusive evidence that it truly expressed the agreement of the parties. While it may be impeached, it should only be done on the most satisfactory evidence. In this case Gerard only gives it as his impression that a mistake was made. It would be dangerous, indeed, to tenures, if mere impressions could overturn estates, and destroy the highest evidence of ownership of lands. This evidence was manifestly insufficient to warrant the former decree reforming the deed, and the decree would have been reversed on this evidence.

It is urged, that Beckert and Mrs. Zimmer were Germans, and unable to understand the English language, and Gerard so testified in the former case. If this were true, we do not perceive that it would authorize them to repudiate a contract deliberately entered into, when the law presumes, that they were informed of the nature and effect of their acts. They had the means, if necessary, to ascertain the effect of the deed by an interpreter or otherwise, and the law will presume that they did so before the transaction was consummated. But, so far from such being the fact, the evidence shows that the parties were informed, understood and assented to the agreement, and the deed made in accordance therewith. Ogden testifies, that lot twenty-one, at the time the forfeiture was declared, and it was resold to Beckert, was worth one thousand dollars, that it

was supposed, the life estate in the premises, to him and his wife, would fully compensate him for paying the balance of the purchase-money, which was but about one hundred and seventy-five dollars. He also states that he would have sold to Beckert on no other terms, than May's children should get the ultimate fee; and that he has no doubt it was fully understood by the parties. When this evidence is considered, in connection with the written agreement and the deed, we are unable to see how it could be possible for them to have been mistaken. Again, two or three persons swear, that Beckert then could speak the English language reasonably well, and could read and understand it.

The former decree being clearly erroneous, and Henry May being a minor when this suit was brought, he must be allowed his day in court, for the purpose of avoiding the decree. Such is the practice, and we regard it reasonable and just, that minors of tender years, who are incapable of looking to and protecting their interests, and where their rights are intrusted to others indifferent to their welfare, or whose interests clash with the rights of the minor, should have the right, on arriving at age, to impeach a decree for error, where the decree injuriously affects their rights. We deem it unnecessary to discuss the question of fraud in procuring the decree. The decree of the court below is reversed, and the cause remanded.

Decree reversed.

THE BOARD OF SUPERVISORS OF LIVINGSTON COUNTY

v.

WILLIAM HENNEBERRY.

1. SPECIFIC PERFORMANCE—*conditions must be performed.* A party cannot compel a specific performance of a contract for the conveyance of land unless he shows he has himself performed his part of it, and he must show full performance on his part of all the stipulations to be by him performed, to entitle him to a decree.

2. So, where a party purchased swamp lands from a county, the contract of sale prescribing, as conditions precedent to the conveyance, the payment of the purchase-money, the drainage of the land, and the improvement of one-half the land, it was *held*, that the purchaser could not compel a specific performance upon showing, merely, that he had offered to pay the purchase-money,—he should have shown that he had performed all the conditions on his part to be performed.

3. SAME—*waiver of conditions—power of a drainage commissioner in that respect.* That it was not customary for the drainage commissioner to insist upon the performance of any part of such contracts except the payment of the money, could not excuse the purchaser from the performance of the other conditions; such waiver could only be by the authority of the county, with whom the contract was made.

4. TENDER—*in chancery—money need not be brought into court.* In chancery it is not required that a tender shall be kept good by bringing the money into court.

WRIT OF ERROR to the Circuit Court of Livingston county; the Hon. CHARLES R. STARR, Judge, presiding.

The opinion of the court contains a statement of the case

Mr. A. E. HARDING, for the plaintiff in error.

Mr. JOHN M. BARRIT, for the defendant in error.

Mr. JUSTICE BREESE delivered the opinion of the Court:

This was a bill in chancery in the Livingston Circuit Court, exhibited by William Henneberry against the board of supervisors of that county praying for a specific performance of a contract for the purchase of certain swamp lands by the complainant, of the county of Livingston.

The bill alleges, that the complainant paid the sum of $520 for the land and took a certificate of purchase therefor subject to certain stipulations and requirements therein contained, all which complainant alleges he had performed. He avers he has not received a deed from the county and that the county refuses to make a deed.

The answer admits the purchase as alleged, but denies that any part of the purchase-money or interest has been paid;

denies that complainant has complied with the conditions and stipulations in the certificate specified; denies that complainant ever did any drainage on the land, though drainage was necessary; denies making any improvements by complainant upon the land, as was required of him by the terms of the contract, to the satisfaction of the board of supervisors; nor has he made any improvements whatever thereon. And the answer insists, that each and every condition of the contract, namely, the payment of the purchase-money and interest, the drainage of the land and the improvement of one-half the land, are conditions precedent, to be kept and peformed by the complainant before he is entitled to a deed, and that, having failed to comply with the conditions, he is not entitled to a deed.

A replication was put in to the answer, and the cause heard on bill, answer and replication, and the testimony of J. R. Woolverton, together with the certificate of purchase from the swamp land commissioner, which was in evidence.

Woolverton stated he was swamp land commissioner and had been since 1859; that he knew complainant; that he tendered witness the purchase-money for the land described in his certificate of purchase and demanded a deed therefor, some time before this suit was brought; witness refused to make a deed because another party had a prior certificate to the same land, which witness thought had been forfeited, but as he did not know which party was entitled to the deed, witness told complainant he preferred to have the courts decide which was entitled, and that he would make a deed according to the decision; it had never been customary with him to insist upon anything except payment of the money as a condition to giving a deed.

This was all the evidence in the cause, on which the court passed a decree for the complainant for a specific performance of the contract.

The case is brought here by writ of error.

The whole of the evidence being set out as above, it is not distinctly perceived how the court could pass a decree for a

specific performance. The record is barren of any evidence showing a performance by complainant of the conditions of the contract, all which were conditions precedent. A party cannot compel a specific performance of such a contract unless he shows he has himself performed his part of it (*Scott* v. *Shepherd*, 3 Gilman, 483), and he must show full performance on his part of all the stipulations, to be by him performed, to entitle him to a decree. *Church* v. *Jewett*, 1 Scam. 54.

The fact, that it was not customary for the swamp land commissioner to insist upon the performance of any part of the contract except the payment of the money, cannot alter the case, for it was not his duty to insist upon any thing else. It was a contract with the county, that these conditions, all of them, should be performed, and it was for that authority to absolve the complainant from the performance. Scates' Comp. 1163.

It is further objected by the plaintiff in error, that the defendant in error did not keep his tender good by bringing the money into court. This, under the authority of *Webster* v. *French*, 11 Ill. 275, is not, in chancery, an objection.

Complainant, having shown no performance on his part, is not entitled to a deed. The decree must be reversed.

Decree reversed.

THE BOARD OF SUPERVISORS OF LIVINGSTON COUNTY

v.

PATRICK HENNEBERRY.

WRIT OF ERROR to the Circuit Court of Livingston county; the Hon. CHARLES R. STARR, Judge, presiding.

Mr. A. E. HARDING, for the plaintiffs in error.

Mr. JOHN M. BARRIT for the defendant in error.

Mr. JUSTICE BREESE: This case is in all respects similar to the case of the Board of Supervisors of Livingston county

against William Henneberry, *ante*, and must be decided in the same way.

The decree of the Circuit Court is reversed.

Decree reversed.

CORNELIA RUSSELL

v.

WILLIAM H. BROWN *et al.*

1. WRIT OF ERROR—*effect of delay in prosecuting, not amounting to a bar.* Where the wife of a mortgagor, who had joined in the mortgage and was a party to a judgment of foreclosure thereof, after her husband's death, and after a lapse of more than twenty years from the time of rendering the judgment, sues out a writ of error to reverse such judgment, the property in the mean time having frequently changed hands and risen in value, the case will not receive any indulgence at the hands of the court, beyond what is required by the strict rules of law.

2. SERVICE OF PROCESS. It is sufficient service of a *scire facias* to foreclose a mortgage, where the defendants, husband and wife, indorse upon it their written acknowledgment of service of the writ, and pray the court to enter their appearance accordingly.

3. SAME—*proof thereof.* And the recital in the judgment that it appeared to the court that the defendants had been duly served with process, is satisfactory proof that the defendants did make the indorsement.

4. FORECLOSURE *by scire facias—in what cases allowable.* A mortgage which is given to secure the payment of money, may be foreclosed by *scire facias*, although the mortgagor was primarily liable for only a part of the debt thus secured, as to the residue his liability being merely secondary, and could only accrue in the event of nonpayment by other parties and notice.

5. ASSESSMENT OF DAMAGES *by the clerk—when allowable.* In a proceeding by *scire facias* to foreclose a mortgage given to secure the payment of certain bills of exchange of which the mortgagor was indorser, as well as a promissory note of which he was the maker, it is proper, as the damages rest in computation, for the court to direct the clerk to compute them. The court would instruct the clerk at what rate to compute them, both as to the interest and the legal damages for protest.

6. JUDGMENT *on foreclosure by scire facias against husband and wife—its form.* The judgment in a proceeding by *scire facias* to foreclose a mortgage against husband and wife, directed, first, that the plaintiff have and

recover a certain sum from defendants, and then directed how they were to recover it, that is, by the sale of the premises. The entire judgment, taken in connection with the record, was held to be merely a judgment *in rem*, and not a judgment *in personam*.

7. ERROR — *what character of error will reverse.* It is judicial errors of which an appellate court takes cognizance. Clerical errors are left for correction to the court where the error occurs. So an appellate court will not reverse a judgment merely for a clerical error which it sees by the record can be amended, and from which no injury can arise to the plaintiff in error.

8. CLERICAL ERROR — *what constitutes — misdescription of premises in a judgment.* The judgment in a proceeding by *scire facias* to foreclose a mortgage, in describing the land referred to a deed by which it had been conveyed, and gave the wrong date to the deed. This was held to be a mere clerical error, which could be corrected on motion in the court below by the files in the cause, and did not afford ground for reversal.

9. JUDGMENT *on foreclosure by scire facias — description of the premises.* A mortgagee has a right to an order of court for the sale of the mortgaged premises as they are described in the mortgage, unless the court can see that the description is of a character which cannot be rendered certain or definite.

10. A mortgage which was sought to be foreclosed by *scire facias*, described the premises mortgaged as "all that certain lot or parcel of land situated in the county of Cook, and State of Illinois, and being part of the north-east quarter" of a certain designated section, township and range, "being the same premises that were conveyed to" this mortgagor by the mortgagee, by deed bearing a certain date, "saving and excepting out of the same such lots as may appear to have been conveyed by" the mortgagor on the record of deeds previous to a certain date. The judgment of foreclosure gave the same description, and, on error, it was held sufficient. Whether the calls of description could be satisfied, was not a question arising on the writ of error, but could only arise when those claiming under the judgment should be called on to defend their title.

11. SCIRE FACIAS — *the court cannot reform the description of the land.* In this proceeding the court has no power to change the description of the mortgaged premises, if it appear not to be as definite in the mortgage as desired, as might be done on bill in chancery to foreclose, but the judgment must follow the description in the mortgage.

WRIT OF ERROR to the Superior Court of Chicago.

On the 20th day of October, 1845, William H. Brown and H. Griswold Hubbard, as executors of Elijah K. Hubbard, deceased, instituted proceedings in the County Court of Cook county to foreclose a mortgage by *scire facias*, the mortgage

having been executed to the testator in his life-time, on the 21st day of June, 1837, by John B. F. Russell and Cornelia Russell, his wife, to secure the payment of certain sums of money, as described in the following condition thereto:

"Whereas, the said Russell is justly indebted to the said Hubbard in certain sums of money, to wit: the said Russell being indorser on a certain bill or draft of E. H. Vell *on* J. C. Van Rensselaer, New York, dated July 19, 1836, payable nine months from date, for six hundred and sixty-six $\frac{66}{100}$ dollars, with damages, interest and expenses thereon. And, also, being indorser on a certain bill or draft of J. C. Van Rensselaer *on* E. H. Vell, of same date, and due and for the same amount, with damages, interest and expenses, which said bills have been protested for non-payment; and said Russell, being also indorser on a certain promissory note of Maurice Wakeman in favor of Edward Shepard, or order, by him also indorsed, dated July 7, 1836, payable in twelve months, for the sum of fifteen hundred dollars, with interest and expenses; and also the said Russell being indorser on a certain note signed by Henry Moore, in favor of Rogers & Markoe, or order, and by them indorsed, bearing this date, and due on the fifteenth of February next, for nine hundred and four $\frac{59}{100}$ dollars; and also the said Russell being maker of a certain note payable to Rogers & Markoe, or order, of this date, payable in six months, with interest, for five hundred and forty-four $\frac{84}{100}$ dollars, and also by them indorsed over; and also being indorser on a certain note of George W. Dole, dated June 19, 1837, payable in one year, for one thousand dollars: Now if the amount of each and all the above described notes and bills, with all damages, interest and expenses thereon, shall be well and truly paid to the said E. K. Hubbard, or his heirs or assigns, on or before the first day of February, 1838," the said deed to be void.

The *scire facias* recites, that all of the sums of money mentioned in the mortgage, except the last mentioned note to George W. Dole for one thousand dollars, remain wholly unpaid, and that they are due, etc.

The mortgaged premises are described in the mortgage as follows: "All that certain lot, parcel or piece of land situated in the county of Cook and State of Illinois, and being part of the north-east quarter of section number thirty-four, township thirty-nine, range fourteen east, being the same premises that were conveyed to said Russell by the said Hubbard, by deed bearing date about the 28th day of July, A. D. 1836, saving and excepting out of the same such lots as may appear to have been conveyed by said Russell on the record book of deeds previous to this date," which was the 21st of June, 1837.

On the back of the writ of *scire facias* appears this indorsement: "We hereby acknowledge service of this writ, and pray the court to enter our appearance accordingly.

"*October* 21*st*, 1845. J. B. F. RUSSELL,
C. RUSSELL."

On the 29th day of November, 1845, a judgment of foreclosure was entered of record in the following form:

"This day come the said plaintiffs by Cowles & Brown, their attorneys, and it appearing to the court that the said defendants have been duly served with process, and they being solemnly demanded come not or any one for them, but herein fail and make default, which is ordered to be entered. Therefore, it is considered that the said plaintiffs ought to recover of the said defendants their damages herein sustained on occasion of the premises; but because those damages are uncertain and unknown to the court, this suit being founded on an instrument in writing for the payment of money only, it is referred to the clerk to assess the same, and the clerk, having assessed the damages, reports that they amount to the sum of eighteen hundred and thirty-four dollars and eighty-one cents, which said report is ordered to be accepted and confirmed."

"Therefore, it is considered that the said plaintiffs, William H. Brown and H. Griswold Hubbard, executors as aforesaid, do have and recover of the said defendants, John B. F. Russell

and Cornelia Russell, his wife, their damages of eighteen hundred and thirty-four dollars and eighty-one cents, in form aforesaid assessed, together with their costs and charges by them about their suit in this behalf expended, and that they have execution against all that certain lot or parcel of land situated in the county of Cook, and State of Illinois, and being part of the north-east quarter of section number thirty-four, township thirty nine, range fourteen east, being the same premises that were conveyed to said Russell by the said Hubbard, by deed, bearing date about the 28th day of July, 1831, saving and excepting out of the same such lots as may appear to have been conveyed by said Russell on the record book of deeds previous to the 21st day of June, 1837."

The record of these proceedings having been transferred to the office of the clerk of the Superior Court of Chicago, Cornelia Russell, the survivor of the defendants below, sued out this writ of error to that court, to the April Term, 1866, of this court, for the purpose of bringing in review the proceedings of the County Court in the premises. The specific objections taken to those proceedings are set forth in the opinion of the court.

Mr. J. S. PAGE, for the plaintiff in error.

Messrs. MCALLISTER, JEWETT & JACKSON, for the defendants in error.

Mr. JUSTICE LAWRENCE delivered the opinion of the Court:

On the 21st of June, 1837, John B. F. Russell and Cornelia, his wife, the present plaintiff in error, executed a mortgage to Elijah K. Hubbard, to secure the payment of various notes and drafts upon some of which Russell was primarily, and upon others secondarily, responsible. The notes and drafts were six in number, and amounted in all to over five thousand dollars. At the November Term, 1845, of the Circuit Court of Cook county, the executors of Hubbard sued out a *scire facias* on this mortgage, and obtained a judgment for eighteen

hundred and thirty-four dollars and eighty-one cents. From an affidavit filed for the purpose of making certain persons parties to the writ of error as *terre tenants*, it appears that the mortgaged premises were sold under the judgment. This writ of error to reverse the judgment is now prosecuted in the name of Cornelia Russell, one of the parties to the judgment and the mortgage. It is more than twenty years since the judgment was rendered, during which time the property has probably changed hands many times, and, as stated in the argument of counsel on each side, risen immensely in value. It is now sought, by means of this writ of error, to recover back property, with the disposition of which, in payment of a debt, the parties have rested content for twenty years. This belongs, therefore, to a class of cases which are not entitled to, and do not receive, any indulgence at the hands of a court, beyond what is required by the strict rules of law. If these have been violated to the injury of the plaintiff in error, she must, of course, receive redress.

The first error assigned was that the court acquired no jurisdiction of the persons of the defendants. The writ has the following indorsement:

"We hereby acknowledge the service of this writ and pray the court to enter our appearance accordingly.

"(Signed) J. B. F. RUSSELL,
C. RUSSELL."

The judgment recites that it appeared to the court that the defendants had been duly served with process. This brings the case fully within that of *Banks* v. *Banks*, 31 Ill. 164.

It is next urged that this mortgage was of such a character that it could not be foreclosed by a *scire facias*, and reference is made to the case of *McCumber* v. *Gilman*, 13 Ill. 542. In that case the mortgage was given to secure the delivery of a certain amount of internal improvement scrip. The court held, that a *scire facias* would not lie to foreclose a mortgage given to secure the delivery of specific articles of property, or the performance of any act, except the payment of money. Such,

indeed, is the language of the statute. But the mortgage in the case before us was given to secure the payment of money. On some of the instruments secured by the mortgage the liability had already accrued, and a debt was owing from the mortgagor to the mortgagee. On others his liability was secondary, and would only accrue in the event of non-payment by other parties and notice. But as to all the instruments, the mortgage was given merely to secure the payment of money, and was, therefore, within the terms of the act.

Whether the liability had accrued on all, was a matter which the court necessarily investigated at the time of rendering judgment, in the same way that it determines, when it renders a judgment upon a mortgage given to secure the payment of a note from the mortgagor to the mortgagee, whether the note has been paid. As to two of the drafts, the mortgage recites a protest, and admits the then existing liability of the mortgagor to the mortgagee. There was also a note made by the mortgagor, and indorsed by the payees to the mortgagee. There could be no question as to the power of the court to render judgment on a *scire facias* for the amount admitted by the mortgage to be due on the three instruments, and together they amounted to more than the judgment. We must presume, in the absence of a bill of exceptions, that the judgment was rendered for the amount which the court found due on these instruments, rather than on those where the liability of the mortgagor was only secondary. And that a judgment could be rendered on a *scire facias* for the amount thus due is undeniable.

It is also urged that the court erred in referring the assessment of damages to the clerk. But the damages rested in computation, and it was proper for the court to direct the clerk to compute them. The court would instruct the clerk at what rate to compute them, both as to the interest and the legal damages for protest.

It is also assigned for error, that a joint judgment was rendered *in personam* against both Russell and his wife, whereas the debt was the debt of the husband only. The commence-

ment of the judgment is in form *in personam*, it is true, but it proceeds to award a special execution against the mortgaged premises, describing them as described in the mortgage, and if there was an error in the form, it was one which could work this plaintiff in error no prejudice. She could not be made personally liable upon it, because the record would show that the proceeding was of a character in which a personal judgment could not be rendered, and the order of the court, taken as a whole, would be construed simply as fixing the amount due on the mortgage, and directing the sale of the mortgaged premises. It directs that the plaintiffs have and recover a certain sum from the defendants, and then directs how they are to recover it — to wit, by the sale of the premises. No court, inspecting the entire record and the entire judgment, would hold it to be any thing more than a judgment *in rem*, and to this judgment the wife was a proper party as decided in *Gilbert* v. *Maggord*, 1 Scam. 471.

Another error assigned is, that the description in the judgment, of the mortgaged premises is void for uncertainty. The premises against which execution is awarded are described in the judgment as follows:

"All that certain lot or parcel of land situated in the county of Cook, and State of Illinois, and being part of the north-east quarter of section number thirty-four, township thirty-nine (39), range fourteen (14) east, being the same premises that were conveyed to said Russell by the said Hubbard, by deed bearing date about the twenty-eighth day of July, A. D. 1831, saving and excepting out of the same such lots as may appear to have been conveyed by said Russell on the record book of deeds previous to the twenty-first day of June, A. D. 1837."

This description follows precisely the description in the mortgage, as set out in the *scire facias*, except that the mortgage refers to the deed from Hubbard to Russell, as bearing date the 28th of July, 1836, while the judgment refers to it as bearing date the 28th of July, 1831. This is evidently a mere clerical error, and one which, as has many times been decided

by this court, may be corrected on motion and notice at a subsequent term, by the files in the cause. In this case it could be corrected by the *scire facias*. An appellate court will not reverse a judgment merely for a clerical error which it sees by the record can be amended, and from which no injury can arise to the plaintiff in error. It is judicial errors of which an appellate court takes cognizance. Clerical errors are left for correction to the court where the error occurs.

Treating this discrepancy of dates as a mere clerical error, is this judgment to be reversed, as urged by the plaintiff in error, because of the alleged uncertainty in the description of the premises against which execution is awarded? We do not perceive how it can be so held. The court gave judgment for the sale of the mortgaged premises as it found them described in the mortgage. It could do no otherwise. It had no power to change the description in a proceeding of this character. On a *scire facias*, the mortgage is treated as a record, and the court must follow it. If the foreclosure had been by bill in chancery, the court would, on proper application and proof, have substituted a more definite description. But, in the case before us, it had no such power. How, then, can we reverse a judgment simply because the court did precisely what the law required it to do? Whether the description of the mortgaged premises is available will depend upon whether persons claiming under the judgment and execution can make the proof necessary to identify them. This question will arise when they are called upon to defend their title, and its decision will depend upon the evidence that may then be presented. Whether the calls of this description can be satisfied or not is not a question arising under this writ of error. The mortgagee had a right to an order of court for the sale of the premises as they were described in the mortgage, unless the court could see that the description was of a character which could not be rendered certain or definite, which was not the case here, and the mortgagee took his decree, and the purchasers took their title at their peril, and assuming the risk as to their ability to furnish proof to locate the land.

If a mortgage described the mortgaged premises as ten acres of land, part of a certain quarter section, and bounded by a line beginning at the north-east corner of a house then occupied by A B, and running thence south eighty rods, thence east twenty rods, thence south eighty rods, thence west twenty rods to the place of beginning, undoubtedly a court might, upon a *scire facias*, order the sale of the premises by such description, and if the house called for as the starting point could be proved, the purchaser under a sale would take the title of the mortgagor; but if it should prove there was no house on the land, the description would fail, and he would take nothing. So here, if the deed from Hubbard to Russell, referred to for the description, can be produced and identified, and that deed contains a description capable of definite location, and if it further appears that the property as to which the proof is offered was not within the excepting clause of the mortgage, then the purchaser making this proof will show a good title under the mortgage. The description here is of the same character as that which was held good in *Choteau* v. *Jones*, 11 Ill. 300; See also *Benedict* v. *Dillehunt*, 3 Scam. 287.

We have considered all the errors assigned, and deem none of them fatal to the judgment.

Judgment affirmed.

JAMES H. BOWEN *et al*
v.
GEORGE L. SCHULER.

1. INSTRUCTIONS — *need not be repeated.* It is not error to refuse an instruction, though proper in itself, when the principle embodied in it is embraced in an instruction already given at the instance of the same party.

2. SALE — *fraud — intent.* A purchase of property, made with the intention not to pay for it, is fraudulent as between buyer and seller, and no title passes; and the fraudulent intent may be found from acts of the purchaser after the sale.

3. SAME — *rescission for fraud.* Where a seller elects to rescind a sale of goods on account of fraud on the part of the buyer, the seller must restore, or

offer to restore the purchaser what he has paid on the goods at the time of the purchase. So, on a sale where fraud has been practiced by the purchaser, entitling the seller to rescind, and a note has been given for the price of the goods, the seller must offer to return the note before he can rescind and recover the goods.

4. SAME — *seller may elect to affirm or rescind.* In such a case, the seller has the option to elect to affirm the sale, and might, no doubt, retain the money paid on the purchase and sue and recover damage for the deceit, or sue on the contract, or he may rescind and recover back the property, but must first place the purchaser in *statu quo*, or at least make the offer. If rescinded, it must be of the whole contract and not of a part. To authorize it would be to permit the vendor to make a new contract.

APPEAL from the Circuit Court of Lee county; the Hon. W. W. HEATON, Judge, presiding.

This was an action of replevin for the recovery of a large quantity of goods, brought by James H. Bowen, George S. Bowen, Chauncey J. Bowen and George Whitman, in the Lee Circuit Court, against George L. Schuler. The declaration was for the wrongful taking and detention of the goods.

The pleas were, *non cepit*, *non detinet* — property in defendant and property not in the plaintiffs. A demurrer was sustained to the last plea and issue formed on the others.

At the June Term, 1865, a trial was had by the court and a jury. It appears from the evidence that one Lyman Culver purchased the goods in controversy of plaintiffs, and paid them on the purchase $1,500, obtained possession of them, shipped them by rail to Dixon and then sold them to defendant. He, on a demand of the goods, refused to give them up, and they then instituted this suit.

The jury found the issues for the defendant, and plaintiffs entered a motion for a new trial, which the court overruled and rendered judgment on the verdict, and awarded a return of the goods. Plaintiffs bring the case to this court by appeal and ask a reversal of the judgment.

Mr. EMERY A. STORRS, for the appellants.

Mr. H. B. FOUKE, for the appellee.

Mr. CHIEF JUSTICE WALKER delivered the opinion of the Court:

Appellants brought an action of replevin against appellee to recover a large stock of goods and merchandise. The declaration was in the usual form, and appellee filed the pleas of *non cepit*, *non detinet*, property in defendant, and that the plaintiffs were not the owners of the goods. Issue was joined on these several pleas, a trial was afterward had by the court and a jury, resulting in a verdict and judgment in favor of defendant. And the cause is brought to this court on appeal, and reversal is urged upon several grounds.

The first is, that the court erred in refusing to give for appellants the second and third instructions of a number asked by them. They are these:

2. "If the jury believe, from the evidence in this case, that Culver obtained the possession of the goods in controversy without paying for them, and immediately after obtaining possession of the goods in controversy, secretly took or caused them to be taken from Chicago, and shipped them to Dixon to a fictitious party, and then sold them at a discount, they would be justifiable in finding, from such facts, that the purchase of the goods was originally made by Culver with the intention not to pay for them.

3. "The jury are instructed, as a matter of law, that, in order to render a purchase of property fraudulent, as between the parties thereto, it is not necessary that there should have been any false representations made by the purchaser in order to effect his purchase; if the purchase was made with intent not to pay for the property, then it is a fraudulent transaction, and the intent may be ascertained from the subsequent acts of the purchaser."

By the first of appellants' instructions, which the court gave to the jury, they were informed, that a purchase of property made with the intention not to pay for it, is a fraud as between the buyer and the seller, and passes no title; and that the

fraudulent intent may be found from acts of the purchaser after the sale. This instruction fully covers and embraces the principle announced by the two which were refused. It is not in the same language, but it embraces the principle. The only difference is that those which were refused, recited a portion of the evidence before the jury, and which they, as intelligent men, knew was introduced to prove fraud, and it was for them to say, whether it, with the other evidence in the case, proved fraud. By the second instruction asked, it may be an undue prominence was given to a portion of the facts in the case, while it was the duty of the jury to consider all of the evidence before them. We think the court below committed no error in refusing these instructions.

It is again insisted, that the action could not be maintained, because, conceding the right, appellants had not avoided the sale of the goods, by restoring, or offering to restore, the money paid by Culver on the purchase. He, at the time he contracted for the goods, paid to appellants fifteen hundred dollars on the purchase, and at the time obtained possession of the goods, and afterward sold them to appellee; but there is no evidence, that, before they brought their suit, they did any thing to place Culver in *statu quo*. And it is believed to be a general, if not a rule of universal application, that, when a person parts with his property upon false representations, amounting to a fraud, he has a right to rescind the contract, and repossess himself of the property, so long as it has not passed into the hands of an innocent purchaser without notice, or he may if he choose affirm the sale. If he, however, elects to rescind the contract, he must restore to the other party, whatever consideration he may have received on the sale. *Thayer* v. *Turner*, 8 Metc. 551. It has also been held, that when a party had obtained goods on a fraudulent purchase, and they were seized under an execution against the purchaser, and replevin was brought by the vendor, he could not recover without offering to return the note given for the purchase-money. *Ayres* v. *Hewett*, 14 Maine, 281. And to the same effect are the cases of *Fisher* v. *Conant*, 3 E. D. Smith, 199; *Mason* v. *Barret*, 3 Denio, 69;

Stewart v. *Dougherty*, 3 Dana, 479; *Keteltas* v. *Fleet*, 7 Johns. 324; *Kimball* v. *Cunningham*, 4 Mass. 502; *Jennings* v. *Gage*, 13 Ill. 610. Other authorities might be cited, but these are sufficient to illustrate the rule.

There is no doubt, that the party upon whom the fraud has been perpetrated has his election either to affirm or rescind the contract; and while the title to the property does not pass by such a sale, he may no doubt retain the money received on the sale, and maintain an action for deceit, and recover such damages as he may have sustained by the fraud, or may sue upon and enforce the agreement. If he rescind, he must place the other party in *statu quo*, or at least offer to do so, before he can recover the property with which he has parted. *Smith* v. *Doty*, 24 Ill. 163; *Ryan* v. *Brant*, decided at this term.* Nor can a party rescind a contract as to one part and affirm it as to another part. The rescission, if made, must be full, and embrace the entire contract. He cannot retain the consideration he has received, or a portion of it, and rescind as to a portion of the property he has sold, and recover that portion back. *Buchanan* v. *Harney*, 12 Ill. 336; *Jennings* v. *Gage*, 13 id. 610. To permit him to do so, would be to permit him to make a new contract for the sale of a part instead of the whole of the property with which he has parted.

The right of recovery in this case is placed on the right to rescind the contract. Whatever may have been their intention, appellants have failed to rescind, inasmuch as they did not return, or offer to return, the money they had received on the sale to Culver, before the suit was brought. To hold, that a recovery might be had, would be to hold, that a party may affirm a contract in part and rescind it in part, for a fraud. Appellants did not have the right to retain the money and recover the goods. Culver did not agree to pay the money for a part of the goods, and to give them a note for a large sum beside. Although the rule may operate hardly in this case, we regard it as too firmly fixed to be disregarded. This view of the case renders unnecessary an examination of the question

* And to be reported in 42 Ill.

whether appellee had notice of the fraud, or of such facts as put him on inquiry. The judgment must be affirmed.

Judgment affirmed.

EDWIN HASKIN
v.
HENRY HASKIN.

1. INSTRUCTIONS. An instruction which is so confused and obscure that it is calculated to mislead the jury, is erroneous.

2. AGENCY — *liability of principal to indemnify his agent.* Under ordinary circumstances, where an agent incurs loss in the proper prosecution of the business of his agency, the liability of the principal to indemnify him, follows, as of course.

3. SAME — *how far the conduct of the agent may impair his right to indemnity.* If the agent neglects his duty in reference to the matter out of which his loss arises, to the injury of his principal, such neglect will, to the extent of the injury, reduce or discharge the liability of the principal to indemnify the agent.

4. But, if such neglect does not result in injury to the principal, the rights of the agent will not be affected thereby.

5. RECOUPMENT — *money paid under duress.* In order to enable a defendant to recoup money which he alleges was paid to the plaintiff under duress, it must be shown to have been paid under some kind of legal duress.*

APPEAL from the Superior Court of Chicago; the Hon. JOSEPH E. GARY, Judge, presiding.

This was an action of assumpsit, brought in the court below by Henry Haskin against Edwin Haskin, to recover the value of 800 barrels of salt, which the plaintiff claims he was obliged to furnish upon a warehouse receipt, issued by him, in his own name, but as the agent, and while he was carrying on the business of the defendant.

---

* See *Elston et al.* v. *City of Chicago*, 40 Ill. 514, as to what will be regarded as a compulsory payment.

Statement of the case.

It appears, that, prior to June, 1863, Edwin Haskin, the defendant, was engaged in the salt business in Chicago, and Henry, the defendant, was in his employment.

In May of that year, the defendant returned from New York, stating that he had taken the agency of a salt company, and could not carry on the business any longer, but would have to close it up.

A short time after, the business was being carried on in the name of Henry Haskin, the plaintiff, at the same office, but, as he insists, as the agent of Edwin.

From June 1, 1863, to April 1, 1864, the business was carried on, and all warehouse receipts were issued, in the name of Henry Haskin, but the bank account was kept in the name of Edwin, during which time, on the 13th of October, 1863, a warehouse receipt was given in the name of Henry Haskin, for 800 barrels of salt, which was not entered on the books.

It was admitted by both parties that Henry Haskin was the agent of Edwin Haskin, in carrying on the salt business, from June 1, 1863, to April 1, 1864, in the name of Henry Haskin, but on account of Edwin Haskin.

On the 1st of April, 1864, at which time a settlement was had between the parties, and their business relations ceased, there was a surplus of a little less than fifteen hundred barrels of salt on hand, as claimed by the plaintiff, for which the books did not show outstanding receipts.

It appears that Henry Haskin had the whole charge of the business from June 1, 1863, to April 1, 1864. The profits of the business during that time were about $18,000, the surplus salt on hand not entering into the calculation.

On the settlement between the parties, on the 1st of April, 1864, the defendant paid to the plaintiff, the sum of $6,000, one-third of the profits, which the defendant claims was extorted from him by the plaintiff withholding receipts and other valuable papers, which he refused to deliver up until he was paid that amount.

On the 16th of November, 1864, a demand was made of Edwin Haskin for the salt specified in the warehouse receipt

mentioned, which was given in the name of Henry Haskin, and Edwin refused to deliver the salt or pay for it. Henry thereupon delivered the salt called for by the receipt, and afterward instituted this suit to recover from Edwin the value thereof.

The theory of the defendant, upon one branch of the case, is, that the six thousand dollars which he paid to the plaintiff, on the 1st of April, 1864, being extorted from him in the manner stated, he may recoup the same in this action.

On the trial the court gave the following instruction:

"This action is brought to compel the defendant to indemnify the plaintiff for acts done by the latter as agent of the former. The fact, the defendant was the principal and the plaintiff was his agent, is not in dispute, and under ordinary circumstances, the liability to indemnify follows as of course. The failure to enter the receipt in question, in this case, upon the books, if caused by the carelessness, neglect, or default of the plaintiff, and, if the defendant was injured by such failure, would, to the extent of such injury, reduce or discharge the liability of the defendant; but if the defendant was not injured by such failure, then it would have no effect. But a more serious question in this case is, whether the plaintiff, at the time the agency terminated, wrongfully took into his possession, and withheld from the defendant [the property of the defendant], until the defendant would submit to pay him a share of the profits of the business beyond his salary, and beyond what he was entitled to by any agreement between them; because, if that be so, the defendant, to the extent to which he was injured by such conduct of the plaintiff, would be discharged from the liability imposed by law upon him to indemnify the plaintiff as his agent. If the property consisted of receipts or orders issued to the plaintiff, it would make no difference as to the right of the plaintiff to deprive the defendant of the control of them, if in fact they were the property of the defendant."

The words in brackets are not contained in the instruction

as set forth in the record, but the plaintiff insists they were in the original instruction as given by the court to the jury; and one of the grounds of objection to the instruction is, that, without those words, or others of definite import, it is vague and uncertain, and calculated to mislead the jury.

A verdict was returned for the plaintiff for $1,485.60 damages, upon which judgment was rendered. The defendant thereupon took this appeal.

Besides the question as to the sufficiency of the instruction, a question is presented in relation to the character of duress under which money has been paid, which will authorize a recoupment in favor of the party paying it.

Messrs. HURD, BOOTH & KREAMER, for the appellant.

Messrs. KING & SCOTT, for the appellee.

Mr. JUSTICE BREESE delivered the opinion of the Court:

It appears from the record in this cause, that the instructions asked by counsel for both parties were refused by the court, the court undertaking to give, instead thereof, an instruction of its own, in its own phraseology. We have examined the record for this instruction, and are satisfied it would have embodied the law correctly, but for the omission of a few very important words, which omission was doubtless accidental, but destroys the meaning of the instruction.

The instruction is, *verbatim*, as follows: "This action is brought to compel the defendant to indemnify the plaintiff for acts done by the latter as agent of the former. The fact that the defendant was the principal, and the plaintiff was his agent is not in dispute, and, under ordinary circumstances, the lia bility to indemnify follows, as of course. The failure to enter the receipt in question in this case upon the books, if caused by the carelessness, neglect or default of the plaintiff, and, if the defendant was injured by such failure, would, to the extent of such injury, reduce or discharge the liability of the defend

ant, but, if the defendant was not injured by such failure, then it would have no effect.

"But a more serious question in this case is, whether the plaintiff, at the time the agency terminated, wrongfully took into his possession and withheld from the defendant, until the defendant would submit to pay him a share of the profits of the business beyond his salary, and beyond what he was entitled to by any agreement between them; because, if that be so, the defendant, to the extent to which he was injured by such conduct of the plaintiff, would be discharged from the liability imposed by law upon him to indemnify the plaintiff as his agent. If the property consisted of receipts or orders issued to the plaintiff, it would make no difference as to the right of the plaintiff to deprive the defendant of the control of them, if in fact they were the property of the defendant."

"Took into his possession and withheld from the defendant," what? There is an omission of important words here, which we are not at liberty to supply, and which with the volume of matter contained in it makes the instruction obscure and calculated to confuse and mislead the jury and be of no use as an aid to their arrival at correct results. Counsel, on both sides, have taken the liberty, in their arguments, of changing the instruction given, but a resort to the record shows that it was in the identical words in which we have given it. It, being confused and obscure, was calculated to mislead, and was therefore erroneous, and must reverse the judgment.

Upon the merits, we may say, if the appellee was not entitled to the six thousand dollars paid him by appellant, appellant must be shown to have paid it under some kind of legal duress before he can recoup.

For the reasons given, the judgment is reversed and the cause remanded for a new trial.

Judgment reversed.

JOHN RICHARDSON *et al.*
v.
ASAHEL C. THOMPSON *et al.*

1. RETURN UPON PROCESS — *its requisites.* A return upon a summons issued against two persons, of service "on the within named defendant," in the singular number, not giving the name of the defendant served, is insufficient, as it is impossible to tell which of the two defendants had been served.

2. SUMMONS IN CHANCERY — *its requisites.* A summons in chancery should correctly describe the parties to the suit. Describing the suit as being brought by two, only, when the bill was filed by those two and another, is not sufficient.

WRIT OF ERROR to the Circuit Court of McHenry county; the Hon. ISAAC G. WILSON, Judge, presiding.

The opinion of the court contains a sufficient statement of the case.

Mr. JUSTICE LAWRENCE delivered the opinion of the Court:

This was a bill in chancery filed by Asahel C. Thompson, James R. Allaban and Orson M. Allaban against Zacheus Richardson and John Richardson for the foreclosure of a mortgage. A summons issued against the defendants, requiring them to appear and answer to a bill filed by James R. Allaban and Orson M. Allaban, omitting the name of Thompson. This summons was served on Zacheus Richardson, and both defendants were defaulted. The default was afterward set aside and an alias summons against both defendants issued, which was returned served "on the within named defendant," in the singular number, not giving the name of the defendant served. The court, thereupon, pronounced a decree *pro confesso* as to both defendants.

This was error. The first summons not only misdescribed the parties, but it was served on only one of the defendants. As to the second summons, it is impossible to tell, from the

return of the sheriff, which of the two defendants had been served. There is no evidence that John Richardson was ever before the court.

Decree reversed.

JUSTIN BOWMAN
v.
GEORGE W. WOOD.

1. PRACTICE — *service of summons.* Where there are ten days, after excluding the day on which service is made, before the first day of the term to which a summons is returnable, *held* that the service was in time and will support a judgment by default.

2. SAME — *computation of time.* The rule for computing time is, where an act is to be performed within a specified period, after a day named, to exclude that day, and to include the day named for the performance. In cases of service, the day it was made should be excluded, and the return day may be included.

3. SAME — *setting aside a default.* It is discretionary in a court to set aside a default, and an appellate court rarely reviews the exercise of the discretion, and then only to prevent gross injustice.

4. SAME — *grounds for setting aside a default.* Where the ground relied upon for setting aside a default is, that the defendant has a cross action against the plaintiff, it simply appeals to the circuit judge to exercise a discretion, and as the defendant may still sue and recover judgment on his demand against the plaintiff, the refusal to let such a defense in, cannot work injustice.

5. SAME — *oyer granted does not extend time to plead.* When a defendant has been duly served with process, he must plead, or obtain further time, on the return of the writ. And when oyer is granted, it does not extend the time to plead; if further time is necessary, defendant should apply to the court and obtain it, or he will be in default.

APPEAL from the Superior Court of Chicago.

This was an action of covenant brought by George W. Wood, in the Superior Court of Chicago, to the October Term, 1865, against Justin Bowman. The summons was tested on the 20th of September, 1865; it was served on defendant on the 22d, and was returnable on the 2d day of the following October.

The declaration was filed on the 22d day of September, 1865, with a copy of the instrument upon which the suit was brought. On the fourth of October, no plea, demurrer or motion having been filed by defendant, a default was entered, and the plaintiff's damages were assessed at $500, and judgment was rendered against defendant for that sum.

On the next day, defendant entered a motion to set aside the default and to be permitted to plead to the action. The motion was based on affidavits. And the grounds of the motion were, that defendant had a set-off to the cause of action, and that he had, on the 4th day of October, demanded oyer of the agreement sued upon, with a view of preparing pleas, and that, within a very short period after receiving a copy of the instrument, and an insufficient time within which to prepare proper pleas, plaintiff, on the forenoon of the same day, entered the default, and had judgment rendered for the want of a plea.

On hearing the motion, the court below overruled it and refused to set aside the judgment by default, and defendant excepted and brings the case to this court by appeal, and asks a reversal of the judgment of the court below refusing his motion.

Messrs. BORDEN & SPAFFORD, for the appellant.

Messrs. HERVEY, ANTHONY & GALT, for the appellee.

Mr. CHIEF JUSTICE WALKER delivered the opinion of the Court:

This was an action of covenant, commenced by George W. Wood, in the Superior Court of Chicago, against Justin Bowman. The service was had more than ten days before the commencement of the court, and the declaration was filed in proper time. A default was taken for want of a plea on the second day of the term, and damages were assessed, and a judgment rendered against appellant for the sum of five hundred dollars. A motion to set aside the default was entered, but overruled by the court, and the cause is brought to this court to reverse that judgment.

It is objected, that the service was not in time. The summons was served on the 22d of September, and the court convened at its next term, on the 2d day of October. If we exclude the 22d of September, we still have eight days remaining of that month, and the 1st and 2d days of October would make the full ten days, without including any portion of the day on which the service was made. It is believed that the uniform construction given to the practice act, has been to exclude either the day on which the summons was served, or the return day, and if there then remained ten days, the service is held to be in proper time, and will sustain a judgment by default. To hold otherwise would be to overrule the practice which has obtained since the organization of the State government, and to overturn titles acquired under judgments, obtained on such service, to an extent that is perhaps beyond calculation. But we do not see the slightest reason for a different construction. The computation in the mode which has obtained, is so reasonable and natural as to require considerable ingenuity to make any other seem even plausible. The service was in time and will sustain the judgment.

This court has held, that the proper mode of computing time, when an act is to be performed within a particular period after a day named, is to exclude that day and to include the day of performance. *Ewing* v. *Bailey*, 4 Scam. 420; *Hall* v. *Jones*, 28 Ill. 54; *The People* v. *Hatch*, 33 id. 9. In the case of *Vairin* v. *Edmonson*, 5 Gilm. 270, the court held, that, in computing the time of service by publication in an attachment suit, the first day of publication should be excluded, and the return day included. And no reason is perceived for the adoption of a different rule in the service of a summons. The statute does not require it, nor does the uniform practice of our courts sanction it.

It is urged, that the court below erred in refusing to set aside the default. As a general rule (it may be subject to a few exceptions), the court rendering the default is clothed with discretionary power to grant or refuse a motion to set it aside. Where, from affidavits filed in the case, it appears to

the circuit judge, that injustice has been produced by the rendition of the judgment, he will never hesitate to set it aside and let in a meritorious defense, on equitable terms. But an appellate court rarely, if ever, revises the exercise of such a discretion, and then only when gross injustice has resulted. The sense of justice, as well as of duty, will always induce a circuit judge to see that justice is administered in his court, when it is not prohibited by some positive rule of law. This being so, he will ever readily, and without hesitation, exercise his discretionary power in the advancement of justice.

The meritorious grounds relied upon are, that appellant has a cross demand against appellee. If this be true, what prevents him from suing and recovering in an action against appellee; or claiming it as a set-off to other installments still to fall due, under the contract? We do not see that the court below was called on to set aside the default, as it might have been if the set-off would have been lost, or could not have been otherwise recovered. But it was within the discretion of the court below, and we have no power to interfere with the decision.

It is again urged, that the judgment of default was taken too soon after oyer of the instrument sued on was given. Oyer was had at the opening of the court, and the default was taken about an hour afterward. If oyer was really necessary to enable appellant to plead, and time was also necessary for the purpose, he should have applied to the court for an extension of time. When a defendant is duly served with process in proper time, he must plead or otherwise answer the action, by the meeting of the court, and if he fail to do so, without an extension of time for the purpose, he is in default, and the plaintiff has the right to have it entered, at any time, before plea, demurrer, or a motion suspending proceedings, is interposed, unless the time to plead has been extended. The question, as to whether oyer was properly demanded or given, does not therefore arise. The only question is, was appellant in default? He had filed no plea, demurrer, motion suspending the proceedings, or obtained from the court an extension of time to plead, and was therefore in default, and appellee was

entitled to his judgment. We perceive no error in this judgment for which it should be reversed, and it is therefore affirmed.

Judgment affirmed.

CHARLES MEARS
v.
GEORGE S. NICHOLS.

1. CONTRACTS — *where a party fails to execute his work according to contract — rights and remedies of the parties.* Where a party has built a water-wheel for a mill for another, the latter furnishing the materials therefor, and the builder agreed that the wheel should do certain specified work and should be satisfactory to the other party, and the builder had notice, formal or informal, but substantial, that the wheel did not do the required work, and was not satisfactory, he has no cause of action for his labor, either upon a *quantum meruit* or otherwise, his only remedy being to pay for the materials in the wheel furnished by the other party, and take it away.

2. And in such case, the party for whom the wheel was built, and who furnished the materials, is not bound to return the wheel or permit it to be taken away, without payment for the materials, nor to incur any expense in removing the wheel.

3. The doctrine of election to return or keep the article, has no application in such a case. So, the party for whom the wheel was built would not become liable to pay the contract price for building it, by failing to return it in a rea sonable time. Where there is an express warranty that an article is of a certain quality and shall answer a specified purpose, it is not necessary that the purchaser, before he can bring suit, should offer to return the property. He may bring suit for damages, or in a suit against him for the price, he may claim such damages by way of recoupment or set-off.

4. Without giving notice of the defect in the wheel, and without an offer to return it, he would be entitled to recoup his damages for breach of the contract in building the wheel.

5. Even a refusal to permit the builder to take away the wheel would not render him liable for the contract price. Where there is an express warranty that the article made shall do certain specified work, in a suit for the price the vendee may recover his damages by way of recoupment, and in some cases defeat a recovery by showing that the article was worthless for the purpose intended.

APPEAL from the Superior Court of Chicago; the Hon. JOSEPH E. GARY, Judge, presiding.

The opinion of the court contains a sufficient statement of the case.

Messrs. WOODBRIDGE & GRANT, for the appellant.

Messrs. RUNYAN & AVERY, for the appellee.

Mr. JUSTICE BREESE delivered the opinion of the Court:

This was an action of assumpsit, in the Superior Court of Chicago, brought by George S. Nichols against Charles Mears, and a verdict rendered for the plaintiff for one hundred and seventy-five dollars and eighty-nine cents. A motion for a new trial was made and overruled, and judgment entered on the verdict, from which Mears appeals to this court, and assigns the following errors:

The court erred in modifying and changing instructions asked by appellant; the court erred in giving instructions asked by the plaintiff below; the court erred in giving instructions of his own motion; the verdict was manifestly against the weight of evidence; the damages found are excessive; the court erred in overruling appellant's motion for a new trial.

The declaration counted on services rendered by the appellee in the construction of a water-wheel for the appellant, and for certain days work. There were also the common counts for goods sold and delivered, *quantum meruit* for the same, the money counts and account stated, and the following count: "And in the like sum for the price and value of work then done, and material for the same, provided by the plaintiff for the defendant."

The pleas were the general issue and set-off, alleging specially therein damages arising from the failure of appellee to construct two certain water-wheels for appellant according to agreement, upon which issue was joined.

The contract in regard to building the water-wheel was substantially this: Appellee agreed to put in a wheel to run the shingle-mill and its attachments for $130, and furnish all the materials; appellant was to furnish lumber, board, and other

materials, such as bolts and iron work about the wheel, at the same price he had furnished appellee for the construction of a wheel at Lincoln, Macon county, Michigan. The prices of the materials in the former contract were not disclosed. Appellee called the wheel a "Turbine wheel." Appellee agreed to guarantee that the wheel should be competent to do the work specified, which was to drive the shingle-machine and drag-saw and jointers sufficient to work the machinery to its full capacity. The wheel when constructed did not accomplish the purpose for which it was constructed. It operated very well so far as the wheels running light, but it was not powerful enough to drive all the machinery.

The result was, that, in consequence of that wheel not working, the machine could not work. It would drive one-half the machine. The appellee was notified, though not formally, that the wheel did not answer the contract, for he acknowledged that the wheel did not satisfy him, and he said he would put in another wheel that would drive it or he would pay for the materials and take it out, and he commenced building it; he said he had other engagements and had not time to finish it, and thought it could be finished by the mill-mechanics; he did not take out the wheel he had put in, and did not finish the wheel he had commenced. He consented that appellant might use the wheel, but appellant did not accept it under the contract. There was evidence tending to show, that, if the wheel was not satisfactory to appellant, appellee was to take it out and pay for the materials.

On these facts what is the law of the case?

Appellant asked of the court as the law of the case this instruction:

"The jury are instructed by the court, that if they shall believe from the evidence, that the plaintiff, in constructing the shingle-mill wheel, agreed and guaranteed that it should answer a specific purpose, and that the same did not answer that purpose, and defendant refused to take it, then the plaintiff cannot recover for the same, and the defendant may

offset any necessary damage arising from such failure of construction, against the plaintiff's claims."

This instruction the court refused to give, except with this modification: striking out the words, "and the defendant refused to take it," after the word "purpose," and inserting after the word "same" the words, "more than the same was worth to the defendant;" so that the instruction, as modified, was made to read as follows:

"The jury are instructed by the court, that if they shall believe from the evidence, that the plaintiff in constructing the shingle-mill wheel, agreed and guaranteed that it should answer a specific purpose, and that the same did not answer that purpose, then the plaintiff cannot recover for the same *more than the same was worth to the defendant*, and the defendant may offset any necessary damage, arising from such failure of construction, against the plaintiff's claims."

This modification excluded from the jury the consideration of a very important matter, and that was, was the wheel made according to the contract, and so accepted by the appellant? If there was a special contract as to the capacity of this wheel, and it did not answer the purpose, and the appellant never accepted it in discharge of the contract, the question of its value, or what it was worth to appellant, seems to us irrelevant. Appellee had expressed his own opinion about the wheel, and said it did not satisfy him, and he would make one which would answer the purpose, and actually commenced its construction. We do not see from the testimony, that appellant was to bear the trouble and expense of taking out the wheel, or to let it pass into the possession of appellee without first receiving payment for the materials in it, all which appellant had furnished by the contract.

This evidence, we think, was sufficient to have warranted the jury in finding, that appellee had notice, that appellant refused to accept the wheel under the contract, and, therefore, the court should not have withdrawn it from their consideration.

The gist of the controversy lies in this: If appellee agreed to build a wheel which should do certain specified work, and should be satisfactory to appellant, and he had notice, formal or informal, but substantial, that the wheel did not do the required work, and was not satisfactory, then appellee had no cause of action, either upon a *quantum meruit* or otherwise, his only remedy being to pay for the materials in the wheel furnished by appellant, and take it away. If appellee has failed to perform the contract on his part, we do not see how he can enforce it, even partially, against appellant, as the modification of the instruction assumes that he may, unless it is proved that appellant accepted the wheel as it was.

It is urged by appellant, that the first instruction asked by the plaintiff, appellee here, was erroneous and should not have been given. That instruction is as follows:

"If the jury believe from the evidence, that the plaintiff built a water-wheel upon a contract, that, if the wheel was satisfactory to Mears (the defendant), he should pay for the same, $130, and if not satisfactory, that then the plaintiff should take the wheel and pay for the materials, the defendant, if the wheel was not satisfactory, must elect to return it to the plaintiff in a reasonable time, or become liable absolutely to pay the contract price for the wheel."

This instruction was clearly erroneous, for, if the contract was, as assumed in the instruction, appellant was not obliged to return the wheel without payment for the materials, nor to incur any expense in taking out the wheel. This devolved on the appellee according to the contract.

The instruction also asserts the principle, that appellant, failing to return the wheel in a reasonable time, had become absolutely liable to pay the contract price thereof.

We do not understand the law, in such cases, to be as stated. When there is an express warranty that an article is of a certain quality, and shall answer a specified purpose, it is not necessary that the purchaser, before he can bring suit, should offer

to return the property. He may bring suit for damages, or in a suit against him for the price, he may claim such damages by way of recoupment or set-off. *Crabtree* v. *Kile*, 21 Ill. 180, and authorities there cited.

Under these authorities, appellant, without giving notice of the defect in the wheel, and without an offer to return it, would be entitled to recoup his damages for breach of the contract in building the wheel. This advantage would be lost by this instruction.

The second instruction for the appellee was also erroneous. It is as follows:

"The jury are instructed, that, if they find from the evidence, that the defendant, Mears, had the option to return said wheel if not satisfactory to him, he *must make his election* in a reasonable time, *and give notice of said election* to plaintiff, or he becomes liable to pay for the wheel at its *contract price.*"

There is no proof of any option on the part of appellant to return the wheel if not satifactory, and therefore the doctrine of an election in a reasonable time, seems foreign to the case. And besides, the instruction deprives appellant of his right of recoupment, and of the value of the materials used in the construction of the wheel.

It is also objected that appellee's fourth instruction was erroneous. It is as follows:

"If the jury find from the evidence that the contract for building the wheel was, that if it was not satisfactory to the defendant, Mears, then the plaintiff should take it and pay for the material, then the jury are instructed that the only option the defendant had, was to let the plaintiff take the wheel or else to keep it and pay for it the *contract price.* He could not keep the wheel, and insist on damages for its not being properly built."

Appellant contends that this instruction assumes that appellant had refused to permit appellee to take the wheel, and that it also assumes, that, in case of appellant's refusal to permit him

to take the wheel, appellant would be bound to pay the contract price.

There is no evidence that appellant, at any time, refused to let appellee take out the wheel, and if he did, then, on the authorities cited, where there is an express warranty that the article made, shall do certain specified work, in a suit for the price, the vendee may recover his damages by way of recoupment, and in some cases defeat a recovery by showing that the article was worthless for the purpose intended. *Street* v. *Blay*, 2 Barnw. & Adolph. 456; *Pateshall* v. *Hunter*, 3 Adolph. & Ellis, 103.

These considerations involve the necessity of reversing the judgment of the court below, and remanding the cause for a new trial, which is ordered accordingly.

Judgment reversed.

WILLIAM T. HUGHES
v.
HENRY ATKINS *et al.*

ALLEGATIONS AND PROOFS—*of an original and a collateral promise.* In an action for goods alleged to have been sold and delivered by the plaintiff to the defendant, if it appears the goods were sold upon the personal promise of the defendant to pay for them, and the credit was given to him, he will be liable, but if the goods were sold to another, then the defendant will not, in such action, be liable, even though he had agreed to be responsible for the payment.

APPEAL from the Superior Court of Chicago; the Hon. JOSEPH E. GARY, Judge, presiding.

The opinion states the case.

Messrs. BONNEY & GRIGGS, for the appellant.

Messrs. HITCHCOCK & DUPEE, for the appellees.

Mr. JUSTICE LAWRENCE delivered the opinion of the Court:

This was an action of assumpsit brought by Atkins & Co. against Hughes for goods sold and delivered upon his order, while he was acting under a decree of court as receiver of a hotel called the Sherman house in the city of Chicago. The only real question in the case is, whether the credit was given to Hughes or to Roberts, the former proprietor. Was Hughes the real purchaser, or was he only a guarantor for Roberts? This question was left to the jury by the court in a series of instructions given for both parties, to which there is no substantial objection. They said, in substance, if the goods were sold upon the personal promise of Hughes to pay for them, and if the credit was given to him, he would be liable, but if the goods were sold to Roberts, then Hughes would not, in this action, be liable, even though he had agreed to be responsible for the payment. The jury found for the plaintiff, and we are so far from being inclined to disturb their verdict, that we do not see how they could have found otherwise. The evidence leaves no doubt that the sale was made exclusively to Hughes and upon his exclusive credit.

An error is assigned upon the refusal of the court to exclude the deposition of the witness Lawrence. But the court excluded so much of the deposition as professed to state the contents of a letter, and the residue was legitimate evidence. This letter did not, as assumed by counsel for plaintiff in error, embody the contract in any such sense as to make its production indispensable as the highest evidence. It was simply a letter written by the witness to Atkins & Co., at the request of Hughes, in which he stated, Hughes would be personally responsible for the goods, if they would send them. But it did not constitute the contract, nor was it any better evidence of the understanding upon which the goods were sold by the one party and bought by the other, than the other letters and parol evidence in the record, and these show beyond all question that the verdict of the jury was right.

Judgment affirmed.

WILLIAM A. TINNEY
v.
ELIZABETH WOLSTON *et al.*

1. JUDGMENT LIEN — *not affected by subsequent action of the judgment debtor.* A person who gives another a valid lien upon land, or against whom the law has created a lien, is unable, by any act of his, short of discharging it, to impair or affect it.

2. So a judgment creditor, who has obtained a lien upon the land of his debtor, has a right to enforce his lien precisely in the condition he obtained it, and to sell the property as the debtor held it at the time the lien was created.

3. SAME — *effect of the lease taken by the judgment debtor upon his own land, as to a purchaser under the judgment.* The taking of a lease by a judgment debtor upon his own land, from one who has no title, after the lien of the judgment has attached, and thereby acknowledging the lessor to have the superior title, will not estop the judgment creditor, or those acquiring their rights by purchasing under the judgment, from disputing the title of such lessor.

4. So a purchaser under such judgment would not be liable to pay the rent which might be reserved in the lease given under such circumstances, and agreed to be paid by the judgment debtor.

WRIT OF ERROR to the Circuit Court of Tazewell county; the Hon. JAMES HARRIOTT, Judge, presiding.

This was an action of covenant, brought by Elizabeth Wolston and Abraham Wolston, in the Tazewell Circuit Court, to the June Term, 1865, against William A. Tinney. The declaration was on the covenants contained in a lease made by plaintiffs to one Richard Snell, of certain lots in the city of Pekin, for the term of the natural life of Elizabeth; that Snell covenanted to pay her $300 per annum in monthly installments as rent for the premises; that Snell entered upon the term; and that afterward Benj. S. Prettyman, by assignment, became the owner and possessed of the term, and entered into the possession of the premises thereunder.

That Prettyman assigned and transferred the term to defendant, and that he entered into possession under the term and

had held the same; that plaintiffs had kept and performed all of their covenants, but that defendant had failed to keep the covenants entered into by Snell, and which he, by the assignment of the term to him, had become liable to perform, and has failed to pay the rents which had accrued under the lease.

Defendant filed five special pleas, to the first three of which plaintiffs filed a general demurrer. The court sustained the demurrer to each of the pleas, and defendant withdrew the fourth and fifth pleas, and abided by the first, second and third. The court thereupon heard evidence, and assessed the damages at the sum of $2,121.58, and rendered judgment against defendant for that amount. Defendant brings the case to this court, and assigns the judgment of the court below in sustaining the demurrer to his pleas, as error.

Mr. B. S. PRETTYMAN, for the plaintiff in error.

Mr. E. N. POWELL and MR. J. K. COOPER, for the defendants in error.

Mr. CHIEF JUSTICE WALKER delivered the opinion of the Court:

This was an action of covenant, brought by Elizabeth Wolston and Abraham Wolston, against William A. Tinney, on a lease for the recovery of rent claimed to be due. The declaration contained two counts. In the first, it is averred, that plaintiffs, on the 7th day of April, 1857, leased the premises, out of which it is claimed the rents issue, to one Richard H. Snell, for and during the term of the natural life of Elizabeth Wolston, at a yearly rent of $300, payable in equal monthly installments; that Snell entered into the possession of the premises under the lease; that, on the 24th day of March, 1858, Snell assigned and transferred his lease to Prettyman, who also entered into possession of the premises, under the lease; that, on the 27th day of May, 1859, Prettyman assigned and transferred the lease to

defendant, who in like manner entered into possession, and had since that time used and occupied the premises, under the lease; that he had failed to keep and perform the covenants contained in the lease, but had broken the same by failing to pay the rent, or any part thereof, which had accrued since he had entered; nor had the same or any part thereof been paid by any one. The second count is substantially the same as the first.

Among others, defendant filed three pleas. The first of these avers, that, on the 8th day of April, 1834, one Thomas Snell, Sr., owned the premises in fee. That he, on that day, executed a mortgage on the same to Guest & Rockey, to secure the payment of three thousand six hundred and eighty-two dollars and ninety-six cents, which they assigned to Richard H. and Thomas Snell, Jr. That they foreclosed the mortgage and became the owners of the premises, Richard H. being the purchaser, but Thomas, the owner of one undivided half, in equity; and that Richard took possession for their use.

That, being indebted to Ludwig & Needler, they on the 8th of September, 1845, recovered a judgment against Richard and Thomas Snell, for $254.39, in the Tazewell Circuit Court. That, on the 25th of November, 1845, an execution was issued on the judgment, and levied on the premises, but was returned without sale of the property. Afterward, an execution was issued on the same judgment, and on the 18th of March, 1851, the premises were sold thereunder, while Snell was still in possession, and Prettyman became the purchaser, and afterward received a sheriff's deed therefor, on the 19th of June, 1852.

That Prettyman, on the 3d of July, 1852, sold the premises to James M. Ruggles, who afterward, on the 22d of October, 1855, reconveyed the premises to Prettyman. That he demanded the possession of the premises of the Snells, who surrendered it to him as the owner in fee, and not otherwise. That Prettyman, on the 24th day of May, 1859, conveyed the premises to defendant below.

That, on the 7th day of February, 1851, the Wolstons had no title to the premises which they could lease, but that it

belonged to Richard H. Snell, at law, but Thomas owned an undivided half in equity, all of which was known to plaintiffs below. That the lease was executed by the parties for the purpose of hindering, delaying and defrauding Ludwig & Needler in collecting their debt.

The second plea is substantially the same as the first. It, however, is different, in so far as it avers that Thomas Snell, Jr., and Richard Snell were the joint owners of the property, at the time Ludwig & Needler sold it under execution. The third is substantially the same, except it avers that Richard H. Snell was the sole owner. A demurrer was filed to these several pleas, which was sustained by the court. And, thereupon, defendant below abided by these pleas, and withdrew the others, and the court heard evidence and assessed the damages at the amount of rent remaining unpaid, with interest on the various installments, and rendered judgment for the amount thus found. To reverse that judgment the record is brought to this court by writ of error.

The question presented by this record is the sufficiency of these pleas. It is urged in support of the judgment, that the pleas fail to answer the declaration,— that they neither traverse nor confess and avoid the cause of action it sets forth. That it avers that the Snells took a lease for the life of Mrs. Wolston, and that they held under that lease, until they sold to Prettyman, and that he in like manner held under the lease, until he transferred it to plaintiff in error, who had ever since held under the lease. That these averments are not traversed. And that if they are true plaintiff in error is estopped from showing that he is the owner of the premises in fee. That although Prettyman did own the fee, still, when he purchased the lease he became liable to perform its covenants, precisely as if he had been a stranger to the title. Or if Richard Snell owned the fee, and took a lease of Mrs. Wolston for her life, and Prettyman purchased of him, he took it subject to the lease. That in either case his grantee stands in the same position.

It is true, that these pleas do not traverse the averments in the declaration. But the new matters set up in these pleas we

think, informally it may be, in effect confess and avoid the averments of the declaration. The law always infers that the owner of the fee has the right to hold and possess the property, as against all persons. When he claims possession or is in possession, being the owner of the fee, he is presumed to be entitled to hold it, and is liable neither to rent nor service to any person. To rebut that presumption, it must be shown that there is an outstanding lesser estate, consistent with the fee, to prevent his recovery of the possession under his fee. Or if in possession, he will be presumed to hold under his fee, until it is shown that he holds under an estate adverse to and not subordinate to his fee. If an heir or his grantee were to enter upon the premises assigned to the widow for her dower, the fee could not be set up as a bar to a recovery. Or if the heir or his grantee were to lease the portion assigned to the widow for her dower, they could not rely upon the fee simple title to defeat a recovery of rent under the lease. Or if the owner of the fee, in his folly, were to take a lease on his own premises, from a stranger having no title, it might be that he would be estopped from setting up his fee as a defense to a recovery of the rent under the lease.

But, in this case, it does not appear that Mrs. Wolston holds this property as dower, in the estate of plaintiff in error. Nor does it appear that Prettyman, who purchased the fee at the sheriff's sale, took such a lease of Mrs. Wolston. But it is insisted, that, as the judgment debtor did take such a lease, when Prettyman became the purchaser under the execution, although he acquired the fee, he took it incumbered with the lease for life, and liable to pay the rents reserved in the lease.

There is no rule of law better recognized than that a person who gives to another a valid lien, or against whom the law has created a lien, is unable, by any act of his short of discharging it, to impair or affect it. Nor can he, in conjunction with others, accomplish such a result. When Ludwig and Needler, therefore, obtained their judgment against the Snells, and thereby acquired a valid lien on these premises, the Snells could not, by sale, by mortgage, by leasing it, or otherwise, but

by payment or satisfaction of the judgment, remove, impair, or in the least alter the lien. The judgment creditors had a right to enforce their lien precisely in the condition they obtained it, and to sell the property as the judgment debtors held it at the time the lien was created. It is to be understood, that it would be different with taxes and other government burdens, as they are liens paramount to all others.

Then did the Snells, after Ludwig & Needler obtained their judgment, by acknowledging that the Wolstons had a superior title to theirs, estop their judgment creditors, or those acquiring their rights by purchasing under execution, from disputing that title? For that is the effect of the position held by defendants in error. If the Snells might incumber this property by taking a lease for the life of the lessor, they could have taken one for nine hundred years. And instead of agreeing to pay three, they might have agreed to pay ten thousand dollars per annum. And if the judgment creditor, by purchasing the property, became liable to pay the rent, then a most effectual means would have been adopted by which judgment debtors could prevent a sale of their lands. They would only have to find some person willing to execute a lease for so large a rent as to render the property valueless, to prevent a sale by the creditor. And it would not matter that the lessor had no title, if, by levying under the execution, the purchaser was estopped from asserting the title upon which the lien attached. It is most confidently believed that such a doctrine has never been asserted, and it is not even probable that it will by any court of last resort.

If a judgment debtor, after the lien of the judgment has attached, incumbers the property, it is destroyed by a sale under the judgment, unless a redemption is had in the mode prescribed by the statute. If the land is subsequently charged with a mortgage, judgment, sale or otherwise by the judgment debtor, it is freed from such a charge or incumbrance by a judicial sale and conveyance under the prior lien. And we are at a loss to see upon what principle a judgment debtor can charge the property with a valid rent, to the exclusion of a

prior judgment lien. Such an incumbrance has no greater claims to consideration than the others, and it must be held, that they do not affect the prior lien of the judgment; and that the lease so made, like a mortgage or judgment junior to the lien, is an extinguished lien, when the paramount lien has ripened into a title.

If the Wolstons have a valid outstanding title, they may not be estopped, by making the lease, from asserting it against the fee simple title which Prettyman and his grantee have set up under the sheriff's sale. Prettyman did not acquire the lease by his purchase, nor did he become liable to its terms and conditions. If Mrs. Wolston has dower in the premises, or if she has paramount title, she may assert her title as though the lease had never been given. But she must establish her title, or show that Prettyman or those holding under him are in possession under her title. The pleas allege that Prettyman and his grantee entered under the fee which he acquired under the execution sale, and the demurrer admits the truth of this averment. If, however, he did enter under the lease, and not under his fee simple title, then it would be otherwise.

It was supposed that this case is similar to one previously before this court, in which Prettyman was plaintiff in error, and the Wolstons were defendants in error. The question presented in that case, on the pleadings, was, whether Prettyman, as assignee of a lease for life, and in possession under the lease, was liable to pay the taxes accruing on the premises, or whether that duty devolved upon the owner of the life estate, under whom he held. We regard the two cases as being entirely dissimilar. And that case does not control the decision of this. The court below erred in sustaining the demurrer to these pleas, and the judgment of the court below is therefore reversed, and the cause remanded.

Judgment reversed.

Syllabus. Statement of the case.

WILLIAM COX
v.
JOSHUA A. BRACKETT.

1. PLEADING — *of the declaration — whether averment of proper care on the part of the plaintiff is necessary.* In an action on the case to recover damages for injuries received by the plaintiff by the running away of the horses of the defendant, through the carelessness and mismanagement of the latter, an averment in the declaration of the exercise of ordinary care on the part of the plaintiff is not necessary.

2. CASE OR TRESPASS — *which is the remedy.* It seems, an action on the case is the proper remedy for the recovery of damages for injuries received by the plaintiff, on being run over by the horses of the defendant, while the same were running away through the carelessness of the latter.

3. DEFAULT — *motion to set aside — when it must be made.* A motion to set aside a default should be made at the term, before final judgment is entered up; such a motion cannot be entertained at all, at a subsequent term after final judgment.

4. MOTION *to supply a lost plea — when it should be made.* A motion to supply a plea alleged to have been lost from the files in a cause, comes too late at a term subsequent to that at which final judgment was rendered.

WRIT OF ERROR to the Circuit Court of Cook county; the Hon. E. S. WILLIAMS, Judge, presiding.

This was an action on the case brought in the court below by Joshua A. Brackett against William Cox, George A. Hall and J. H. Marsh, for the recovery of damages for injuries alleged to have been received on being run over by the horses of the defendants while the same were running away through the carelessness and mismanagement of the latter. The declaration contained no averment of the exercise of due care on the part of the plaintiff to avoid the injury. A judgment being rendered for the plaintiff, the defendants sued out this writ of error. A full statement of the case will be found in the opinion of the court.

Mr. W. K. MCALLISTER, for the plaintiff in error, upon the principal question, contended the declaration was defective in substance, because it does not, in any manner, thereby appear that the plaintiff below was in the exercise of ordinary care to avoid the injury, for the redress of which he brought this action, citing *Chicago, Burlington and Quincy Railroad Company* v. *Hazzard*, 26 Ill. 376; *Butterfield* v. *Forrester*, 11 East, 60; *Humiston* v. *Harlow*, 6 Cow. 192; *Lane* v. *Crombie*, 12 Pick. 177; *Smith* v. *Smith*, 2 id. 621; *Adams* v. *Carlisle*, 21 id. 146; *Flower* v. *Adam*, 2 Taunt. 314; *Button* v. *Hudson River Railroad Company*, 18 N. Y. 248.

Counsel also insisted the action should have been trespass, not case, citing 2 Ch. Pl.; 3 East, 601; 1 East, 109.

Mr. WALTER B. SCATES, on the same side, upon the question of the sufficiency of the declaration, cited the following, in addition: *Galena and C. U. R. R. Co.* v. *Fay*, 16 Ill. 569; *C. and G. M. R. R. Co.* v. *Jacobs*, 20 id. 478; *G. and C. U. R. R. Co.* v. *Garwood*, 15 id. 469.

Messrs. DOW & THOMPSON, for the defendant in error, insisted the declaration was sufficient, citing *Illinois Central Railroad Co.* v. *Simmons*, 38 Ill. 242; *Smith* v. *Eastern Railroad Co.*, 35 N. H. 356; *Beatty* v. *Gillmore*, 16 Penn. 467; *Moore* v. *Central Railroad Co.*, 4 Zabr. (N. J.) 284; *May* v. *Hanson*, 5 Cal. 360.

Mr. MELVILLE W. FULLER argued the case on the same side.

Mr. JUSTICE BREESE delivered the opinion of the Court:

This was an action on the case brought in the Cook Circuit Court at the March Term, 1864, by Joshua A. Brackett against William Cox and others for suffering their horses, by reason of their carelessness and mismanagement, to break away from them, and with force and violence run against and upon the plaintiff, knocking him down, breaking his bones and otherwise disabling him, so that he became sick and sore, lame and dis-

ordered, and so remained for a long time, suffering great pain, and was hindered and prevented from attending to his ordinary business, by which he lost great profits, and was forced and obliged and did expend large sums of money, in all five hundred dollars, in endeavors to be cured of the fractures, wounds and bruises.

The second count is similar to this, with the additional averment that defendants' horses were vicious and they knew it.

The plea was said to be the general issue which, by some accident, was averred to be lost from the files. A default for want of a plea was regularly taken at the May Term, 1864, and on the 21st of that month.

A motion was made at the same term by Cox to set aside the default and for leave to plead, for reasons stated in the affidavit on file. On the same day, Cox filed the affidavit of C. L. Jenks, his attorney, stating, in substance, that, on the 10th day of May, 1864, Jenks drew and filed in the cause the plea of the general issue for him, Cox; that affiant knew of his own knowledge that this plea was properly entitled, drawn and signed and filed in time; that it was removed from the files, but did not know how or by whom; that he fully believed the plea was on file until he learned on the 24th of May inst. of the judgment.

On the 20th of the same month of May, Cox filed his own affidavit, stating that, immediately after being served with the summons in the cause, he employed Jenks to conduct his defense, who wrote out a plea in the cause, and his attorney told him that the plea was filed and the cause would be tried when reached on the docket; and then he goes on to assert he was not guilty, and to show how the accident occurred.

This motion was overruled, on the ground that the court had no power to set aside a default after the close of the term at which the default was entered. To this ruling, Cox excepted.

On the 20th of September thereafter, Cox entered his motion for leave to file his plea, as of the 10th of May, 1864, but this the court refused, and Cox excepted. On the 18th

of October, 1864, the court assessed the damages of the plaintiff at two thousand dollars, and rendered judgment thereon.

On the 5th of May, 1865, Cox, by his attorney, entered his motion for leave to supply, in the record, the plea of the general issue filed, as alleged, on the 10th of May, 1864; but the court denied this motion; and the defendant excepted, and brings the cause here by writ of error, assigning as error, that the declaration is defective in substance, inasmuch as it does not allege that the plaintiff was exercising due care on his part, at the time of the alleged injury, and that the action should have been trespass; in refusing to set aside the default; in refusing to permit Cox to supply the plea of the general issue; in assessing the damages, and refusing to set aside the assessment, and rendering judgment for the plaintiff.

As to the first error assigned, that has been settled by this court in the case of the *Illinois Central Railroad Company* v. *Simmons*, 38 Ill. 242. In that case, it was held, after a review of the authorities, that the averment of the exercise of ordinary care on the part of the plaintiff was not necessary.

This disposes of the principal question in the case. The motion to set aside the default was addressed to the sound discretion of the court, and we cannot say the court abused it in refusing the motion. *Wallace* v. *Jerome*, 1 Scam. 534; *Garner* v. *Crenshaw*, id. 143; *Harrison* v. *Clark*, id. 131; *Woodruff* v. *Tyler*, 5 Gilm. 458.

This presupposes the motion to be made at the term before final judgment is entered up. That the motion cannot be entertained at all, at a subsequent term after final judgment, is settled by the case of *Cook* v. *Wood*, 24 Ill. 295.

The motion made in May, 1865, to supply in the record the plea of the general issue alleged to have been filed at the May Term, 1864, came too late and was properly refused. This motion, had it been made at the May Term, 1864, would, doubtless, have been allowed. When made in 1865, the case had passed out of the control of the court and was no longer on the docket.

Believing the declaration sufficient to sustain the judgment, the refusal of the court to set aside the default and to supply the loss of the plea, are not grounds of reversal. The judgment must be affirmed.

Judgment affirmed.

The Toledo, Peoria and Warsaw Railway Co.

v.

Thomas Sweeney.

1. Fencing railroads — *whether the necessity is obviated by an embankment.* The necessity of fencing a railroad at a given point is not obviated by there being an embankment at that place from twelve to twenty feet in height, it not appearing that the embankment was sufficient to prevent stock from getting upon the track.

2. And the necessity for a fence in such a case would be shown by proof that cattle had got upon the road.

3. Measure of damages — *in suit against a railroad for killing stock.* In a suit against a railroad company for killing the cattle of the plaintiff, where it appears the weather was warm and the cattle when found were swollen and unfit for beef, the plaintiff is entitled to a verdict for their full value.

Appeal from the Circuit Court of Iroquois county; the Hon. Charles R. Starr, Judge, presiding.

The opinion of the court contains a sufficient statement of the case.

Messrs. Ingersolls & Puterbaugh, for the appellant.

Messrs. Wood & Long, for the appellee.

Mr. Justice Lawrence delivered the opinion of the Court:

This was an action brought against the railway company for killing cattle. It was proved, that the road was not fenced, and a verdict was found and judgment was rendered for the plaintiff.

It is urged in behalf of appellant, that there was no necessity for fencing the road, since there was an embankment from twelve to twenty feet in height. The embankment might be of this height and yet so gradual in its slope that cattle could descend it. There is no evidence from which it is to be inferred, that a fence was unnecessary. That it was necessary, is proven by the fact, that the cattle were on the track.

It is urged, that the damages were too high, as the cattle were fit for beef. The record states, that the weather was warm, and the cattle, when found, were swollen, a fact not stated in the abstract. The plaintiff was, therefore, entitled to a verdict for the full value of the cattle.

Judgment affirmed.

HERMAN DEININGER *et al.*

v.

MURRAY MCCONNEL.

1. DEED—*acknowledgment—record—curative law.* Where two deeds made by a patentee to different persons, for the same piece of land, in October 1818, and acknowledged in the State of New York, the first before a commissioner, on the 13th of March, 1819, and recorded at Edwardsville the 3d of January, 1820, the latter in date acknowledged before a notary public, on the 14th day of October, 1818, the date of the deed, and again on the 29th of that month, before a commissioner, and was recorded on the 19th of January, 1819, both executed and acknowledged and recorded before the adoption of the curative act of December 30, 1822,—*Held*, that as neither deed was so acknowledged as to entitle it to record, the effect of that act was to record both at the same instant of time, and left the operation of the deeds as at common law, and that the first executed passed the title to the land described in it, which was an undivided half of the tract.

Statement of the case.

2. SAME. Where an acknowledgment bears a date subsequent to that of the execution of the deed, it does not rebut the presumption that the deed was delivered on the day it bears date.

3. SAME — *seal to copy.* Where a certified copy of deed is produced as evidence, and the word "seal," surrounded by a scroll, is found where a seal is usually placed, as the recorder in making a copy never attaches a seal of wafer or wax, the presumption will be indulged, that the original was properly sealed.

4. EVIDENCE — *lost deed, affidavit.* Where an affidavit states that the original deed was not, or ever had been, in the possession of the party offering the copy, or in his power or control, or that of his agent or attorney, *held,* this was a compliance with the statute and authorized the reading of the certified copy in evidence.

5. CONVEYANCE — *recording — retrospective law.* A law not retrospective in terms, cannot be held to operate on previous transactions; so an act which declares that deeds not proved or acknowledged so as to entitle them to record, when spread on the record, shall be notice to subsequent purchasers, was only intended to apply to deeds thereafter made; but, had it been intended to operate on deeds previously made, the legislature have no power to alter the rights of grantees, or to transfer one man's land to another. A plaintiff in ejectment claiming in his declaration to be "sole seized," cannot recover an undivided half of the land.

APPEAL from the Circuit Court of Bureau county; the Hon. MADISON E. HOLLISTER, Judge, presiding.

This was an action of ejectment, brought by Murray McConnel, in the Bureau Circuit Court, to the September Term, 1864, against Herman Deininger and Lewis Deininger, for the recovery of the S. E. 23, 15 N. R., 7 E., 4 prin. mer. The general issue was filed by defendants.

A trial was had by the court, a jury having been waived by consent of parties. Plaintiff, on the trial, read a patent from the United States government for the land in controversy; also a deed from William Daniels, the patentee, to Horace Jones, dated the 14th day of October, 1818, and acknowledged before a notary public on the same day, and subsequently before a commissioner of deeds in New York, on the 29th day of the same month. On the back of this deed was a certificate that it was recorded at Edwardsville, in this State, on the 19th day of January, 1819.

He also read in evidence a certified copy of a deed from Horace Jones and wife to Paris Mason, dated December 30, 1822, acknowledged the same day, and recorded the 11th of October, 1823, at Pittsfield, in this State. A deed from Paris Mason and his wife to James P. Mason, dated the 2d of June, 1849, acknowledged on the 4th, and recorded on the 19th in Bureau county. Also a deed from James P. Mason to himself, dated the 25th of December, 1849, acknowledged on the 28th, and recorded on the 5th of January, 1850, in Bureau county. Defendants admitted possession.

Defendants, to show an outstanding title, offered a certified copy of a deed from Daniels, the patentee, to Parkus Willard, conveying an undivided half of the land, with certified copies of acknowledgment and of recording, which deed purported to bear date the 7th day of October, 1818, acknowledged on the 13th of March, 1819, before a commissioner of deeds in New York, and recorded on the 3d of January, 1820, at Edwardsville, in this State. As a foundation for the introduction of this copy, an affidavit was filed that the original deed was not, nor had it ever been, in the possession, power or control of defendants, or either of them, or their attorney or agent, and that it was not in their power to produce it on the trial.

Plaintiff objected to the reading of this copy in evidence, but the objection was overruled and the copy was admitted, and an exception was taken.

Upon this evidence the court found the issue for the plaintiff, and defendants entered their motion for a new trial, which was overruled by the court, and a judgment rendered on the finding, from which defendants appeal to this court, and ask a reversal of the judgment.

Mr. M. SHALLENBERGER, for the appellants.

Mr. MILO KENDALL and Mr. GEORGE O. IDE, for the appellee.

Mr. CHIEF JUSTICE WALKER delivered the opinion of the Court:

This was an action of ejectment, for the recovery of the N. E. quarter of section 23, T. 15, N. R. 7, E. 4 principal meridian, in Bureau county. Issue was joined, and a trial was had. Appellee traced title from the United States to himself. In his chain of title, was a deed executed by Daniels, the patentee, to Horace Jones, dated October 14, 1818. On this deed there were two certificates of acknowledgment made in the State of New York; one on the date of the deed, given by a notary public, and the other dated on the 29th of the same month, and given by a commissioner. This deed appears to have been recorded at Edwardsville, on the 19th day of January, 1819.

Appellants offered in evidence the copy of a deed, duly certified by the clerk, which purported to have been recorded in Bureau county, and appeared to have been executed by Daniels, the patentee, to one Parkus Willard. It purported to convey the undivided half of the land in controversy, and was dated on the seventh day of October, 1818, seven days before the other, introduced by appellee. It was also acknowledged in New York, before a commissioner, on the 13th of March, 1819, and recorded on the 3d of January, 1820, at Edwardsville. The offer to read this copy in evidence was based upon an affidavit, stating that the original deed was not, nor had "it ever been in the possession, power or control of the defendants, or either of them, or their attorney, or agent, and was not in their power, or of either of them, to produce the original on the trial." Against the objection of appellee the copy was admitted in evidence. The court found for plaintiff below, and rendered a judgment against defendant, from which he appeals to this court.

It is urged, that this copy of a deed, read in evidence, showed an outstanding title for one-half of the land, and, as appellee had sued for the whole quarter, he was not entitled to recover either the whole or an undivided half. This question turns upon the effect which shall be given to the two deeds executed by Daniels, the patentee. They were executed in another State, and were attempted to be acknowledged before officers, who, at the time, had no authority to receive acknowledgments and

grant certificates, under our statutes then in force. They were also recorded before the passage of the act of December 30, 1822. The second section of that act (Sess. Laws, 86) declares that all deeds and conveyances of land in this State, which had been executed and acknowledged in conformity with the laws of the State or territory in which they were executed, and which had been reduced to record, should be deemed and held to be duly executed and recorded in as full and perfect a manner as if such deeds and conveyances had been proved and acknowledged according to the laws of this State.

Neither deed having been properly acknowledged to entitle it to record, when they were copied upon the record books, and both of them being precisely in the same situation when the act of 1822 was adopted, except the dates, the act could have no effect on one deed over the other.

Each fell equally within the provisions of the act, and, as it did not validate either one over the other, it left them both simultaneously recorded, and, as at common law, the oldest deed must have the preference. By the deed of the seventh of October, the grantor held the undivided half of the land as against the grantee of the deed of the fourteenth of that month. And, as he obtained no advantage by the act of 1822, he was in no better condition after its passage than before. *Noakes* v. *Martin*, 15 Ill. 118. That case is decisive of that question.

It is, however, insisted, that, as the acknowledgment of the first deed bears date after the latter was executed, we must, therefore, infer that the first deed was not delivered and did not become operative until the time of its acknowledgment. And, inasmuch as a delivery is essential to the validity of a deed, the deed of the patentee, bearing the later date, was the first to become operative to pass the title, and that it is, in fact, the elder deed. It is believed that the rule is well established, that the presumption must be indulged, that a deed was delivered at the time when it bears date. It may even be averred and proved, that it was delivered on a different day; but the presumption is, that it was on the same day, and that presumption must stand until the contrary is proved. *McConnell* v.

Brown, Litt. Select Cases, 459; and numerous other authorities might be referred to in support of the proposition, if it were deemed necessary.

It was also urged, that the deed, of which this was a copy, was not sealed. The copy, when produced, only showed the word "seal" in a scroll, at the place where the seal is usually placed. This, under our present statute, is all that is required; but it is urged, that the law had not authorized a scroll to be used at the time when this deed was executed, and the common law seal of wax or wafer would alone have answered. Admitting this to be true, still, in practice, the recorder never attaches a seal of wax to the transcript he makes of the original, but simply uses a scroll to represent a seal, sometimes writing therein the word "seal." And, when a copy from the record is produced, having such a representation, we must presume that the seal to the original was such as the law requires. It appears from the copy, that the grantor says that his seal was attached, and as a *fac simile* cannot be transferred to the record, it will be held good until it is shown that a proper seal was not attached.

It was further urged, that Strong's affidavit was not sufficient to authorize the introduction of this copy. That it should have positively stated the existence of the original deed. We do not perceive any force in this objection. Under previous decisions of this court we should have considered the objection well taken, but the legislature in 1861, to modify the rule we had theretofore adopted, changed the law. The affidavit describes a deed, calls it the original, and then observes every requirement of the statute. Nothing required has been omitted, and there was no error in admitting the copy in evidence. In the case of *Pardee* v. *Lindley*, 31 Ill. 174, no reference seems to have been made to the act of 1861, either in the briefs or in the opinion of the court. And the admission of the certified copy is placed on the sufficiency of the affidavit, and, being sufficient under the construction given to the act of 1845, it was placed upon that ground, and the act of 1861 was not referred to in deciding the case. But, it does not follow, because

that affidavit conformed to the previous decisions, and it was so held, that this affidavit is not sufficient under the present act.

The case of *Dickinson* v. *Breeden*, 25 Ill. 186, although reported as of the November Term, 1860, was, in fact, determined at the January Term, 1861. It is understood by the court, that the decision in that case led directly to the enactment of the law of 1861, and that it was intended to obviate the construction then placed on the act of 1845. But, be this as it may, the evident design was to amend the twenty-fifth section of the conveyance act, and to give the construction contended for would practically defeat the design of the legislature. This affidavit, embracing all of the requirements of the act, must be held sufficient.

It is likewise contended, that the act of 1837 (Sess. Laws, 13) operates to cure the defect in the deed of the patentee to Jones. We do not perceive any language in that act which can be construed to affect a record of a deed made previous to that time. It is not retrospective in its language, nor will it bear such a construction. But, if it did, we are at a loss to perceive how the legislature could transfer one man's land to another. If Willard, holding the first deed, was the owner of the land at the date of this enactment, the legislature had no power to say, that acts already performed by Jones, which were nugatory, without any other act being done by either party, should become operative to transfer Willard's title to Jones. But such was not the design of the legislature, but only to give effect to the recording of deeds after the passage of the law. The act only declares, that instruments relating to, or affecting title to, real estate, when recorded, shall be notice, although not properly proved or acknowledged, but it does not say of deeds previously recorded that the first placed upon record should, although not entitled at the time to record, be considered as valid and binding.

Appellee having in his declaration claimed the whole title to the land and only established a title to an undivided half, cannot recover unless he amend his declaration by claiming

the interest which he owns. The judgment of the court below is therefore reversed, and the cause remanded.

Judgment reversed.

THE CHICAGO AND ROCK ISLAND RAILROAD CO.

v.

HARRIET CRANDALL.

1. NEW TRIALS — *verdict against the evidence.* A verdict will not be set aside where there is a contrariety of evidence on both sides, and the facts and circumstances, by a fair and reasonable intendment, will warrant the inference of the jury, notwithstanding it may appear to be against the strength and weight of the testimony.

2. Upon a slight preponderance of evidence against a verdict, the court will not disturb it.

3. Where the evidence has been fairly presented to the jury, and they have passed upon it, although it may not be entirely free from doubt, their verdict will not be disturbed unless it is clearly against the weight of evidence.

4. A verdict will not be disturbed unless it is *clearly* wrong.

APPEAL from the Circuit Court of Bureau county; the Hon. MADISON E. HOLLISTER, Judge, presiding.

This was a suit commenced before a justice of the peace in Bureau county, by Harriet Crandall, against the Chicago and Rock Island Railroad company, to recover a claim of eighty-six dollars for cattle belonging to the plaintiff, and alleged to have been killed by a train of the company upon their road. The cause was removed into the Circuit Court by appeal, where a trial resulted in a verdict and judgment for the plaintiff. The railroad company brings the cause to this court by appeal.

The only question presented on the record is, whether the verdict was contrary to the evidence.

Mr. GEORGE C. CAMPBELL, for the appellant.

Mr. J. I. TAYLOR, for the appellee.

Mr. JUSTICE BREESE delivered the opinion of the Court:

This record presents no question of law for our consideration. The only point of any importance is, the refusal of the court to set aside the verdict and grant a new trial for the alleged insufficiency of the evidence.

There was testimony on both sides as to the sufficiency of the fence, and as to the point where probably the cattle got on to the railroad. If at the point testified to by Ziegler and others, at that point the fence was defective and insufficient to prevent cattle getting on to the road. If at another point which other witnesses thought was the point, the fence was sufficient. All this evidence went to the jury and was carefully weighed by them, and we cannot say it does not preponderate as the jury have found. It is certain the testimony is somewhat contradictory, and not so decisive either way as to justify the court in disturbing the verdict.

It is a rule long established in this court, that a verdict will not be set aside, when there is a contrariety of evidence on both sides, and the facts and circumstances, by a fair and reasonable intendment, will warrant the inference of the jury, notwithstanding it may appear to be against the strength and weight of the testimony. *Lowry* v. *Orr*, 1 Gilm. 70; *Jenkins* v. *Brush*, 3 id. 18; *Roney* v. *Monaghan*, id. 85; *Sullivan* v. *Dollins*, 13 Ill. 85; *Bloom* v. *Crane*, 24 id. 48.

Upon a slight preponderance of evidence against a verdict, the court will not disturb it. *Bloomer* v. *Denman*, 12 Ill. 240; *Goodell* v. *Woodruff*, 20 id. 191.

And it is further held, that a verdict will not be disturbed, unless it is clearly wrong. *French* v. *Lowry*, 19 Ill. 158; *Bush* v. *Kindred*, 20 id. 93; *Carpenter* v. *Ambroson*, id. 170; *School Inspectors of Peoria* v. *Hughes*, 24 id. 231; *Cross* v. *Carey*, 25 id. 562.

We cannot say, looking at the testimony, that the verdict is

clearly wrong, or that there is such a great preponderance of evidence against the plaintiff as to justify setting it aside.

And where the evidence has been fairly presented to the jury, and they have passed upon it, although it may not be entirely free from doubt, their verdict will not be disturbed, unless it is clearly against the weight of evidence. *Chi. & Rock Island R. R. Co.* v. *Hutchins*, 34 Ill. 108.

The judgment must be affirmed.

Judgment affirmed.

CHARLES J. BORSCHENIOUS
v.
THE PEOPLE OF THE STATE OF ILLINOIS.

STATE'S ATTORNEY'S CONVICTION FEES — *whether allowable upon more than one of several counts in the same indictment.* Where a party is convicted under several counts in the same indictment, the State's attorney is entitled to a conviction fee upon each count under which there is a conviction.

APPEAL from the Circuit Court of La Salle county; the Hon. MADISON E. HOLLISTER, Judge, presiding.

The opinion of the court contains a statement of the case.

Mr. OLIVER C. GRAY, for the appellant.

Mr. C. BLANCHARD, State's Attorney, for the people.

Mr. JUSTICE LAWRENCE delivered the opinion of the Court:

This was an indictment for the sale of liquor without license, containing ten counts. The defendant pleaded guilty, and the court rendered judgment —

"That the people of the State of Illinois, recover of said defendant ten dollars upon each of the ten counts in the said

indictment, amounting in the aggregate to the sum of one hundred dollars, for their fines; also their costs and charges in and about this prosecution expended; and that execution issue therefor, February 12, 1866."

A conviction fee of five dollars upon each count was taxed in favor of the State's attorney. The defendant moved to quash the fee bill, on the ground that only one conviction fee should have been taxed, and the court overruled the motion, whereupon the defendant appealed.

In cases of this character, the statute allows the State's attorney a fee of five dollars for each conviction. The appellant insists, that, in this case, there has been but one judgment, and consequently but one conviction. It is true there is but one entry of a judgment, but it will be observed that this entry, as above set forth, is a several judgment upon each count in the indictment, and by this judgment the defendant is "convicted" of ten distinct violations of the statute, and fined ten dollars for each violation. It is not urged that the judgment is improperly rendered, but it clearly is so unless the plea of guilty to the indictment is equivalent to a distinct conviction upon each count for as many distinct offenses. No objection, however, can be taken to the form of the judgment. The clerk might have made a separate entry of the judgment upon each count, but it was wholly unnecessary to do so. This one entry embodies a several judgment on each count. Although several counts are sometimes introduced into an indictment for the purpose of describing the same offense, yet in theory each count presents a different offense, and in cases of this character, on a general plea or verdict of guilty, the court must assess a fine under each count as for so many distinct offenses. These are so many distinct convictions, and the State's attorney is entitled to his conviction fee under each count.

So far as is known to the different members of this court, this has been the uniform practice of the various circuits in this State in cases of this character. We hold it to be clearly

warranted by law, and it is a far better practice than to compel the State's attorney to cumber the dockets and records of the courts with a separate indictment for each offense under this statute.

Judgment affirmed.

THE TOLEDO, PEORIA AND WARSAW RAILWAY COMPANY
v.
JOHN MCCLANNON.

1. PRACTICE — *instructions — demurrer.* Where it is urged that the declaration fails to contain an averment that it was necessary to have fenced the track of the railroad at the place where an accident occurred, it is not error for the court to refuse on the trial to instruct the jury that such an averment was necessary; if material, it should have been presented by demurrer. The evidence on the trial showing that a fence was necessary cured the want of the averment and sustained the verdict.

2. NEW TRIAL — *verdict against the evidence.* The question whether the road was bound to fence; whether it had been in use six months; whether plaintiff was the owner of the stock killed, and the amount of damages sustained, were questions for the jury, to be determined from the weight of the evidence, and, unless the finding is manifestly against the evidence, the verdict will not be disturbed.

3. PLEADINGS — *proof of averments.* A plaintiff is not held to proof that the injury was committed on the day laid in the declaration, but may prove it to have been done at any time within the statute of limitations.

APPEAL from the Circuit Court of Iroquois county; the Hon. CHARLES R. STARR, Judge, presiding.

This was an action on the case, brought by John McClannon, in the Iroquois Circuit Court, against the Toledo, Peoria and Warsaw Railway company, to recover for killing six head of cattle on the 17th day of September, 1865, on their road, with their engines and cars, at a place where they were by law required to fence their road, but had entirely failed. A plea of the general issue was filed, and issue joined on the plea.

A trial was had at the February Term, 1866, by the court and a jury. It appeared on the trial, that six of plaintiff's cattle were killed, and appeared to have been done by a train of cars, and about the 15th or 17th of September, 1865. Some were killed, and others crippled so that they were killed by the employees of the road. The road was not fenced at the place of the accident, and it was not at a road crossing in a city, town or village.

The jury found the issues for the plaintiff, and assessed his damages at $150. Defendants entered a motion for a new trial, which was overruled by the court, and judgment was rendered upon the verdict, from which defendant has appealed to this court, and asks a reversal of the judgment of the court below.

Messrs. ROFF & DOYLE, and INGERSOLLS & PUTERBAUGH, for the appellants.

Messrs. WOOD & LONG, for the appellee.

Mr. CHIEF JUSTICE WALKER delivered the opinion of the Court:

This was an action on the case brought by McClannon, in the Iroquois Circuit Court, against The Toledo, Peoria and Warsaw Railway company, for alleged negligence, in killing a number of cattle, on their track. The declaration alleges that the company had failed to fence their road at the place where the injury was done, although their road had been open and in use for more than six months; and that the injury occurred at a place not exempted from being fenced, by the statute. The evidence showed that the injury did not occur at a road crossing in a town or village, or more than five miles from a settlement; and that the road had been in use for five years or more; and that it was not fenced at the place where the cattle were injured; and there was an abundance of evidence from which the jury were warranted in inferring, that the cattle

were killed by a locomotive running on this road. In fact it is not insisted by appellants that the injury did not occur from the locomotive and train.

But it is urged that the court erred in refusing to give an instruction that the plaintiff should have averred, in his declaration, that a fence was necessary at the place of the accident. If such an averment was necessary, appellants should have demurred to the declaration, and, failing to do so, and taking issue to the country, the objection, if it be such, comes too late. There are many averments which are necessary to be made, and the omission of which will render the declaration obnoxious to a demurrer, but which are cured by verdict, on the supposition that the necessary proof was made on the trial. And, if this averment was necessary, which we are not prepared to hold, it was fully cured by the evidence preserved in the bill of exceptions. It appears that the cattle did get on the track at that place, which is proof of the most convincing character, that a fence was necessary. Had it been unnecessary, the cattle could not have got upon the track. The court, therefore, committed no error in refusing to give this instruction.

The evidence we think fully warranted the jury in finding that the cattle were killed by the train, at a place where the company were bound to fence, and that the road had been in use for more than six months. It also warranted them in finding that appellee was the owner, and, from the evidence, we are not prepared to say that the damages are excessive. These were all questions strictly within the province of the jury, and the conclusion at which they have arrived is not so manifestly against the weight of evidence, that their verdict should be disturbed.

The court below was also asked to instruct the jury, that, if they believed that the cattle were killed on the fifteenth day of September, and not on the seventeenth as averred in the declaration, they should find for the defendant. If the repeated and uniform decisions of this court, as well as all other judicial tribunals, and text books, have failed to settle the law, that in such a case the plaintiff is not confined to the date laid in

his declaration, but may prove the injury to have occurred at any time before the commencement of the suit, within the statute of limitations, we shall despair of ever being able to settle it.

The court below did right in refusing this instruction. We are unable to perceive any error in this record, and the judgment of the court below must be affirmed.

Judgment affirmed.

BYRON W. WATSON
v.
JOSEPH R. WOOLVERTON.

1. ASSUMPSIT—*for money had and received—when it lies.* The action of assumpsit for money had and received, is an equitable action, in which the plaintiff can recover from the defendant so much money as he can show the defendant, *ex equo et bono*, ought not to retain.

2. PRACTICE IN THE SUPREME COURT—*who may object to the character of the remedy resorted to.* Where a party sued out a writ of error to reverse a judgment in his favor, the defendant objected that the action brought was not the proper remedy, but, as he made no such objection in the court below, and did not prosecute the writ of error, it was deemed unnecessary to decide whether the action was the proper one on the facts.

3. MEASURE OF DAMAGES—*in suit to recover back the purchase-money on failure of title to land.* Where a purchaser of land, who holds the obligation of his vendor to make him "a good and sufficient warranty" deed for the premises, has been actually evicted therefrom under an outstanding paramount title, and lost the property, the measure of damages in an action to recover back the purchase-money, is the price paid for the property and six per cent interest thereon.

4. But if there was only a failure of title as to the land, and the purchaser has purchased in the outstanding title from the true owner, and has never been disturbed in his possession of the premises, the measure of damages would be the value of the title he had to purchase in order to protect himself in the enjoyment and possession of the property which he had purchased from the defendant, and to prevent an actual eviction, and any costs and expenses he may have been compelled to lay out in so purchasing title and protecting his possession.

5. ERROR WILL NOT ALWAYS REVERSE — *of improper instructions.* The giving of an erroneous instruction will not be ground for reversal, if the verdict of the jury was just and proper.

WRIT OF ERROR to the Circuit Court of Livingston county; the Hon. CHARLES R. STARR, Judge, presiding.

The opinion of the court contains a sufficient statement of the case.

Messrs. FLEMING & PILLSBURY, for the plaintiff in error.

Mr. JOHN M. BARRET, for the defendant in error.

Mr. JUSTICE BREESE delivered the opinion of the Court:

This was an action of assumpsit in the Livingston Circuit Court, brought by Byron W. Watson, against John R. Woolverton, to recover back the consideration paid for a certain house and lot in Ancona, in that county, the title to which was alleged to have failed.

There was a trial by jury on the pleas of the general issue, and the statute of limitations, and a verdict for the plaintiff for one hundred and twenty dollars. A motion for a new trial was made by the plaintiff and overruled and exception taken, and judgment was entered on the verdict.

The plaintiff read in evidence to the jury a contract between defendant and plaintiff, for the property for which the money sought to be recovered back was paid, as follows:

"ARTICLE OF AGREEMENT made this 21st day of November in the year of our Lord one thousand eight hundred fifty-seven, between J. R. Woolverton, of the town of Ancona, Livingston county, and State of Illinois, of the first part, and Byron W. Watson, of the county and State above written, of the second part,

"WITNESSETH, That the said J. R. Woolverton has this day granted, bargained and sold to the said Byron W. Watson, the following described property, situated in the town of Ancona, it being the house now occupied by the said J. R. Woolverton,

for which the said Byron W. Watson agrees to pay the sum of one thousand dollars, in hand paid, the receipt whereof is hereby acknowledged; and the said J. R. Woolverton binds himself, his heirs and assigns, to make the said Watson a good and sufficient warranty deed for the said property or house.

"In testimony whereof we hereunto set our hands and seals, the day and year above written.

"J. R. WOOLVERTON, [L. S.]
"B. W. WATSON. [L. S.]

"Witness: B. D. SHACKLETON."

To reverse this judgment Watson prosecutes this writ of error, and assigns as errors the following:

The court erred in excluding proper evidence offered by the plaintiff; in admitting improper evidence on the part of defendant; in refusing to give to the jury plaintiff's instructions numbered 2, 3, 4, 5 and 6, respectively; in giving instruction number 1, as asked for by the defendant; in giving to the jury improper instructions upon its own motion; in overruling motion for new trial; in entering judgment upon the verdict of the jury.

The case is argued here, principally on the instruction by the court, and we will confine ourselves chiefly to that. This action of assumpsit, for money had and received, was said by Lord MANSFIELD, in the case of *Moses* v. *McFarlane*, 2 Burrow, 1012, to be an equitable action in which the plaintiff could recover from the defendant, so much money as he could show the defendant, *ex equo et bono*, ought not to retain.

An objection is made, that assumpsit was not the proper remedy on the facts of this case. This objection comes from the defendant, but he made no such objection in the court below, and does not prosecute this writ of error, so that it is unnecessary to decide whether or not assumpsit is the proper action. Nor need we consider what would be the measure of damages under the covenant of warranty, as the suit is not brought upon the covenant. The action is purely equitable, and, though the grounds on which the jury based the verdict

are not very clear, we are unable to say they were misconceived and erroneous. It is in proof, the plaintiff was in the undisturbed possession of the house and lot, no attempt has been made to eject him. What then should be the measure of damages? It is in proof, he perfected the title to the two acres of land, from the true owner, for which he paid a sum less than sixty dollars per acre. The jury gave him one hundred and twenty dollars, a sum greater in amount than he was required to pay to perfect the title. There having been no eviction of plaintiff, the liability of the defendant ought not to be stretched beyond the actual damage suffered by the plaintiff, and that does not appear to have amounted to a sum equal to the verdict.

In equity and justice, the defendant should not be required to refund more of the purchase-money received for the house and lot, than it required to perfect the title to the ground, and this the verdict compels him to do.

As to the instructions asked by the plaintiff, and refused, and assigned as error, they seem to have been abandoned, as no argument has been offered in relation to them; the argument being directed principally to the instruction given by the court on its own motion, and which was intended to embody the law of the case.

That instruction is as follows:

"The court instructs the jury, that the measure of damages in this case is the price paid for the property, and six per cent interest thereon, if they believe, from the evidence, that plaintiff was actually evicted and lost the property. But if the jury believe, from the evidence, that there was only a failure of title as to the land, and that plaintiff was never disturbed in his possession of the house, the measure of damages would be the value of the title he had to purchase in order to protect himself in the enjoyment and possession of the property which he had purchased from the defendant, and to prevent an actual eviction, and any costs and expenses he may have been compelled to lay out in so purchasing title and protecting his possession."

We are of opinion this instruction is the law of this case, and in accordance with the authorities. *Brady* v. *Spurck*, 27 Ill. 478.

The instruction marked 1, given for the defendant, is objected to. That is as follows:

"If the jury believe, from the evidence, that Woolverton had no title to the land at the time he entered into the contract with Watson, and that Watson knew this, and that Woolverton only designed to sell Watson the house, and did not intend to sell the land, and that Watson so understood, and that Watson entered into the written contract with a full knowledge of these facts, then the law is with the defendant, and the jury will so find by their verdict."

It is insisted there was no evidence on which to found this instruction, and that it is not the law. Though this instruction may not be correct, as it seems to leave the construction of the written agreement to the jury, yet it could not have misled the jury, or worked any injury to the plaintiff, the jury having allowed him all he was authorized to claim, and that was the amount he paid to secure the title to the lot, if the lot had been embraced in the agreement.

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

Judgment affirmed.

JOHN G. NATTINGER

v.

CHARLES B. WARE.

1. RECORDING ACT — *whether a deed takes effect as notice from the time of filing for record — effect of misdescription in recording.* Under the recording act of 1833, a deed took effect as notice to subsequent purchasers and incumbrancers, from the time of filing it for record, and the grantee in the deed is none the less protected because of a recording of the deed with a misdescription of the premises.

2. SAME—*whether that rule was changed by the act of* 1837. Nor was the act of 1833 repealed or changed in that regard by the act of July 31, 1837, so as to make the deed notice only from the date of its actual record. The object of the latter act was simply to authorize the recording of all instruments in writing relating to real estate, although not acknowledged or proven in conformity with the laws of the State, and to make such instruments as effectual, in the way of notice to subsequent purchasers, as if they had been properly acknowledged.

3. SAME—*construction of the act of* 1837. Nor, it seems, is the act of 1837 to be given such a construction as to make the class of instruments therein provided for, effectual in the way of notice only from the time of their actual record. When that law was passed a deed was considered as legally recorded at the moment it was filed for record, and there is no doubt the term "recording" was used in this act in that sense.

WRIT OF ERROR to the Circuit Court of La Salle county; Hon. MADISON E. HOLLISTER, Judge, presiding.

This was an action of covenant, instituted by the plaintiff in error, in the court below, against the defendant in error, for an alleged breach of warranty in the title to certain premises.

The facts in the case are substantially as follows: On the 29th day of October, 1856, the defendant and wife conveyed to plaintiff, by a warranty deed, for a consideration of $3,000, a part of lot four, block eighteen, original town of Ottawa, commencing at the south-west corner, thence north 75 feet, east 51 feet, south 75 feet, west 51 feet to beginning. The defendant claimed title through one Jabez Fitch. Fitch, on the 22d day of March, 1837, being the owner of the premises, conveyed the same to one Chester Hall, together with other lots. This deed was filed for record October 31, 1837, but, by mistake of the recorder, the word "seventy-five," in the description of the premises, was written on the record "twenty-five," making a misdescription of the premises. This deed was twice subsequently recorded, but not until the last time, October 2, 1841, was it correctly done. Hall and wife conveyed the premises March 1, 1838, to defendant. At the April Term, 1838, of the La Salle Circuit Court, a judgment was rendered against Fitch and one Solon Knapp, for $508, and costs of suit; and, on the 25th day of March, 1841, execution was issued against

Fitch, and levied upon the following part of said lot four: commencing at the south-west corner, thence east 29½ feet, north 75 feet, west 29½ feet, south 75 feet to place of beginning. June 16th, 1841, the premises were sold at sheriff's sale, and purchased by one John V. A. Hoes, for $400. That, on April 11, 1845, another execution was issued on said judgment, and levied on the following part of said lot four: commencing 29½ feet east of the south-east corner of said lot, thence east 21 feet, thence north 75 feet, thence west 21 feet, thence south 75 feet to beginning, which was also purchased by said Hoes.

The plaintiff alleges that he was compelled to and did, on the 1st of September, 1856, purchase the same from Hoes for $500.

The declaration contained a second breach, upon which the plaintiff, by agreement, recovered judgment for $137.79 and costs.

The plaintiff appeals to this court, asking that he may recover, in addition to the judgment below, the sum of $500, with six per cent interest from September 1, 1856; it being agreed that this court may render final judgment in the case.

Mr. GEORGE C. CAMPBELL, for the plaintiff in error.

Messrs. LELAND & BLANCHARD, for the defendant in error.

Mr. JUSTICE LAWRENCE delivered the opinion of the Court:

This record presents the single question, whether a deed, properly executed and acknowledged, and filed for record on the 31st day of October, 1837, but recorded with a misdescription of the premises, will protect the grantee against subsequent purchasers and incumbrancers. It is insisted by the plaintiff in error, that, although a deed, under the law of 1833, took effect as notice to subsequent purchasers from the time of filing it for record, yet, under the act of July 31, 1837, the rule was so changed as to make the deed notice only from the date of its actual record, and that this new rule continued in force up to the session of 1845.

The law of 1833 was as follows:

"SEC. 5. That from and after the first day of August next, all deeds and other title papers which are required to be recorded, shall take effect and be in force from and after the time of filing the same for record, and not before, as to all creditors and subsequent purchasers without notice; and all such deeds and title papers shall be adjudged void as to all such creditors and subsequent purchasers without notice, until the same shall be filed for record in the county where the said lands may lie." Purple's Real Estate Stat. 489, § 5.

The law of 1837 was as follows:

"SEC. 1. *Be it enacted by the People of the State of Illinois, represented in the General Assembly:* That the recording of any deed, grant, bargain, sale, lease, release, mortgage, defeasance, conveyance, bond, contract, or agreement of and concerning any lands, tenements or hereditaments, or whereby the same may be affected in law or equity, whether executed within or without the State, by the recorder of the county in which the lands, tenements, hereditaments, intended to be affected are situated, shall be deemed and taken to be notice to subsequent purchasers and creditors from the date of such recording, whether the said writing shall have been acknowledged or proven in conformity with the laws of the State or not. Provided, that no such writing, not acknowledged or proven in conformity with the laws of the State to entitle the same to be recorded, shall be admitted as evidence in any court, unless execution thereof be proven in the manner required by the rules of evidence applicable to such writings; and the provisions of this act shall apply as well to writings heretofore as those hereafter admitted to record."

It has been twice decided by this court, in *Cook* v. *Hall*, 1 Gilm. 575, and *Merrick* v. *Wallace*, 19 Ill. 486, that the failure of the recorder properly to record a deed, would not invalidate the title of the grantee, who had done all that was required of him by the law in leaving the deed for record. The counsel for plaintiff in error, speaks of both of these cases as arising under the law of 1833.

This is true of the last case, but in the first, the deed was made and recorded in 1840, while the law of 1837, now relied upon, was in force, although the court in their opinion do not allude to that law, probably for the reason, that they did not regard it as changing, in this respect, the law of 1833. But, apart from the authority of that case, and supposing that the law of 1837 was accidentally overlooked by both court and counsel, we entertain no doubt as to the proper decision of this question. The legislature, in enacting the law of 1837, did not repeal or change the law of 1833, upon the point in controversy. Their object was simply to authorize the recording of all instruments in writing relating to real estate, although not acknowledged or proven in conformity with the laws of the State, and to make such instruments as effectual in the way of notice to subsequent purchasers, as if they had been properly acknowledged. It is contended that the then existing recording laws had this effect. But such clearly was not the understanding of the legislature, nor has it ever been that of the profession. The construction always given in the courts of other states to registry acts similar to our law of 1827, has been, that deeds not acknowledged or proven in conformity to law, were not entitled to record, and were not notice when recorded, and no one can read the law of 1837, without seeing that the legislature so understood the rule in this State, and passed that act in order to establish a different and more liberal one. The same idea prevailed at the revision of 1845, and the substance of this act is made the subject of a distinct section in the chapter of conveyances. When this was so clearly the object of the law, we should be doing violence to every principle of construction, if we were to say, that, in using the term "recording," instead of the phrase "filing for record," the two expressions being often used in common parlance as equivalents of each other, the legislature designed to introduce a most material and objectionable rule of property, entirely aside from the specific object of the law it was enacting. We say objectionable rule, because the legislature ought not to take from a purchaser the benefit of his contract, and divest

his title to property, when he has done all that it is in his power to do for the purpose of giving notice to subsequent purchasers by filing his deed in apt time for record. It is not in his power to record it. That duty is to be performed by an officer furnished by the law-making power, and if such officer is incompetent or untrustworthy, shall the penalty be visited upon the prior purchaser, who has done all that belongs to him to do, or that it is possible for him to do?

We are not prepared to admit that the legislature would have the constitutional power to enact such a law. It can impose duties and provide, that, for failure to perform them, a man shall lose his property, but can it say that a purchaser shall lose his estate, because of the delinquency of an officer whom he cannot control, and when he has performed any duty required of him by the law? Whatever may be said of the power of the legislature, courts will not give to its enactments so objectionable a construction, unless the language adopted clearly requires it. When the law of 1837 was passed, a deed was considered as legally recorded at the moment it was filed for record, and we have no doubt the term "recording" was used in this act in that sense.

Again, it is to be remembered, that courts do not favor repeals by implication, and if the act of 1833 is repealed by that of 1837, it is only by implication. For the act of 1837 relates to a class of deeds not within the purview of the act of 1833. The former applied to deeds acknowledged or proven according to law, and the latter to those not so acknowledged or proven. Even if the legislature intended that this class of deeds should only take effect as notice from the time of their being actually reduced to record, it does not therefore follow that the former act should cease to operate as to those deeds that had been acknowledged or proven in conformity with the laws of this State, and it is admitted that the deed in controversy falls within this class.

The judgment of the court below is affirmed.

Judgment affirmed.

Syllabus. Statement of the case.

LEVERETTE S. CHITTENDEN
v.
JOHN EVANS.

1. EVIDENCE—*jury judges of weight of.* Where the evidence is conflicting it is the province of the jury to weigh and judge of its weight, and it is error for the court to instruct as to its weight or that one witness is entitled to more credit than another although corroborated.

2. WITNESS—*his credibility.* The mere fact that a witness has sworn falsely on a material point, will not authorize a jury to reject his entire testimony. It is not only necessary that a witness should swear falsely, but his testimony must be knowingly or corruptly false, before a jury are at liberty to disregard it as a matter of law.

3. Or, a witness may even corruptly swear falsely as to a material fact, yet, if other portions of his evidence are properly corroborated by circumstances indicating the truth of such portions, it would not necessarily follow that all of his testimony should be disregarded.

4. INSTRUCTIONS—*a particular kind disapproved.* The practice of selecting a particular fact in evidence, and basing an instruction upon it, unless it is a fact, without the proof of which the party must fail, is calculated to give such evidence undue prominence, and is disapproved.

APPEAL from the Circuit Court of Du Page county; the Hon. ISAAC G. WILSON, Judge, presiding.

This was an action of replevin brought by Leverette S. Chittenden, before a justice of the peace of Kendall county, against John Evans, for the recovery of a colt. A trial was had, resulting in a judgment in favor of defendant, from which plaintiff prosecuted an appeal to the Circuit Court of that county. Afterward the cause was removed by change of venue to Du Page county. At the March Term, 1865, of the Circuit Court of that county, a trial was had before the judge and a jury.

The question was one of identity, upon which there was much and conflicting testimony. The jury found a verdict of property in the defendant. Plaintiff entered a motion for a new trial which was overruled by the court, exceptions taken, and a judgment was rendered on the verdict, and the plaintiff brings the case to this court for a reversal, and assigns various errors on the record.

Messrs. WHEATON & FITCH, for the appellant.

Messrs. VALLETTE & CODY, for the appellee.

Mr. CHIEF JUSTICE WALKER delivered the opinion of the Court:

This was an action of replevin brought by appellant before a justice of the peace in Kendall county, against appellee, for the recovery of a colt. A trial was had before the justice, resulting in favor of defendant. The case was removed to the Circuit Court, and after a mistrial in that court the venue was changed to Du Page county. A trial was had in that court by a jury, who rendered a verdict for defendant. A motion for a new trial was overruled, and a judgment rendered on the verdict, and a return of the property was awarded. The case is brought to this court by appeal to reverse the judgment.

The question for determination before the jury was as to the identity of the animal, both parties having had such colts, and both claiming the one in controversy. As is generally the case on such questions, the evidence was inharmonious, and to some extent positively conflicting. It was therefore the duty of the jury, as far as possible, to reconcile it, and, when that could not be done, to reject such as was unworthy of belief, and from the whole of it to find the truth of the issue. This is a rule that lies at the very foundation of our system of jurisprudence, and any invasion of the right to weigh the evidence and find the issues presented to them for trial has always been regarded as error. It is the duty of the court to decide the law, and of the jury the facts, in a case. An invasion of the rights of either by the other, has uniformly been regarded as error.

In this case the court, at the request of appellee, gave to the jury this instruction:

"If the jury believe, from the evidence, that the witness Petitt swore that the colt of 1860 of the mare Polly died in 1861, and was a horse colt, and that the witness Chittenden swore that the said colt of 1860 was a mare colt, and the colt of said

mare of 1861 was the one that died, then in that case it becomes a question of credibility between said witnesses on such questions of fact, provided both of said witnesses had equal means of knowing; and, if the testimony of said Pettit on such question is corroborated by facts and circumstances detailed by other witnesses, while that of said Chittenden is not, then in that case the evidence of said witness Pettit, with said corroborating evidence, is entitled to greater weight than the evidence of said Chittenden."

It will be observed that this instruction informs the jury that the evidence of Pettit, with corroborating evidence, is entitled to greater weight than the evidence of Chittenden. By it the court, as a matter of law, informs the jury that the evidence of one witness and corroborating circumstances, is entitled to more consideration than the evidence of another witness. While this may be true as a matter of fact, it is certainly not so as a rule of law. Suppose a witness were called, from whose manner on the stand no person could believe, and his evidence was corroborated by slight circumstances, would any man of intelligence be inclined to give it greater weight than that of a witness of intelligence, high moral worth and undoubted character for truth? It only needs to state the proposition to see that it is not a rule of law, and, if it is a question of fact, then it is one for the sole determination of the jury. This instruction was therefore erroneous, and should not have been given.

The court also gave for each party an instruction, which was incorrect. By them the jury were informed, that, if any witness had sworn falsely, on any one material point, in their testimony, the jury were at liberty to reject the entire testimony of such witness. It is not only necessary that a witness should swear falsely, but it must be knowingly or corruptly false in some material matter, before the jury are at liberty to disregard the testimony of the witness, as a matter of law. If a witness, from mistake, accident, or want of memory, should make a false statement, without any corrupt intention, it would

not follow that his entire evidence should therefore be rejected as unworthy of belief. These instructions should have been modified. Again, a witness might even corruptly swear falsely to a material fact, and, if other portions of his evidence were properly corroborated by circumstances indicating the truth of such testimony, it would not necessarily follow that all of his testimony should be disregarded.

Other instructions in the case select a few of the many circumstances in the case, and call the especial attention of the jury to their consideration. This, as a general rule, is very objectionable practice. It has a tendency to induce the belief on the part of the jury, that the facts thus selected have an undue importance in the case, and inclines them to depreciate others. All of the evidence admitted is upon the supposition that it is material to the issues on trial. And the jury should be left free to weigh and consider every circumstance in evidence, uninfluenced by the action of the court. While we would not, as a general rule, reverse for giving such an instruction, we should not if it were refused. When the whole case is admitted to turn on a single fact, it is proper to inform the jury that the fact must be proved, and, if not, the party upon whom the burden rests must fail.

For the errors above indicated, the judgment of the court below must be reversed, and the cause remanded.

Judgment reversed.

COMMISSIONERS OF HIGHWAYS OF THE TOWN OF LANCASTER, IN THE COUNTY OF STEPHENSON,

v.

CHARLES BAUMGARTEN.

1. COMMISSIONERS OF HIGHWAYS—*a majority may act.* The commissioners of highways of a town are a *quasi* corporation, and all such bodies act by a vote of a majority, unless there be some provision in the law of their creation to the contrary.

Syllabus.

2. The law giving commissioners of highways power to act in a specified case, the authority is to them in their corporate capacity, and the decision of a majority is the decision of the body.

3. But, if they were not a corporation, then, the act by which they are appointed being silent as to how many should constitute a quorum, a majority may act.

4. So, where a number of persons are intrusted with powers in matters of public concern, and all of them are assembled and consulting, the majority may act and determine, if their authority is not otherwise limited and restricted.

5. And if it shall appear that a majority have acted in any given matter, it will be presumed the others composing the body were present and consulting, until the contrary is shown.

6. So a contract for building a bridge, signed by two of three commissioners of highways, is binding upon the whole body.

7. TOWNS — BRIDGES — *liability of towns for building bridges.* Section 18 of the 17th article of the act of 1861, concerning township organization, prescribing a mode by which the liability of towns for building bridges may be enforced, did not design to create a liability in that regard where none existed before its passage.

8. Before the passage of that act, as to adjoining towns, there was a mutual liability for the building of bridges over streams dividing such towns, or on the line dividing them, and to such towns the 18th section cited applies, when it declares that the bridges shall be built at the equal expense of said towns without reference to the town lines.

9. But, where one of two adjoining towns had been relieved of the burden of building bridges, by reason of that subject being committed to other authorities, the other town, which would otherwise have been liable, was also thereby exempted from liability, and to such towns and bridges the act of 1861 does not apply.

10. SAME — *exclusive liability of the city of Freeport for building bridges within its limits.* The charter of the city of Freeport gave to the city authorities exclusive jurisdiction over the subject of bridges within its limits, and thereby relieved the town in which the city is located, from that burden; and a bridge being built over the Pecatonica river, at a point where the whole course and width of the river was within the chartered limits of the city, it was *held*, that the adjoining town on the opposite side of the stream, the boundary line of which was the bank of the river on that side, was also exempted from liability to contribute toward the expense of the bridge; and being thus exempted when the act of 1861 was passed, it was not embraced in its provisions.

APPEAL from the Circuit Court of Stephenson county; the Hon. BENJAMIN R. SHELDON, Judge, presiding.

Opinion of the Court.

The opinion of the court contains a statement of the case.

Messrs. BURCHARD, BARTON & BARNUM, for the appellants.

Messrs. BAILEY & BRAWLEY, for the appellee.

Mr. JUSTICE BREESE delivered the opinion of the Court:

This was a bill in chancery exhibited in the Stephenson Circuit Court, by Charles Baumgarten, against the commissioners of highways of the town of Lancaster, and the city of Freeport, both in that county, to compel them to pay for building a bridge across the Pecatonica river, a stream dividing that city from the town of Lancaster.

It appears that appellee had contracted with appellants, and the city of Freeport, to build this bridge according to certain specifications set forth in the contract, to be built entirely at the expense of the appellants and the city, and under the supervision of certain persons appointed by those authorities, respectively. By the contract, the appellants and city of Freeport, agreed to pay appellee thirty-two hundred and fifty dollars, in county, town and city orders, in certain installments, in proportion as the laws of the State make the town of Lancaster and the city of Freeport liable to contribute. The bridge was built and accepted by the city of Freeport, and, on account of some extra work thereon, there was due appellee the sum of three thousand seven hundred and sixty-nine $\frac{6}{100}$ dollars, of which the sum of eighteen hundred and eighty-four $\frac{53}{100}$ dollars, had been paid appellee in county orders of Stephenson county, and one-half of the remainder, being nine hundred and forty-two $\frac{25}{100}$ dollars, had been paid him in city orders of the city of Freeport, leaving the like sum, as appellee claimed, to be paid him by the town of Lancaster, in town orders, of which sum he had been paid five hundred and twenty-five dollars in such orders, leaving due appellee, as he claimed, in like town orders, four hundred and seventeen $\frac{36}{100}$ dollars, which appellants refused to pay him. The prayer of the bill was, that the commissioners should be decreed to pay him this sum in the town orders of the town

of Lancaster, or such sum as might appear to the court to be due him under the contract.

It appears by the answer, that but two of the commissioners signed the contract, and they claimed therefore, that the contract was not binding on the town. The bridge is two hundred and twenty-three feet long, and only sixty feet of it is within the town of Lancaster. By the charter of the city of Freeport, the whole of the river, at the place where the bridge is erected, is within the boundaries of that city; and that by its charter, the city has exclusive control over the streets and bridges within its limits, and is alone liable for the expense of building such bridges. The appellants insist, that neither they nor the town of Lancaster are liable for the expense of building any bridges, except such as may be in the limits of the town, and they insist, that the five hundred and twenty-five dollars paid appellee, by the town of Lancaster, is the full share which it ought to pay for the bridge, and that this amount was paid by the town, and received by appellee, on the understanding if the town was only liable to pay for the proportion of the bridge lying within the limits of the town, then such payment was to be in full discharge of the liability of the town.

There was a stipulation between the parties to the following effect: It is admitted that the "line between the town of Lancaster and the city of Freeport, is the north bank of Pecatonica at the point where the bridge is located. It is admitted that all of sections 31, 32 and 33, in township twenty-seven, range eight, in said county, lying south of the north bank of Pecatonica river, are included in the town of Freeport, and that at the point where said bridge is located, the north bank of Pecatonica river is the boundary line between said towns. It is admitted that the bridge was built according to contract, that about sixty feet of said bridge lies within said town of Lancaster, and that all of said sections north of said north bank are in the town of Lancaster. It is admitted that the town of Lancaster has paid toward the erection of said bridge, a sum proportionate to the part of said bridge lying in the town of Lancaster, and if said town is only liable to build the portion

of said bridge in said town, then, that the town of Lancaster has paid its part of said bridge, and if the town of Lancaster is liable for the payment of one-half of the bridge, then there is due from said town the sum of four hundred and seventeen and twenty-six one-hundredths dollars.

The contract between the parties, and this stipulation, were all the evidence on the hearing of the cause.

The bill was taken as confessed, against the city of Freeport.

The court found, that the bridge was built according to the contract; that the town of Lancaster adjoined the city of Freeport, along the north bank of the Pecatonica river, at the place where the bridge was built; that about sixty feet of the bridge is within the town of Lancaster, and that the sum of $417.26 yet appeared to be due from the town of Lancaster; and ordered and decreed, that the commissioners of highways pay to appellee, within twenty days, that sum, and also the costs, and that the bill be dismissed as to the city of Freeport.

To reverse this decree, the commissioners of highways have taken this appeal.

The first point they make is, that the contract with appellee was not binding, for the reason but two only of the three commissioners executed it.

The answer to this is, that commissioners of highways are a *quasi* corporation, and all such bodies act by a vote of the majority, unless there be some provision in the law of their creation to the contrary. Angel and Ames on Corp. 459; 2 Kent Com. 293. The law giving commissioners of highways power to act in a specified case, the authority is to them in their corporate capacity, and the decision of a majority is the decision of the body. If this was not so, acts of great importance to the public could not be done, if the consent of all was necessary. One obstinate man might defeat important public measures.

But, if they were not a corporation, then, the act by which they are appointed being silent as to how many should constitute a quorum, a majority may act. *Dennis* v. *Maynard*, 15 Ill. 479. So, where a number of persons are intrusted with powers, in matters of public concern, and all of them are assem-

bled and consulting, the majority may act and determine, if their authority is not otherwise limited and restricted. And, where a report is signed by only two of the viewers of a road, it will be presumed the third was present and consulting, until the contrary is shown. *Louk* v. *Woods*, 15 Ill. 256.

The next point made by appellants is, that section eighteen of the act of the general assembly, relied upon by appellee to fix liability upon the town of Lancaster to build this bridge, does not make the town liable, for the reasons, *first*, because that section applies only to a case where any adjoining towns shall be liable, and when the act was passed, the town of Freeport was not liable, the burden having been cast on the city of Freeport, and the town of Lancaster was not liable, no part of the river being within its limits, and as no liability existed, this act could create none; *second*, that this section only purports to apply to towns, and it ought not to be extended to cases to which it does not apply; *third*, the liability of the city of Freeport became fixed by the act incorporating it, and all acts of a local nature were excepted from the operation of the township organization law.

Section eighteen of the seventeenth article of the act of 1861 is as follows:

"Whenever any adjoining town shall be liable to make or maintain any bridge or bridges over any stream dividing such towns, or on the line dividing such towns, such bridge or bridges shall be built and repaired at the equal expense of said towns, without reference to the town lines." Laws of 1861, p. 279.

Before the passage of this act, Freeport had become an incorporated city. The charter was granted in 1857, and by it power was bestowed on the city authorities to open, widen, alter, abolish, extend, establish, grade and pave the streets, etc., and to establish, erect and keep in repair, bridges, and to accomplish these objects, power was granted to levy a tax of five mills on the dollar. Laws of 1855, p. 127. The whole subject of bridges in the city of Freeport was committed by

this act to the city authorities, and the town of Freeport relieved of the burden. The same provision was contained in the charter of the city of Ottawa, and this court held, in the case of *The Town of Ottawa* v. *Walker*, 21 Ill. 605, that the liability of building all bridges situated within the incorporated limits of the city of Ottawa and also within the town of Ottawa, devolved on the city, and for which the town of Ottawa was in no manner liable. Hence it follows, if the decision be correct, which we do not doubt, the town of Freeport, as an adjoining town to the town of Lancaster, had nothing to do with building this bridge, and that the section quoted has no application to the case. The city of Freeport, as agreed by the parties, includes within its chartered limits the whole course and width of the river, which thereby became within the exclusive jurisdiction of the city, and by reason thereof the city became liable to build the bridges over it. This being so, the town of Lancaster, by force of the same reasoning, became exempt from any liability to build a bridge over that stream, it being, at the place where the bridge is erected, entirely within the corporate limits of the city of Freeport, and the act of 1861 did not design to create a liability where none existed before its passage.

Before that act was passed, the burden of building this bridge was on the city of Freeport, neither the town of Freeport, nor that of Lancaster, being under any legal obligation to build it. The act therefore, it is plain, cannot be so construed as to create a liability on the part of the town of Lancaster, where none existed at the time of its passage. As to adjoining towns, such liability did exist, and section eighteen prescribed a mode by which it could be enforced. It being admitted, that about sixty feet of this bridge is in the town of Lancaster, and that it has been paid for by the town, it is unreasonable and unjust, that the town should be required to pay for any portion of the bridge within the chartered limits of the city of Freeport, which the decree requires them to do. It is enough that they pay for the erection of bridges in their own town. The contract has been performed by the town of Lancaster, — they

have paid all they ever engaged to pay, and there is no law making them liable beyond that. The decree, therefore, requiring the town to pay an additional sum of $417.26 on account of this bridge, is reversed, and the bill, as to appellants, dismissed.

Decree reversed.

ISAAC AMES *et al.*
v.
JOHN CARLTON.

1. TOWNS—*power to prohibit cattle running at large.* The statute authorizes every town to prohibit the running at large of cattle, horses, etc.

2. TRESPASS—*by cattle running at large.* Under the operation of a town ordinance prohibiting cattle from running at large, the entry of cattle running at large upon the premises of a stranger is a trespass, as at common law.

3. JURISDICTION *of justices of the peace, in trespass by cattle illegally running at large.* Justices of the peace have jurisdiction under the general law, of the action of trespass to real estate, and would therefore have jurisdiction of an action brought to recover damages for injuries done by cattle illegally at large.

4. JURISDICTION—*how affected by cumulative remedies.* Where a town ordinance which prohibits cattle from running at large, gives a special remedy against the owners for a violation of the ordinance, that does not oust the justice of the general jurisdiction given by statute of an action for damages.

WRIT OF ERROR to the Circuit Court of Livingston county.

This was a suit commenced by John Carlton against Isaac Ames and others, before a justice of the peace in Livingston county. The cause was removed into the Circuit Court by appeal, where it was tried before the court upon the following agreed state of facts: The plaintiff is a resident of the town of Nevada, in the county of Livingston, in this State, and the defendants are residents of the town of Sunbury in said county, the said towns lying adjoining. The defendants' cattle were running at large in the town of Sunbury, in September, 1865,

and while so running at large they crossed the town line, and, running at large in the town of Nevada, did damage to the plaintiff's crop of growing corn to the amount of five dollars.

The plaintiff's crop was protected by no fence except the outside edge of the cultivated field in which the same was growing; in other words, had no protection except such as was afforded, if any, by the first ordinance hereinafter set forth, there being two distinct ordinances passed by said town.

The town of Nevada adopted the following ordinances at the annual town-meeting held in April, 1865, which were posted and publishing according to law:

Fence Ordinance.

"SEC. 1. The outside edge of cultivated lands shall be a good and lawful close or fence for all purposes in law."

Cattle Ordinance.

"SEC. 1. No cattle, horses, mules, asses, hogs, or sheep shall be permitted to run at large in the town of Nevada, in the county of Livingston, and State of Illinois.

"SEC. 2. If any of the above enumerated stock shall be found running at large in said town, the owner, or his or her agent, shall be liable to a fine or damages equivalent to the injury said stock may have done to growing or matured crops in said town, to be paid to the person or persons suffering such injuries; said stock may be impounded by any inhabitant of said town, and shall be held in charge of the pound-master until said fine or damages shall be paid, or until said stock shall be sold under the provisions of this ordinance.

"SEC. 3. Said fine or damages shall be re-assessed by each of the parties choosing one man, and they two a third, and their decision shall be final.

"SEC. 4. Whenever any cattle, hogs, horses, sheep, mules, asses, shall be impounded, if not taken out within five days, the pound-master shall notify the owner or agent, if known to him as such, and if a resident of this town, and shall also post up notices in three of the most public places in said county, giving

a description of said stock, their marks and brands and color, the time and place of their being sold; and, after ten days from the time of posting said notices, said stock shall be sold by the pound-master to the highest bidder for cash, and, after paying fine or damages and costs, the balance of the purchase-money, if any, shall be held subject to the owner's order. The owner may redeem said stock within three months from the day of sale, by paying the amount of the purchaser's bid, with interest thereon at the rate of ten per cent per annum, with costs of keeping said stock after sale."

The Circuit Court found for the plaintiff, and assessed his damages at five dollars, and judgment was rendered accordingly.

It is agreed that no assessment of damage was made under the third section of the latter ordinance.

The defendants bring the cause to this court upon writ of error, and present the following questions:

1. Had the justice before whom the case was tried jurisdiction of the case?

2. Have the inhabitants of the town of Nevada the right to pass such ordinances?

3. In bringing suit for an alleged violation of said ordinance, must the mode of procedure therein specified be followed?

Mr. L. E. PAYSON, for the plaintiffs in error.

Mr. A. E. HARDING, for the defendant in error.

Mr. JUSTICE LAWRENCE delivered the opinion of the Court:

The only point made in this case by the counsel for plaintiff in error is, that the justice had no jurisdiction. This position is not tenable. The statute authorizes every town to prohibit the running at large of cattle, horses, etc. This town did so. Under the operation of this ordinance, cattle running at large were so running, in violation of law, and their entry upon the premises of a stranger was a trespass, as at common law. Justices have jurisdiction of the action of trespass to real estate, and would therefore have jurisdiction of an action brought to

recover damages for injuries done by cattle illegally at large. The special remedy given by the ordinance is simply cumulative, and could not oust the justice of a general jurisdiction given him by statute. The only question for him to decide was, whether the act complained of was a trespass, that is, whether the defendants' cattle had illegally gone on the land of the plaintiff. If a trespass, the owner was liable for any damages done, and these damages could be recovered before any tribunal having jurisdiction of the parties and of the action of trespass.

Judgment affirmed.

WILLIAM WILBORN
v.
TIMOTHY B. BLACKSTONE *et al.*

PRACTICE — *affidavit of merits on appeal.* On an appeal of a case of forcible detainer, in the Cook Circuit Court, *held*, that an affidavit of merits, which in substance conforms to the practice act applicable to the courts in Cook county, is sufficient, although it fails to give the title of the court or the term. Being properly entitled in the case, and regularly filed, it is readily seen to what cause the affidavit belongs, and, if required by the statute, will suffice. The statute requiring the affidavit, intended to prevent delay, and thereby promote justice, but not to cut off meritorious defenses to actions. It is held to be error to dismiss such an appeal on such an affidavit.

APPEAL from the Circuit Court of Cook county; the Hon. ERASTUS S. WILLIAMS, Judge, presiding.

This was an action of forcible detainer, commenced by Timothy B. Blackstone, Joel A. Matteson, Samuel L. Keith, Edward I. Tinkham and John Hossack, before a justice of the peace, against William Wilborn. A judgment by default was entered by the justice of the peace. The case was removed by appeal to the Circuit Court. A motion was there entered to dismiss the appeal for the want of a sufficient affidavit of merits. The appeal was on this motion dismissed, and judgment rendered against defendant for costs. And the case is

brought by appeal to this court, and the dismissal of the appeal is assigned for error. The grounds of the motion sufficiently appear in the opinion of the court.

Messrs. BARKER, TULEY & CUYLER, for the appellant.

Mr. JOHN LYLE KING, for the appellees.

Mr. CHIEF JUSTICE WALKER delivered the opinion of the Court:

This was an action of forcible entry and detainer commenced before a justice of the peace in Cook county. A trial was had, when plaintiffs recovered judgment, and defendant removed the case to the Circuit Court by appeal. Plaintiffs entered a motion in that court to dismiss the appeal for want of a sufficient affidavit of merits, which is this:

"STATE OF ILLINOIS, } ss:
COOK COUNTY, }

"TIMOTHY B. BLACKSTONE, JOEL A. MATTESON, SAMUEL L. KEITH, for themselves, and TIMOTHY B. BLACKSTONE, EDWARD I. TINKHAM, and JOHN HOSSACK, as Trustee of the Estate of GEORGE BARNET,
v.
WILLIAM WILBORN.

Forcible Detainer in Justice's Court, on appeal from C. D. Wolf, J. P.

"This affiant, William Wilborn, being duly sworn upon oath, says: That he has a good defense to said suit upon the merits, and that he is the above named defendant.

"WILLIAM WILBORN.

"Sworn to and subscribed to before me, May 22, 1865.

"C. D. WOLF, J. P."

The objection urged against this affidavit is, that it is not entitled of the court, or of the term to which the cause was appealed. It will be seen that it has a proper venue; is properly entitled of the cause, and no objection is taken to the substance or matter stated in the body of the affidavit. If the statute requires an affidavit in this class of cases, which we deem unnecessary to determine at this time, still we regard this as sufficient. It may be, that, in Great Britain,

before the adoption of their recent rules of practice, such an affidavit would have been defective, because it was not entitled of the court and of the term. But, under the more liberal rules of practice which obtain in this country, it is believed such strictness is not observed. This at most can be regarded only as a strictly technical objection. And when it can be certainly determined to what case, and in what court, the paper belongs, it must be held to answer the requirements of the law. When entitled of the case and property filed, no difficulty can ever occur in determining these questions. When a party has a meritorious defense, courts should be slow to adopt rules of practice so rigid as to be well calculated to deprive a party of his right to interpose such a defense and thus prevent a wrongful recovery against him.

Here is an affidavit duly sworn to and filed, and there can be no doubt either as to the court or term to which it is filed, stating that the defendant has a meritorious defense, and for the purpose of this motion, it must be regarded as true, and shall it be said that the party shall be deprived of his defense, and a recovery had against him, simply because he has failed to indicate in his affidavit what court and term in which the cause is pending, when both facts are certainly known by the file mark and the names of the parties. It may be that with pleas in abatement a different rule should prevail, as they are not favored because they usually delay justice, and, therefore, the most technical precision is required. But natural justice and every principle of right require that a party having a defense to the merits, should be permitted to establish it and prevent a recovery. The statute was not designed to cut off meritorious defenses, but to prevent unjust delays in the administration of justice. The statute was intended to promote and not to obstruct justice. We are, therefore, of the opinion, that this affidavit was sufficient, and that the court below erred in dismissing the appeal.

The judgment of the court below is reversed and the cause remanded.

Judgment reversed.

Syllabus.

THOMAS R. WOOD & CO.

v.

THE MERCHANTS' SAVING, LOAN AND TRUST COMPANY.

1. PROMISSORY NOTE—*payable at a particular place—rights and duties of the parties.* The holder of a promissory note, which is payable at a particular place, is under no obligation to present the note for payment, where payable.

2. The maker, in an action against him on such note, may, however, plead in bar of damages and costs, a readiness to pay at the time and place.

3. If the holder of the note is present at the time and place of payment, and the maker is there, and tenders the amount, and the holder refuses to receive it, this will be no bar to a recovery by suit, and unless the tender is kept good, by bringing the money into court, it will not even bar a recovery for damages and costs.

4. The making of a note payable at a particular place, as a bank, does not amount to an agreement, that the maker may make a deposit at such bank, of the amount of the note, and thus discharge his obligation, and the money so deposited to be at the risk of the holder of the note.

5. Nor would the bank at which such a note was made payable, have the right to pay it, or apply the money deposited in the bank by the maker, to its payment, except by the special direction of the maker and depositor, either verbally, or by check or draft or some other writing.

6. So if the holder of such a note, presents it at the bank where it is made payable, at the time it is due, and the maker then has money on deposit in the bank sufficient to pay the note, but the teller only certifies on the face of the note that it is "good," and the holder takes away the note without the money, this will not change the liability of the parties in any way, nor will the maker be released from his liability even though he should lose his deposits by the failure of the bank on the next day.

APPEAL from the Superior Court of Chicago; the Hon. JOSEPH E. GARY, Judge, presiding.

The case is stated in the opinion of the court.

Mr. JOHN G. ROGERS, for the appellants.

Messrs. GOODRICH, FARWELL & SMITH, for the appellee.

Mr. JUSTICE BREESE delivered the opinion of the Court:

This was an action of assumpsit brought in the Superior Court of Chicago, by the Merchants' Saving, Loan and Trust company, against Thomas R. Wood and Company, on a note of which this is a copy:

"$907.45. Chicago, August 10, 1864.

On the 26th day of September, after date, we promise to pay to the order of Messrs. George A. Berry & Co., nine hundred and seven dollars and forty-five cents, at the banking house of J. G. Conrad, Chicago. Value received.

THOMAS R. WOOD & Co."

The note was indorsed to the plaintiff.

The plea was the general issue, with an agreement that the defendants might give special matters in evidence under it.

The cause was tried by the court, and a verdict for the plaintiffs for $951.46. A motion for a new trial having been overruled, and exception taken, judgment was rendered on this finding, to reverse which, the cause is brought here by appeal, and the error assigned is, this finding of the court, and refusing to grant a new trial.

The facts of the case are, briefly, as follows: Appellees, being then the owners of the note, on the twenty-ninth day of September presented it at the banking house of Conrad, and was told that the note was good, and the teller so certified, by writing upon the face of the note the words "Good, C. W. Dunlop, teller," and with this, the holder left the bank with the note, without the money. At that time appellants had on deposit with Conrad funds sufficient to pay the amount due on the note.

On the thirtieth of September, the day following the presentation of the note, Conrad made an assignment, and his bank was closed, and has not been opened for business since, he being insolvent from that day, and the amount standing to the credit of appellants, having never been withdrawn.

Appellants insist, that the presentation of the note at Conrad's banking house, and it being there certified as "good," and the failure of the holder then and there to receive the amount due on the note in money, which he had the right and opportunity of doing, released the makers of the note, and was equivalent to payment by the makers.

The whole case, in the view we take of it, turns on this proposition:

Had the holder this right, and had Conrad any authority whatever to pay the note, out of the funds on deposit in his bank to the credit of the makers?

The custom sought to be established among bankers has nothing, in our judgment, to do with the question. What is the effect of making a note payable at a particular place? Was it ever before heard, that the effect was to transfer, *ipso facto*, the money at the place belonging to the makers, absolutely to the holder, on his presenting the note at the place of payment. There is no such rule, in any commercial country, of which we have any knowledge. It is well settled doctrine, in the courts of England and of this country, and of this court, that the holder of such paper is not under any obligation, even to present the note for payment when payable. The maker, in an action against him on such note, may plead, in bar of damages and costs, a readiness to pay at the time and place.

We do not understand that the fact of making a note payable at a particular place, amounts to an agreement that the maker may make a deposit at the bank, of the amount of the note, and thus discharge his obligation, and that the money so deposited, is at the risk of the holder of the note. It is a mere designation of the place where the note is to be paid, not of the person to whom the money is to be paid. By the terms of the note, the money was to be paid by the makers to the payee, not to Conrad, but at Conrad's banking house. As put by appellee's counsel, "if the holder of the note was present, at the time and place of payment of the note, and the maker was there, and tendered the amount, and the holder refused to accept it," this would be no bar to a recovery by suit, and unless

the tender was kept good, by bringing the money into court, it would not bar a recovery for damages and costs. This position is sustained by the case of *Butterfield* v. *Kinzie*, 1 Scam. 445, where the court cite, *Woolcott* v. *Van Santvoord*, 17 Johns. 278; *Caldwell* v. *Cassidy*, 8 Cowen, 271; *Stanton* v. *Bishop*, 3 Wend. 20; Bailey on Bills, 203; 4 Litt. 225; 11 Wheat. 171, and *Wallace* v. *McConnell*, 13 Pet. 136, is refered to in note by reporter, to the same effect. To the same point is the case of *New Hope and Delaware Bridge Co.* v. *Perry et al.*, 11 Ill. 471, citing the same cases.

The money on deposit with Conrad belonged to the maker of the note, it was his money, and under his control. If this be so, if the holders of this note were under no obligation to present this note at Conrad's counter, does the fact that it was presented, change the liability of the parties in any way?

Wherein consisted "the right and opportunity" of the holder to receive this money from Conrad, except by the actual payment of the money by the maker, by himself or Conrad. Conrad had no right to pay it, nor could the money be taken to pay it, except by means of the verbal order, check or draft of the maker and depositor. No one taking such paper, has ever supposed the bank, at which it was made payable, was bound to pay the note on presentation, or that any obligation was imposed upon it, so to do. It is not according to the usage of banks to pay out money except upon checks or drafts drawn by its creditors having funds in the bank.

No case can be found, where, in such case, a bank has been considered as authorized to pay a note made payable at its banking house, without the express direction of the maker, or in the absence of any check or draft by him appropriating his money deposited there to such purpose. Nor is there any obligation resting on the bank to pay, for the bank may have claims against the deposit superior to those of the holder of the note.

Holding, as we do, that neither "the right nor opportunity" existed to the holder to receive this money at Conrad's bank, the makers of the note are not released.

It is unnecessary to examine the other questions raised, as the decision on this point disposes of the case. To sum up all on this point, in a few words, the fact that the note was made payable at Conrad's bank, did not authorize that bank to pay the note without being so ordered by the maker, verbally, or by check or draft or other writing. The holder of the note could not, therefore, draw the funds, except on the order of the maker, and the money in the bank belonging to him remained at his risk.

It would be going too far to hold that the mere certification of a note by the bank at which it was payable, that it was "good," should operate to release the maker, and be held equivalent to an actual payment of the money. We think the better rule is to consider nothing as an actual payment which is not really such, unless there be an express agreement that something short of a payment shall be taken in lieu of it. *Olcott* v. *Rathbone*, 5 Wend. 490.

For the reasons given, the judgment is affirmed.

Judgment affirmed.

WILLIAM CLEARY
v.
BILLINGS P. BABCOCK.

MISTAKE — EVIDENCE — *degree of proof required.* A court of chancery will not reform a written instrument except upon clear and satisfactory proof of a mistake.

APPEAL from the Circuit Court of Livingston county; the Hon. CHARLES R. STARR, Judge, presiding.

This was a suit in chancery, instituted in the court below by Billings P. Babcock against William Cleary, to reform a deed executed by the complainant to the defendant, in reference to an alleged mistake therein, and to enjoin a suit at law com-

menced by the latter against the former, for a breach of one of the covenants in such deed.

Such proceedings were had that the court decreed the relief sought by the bill, and the defendant thereupon took this appeal. The case is sufficiently stated in the opinion of the court, the only question being whether the alleged mistake was proven.

Mr. A. E. HARDING, for the appellant.

Messrs. FLEMING & PILLSBURY, for the appellee.

PER CURIAM: A court of chancery will not reform a written instrument, except upon clear and satisfactory proof. The complainant in this bill seeks to reform a deed by excepting from the operation of the covenants an incumbrance arising from a railroad right of way. But the proof is insufficient. The written contract originally executed between the parties was not produced, nor was there any proof that the deed was not drawn in conformity with it. The deed purported to convey lot one, with full covenants, and the proof showed it was subject to a railroad right of way which was afterward occupied by the railroad company. The evidence relied upon to show a mistake was, that the complainant and defendant both directed the surveyor to lay out a four acre lot with the center of the railway for a boundary on one side. This shows that they contracted with full knowledge of the incumbrance, and we do not understand why it should not have been excepted from the operation of the covenants, but we do not feel authorized to change the terms of a written instrument merely because they are singular in their character, and in the absence of any direct proof of mistake. The decree itself recites that the alleged mistake was not clearly proven, and that being the case there was no ground for the relief granted.

Decree reversed.

Syllabus. Statement of the case.

HUGH MINES
v.
JEREMIAH MOORE.

1. MORTGAGE—*foreclosure—notes not due.* A decree of foreclosure to satisfy a part of the mortgage debt, found the sum due and ordered the sale of the mortgaged premises, subject to a lien on the land to secure the portion of the debt not then due; a sale was thus made; the land was not redeemed, and the purchaser acquired a deed for the premises. An action at law was subsequently brought on the notes not due when the decree was rendered, by the payee, who had purchased the mortgaged premises at the master's sale. *Held*, that, under such a decree, the purchase of the mortgaged premises by the mortgagee operated as a satisfaction of the entire debt, as well the portion not due as that which was. In such a case, the purchaser virtually becomes a mortgagor to the extent of the balance of the mortgage debt not due.

2. DEFENSE—*at law.* Also held, that this defense can be made in an action of assumpsit brought on the remaining notes, for their collection.

APPEAL from the County Court of La Salle county; the Hon. P. K. LELAND, County Judge, presiding.

This was an action of assumpsit brought by Hugh Mines, to the June Term, 1865, of the La Salle County Court, against Jeremiah Moore, for the recovery of four promissory notes executed by the latter to the former. The notes bore date the 24th of September, 1856, and amounted in the aggregate, exclusive of interest, to the sum of $1,039. The declaration is in the usual form.

Defendant filed the plea of the general issue, and a special plea, that there was given as a part of the same transaction ten other notes; that, at the November Term, 1861, of the Circuit Court, plaintiff filed a bill to foreclose a mortgage given to secure all of the notes, when a decree was rendered finding ten of the notes to be due, and that there was unpaid upon them the sum of $1,894.69, and that the four notes in controversy, and not then due, were unpaid. A sale of the mortgaged premises was ordered to satisfy the decree, but it was expressly declared that the sale was to be made subject to a lien to secure the payment of these notes. That the mort-

gaged premises were thus sold and purchased by plaintiff's attorney for the sum of $1,953.48, the amount of the decree, interest and costs, and a deed was made by the master, whereby these notes were fully paid and extinguished.

Plaintiff filed a demurrer to this plea, and it was sustained by the court; defendant abided by his plea. A trial was thereupon had, at the return term, by the court without a jury, by consent of parties, resulting in a judgment in favor of the defendant, in bar of the action and for his costs. Plaintiff brings the case to this court by appeal, and assigns the judgment of the court below for error.

Mr. J. C. CROCKER, for the appellant.

Mr. WM. E. BECK, for the appellee.

Mr. CHIEF JUSTICE WALKER delivered the opinion of the Court:

This was an action of assumpsit brought by Mines against Moore, on four promissory notes, amounting in the aggregate to $1,039. The plea of the general issue was filed, and also a special plea, to which a demurrer was sustained. A trial was had by the court on the general issue, a jury having been waived, by agreement of the parties. The court found the issues for the defendant, and rendered a judgment in his favor for costs.

On the trial, plaintiff in error introduced in evidence the notes sued on, and rested his case. Defendant in error then introduced the record and decree, in a cause in chancery, in the La Salle Circuit Court, rendered in 1861. It appears from that record, that plaintiff had filed a bill in that court to foreclose a mortgage on certain real estate, given to secure fourteen promissory notes; ten of which had then matured, and the other four were not due; and the latter appear to be the notes sued on in this case. In that case, the court decreed a foreclosure and sale of the property to satisfy the notes then due. The decree also finds, that the four notes not then due

amount to $1,039, and declares, that the decree shall be a lien on the mortgaged premises for the sum thus found not to be due; and orders the premises, in case of default in payment of the sum then due, to be sold, subject to the lien decreed to secure the payment of these notes. It appears the money was not paid, as directed by the decree, and the premises were sold by the master, and bid off by appellant, or his attorney, for a sum sufficient to satisfy the amount found to be due, and ordered to be paid by the decree, as well as the costs of the proceeding. The lands were not redeemed, and a deed was made by the master to the purchaser, and appellant thus became the owner under the sale.

On one side it is insisted that the sale was a satisfaction of the entire indebtedness, as well that which was due, as that which had still to mature. By the other it is contended that the foreclosure and sale was only a satisfaction of the portion found by the decree.

Had the decree been in the usual form the latter position would be undeniably correct. When the property was bought in by the creditor under this decree a very different question is presented. The portion of the debt not then due was found, declared to be a lien, and the premises to be sold subject to that lien. The sale was so made and the property bid off subject to that lien. In the case of *Weiner* v. *Heintz*, 17 Ill. 259, which was a case where the material facts were similar to those in the case at bar, it was said by the court, that, although the mortgagor was not entitled to redeem after twelve months had expired, from the sale, he was entitled to relief against the collection of the note not due when the decree was rendered. The court also held, that, when the land was sold to pay the note which had matured, subject to the incumbrance of the mortgage, to the extent of the sum not due, the purchaser took the land subject to the incumbrance, and thereby became a mortgagor to the extent of the note, and the land remained subject to its payment, whoever might become the purchaser of the note, or the owner of the fee, and equity would enforce payment out of the land. "The purchaser is presumed to

have bought the land at its value less the unpaid note, and equity will not permit him to hold the land, and collect the note of Weiner. Besides, the note is paid by operation of law." The court further say: "Heintz owned the mortgage debt, and got the fee of the land by his deed, under the decree, thereby becoming, substantially, mortgagor and mortgagee. The mortgage, and with it the debt, therefore merged in the fee, and could no longer exist. Where two titles or interests in land become united in the same person, in the same right, and at the same time, as that of mortgagor and mortgagee, the lesser will merge in the greater estate and become extinct."

It is true, that case was a bill to redeem, upon the ground that the last note was not paid, but the court held it was, and reversed the decree of dismissal, that the mortgagor might obtain an injunction and surrender of the note. In principle, no distinction is perceived, whether the bill be filed to foreclose or to redeem, or the suit be on the notes. That case is in point and fully disposes of this case.

Nor can it be objected that the defense cannot be made at law. When the purchase was made, the bidder, in view of the terms of the decree, would first ascertain the sum he would have to pay on these notes, and then determine how much the land was worth above that sum. Appellant, being purchaser in this case, would of course determine how much he could give for the premises after satisfying the notes, and he no doubt bid with that view, and thus became the purchaser, and satisfied the notes. And in an action of assumpsit, almost any defense, showing the satisfaction or discharge of the debt, may be shown under the general issue. And we think this defense might clearly be relied on in this case. The judgment of the court below is therefore affirmed.

Decree affirmed.

THE PEOPLE OF THE STATE OF ILLINOIS *ex rel.* ORRIN MILLER *v.* RUFUS J HARVEY.

THE SAME *ex rel.* FRANCIS BURNAP *v.* ORRIN MILLER.

1. ATTORNEYS AT LAW — *requirements as to their conduct.* When a clear case is made out against an attorney at law, of malpractice, or of conduct unbecoming an attorney and a gentleman, the court will visit upon him the heaviest punishment they can inflict. But the case must be clear, and free from doubt, not only as to the act charged, but as to the motive.

2. Members of the legal profession cannot be too circumspect in their conduct, nor can they claim immunity for acts which, though free from moral stain, yet sully their professional honor.

RULES were entered in this court against Rufus J. Harvey and Orrin Miller, attorneys at law, to show cause why their names should not be stricken from the roll of attorneys. The facts in relation to the application are presented in the opinion of the court.

Mr. D. P. JONES, State's attorney, for the relators.

PER CURIAM: On the eighth day of May, 1863, it being the April Term of this court, on the affidavit of Orrin Miller, a rule was entered against Rufus J. Harvey, an attorney of this court, requiring him to show cause why his name should not be stricken from the roll of attorneys, for the reasons stated in the affidavit. At the same term of this court Francis Burnap moved, on his affidavit, for a like rule against Miller. Returns were made to both rules, consisting of various affidavits, presenting much contrariety of testimony. The charges against each of these attorneys were malpractice. That against Harvey consisting in abstracting from the court-room, in the progress of a cause in which he was the attorney, a certain instruction which the court had refused to give the

jury on his application, and afterward denying that he had taken it. That against Miller was for abstracting a deposition from the files of the court, which Burnap had caused to be taken on his behalf in a case in the Circuit Court of Winnebago county, in the suit of Cook for the use of Miller, against him, Burnap. Harvey was the law partner of Burnap at this time. The charges are denied on oath, and no sufficient evidence *aliunde* is produced to prove them. There is, however, enough shown to satisfy us that neither of the parties charged has conducted himself with that scrupulous regard to propriety in his profession, its honorable nature requires of all engaged in it. They appear to be, though practicing at the same bar, at enmity with each other, and which has become implacable, and each seeks to deprive the other of the privileges attached to his enrollment as a member of the bar of this court. When a clear case is made out against an attorney of this court of malpractice, or of conduct unbecoming an attorney and a gentleman, we will not be slow to visit upon him the heaviest punishment we can inflict. But the case must be clear, and free from doubt, not only as to the act charged, but as to the motive. We are not satisfied in the case of Harvey, that his withdrawal of the refused instruction was from a bad motive, as we cannot see how he or his client could profit by it; nor can we see why Miller should withdraw and conceal the deposition in Cook's case for his use, since, on inspection of the deposition, a copy of which is among the papers, it had no great tendency to injure the plaintiff's claim, or defeat a recovery by him.

We shall discharge the rule in each of these cases, with the remark, if these members of the bar are again charged with malpractice, or professional misconduct of any character, and the charge is established, they need not expect to escape punishment. Members of our profession cannot be too circumspect in their conduct, nor can they claim immunity for acts, which, though free from moral stain, yet sully their professional honor.

The rules will be discharged on payment of costs.

Rules discharged.

DANIEL L. REEDER *et al.*
v.
ERASTUS S. PURDY AND WIFE.

SAME
v.
ERASTUS S. PURDY.

1. TRESPASS — *when it will lie — right of the owner in fee of land, who is entitled to possession, to enter by force.* The owner of real estate has a right to enter upon and enjoy his own property, if he can do so without a forcible disturbance of the possession of another.

2. But, though the owner in fee be wrongfully kept out of possession, he cannot, in this State, be permitted to enter against the will of the occupant. The common law right to enter, and to use all necessary force to obtain possession from him who may wrongfully withhold it, has been taken away by our statute of forcible entry and detainer.

3. That statute, not in terms, but by necessary construction, forbids a forcible entry, even by the owner, upon the actual possession of another.

4. Nor is the remedy afforded by the statute — an action for the recovery of the possession — the only remedy given to the party upon whom a forcible entry may be made by the owner. Under the statute, such an entry is unlawful; and being unlawful it is a trespass, and an action for the trespass will lie.

5. Such an entry being forbidden by the statute, which has taken away the common law right of forcible entry by the owner, it must be held illegal in all forms of action.

6. And any entry is forcible, within the meaning of this law, that is made against the will of the occupant.

7. A landlord, however, has the right to enter upon the possession of his tenant for certain purposes, as to demand rent, or to make necessary repairs, and the action of trespass *quare clausum* by the tenant against the landlord, even for the recovery of nominal damages, is confined to those cases where an action of forcible entry and detainer will lie under our statute.

8. MEASURE OF DAMAGES — *in trespass against the owner of land for a forcible entry thereon.* Although the occupant of land may maintain trespass against the owner for a forcible entry, yet he can only recover such damages as have directly accrued to him from injuries done to his person or property, through the wrongful invasion of his possession, and such exemplary damages as the jury may think proper to give. He cannot recover for any damages to the real estate.

9. And, for the mere entry of the landlord upon the possession of his tenant, holding over, unaccompanied by any trespass upon either the person or the personal property of the occupant, only nominal damages can be recovered, because the plaintiff has no legal right to the possession.

10. OF EXEMPLARY DAMAGES — *where there are two suits, in different rights, for the same trespass.* Where there are two actions of trespass brought for injuries to the person of a *feme covert*, one in the names of the husband and wife jointly, and the other in the name of the husband alone, and the circumstances and acts out of which the question of punitive damages arises, are the same in both cases, it being one and the same transaction, if on the trial of the former suit those circumstances of aggravation were submitted to the jury, while, in strict law, exemplary damages are recoverable in both cases, because the suits are in different rights, yet, on the trial of the second case, the jury, in considering the same circumstances of aggravation with the view to punitive damages, should also consider that they had been submitted on the former trial.

11. MITIGATION OF DAMAGES — *in trespass against the owner of land for a forcible entry.* In trespass, by the occupant of land against the owner, for a forcible entry on the premises, the fact that the defendant was the owner, and entitled to the possession, cannot be regarded in mitigation of the *actual* damage suffered by the plaintiff, but may be considered in mitigation of exemplary damages.

12. EVIDENCE — *in trespass by husband and wife for injuries to the latter.* In an action of trespass by husband and wife for personal injuries to the latter, evidence of injury to the property of the husband at the same time, is inadmissible, except so far as may be necessary to explain the assault on the person of the wife.

13. INSTRUCTIONS. Although an instruction may, in itself, be strictly correct, yet, if, in view of the circumstances surrounding the case, it would be likely to mislead the jury, its effect in that regard should be guarded against by other instructions

APPEALS from the Circuit Court of Kane county; the Hon. ISAAC G. WILSON, Judge, presiding.

The opinion of the court contains a sufficient statement of the cases.

Mr. S. W. BROWN, for the appellants, upon the principal question arising under the assignment of errors, contended that a person who is the owner of premises, and lawfully entitled to the possession of the same, may enter upon the person in possession, and remove him and his goods, with such gentle force

as may be necessary for the purpose. Citing 4 Kent's Com. (3d ed.) marg. p. 118; *Taylor* v. *Cole*, 3 Term, 292; *S.C.*, 1 H. Black. 555; *Taunton* v. *Costar*, 7 Term, 431; *Overdeer* v. *Lewis*, 1 Watts & Sergeant's; *Harvey* v. *Brydges*, 14 M. & W. 437 (Exchequer); *Walton* v. *File*, 1 Dev. & Bat. 567; *Meriton* v. *Combs*, 67 E. C. L. 788; 1 Hawk. 274; *Jackson* v. *Stansbury*, 9 Wend. 201; *Wilde* v. *Cantellon*, 1 Johns. Cases, 123; *McDougall* v. *Sitcher & Weeks*, 1 Johns. 44; *Ives* v. *Ives*, 13 id. 235; Blackstone Com. marg. p. 214; and that a party is not liable in an action of trespass for exercising that right.

Mr. B. F. PARKS, on the same side.

Messrs. WHEATON & SEARLES, for the appellees, insisted the law to be otherwise, that a person who is the owner of premises, even though he has the right of possession, has no right to enter upon another who is in the quiet and peaceful possession of such premises, and put him out by force, thereby taking the law into his own hands, in violation of the statute of forcible entry and detainer; and, if he does so, trespass will lie. Citing *Justin* v. *Cowdry et al.*, 23 Verm. 631; *Newton and wife* v. *Harland et al.*, 1 Man. & Gr. 644 (39 Eng. Com. Law, 581); *Hilary* v. *Gray*, 6 Carr. & Payne (25 Eng. Com. Law, 368); *Faulkner* v. *Alderson*, 1 Va. (Gilman) 221; 28 Ill. 387; 32 id. 290.

Mr. JUSTICE LAWRENCE delivered the opinion of the Court:

These two cases, although separately tried, depend upon the same facts and present similar questions, and it will be more convenient to dispose of both in one opinion.

In October, 1862, Reeder, claiming to be the owner of a house occupied by Purdy and his wife, entered it, accompanied by the other appellants, for the purpose of taking possession. Purdy was not at home. Mrs. Purdy refused to leave, whereupon Reeder commenced putting the furniture out of doors. She resisted this, and he seized her and held her by the wrists, while Baker, one of the co-defendants, continued to remove the

furniture. This was somewhat damaged, and some slight injury was done to the wrists of Mrs. Purdy by the force applied in holding her. The appellants finally abandoned their attempt to take possession and withdrew.

Two actions of trespass have been brought, one by Purdy alone, and one by Purdy and wife jointly. The declaration in the suit brought by Purdy contains three counts, the first being for the assault upon his wife, the second for the injury to the personal property, and the third for breaking his close and carrying off his furniture. The declaration in the suit of Purdy and wife contains two counts, both of which are for the assault upon the wife. There were pleas of not guilty, and an agreement that all defenses might be made under them. A verdict for the plaintiff of $450 in one case, and $500 in the other was returned by the jury, and a judgment was rendered upon it, from which the defendants appealed.

It is insisted by the appellants that Reeder, being the owner of the premises, had a right to enter, and to use such force as might be necessary to overcome any resistance, and that he cannot be made liable as a trespasser, although it is admitted he might have been compelled to restore to Purdy, through an action of forcible entry and detainer, the possession thus forcibly taken. The court below instructed otherwise, and this ruling of the court is assigned for error.

We should not consider the question one of much difficulty, were it not for the contradictory decisions in regard to it, and we must admit that the current of authorities, up to a comparatively recent period, is adverse to what we are convinced must be declared to be the law of this State. But the rule can not be said to have been firmly or authoritatively settled even in England, for ERSKINE, J., observes in *Newton* v. *Harland*, 1 Man. & Gr. 644 (39 E. C. L. 581), that "it was remarkable a question so likely to arise, should never have been directly brought before any court *in banc* until that case." This was in the year 1840, and all the cases prior to that time, in which it was held that the owner in fee could enter with a strong hand, without rendering himself liable to an action of trespass,

seem to have been merely at *nisi prius*, like the oft-quoted case of *Taunton* v. *Costar*, 7 T. R. 431. Still this was the general language of the books. But the point had never received such an adjudication as to pass into established and incontrovertible law, and a contrary rule was held by Lord LYNDHURST in *Hilary* v. *Gay*, 6 C. & P. 284 (25 E. C. L. 398). But in *Newton* v. *Harland*, already referred to, the Court of Common Pleas gave the question mature consideration, and finally held, after two arguments, that a landlord who should enter and expel by force a tenant holding over after expiration of his term, would render himself liable to an action for damages. But the later case of *Meriton* v. *Combs*, 67 E. C. L. 788, seems to recognize the opposite rule, and we must, therefore, regard a question which one would expect to find among the most firmly settled in the law as still among the controverted points of Westminster hall.

In our own country there is the same conflict of authorities. In New York it has been uniformly held, that, under a plea of *liberum tenementum*, the landlord, who has only used such force as might be necessary to expel a tenant holding over would be protected against an action for damages. *Hyatt* v. *Wood*, 4 Johns. 150, and *Ives* v. *Ives*, 13 id. 235. In *Jackson* v. *Farmer*, 9 Wend. 201, the court, while recognizing the rule as law, characterize it as "harsh, and tending to the public disturbance and individual conflict." KENT, in his Commentaries, states the principle in the same manner, but in the later editions of the work, reference is made by the learned editor, in a note, to the case of *Newton* v. *Harland*, above quoted, as laying down "the most sound and salutary doctrine." In *Tribble* v. *Trance*, 7 J. J. Marsh. 598, the court held, that, notwithstanding the Kentucky statute of forcible entry and detainer, the owner of the fee, having a right of entry, may use such force as may be necessary to overcome resistance, and protect himself against an action of trespass, under a plea of *liberum tenementum*. On the other hand, the Supreme Court of Massachusetts has held, that, although trespass *quare clausum* may not lie, yet, in an action of trespass for assault and bat-

tery, the landlord must respond in damages, if he has used force to dispossess a tenant holding over. The court say "he may make use of force to defend his lawful possession, but being dispossessed, he has no right to recover possession by force, and by a breach of the peace." *Sampson* v. *Henry*, 11 Pick. 379. See also *Ellis* v. *Page*, 1 id. 43; *Sampson* v. *Henry*, 13 id. 36; *Meader* v. *Stone*, 7 Metc. 147, and *Moore* v. *Boyd*, 24 Maine, 242. But by far the most able and exhaustive discussion that this question has received, was in the case of *Dustin* v. *Cowdry*, 23 Vt. 635, in which Mr. JUSTICE REDFIELD, delivering the opinion of the court, shows, by a train of reasoning which compels conviction, that, in cases of this character, the action of trespass will lie. And he also says: "whether the action should be trespass *quare clausum*, or assault and battery, is immaterial, as under this declaration, if the defendant had pleaded soil and freehold, as some of the cases hold, the plaintiff might have new assigned the trespass to the person of the plaintiff, and a jury, under proper instructions, would have given much the same damages, and upon the same evidence, in whatever form the declaration is drawn." The case of *Massey* v. *Scott*, 32 Vt., cited as inconsistent with this case, does not in fact conflict with it. It only holds, that trespass *quare clausum* will not lie in behalf of a tenant for an entry not within the statute of forcible entry and detainer.

In this conflict of authorities we must adopt that rule which, in our judgment, rests upon the sounder reason. We cannot hesitate, and were it not for the adverse decision of courts, which all lawyers regard with profound respect, we should not deem the question obscured by a reasonable doubt. The reasoning upon which we rest our conclusion lies in the briefest compass, and is hardly more than a simple syllogism. The statute of forcible entry and detainer, not in terms, but by necessary construction, forbids a forcible entry, even by the owner, upon the actual possession of another. Such entry is, therefore, unlawful. If unlawful it is a trespass, and an action for the trespass must necessarily lie. It is urged that the only remedy is that given by the statute,— an action for the recovery of the posses-

sion. But the law could not expel him who has entered if his entry was a lawful entry, and if not lawful all the consequences of an unlawful act must attach to it. The law is not so far beneath the dignity of a scientific and harmonious system that its tribunals must hold in one form of action a particular act to be so illegal that immediate restitution must be made at the costs of the transgressor, and in another form of action that the same act was perfectly legal, and only the exercise of an acknowledged right.

It is urged that the owner of real estate has a right to enter upon and enjoy his own property. Undoubtedly, if he can do so without a forcible disturbance of the possession of another; but the peace and good order of society require that he shall not be permitted to enter against the will of the occupant, and hence the common law right to use all necessary force has been taken away. He may be wrongfully kept out of possession, but he cannot be permitted to take the law into his own hands and redress his own wrongs. The remedy must be sought through those peaceful agencies which a civilized community provides for all its members. A contrary rule befits only that condition of society in which the principle is recognized that

> He may take who has the power,
> And he may keep who can.

If the right to use force be once admitted, it must necessarily follow as a logical sequence, that so much may be used as shall be necessary to overcome resistance, even to the taking of human life. The wisdom of confining men to peaceful remedies for the recovery of a lost possession is well expressed by Blackstone, book 4, p. 148: "An eighth offense," he says, "against the public peace, is that of a forcible entry and detainer, which is committed by violently taking or keeping possession of lands and tenements with menaces, force and arms, and without the authority of law. This was formerly allowable to every person disseized or turned out of possession, unless his entry was taken away or barred by his own neglect or other circumstances, which were explained more at length in a

former book. But this being found very prejudicial to the public peace, it was thought necessary, by several statutes, to restrain all persons from the use of such violent methods, even of doing themselves justice, and much more if they have no justice in their claim. So that the entry now allowed by law is a peaceable one; that forbidden, is such as is carried on with force, violence and unusual weapons." In this State, it has been constantly held that any entry is forcible, within the meaning of this law, that is made against the will of the occupant.

We state, then, after a full examination of this subject, that in our opinion the statutes of forcible entry and detainer should be construed as taking away the previous common law right of forcible entry by the owner, and that such entry must be therefore held illegal in all forms of action.

There are, however, some minor points upon which both of these judgments must be reversed. In the suit brought by the husband alone, the court refused to instruct the jury that the plaintiff could not recover for any damages to the real estate. This instruction should have been given. Although the occupant may maintain trespass against the owner for a forcible entry, yet he can only recover such damages as have directly accrued to him from injuries done to his person or property, through the wrongful invasion of his possession, and such exemplary damages as the jury may think proper to give. But a person having no title to the premises clearly cannot recover damages for any injury done to them by him who has title. It would be a startling doctrine to hold that the wrongful occupier of land could make the owner thereof respond to him in damages for timber that the owner might cut upon the premises. This point was decided by this court in *Hoots* v. *Graham*, 23 Ill. 82, to the decision in which case we fully adhere.

In the case brought by Purdy, the court, after telling the jury they could give exemplary damages, gave the following instruction for the plaintiff:

"In estimating the amount of exemplary damages, if they find any, the jury have a right to take into consideration the

unlawful purpose for which defendants were together, if any is proven; the force and violence with which they attempted to carry out that unlawful purpose, the wantonness of the attack upon the premises, family and property of the plaintiff, if the proof show any such, and the willfulness of the defendants in doing the acts, if the evidence show any such."

The suit brought by Purdy and wife had been already tried, and in that suit the jury had been instructed they might give exemplary damages, and they had undoubtedly given them. The record of that suit was in evidence on the trial of the second suit. The court refused the instructions asked by the defendant, and properly, in the form they were drawn, except as to the one already considered. Neither is there any thing in itself wrong in the foregoing instruction, and yet it is of such a character, that the court, in order to secure a fair consideration of the case by the jury, and having refused all the instructions drawn by the defendant, should, of its own motion, have modified the somewhat augmentative effect of this one by telling the jury that they were also, in estimating the exemplary damages, to consider the fact that the jury in the other suit had been authorized to give exemplary damages, and to take into consideration on that question the amount of the verdict in the other case. We must hold, that, in strict law, exemplary damages are recoverable in both cases, because the suits are brought in different rights. In the suit by Purdy and wife, if Purdy fails to collect the judgment in his life-time, on his death it would go to the wife surviving him, and not to his personal representatives. But, apart from that contingency, the fruits of both judgments go into his pocket. It would, therefore, be highly proper that the jury, in considering the question of punitive damages, should have taken into consideration not only the circumstances of aggravation enumerated in the instruction, but also the fact, that these same circumstances, and the same transaction, had been submitted to another jury, in a suit prosecuted in reality for the benefit of the same plaintiff, and, so far as related to the single question

of the amount of vindictive damages, the amount of the former verdict would have been a proper subject of regard.

The jury were also told in the third instruction for the plaintiff, at the suit of Purdy, that the fact, that the defendant was the owner and entitled to the possession of the premises occupied by the plaintiff could not be regarded by the jury in mitigation of any actual damages caused to the plaintiff by the assault and force. This is undoubtedly true so far as *actual* damage was concerned, but it would not be true in regard to exemplary damages, unless we are prepared to say, that it is as inexcusable for a person to attempt to recover his own property by force as it would be to attempt to rob another of property to which the assailant had no claim. This would not be contended, and while, therefore, the third instruction was strict law, yet, in connection with the other instructions in regard to exemplary damages, and unexplained by any thing in behalf of the defendant, we think the jury would be likely to be misled. This is more especially true in regard to the suit of Purdy and wife, for in the third instruction for the plaintiff in that suit, the jury are told the same thing as to damages, but the word *actual* is left out. The instructions should have been so modified, that the jury would clearly understand on the question of vindictive damages, they would have a right to regard the fact, that the plaintiff was the owner and entitled to the possession of the property, a fact proven in the case.

This last objection applies equally to the instructions in both cases. The others above considered apply only to the suit of Purdy. There is, however, another fatal objection to the judgment in favor of Purdy and wife. Both counts in that declaration are for injuries done to the person of the wife. A suit could not have been maintained in their joint names for injuries done to the property of Purdy. Yet the court, against the objections of defendants, allowed the plaintiff to give in evidence the injury done to the furniture. This was wholly inadmissible, except so far as might be necessary to explain the assault on the person of the wife, and, in a case of this character, notwithstanding the instruction given for the

defendants, this evidence would have a strong tendency to improperly prejudice them in the minds of the jury.

In order to prevent misapprehension we would say, in conclusion, that, for a mere entry by the landlord upon the possession of his tenant holding over, unaccompanied by any trespass upon either the person or personal property of the occupant, only nominal damages could be recovered, because the plaintiff has no legal right to the possession. The *gravamen* of actions of this character is the trespass to the person, and goods and chattels of the tenant. If, for example, a tenant of a house should remove his family and furniture at the end of the term, but refuse, without reason, to surrender the key to his landlord, and still claim the possession, the landlord might, nevertheless, force the door of his vacant house, without incurring a liability to more than nominal damages. He would be liable to an action of forcible entry and detainer, and to an action of trespass, in which nominal damages would be recovered, because the entry would be unlawful, but to nothing more. But for an entry, while the house is still occupied by the family and furniture of the tenant, and for forcibly thrusting them into the street, or attempting to do so, he would be liable to such damages as a jury might deem the case to require. A landlord, however, would have the right to enter upon the possession of his tenant for certain purposes, as to demand rent or to make necessary repairs, and we must be understood as confining the action of trespass *quare clausum* by the tenant against the land lord, even for the recovery of nominal damages, to those cases, where an action of forcible entry and detainer would lie under our statute. By the application of this principle much of the apparent conflict in the authorities can be explained.

The judgment in both of these cases must be reversed and the case remanded.

Reversed and remanded.

WILLIAM BAILEY
v.
WILLIAM B. WEST.

TRUST ESTATE — *dower.* Where a person holds lands in trust for another, the wife of the trustee is not entitled to dower in such premises. But until the establishment of the trust the widow is *prima facie* entitled to dower, and in a suit to establish the trust, the widow of the trustee and her husband by a second marriage, are necessary parties. Her separate deed after her second marriage and during coverture could not operate to relinquish her dower in the premises. Nor could she convey her right of dower before it was assigned, to any person but the owner of the fee. The husband of the widow by the second marriage, if she had dower in the premises, was entitled to the rents and profits, and should have been made a party that he might contest the establishment of the trust, and could not be barred from asserting the right except he was a party to the decree.

WRIT OF ERROR to the Circuit Court of De Kalb county; the Hon. ISAAC G. WILSON, Judge, presiding.

This was a bill in equity, filed by Wm. B. West and Hira Barrett, to the September Term, 1859, of the De Kalb Circuit Court, against Lydia Low, John Bailey, Wm. Bailey, Frederick W. Bailey and George Bailey.

The bill alleges, that Thomas R. Green, prior to the 21st of February, 1849, had purchased and was the owner of the W. ½ S. W. qr. sec. 27, T. 40, N. R. 5 E. 3 Prin. Mer. That he on that date conveyed the same to Wm. Bailey, Jr., for $100. That Wm. Bailey, Jr., at the same time agreed with his father, Wm. Bailey, Sr., to convey to him on the payment of the $100 and interest. That, in August following, Wm. Bailey, Jr., died, leaving Lydia, his widow, who, in February, 1854, executed a deed of conveyance for the land to Wm. Bailey, Sr. In the following month of June, Wm. Bailey, Sr., and wife, conveyed the lands to Frederick W. Bailey. Afterward, in October, 1855, the elder Bailey also died.

Afterward, in October, 1856, Frederick executed to Wm. J. Hunt a trust-deed, to secure the payment of $109. Afterward,

in October, 1857, he executed another deed of trust on the land to Maybourn, to secure the payment of $642, due to Barrett. That Lydia Bailey, before the commencement of the suit, married William Low. That Frederick conveyed the land in May, 1858, to George Bailey, and in December, 1858, Hunt sold the land on the trust-deed and West became the purchaser.

The bill prays that defendants be decreed to pay complainants the amount paid by West at Hunt's sale, and retain the land, or that the land be conveyed to complainants.

A guardian *ad litem* was appointed for the minor defendants, who answered, and requires proof of the allegations of the bill. Lydia Low answered, denying the allegations of the bill, but exceptions were sustained to it, and the bill was taken as confessed as to her and the other adult defendants, and referred to a master to take and report proofs. A hearing was had and a decree rendered, granting the relief sought, and that West stand seized of the premises. To reverse which, the record is brought to this court, and various errors are assigned.

Mr. RICHARD L. DIVINE, for the plaintiff in error.

Mr. J. H. MAYBORNE, for the defendants in error.

Mr. CHIEF JUSTICE WALKER delivered the opinion of the Court:

It is insisted, that Green conveyed the land in controversy to William Bailey, Jr., to secure the purchase-money loaned by him to his father, for the purpose of making payment to Green, of whom he had purchased. The title in fee having vested in William Bailey, Jr., his wife, *prima facie*, became entitled to dower in the premises, and, at his death, her inchoate right became a vested interest, which she could enforce at law, but which might be defeated in equity by showing that her husband, in his life-time, only held the land in trust for his father. When the latter, or his heirs, paid the money to her, to secure the payment of which the land had been conveyed to her husband, her receipt of the money and conveyance to

William Bailey, Sr., if made before her last marriage, divested her right of dower in the premises, if he was the owner in equity.

Until, however, the trust was established, she would be entitled to dower in the land. When she married Low, he became entitled to an interest in her dower in the land during their joint lives. If she still held dower, he became, by the marriage, vested with the right to receive rents and profits of her dower after it should be assigned to her. And, for the purpose of procuring an allotment, he could institute the necessary legal proceedings. This, then, vested him with such an interest, and rendered him a necessary party to this bill. He had a right to be heard before his apparent right was divested.

Her separate deed, after her marriage with Low, did not transfer her title to William Bailey, Sr. Of this conveyance there seems to be no evidence in the record, but the court below finds, in the decree, that Lydia Low had so conveyed the premises. After her marriage, a deed from her without her husband's uniting in its execution could convey no title. It is true, that, in another part of the decree, there is a recital that Lydia Bailey had quitclaimed the land to William Bailey, Sr. Which of these recitals is true, we are unable to determine in the absence of all the evidence. If the latter is true, then the release of her interest in the land would be good, if the elder Bailey was the equitable owner in fee; otherwise it would not affect her interest, as she could not convey her dower before assignment. *Blain* v. *Harrison*, 11 Ill. 384. This, therefore, made Low a necessary party, as he had the right to contest the right of William Bailey, Sr., to the land. If it appeared that William, Jr., only held the land as a security for money advanced to William, Sr., on its payment to him, or to his legal representative after his death, the object of the trust then ceased, and William Bailey, Sr., or his heirs or grantees, would, in equity, be entitled to a reconveyance. On the death of William, Jr., the fee simple held by him vested in his heirs, and the conveyance by his widow, whether before or after her marriage with Low, did not affect their title.

For the want of necessary parties, the decree of the court below is reversed and the cause remanded, with leave to amend, by making new parties.

Decree reversed.

GEORGE MILLER *et al.*

v.

WILLIAM H. BRUNS *et al.*

1. ADMISSIONS -- EVIDENCE. The rule among merchants, dealing with each other, seems to be, if an account rendered is not objected to in a reasonable time after it is presented, the account is regarded as allowed.

2. In a case of that character the court below refused to instruct the jury for the plaintiff, that the defendant having retained the account rendered to him by the plaintiff for a certain time without objection to the correctness thereof, amounted to an admission of its correctness, but instructed the jury that such fact was a circumstance to be taken into account, in determining whether or not the defendant had admitted the correctness of the account. This submitted the question of admission fairly to the jury.

APPEAL from the Circuit Court of Cook county; the Hon. ERASTUS S. WILLIAMS, Judge, presiding.

This was an action of assumpsit brought in the court below by William H. Bruns and Charles Wachsmuth against George Miller and Robert Stafford, to recover the price of a quantity of high wines alleged to have been purchased by the plaintiffs for the defendants. A trial resulted in a judgment for the plaintiffs, from which the defendant took this appeal.

The only question presented arises upon an instruction given by the court, which will be found in the opinion.

Mr. E. W. EVANS and Mr. M. D. BROWN, for the appellants.

Messrs. STORRS & MARSH, for the appellees.

Mr. JUSTICE BREESE delivered the opinion of the Court:

This was an action of assumpsit on the common counts brought in the Circuit Court of Cook county, by William H.

Bruns and others against George Miller and others, and tried by a jury on the plea of *non-assumpsit.* There was a verdict for the plaintiffs and a motion by defendants for a new trial, which was overruled and exception taken. Judgment was rendered on the verdict, to reverse which the record is brought here by appeal.

The principal question made is the instruction on behalf of the plaintiffs.

As originally asked, that instruction was as follows: "If the jury believe, from the evidence, that the plaintiff, on or about the 12th or 15th of November, 1864, sent to the defendants an account, showing the purchase of the high wines by the plaintiffs for the defendants; the amount paid for the same; the interest on the amount so paid; the credits to the defendants for the $500 paid by them; the sum for which the high wines was sold, and the interest on these amounts, showing a balance in favor of the plaintiffs of $915.14; and the defendants held said account, without making any objection to the correctness thereof, then this amounts to an admission by the defendants of the correctness of the account."

This instruction the court refused to give, but modified it, and gave it as follows:

"If the jury believe, from the evidence in the case, that the plaintiffs, on or about the 12th or 15th days of November, 1864, sent to the defendants an account, showing the purchase of the high wines by the plaintiffs for the defendants; the amount paid for the same; the interest on the amount so paid; the credits to the defendants for the $500 paid by them; the sum for which the high wines were sold, and the interest on these amounts, showing a balance in favor of the plaintiffs of $915.14; and the defendants held said account, and retained possession of the same from the date of such delivery up to the time when this suit was commenced, without making objections to the correctness of such account, this is a circumstance to be taken into account by the jury in determining whether or not the defendants have admitted the correctness of said account"

We are satisfied the instruction, thus modified by the court, fairly submitted to the jury the question whether the defendants had admitted the correctness of the account, and we see no reason for disturbing the verdict.

The rule among merchants is, as we understand it, if an account rendered is not objected to in a reasonable time after it is presented, the account is regarded as allowed. 1 Greenl. Ev. 197. Here the parties were merchants, mutually dealing with each other.

Perceiving no error in the record, the judgment is affirmed.

Judgment affirmed.

FREDERICK SCHMIDT *et al.*

v.

THE PEORIA MARINE AND FIRE INSURANCE COMPANY.

1. INSURANCE — *whether words constitute a warranty as to future use of the property, or a mere affirmation of its present condition.* A policy of insurance issued upon a tannery contained these words: "No fire in or about said building, except one under kettle, securely imbedded in masonry (used for heating water), and made perfectly secure against accidents." These words do not constitute a warranty on the part of the assured that there shall be no fire in the building during the continuance of the policy except the one under the kettle, but merely affirm what the condition of the property was at the time the policy issued.

2. So the use of other fires in the building during the term of insurance, will not, under such a clause, avoid the policy.

3. SAME — *effect of an express provision against an increase of risk subsequent to the issuing of the policy.* Where it is provided in a policy of insurance, that, "if, after insurance is effected, the risk be increased by any means, or occupied in any way so as to render the risk more hazardous than at the time of insuring, such insurance shall be void and of none effect," these words are construed to mean that the policy shall become inoperative only while the increased risk shall be in existence, and, when it terminates, the liability of the company will recommence.

4. SAME — EVIDENCE — *what is the real question in case of loss, under such a clause.* Where a loss has occurred, and the insurer invokes such a clause for his protection, alleging an increase of risk, as in the use of more fires in

the building, it is not competent to prove that the risk is increased by the increase of the number of fires in a building; but the real question is, was the risk to the particular building, at the time it was burned, greater in consequence of the presence therein of stoves, in which fires had been used at a time more or less remote from the time of the loss, and which were not in the building at the time the policy was issued, placed as the stoves were and used in the manner shown by the proof?

5. TESTIMONY OF EXPERTS—*insurance agents.* Insurance agents cannot be called as experts to prove what, in their opinion, would or would not be an increase of risk in a building, merely because they are insurance agents, unless it appears that in the course of their business they have acquired special knowledge upon that subject.

6. PAROL EVIDENCE—*to change the terms of a policy.* A policy of insurance must be taken as embodying the contract of the parties, and its terms cannot be changed by parol proof.

APPEAL from the Circuit Court of Cook county; the Hon. ERASTUS S. WILLIAMS, Judge, presiding.

This was an action of covenant brought in the court below, by Frederick Schmidt and August Binzo, against the Peoria Marine and Fire Insurance company, upon a policy of insurance.

A portion of the policy is as follows:

"*The Peoria Marine and Fire Insurance Company, Peoria, Illinois:*

"By this policy of insurance the Peoria Marine and Fire Insurance company, in consideration of forty dollars to them paid by the assured hereinafter named, the receipt whereof is hereby acknowleged, do insure Messrs. Schmidt & Company against loss or damage by fire to the amount of four thousand dollars.

"$2,500 on their stock of hides and leather, and $500 on their tools contained in their one and a half story frame building, occupied as a tannery, situate on the west bank of the Chicago river, 200 feet north of Clybourne bridge, Chicago. $250 on their bark mill, and $250 on their frame building containing the same, situate on the north side of, and attached to said tannery. $500 on the stock of bark piled in and near the

building containing bark mill. No fire in or about the above buildings, except one under kettle securely imbedded in masonry (used for heating water) and made perfectly secure against accidents. The above buildings are situate over 200 feet from any other building."

One of the questions presented is, in regard to the proper construction of the words describing what fire was used in the buildings.

The facts upon which other questions arise, will be found in the opinion of the court.

A trial resulted in a verdict and judgment for the defendant. The plaintiffs bring the case to this court by appeal.

Messrs. ROSENTHALL & HOPKINS and Mr. M. F. TULEY, for the appellants.

Messrs. SCAMMON, MCCAGG & FULLER, for the appellee.

Mr. JUSTICE LAWRENCE delivered the opinion of the Court:

This was an action brought by the appellants against the appellee, upon a policy of insurance issued upon a tannery in the city of Chicago. The policy contained these words: "No fire in or about said building, except one under kettle securely imbedded in masonry (used for heating water), and made perfectly secure against accidents." The policy was issued on the 16th September, 1864. It was proved that the building was destroyed by fire in March, 1865, and that at the time of the fire there were two stoves in the building, one up stairs and the other on the first floor. It was also proved that there had been no fire in the stove on the first floor for eight days previous to the destruction of the building. In the stove up stairs a fire had been kindled at six o'clock in the morning and extinguished at eight or half-past eight o'clock in the morning, and was not again rekindled. The fire occurred about 11 o'clock the following night.

It is contended by the appellee that the words in the policy above quoted are to be taken as a warranty, on the part of the

assured, that there shall be no fire during the continuance of the policy, except the one under the kettle, and that a breach of the so-called warranty avoids the policy. In behalf of the appellants, it is insisted that these words are, what is called by some writers upon insurance, an affirmative as distinct from a promissory warranty, and are to be construed as referring to the condition of the property at the time the policy was issued. It is a question upon which the authorities differ; but, in view of the fact, that insurance companies dictate the language of their own policies, which is therefore to be construed most strongly against themselves, and can, if they wish, insert a stipulation which in terms refers to the future use of the property, and do, by an express provision in this, as in, we presume, all policies, relieve themselves from all liability in case the risk is actually increased, we are inclined to adopt the ruling of those cases which hold that these words are to be construed in reference to the then condition of the property. *Smith* v. *Mech. Fire Ins. Co.*, 32 N. Y. 399; *O'Neil* v. *The Buffalo Ins. Co.*, 3 Comst. 122; *Catlin* v. *The Springfield Ins. Co.*, 1 Sumn. 435; *Blood* v. *Howard Fire Ins. Co.*, 12 Cush. 474; *Rafferty* v. *New Brunswick Ins. Co.*, 3 Harrison, 480. With this construction of that clause no violation of it is shown.

There is, however, another clause in the policy, which the company invokes for its protection, as follows:

"If, after insurance is effected, either by the original policy or by the renewal thereof, the risk be increased by any means, or occupied in any way so as to render the risk more hazardous than at the time of insuring, such insurance shall be void and of none effect."

This is a very material provision in the policy, and should not have been omitted from the abstract furnished by counsel for appellant. This language admits of no controversy as to its meaning, and the only question under it is, was there such increased risk in consequence of these stoves at the time of the fire? This court held, in *New Eng. Fire & Mar. Ins. Co.* v. *Wetmore*, 32 Ill. 245, that the true construction of a clause like

this was, that the policy became inoperative only while the increased risk was in existence, and when it terminated the liability of the company would recommence. The instruction asked by the defendant on this point, and given by the court, was in harmony with this ruling, but on the trial the defendant was permitted, against the objections of the plaintiffs, to call insurance agents as *experts*, and ask them the following question: "Q. From your experience and knowledge of your business as an insurance agent, and of insurance, do you think that the increase of the number of fires in a building does or does not increase the risk of fire to that building?" Neither this question, nor any of the evidence given under it, touched the true point in the case.

The point for the consideration of the jury was, not whether an increase of the number of fires in a building does or does not ordinarily increase the risk, but whether, in the case then before the court, the risk to the building at the time it was destroyed, at 11 o'clock at night, was or was not increased by the two stoves, in one of which there had been no fire for eight days, and in the other none after eight and a half o'clock of the preceding morning. Was the risk to this particular building, at the time it was burned, greater in consequence of the presence of these stoves, placed as they were, and used in the manner shown by the witnesses? This was a question of fact to be passed upon by the jury, not in reference to the opinions of insurance agents as to the general effect of an increase of fires, but in reference to the facts of this particular case. We are at a loss to perceive on what ground insurance agents could be called as experts on a matter of this kind, merely because they were insurance agents, unless it appeared, that, in the course of their business, they had acquired special knowledge upon this subject. But, if their opinions were admissible at all, the real point of the controversy was not inquired into, and the questions, as asked and answered, tended to mislead the jury.

There is also another error in this record. The appellee was permitted to prove, against the objections of the plaintiffs, that

the agent who effected the insurance for the plaintiffs verbally promised in their behalf, at the time of taking out the policy, that there should be no other fire in the building than that specified in the policy. This was obviously improper. The only instrument executed by either party in this case was the policy. That embodied their contract. It bound the assured not to do certain things, but contained no express stipulation that an additional fire should not be used. It is now sought to incorporate a verbal agreement to this effect into the contract. This cannot be done. The rights of the parties must be settled by the policy. *Higginson* v. *Doll*, 13 Mass. 96; *Alston* v. *Merchants' Ins. Co.*, 4 Hill, 329. This evidence was improper, and the instruction given for the defendant, as far as it related to this evidence, was also improper. The judgment must be reversed, and the cause remanded.

Judgment reversed.

Dennis McCarthey
v.
William Mooney.

1. Practice—*motion to continue.* A motion for a continuance for the want of a bill of particulars under the declaration, comes too late after filing a plea in bar. To be availing, the motion must be made at the earliest practicable moment. If not sufficient, the court will rule the plaintiff to file a full and sufficient bill of particulars on a motion by the defendant.

2. Verdict—*weight of evidence.* Before a plaintiff is authorized to recover a verdict, the evidence must preponderate in his favor. If equally balanced or the testimony preponderates in favor of the defendant, the plaintiff fails to establish a right of recovery. And a verdict unsustained by the proof, should be set aside and a new trial granted.

Appeal from the Recorder's Court of the city of Chicago; the Hon. Evert Van Buren, Judge, presiding.

This was an action of assumpsit brought by William Mooney, in the Recorder's Court of the city of Chicago, to the February

Term, 1866, against Dennis McCarthey. The declaration contained the common counts. Service was had, and defendant filed the plea of the general issue.

A motion was subsequently entered for a continuance for want of a sufficient bill of particulars filed with the declaration. This motion was overruled and an exception taken. A trial was had at the return term, by the court and a jury, which resulted in a verdict in favor of plaintiff for the sum of $230. Defendant thereupon entered a motion for a new trial, which was overruled by the court and a judgment was rendered on the verdict.

Defendant prosecutes an appeal to this court, and assigns various errors, among which is the refusal to grant a continuance, and in overruling the motion for a new trial.

Mr. O. B. Sansum, for the appellant.

Messrs. Haines & Story, for the appellee.

Mr. Chief Justice Walker delivered the opinion of the Court:

This was an action of assumpsit brought by William Mooney, in the Recorder's Court of Chicago, against Dennis McCarthey The declaration contained the common counts for work and labor; for goods, wares and merchandise; the money count; and the count on an account stated. Defendant filed the general issue. A trial was subsequently had by the court and a jury, resulting in a verdict in favor of plaintiff for the sum of $230. A motion for a new trial was overruled by the court, and judgment was rendered on the verdict. Defendant has removed the case to this court by appeal, and asks a reversal on several grounds.

Defendant entered a motion for a continuance for the want of a bill of particulars. Such dilatory motions must, under the rules of practice, be made at the earliest practicable period. Such a motion, therefore, comes too late after a plea in bar to the action. This, like a motion to dismiss for want of security

for costs, pleas to the jurisdiction and in abatement, does not go to the merits, and is not favored by the courts. If such a motion may be entertained after a plea in bar, it may be at any time before the trial. And such a practice would be attended with great delay, and in no wise tend to the promotion of justice. If, however, the account is not sufficiently specific, the defendant, under the rules of practice, may apply to the court, who will grant a rule to file a sufficient bill of particulars so as to apprise the defendant of what he is to answer. This may be done at any time before the trial commences, but that would form no ground of continuance, unless it produced an actual surprise on the defendant.

Next, was the verdict against the weight of evidence? If appellant owed appellee for labor, he was bound to prove the amount and value, before he could recover. He held the affirmative, and, to succeed, was bound to prove it by a preponderance of evidence. It is true, that the law does not, under such issues, require the evidence to establish the fact beyond a reasonable doubt; but it must preponderate. If equally balanced, or it preponderates in favor of the defendant, the plaintiff must fail in his action. Usually, a creditor can prove his demand, but if he cannot, it is his misfortune and the court is powerless to afford relief.

In this case there was evidence that appellee performed labor for appellant, at different times through the year, in loading and unloading vessels with grain, and that appellant had paid him as much as seventy dollars. But no witness pretended to know the length of time he had labored, or even its probable length, or the value of the labor and the sum he had earned. Nor is the evidence such that these facts can be reasonably ascertained by inference. The witnesses stated, that, if he was constantly engaged, he could have earned at least eight hundred dollars, at the usual prices paid for such labor. But no time is fixed that he did labor. It also appeared, that, until a few weeks before the close of navigation, appellant was in the habit of paying his hands weekly, and it fails to appear that appellee was an exception to the rule. It would

be but a fair presumption, in the absence of evidence to the contrary, that appellee was paid at the same time.

After a careful examination of the evidence, we are unable to find that appellee performed any labor for appellant, after he ceased to pay his hands weekly. In the absence of some such evidence, we are at a loss to understand how an inference could be indulged, that appellee had performed such labor during that period. A careful examination of the evidence in this case, we think, shows that it is too loose, indefinite, and unsatisfactory in its character to sustain the verdict. And the court below, therefore, erred in overruling the motion for a new trial The judgment is reversed and the cause remanded.

Judgment reversed.

THE PEOPLE OF THE STATE OF ILLINOIS

v.

WILLIAM W. O'BRIEN *et al.*

1. SCIRE FACIAS *on recognizance — what must be averred.* It is not necessary that it should be alleged in a *scire facias* on a recognizance, that the principal cognizor was indicted by the grand jury, at the term of the court named in the recognizance.

2. RECOGNIZANCE — *at what "term" the principal should appear.* Where a recognizance is conditioned for the appearance of the principal cognizor at the "next term" of the court, it must be understood to mean the next term at which criminal business can be transacted, and does not refer to a term which may happen to intervene, and which by law must be devoted exclusively to civil business.

WRIT OF ERROR to the Circuit Court of Peoria county.

The opinion of the court contains a sufficient statement of the case.

Messrs. MCCULLOCK & TAGGART, for the plaintiffs in error.

Messrs. O'BRIEN & CRATTY, and Messrs. JOHNSON & HOPKINS, for the defendants in error.

Mr. JUSTICE BREESE delivered the opinion of the Court:

This was a *scire facias* upon a recognizance and demurrer thereto, and judgment on the demurrer for the cognizors. The people bring the case here by writ of error, assigning this judgment as error.

The case is, that one Drury Dalton entered into a recognizance before two justices of the peace of Peoria county, to answer an indictment for larceny, which recognizance the defendants in error signed as sureties. At the April Term, 1865, the recognizance was forfeited by the non-appearance of Dalton, and a *scire facias* ordered. That writ issued April 20, 1865. On demurrer to the *scire facias*, these points were made and are again made here. First, the *scire facias* does not allege that Dalton was indicted by the grand jury at the term of the court named in the recognizance.

This objection is not tenable, as decided by this court in *Alley* v. *The People*, 1 Gilm. 109, and *Wheeler* v. *The People*, 39 Ill. 430.

The second point made is, that the recognizance was condi tioned for the appearance of Dalton, at a term and time when his appearance was impossible in law.

This is a serious objection, but it is obviated, we think, by a reference to a few considerations growing out of the requirements of the statute applicable to the county of Peoria.

The recognizance was taken on the 16th day of January, 1865, and was conditioned for the appearance of Dalton at the next term of the Circuit Court.

Now, it is argued by the defendants in error, that, by the law of 1863, the terms of the Circuit Court in Peoria county are fixed for the first Mondays of February, April, June, September, October and December, and it provides that the terms of that court held in February, June and October, shall be devoted solely to the trial of civil, common law and chancery cases, and that the terms to be held in April, September and December, shall be devoted solely to the finding of indictments and the trial of criminal cases, and the hearing of motions con-

nected with criminal proceedings and trials of suits on forfeited recognizances, and inasmuch as the recognizance was conditioned for the appearance of the prisoner at "the next term," which would be the February Term, and that being by law a term devoted solely to civil business, his undertaking was void and the Circuit Court at such term would have no jurisdiction of the offense to try it.

We think there is no difficulty in this question or in the proper disposal of the point made.

The recognizance must have a reasonable interpretation in view of the existing law fixing the terms of the Circuit Court, and giving them jurisdiction. Now, as the "next term" after entering into the recognizance was a civil term, and the parties entering into it must be presumed to know the law, the essence of their undertaking was, that the prisoner should appear at that term next ensuing the recognizance, when an indictment could be found, and all criminal matters investigated. The civil terms were not "terms" in reference to the subject-matter of this recognizance. The "next term" of the Circuit Court, as stated in the recognizance, must be understood to mean the next term at which criminal business could be transacted.

We have looked into the authorities cited by defendants in error, but do not perceive they have any direct bearing on the points made, except the case of *Manes* v. *The State*, 20 Texas, 38, which seems to favor the view presented by the plaintiffs in error.

The judgment of the Circuit Court, for the reasons given, must be reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

Judgment reversed.

Syllabus.

THE CITY OF CHICAGO
v.
LAWRENCE BAER *et al.*

1. SPECIAL ASSESSMENTS — STREET RAILWAYS — *benefits must be assessed upon all who are directly benefited — principle of the Larned case applied.* The rule adopted in the case of the *City of Chicago* v. *Larned*, 34 Ill. 267, that the constitutional provision, requiring equality of taxation, applied as well to special assessments for public improvements, as to any other form of taxation, extends to the mode of distributing the burden among those who are to be benefited; so that, when the burden is to be thus imposed, it must be imposed upon all who are directly benefited by the proposed improvement, in the ratio of benefits, since it would be a violation of the equality sought to be secured by the Constitution to exempt a portion of those benefited, and thereby increase the burden upon the remainder.

2. Or, referring the right to make these special assessments, rather to the right of eminent domain than to the taxing power, as was done in the *Larned case*, and permitting the just compensation required by the Constitution to be made in benefits, still the assessments must be made in the *ratio* of advantages or benefits, that is, they should be imposed equally upon all property equally benefited, or they will be unlawful.

3. A city ordinance which seeks to exempt a portion of the property to be benefited from paying for its portion of street improvements is not only in violation of the constitutional provision securing equality of taxation, but also of that other principle of constitutional law, that the property of one person cannot be taken for the use of another, either with or without compensation.

4. Nor can the legislature confer upon a city the power to make a valid contract with the owner of any interest in property which should contribute toward the expense of such improvements, which shall have the effect to exempt him from his portion of the burden.

5. SAME — *what character of interest or estate is subject to such assessments — street railways.* An assessment for the improvement of a street must be laid upon all property that is substantially and directly benefited. This necessarily excludes all personal property of a movable character. But every estate, in land, adjacent to the street, whether in fee, for life or for a term of years, may be increased in value by the improvement, and would be subject to the assessment.

6. A street railway company occupying a portion of a street with their track and in the use thereof, under a charter, and a contract with the city authorities, have a franchise and right of occupancy which is a property of a character to be substantially benefited by the paving of such street; and in proportion as it is thus benefited it should contribute its share to the cost of the improvement, in common with the other property upon the street

APPEAL from the Superior Court of Chicago, the Hon. JOHN M. WILSON, Chief Justice, presiding.

The opinion of the court contains a sufficient statement of the case.

Mr. S. A. IRVIN, Messrs. GOUDY & CHANDLER and Mr. E. C. LARNED, for the appellant.

Mr. FRANCIS ADAMS and Mr. M. F. TULEY, for the appellees.

Mr. JUSTICE LAWRENCE delivered the opinion of the Court:

On the 27th of July, 1865, the common council of the city of Chicago, passed an ordinance requiring North Clark street, from the north line of Chicago avenue, to the dock line of the Chicago river, to be curbed with stone and paved with what is known as the Nicholson pavement. The commissioners of the board of public works proceeded to make an assessment on the real estate deemed benefited by the contemplated improvement, and reported it to the common council, by which body it was approved, and on the 18th of October, 1865, a warrant was issued for its collection. At the February Term, 1866, of the Superior Court of Chicago, the collector made an application for judgment against those lots on which the assessment had not been paid. The owners of many of the lots appeared and resisted the petition. The court sustained their objections, and refused to enter judgment, and the city has brought the record to this court.

In the view we have taken of this case, it is necessary to consider but one of the numerous objections taken to the collector's report. It appears by the record that a street railway company, called the North Chicago City Railway company, has possession of a considerable portion of this street by its road-bed, ties, rails and cars, and that no part of the assessment in question was levied upon the railway company. It is not contended that the company is not benefited by the improvement. That it must be very largely benefited, is a proposition as to which, we presume, there can be no contro-

versy. We are not advised by the record what is the present pavement of North Clark street, or whether it is paved at all, through the whole distance intended to be covered by the proposed improvement. If paved, we must suppose the pavement has become imperfect, or it would not be renewed at a heavy cost. But whether this new pavement was to be in place of one of some other kind, no longer fit for use, or to replace the alternate mud and dust of the original street, it is clear that the railway must be largely benefited by the improvement. It must be a matter of great importance to it to have a smooth and durable road-bed for the passage of their cars and the travel of their horses. The commissioners have not reported that the railway was not benefited. No question of that character embarrasses the record. It is admitted in all the arguments, that the railway was not assessed, because, in whatsoever degree it might be benefited, it was not considered by the city authorities liable to any portion of the expense. The case is submitted to us upon that issue, and both parties express themselves desirous of a decision that shall settle a question of much importance to the people of Chicago. We assume then, as counsel have assumed, that the railway company would be benefited by the proposed improvement. The precise degree is, for the purposes of this case, wholly immaterial.

On the 14th of February, 1859, the legislature passed an act incorporating the North Chicago City Railway company, and authorized it to construct and operate a railway in such streets in the north division, and upon such terms, as might be agreed upon with the city council. On the 23d of May, 1859, the council passed an ordinance, the seventh section of which purports to fix these terms, and which the company accepted. On the original draft of the ordinance, now on file in the city clerk's office, and over a portion of this seventh section, is pasted a strip of paper, on which is written what purports to be a portion of the provisions of this section. The writing underneath this pasted paper is not obliterated, and, by being held against a strong light, can be read. The writing under-

neath requires the company to keep eight feet of every street occupied by them, if only a single track is laid, or sixteen feet if a double track is laid, in good repair and condition, and to pay in the same proportion for any improvement that shall be ordered by the city council. The writing upon the pasted paper is so worded as to make the company liable for only ordinary repairs. The handwriting of the original ordinance and that upon this pasted paper are not the same. It is contended on the one side that the section which actually was adopted by the council was that written upon the original paper, and that the pasted paper is a forgery, interpolated into the ordinance without the authority of the council, and never adopted by that body. All this is denied upon the other side; and it is contended that the provisions found on the pasted paper were a portion of the ordinance adopted. On this issue much evidence was taken, and to its discussion much of the argument has been devoted. Whether, however, this pasted paper was proved to be a forged interpolation, by evidence legally admissible for that purpose, is a question which, in the view we have taken of the case, it is unnecessary to decide. It may be remarked, however, that the mere fact that such a question should be made and left in so great doubt, and the evidence embodied in the record in regard to it, show the necessity of adopting some system by the common councils of our growing cities, whose local legislation affects pecuniary interests of great value, that shall not leave in doubt what the ordinances really are under which their people live.

We now will state the grounds upon which we place our decision. In our judgment, this case must be clearly decided upon the principles established by this court as the law of this State, in the case of the *City of Chicago* v. *Larned*, 34 Ill. 267. That case was very fully argued and very maturely considered by the court, and we are entirely satisfied with the conclusions there announced. It was there held, that the constitutional provision requiring equality of taxation applied as well to special assessments for improvements of this character as to any other form of taxation; that, when the burden is to be

imposed upon those who are benefited by the proposed improvement, it must be imposed upon all who are directly benefited in the ratio of the benefits, since it would be a violation of the equality sought to be secured by the Constitution, as well as of all just principles of taxation, to exempt a portion of those benefited, and thereby increase the burden upon the remainder. It is true, the right to make these special assessments was referred rather to the right of eminent domain than to the taxing power, and it was said the just compensation required by the Constitution might be made in benefits; but it was held that the assessment must be made in the *ratio* of advantages or benefits, which would necessarily require that it should be imposed equally upon all property equally benefited, or it would be unlawful. The court said, "from the case of the *Canal Trustees* v. *The City of Chicago*, 12 Ill. 400, to the present time, the ruling principle of all of them is, that, as the assessments are in the ratio of advantages or benefits, they are lawful." Hence, the court held that an assessment for the improvement of a street by which the cost was assessed upon the property bordering the street, in proportion to the frontage of each lot, without any reference to the degree in which the different lots might be benefited, was unconstitutional and void, because, under the guise of a special assessment, and under the plea of eminent domain, the city was really violating the principle of equality of public burden prescribed by the Constitution. The sole question involved and decided in that case, was the same presented by the case at bar.

In this case, as in that, the cost of the improvement has been assessed upon property without reference to the ratio of benefits. Can any thing be clearer than that, if one-third or one-quarter of all the benefits to be reaped by property holders from this improvement accrues to this railway company, and yet they are wholly exempted from the assessment, the other property holders are unequally and unjustly taxed to the extent of that portion which, in the ratio of benefits, should have been assessed against the railway? In other words, their property is taken for the benefit of the railway. Suppose, for

example, a street improvement costing ten thousand dollars was of such a character as to increase to that amount the value of A's property, and B and C each have property whose value is increased to the same amount, but nevertheless the entire cost of the improvement is assessed upon the property of A. Can his complaints be justly answered by telling him that he is not injured, because, although he pays ten thousand dollars, his property is increased in value to that amount? May he not truthfully reply that he has nevertheless been obliged to pay for benefits to the property of B and C, and to that extent his money has been taken for their use? We hold it to be clear, that, while the power to make these special assessments may be sustained under the right of eminent domain, yet, in making them, the constitutional principle of equality applies as fully as to the ordinary modes of taxation — that one person's property cannot be improved at the expense of another, and that no special assessment can be sustained which imposes all the cost upon a portion of the property benefited, and leaves other property equally benefited wholly exempt. That the exact ratio of benefits can be determined with mathematical nicety is of course impossible, but that is the principle upon which the assessment must be made, as correctly as is possible to fallible human judgments.

In the *Larned case* the court say: "We consider that both the exercise of the right of eminent domain and the power of taxation are limited under our Constitution, and the rule with us is deduced, not from general principles, but the Constitution itself, that there does not exist either in the legislature, or in any of the subdivisions of State sovereignty, a power of apportioning taxes, whether of a general or local character, except on the principle of equality and uniformity."

This most salutary principle, restraining the wanton exercise of municipal authority in making these special assessments, and having its firm basis, not only in the constitutional provisions securing equality of taxation, but also in that other principle of constitutional law, universally recognized by the American courts, that the property of one person cannot be taken

for the use of another, either with or without compensation, must be held as invalidating this ordinance, if it really passed in the form insisted by the appellant, so far as it seeks to exempt the railway company from paying for its portion of street improvements, in proportion to the benefits received. The city council could make no valid contract of this character, and the legislature could not authorize it to do so.

The counsel for appellants seek to discriminate between the present case and *The City of Chicago* v. *Larned*, by insisting that assessments can only be laid on real estate, and that the railway company has no real estate, but only a right of way. The position is ingenious but unsound. The assessment must be laid upon all property that is substantially and directly benefited. This necessarily excludes all personal property of a movable nature. Its value cannot be affected by laying this pavement. But every estate in land adjacent to the street, whether in fee, for life or for a term of years, may be increased in value. If adjacent property is held under a lease for fifty or a hundred years, the benefit to the property arising from replacing an old by a new pavement, would probably accrue wholly to the lessee.

The pavement would probably be worn out before the expiration of the lease, and, therefore, the benefit which might accrue to the owner of the fee would be so uncertain and remote as not to be taken into the account. In a case of that character, as between the lessee and the owner of the fee, the former would undoubtedly be required to pay the entire assessment upon the property. *Prettyman* v. *Walston*, 34 Ill. 191.

Now, it is true, as urged by counsel, that the railway company has not become the owner of any portion of these streets in fee, but it has certainly, through its charter from the legislature, and its contract with the city, acquired a property in them of the most valuable character, which neither the legislature nor the city can take away without the consent of the company, and capable, like other property, of being sold and conveyed. The city council has made a contract with the company, by which it has granted to the latter what is substantially a lease-

hold interest in a portion of this street for a term, by the original ordinance, of twenty-five years. The legislature, at its last session, extended the charter to ninety-nine years, but whether the city council has extended the term for occupying the street, this record does not inform us. The terms offered by the city in its ordinance were formally accepted by the company, and it executed a bond to the city to secure compliance on its part. By this contract the railway company acquires the right to occupy a certain portion of the street by its ties, rails and cars, so far as may be necessary for operating the railway. It has acquired rights in the street which neither any other person or company, nor the general public possess. It can now occupy the street in a manner which would not be permitted without the aid of legislation. If a private individual were to occupy a street in this manner, without authority from the city council, he would be liable to prosecution.

It is wholly unnecessary to define, for the purposes of this case, what is the precise extent or nature of its property.

Certain it is, that this railway company has a franchise appurtenant to this street; that through this franchise it has a right of occupancy in a portion of the street, peculiar to itself, and, so far as may be necessary to run its cars, exclusive; that this right of occupancy is secured for a long term of years; that this franchise and this right of occupancy together constitute a property fixed and immovable in its character like realty, and recognized and protected by the law as fully as a fee simple in land; that this property is of a character to be substantially and directly benefited by the proposed pavement; and that in proportion as it is thus benefited it should contribute its share to the cost of the improvement in common with the other property upon the street.

In *Rex* v. *Brighton Gas-light Company*, 5 B. & C. 466 (11 E. C. L. 543), the question was, whether the gas company was liable to the poor-rates, and this depended upon whether their gas-pipes, laid under the surface of the streets, made them "occupiers of land" in the parish. The court held that the company "were in the exclusive occupation of that portion

of the land in which their pipes lay," and that they were liable to be rated for the relief of the poor of the parish of Brighton, although their gas works were in the parish of Rottingdean, and the gas was sold and used in the parish of Brighthelmstone, and the only connection of the company with the parish of Brighton was in using its streets for laying pipes to convey the gas. Numerous authorities are cited by the court in support of its decision. That is a much stronger case than the present in favor of taxing, as fixed property, a private easement over a public street.

We would remark, in conclusion, that the rule declared in *The City of Chicago* v. *Larned*, to be a constitutional requirement in regard to the tax levied under these special assessments, and here re-affirmed, is in conformity with all the charters ever granted to the city, except that of 1863. Those of 1837, 1851 and 1865 all require the assessment to be in the ratio of benefits. That case, therefore, introduced no new rule into the civil polity of Chicago, nor one difficult of application. The judgment of the court below must be affirmed.

Judgment affirmed.

NICHOLAS ROTH
v.
BRADNER SMITH.

1. EVIDENCE — *damages.* A defendant in an action of trespass *vi et armis* may show that he was persuaded by others to make an affidavit upon which an illegal arrest was made, to show the animus with which he acted, and to avoid vindictive damages. Evidence may be admissible for such a purpose, when it does not tend to establish a bar to the action; and the plaintiff may, when it is admitted, have the jury so instructed that it shall be limited to its legitimate purpose.

2. FALSE IMPRISONMENT — *what acts will subject a party to an action therefor.* Where a party makes an affidavit for the purpose of procuring legal process for the arrest of another, he will not be liable, in case of an improper use of the affidavit by an officer, who illegally arrested and imprisoned the party thereunder, without the knowledge and contrary to the intention of the person making the affidavit.

Statement of the case.

3. INSTRUCTIONS — *need not be repeated.* It is not error to refuse to give an instruction, when the same rule of law has already been given in another, although in different language.

4. ACCESSORY — *in assault and false imprisonment.* A person who counsels, advises or procures the false imprisonment of another is liable as a principal for the consequences of the act, although he did not participate actively in the commission of the act.

5. NEW TRIAL — *verdict against the evidence.* Where the weight of evidence is clearly against the finding of the jury, their verdict should be set aside and a new trial granted, and it is error in the court below to refuse, on a proper motion for the purpose.

WRIT OF ERROR to the Circuit Court of Jo Daviess county; the Hon. Benj. R. SHELDON, Judge, presiding.

This was an action of trespass *vi et armis* for false imprisonment, brought by Nicholas Roth, in the Jo Daviess Circuit Court, to the May Term, 1863, against Bradner Smith. The declaration contained two counts, to which defendant filed the plea of not guilty, upon which issue was joined. At the August Term, 1863, a trial was had before the court and a jury, who found a verdict of guilty, and assessed the damages at $300. A new trial was granted, and the cause was again tried at the October Term, 1863, of the Circuit Court.

It appeared on the trial, that the sheriff of Jo Daviess county, on the 11th day of August, 1862, arrested plaintiff, and committed him to jail and confined him there over twenty days. He then delivered him to the United States marshal. The sheriff swears that he had no process or warrant for the arrest of plaintiff, but made the arrest on an affidavit.

Another witness testified, that he and plaintiff were confined in jail from the 11th of August until the 2d of September, 1862; that they were then taken to Chicago and confined in Camp Douglass until some time in the early part of October; that a part of the time they were in jail they were confined in the cell, and another part had the liberty of the hall or passage between the cells; that plaintiff was kept in close confinement at both places.

The evidence shows, that plaintiff was a man of limited

means; that he had a wife and four children, who were altogether dependent on him for support; that he was sick when arrested. It also appears, that the sheriff refused to arrest plaintiff without an affidavit. Defendant made an affidavit that plaintiff, who had been a lieutenant in the 12th regiment of Illinois volunteers, had said, in the presence of affiant, that he had advised his, plaintiff's, friends not to enlist in the war; and that affiant understood, from admissions and statements, that he, plaintiff, was using exertions to discourage and prevent enlistments in the army. It was this affidavit under which the sheriff acted in making the arrest, and under no other authority.

It appears from the evidence that on the next day defendant stated, to several persons, "I am the man had him arrested," while speaking of and in reference to the arrest of plaintiff. It appears that plaintiff had an altercation with defendant on the same day plaintiff was arrested, when defendant accused plaintiff of cowardice, and that he stood behind a tree. That hard words occurred between them.

It appears from defendant's evidence, that either Miner or Hawkins asked defendant if he would make such an affidavit. McMaster testified, that he advised the sheriff to make the arrest, and advised Smith to make the affidavit. The sheriff testified, that defendant did not advise him to make the arrest Huntington testified, that he went to defendant to get him to make the affidavit, but don't think any thing was said about the arrest of plaintiff. It also appeared that defendant was out of debt and worth some $10,000 or $12,000.

The jury found the defendant not guilty, and plaintiff thereupon entered a motion for a new trial which was overruled by the court, and judgment was rendered on the verdict. Plaintiff prosecutes this writ of error to reverse the judgment of the Circuit Court.

Mr. M. Y. JOHNSON, for the plaintiff in error.

Mr. GEORGE C. CAMPBELL, for the defendant in error.

Mr. CHIEF JUSTICE WALKER delivered the opinion of the Court:

Plaintiff in error sued defendant in error, in the Jo Daviess Circuit Court, for an assault and false imprisonment. The first count avers, that defendant, intending to injure and imprison plaintiff, made a pretended charge of his having discouraged volunteers from enlisting in the army of the United States; and to execute his evil intentions he caused plaintiff to be arrested and imprisoned by certain officers. That he was so arrested, and placed in the county jail without lawful authority or in accordance with the forms of law, and without any probable cause; and restrained of his liberty for the space of two months; and was removed from the county jail to Camp Douglas, in Cook county, and was there restrained of his liberty for the space of four months. The second count is in the usual form. The defendant pleaded the general issue, upon which a trial was had, resulting in a verdict of not guilty. A motion for a new trial was entered, but overruled by the court, and judgment rendered on the verdict.

It is insisted, that the Circuit Court erred, in permitting defendant below to prove that he was advised to make the affidavit under which it is claimed that plaintiff was arrested. If admissible for any purpose, the court below committed no error in permitting it to go to the jury. If for no other purpose, it was admissible to show the feelings of defendant toward plaintiff. The spirit which actuates a party who commits a trespass, enters largely into the question of damages. Where a party acts without malice, or under a misapprehension of facts, without malice or recklessness, he should not be punished with vindictive damages. For the purpose of showing, that he was not actuated by vindictive feelings this evidence was proper, and if proper for any purpose it should always be admitted, and if the party against whom it is received, desires to have it limited to its legitimate purpose he should ask an instruction for the purpose.

It is next insisted, that the court erred in giving the instructions asked by defendant. The second is more particularly

objected to as calculated to mislead the jury. It is this: "If the jury believe from the evidence, that the plaintiff was arrested by sheriff Miner, who had in his possession, at the time of making the arrest, the affidavit offered in evidence, and that it was procured by Harris and Huntington, for the purpose of arresting Roth, they not informing Smith of such purpose, and that it was not made or used by defendant for the purpose of having plaintiff arrested, then the jury should find the defendant not guilty, as far as the affidavit is concerned." If the mere making of the affidavit was relied upon as the only ground of recovery against defendant, then this instruction was proper. If he did not know the purpose for which the affidavit was procured, and did not intend it to be used for the purpose of arresting plaintiff illegally, or supposed that it was intended to be used to procure legal process for his arrest, then he did not incur any liability by making the affidavit. If this is what the instruction was designed to inform the jury it was unobjectionable. And this seems to be its fair import. There were other facts in the case upon which the jury were still required to pass unaffected by this instruction.

It is insisted that the court erred in refusing to give plaintiff's seventh instruction. There is no force in this objection, inasmuch as the propositions it announced were given in other instructions, in language somewhat different, it is true, but nevertheless the same in principle, and as clearly stated as by this instruction. This court has repeatedly held that the Circuit Court is not required to repeat the same rule of law, in various forms and in different instructions. That, having once stated a legal principle, it is the better practice not to incumber the record with other instructions announcing the same rule, to say nothing of the unfair advantage it might give the party asking them, by impressing the jury with the belief that the court regarded the principle thus announced as the most important question in the case.

The last ground urged in favor of a reversal was overruling the motion for a new trial by the court below. It involves the question whether the evidence warranted the finding of the

jury. If defendant counseled, advised or procured the arrest and imprisonment, although not an active participant in the act, he was nevertheless responsible for its consequences. If, however, he neither advised, counseled, aided nor assisted in the arrest, he should not be held liable.

Several persons seem to have advised him to make the affidavit for his arrest. He seems to have made it, and the sheriff had it when he arrested plaintiff. Again, two witnesses testified, that, on the day following the arrest and imprisonment of defendant, they heard defendant say that he was the man who had plaintiff arrested on the previous day. If this evidence is to be credited, it seems to us that it was an admission that he was responsible for the act. So far as the record before us discloses, these witnesses stand unimpeached, and unless their manner on the stand satisfied the jury that they were unworthy of belief, we must believe that the jury failed to give due weight to this admission. We therefore believe that the case should be submitted to another jury for their consideration. The judgment below is reversed, and the cause remanded for further proceedings.

Judgment reversed.

LAWRENCE, J.: I cannot concur in the opinion of the majority of the court. The evidence is contradictory, but I think it fully justifies the verdict.

THE TOWN OF HARLEM
v.
WILLIAM P. EMMERT.

1. MISJOINDER OF PARTIES — *when and in what mode taken advantage of.* Advantage should be taken of a misjoinder of parties defendant in an action on the case, by plea in abatement; failing to do that, a verdict cures the defect by force of the statute of amendments and jeofails.

2. NON-LIABILITY OF A PART *of the defendants — when and in what mode taken advantage of.* In an action on the case against a town and the commis-

sioners of highways of such town, for so constructing and maintaining a bridge over a navigable stream as to obstruct the navigation thereof, it was objected, on error, that the commissioners were not liable for the acts of the town, but the objection came too late. It should have been taken by plea in abatement.

3. TOWNS — BRIDGES — *duty of towns to build bridges.* Under the township organization law, it is the duty of a town to build bridges over streams within its limits.

4. BRIDGES — NAVIGABLE STREAMS — *liability for obstructing.* It being the duty of a town to build a bridge over a stream within its limits, the town must be responsible, if they make such a structure as will obstruct the free navigation of the stream.

5. AN ACTION for a *tort* will lie against a corporation.

APPEAL from the Circuit Court of Stephenson county; the Hon. BENJAMIN R. SHELDON, Judge, presiding.

The case is stated in the opinion of the court.

Messrs. TURNER & CRAIN, for the appellants.

This is an action on the case, to recover damages alleged to have been sustained by reason of defendants having so negligently built and maintained a bridge in the town of Harlem, across the Pecatonica river — claimed to be navigable — that plaintiff could not navigate said river with boats, barges, steamboats, etc. The suit is brought against the town of Harlem, joined with McCool, Miller and Fuller, commissioners of highways of said town.

1. The town of Harlem is a public or *quasi* corporation, possessing but limited powers, and subject to such liabilities only as are expressly imposed by statute. Haines' T. Org. L. (ed. 1865), p. 16; *Commissioners of Highways of Niles* v. *Martin*, 4 Mich. (Gibbs), 558; *Riddle* v. *Proprietors of Locks and Canals on Merrimack River*, 7 Mass. 187; *Morey* v. *Town of Newfane*, 8 Barb. S. C. 645; *Hickok* v. *The Village of Plattsburg*, 15 id. 440.

The principle enunciated by the authorities as to counties applies to towns. *Board of Commissioners of Hamilton County* v. *Mighels*, 7 Ohio, 112; *Schuyler Co.* v. *Madison Co.*, 4 Gilm.

20; *Hayes* v. *County of Madison*, 1 id. 567; *McKinnon* v. *Penson*, 18 E. L. & E. 599; *S. C.*, 25 id. 457; *Russell* v. *Men of Devon*, 2 T. R. 667.

Therefore, as an action could not be sustained against the town of Harlem, if sued alone for the acts complained of, there is a misjoinder in suing said town together with the commissioners of highways.

2. The commissioners of highways are officers independent of the town of Harlem — a species of town corporation themselves, over whom the town exercises no control, and is not, therefore, liable for their acts. Haines' T. Org. (ed. 1865), p. 63; *Hickok* v. *The Trustees of Plattsburg*, 15 Barb. S. C. 440; *Commissioners of Niles* v. *Martin*, 4 Mich. (Gibbs), 564; *Town of Gales* v. *Cydel & Rose Plank Co.*, 27 Barb. 551; *Town of Fishkill* v. *Fishkill & Beckman P. R. Co.*, 22 id. 646.

Messrs. BAILEY & BRAWLEY, for the appellees.

The cases cited by appellant arose from the *omission*, on the part of the towns, to perform their alleged duty, and are only to the effect that agents of *quasi* corporations are to be prosecuted for a failure to perform their public duties. *Hedges* v. *The County of Madison*, 1 Gilm. 570; *Morey* v. *The Town of Newfane*, 8 Barb. S. C. 645; *Hickok* v. *The Village of Plattsburg*, 15 id. 440.

The case at bar differs from the cases cited, in that it is brought against the town and its agents in *tort*, for the actual performance of their duty, but in such a manner that the plaintiff has suffered damage thereby. For an omission to perform a duty the punishment would be by presentment, and which would be in behalf of the public; but when a duty has been performed in such a way that an individual is damaged, of course that individual would have his remedy, and it would be against the party causing the damage, which in this case was the town.

It is submitted, that, under our township organization laws, it is the duty of the towns to build necessary bridges therein, the commissioners of highways being the agents of the town,

having care and superintendence merely thereof. Township Organization Laws (Haines'), art. 17, § 14, title "Bridges," p. 71 (1862); and see § 18, art. 17 of Township Organization Laws, p. 72, on the subject of bridges to be built by adjoining towns, evidently showing that it was the intention of the legislature that bridges should be erected by towns. See § 1 of art. 17, p. 63 of same laws, as to the duty of commissioners of highways. Previous to the township organization system in this State, the burden of maintaining bridges rested upon the counties. *The People ex rel. Hoes* v. *Canal Trustees*, 14 Ill. 403. The town, having undertaken to maintain the bridge, should be held responsible for its complete and perfect execution, and for a failure therein is liable to a private action. *Hickok* v. *The Village of Plattsburg*, 15 Barb. S. C. 443.

Mr. JUSTICE BREESE delivered the opinion of the Court:

This was an action on the case, brought in the Stephenson Circuit Court by William P. Emmert, against the town of Harlem and the commissioners of highways of that town, to recover damages against them for so building a bridge across the Pecatonica river, a navigable stream in that town, as to prevent easy and safe navigation thereof.

There was a trial by jury on the plea of not guilty, and a verdict for the plaintiff and damages assessed at fifty dollars. A motion for a new trial was overruled and exception taken, and the cause brought here by appeal.

The points made by appellants are, that the town of Harlem is a *quasi* public corporation, against which no action could be maintained, if sued alone, for the act complained of, and therefore there is a misjoinder in suing the town together with the commissioners of highways; that the commissioners of highways are officers independent of the town — a species of town corporation themselves, over whom the town exercises no control, and is not, therefore, responsible for their acts. The evidence is not sufficient to charge the defendants.

As to the first objection, advantage should have been taken of the misjoinder, if there be one, by plea in abatement. Fail-

ing to do this, the verdict cures the defect by force of the statute of amendments and jeofails. The second objection is of the same nature, and it is now too late to make it.

The cases to which appellants refer are not cases of *tort*, where the charge was for performing a duty so negligently and unskillfully, that damage was occasioned thereby to the plaintiff. Now, if it was the duty of the town of Harlem to build this bridge, and that it was is apparent from the fourteenth section of article seventeen of the township organization law (Haines' Comp. 71), the town must be responsible, if they make such a structure as will obstruct the free navigation of the river. The proof is, this structure was of that character. The town had the means in their control to make a sufficient bridge, by levying a sufficient tax for that purpose. The whole subject was under their control, and they ought to be responsible for the manner in which they have dealt with it.

That an action for a *tort* will lie against a corporation, is fully settled by this court in the case of the *St. Louis, Alton and Chicago R. R. Co.* v. *Dalby*, 19 Ill. 353.

The judgment is affirmed.

Judgment affirmed.

TRUSTEES OF SCHOOLS

v.

C. H. MCCORMICK & BROTHERS.

1. PRINCIPAL AND AGENT — *payment of the agent's debts with property of the principal.* A creditor who has knowledge that his debtor has property in his possession merely as the agent of another, for sale, has no right to receive such property from the agent in payment of his debt.

2. SAME — *ratification of the act of the agent.* But if the principal ratifies such a transaction, with a full knowledge of the facts, by receiving from his agent the notes of other parties in payment for the property, he thereby waives his right to hold the creditor of the agent liable for the value of the property thus received in payment of the agent's indebtedness.

3. INSTRUCTIONS — *should not be misleading.* Although instructions may contain nothing objectionable as abstract legal propositions, yet if they tend,

standing by themselves, to mislead the jury by directing their attention away from the true issue in the case, they should be so modified as to present the real question involved.

WRIT OF ERROR to the Circuit Court of De Kalb county; the Hon. T. D. MURPHY, Judge, presiding.

This was an action of assumpsit brought in the court below by Cyrus H. McCormick, William S. McCormick and Leander J. McCormick, as partners, under the style and firm of C. H. McCormick & Brothers, against the trustees of schools of township number forty, north range, three east of the third principal meridian, to recover the value of a reaping machine which had been placed by the plaintiffs in the hands of one Goodrich, as their agent, for sale, and which Goodrich turned over to the defendants in payment of a debt he owed them, they having knowledge at the time that Goodrich had possession of the machine only as agent for its sale.

The only question presented here is, whether the proof showed a subsequent ratification of the transaction by the plaintiffs.

The jury returned a verdict for the plaintiffs, upon which judgment was entered. The defendants thereupon sued out this writ of error.

Messrs. ALLEN & RANDALL for the plaintiffs in error.

Mr. EMERY A. STORRS and Mr. CHARLES KELLUM, for the defendants in error.

Mr. JUSTICE LAWRENCE delivered the opinion of the Court:

Goodrich, being agent of the defendants in error at Malta, in De Kalb county, for the sale of reaping machines, and being also in debt to the trustees of school township 40 north range 3 east, for money loaned, turned over to them a reaper in exchange for his note. The trustees sold the machine to one Buskirk, taking therefor his note secured by mortgage, which Buskirk paid after the commencement of this suit. The

defendants in error brought this suit against the trustees for the value of the machine, and recovered.

We think it sufficiently appears that the trustees knew Goodrich had possession of this machine only as agent for its sale, and such being the fact they clearly had no right to receive it from him in payment of his own debt. They were lending themselves to an act of fraud on the part of an agent toward his principal, and appropriating the property of McCormick to pay the debt of Goodrich. The only question in the case is, whether McCormick, through his general agent Champlin, ratified the transaction with a full knowledge of the facts, and settled with Goodrich, by taking the Talbot notes. Goodrich swears that he held some notes against one Talbot, and that he informed Champlin of the sale of the machine to the trustees and gave him the Talbot notes in payment therefor. Champlin swears that he accepted the Talbot notes for a machine, which Goodrich told him had been sold to Talbot. The decision of the case must turn upon the degree of credit to be respectively given to these witnesses. In this state of the evidence the court instructed the jury as follows:

"The jury are instructed that all promissory notes payable in money are, by the law of this State, negotiable, and that if the jury believe, from the evidence, that the machine in question was sold by the defendants in this suit to Buskirk, and that they took his note for the same, before the commencement of this suit, then the plaintiffs are in the same condition in reference to their right to recover in this suit, as if the money had been actually paid by Buskirk to the defendants at the time of sale of the machine by them to him."

"The jury are instructed that if they believe from the evidence, that the defendants have received money or money's worth for a reaper belonging to the plaintiffs, an action of assumpsit will lie to recover the same, and that a negotiable promissory note is, in contemplation of law, money's worth."

These were the only instructions given, and while they may contain nothing objectionable as abstract legal propositions,

yet they tended, standing by themselves, to mislead the jury by directing their attention away from the true issue. The jury would understand, from the second instruction, that, if the transfer of the machine to the trustees was of such a character as to leave the title in McCormick, and if they had sold it, the verdict must be for the plaintiff. This ignored the main question in the case — that of ratification. This instruction should have been modified by adding a clause, telling the jury, if Champlin, as general agent of McCormick, and with a knowledge of the facts connected with the transfer of the machine to the trustees, had received from Goodrich the Talbot notes in payment for said machine, the verdict must be for the defendants. The judgment is reversed and the cause remanded.

Judgment reversed.

John McNab

v.

Horatio N. Heald *et al.*

1. Chancery — *jurisdiction to subject equitable interests to satisfy a judgment at law.* The interest of a defendant held by himself or any other to his use, whether held by deed, bond, covenant, or otherwise, for a conveyance, or as mortgagee or mortgagor of land, in fee, for life or for years, is declared by statute to be subject to sale on a *fi. fa.* at law.

2. Same. The statute also declares, that, when an execution is returned unsatisfied, in whole or in part, the plaintiff in execution may file a bill against the defendant and any other person, to compel a discovery of any property, or thing in action, due to or held in trust for him.

3. Same. Independent of our statute, a court of equity in a proper case would subject a mere equitable estate or interest of a defendant in execution, growing out of a contract for the sale of the land, to the payment of the judgment. Before the adoption of the first section of the statute in reference to judgments and executions, rendering such interests liable to sale on a *fi. fa.*, the only means of reaching them was by bill in equity.

4. Same — *concurrent jurisdiction.* Where a jurisdiction is vested in a court of equity, and the like jurisdiction is conferred by statute on a court of law, the presumption is that it was designed to be concurrent and not exclu-

sive, unless the court of equity is prohibited or limited in its exercise by the language of the act. And such a legal remedy does not preclude a court of equity from assuming jurisdiction and affording relief.

5. Contract — *for sale of land liable in equity to pay judgment.* Where a judgment debtor holds a contract for the purchase of lands, and an execution has been returned no property found, and his vendor is dead, and a portion of the purchase-money remains unpaid, plaintiff in execution may file a bill against the defendant, and the executor and heirs of the vendor of defendant, for discovery, and to subject the interest of defendant to pay the judgment. And the executor and heirs are proper parties, for the purpose of ascertaining whether the contract of purchase is still in force, and the sum remaining due on the contract. Such a bill is not multifarious.

6. Same. In such a case, it is important to the heirs, as well as the purchaser of their ancestor, that the amount remaining unpaid on the contract, be ascertained, and be paid to the heirs before they be decreed to convey to the purchaser under an execution or decree.

7. Practice — *relief under prayer in bill.* If the prayer is for more than the proof warrants, still adequate and proper relief may be decreed, if consistent with the prayer, or under the prayer for general relief.

Appeal from the Superior Court of Chicago.

This was a suit in chancery, brought by John McNab, in the Superior Court of Chicago, against Horatio V. Heald and a large number of other defendants.

The bill alleges that complainant recovered judgment against defendant Heald, to the amount of $30,575.70; that execution was issued thereon and returned no property found. That there was still due on the judgment $7,000. That the sheriff levied an alias execution on the undivided one-third of the W. ½ S. E., 34 S., 40 N. R., 13, E. 3d meridian. That Heald had, previous to that time, entered into an agreement in writing with Henry Moore, for the purchase of the land, and had paid Moore all but about sixty dollars, which, with taxes on the land, he tendered Moore in his life-time, but he refused to convey the premises.

That Moore died in 1863, and by his will appointed Mary T. Moore, his widow, his executrix; that it was duly proved and letters testamentary were granted to her; that the other defendants are heirs at law of Henry Moore, deceased; that

the sheriff cannot safely proceed to sell the premises because the title is in the heirs of Moore. The bill prays discovery, and that the heirs be required to execute a deed for the property to a receiver and that it be sold to satisfy the judgment.

Heald answered, admitting the allegations of the bill and discovering other real estate. The other defendants demurred to the bill, and the demurrer was sustained by the court, and the bill was dismissed. Complainant, thereupon, prayed an appeal, and brings the record to this court, and assigns the decree sustaining the demurrer and dismissing the bill for error.

Mr. E. S. Smith, for the appellant.

Messrs. Woodbridge & Grant, for the appellees.

Mr. Chief Justice Walker delivered the opinion of the Court:

It appears that appellant obtained a judgment against Heald on the 4th day of September, 1858, in the Cook county Court of Common Pleas, for the sum of $30,575.70, and on the 29th day of August, 1859, sued out an execution, which was returned by the proper officer, no property found. That on the 2d day of October, 1862, an alias execution was issued and delivered to the sheriff of Cook county, who, on the same day, levied it upon the undivided third of the W. ½ of the S. W. 34, S. 40, N. R. 13 E. The bill alleged that Heald held an interest in the land, by virtue of a contract of purchase from one Henry Moore, and that Heald had paid a portion of the purchase-money on the contract; but Moore claimed that it was forfeited by Heald's failing to comply with his contract. Appellant, however, insists that there remained due on the contract but $112.75, as a balance for the purchase of the land. It appears that at the time the bill was filed, a considerable sum remained unpaid on appellant's judgment.

That Moore died testate, some time in 1863, appointing his wife his executrix. That his will had been duly proved, and

that his executrix had entered upon the duties of the trust. His heirs are made parties to the bill, which alleges that Heald is entitled to a deed for the premises, but defendants refuse to convey. The bill prays the appointment of a receiver, and that defendants be required to convey the premises to him, and that the same be sold to satisfy the execution. Also, for an injunction preventing defendants from selling the premises, and for other and further relief.

Defendant Heald answered, admitting the allegations of the bill as to the judgment, execution and levy, and as to the contract for the conveyance of the land, and the payments made on the purchase. The other defendants filed a demurrer to the bill, and assign, as grounds, that the bill discloses a complete and adequate remedy at law, and discloses several distinct matters in many of which defendants have no interest. The demurrer was sustained and the bill dismissed.

The grounds for dismissing the bill on demurrer are raised on this record. As to the first ground assigned on demurrer, the first section of the chapter entitled "Judgments and Executions," declares that "the term 'real estate' in this section shall be construed to include all interest of the defendant, or any person to his use, held or claimed by virtue of any deed, lease, covenant or otherwise, for a conveyance, or as mortgagee or mortgagor, of lands in fee, for life or for years." The preceding portion of the section declares that lands, tenements and real estate of every defendant shall be liable to sale on execution. Hence it is contended that the interest of Heald disclosed by the bill, is liable to be sold as "real estate," on execution at law, and, therefore, the remedy in that form is adequate and complete.

The thirty-sixth section of the chancery act declares, that whenever an execution at law has been issued against the property of the defendant, on a judgment at law or in equity, and it has been returned unsatisfied in whole or in part, the plaintiff in execution may file a bill against the defendant, and any other person, to compel a discovery of any property or thing in action due to or held in trust for him. The next section

declares that the court shall have power to compel discovery, and prevent the transfer, payment or delivery, and to decree satisfaction of the sum remaining due on the judgment, out of the personal property, money or things in action belonging to defendant in execution, or held in trust for him, which shall be so discovered, whether the same were or not originally liable to be taken in execution at law.

The bill charges, and Heald admits in his answer, and the same fact is admitted by the demurrer, that he held an equitable interest in the land. It may be that it was not an equitable estate, but it was a contract giving him an interest in the premises which a court of equity would enforce. And, independent of these enactments rendering any interest other than a legal title liable to sale on execution, a court of equity, on a return of *nulla bona*, would undoubtedly, while the contract was in force, have taken jurisdiction, and enforced the lien for the satisfaction of the execution. This is within the general equity powers of a court of chancery. Story's Eq. § 1214. Before the adoption of the first section of our judgment and execution law, declaring a lien, and subjecting such interests in real estate to sale under a *fi fa.*, the only remedy would have been by bill in equity.

The question is then presented, whether the adoption of the act affording a remedy at law, by a sale on execution, of such an interest, took from the court of chancery its prior sole, but well recognized, jurisdiction, in such cases. The rule is well recognized, that, where equity has jurisdiction, and an act of the legislature confers like jurisdiction on a court of law, it then becomes concurrent in the two courts. Jurisdiction having once vested in a court of equity, it remains there until the legislature shall abolish or limit its exercise; as, without some positive act, the reasonable inference is, that it is the legislative pleasure that the jurisdiction shall remain upon its old foundations. Story's Eq. § 64, *i.* Even where courts of law have been vested by legislative enactment, with equitable jurisdiction, unless there are prohibitory or restrictive words

employed, the uniform interpretation is, that they confer concurrent and not exclusive remedial authority.

It then follows, that this enactment authorizing a sale of such an interest on execution at law, as it contains no prohibitory or restrictive clause, the remedy is not exclusive at law. And it is highly proper, as in many cases such a sale would not afford a complete remedy, inasmuch as a discovery would be necessary to the ascertainment of the rights of the parties. In this case the bill alleges that defendants claimed that there had been a forfeiture of the agreement, and if so, it could perhaps only be ascertained by a discovery. Or, it may be, that no other means is open to the creditor to ascertain the amount remaining unpaid on the contract. These are both matters of importance to the defendant in execution, as without their adjustment the property would be liable to sacrifice on the sale. We are, for these reasons, of the opinion that the demurrer should not have been sustained on those grounds.

As to the objection, that the bill contains several matters in which Moore's heirs have no interest, we do not perceive that it is well taken. It may be, and frequently is true, that a portion of the grounds of relief only affect a part of the defendants, and still they are all necessary parties. In this case, if Moore's heirs are liable to convey, it is a matter of no interest to them whether it be to one person or another; but it is of moment to them, that they be first paid. And if they are not legally bound to convey to any one, they have an important interest in being heard before a decree is passed. Unless they were made parties, it might be difficult for the creditor to prove that they were liable to convey, to ascertain the amount, if any thing, due on the contract. They were necessary parties for the purpose of discovery, if for no other reason. While it is a matter of no concern to them whether Heald is indebted to appellant, by judgment or otherwise, or whether he has property out of which the judgment can be collected, still they are proper parties, that in rendering a decree their interests may be protected, and these facts are important to appellant, and were essential to be alleged in the bill.

Nor do we see that the prayer of the bill is objectionable. It may pray for more than it would be proper to grant, but it does contain a prayer for general relief. If not proper to appoint a receiver, and no necessity is perceived for such an appointment, a sale could be made by the master if such relief appeared to be proper on the hearing, and satisfaction thus had. Or any other appropriate relief could be granted. We see nothing on the face of the bill which required that the demurrer should be sustained. The decree of the court below is therefore reversed and the cause remanded for further proceedings.

Decree reversed.

GEORGE BENNETT *et al.*
v.
NEHEMIAH MATSON.

1. STATUTE OF FRAUDS — *performance of a parol contract within a year.* At the time of a sale under a decree of foreclosure obtained by a prior mortgagee, of two parcels of land, such mortgagee and a junior mortgagee of the same premises, who was a party to the proceeding for foreclosure, made a parol agreement that the prior mortgagee should bid the amount then due him on one of the parcels of land, and if the sale should not be redeemed from, the junior mortgagee was to have the other parcel discharged from the lien which had been reserved in the decree in favor of the prior mortgagee for a portion of his debt which was not yet due, the junior mortgagee to pay the costs of the suit for foreclosure, and one half of the solicitor's fee therein. Within a year from the time this agreement was made, the sale took place, the prior mortgagee bidding the whole amount due him upon one parcel, as agreed, and the junior mortgagee becoming the purchaser of the other parcel for the costs It was *held*, that, as between the parties, this was a consummation of the agreement within a year, and therefore it was not within the statute of frauds, notwithstanding it might be defeated by a redemption thereafter to be had.

2. NOTICE — *what circumstances will put one upon inquiry as to another's equities.* A purchaser of a decree of foreclosure from a prior mortgagee, in whose favor it was rendered, is put upon inquiry as to the nature and extent of a junior mortgagee's equities arising out of a parol agreement previously made between the two mortgagees, by the fact, that such junior mortgagee was a party to the decree.

3. PURCHASER *under a decree of foreclosure — when entitled to possession.* A purchaser at a sale, under a decree of foreclosure, is not entitled to possession, under our statute allowing redemption from such a sale, until a deed has been executed to him by the officer selling; and a decree of foreclosure which provides for putting the purchaser in possession before that time is erroneous.

WRIT OF ERROR to the Circuit Court of Bureau county; the Hon. M. WILLIAMSON, Judge, presiding.

The opinion of the court contains a statement of the case.

Messrs. STIPP & GIBONS, and Messrs. ECKLES & KYLE, for the plaintiffs in error.

Messrs. FARWELL & HERRON, for the defendant in error.

Mr. JUSTICE BREESE delivered the opinion of the Court:

This was a bill in chancery, exhibited by Nehemiah Matson, in the Bureau Circuit Court, against George Bennett, Arvis Chapman, Claramon Flint, Willard Shumway, John Whittington, James T. Stevens and William Hall Jenkins, to foreclose a mortgage. The bill was filed July 15, 1861. The prominent facts of the case are these: George Bennett was the owner of two certain tracts of land, particularly described, situate in the county of Bureau. On the 31st of August, 1854, Bennett conveyed both tracts to John Whittington, who, on the same day, mortgaged the same to Bennett to secure the sum of eighteen hundred dollars, which mortgage was duly recorded.

On the 12th of November, 1856, Whittington sold and conveyed the lands to Willard Shumway, who, on the same day, executed a mortgage thereon to Whittington to secure the sum of eleven hundred and forty dollars, he having paid in part, purchase-money amounting to seven hundred dollars. Afterward, on the 8th of December, 1857, Shumway and wife conveyed the premises by deed of that date, to John Whittington, for the consideration of twelve hundred dollars, which was duly recorded, December 18, 1857.

On the same 12th of November, 1856, Shumway being indebted to Matson, the complainant, by note of that date, in the sum of $603.64, due in one year at ten per cent interest, and being indebted to one Joseph Mercer, by note of the same date, in the sum of $236.64 due in one year with ten per cent interest, which note was afterward assigned to Matson, executed to Matson a mortgage upon the premises, bearing date November 12, 1856, to secure these notes, which mortgage was duly recorded on the same day of its execution. The mortgage to Whittington from Shumway was recorded November 13, 1856.

On the 14th of May, 1860, for the consideration of three thousand dollars expressed in the deed, Whittington and wife conveyed the premises, by quitclaim deed of that date, to Claramon Flint, which deed was duly recorded, May 29, 1860.

At the December Term, 1859, of the Bureau Circuit Court, Bennett filed his bill against Matson and the others, to foreclose his mortgage, and a decree passed in his favor against all of the premises, and the master in chancery was ordered to sell so much of the same as would be sufficient to pay the amount then due and costs, which amount was found to be four hundred and sixty-two dollars, subject to the amount of four notes of two hundred dollars each, and interest from May 20, 1854, not then due, and the master was required to make a certificate of purchase to the purchaser, conditioned that he should have a deed subject to the lien of the mortgage for the notes not then due, at the end of fifteen months, if the premises were not redeemed. For convenience, the premises are called in the pleadings, the "north eighty," and the "south eighty."

The master made the sale, and Bennett became the purchaser of the south eighty for $466.05, from which there was no redemption, and he received a deed. The north eighty and a ten acre tract, were sold to Matson for the costs. The sales were made subject to the lien of the mortgage for the notes not then due.

It is alleged, by Matson, in his bill of complaint, that, at the

time of the sale under the decree, it was agreed between him and Bennett, that Bennett should bid the amount then due him upon the south eighty, and if the sale was not redeemed from, Matson was to have the north eighty discharged from the lien of the mortgage for the notes not then due, and Bennett was not to assert any right to the north eighty under his mortgage and decree, and Matson was to pay, and did pay, the costs of the proceeding, amounting to about forty dollars, and also one-half of Bennett's solicitor's fees.

Claramon Flint, the grantee of Whittington, redeemed the north eighty from this sale to Matson, he receiving the redemption money.

Matson alleges, in his bill, that, in consequence of this agreement with Bennett, that he would look alone to the south eighty for his debt if it was not redeemed, and leave the north eighty to complainant, on which alone, his mortgage was a lien, he did not appear in Bennett's foreclosure suit, made no defense, and allowed his default to be entered. He avers that the south eighty is amply sufficient to pay Bennett his entire claim, and he insists that this eighty should be first exposed to sale for the unpaid balance of the indebtedness to Bennett, and on which he, Matson, is willing to bid the whole amount of such balance if necessary.

The bill also alleges, that, after Bennett obtained the master's deed for the south eighty, he assigned to Arvis Chapman his remaining interest in the decree of foreclosure, for which complainant alleges Chapman paid nothing, and that it was for the benefit of Claramon Flint and James T. Stevens, from whom the consideration moved, and that the assignment was made with notice of the complainant's equities.

The bill then avers that Chapman and Stevens are threatening a further sale under Bennett's decree, of the north eighty, which it is alleged is worth no more than complainant's debt, and that the Bennett mortgage is the only lien on the south eighty, and that it is ample security for the whole debt. Shumway is alleged to be insolvent. George Bennett, Shumway, Claramon Flint, James T. Stevens, Arvis Chapman and

John Whittington are made defendants, and the prayer of the bill is, that they answer not under oath, and that a decree of foreclosure be passed in favor of complainant, and a sale of the premises be ordered without redemption, and that complainant's mortgage take precedence of the Bennett mortgage, and of the decree rendered thereon. That this mortgage and decree be held and adjudged to be satisfied, and that it be held for the benefit of complainant, and that Bennett and Chapman be perpetually enjoined from asserting any right under the decree as against complainant, and that they be required to complete and fully perform the agreement made between complainant and Bennett, and in case a further sale be ordered under Bennett's decree for the balance of the indebtedness, that Chapman and all others interested in the decree be required first to sell the south eighty, before proceeding against the north eighty, and for general relief.

On the 19th of July, 1861, Matson filed a supplemental bill, alleging that W. H. Jenkins, the master in chancery, was about to sell the north eighty, and that he had advertised the premises, and would sell the same on the third day of August, and that the sale was to be made under Bennett's decree, and he prayed an injunction, which was granted.

At the December Term, 1861, Whittington files his answer to both bills, which is substantially as follows:

Respondent cannot state positively whether any such agreement was made between the complainant and George Bennett, as is alleged in complainant's bill, but respondent has been informed, and believes no such agreement was ever made. He admits that he sold his interest in the premises to Claramon Flint; also, that Shumway reconveyed the premises to respondent.

At the same term of court, the defendants, James T. Stevens and Claramon Flint, two of the defendants to the original and supplemental bills, filed answers, in which they state, in substance, that if the said Shumway ever did execute the notes and mortgages mentioned in complainant's bill, the same have been long since taken up and canceled.

They admit that Whittington conveyed all his interest in the premises to the said Claramon Flint, and that the said Stevens was only acting as the agent of said Claramon; that the said Claramon purchased the premises of Whittington in good faith, and for a valuable consideration; that as such purchaser, the said Claramon, by her agent, Stevens, redeemed the premises from the sale to Matson on Bennett's mortgage, and respondents insist that the said Matson has no claim, either by mortgage or otherwise; that the said Claramon, having redeemed the premises as aforesaid, is substituted in the place of Bennett, and possessed of all his rights, subject to the lien imposed on the land to secure the other notes mentioned in Bennett's mortgage. Respondents expressly deny that any such agreement was made between Bennett and the complainant, as is mentioned in complainant's bill; on the contrary, they aver that no such agreement was made.

They also insist, that, even if such agreement was made, the rights of the said Claramon ought not to be prejudiced thereby, as she had no notice of any such agreement, and that she redeemed from the sale in the utmost good faith. They also deny that the Bennett decree is annulled, canceled, or satisfied by virtue of the master's deed to the south eighty; that, by law, said eighties must be sold separately; and, even if the deed does extinguish the decree as to the south eighty, it can in no wise affect the lien on the north eighty.

Respondents deny that the assignment of the decree to Chapman was made at the instance of Claramon Flint and James T. Stevens, and for their benefit.

Respondents insist that the rights of the said Claramon ought not to be prejudiced by any arrangement between Bennett and Chapman.

They further insist that the complainant has no lien, legal or equitable, as against the respondent, Claramon Flint, as he was made a party to the foreclosure, and having failed to assert his claim at that time, it is now too late for him to set up his claim after the interests of innocent purchasers have intervened.

Respondents, further answering, deny that Stevens has any interest in the premises, except as the agent of the said Claramon.

Respondents admit that Bennett was the original owner of the premises, and that he deeded the same to Whittington, and that Whittington executed a mortgage on the premises to secure the purchase-money to Bennett, and on which the decree assigned by Bennett to Chapman was rendered.

They deny all the other allegations in the original and supplemental bills.

Arvis Chapman answers in substance as follows: That he has no personal knowledge of the execution of the notes and mortgage by Shumway. He admits the execution of the mortgage by Whittington to Bennett, but denies that any such agreement was made by Bennett and Matson, as in said bill alleged. But even if such an agreement was made, respondent avers that he had no notice of such agreement; that he purchased Bennett's interest in the decree in good faith and for a valuable consideration, for his own benefit, and not for the benefit of James T. Stevens and Claramon Flint, as is wrongfully alleged in the bill; that the decree was regularly assigned to this respondent by Bennett, under his hand and seal. He, further answering, says, that he had no notice of any equities of the complainant in and to the premises.

He admits that he directed the master in chancery to sell the premises in question, under and by virtue of the decree. He denies that he has two securities, as in the bill is alleged.

Respondent, further answering, says that all the other allegations in the bill not referred to, are wholly untrue.

At the same term Bennett filed his answer in substance as follows:

That it is true, as alleged in the bill, that on the 12th day of November, 1856, John Whittington executed a deed for said premises to Willard Shumway, who paid therefor to Whittington $700 at the time of such sale, and executed to Whittington a mortgage for the securing of notes to the amount of $1,140, the balance of the purchase-money; that Shumway borrowed

the money he so paid to Whittington of the complainant, Matson, and Joseph Mercer, and gave the notes and mortgage mentioned in the bill, to Matson and Mercer, they both knowing the fact of Shumway borrowing the money for the purpose of paying Whittington, and that Shumway had executed the mortgage aforesaid for the balance of the purchase-money; that Whittington did, as alleged in the bill, acquire his title to the premises of this defendant on the 31st day of August, 1854; that he paid $600 down, and for the balance of the purchase-money he executed a mortgage to this defendant for the securing of notes to the amount of $1,800, which mortgage is the senior lien on said premises.

And he, further answering, says, that although the mortgage from Shumway to Matson may have been placed on record earlier than that to John Whittington, yet Matson had knowledge and notice of the sale from Whittington to Shumway, and the mortgage from Shumway to Whittington; that it being ascertained that Shumway would not be able to meet the payment of the notes given for the balance of the purchase-money, so secured by the mortgage, it was mutually agreed between Whittington and Shumway, that Shumway should reconvey the first mentioned premises to Whittington, and accordingly on the 8th day of December, 1857, Shumway did reconvey said premises to Whittington.

Respondent, further answering, says, it is true, as alleged in the bill, that he foreclosed his mortgage against Whittington and obtained a decree as mentioned in the bill; that under the decree the master sold all of the premises, the south eighty to this defendant and the north eighty to Matson, for the consideration mentioned in the bill; that this defendant obtained a master's deed for the portion so purchased by him, and the portion so purchased by Matson was redeemed by Claramon Flint, a grantee of Whittington, who became the owner of the north eighty, subject to the provision of the decree of this defendant.

He wholly and expressly denies making any such agreement with the complainant, as in his bills alleged.

He, further answering, says that, for a valuable consideration and in good faith, he sold and assigned his interest in the decree to said Arvis Chapman. He further denies, that he was in any way obliged to hold the decree for the benefit of the complainant.

A general replication was put in to this and the other answers, and the cause set for hearing at the Special May Term, 1865, on bill, answers, exhibits and depositions and oral evidence in open court, the default of Shumway and Jenkins was duly entered and the bill taken as confessed against them. The court found that Shumway made the mortgage to the complainant, and the notes therein described, as mentioned in the bill, and that said notes and mortgage have long since been due and payable, and it appearing from the evidence, that the equities in the cause are with the complainant, and that the rights and equities of the complainant are superior to the alleged rights and equities of the defendants, or either of them, and the cause having been dismissed by the complainant as to the defendant, James T. Stevens, and the court having heard all the evidence, and after hearing the argument of counsel on the part of the complainant, and also upon the part of the defendants Bennett, Chapman, Flint and Whittington, and having taken the cause under advisement, since the last December Term of this court, and the court having fully considered the matters in controversy in the cause, did order, decree and adjudge, that the equities are with the complainant, and it was further ordered, that Willard Shumway pay to the complainant, within twenty days from the filing of this order, the amount of the mortgage and notes, being fifteen hundred and fifty-one and sixty-six one-hundredths dollars, and interest thereon at six per cent from this date, and that, in default of such payment within such time by Shumway, or any other of the defendants, the master in chancery proceed to sell the premises described in the bill, and being the same premises described in the mortgage, at the east front door of the court-house in Princeton, to the highest and best bidder therefor, for cash, after publishing a notice of the time, place and terms of such sale, for three suc-

cessive weeks prior to such sale, in a paper printed and published in Princeton, and that, at such sale, the master make to the purchaser of the premises a certificate of purchase, the same as is required of sheriffs, in selling real estate under execution, and that such sale be made subject to redemption as required by law; and it was further ordered, that the claim or lien claimed by the defendants, or any of them, under and by virtue of the decree of the Circuit Court of said county, entered in a suit in chancery, wherein George Bennett was complainant and Nehemiah Matson and others were defendants, said suit being brought to foreclose a mortgage made by John Whittington to George Bennett, be, and the same is, hereby made subordinate to the said sale; and it is further ordered, that none of the defendants shall ever hereafter set up or assert any right or equity, as against complainant, to the premises hereby ordered to be sold under and by virtue of the decree rendered as aforesaid in the Bennett foreclosure suit, and that the decree, as far as the same relates to the premises hereby ordered to be sold, was hereby discharged and satisfied and held subject to this decree; it was further ordered, that the mortgage made by Willard Shumway to John Whittington was adjudged to be satisfied and subject to the mortgage of the complainant. And it was further ordered, that the purchaser or purchasers of the premises at the sale, if any should be made, shall be let into immediate possession thereof, and that, in case the same, or any part thereof, shall be redeemed, such purchaser or purchasers shall account for the rents, issues and profits thereof, to the person or persons redeeming; and it was further ordered, that the costs of this proceeding should be paid out of the proceeds of the sale of the premises, and that, in case the same should be purchased by the complainant, and should not be redeemed, Bennett shall pay complainant the costs aforesaid, and that he have execution against Bennett therefor.

From this decree plaintiffs in error prosecute this writ of error, and assign as errors the following:

1. The court erred in rendering a decree in favor of the complainant, Matson.

2. The court erred in decreeing the mortgage of said complainant paramount to that made by Shumway to Whittington, and that said Whittington mortgage be satisfied and subject to the mortgage of the complainant.

3. The court erred in decreeing the mortgage of the complainant superior to the lien held by the defendant Chapman, as assignee of the defendant Bennett and in declaring the Bennett decree satisfied.

4. The court erred in decreeing the sale of the premises described in the decree, for the payment of the amount thereby found due from Shumway to the complainant.

5. The court erred in rendering a decree subjecting the rights of the defendant Flint to those of the complainant.

6. The court erred in rendering a decree, subjecting the rights of the defendant Chapman to those of the complainant.

8. The court erred in not specifically determining the rights of the complainant and the different parties defendants, to the premises in dispute.

9. The amount found due to complainant by the decree is greater than is warranted by the evidence.

10. The court erred in decreeing the right of immediate possession to the purchaser, under the complainant's sale.

11. The court erred in rendering a decree against the defendant George Bennett for costs.

12. The decree is insufficient, uncertain and ambiguous, is contrary to law and equity, and contrary to the evidence.

13. The court erred in refusing to suppress the depositions of Joseph Mercer.

The last assignment of error is not pressed by the plaintiffs in error, and we will confine our attention to the important points raised on the others, and argued by counsel.

The first question which presents itself for consideration is, was the agreement between Matson and Bennett within the statute of frauds? That there was such a verbal agreement as set out in the bill of complaint, is sufficiently established by

the testimony of Cyrus Bryant, Joseph Mercer and Joseph I. Taylor.

This agreement, from all the proof, must be considered as executed, as between themselves, within the year, and thereby it is taken out of the operation of the statute. The purchase by Bennett of the south eighty, and by Matson of the north eighty, was at one and the same time, and both within the year in which the agreement was made; and though it might be defeated by a redemption thereafter to be had, still, the agreement itself, as between the parties, was consummated within one year; consequently, the statute of frauds and perjuries can have no application.

There are divers interests to be considered and disposed of in this case. There are the interests of Chapman, who took the assignment from Bennett, after he, Bennett, had made this agreement; then there is the interest of Claramon Flint, who took a quitclaim deed from Whittington after the decree passed in favor of Bennett, and after the agreement between Matson and Bennett.

Now, as to Chapman, he took the assignment of the decree subject to the equities existing between Matson and Bennett, Matson being a party to the decree, and that was a circumstance calculated to put Chapman on inquiry as to the nature and extent of Matson's equities. As against Chapman and Bennett therefore, Matson has the better equity, and ought to be protected in it.

As to Claramon Flint, she did not set up in her answer, and prove that she was the assignee of the notes from Shumway to Whittington, therefore the question of merger cannot arise. The notes were not offered in evidence. The deed from Whittington to her, of itself, merely conveyed the equity of redemption. The record does not show she was the assignee of the mortgage which would pass by the assignment of the notes, nor does it show that the notes are unpaid, consequently, she can set up no claim to defeat Matson.

But the decree of the court is erroneous in this, it provides for delivery of possession of the premises to Matson before a

deed is made. This we conceive to be in contravention of the statute allowing a redemption from such sales. No case can be found where a party has been put in possession who was a purchaser at a judicial sale, before a deed has been executed to him by the officer selling. Until the purchaser obtains his deed, he is, for most purposes, a stranger to the possession, and if, after he obtains a deed, possession is refused him, he must resort to his action of forcible detainer under the statute, or seek some other appropriate remedy. We have not deemed it necessary to consider the errors in the order they were assigned, but only to express our views on the principal points in the case. The decree must be reversed, because of the error in putting the party in possession before he has obtained his deed, and the cause must be remanded.

Decree reversed.

CHARLES S. DOLE *et al.*

v.

JOHN D. OLMSTEAD *et al.*

1. ASSIGNMENT — *by commission merchants.* Where commission merchants in failing circumstances made an assignment for the benefit of creditors, and there was a large amount of grain on storage, the assignees take only the interest of the assignors. Having been informed by the assignor that the corn was on storage, and the assignees having agreed to deliver the corn to the several owners, when they should present their receipts, the assignees can have no pretense of a claim to any portion of such grain.

2. SAME — *average loss by owners of grain on storage.* Where in such a case, the grain when measured out, falls short when stored by the consent of the owners, in one common mass, the court should average the loss *pro rata*, among all of the owners. And when the assignees had sold the corn, each owner should be compensated in money in due proportion to the amount which he placed in store, and a decree against the assignees in favor of each owner for their several sums due them is proper.

3. WAREHOUSEMEN — *their liability when they convert grain stored.* When assignees become warehousemen, and convert grain in store with them, received of their assignors who were warehousemen, and appropriate the money to their own use, they are at least liable to account to the owners for the amount received, with interest from the date of the sale.

APPEAL from the Circuit Court of La Salle county; the Hon. MADISON E. HOLLISTER, Judge, presiding.

John D. Olmstead and Thomas Herford, in June, 1860, filed a bill in equity in the La Salle Circuit Court, against Charles S. Dole and James H. Dole. This case was previously before the court, and is reported in the 36th Ill. 150, and the state ment there given, with that in the opinion of the court, presents the facts of the case.

On the hearing below, the court granted the relief prayed, in accordance with the previous decision of the case in this court. Defendants appealed to this court from this last decree and assign various errors on the record, and ask a reversal of the decree.

Messrs. LELAND & BLANCHARD, for the appellants.

Messrs. GRAY, AVERY & BUSHNELL, for the appellees.

Mr. CHIEF JUSTICE WALKER delivered the opinion of the Court:

This case was before the court at a previous term. It was then remanded for a new trial on the principles then settled as applicable to the facts of the case. It is now insisted that the court below in rendering this decree failed to observe the decision announced by this court. This decree only settles the rights of the parties in the corn which they had stored with the assignor of appellants. It does not embrace any portion of the corn subsequently delivered under contracts made to their assignor, and transferred to them when the assignment was made. Appellants are left with all of the corn for which they paid on unfulfilled contracts with Fairfield and Weld. The decree made distribution of the remainder of the 14,292 bushels, in the cribs which had been received in store from the appellees by Fairfield & Weld, and for which the latter had given their receipts. There is no pretense that appellants ever paid any money on this corn or owned any portion of it, or that Fairfield & Weld owned any part of it when they made the assignment to appellants; and hence appellants acquired

no interest in it by the assignment, and there is no evidence that they ever did by any other means.

It also appears, that, at the time when Fairfield and Weld made the assignment, they informed appellants that this corn was on storage, and their receipts were outstanding for it, and they had no claim on or interest in the corn. And that appellants agreed to deliver it to the owners when they should present their receipts, except to Cushman, True & Co. That firm, however, replevied, and established their right to their portion. And how or on what pretense appellants can claim any portion of this corn, we are at a loss to comprehend.

It appears, that, when the corn was measured out it fell short of the amount put into the cribs five hundred bushels. This was occasioned by waste and otherwise. Cushman, True & Co., deducting their *pro rata* portion of the loss, were entitled to receive 2,832 bushels. The proportionate shares of appellees in the remainder were then ascertained, and the value of each was computed, and appellants agreed to pay the several amounts to appellees. The corn was theirs, stored by them with the persons of whom appellants with notice received the corn. And the evidence shows that appellants had sold the corn, and appropriated the proceeds to their own use. The court fixed the several amounts due to each appellee, at the price at which appellants had sold the grain, and allowed interest on the amount from the time appellants converted the corn into money. They were at least liable to this extent.

Had any portion of the proceeds of this corn come from the contracts that Fairfield and Weld had made with farmers, and which they assigned to appellants, it might have presented a different question, especially if they had paid for the corn on its delivery. But they had no interest in the corn from which this fund was produced, and consequently could not share in its distribution. We do not perceive that the court below erred in rendering the decree, but it seems to conform in every respect to the former decision of this court. The decree of the court below is therefore affirmed.

Decree affirmed.

EDWARD P. MORGAN *et al.*

v.

ERASTUS PEET.

1. NEW PROMISE, *by assignor of a note after he is discharged by laches of the holder.* Where the liability of an indorser of a note has been discharged by the failure of the holder to bring suit against the maker in due time, and the holder relies upon a new promise to pay, made by the indorser after such discharge, such new promise, to be binding, must have been made with knowledge of the facts from which the discharge arose.

2. If the indorser had knowledge of such facts, whether he knew that, by the rules of law, they would operate to discharge him, is immaterial.

WRIT OF ERROR to the Circuit Court of Peoria county; the Hon. M. WILLIAMSON, Judge, presiding.

This was an action of assumpsit brought in the court below by Edward P. Morgan and Ralph R. Root, against Erastus Peet, as the indorser of a promissory note, executed by Burdick and Peet to Erastus Peet, and indorsed by the latter to one Earl, and by Earl to the plaintiffs.

A trial resulted in a verdict for the defendant. The plaintiffs bring the cause to this court upon writ of error. The grounds upon which the alleged error arises are set forth in the opinion of the court.

Mr. J. K. COOPER, for the plaintiffs in error.

Messrs. JOHNSON & HOPKINS, for the defendant in error.

Mr. JUSTICE LAWRENCE delivered the opinion of the Court:

This was an action against the indorser of a note whose liability had been discharged by the failure of the holder to bring suit in due time against the makers. The plaintiff relied on a promise to pay, made after such discharge. The court instructed the jury that such promise would not be binding, unless made with knowledge of the facts from which the discharge arose. This was in conformity with the opinion of this

court when this case was formerly before it, as reported in 31st Ill. 289. But, after a careful examination of the evidence, we can entertain no doubt that a new promise was made, with full knowledge that the holder of the note had allowed a term of court to elapse without bringing suit against the maker. Whether the indorser knew, that, by the rules of law, such *laches* of the holder discharged him, is immaterial. It is sufficient, if he knew the facts, and the conviction that he did know them is irresistible, under the evidence spread upon this record. He was the father of one of the makers of the note, who was unmarried and lived with him. The payment of the note was made the subject of much negotiation. The holder's agent had come from Ohio to collect it, and waited some days in Peoria to that end. The defendant seems to have been familiar with the business of his son, for whom he had become indorser, and insisted that Burdick, his son's partner, had means in his hands with which the note should be paid. These circumstances raise a very strong presumption, that he knew his son had not been sued. But all doubt is removed by other and positive evidence. Earl, who was trying to collect the note, as agent for the holders, swears positively that the defendant knew the note had not been sued. He might well have known that fact and been able to swear to it, from statements made to him by the defendant. It is said, however, that this witness is contradicted in material points by other witnesses. But if we lay his testimony out of the case, and examine that of William N. Peet, the son of defendant and one of the makers of the note, we find the proof on this point equally clear. He says in his deposition: "Earl wanted father to borrow money to pay him. Father said he had no right to borrow money to pay him — that it was not his place to pay it, as Earl had not tried to get the money from Burdick & Peet." This clearly shows that the defendant knew Burdick & Peet had not been sued, and, taken in connection with the other testimony, leaves no doubt on that point. The new promise is proven, not only by Earl, but by Moss, at a subsequent time and unequivocally. We can only explain this verdict by remembering the well known reluct-

ance of juries to find against parties who sign contracts merely as sureties. But the law itself extends to them sufficient favor, and juries cannot be permitted to extend this favor still further by finding verdicts warranted neither by the evidence nor the instructions. This judgment must be reversed and the cause remanded.

Judgment reversed.

CHARLES O. BOYNTON
v.
ALBERT ROBB *et al.*

1. ALLEGATIONS AND PROOFS — *the rule where the matter is alleged in an inducement.* Every allegation in an inducement in a declaration, which is material, and not impertinent and foreign to the cause, and which cannot be rejected as surplusage, must be proved as laid.

2. So, in a declaration in debt on an injunction bond, the judgment which had been enjoined was alleged in the inducement to have been rendered for $259.75, and the record of the judgment given in evidence was for $249.75. *Nul tiel record* being pleaded, the variance was fatal. The recital of the judgment in the declaration was both pertinent and germane to the cause, and could not be rejected as surplusage.

APPEAL from the Circuit Court of De Kalb county; the Hon. T. D. MURPHY, Judge, presiding.

This was an action of debt brought in the court below by Albert G. Robb, John H. Ball and William Phelps, for the use of George L. Wood, against Hiram E. Whitney, Charles O. Boynton and George Walrod.

The action was upon an injunction bond executed by the defendant Whitney, as principal, and Boynton and Walrod as his securities, upon the granting of an injunction enjoining and restraining the collection of certain judgments which had been obtained by the plaintiff Robb against Whitney.

The judgments which had been enjoined in that proceeding

were described in the declaration as follows: "For that, whereas the said plaintiff, Albert G. Robb, heretofore, to wit, on the 29th day of October, A. D. 1865, by the judgment and consideration of the Circuit Court for the county of Cook, in the State of Illinois, at the October Term of the said court in the year 1855, recovered against the said defendant, Hiram E. Whitney, two certain judgments, one for the sum of two hundred and fifty-nine dollars and seventy-five cents damages and six dollars costs, and the other for the sum of one thousand and fifty-five dollars damages and six dollars costs, upon both which said judgments, afterward, to wit, on the same twenty-ninth day of October, A. D. 1855, writs of execution were duly issued out of said Circuit Court of Cook county, directed to the said William Phelps, who then and there was the sheriff of said county of De Kalb, to execute, commanding him that, of the goods and chattels, lands and tenements and chattels real of said Hiram E. Whitney, he should cause to be made the amount of said several judgments and the costs thereon, and that he return the said writs of execution into the office of the clerk of said Circuit Court within ninety days after the date thereof, which said executions were then and there delivered to the said William Phelps, sheriff as aforesaid, upon which said executions, he, the said William Phelps, sheriff as aforesaid, proceeded to levy, and did levy, upon property of the said Hiram E. Whitney, sufficient to satisfy both said executions, and afterward, to wit, on or about the ninth day of February, A. D. 1856, the said Hiram E. Whitney, as complainant, filed his bill of complaint in the said Circuit Court of Cook county, on the chancery side thereof, making the said plaintiffs herein defendants thereto, praying, among other things, that said Albert G. Robb, John H. Ball and William Phelps, their agents, attorneys and deputies, be enjoined from proceeding in any manner or form whatever to enforce the collection of said judgments," etc.

Among other pleas, the defendants pleaded *nul tiel record* as to the recoveries in the declaration mentioned. On the trial, the plaintiffs gave in evidence the record of a judgment in favor of Robb against Whitney, corresponding with the first judg-

ment described in the declaration, except that it was for two hundred and *forty*-nine dollars and seventy-five cents.

The issues were found for the plaintiffs, and judgment was entered accordingly. The defendant Boynton thereupon took this appeal. The only question arising on the record, is, whether there was such a variance between the judgment first described in the declaration and that given in evidence as to require a reversal of the judgment.

Mr. GEORGE C. CAMPBELL, for the appellant, contended the averment was material, although it was in an inducement, and should be proved as alleged, citing *Hess* v. *Fox*, 10 Wend. 437; *People* v. *Manhattan*, 9 id. 351; *Leidig* v. *Rawson*, 1 Scam. 272; *Hull* v. *Blaisdell*, 1 id. 332.

Mr. CHARLES KELLUM and Mr. H. B. FOUKE, for the appellees.

Mr. JUSTICE BREESE delivered the opinion of the Court:

The only error we are enabled to discover in this record is this: The judgment described in the declaration is a judgment for the sum of two hundred and fifty-nine $\frac{75}{100}$ dollars, recovered by Robb against Whitney. The record offered in evidence shows a judgment in favor of Robb against Whitney for the sum of two hundred and *forty*-nine $\frac{75}{100}$ dollars. Though it may be said this was but inducement to the execution of the bond, yet the rule is that every allegation in an inducement which is material, and not impertinent and foreign to the cause, and which cannot be rejected as surplusage, must be proved as alleged. 1 Chitty Pl. 295. The recital of this judgment was both pertinent and germane to the cause, and could not be rejected as surplusage. Being so, it should have been truly stated, and, not having been so stated and proved, the plea of *nul tiel record* being pleaded, the variance is fatal, and the judgment must be reversed and the cause remanded.

Judgment reversed.

Cyrus H. McCormick
v.
Edward J. Moss *et al.*

Securities on official bonds — *liability where there have been two bonds given for different terms of office.* An execution was delivered to a constable, but before he had taken any steps for its collection his term of office expired. He was re-elected, and gave different securities on his new official bond from those on his first bond. During his second term of office he made a levy of the execution and collected the money. Failing to pay it over, the securities on the first bond were held liable — not those upon the second bond.

Writ of Error to the Circuit Court of Peoria county; the Hon. M. Williamson, Judge, presiding.

This was a suit originally commenced before a justice of the peace in Peoria county, by Cyrus H. McCormick against Edward I. Moss, Gilbert Hathaway and John Moss. The cause was removed into the Circuit Court by appeal.

The question in this court is presented upon the following agreed state of facts:

"This is a suit brought against the securities of E. J. Moss, constable. Said Moss served as constable for two terms. His first term expired on the 1st day of April, A. D. 1862. He was re-elected and gave as his securities upon his official bond, upon which bond this suit is based, for his second term, the defendants in this case, viz.: John Moss and Gilbert Hathaway. During his first term of office, to wit, on the 6th day of March, 1862, the execution upon which this action is based came into said Moss's hands as constable, and was accordingly indorsed. The levy was made and money collected during the second term of office. The execution came into his hands and became a lien on the personal property of the defendant in execution during his first term of office, but we do not know that defendants owned during constable's first term of office, the property levied upon afterward. The money upon said execution has never been paid over or accounted for by said constable."

The securities on the last official bond were different from those on the first bond.

The court below found the issue for the defendants, and rendered a judgment against the plaintiff for costs.

The plaintiff thereupon sued out this writ of error.

The only question presented is, which securities are liable, those upon the first or those upon the second bond?

Messrs. O'Brien & Cratty, and Messrs. Johnson & Hopkins, for the plaintiff in error.

Mr. N. E. Worthington, and Messrs. McCullock & Taggart, for the defendants in error.

Mr. Justice Lawrence delivered the opinion of the Court:

An execution was delivered to a constable, but before he had taken any steps for its collection his term of office expired. He was re-elected and gave different securities on his new official bond from those upon his first bond. During his second term of office he made a levy and collected the money. Having failed to pay it over, the question is now presented, which securities are liable, those upon the first or upon the second bond?

In the absence of statutory provisions there would be strong reasons for holding the securities upon the last bond liable. But we are obliged to consider the statute as clearly establishing a different rule. Section 113 of the act upon justices and constables is as follows:

"Any constable to whom an execution shall have been delivered, and whose term of office shall expire before the expiration of the time within which the return of such execution shall be required by law, shall be authorized to proceed in all matters relating to said execution and in the same manner to collect the same that he might have done had the term of said office not expired, and the constable and sureties shall be liable for any neglect of duty and for all moneys collected on said execution in the same manner and to the same extent they

would have been if the term of office of said constable had not expired."

Section 114 provides, that, " where by law any justice of the peace or constable shall be authorized or required to complete any business or perform any duties growing out of business commenced and in their hands previous to going out of office, the bond shall apply to such cases until such business is concluded by such justice or constable."

It is unnecessary to discuss these sections. They are so clear as to admit of no debate. Without entirely perverting them we cannot hold that the securities on the first bond in the case before us are not liable. The collection of this execution was in the language of the law, " business commenced " and in the hands of the constable previous to his going out of office. The law says the first bond shall apply to this business until its completion.

Judgment affirmed.

JAMES D. COBURN
v.
JAHALON TYLER.

MECHANICS' LIEN — *contract to furnish materials.* Under the act of 1845, creating a lien for labor and materials furnished for the erection of a building, it is necessary to create a lien that a time should be specified within which under the contract they should be furnished. An agreement to furnish them within a reasonable time does not cure the omission to name a specific time, and does not create a lien. Had the contract been entered into and the materials furnished since the adoption of the act of 1861, it might probably have been otherwise.

WRIT OF ERROR to the Circuit Court of Mercer county; the Hon. JOHN S. THOMPSON, Judge, presiding.

On the 30th of December, 1858, Jahalon Tyler filed his petition in the Mercer Circuit Court, to enforce a mechanics' lien,

on a lot in the town of Keithsburg. It alleges that James D. Coburn was the owner in fee of the lot, on the 1st of November 1858, at which time he entered into a contract with petitioner to furnish bricks to build a cellar wall under a dwelling-house. That they were to be furnished in a reasonable time, at nine dollars per thousand and delivered on the premises, or eight if delivered where they then were; that petitioner delivered 8,000 bricks under the contract which were used in the building; that, on the 30th of November, 1857, the parties had a settlement and Coburn gave his note to petitioner for the amount.

That the brick thus furnished being insufficient to complete the work, petitioner in the month of May, 1858, furnished 2,500, of which 1,500 were delivered at the cellar at nine dollars per thousand, and the balance at eight dollars per thousand, all of which were used in constructing the cellar. That no part of the price had been paid. The petition prays that a lien on the premises may be established, the money decreed to be paid and in default thereof that the premises be sold.

Defendant was brought in by publication, and filed a demurrer to the petition, which, being confessed, on leave, the petition was amended. The amendment consisted in the allegation that the bricks were to be furnished in a reasonable time after making the contract, and that they had been so furnished. Also in making Phillip Gore, a mortgagee, a party defendant. Having been served with process, he entered a motion to dismiss as to him which motion was overruled, and failing to answer, the petition was taken as confessed as to him; petitioner then dismissed as to him.

Coburn filed a demurrer to the petition, which was overruled, and failing to answer, a decree was rendered in accordance with the prayer of the petition, and this writ is prosecuted to reverse that decree.

Messrs. J. R. & I. N. BASSETT, for the plaintiff in error.

Mr. B. C. TALLIAFERRO, for the defendant in error.

Mr. CHIEF JUSTICE WALKER delivered the opinion of the Court:

This was a proceeding under the act of 1845, to enforce a mechanics' lien. The contract set out in the petition, specified no time within which the brick were to be furnished. It is, however, alleged, that, under the agreement, they were to be furnished to appellant in a reasonable time, at the price of nine dollars per thousand if delivered at the place where they were to be used, or at eight, if delivered at the kiln.

In the case of *Cook* v. *Vreeland*, 21 Ill. 431, it was held, that, where the contract fails to specify the time in which the labor is to be performed, or the money is to be paid for such labor or the materials furnished, a decree will not be granted. The case of *Senior* v. *Buberer*, 22 Ill. 152, announces the same rule. And the case of *Moser* v. *Matt*, 24 Ill. 198, refers to and affirms the doctrine of those cases. The principle which they announced must control this case. There is the same necessity for specifying the time when the materials shall be furnished, as for the completion of the work, or the payment of the money. In principle, those cases are the same as this, and no reasonable distinction can be taken between them. To hold, that, under that act, a time need not be fixed by the contract for the delivery of the materials, would conflict with those cases, and we see no reason for departing from the interpretation of the act there given.

Nor does the fact that it was agreed the brick should be delivered within a reasonable time alter the case. Such an agreement is uncertain, and there is no means of determining when the performance of such an agreement may be required. That could only be certainly known by a judicial determination. In such contracts a great many circumstances may enter into the reasonable requirement as to the time of its performance. Under the law of 1845, we think such an agreement is insufficient to create a lien, although it probably would under the amendatory act of 1861. The contract having been made and performed under the former act, it must be governed by

its provisions. Had the agreement been made and performed since the adoption of the latter act, a different question would have been presented. The decree is reversed and the cause remanded.

Decree reversed.

SULLIVAN S. CHILD
v.
EDWARD H. GRATIOT.

1. ADMINISTRATOR — *appointment of a non-resident — not allowable.* A non-resident cannot legally be appointed administrator, on an estate in this State, not even on the estate of a non-resident dying abroad and leaving effects in this State.

2. This rule is deduced from the evident object and policy of the act of 1847, which provides for the removal of an administrator from office, in case he shall remove from the State, and neglect or refuse to make settlement of his accounts on proper notice given for that purpose.

3. If, in such case, the administrator who has removed from the State, makes a settlement, his trust thereupon, *ipso facto*, terminates. If he does not make the settlement, he is to be removed from office.

4. ACT OF 1847, on that subject, as reprinted in 1853, and as it appears in Scates' Compilation, p. 1238, is not correctly copied from the original session laws, important words being omitted.*

5. REVOKING LETTERS OF ADMINISTRATION — *where a non-resident is appointed.* Should a non-resident be appointed administrator of an estate in this State, it is the duty of the probate court to revoke the appointment on proper application being made.

6. SAME — *by whom the application may be made.* In this case such application was made by an administrator of the same estate, appointed in another State, the domicile of the intestate, and his application was entertained.

APPEAL from the Circuit Court of Jo Daviess county; the Hon. BENJAMIN R. SHELDON, Judge, presiding.

The opinion of the court contains a statement of the case.

---

* But it is correctly printed in Purple's Statutes, and in the recent compilation by Gross, p. 811, § 100.

Mr. LOUIS SHISSLER and Mr. M. Y. JOHNSON, for the appellant.

Messrs. LELAND & BLANCHARD, for the appellee.

Mr. JUSTICE BREESE delivered the opinion of the Court:

At the June Term, 1865, of the County Court of Jo Daviess county, Sullivan S. Child, administrator on the estate of William H. Child, by letters of administration granted at Marietta, in the State of Pennsylvania, applied to the County Court to revoke the letters of administration on the same estate, granted by that court to Edward H. Gratiot, for the reasons, first, because Gratiot was a non-resident of this State, and could not be legally appointed such administrator; second, because the letters were obtained through misrepresentation and false pretenses; third, because they were obtained by a suppression of the truth; fourth, because letters of administration had been granted at Marietta, Pennsylvania, the domicile of deceased, on the 15th of August, 1864, to applicant.

The County Court refused the application, and an appeal was taken to the Circuit Court, where the decision of the County Court was affirmed. From this judgment an appeal is brought to this court on bill of exceptions duly taken.

Proof was made that Gratiot was a resident of Wisconsin at the time of his appointment, and had been such resident for a great number of years, and yet a resident thereof. He was the uncle of the intestate, whose father was living in Baltimore. After his appointment, Gratiot called on Edward H. Beebe, the guardian of the intestate, and received from him the sum of ten hundred and eighty-six dollars and ninety-one cents, due the estate of the intestate, and gave his receipt for the same, as administrator of William H. Child, deceased. This sum was a balance in the hands of Beebe, as guardian. No debts were proved against the intestate in Jo Daviess county, nor had he resided there for many years.

The question presented is, can a non-resident of this State be appointed an administrator on the estate of a non-resident

dying abroad and leaving effects in this State, or if such appointment be made, it is the duty of the court making it, to revoke it, on proper application being made.

In this case, the application to revoke the letters granted to Gratiot, was made by the administrator appointed by the court of the domicile of the intestate.

We see grave objections to the appointment of a non-resident administrator on the estate lying in this State, among which is, the impossibility of compelling him to render an account and make a settlement, and pay claims and demands against the estate, as he is beyond the reach of the process of the court, and can set it at defiance, to the great loss and injury of creditors.

By the act of 1847, it is provided, when any executor or administrator may have removed, or shall remove without the limits of this State, it shall be the duty of the probate justice of the proper county, upon affidavit being filed of such removal by any person interested in the estate in the hands of such executor or administrator, to cause a notice to be published in some newspaper in the county where letters testamentary or of administration may have been granted, for four weeks successively, and if no newspaper is published in said county, then by posting up a notice at the court-house door, setting forth that said affidavit has been filed, and notifying the said executor and (or) administrator to appear before him within thirty days after the date of said notice and make a settlement as aforesaid, it shall be the duty of said probate justice to remove said executor or administrator from office, and supply the vacancy as now directed in other cases. Scates' Comp. 1238.

The spirit of this law would seem to forbid the appointment of a non-resident to any such trust, for if he can be deprived of his office on his removal to another jurisdiction, no court would be warranted in appointing him to the office, he being a non-resident at the time of his appointment. There is an incongruity in it which cannot be reconciled. We therefore are of opinion, that on the facts before the Circuit Court, the appointment of Mr. Gratiot, he being non-resident, should have

been revoked on the application of the administrator, who had been appointed such, by the court of the domicile of the intestate.

For these reasons the judgment of the court below must be reversed.

Judgment reversed.

At the April Term, 1867, a rehearing of this case was asked upon grounds which are set forth in the following supplemental opinion of the court, but the application was denied.

Messrs. R. H. McCLELLAN, D. W. JACKSON and E. A. SMALL, counsel for the appellee, made the application.

Mr. LOUIS SHISSLER and Mr. M. Y. JOHNSON, for the appellant, *contra.*

Mr. JUSTICE BREESE delivered the opinion of the Court:

Since filing the above opinion, a petiton has been presented by the appellee for a rehearing. It is suggested in the petition that we have misapprehended the statute, on which the opinion was based. The act in question is the act of 1847, entitled "An act further to define the duties of probate justices," and is composed of one section. We quoted from "Scates' Compilation," p. 1238, and referred also to the act, as printed among the laws of 1847, in the reprint of 1853, p. 63, and found an entire correspondence. The counsel for appellee insisting in his petition there was an important omission, which, in his opinion, materially changed the character of the enactment, we sent for and obtained the original publication of the acts of 1847, made in that year, which, on examination, verified the statement of counsel.

In the act of 1847, as originally published (Sess. Laws, 1847, p. 63), these words are found in it, after the words, "make a settlement," which are not found in the reprint of 1853, or in "Scates' Compilation" of 1858, "*of his accounts as now required by law; and in case said executor or administrator*

shall neglect or refuse to make said settlement as aforesaid," it shall be the duty of said probate justice to remove the administrator, etc.

These words in *italics* are entirely omitted from the printed acts from which we quoted, but by supplying them we are not of opinion that the implication we raised on the statute with those words omitted, is destroyed or weakened.

This act does not, nor does any act to which reference has been made, authorize, in express terms, the appointment of a person, who is non-resident, to the office and trust of administrator on an estate lying wholly within this State, and we think there are insuperable objections to it. It is the purpose of this very act to put an end to the trust on the removal of an administrator duly appointed while a resident, to another jurisdiction, for if he obeys the notification to appear and settle, and he makes a settlement, his trust, *ipso facto*, terminates, else why a settlement? If he does not, on notice, make a settlement, the same result is produced. These are modes provided by which the trust shall cease. This is the evident object and policy of the act of 1847; from the same motives of policy then, a non-resident should not be appointed to such a trust. In the first place a non-resident administrator cannot be compelled to perform the duties pertaining to the trust. He is not present to be served with notice of existing claims against the estate he represents nor with process. It cannot be that the law intended each creditor, who wishes to prosecute a claim before the Probate Court, be his claim large or small, should be under the necessity of filing an affidavit of non-residence, and make proof of publication in a newspaper, for the administrator to appear and defend. The law prescribes a mode of presenting claims against an estate, which is by notifying the administrator, and if he happens to reside in Oregon or some other State, it would be attended with great delay, loss, expense and inconvenience, and in many cases result in the loss of the claim.

Nor is it possible to carry into effect section 126 of chapter entitled "Wills," if the administrator be a non-resident. That section provides on failure to pay over money or dividends in

pursuance of the order of the Court of Probate, within thirty days after demand made, the delinquent administrator shall be attached and imprisoned until he complies with the order. A non-resident administrator cannot be brought within the operation of this section, and his body being absent, the creditors and distributees would lose one of the strongest holds the law has wisely given them for the due performance of the duties of an administrator. We see an incompatibility in the two positions not to be reconciled.

The suggestion by appellee, that a suit can be brought on the administrator's bond, is not a sufficient answer, nor a relief from the dilemma. If the administrator can be non-resident, why may not his sureties be also? And how will you proceed against them on the bond without personal service? We see no effective mode.

Section 57, chapter "Wills," has provided fully for such a case as was presented to the County Court of Jo Daviess county. It is as follows:

"Whenever any person shall die intestate in any county in this State, or whenever any non-resident shall die intestate, leaving goods or chattels, rights and credits, or either, and no widow or next of kin, or creditor or creditors shall be living within this State, administration of the goods or chattels, rights and credits of such intestate, shall be granted to the public administrator of the county in which such intestate died, or in which the goods or chattels, rights, credits and effects shall be found, in case such intestate shall have been a non-resident, and his successors in office." Scates' Comp. 1192.

This statute would have justified the county court in a refusal to issue letters of administration to any person other than the public administrator. No other person had a right, under the law, to administer on this estate. The intestate left no widow, or next of kin, or creditors living in this State, consequently the right to administer devolved upon the public administrator, and upon no other person.

The letters of administration to appellee were improvidently granted. The money of the intestate was safe in the hands of Beebe, and as there were no creditors, no necessity existed for administration. Should there be danger of loss of the money, or creditors appear, then, on proper representations being made to the County Court, it would be the duty of that court to commit administration to the public administrator.

It does not follow from what we have said, that appellant would succeed to the trust. By no means. He is in the same predicament as appellee, being a non-resident. Whatever rights he may have, he can exercise them by complying with the act authorizing administrators and executors from other States to prosecute suits in this State, approved March 3, 1845. Rev. Stat. 596.

We are entirely satisfied a non-resident cannot legally be appointed administrator on an estate in this State, and where such a person has been appointed the appointment should be revoked.

We adhere to the opinion first delivered, and must reverse the judgment of the Circuit Court.

Judgment reversed.

WARREN B. ESTY
v
JOHN SNYDER.

1. ASSIGNEE OF PROMISSORY NOTE—*how far protected against a want of title in his vendor.* Where the payee of a promissory note indorses the note in blank and delivers it to another person, no matter for what purpose, he thereby holds the latter out to the world as the owner, and a *bona fide* purchaser from him, before its maturity, will take a good title.

2. INSTRUCTIONS—*need not be repeated.* It is not error to refuse an instruction which is substantially embodied in other instructions given to the jury.

WRIT OF ERROR to the Circuit Court of Woodford county; the Hon. S. L. RICHMOND, Judge, presiding.

The opinion states the case.

Messrs. CLARK & CHRISTIAN, for the plaintiff in error.

Messrs. INGERSOLL, PUTERBAUGH & CASSELL, for the defendant in error.

Mr. JUSTICE LAWRENCE delivered the opinion of the Court:

This was an action of trover, brought by Esty against Snyder, to recover the value of a promissory note given by one Bacon to Esty, and at the commencement of the suit in possession of Snyder. It appears from the evidence, that Esty had deposited the note with Clark & Keller, attorneys at law, with what precise object does not appear; but it is to be presumed for negotiation, as he placed on it his blank indorsement. Keller transferred the note to the defendant, Snyder, and left the State, and Esty now insists that Snyder acquired no title. It of course depends upon whether the transfer of the note by Keller to Snyder, was made in good faith so far as Snyder is concerned, and for a valuable consideration. The case was fairly left by the court to the jury on this point, and they have found that it was thus transferred, and the evidence sustains the verdict. The law governing the case is very plain. Esty by indorsing the note in blank and delivering it to Clark & Keller, held them out to the world as the owners, and a *bona fide* purchaser from them before maturity would take a good title. The fourth instruction asked for the plaintiff and refused, was technically wrong as to the measure of damages, and its substance, in other respects, was embodied in the other instructions. There was therefore no error in refusing it.

Judgment affirmed.

Syllabus. Statement of the case.

JAMES H. REESE
v.
JOHN G. MITCHELL.

CHATTEL MORTGAGE — *default — days of grace.* Prior to the passage of the act of 1861, notes in this State were not entitled to days of grace; and the cus tom of giving days of grace by a portion of the business community did not change the law, nor was any one bound by such a usage. The act of 1861 did not apply to or govern notes previously given, but only controlled notes sub sequently executed; *Held*, that a mortgagee of personal property was in default in not reducing it to possession without delay on a default in the payment of the note on the day specified. It not having days of grace, the mortgagee could not allow them to the mortgagor, as to creditors or subsequent purchasers. It is fraudulent as to creditors and purchasers to permit such property to remain in the hands of the mortgagor two days after the maturity of the mort gage debt, where the parties reside in the same town or county, and no obsta cle prevented him from reducing it to possession.

APPEAL from the Superior Court of Chicago.

This was an action of replevin brought by James H. Reese, in the Superior Court of Chicago, to the December Term, 1860, against John G. Mitchell, for the recovery of a number of arti cles of personal property. The declaration was in the usual form, for taking and unlawfully detaining the goods. Defend ant filed a plea of *non detinet*, and a plea of property in the defendant. On these pleas issue was joined. And the cause was, at the February Term, 1865, submitted to the court for trial, without the intervention of a jury, by consent of parties.

It was admitted in the court below that plaintiff claimed the property in dispute under a chattel mortgage dated the 14th of November, 1859, by Thomas Sim, to plaintiff, to secure $680.50, due one year after date. That the mortgage provides that the mortgagor might retain possession of the property, until he should make default in the payment of the money.

That defendant claimed the property under a levy made by him as a constable, by virtue of executions from the docket of a justice of the peace, against Sim. That the levy was made

on the 16th day of November, 1860, two days after the day named in the note and mortgage for the payment of the money.

It was agreed that no exceptions should be taken to the pleadings, but they were to be treated in all respects as regular and proper. The property was household furniture, and part of the same named in the mortgage. That it was duly demanded before the suit was brought. The judgments upon which the executions issued and the mortgage, were admitted to be regular and valid.

That the question to be determined was whether the mortgagee was guilty of laches in failing to take possession of the goods before the time of the levy, or the property was subject to levy under the executions.

The note and mortgage and also the executions and levies were introduced in evidence. Plaintiff introduced evidence that among bankers and business men at Chicago, days of grace were allowed on promissory notes.

The court found the issues for the defendant. Plaintiff then entered a motion for a new trial, which was overruled by the court and exception taken. The court thereupon rendered judgment in favor of the defendant, and that he have return of the property. To reverse that judgment plaintiff prosecutes this appeal and assigns the rendition of the judgment for error.

Mr. GEO. W. THOMPSON, for the appellant.

Mr. OBADIAH JACKSON, for the appellee.

Mr. CHIEF JUSTICE WALKER delivered the opinion of the Court:

This was an action of replevin brought by James H. Reese, in the Superior Court of Chicago, against John G. Mitchell, for the recovery of various articles of personal property. A trial was had by the court, a jury having been waived by the parties. The court found the issues for the defendant; a motion for a new trial was entered and overruled by the court;

and judgment was rendered according to the finding. The cause is brought to this court by appeal.

Appellant claims the property in controversy under a chattel mortgage executed by Thomas Sim, to secure the payment of a promissory note given by him to appellant for $680.50, due one year after date, and bearing date on the 14th of November, 1859. The mortgage purports to have been executed at the same time, and contains a provision that, upon the payment of the note, the mortgage should be void. It also provided that Sim should hold and retain possession of the property, at his expense, until he should make default in the payment of the note.

Appellee seized the property under two executions in his hands as a constable, which had been issued by a justice of the peace against Sim, the mortgagor. One was in favor of Joshua Thomas, and the other in favor of Simeon Hieshbach. The levies were made on the 16th of November, 1860, two days after the maturity of the note.

By an agreed statement in writing, the following were admitted as facts on the trial, viz.: "That the property levied upon is part of the mortgaged property. That Sim, at the time of the levy, was housekeeping, with his wife and children, in the south part of the city of Chicago. That the mortgage covered nearly all the necessary household furniture and property of said Sim in daily family use. That said Sim was then in active practice as a physician and surgeon in the city of Chicago, and that the mortgage also covers the medical and surgical books, implements and furniture of said Sim then in use by him in his practice. That the plaintiff resided at Lake View, a different town from that in which Sim resided, being about seven miles apart, but that the plaintiff had an office and did business in the city of Chicago, and that Sim and plaintiff married sisters. It was further stipulated, that the question to be tried in the case was, whether the plaintiff was guilty of *laches* in not taking possession of the mortgaged property before the time of the levy by the defendant, or whether, under all the circumstances of this case, the property

was subject to said executions by reason of possession not having been taken of said goods by the plaintiff, as mortgagee, before the levy — to establish which issue the plaintiff should be at liberty to introduce any competent proof, and the defendant to rebut the same by competent evidence."

Appellant claims, that, by the law and usage of business men, notes of this character, at the time of their maturity, are entitled to days of grace. And that the note was, therefore, not due until the 17th, and the maker was not in default in payment, or the mortgagee in taking possession at the time the levy was made. Whatever may have been the usage of bankers and a portion of the business community, the custom of allowing days of grace did not obtain among the great majority of the people in our State. Nor has the statute or the decisions of our courts declared that such a rule obtained, prior to the act of February, 1861. But on the contrary, the decisions of this court had announced a different rule. In the case of *Walter* v. *Kirk*, 14 Ill. 55, the note was assigned on the day named for its payment, which was the 1st of November, and it was held to have been assigned before it was due. But the court say: "The maker had the whole of the day on which it was indorsed in which to make payment. He was not in default until the day had expired. An action could not have been maintained on the note until the 2d day of November. A suit on the previous day would have been dismissed, because prematurely brought." It is true, that the question was only incidentally presented in that case.

The precise question, however, was presented to the court in the case of *Elston* v. *Dewes*, 28 Ill. 436. It was there held, that days of grace did not exist as a right, prior to the passage of the act of 1861, so far as it related to promissory notes. The fact that days of grace were given on bills of exchange, does not affect the question, as that rule obtained under the law merchant, and only as to commercial paper. But promissory notes only became negotiable by force of the statute, and it failed to give days of grace when it authorized them to be assigned. Under the common law, they partook of few, if any,

of the characteristics of commercial paper, and were certainly not entitled to days of grace.

The act of 1861 was not adopted to control an existing right, but to confer one that had not previously existed. Nor does the expression of the act, "usual days of grace," refer to days of grace already allowed on promissory notes. No such days of grace existed; and if they had, it would have been supererogation to enact a law already in existence. The usual days of grace referred to, are such as were, by the law merchant, throughout the commercial world, allowed on bills of exchange. By that usage three days are uniformly given on bills of exchange, and by legislative enactment of most of the States of the Union, the usage is the same on all instruments to which it applies. The note in this case was not entitled to days of grace.

The note then having fallen due on the 14th day of November, and the money not having been paid, the mortgagor was in default. And the property still being in his possession on the 16th of November, the mortgagee was guilty of *laches* in not reducing it to possession. It has been uniformly held by this court, ever since the decision of *Thornton* v. *Davenport*, 1 Scam. 296, which is the leading case of this court, that the possession of personal property contrary to the terms of the mortgage, marriage settlement or limitation over, is fraudulent *per se* against purchasers and creditors. And in the cases of *Reed* v. *Eames*, 19 Ill. 595; *Frink* v. *Staats*, 24 id. 633; *Thompson* v. *Yeck*, 21 id. 73, and *Cross* v. *Perkins*, 23 id. 382, it was held, that suffering personal property to remain with the mortgagor, after making default in payment, is a fraud on creditors and purchasers. And in the first two of these cases, it was held to be incapable of explanation. In the case of *Reed* v. *Eames*, it was said, that when parties live in the same town or county, one day after default would be a reasonable time within which to take possession; and that what is a reasonable time must be determined by the situation of the parties, their vicinity and facilities for intercourse.

In the case of *Cross* v. *Perkins*, it was said, that, under some

circumstances one day might be reasonable, whilst under others, it might be unreasonable; that no general rule could be established, but that the mortgagee must act with promptness, and must use every reasonable effort to reduce the property into his immediate possession after a default has occurred. In this case the parties lived in the same county and but a few miles apart, and we do not see a single circumstance that would have prevented the mortgagee from obtaining the property during the fifteenth of November. Nor does it appear that he made the slightest effort in that direction, either by himself or an agent. He was, therefore, guilty of *laches*, and after the default the possession by the mortgagor was fraudulent as to creditors. The court below was therefore fully warranted in finding for the defendant below, and the judgment is affirmed.

Judgment affirmed.

JULIUS ROSENTHAL, Administrator of the estate of Michael Doyle, deceased,

v.

JOHN MAGEE.

1. ADMINISTRATION OF ESTATES — *in what forum a creditor of an estate may have his remedy.* A creditor of an estate is not compelled to present his claim to the probate court for allowance, but can choose his forum, and resort in the first instance to the Circuit Court, if that court has jurisdiction.

2. COSTS *in suits against administrators — construction of the statute of "Wills' in that regard.* It is not essential that a creditor of an estate should present his claim to the probate court at the term appointed by the administrator for that purpose, under section 95 of the statute of "Wills," to entitle him to recover costs in a suit subsequently brought against the administrator. That section, in providing, that if claims are not presented at such term the estate shall not be liable for the costs on any claim presented thereafter, has reference alone to claims presented to the probate court.

3. So the creditor, without having presented his claim to the probate court, may sue the administrator in the Circuit Court, after the term thus appointed for prosecuting claims to the probate court, upon the expiration of a year from

the taking out of letters of administration, as provided in section 101 of the same statute, and recover his costs in such suit, if he prove a demand before the commencement thereof.

WRIT OF ERROR to the Circuit Court of Cook county; the Hon. ERASTUS S. WILLIAMS, Judge, presiding.

The case is stated in the opinion of the court.

The question presented is, whether a creditor of an estate may recover costs in a suit against the administrator, commenced in the Circuit Court after having made a demand, but without having presented his claim to the probate court at a term which had been appointed by the administrator for that purpose.

Mr. JULIUS ROSENTHAL and Messrs. HIGGINS & SWETT, for the plaintiff in error, stated that the defendant in error claimed the right to recover costs under the 101st section of the statute of "Wills," but that an examination of the history of the legislation in this State would show the rule to be otherwise. Under sections 95 and 97 of the laws of 1829, in relation to wills (Gale's Stat.), there is no doubt that an administrator was liable for costs, after demand. But counsel contended that section 101 of the statute of wills, as it appears in the revision of 1845, was so far modified by the act of 25th February, 1833 (Gale's Stat. 722, § 5), as to require that every claimant should, in order to recover costs, present his claim to the term of the probate court fixed upon by the administrator.

In the revision of 1845 the original sections are to be found, but they were improperly preserved in that revision.

As the law is now, a demand of the administrator would be of no practical benefit, as he cannot pay a claim or even allow it, without its being proved before the County Court. *Reitzell* v. *Miller*, 25 Ill. 67; R. S. title "Wills," §§ 118, 122, 124.

When the 101st section was originally passed, and before the 95th section was enacted or became a law, a demand could be made, and then the statute meant something, as the administrator could allow the claim or reject it. But since that sec-

tion of the statute was in force, viz., since February 25, 1833, the provisions in regard to recovering costs by making a demand, has not been in force, unless it is also shown that the claim was duly presented as required by the 95th section.

It is believed that this view of the case is fully sustained by the case of *Granjang* v. *Merkle*, 22 Ill. 249.

In the case of *Bullock* v. *Bogardux et al.*, 1 Denio, 276, it was held, under a similar statute, that, if a party failed to present his claim within nine months, or the time fixed by the statute, he could not recover costs, even though the administrator had wholly failed to give the notice which the statute required should be given. But, where the notice has been given, as is admitted in this case, and the claim has not been presented as required by law, it would seem there should be no doubt about this question.

Messrs. GOODRICH, FARWELL & SMITH, for the defendant in error.

1. The proviso in section 95, statute of wills (Revision of 1845), exempting estates from costs unless claims are filed on or before the adjudication term of the probate court, relates only to costs of the probate court.

This is evident from the language of the section.

2. The actions referred to in section 101 of statute of wills, are not the statutory proceedings for proving up claims in the probate court, but they are suits at law or in equity, brought against the administrator in any court having common law jurisdiction. Claims may be proved up in the probate court at any time after letters are taken out. The regular adjudication day should be within nine months (§ 95), and distribution may be ordered at the end of a year (§ 124). But the actions referred to in section 101 cannot be brought within a year.

3. The jurisdiction of the probate court is not exclusive.

A person having a valid claim against an estate, is not compelled to present it in the probate court or lose his debt.

If it is of a nature that the probate court has jurisdiction, he may present it there; but it may be an equitable demand, of such a nature that the probate court cannot pass upon it. *Pahlman* v. *Graves*, 26 Ill. 405.

The creditor may choose his forum. He can bring his suit in the Circuit Court. The legislature cannot deprive him of this right, for the Constitution provides (Constitution of Illinois, art. 5, § 8) "that said (Circuit) courts shall have jurisdiction in all cases at law and in equity."

Suits against executors and administrators are not a modern invention. They are not given by statute, but are known to the common law; and the Constitution secures unto the Circuit Court jurisdiction in these well known "cases."

An examination of the reported decisions of the Supreme Court will show that it has been the practice to try such suits in the Circuit Court, in the first instance. See *Peacock* v. *Haven's Adm'rs*, 22 Ill. 23; *Granjang* v. *Merkle*, 22 id. 249 *Judy* v. *Kelley*, 11 id. 211.

Mr. JUSTICE BREESE delivered the opinion of the Court:

The question presented by this record, involves the construction of certain sections of the chapter entitled "Wills," which do not seem entirely harmonious. They are sections 95 and 101.

An action of assumpsit was brought in the Cook Circuit Court upon a promissory note made by Michael Doyle to John Magee, and against Julius Rosenthal, administrator on the estate of Doyle. The pleas were the general issue — denial of the execution of the note — that it was assigned after maturity and set off.

The jury found for the plaintiff and assessed the damages at six thousand three hundred and thirty-two dollars, on which verdict judgment was rendered.

The following stipulation was entered into, on plaintiff's motion that the costs be awarded to him:

"It is hereby stipulated and admitted, that the defendant took out letters of administration on the 15th day of January,

1863, and gave the notice required by the statute, for creditors to present their claims for adjudication, for the March Term of the County Court, 1863; and that the plaintiff, before the commencement of this suit, caused the note upon which this suit is brought, to be presented to the defendant, and requested payment thereof of him, as administrator of the estate of Michael Doyle, deceased, which payment was refused, and that such presentation, demand and refusal were proved by the plaintiff's witnesses on the trial of this suit. And the said claim was not presented in the County Court, and that no other demand was made than that above mentioned."

Whereupon, the court rendered the following judgment:

"That the plaintiff do have and recover of the defendant, as administrator as aforesaid, his damages of $6,332, in form aforesaid, by the jury aforesaid assessed, together with his costs and charges about his suit in this behalf expended, to be paid in the course of administration."

The cause is brought here by writ of error; defendant assigning as error this judgment for costs against him as administrator.

It is insisted by the plaintiff in error, that all claims must be presented at the term of the probate court, appointed by the administrator, under section 95 of the statute of "Wills," for the adjustment of claims against the estate, and if not so presented, the estate is not liable for the costs on any claim presented thereafter. Scates' Comp. 1205.

It is very apparent this section has reference alone to claims presented to the probate court.

Section 101 of the same statute provides, that no action shall be maintainable against any executor or administrator for any debt due from the testator or intestate until the expiration of one year after the taking out letters testamentary or of administration, except as is herein excepted; nor shall any person suing after that time recover costs against such executor or administrator, unless a demand be proved before the commence-

ment of such suit; but, in all other cases, both executors and administrators shall be liable to pay costs as other persons. Id. 1206. Section 102 provides, that suits to recover claims shall not be brought, unless within one year next after such executor or administrator shall have settled his accounts with the court of probate.

The proposition of plaintiff in error, that no suit can be brought against an administrator, unless he has presented his claim for allowance, to the court of probate, does not seem maintainable, for section 116 provides, that the manner of exhibiting claims against an estate may be by serving a notice of the claim on the administrator, or presenting him the account, or filing the account with the court of probate, while section 117 preserves the distinction between a claim filed, and a suit brought on it.

The case of *Reitzell et al.* v. *Miller*, 25 Ill. 67, simply decides that an administrator cannot submit a claim against the estate he represents to arbitration, and that an administrator has no power to admit a claim so as to bind the estate.

The case of *Granjang* v. *Merkle*, 22 Ill. 249, refers to sections 95 and 101 of the statute of wills, but no decision is made or opinion intimated, that a suit cannot be maintained under the latter section after a demand is made, for that section expressly so provides, and it is expressly agreed a demand was made before suit brought.

Though there is not perfect conformity between these sections, yet we think they can both be made operative by confining section 95 to cases in the probate court, to which it is evidently directed, and section 101 to cases arising in the Circuit Court, by original suit.

A creditor of an estate is by no means compelled to present his claim to the probate court for allowance,—he can choose his forum and resort in the first instance, to the Circuit Court, if that court has jurisdiction. Many circumstances may concur to prevent an application to the probate court. The Circuit Court is always open to all kinds of actions. If the bar of the statute of limitations can be set up, the party claim-

ing will be defeated, but if it is not, and the estate inventoried has been settled, the claimant can, notwithstanding, recover his judgment and collect the proceeds out of assets thereafter to come to the hands of the administrator. *Peacock* v. *Havens, Admr.*, 22 Ill. 23; *Judy* v. *Kelley*, 11 id. 211; *Granjang* v. *Merkle*, before cited.

On careful consideration, we are of opinion that these sections are not so inconsistent that they cannot both be enforced. It is not for us to say the legislature did not design that both should be carried into effect in the manner we have here intimated.

The judgment of the court below is affirmed.

Judgment affirmed.

HENRY L. SWARTWOUT
v.
JOSEPH EVANS.

EVIDENCE—*leading questions.* In an action of trover, one of the questions of fact in controversy was, whether plaintiff, in making a demand of the property from the defendant, demanded the entire property or only a half interest which he owned, and the plaintiff asked his own witness, who was present when the demand was made, "What was said, if any thing, at that time about his interest in the machine?" The question was *held*, not to be leading, but merely directed the witness' attention to the particular point in controversy.

APPEAL from the Superior Court of Chicago; the Hon. JOSEPH E. GARY, Judge, presiding.

This case was originally before this court at the April Term, 1864, and again, upon a re-hearing at the April Term, 1865, when the judgment of the court below, which was in favor of the plaintiff, Evans, was reversed and the cause remanded. That case is reported in 37 Ill. 442.

The action was trover, brought by Evans against Swartwout, to recover for the alleged conversion by the defendant of a mowing and reaping machine, claimed to belong to the plaintiff.

Another trial was had, resulting as before, in a verdict for the plaintiff. Upon the second trial, a son of the plaintiff, Joseph Evans, Jr., testified, in reference to the demand made by the plaintiff of the defendant, and to direct the witness' attention to the character of the demand made, whether for the entire machine or only the plaintiff's half interest therein, he was asked this question:

"What was said, if any thing, by the plaintiff, at that time, about his interest in the machine?" The defendant objected to the question, on the ground that it was leading. The court overruled the objection and the defendant excepted.

The witness answered:

"Father told Swartwout he wanted his share of the machine, his half. Defendant said he had bought and paid for it, and that he should not give it up; that he had bought it of my brother Richard."

Judgment being rendered upon the verdict, the defendant brings the cause to this court by appeal. The principal question arises in regard to the sufficiency of the proof to sustain the verdict.

Mr. J. W. WAUGHOP, for the appellant.

Messrs. GARRISON & BLANCHARD, for the appellee.

PER CURIAM: This case was before us at the April Term, 1864, and the judgment reversed, because the verdict was not sustained by the evidence. It has been again tried, and a second verdict has been found for the plaintiff. No question of law is raised on the record before us. No objection is taken to the instructions of the court, as none could be. The evidence makes a stronger case for the plaintiff than on the former trial. The testimony of the witness, who proves the demand for the

machine, is somewhat confused on the point as to whether the demand was for the entire machine, as the sole property of the plaintiff, or only for its joint use and possession; but the jury have passed upon that question under correct instructions from the court, and we cannot say that they found clearly against the evidence. The same remark applies to the question of damages. The question to the witness objected to as leading, merely directed his attention to the particular point in controversy.

Judgment affirmed.

JOHN M. MACK
v.
COMMISSIONERS OF HIGHWAYS.

HIGHWAYS—*location of, near town line. Held,* that the location of a highway by road commissioners, near to a town line, but wholly within the town, and not on the line and partly within both towns, is authorized to be done by the commissioners of the town in which the road is located. That in such case it does not require the joint action of the highway commissioners of both towns; otherwise, when it is located on the town line, and partly in each, as then it becomes a road common to both bodies, and under the joint control of the two, and it must be located and maintained under the provisions of the 85th section of the township organization law of 1861.

WRIT OF ERROR to the Circuit Court of Winnebago county; the Hon. BENJAMIN R. SHELDON, Judge, presiding.

This was a petition for a writ of *certiorari*, filed by John M. Mack, in the Winnebago Circuit Court, against the highway commissioners of the town of Seward, in the county of Winnebago, and State of Illinois, to compel them to certify the record of the location of a public highway in that town. The writ was awarded, returnable on the 17th day of February, 1862.

The commissioners made return, and it was agreed that they had located a public highway in the town, two miles in length, wholly in the town, but up to, and adjoining, the line

between the towns of Seward and Winnebago. It is not denied that the road was located upon a formal petition, after notices were given, and all the formal steps taken by the commissioners.

But it was urged that the commissioners were not authorized by law to locate a road adjoining the town line without the joint action of the highway commissioners of the adjoining town.

On a hearing, the court below affirmed the proceedings of the commissioners, and rendered judgment against petitioner for costs. And he brings the case to this court on a writ of error, and asks the reversal of the judgment of the court below.

Messrs. BROWER & TAYLOR, for the plaintiff in error.

Messrs. LATHROP & BAILEY, for the defendants in error.

Mr. CHIEF JUSTICE WALKER delivered the opinion of the Court:

This was a proceeding by writ of *certiorari*, directed to the commissioners of highways of the town of Seward, in the county of Winnebago, to certify the record and proceedings in the location of a road on the line between that and the town of Winnebago. The record was returned in answer to the writ, and, on the trial below, a stipulation was filed, agreeing upon the facts in the case, — that the road described in the petition for the *certiorari* is two miles in length, and is laid out and located in the town of Seward, but up to, and adjoining, the town line between the towns of Seward and Winnebago, in Winnebago county. Also, agreeing that the only question in the case is, whether the defendants, as highway commissioners of the town of Seward, could legally lay out and locate the road described in the petition, without the joint action of the highway commissioners of the town of Winnebago, as said road was laid out and located by them for its entire length up to, and adjoining, the town line between the towns of Seward and Winnebago, and also agreeing to submit the case to the court for trial.

It is claimed, that this case falls within section 85 of article 17 of the township organization law of 1861. That section, as it now stands, is this: "Whenever the commissioners of any town receive a petition praying the location of a new road, the alteration or discontinuance of an old one, on the line between two towns, such road shall be laid out, altered or discontinued by two or more of the commissioners of highways of each of said towns, either upon such line, or as near thereto as the convenience of the ground will admit, and they may so vary the same either to the one or other side of such line, as they may think proper. The petition, in such cases, shall be addressed to the commissioners of the two towns jointly, and presented to each in duplicate. It is insisted, that this section deprives the commissioners of either town of the power conferred by section one of the same article, to locate and establish a road adjoining, although not on, the town line, but entirely within one of the towns, and fully within their jurisdictional limits. The second clause of the section last named confers ample power for the purpose, and they may exercise the authority unless restrained by the eighty-fifth section.

In this case, the petition was addressed to the commissioners of the town of Seward, and they alone acted in locating the road. And there can be no pretense, that the proceeding was not under section one, or in conformity to the requirements of sections fifty-one, fifty-two, etc. By these sections, they were authorized to act anywhere within the limits of their township. And this road was, in its whole length, located by them within their township, and is undeniably within the letter of the law conferring jurisdiction on them. Neither the petition nor order establishing the road refers to it as being on the township line. It was altogether within the territorial jurisdiction of the town of Seward. There is nothing in the entire proceeding which indicates that it was intended by the petitioners or officers to be under the eighty-fifth section. This was no doubt a case where, if it had been desired, the road could have been located under the eighty-fifth section, but it was not under that provision.

We do not see that the eighty-fifth section has in the least abridged the power of the commissioners over roads in their towns. It has not declared, that, when it is desired a road shall be located near or adjoining to the town line, the action shall be joint. It has left them the sole right to act when the road is in their town; but when on the line and partly in two towns, it is different. Independent of this provision such a road could not have been established, as the commissioners of either separately, or both jointly, could not have acted. When it is designed that the road shall embrace the town line, extending partly into both, varying at places for the purpose of obtaining better ground, the jurisdiction attaches for joint action of the two towns, but when it is wholly in one town, such was not the design of this provision of the law. This is the language of the act, and it must mean what it says. We can see no necessity for a different construction. If the citizens of one town feel that they need a road in their own town near the town line, they have and should have the right to locate and maintain it without the consent of the citizens of the other town. But if such a road could only be located under the eighty-fifth section, the citizens and officers of the other town would have the power to prevent them from having such a road, however much the public necessity might require it, as it could only be located by the joint action of both bodies. If a road near a town line, but entirely in one of the towns, must be located by the joint action of both bodies, the question would then arise how far from the line it would have to be, to authorize the separate action of one of the towns. The statute has not specified the distance. But we are of the opinion that the commissioners of Seward had jurisdiction to locate the road in controversy, and that they did not exceed their power.

The judgment of the court below is therefore affirmed.

Judgment affirmed.

CHARLES P. MALLETT
v.
EDWARD G. BUTCHER *et al.*

1. JURISDICTION IN CHANCERY — *when there was a defense at law which was not asserted — the general rule.* The general doctrine is, that when a party has a defense to an action at law, known to him and he fails to make it, no court can relieve him.

2. SAME — *exception as to judgments rendered on gambling contracts.* But by statute all judgments rendered on gambling contracts are void, and may be set aside and vacated by any court of equity upon bill filed for that purpose, although the character of the contract could have been set up as a defense in the suit at law in which such judgment was rendered, and the party had knowledge of the defense and omitted to assert it.

3. FORMER DECISION. The case of *Abrams* v. *Camp*, 3 Scam. 290, is overruled upon this question.

WRIT OF ERROR to the Circuit Court of Whiteside county; the Hon. WILLIAM W. HEATON, Judge, presiding.

Mr. SAMUEL STRAWDER and Mr. C. J. JOHNSON for the plaintiff in error.

Mr. O. F. WOODRUFF for the defendants in error.

Mr. JUSTICE BREESE delivered the opinion of the Court:

This was a bill in chancery in the Whiteside Circuit Court, exhibited by Charles P. Mallett against Edward C. Butcher and James Corking, to set aside a judgment on a note given for money lost at gambling with cards at a game called "faro."

The bill contains all the necessary averments in such a case. The defendants put in a demurrer to the bill, which the court sustained, and dismissed the bill. From this decree the complainant prosecutes a writ of error to this court, assigning this decree as the principal error.

The bill was filed under chapter 66, relating to gaming contracts, securities, etc. Scates' Comp. 294.

This statute provides in the first section: "That all promises, notes, bills, bonds, covenants, contracts, agreements, judgments, mortgages or other securities or conveyances, made, given, granted, drawn or entered into, or executed by any person or persons whatsoever, when the whole or any part of the consideration thereof shall be for any money, property, or other valuable thing, won by any gaming, or playing at cards, dice or any other game or games, or by betting on the side or hands of any person gaming, or for the re-imbursing or paying any money or property, knowingly lent or advanced, at the time and place of such play, to any person or persons so gaming or betting, or that shall, during such play, so play or bet, shall be void and of no effect."

Section three provides that: "All judgments, mortgages, assurances, bonds, notes, bills, specialties, promises, covenants, agreements, and other acts, deeds, securities or conveyances, given, granted, drawn or executed contrary to the provisions of this chapter, may be set aside and vacated by any court of equity, upon bill filed for that purpose by the person so granting, giving, entering into or executing the same, or by his executors or administrators, or by any creditor. heir, devisee, purchaser, or other person interested therein [illegible] judgment, the same may be set aside on motion of any person aforesaid, on due notice thereof given."

Section four provides that: "No assignment of any bill, note, bond, covenant, agreement, judgment, mortgage, or other security or conveyance, as aforesaid, shall in any manner affect the defense of the person giving, granting, drawing, entering into or executing the same, or the remedies of any person interested therein."

And by section five it is provided, that the party shall be obliged to answer, under oath, any bill or proceeding commenced under the provisions of this chapter, and that the party so answering shall be acquitted from any other punishment, forfeiture or penalty which he might be liable to for gambling.

This statute was evidently designed to strike at the root of

a vice, the indulgence of which more effectually demoralizes its victims than any other which can be named. A persistence in it, so changes the nature of the infatuated, that they no longer feel the common instincts of humanity, but become brutalized.

All our legislation has been with an earnest desire to put a stop to the vice, and it was thought the statute before us would go far to effect that object. What could be supposed more efficacious, than depriving the successful party of all right to recover money he may claim to have won in the pursuit? But it has not so proved. The defect is in our natures and in our training, and unless both be reformed by proper discipline and education, legislation cannot avail much to destroy the propensity.

The statute we are considering is very broad, and makes void, not voidable only, all contracts having their origin in gaming, and, in the proper interpretation and understanding of that law, it would seem to us to be entirely immaterial when or how the fact is made patent to the court.

It is contended here, that the defense would have availed if it had been set up in the action at law, but not having been so set up, a court of chancery cannot relieve.

We concur in the general doctrine always enforced in this court, that, when a party has a defense to an action at law known to him, and he fails to make it, no court can relieve him. But this case is peculiar. The statute declares all judgments obtained on a gambling contract may be set aside and vacated by any court of equity, upon bill filed for that purpose, by the person so granting, giving, entering into or executing the same, or by his executors or administrators; or by any creditor, heir, devisee, purchaser or other person interested; or, if a judgment, the same may be set aside on motion of any person so named, on due notice thereof given, and no assignment shall affect this right.

This provision takes all such cases out of the general rule, that a defense must be made at law, if action is brought on the gaming contract. We hold, application may be made, in the

spirit of this law, in the first instance, to a court of equity, and it would be absurd to say that such a court cannot do, under the terms of this law, by bill regularly filed, containing all proper averments, what the court on a mere motion could do

Great reliance is placed on the case of *Abrams et al.* v *Camp*, 3 Scam. 290, where, under this same law, this court held, that relief in such case would not be granted against a judgment at law, when a party permitted a judgment to pass against him, without setting up his defense. We cannot receive this as the rule in cases arising under this statute. That is *sui generis*, and provides for special cases, and must be executed with reference alone to itself, and under it, we are free to say, that, neglecting to set up the statute at law, does not preclude a party claiming the benefit from a resort to chancery for relief. It was the intention of the legislature to make all judgments, like the contracts on which they were founded, absolutely void — of no vitality, and they cannot be vitalized by the action of any court.

We cannot subscribe to the doctrine of *Abrams* v. *Camp*, and, though the maxim *stare decisis* is most valuable in the law and in judicial proceedings, the higher behests of the legislature must have precedence and controlling power.

The relief sought should have been granted by the Circuit Court. For failing to grant it, and dismissing complainant's bill, the decree must be reversed, and the cause remanded for further proceedings consistent with this opinion.

Decree reversed.

WILLIAM M. TILDEN *et al.*

v.

HENRY S. ROSENTHAL *et al.*

1. CONTRACT *to deliver a specific number of cattle, "more or less."* Where a party contracts to deliver a specific lot of cattle, containing two hundred and sixty-two head, "more or less," to average a certain specified weight, it is not a sufficient performance to tender to the purchaser one hundred and seventy-eight head averaging that weight.

Statement of the case.

2. The words "more or less" in such contract, are used to cover such trifling deficiencies in number, as might be caused by the ordinary casualties of death or loss; subject to this modification, it was a sale of a specific lot of two hundred and sixty-two cattle, which the vendor warranted should average a certain weight.

WRIT OF ERROR to the Superior Court of Chicago.

This was an action of assumpsit commenced in the Recorder's Court of the city of Chicago, by Tilden and McCoy, against Henry S. Rosenthal & Co., to recover damages resulting to the plaintiffs in the refusal of the defendants to accept or receive one hundred and seventy-eight head of cattle, alleged to have been sold and tendered by the plaintiffs to the defendants, and which the latter refused to accept.

The cause was removed into the Superior Court of Chicago, on a change of venue.

The contract between the parties in reference to the cattle, was as follows:

"CHICAGO, February 7, 1865.

"For and in consideration of one hundred ($100) dollars paid in hand, and three thousand dollars to be paid by the first day of April next, we do covenant and agree, bargain and sell, to deliver unto Henry S. Rosenthal & Co., at the Fort Wayne Stock Yards, in the city of Chicago, Ill., two hundred and sixty-two (262) head, more or less, of good fat cattle, to be weighed from the cars direct, at the price of ten ($10) dollars per hundred pounds gross, and to be paid for on delivery in good bankable funds. Said cattle are to average thirteen hunhundred (1300) pounds, and are the cattle known as the McCoy and Bishop lot now being fed in the vicinity of Council Bluffs, Iowa, and to be delivered at the above place by the 25th day of June next.

"TILDEN & McCOY,
H. S. ROSENTHAL & Co."

The plaintiffs tendered one hundred and seventy-eight head by the day named, which the defendants refused to receive. Whereupon the plaintiffs brought this suit.

The question was, whether this was a sufficient performance, and arose on a demurrer in the declaration. The court sustained the demurrer, and rendered final judgment thereon against the plaintiffs. Thereupon they sued out this writ of error.

Messrs. SCATES, BATES & TOWSLEE for the plaintiffs in error.

Messrs. WARD & STANFORD for the defendants in error.

Mr. JUSTICE LAWRENCE delivered the opinion of the Court:

The plaintiffs entered into a written contract with the defendants, by which they contracted to deliver to them, by a certain day, "two hundred and sixty-two head, more or less, of good fat cattle. * * * To average thirteen hundred pounds, and are the cattle known as the McCoy & Bishop lot, now being fed in the vicinity of Council Bluffs, Iowa." The plaintiffs tendered one hundred and seventy-eight head by the day named, which the defendants refused to receive, whereupon the plaintiffs brought suit. The only question is, whether this was a sufficient performance, and we are of opinion that it was not. The counsel for the plaintiffs insist, that the phrase "more or less," used in the contract, relieved the vendors from the necessity of delivering the precise number, and required them to deliver only such portion of the cattle contracted for as might weigh thirteen hundred pounds. But the sale was for a specific lot of two hundred and sixty-two cattle, which the vendors warranted should average thirteen hundred pounds, and we understand the phrase "more or less," as having been used by the parties to cover such trifling deficiencies in number as might be caused by the ordinary casualties of death or loss. But the deficiency was nearly one third of the whole number contracted for. We are not prepared to say, that, when a person contracts for a lot of cattle containing two hundred and sixty-two head, he shall accept one hundred and seventy-eight.

Judgment affirmed.

Syllabus. Statement of the case.

CHARLES L. INGERSOLL
v.
DANIEL P. BANISTER.

ACCOUNTS — *books as evidence.* Where an agent sold the grain of his principal to a merchant on time, and before it was paid, the agent and merchant became partners, and this debt was taken into account by them, the principal would not thereby have an action against the firm, and an arrangement on the dissolution of the partnership that the agent should pay for the grain, did not render him the debtor of his principal, or prevent him from recovering for the grain of the purchaser. And it was error to admit the firm books in a suit by the owner of the grain against the purchaser, to prove that it was agreed the agent should pay him. They were not evidence to bind the owner of the grain. Account books are not admissible as evidence until it is proved that they are the books of original entry, that persons had settled by and found them correct, that some of the items charged had been delivered, that the trader had no clerk when the entry was made.

WRIT OF ERROR to the County Court of De Kalb county; the Hon. EDWARD L. MAYO, Judge, presiding.

This was an action of assumpsit, brought by Charles L. Ingersoll, in the County Court of De Kalb county to the June Term, 1865, against Daniel P. Banister. The declaration contained the usual common counts. The plea of the general issue only was filed. A trial was had at the return term by the court and a jury.

It appears that plaintiff by his agent, Norman Weaver, sold to defendant a quantity of wheat, oats and corn, and took this receipt.

"CORTLAND, Nov. 24, 1862.

"Bought of N. Weaver, Ingersoll's wheat 152 50-60 bush. at 60c. per bush.; oats 182 5-32 at 56c per bush.

"(Signed) D. P. BANISTER."

Weaver testified, that there was seven hundred bushels of corn or upward, but no receipt was given for it; that it was sold for 22 cents per bushel and upward. He states that the

aggregate amount of the wheat, corn and oats, was $437.04, and that Ingersoll had never been paid.

It also appears, that, in July, 1863, Weaver and defendant formed a partnership, which continued until December, 1864. The firm books show that this indebtedness was passed to the credit of Ingersoll with the firm, and on its dissolution that the amount was charged to Weaver's account. It, however, does not appear that these entries were made with the knowledge or consent of plaintiff, or that he ever sanctioned them. And Weaver swears they were incorrect, and the latter was made after he left the firm. There was other evidence in reference to these entries, and a settlement by the partners, but it is not material to an understanding of the case, in the view the court has taken of the questions arising on the record.

The jury found a verdict for the defendant, and the plaintiff entered a motion for a new trial, which the court overruled and rendered judgment on the verdict. Plaintiff brings the record to this court on error, and asks a reversal of the judgment.

Mr. R. L. DIVINE, for the plaintiff in error.

Mr. CHAS. KELLUM and Mr. LUTHER LOWELL, for the defendant in error.

Mr. CHIEF JUSTICE WALKER delivered the opinion of the Court:

There seems to be no doubt that defendant in error purchased the grain. This is proved both by his receipt, and Weaver's testimony. But he seeks to discharge himself from paying for it by showing, that, by an arrangement with Weaver, the latter was to become the debtor to plaintiff in error, and to pay for the grain. To establish that fact, defendant in error proved, that, after he bought the grain, Weaver became his partner in business. He then introduced the firm books to show that the amount which he was to pay for the grain, had, on a settlement of the firm business, been charged to Weaver. Defendant in error insists that he was thereby discharged from

all liability, and that plaintiff in error must look to Weaver for his money.

Weaver was examined as a witness and denies that he ever assumed the payment of the debt or made any such agreement. But he swears, that, by the terms of his settlement with defendant in error, the latter was to pay all of the firm debts. He also states, that, when this debt of defendant in error was transferred to the firm books, witness objected, but defendant in error said his means were all in the firm, and it would be taken out of his means when it should be paid.

From this evidence it would seem that the arrangement contended for never existed. But even if it had been proved, that Weaver and defendant in error had made such an arrangement, how could that alter the rights of plaintiff in error in the slightest degree? It is not pretended that he was a party to the arrangement, or ever ratified it. While such an agreement might bind the parties to it, we are at a loss to comprehend how plaintiff in error, a stranger to it, could be affected by it. No one will contend that Weaver and defendant in error could, by their arrangement, make Weaver the plaintiff's debtor for a sum owing him by defendant in error, and without the consent of plaintiff in error. We are confident that such a rule has never been announced, and yet if we understand this case that is the rule contended for by defendant in error. The injustice of such a rule is so palpable that it need only to be stated to be appreciated. No man can be made the debtor of another without the consent of the creditor at the least.

Nor does the fact that Weaver was the agent of plaintiff in error to sell the grain, in the least alter the case. An agent has no right to satisfy the debt of his principal for any thing but money, or to assume the debt and release the debtor, unless authorized by his principal. This is not within the ordinary power of an agent, — to do so he must be specially authorized. And in this case there is no evidence that such authority was given, or that the agent had been in the habit of assuming debts due his principal, and that he had ratified such acts.

Even if the account books of the firm had been admissible as

evidence against plaintiff in error, and we do not see how they could be, a proper foundation for their admission was not laid. It was not proved, that they were books of original entry, that defendant kept no clerk, that persons had settled by these books and had found them correct, or that some items of the account had been delivered to plaintiffs in error. But, in fact, there was but one charge, which has been held prevents books from being introduced. Again, the charge is not against plaintiffs in error, but is against Weaver. The court erred in admitting the books in evidence; and likewise in overruling a motion for a new trial. The judgment of the court below is therefore reversed and the cause remanded.

Judgment reversed.

JOHN J. MERRITT
v.
MORTIMER D. SIMPSON *et al.*

1. GUARDIAN AND WARD—*power of the former to mortgage the real estate of the latter.* The 134th section of the statute of "wills" provides that real estate may be mortgaged by a guardian, *provided*, the mortgage shall not be for a longer term than until the heir entitled to such real estate shall attain the age of twenty-one years, if a male, or eighteen years if a female.

2. So a mortgage in fee executed by a guardian upon the ward's land, being wholly unauthorized by the statute, is nugatory and void, so far as the interests of the ward are involved.

APPEAL from the Circuit Court of Winnebago county; the Hon. BENJAMIN R. SHELDON, Judge, presiding.

The facts of this case are sufficiently stated in the opinion of the court.

Mr. E. S. SMITH, for the appellant.

Messrs. LATHROP & BAILEY and LELAND & BLANCHARD, for the appellees.

Mr. JUSTICE BREESE delivered the opinion of the Court:

There is but one point of any importance presented by this record.

The facts are, that Henry L. Simpson, of Rockford, in the county of Winnebago, died intestate, on the 1st of January, 1851, seized and possessed of the south-west quarter of section 19, township 44 north, range 2 east, except the east forty acres and the middle one-third of the east two-fifths of lot six (6), in block twenty-nine (29), being twenty feet and eight inches front, by sixty-six feet deep, in Rockford. He left a widow, Abigail H. Simpson, and the appellees, together with Ernest L. Simpson, his only children and heirs at law, whose ages ranged from six to twelve years. He left no debts, and had personal assets amounting to $4,692. The widow died in January, 1858, and Ernest, an infant, then eight years old, died in March, of the same year. The widow administered on the estate of her husband, and was also appointed guardian of the children.

In 1855 and 1856, without any order of the court of probate, the administratrix built a store on this city lot, at a cost of four or five thousand dollars, using the moneys of the estate for the purpose.

In December, 1856, Mrs. Simpson, as guardian, filed a petition in the probate court, for leave to mortgage the lands of these heirs, in order to raise money to pay liabilities incurred by her in building the store, and stated the amount necessary to be raised at $2,000, which she averred she could borrow at a rate of interest not exceeding ten per centum per annum.

The court granted the prayer of the petition and authorized her, as such guardian, "to mortgage or pledge the real estate of the estate and of the heirs, or so much thereof as might be necessary, or as she, as guardian, might deem needful, to raise a sum not exceeding $2,500, for a term not longer than years, and at a rate of interest not exceeding ten per cent per annum, the interest to be made payable at such time and in such place as the mortgage or pledge might specify, etc."

Under this authorization, the guardian, on the 13th of January, 1857, applied to appellant, then a resident of the city of New York, for a loan of $2,000, and obtained it for one year at ten per cent per annum interest, and on that day she, as guardian, executed a note for the amount, and a mortgage on the land and lot mentioned to secure the same. The mortgage was executed by Mrs. Simpson, in her own name, as guardian of the children, and not in the names of the heirs, by her as guardian. The money thus obtained was used in erecting a brick store on the city lot, which was soon completed, and brought a large rent.

On the 4th of February, 1860, appellant filed his bill of complaint to foreclose this mortgage, in which he prayed a decree for the amount of the money loaned, with ten per cent interest.

The mortgage was made in the name of the guardian, and it is alleged in the bill, it was so made and given as the mortgage of the wards, and to secure the money used in the building, and that the money was so used, and that complainant lent his money on the security of that property.

Many and various points are made by the counsel on both sides of this cause, and they are supported by able arguments, but we do not consider it necessary to examine and discuss them in detail, believing the whole matter must be and can be fully adjusted by reference to the statute entitled "Wills."

Section 134 of that act provides, that "real estate may be mortgaged or leased by executors or guardians, *provided* such mortgage or lease shall not be for a longer term than until the heir entitled to such estate shall attain the age of twenty-one years, if a male, or eighteen years, if a female." Scates' Comp. 1212.

The mortgage executed by this guardian was a mortgage in fee, and, as such, wholly unauthorized by the statute. It is a proceeding, statutory altogether, and not being in pursuance of it, we must hold it nugatory and void, so far as appellee's interests are involved.

It is suggested that the mortgage might be held good, at least for the minority of the infants. This might be so, but the

record does not show that the minority has not terminated, so that there is nothing before us on which to base such a decree.

We do not deem it important to discuss the question arising under section 135 of the statute of wills, requiring of the guardian a bond for the due application of the moneys to be raised on the mortgage, to be executed on obtaining the order, inasmuch as, the mortgage being in fee, it was unauthorized by the statute and can not be enforced.

The decree is in all things affirmed.

Decree affirmed.

CORNWELLS & ELLIOTT
v.
KRENGEL & SEIFERD.

CONTRACT — *by letter — what constitutes.* A party ordered by letter a lot of paper to be sent him at once. The party to whom this order was addressed, replied he had none on hand, but offered to make it. The first party again wrote as if the other had accepted his order, which he had not, and again saying he "wanted the paper to come right along." The other replied a second time, that he could not send it at once, and advised him if he was in a hurry about it he had better order elsewhere. Here was no contract — no proposition made on one side and accepted on the other.

APPEAL from the Superior Court of Chicago; the Hon. JOSEPH E. GARY, Judge, presiding:

This was an action of assumpsit brought in the court below, by Krengel & Seiferd, partners, against Cornwells & Elliott, also partners, to recover for goods sold and delivered by the plaintiffs to the defendants.

The defendants pleaded a set-off, which rested upon an alleged contract made between the parties, by letter. The correspondence was as follows:

"CHICAGO, June 28, '64.

"Messrs. KRENGEL & SEIFERD:

"Gents,—We will pay you the following 17½c. *here*, *cash*, if sent right away. Let us know by return of mail if you will send it.

50	bdls.,	22	by	24	print,	44	lbs.	to	bdls.
50	"	24	"	36	"	48	"		"
25	"	25	"	37	"	55	"		"
25	"	26	"	40	"	25	"		"

"Yours truly,

"CORNWELLS & ELLIOTT."

To this letter Krengel & Seiferd replied:

"LAFAYETTE, June 30, '64.

"Messrs. CORNWELLS & ELLIOTT, Chicago:

"*Gents*,—Yours of the 28th inst. received and contents noted. We have no paper of your sizes on hand, but will make it at your given price. There is a little mistake in your order; 25 *bundles*, 26x40 *lbs. per bdle.* Very likely 65 lbs. Please correct, and let us know what to do. We finish some of our Cincinnati orders by July 4th.

"Yours, truly,

"KRENGEL & SEIFERD."

Cornwells & Elliott answered:

"CHICAGO, July 2, '63, ('64.)

"Messrs. KRENGEL & SEIFERD:

"*Gents*,—Your favor is at hand of the 30th, accepting our order. The 26x40 should be 63 lbs. to bundle. You can *double* our order on 22x32, 24x36 and 25x37 if you wish. Let us know if you will do so by return mail. We want this paper to come right along.

"Yours truly,

"CORNWELLS & ELLIOTT."

And the following is the reply:

"LAFAYETTE, July 4, 1864.

"Messrs. CORNWELLS & ELLIOTT, Chicago:

"*Gents*, — Yours of the 2d inst. at hand and contents noted. As the canal company will stop us here every week a few days from running our mill for repairs, we cannot make out and ship your orders right along, as you want it. If you are in a hurry about it, you better order it somewhere else. We could not double your esteemed order, as we are in a very close pinch to fill our present orders. As soon as we get our regular water power back we can work day and night again.

"Yours truly,

"KRENGEL & SEIFERD."

The only question arising is, whether these letters are sufficient to show a contract between the parties, so as to bind the plaintiffs to fill the order made for paper by the defendants, or to make them liable for the difference in the price offered and the increased value afterward.

The court below found the issue for the plaintiffs, disallowing the set-off, and rendered judgment accordingly.

The defendants thereupon took this appeal.

Messrs. WILSON & ASAY, for the appellants.

Mr. GEORGE GARDNER, for the appellees.

Mr. JUSTICE LAWRENCE delivered the opinion of the Court:

The only question presented by this record is, whether the letters offered in evidence show a contract. The defendants ordered paper to be sent them at once. The plaintiffs replied they had none on hand but offered to make it. The defendants again wrote as if the plaintiffs had accepted their order, which they had not, and again saying they "wanted the paper to come right along!" The plaintiffs replied a second time that they could not send it "right along." There was here no contract. There was no proposition made on one side and accepted on the other. The set-off was properly disallowed.

Judgment affirmed.

Syllabus. Statement of the case.

JOSEPH A. KIME
v.
WILLIAM KIME.

1. VERDICT — *not sustained by evidence.* It is error in the Circuit Court to refuse to set aside a verdict not sustained by the evidence on the trial.

2. CONTRACT — *default, recovery of consideration paid.* Where a party receives the purchase-money for land, and agrees to convey it to the purchaser, but no time is specified, he is entitled to a reasonable time within which to make the conveyance, and the purchaser in such a case should demand a deed, and the vendor should refuse or neglect to comply with the demand, before the purchaser can recover back the purchase-money paid by him as the consideration for the conveyance.

APPEAL from the Circuit Court of Livingston county; the Hon. CHARLES R. STARR, Judge, presiding.

This was an action of assumpsit, commenced in the Livingston Circuit Court, to the September Term, 1864, by William Kime against Joseph A. Kime. The declaration contained the usual common counts, to which the plea of *non-assumpsit* was filed and issue formed. A trial was had by the court and a jury at the October Special Term.

On the trial in the court below, plaintiff claimed, and introduced evidence to establish, indebtedness of defendant on an account. Defendant insisted upon and introduced evidence of a settlement of all of their dealings, except one or two items. Among the items claimed by plaintiff, was one for the consideration paid for a piece of land, which he insisted defendant had agreed to convey to him, but had failed and refused. The evidence fails to show that plaintiff demanded the deed, or otherwise placed defendant in default.

The jury found the issue for the plaintiff and assessed the damages at $321. Defendant thereupon entered a motion for a new trial, which was overruled by the court, to which he excepted, and the court rendered a judgment on the verdict. Plaintiff brings the case to this court by appeal and asks a reversal of the judgment.

Messrs. FLEMING & PILLSBURY, for the appellant.

Mr. CHARLES J. BEATTIE, for the appellee.

Mr. CHIEF JUSTICE WALKER delivered the opinion of the Court:

This was an action of assumpsit, brought by appellee, in the court below, against appellant, for a recovery on an account. Defendant below filed the general issue, and a notice of set-off; and each party filed his bill of particulars. Several witnesses were sworn on behalf of appellee, by whom he proved a number of items in his account. He also introduced John Burton, who testified that he was present when the parties made a settlement of their accounts, which he says occurred in May or June of 1863. He stated that a note for one hundred and fifty dollars, held by appellee against appellant, was spoken of and no objection made to it. That they talked their matters over, and that note was mentioned. That there was a note for $61.25, which was not included in the settlement, as they were unable to agree about it, appellant claiming that he had paid it to George W. Kime. to whom it was originally given. That other matters were talked of at the time. That he did not remember that a board bill was spoken of, although it might have been. That appellee gave up to appellant at the time a small note; and there was no claim for timber land then made.

This witness further states, that he understood that the parties then settled all matters between them, except the note for $61.25, and leaving it out they were then even as they both stated. There was forty acres of land, which, as a part of the settlement, appellant was to convey to appellee. It seems to have been rated by the parties at $400. He says he afterward heard the parties conversing about the land. Appellant said he was ready to convey, and appellee insisted that appellant had not kept his agreement to convey, but appellant insisted that he had.

This settlement seems to have occurred after a large portion,

if not all, of the items charged in the account, had been gotten by appellant. They therefore must have been embraced in it, and consequently could not be again brought into controversy. If any of the items which entered into that settlement were included in the verdict, it would have been wrong. If the item for the price of the land was excluded, there is no means by which this verdict could have been found under the evidence. As to the $150, appellee proved the statement that it had been paid and delivered up to him, and by Burton that it was included in the settlement. This was appellee's own evidence; it was uncontradicted, unexplained and unimpeached, and should have excluded the amount of the note from the verdict, which seems to have been allowed to appellee. As to this item the verdict is not sustained by the evidence.

It is insisted by appellee, that, from the evidence, the jury were warranted in finding a verdict for the price of forty acres of land, less the items of set-off proved by the appellant. It does not appear that any time was fixed upon by the parties, within which the conveyance was to have been made, or that appellee ever demanded a deed. When a party agrees to perform an act, and no time is specified for its completion, he must have a reasonable time for the purpose, and to be put in default the opposite party must demand its performance. In this case no time is shown in which appellant was to convey, nor does it appear that a deed was ever demanded. It, however, does appear, that appellant at one time said he was ready to convey, but appellee insisted that he had failed to keep his agreement, but appellant insisted that he had kept it. This is not evidence to prove that appellant had broken his agreement to convey, and in the absence of such proof, the jury were not warranted in allowing appellee the price of the land. We are therefore of the opinion, that in either view of the case the verdict is not sustained by the evidence, and the Circuit Court should have granted a new trial. The judgment must be reversed and the cause remanded.

Judgment reversed.

HARRISON BELL
v.
WILLIAM FARRAR.

1. WITNESS — *competency — interest.* Where one who claims to have purchased goods sold them to another, in a suit involving the question of title between the first vendor and the last purchaser, the former claiming title upon the ground that his sale had not been consummated so as to pass the title, the intervening purchaser is a competent witness on behalf of his vendee. His interest is equally balanced between the parties.

2. SALE — *when complete, so as to pass the title — delivery of the property sold.* Where a party sold a quantity of oats, and delivered them, to be weighed and then paid for, no time being fixed when they were to be weighed, the facts showing that a credit was to be given, the sale became complete upon such delivery, it not being essential, to pass the title, that the oats should first be weighed to ascertain the quantity.

APPEAL from the Circuit Court of Jo Daviess county; the Hon. BENJAMIN R. SHELDON, Judge, presiding.

This was an action of replevin brought in the court below by Harrison Bell against William Farrar, sheriff of Jo Daviess county, to recover 854 sacks of oats, marked "H. B." Among other pleas, the defendant pleaded property in Robert H. McClellan, as president of the Bank of Galena, and property in the Bank of Galena.

The facts were substantially as follows: On the 10th day of January, 1865, Bell, the plaintiff, made a contract for the sale of two thousand sacks of oats to Andrew Cannon. Bell was doing business at Bellevue, in Iowa, and Cannon had a warehouse at Galena, in this State. The oats were to be delivered at Cannon's warehouse, in Galena, at a specified price. *Edward Marfield*, the agent of Cannon, who made the contract with Bell, testified that the terms of the contract were, that the oats were to be laid down on the platform, then to be weighed and paid for. Bell was to be at no expense afterward. Witness intended to weigh the oats as fast as they came from Bellevue, but could not do so, because Bell sent them too fast. Nothing

was said about when they were to be delivered,—simply to be laid down on the platform, to be weighed and paid for. The oats were about ten days coming to Galena. Witness not being able to weigh them as fast as they came, he put them in Cannon's warehouse.

On the 28th of January, Cannon issued a warehouse receipt for the oats, and passed it over to the Bank of Galena to raise money on, and out of the money so obtained he paid Bell $1,500, and up to the 14th of February he paid, altogether, the sum of $3,295 on the oats.

On the proof, it is considered there was an unconditional delivery of the oats by Bell, and receiving money on account thereof, showing they were not to be weighed at once, but that time was to be allowed for such purpose, thereby affording evidence that the sale was on a credit. They were not to be paid for until weighed, and no time was fixed when they should be weighed. These facts are regarded as justifying the conclusion that the sale was complete and vested the title in Cannon.

Some time after the delivery of the warehouse receipt by Cannon to the Bank of Galena, McClellan, as president of the bank, took the oats under a writ of replevin, and while they were in the possession of the sheriff under that writ, Bell commenced this action against the sheriff.

On the trial, Cannon was permitted to testify on behalf of the defendant, against the objection of the plaintiff.

The plaintiff asked the court to give to the jury a number of instructions, which were refused, but the court gave the following on behalf of the defendant, to which the plaintiff excepted:

"1st. If the jury believe, from the evidence, that the plaintiff in this suit sold the oats in question to Andrew Cannon, to be paid for on delivery, yet if the plaintiff actually delivered the oats to said Cannon without requiring payment down, the plaintiff is considered as having given credit to the said Cannon for said oats, and that the plaintiff had no claim upon the oats on account of their not being paid for.

"2d. If the jury believe, from the evidence, that the plaintiff, Bell, sold and delivered the oats in controversy to Andrew Cannon, actually and unconditionally, and that Cannon got advances of money on said oats from the Bank of Galena while they were in his possession, and gave the warehouse receipt offered in evidence on said oats to secure such advances, and that the Bank of Galena, through its president, Robert H. McClellan, replevied said oats from said Cannon by virtue of said receipt, and that the defendant, Wm. Farrar, acting as the sheriff of this county, held the oats under a writ of replevin in such replevin suit, at the time this suit was commenced, then his possession was the possession of the said president of the Bank of Galena, Robert H. McClellan, and the jury should find for the defendant.

"3d. If the jury believe, from the evidence, that the said oats were sold and delivered by Bell to Cannon, together with the sacks in which they were contained, in good faith and without condition, it is wholly immaterial what letters or marks were upon said sacks so far as this case is concerned.

"4th. If the jury believe, from the evidence, that plaintiff, Bell, sold the oats in dispute to Andrew Cannon, and was to deliver them on the platform of Cannon's warehouse, and to be paid as the oats were weighed, and that he did so deliver them, and that, while said oats were so in Cannon's possession, Cannon borrowed from the Bank of Galena money upon the security of said oats, and upon the warehouse receipt offered in evidence, and that the Bank of Galena advanced said money in good faith without notice of any claim to said oats by Bell, and that said bank, through its president, Robert H. McClellan, replevied said oats from said Cannon, and that the oats were in possession of the defendant, Wm. Farrar, when this suit was commenced under the writ of said McClellan, then in such case the law protects the right of the Bank of Galena to said oats, and the jury should find for the defendant.

"5th. The law is, that if, by the terms of the sale of personal property, the property is sold and delivery thereof made to the purchaser, the title will pass to the purchaser, if such was the

intention of the parties, even though the property has yet to be weighed to ascertain its amount. And if the proof shows in this case that the oats in dispute were sold and delivered by Bell to Cannon, and were merely to be weighed to ascertain the quantity, the property passed to Cannon by such sale and delivery, and the jury should find for defendant."

The jury found the issues for the defendant, and judgment was entered accordingly. The plaintiff thereupon took this appeal.

The questions arising under the assignment of errors, are, whether the sale by Bell to Cannon was so far complete as to vest the title in the latter, and whether the instructions given were correct. The plaintiff also insists that Cannon was not a competent witness for the defendant.

Mr. L. SHISSLER and Mr. M. Y. JOHNSON, for the appellant.

Messrs. LELAND & BLANCHARD, for the appellee.

Mr. JUSTICE BREESE delivered the opinion of the Court:

This was an action of replevin, in the Jo Daviess Circuit Court, brought by Harrison Bell against Willliam Farrar, sheriff of that county, for eight hundred and fifty-four sacks of oats, marked H. B. The defendant pleaded several pleas, the one principally relied on being the plea of property in Robert H. McClellan, as president of the Bank of Galena, and property in the Bank of Galena. Issues were joined and a trial by jury, who found a verdict for the defendant. The plaintiff entered a motion for a new trial for reasons filed, which the court over ruled and rendered judgment on the verdict, to which the plaintiff excepted, and appeals to this court.

There is really but one question of any importance in the case, and that is, was there such a sale and delivery of oats by Bell to Cannon, as to vest the title in Cannon?

A subordinate question has been stated, as to the competency of Cannon as a witness for defendant, the appellant insisting he was incompetent to testify.

Cannon was the party to whom Bell delivered the oats, and he,

having them in his warehouse, issued a warehouse receipt for them, on which he raised several thousand dollars from the Bank of Galena, a part of which, about $1,500, and some sacks of the value of $795, Cannon delivered to Bell.

We are of opinion, Cannon was a competent witness because his interest was balanced. If Bell succeeded in the action, then Cannon would have to pay on his debt to the bank a sum equal to the value of the oats. If the defendant succeeded under the plea of property in the bank, then Cannon would have to pay Bell for the oats, so that it was a matter of indifference to him, pecuniarily, which party prevailed.

As to the real question, whether the sale was so far complete as to vest the title to the oats in Cannon, this was properly left to the jury by instructions on the part of the defendant, to which we can discover no good objection. We think they clearly state the law of the case on the facts proved, and the proof sustains the verdict. There was an unconditional delivery of the oats by Bell, and he received money on account thereof, from time to time, clearly showing they were not to be weighed at once, but that time was to be allowed for such purpose, thereby affording the strongest kind of evidence that the sale was on credit. They were not to be paid for until weighed, and no time was fixed within which, or at which, they should be weighed. These facts we think justified the jury in finding the sale was complete and vested the title in Cannon. The title being so vested, Cannon had the right to dispose of the oats as he pleased, and having, by the warehouse receipt, placed them in the power and possession of the Bank of Galena, the issue on that point was properly found for the defendant.

The appellant complains that certain instructions asked by him were refused by the court.

These instructions so refused were founded on a partial view of the case, the law of which is fully stated in the instructions given for appellee, and which is in accordance with the principles settled in *Brundage* v. *Camp*, 21 Ill. 330.

The judgment of the court below is affirmed.

Judgment affirmed.

JOHN C. DAVIS *et al.*
v.
CHARLES M. TAYLOR.

1. TROVER — *may lie for a house.* Where a house, as between the parties, was personal property, trover will lie for its wrongful conversion. As, where it was so erected as to be personalty, or where the defendant is estopped by his own acts from denying that it is such.

2. PRESUMPTIONS — *from the want of a bill of exceptions.* Where a declaration in trover alleges the property converted to have been personalty, and there was a verdict and judgment for plaintiff, and no bill of exceptions, *held*, that, in support of the verdict, the Supreme Court must presume the proof showed it was personalty.

3. HUSBAND AND WIFE — *jointly liable for tort.* A wife is liable jointly with her husband for a tort. Hence trover lies against both for a joint conversion. And this was the old rule at common law.

4. MISNOMER — *waived by pleading general issue.* Where the defendant pleads the general issue in the right name, describing herself in the plea as sued by another name, she cannot raise the question of misnomer after verdict.

5. So, where the summons and declaration were against Mrs. John C. Davis, who pleaded the general issue under the name of Christina Davis, describing herself as sued by the former name, she was not allowed after verdict to assign misnomer for error.

6. Under such circumstances it was clearly proper to render judgment against said defendant under the name by which she had been brought into court, and described in the declaration.

7. JUDGMENT AGAINST — *a part of several defendants — tort and assumpsit.* The rule in assumpsit that final judgment against part of the defendants without disposing of the case as to the others, is error, has no applications to actions of tort, there being no contribution among wrong-doers. Hence, a judgment in trover against part of the defendants, amounts to a dismissal, as to the residue, and is not error.

WRIT OF ERROR to the Superior Court of Chicago.

This was an action of trover brought by Charles M. Taylor against the plaintiffs in error. A trial by jury at the September Term, 1865, resulted in a judgment for the plaintiff for six hundred and fifty dollars and costs. The defendants below now prosecute this writ of error. The declaration alleged the conver-

sion of a dwelling-house, the property of the plaintiff, by the defendants, to their own use. There was no bill of exceptions.

Messrs. D. C. & I. J. NICHOLES, for the plaintiffs in error.

1. Trover will only lie for a personal chattel, and not for fixtures or injuries to real estate. 2 Greenl. Ev. 522, § 635; 1 Cowan's Treatise, 291; Bacon's Abridgment, Trover, B.; *Buffey* v. *Henderson*, 8 Eng. L. & E. 305; *Smith* v. *Benson*, 1 Hill (N. Y.) 176; *Overton* v. *Williston*, 31 Penn. State, 155. And a building is *prima facie* real estate. *Chatterton* v. *Saul*, 16 Ill. 150; 2 Sand. Pl. & Ev. 880.

2. Defendants could not have been found guilty with proof of a joint conversion by all. 2 Sand. Pl. & Ev. 885; *Nicholl* v. *Glenn*, 1 M. & S. 588.

3. For a joint conversion by husband and wife, the husband alone is liable, and it is error to join the wife. Com. Dig., Trover, Y.; 2 Kent Com. 149; Reeves' Dom. Rel. 72.

4. It was error to render a judgment below without disposing of all the defendants. *Warren* v. *Lewis*, 1 Ben Monroe, 100; *Dennison* v. *Lewis*, 6 How. (Miss.) 517; *Hutchinson* v. *Sinnis*, 7 Humph. 236; *Dow* v. *Rattle*, 12 Ill. 373. Also, *Barbour* v. *White et al.*, 37 Ill. 164.

Messrs. WARD and STANFORD, for the defendant in error.

1. Trover will lie for a house, where it is averred and proved to be personal property. *Smith* v. *Benson*, 1 Hill, 178; *Jewett* v. *Partridge*, 3 Fairf. (12 Maine) 243; *Osgood* v. *Howard*, 6 Green (6 Maine), 452; *Dame* v. *Dame*, 38 N. H. 429; *Chatterton* v. *Saul*, 16 Ill. 151.

2. It is objected that the declaration and judgment are against husband and wife for joint trover and conversion. But it does not appear from the record, the appellation of husband and wife is never once used. Still, after verdict, this is good. 1 Chitty Pl. 92; 3 B. & Ald. 685.

3. Misnomer must be pleaded in abatement. By appearing, the defendant admits himself to be the person sued, and the

variance is immaterial. *Jackson* v. *Crane*, 1 Cow. 38; Tidd's Practice, 402; 1 Chitty Pl. 246; *Hammond* v. *People*, 32 Ill. 447; *Frink* v. *Schroyer*, 18 id. 416.

Mr. JUSTICE LAWRENCE delivered the opinion of the Court:

This was an action of trover brought by Taylor against John C. Davis, Mrs. John C. Davis, Sarah B. Young, and others, to recover the value of a frame house, described in the declaration as goods and chattels. The general issue was pleaded by all the defendants except Sarah B. Young, and the plaintiff recovered a verdict and judgment. There is no bill of exceptions in the record, and the case therefore presents no questions except such as arise on the summons, pleadings and judgment.

It is first urged that trover will not lie for a house. Whether it will lie or not, depends upon whether the house, at the time of bringing the suit, and as between these parties, was personal property. A house may be so erected as to be strictly personal property, or the defendant may be estopped by his own acts from denying it to be so; as where, for example, he has improperly removed it from the land of the plaintiff, or where he has given a chattel mortgage on it as personal property. *Ogden* v. *Stock*, 34 Ill. 527; *Ballou* v. *Jones*, 38 id. 97. In such cases replevin or trover will lie in behalf of the rightful owner. In the present case the house was described in the declaration as personal property, and in the absence of a bill of exceptions, and in support of the verdict, we must presume the proof showed it to be such.

It is also objected, that trover will not lie against husband and wife, but the suit should be brought against the husband alone. This precise point was ruled by the Court of Kings Bench in *Keynuth* v. *Hill*, 3 Barn. & Ald. 685, on a motion in arrest of judgment. It was urged, that, as a married woman cannot acquire personal property in her own right, the conversion is the sole act of the husband, and must be so charged. But the court said the foundation of the action was not the acquisition of property by the defendants, but the deprivation of the plaintiff's property, and that the conversion might be

by an actual destruction of the property, or by taking it from its true owner and delivering it to a third person. It was further said, that the wife could be guilty of this species of conversion as well as the husband, since the latter would acquire no property thereby, and the rule for arresting the judgment was discharged. We are disposed to follow the authority of this decision, as trover, like trespass, is in reality based upon the defendant's tort, and in trespass the husband and wife may be jointly sued.

Mrs. John C. Davis pleaded the general issue by the name of Christina Davis, describing herself as sued by the name of Mrs. John C. Davis. Judgment went against her by the latter name, and this is now assigned for error. But it is not well assigned. If this was a misnomer, the question should have been raised by a plea in abatement. Having pleaded the general issue, and a verdict having been found against her, it was clearly proper to render judgment against her under the name by which she had been brought into court and described in the declaration. 2 Ch. Pl. 246; Tidd's Pr. 402. By appearing and pleading, the defendant admitted herself to be the person sued, and, not having pleaded in abatement, she cannot now raise this question.

It is also urged, that Sarah B. Young was served with process, and that no judgment was rendered against her. It was held, in *Dow* v. *Rattle*, 12 Ill. 373, which was an action of assumpsit, to be error to render final judgment against part of the defendants, without disposing of the case as to the others. On the authority of this case, the same thing was said in an action of replevin in the case of *Barbour* v. *White*, 37 Ill. 164. There were, however, other grounds for reversing the last named case, and, on further considering this point, we are of opinion, that the rule should not be applied to actions of tort. There is no reason for thus applying it, because there is no contribution among wrong-doers. Taking a judgment against a portion of the defendants amounts to a dismissal of the case as to the residue, and, in actions *ex delicto*, this may be done. If the mode of doing it is irregular, it is an irregularity which

works no prejudice to those defendants against whom the judgment is taken. They should not, therefore, be permitted to assign it for error.

We find no error in this record, and the judgment must be affirmed.

Judgment affirmed.

SELDEN F. WHITE *et al.*
v.
JOSEPH WEAVER.

1. PROMISSORY NOTE — *guaranty and assignment.* Where a party indorses his name on a note before it is delivered to the payee, the presumption will be indulged that he intended to guarantee its payment. If indorsed afterward, then it will be presumed, in the absence of proof, that he intended to become only an assignor of the note. When indorsed after its delivery, it would devolve on the holder to prove that he was authorized to fill up the guaranty, and that it was supported by a sufficient consideration. If an assignment only was intended, and the holder fills it up with a guaranty, the true agreement of the parties may be shown and defeat a recovery on the guaranty.

2. SAME — *indorsement, its effect.* Where an indorsement is made without date, the presumption is that it was of the date of the note, and the presumption will prevail unless rebutted. When shown to have been made after the delivery of the note, it will be presumed that it was as a holder and to assign the instrument.

APPEAL from the Circuit Court of Peoria county; the Hon. MARION WILLIAMSON, Judge, presiding.

This was an action of assumpsit commenced by Selden F. White, James F. White and William G. White, in the Warren Circuit Court, to the September Term, 1857, against Joseph Weaver. The declaration was on a guaranty of the payment of a promissory note, executed by Samuel Stanley, payable to plaintiffs, for the sum of three hundred and forty dollars and ten cents, payable five months after date, and given on the 31st of October, 1856.

It is averred, that, on the date of the note and before its delivery, defendant entered into and made this guaranty: "For value received I guarantee the payment of the within note, and agree to pay the same according to the tenor and effect thereof. JOSEPH WEAVER," and that the note remained due and unpaid.

Defendant filed the general issue, and a plea denying the execution of the guaranty, upon which issues were formed. There were other pleas filed and issues formed, but as no question arises upon them they are unnecessary to an understanding of the case and are not given.

After many continuances the venue of the case was changed to Peoria county. And at the June Term, 1865, of the Peoria Circuit Court, the cause was submitted to the court for trial without the intervention of a jury, by consent of the parties. After hearing the evidence, the court found the issues for defendant, and plaintiffs thereupon entered a motion for a new trial, which was overruled, and judgment rendered in favor of defendant in bar of the action and for his costs. Plaintiffs bring the case to this court by appeal, and seek a reversal of the judgment of the court below.

Messrs. HITCHCOCK & DUPEE, for the appellants.

Messrs. WEAD & JACK, for the appellee.

Mr. CHIEF JUSTICE WALKER delivered the opinion of the Court:

This was an action of assumpsit, upon a guaranty, for the payment of a promissory note. The declaration avers, that the defendant, at the time of making the promissory note, and before its delivery to plaintiff, and in consideration that he would receive the same, made his certain promise and guaranty in writing. That Samuel Stanley made and delivered his promissory note to S. F. White and Brothers, for the sum of $340.10, payable five months after its date, which bore date the 31st of October, 1856. Over the signature of Weaver is

this indorsement: "For value received I guarantee the payment of the within note, and agree to pay the same according to the tenor and effect thereof." The declaration contained two special counts and the usual money counts. The general issue was filed. The venue was changed to Peoria county, and a trial was subsequently had by the court, a jury having been waived by the parties, when the court found the issues for the defendant. A motion for a new trial was overruled, and judgment rendered on the finding of the court. An appeal is prosecuted to reverse that judgment.

The whole controversy, in this case, turns upon the question whether appellee signed his name as a guarantor or assignor. If he wrote his name on the note before its delivery, and did not declare over his signature the nature of the liability he intended to assume, the law will charge him as a guarantor. If, however, he indorsed his name after the note went into circulation, the presumption would be that he designed only to incur the liability of an indorser. In such a case, to overcome that presumption, it would devolve upon the holder to show that he had agreed to guarantee the payment of the note; and such being a new and independent undertaking, it would require a consideration to support it. The holder of a note indorsed in blank, has a right to fill up the indorsement, by writing over the signature, any thing consistent with such instruments, and in accordance with the agreement of the parties. But, if a contract of guaranty is written by the holder when an assignment was only intended, the fact may be shown and defeat a recovery.

On the trial below, the note and indorsement were read in evidence. The signature of appellee on the back of the note was proved to be genuine. The deposition of one Cross, was then read, in which he states that appellee admitted to him, that he indorsed his name on the note before it was delivered to appellants. This witness states, that Haley was present when the conversation occurred. Haley says, he heard the conversation referred to by Cross, and says, that Cross came to the place where appellee and witness were standing, and said

to appellee: "The suit has gone in your favor." To which appellee replied: "That is right, it should have been so decided." That Cross then said he had some doubts about it, but the rest of the jury were satisfied and consequently he had agreed upon the verdict. Appellee replied that: "If his name had been at the bottom of the note he should have paid it." Haley states that this is all he recollects of the conversation. That he was with them during the whole of the conversation, and until they separated.

Quimby testifies, that the note was in his possession for collection. That he was engaged in the banking business, in Monmouth, and the note was sent to him for collection, by Hoffman & Gelpcke, before it was due. At that time the name of the appellee was on the note, but the guaranty was not written over it; nor had there then been any erasure of names on the note, but several names were then on it, which have since been erased. He testifies, that the maker was dead at the time, but the bank had no instructions to call upon appellee for payment, nor did the bank call on him to make payment. This witness also says, that he thinks Cross' hearing is not as acute as that of men in general.

From an examination of the original note, we see that the indorsement of the payees has been erased. Also the names of Hoffman & Gelpcke, which had been indorsed on the back of the note. In the case of *Stewart* v. *Smith*, 28 Ill. 397, it was *held*, an indorsement without date, will be presumed to have been made at the date of the note. In this case there was no date to the indorsement by appellee, nor is there any evidence to show when it was made. Whether before or after it was delivered does not appear from the evidence of any witness. Had any evidence been introduced from which it could have been inferred that the note had been delivered to the payee before appellee indorsed it, then we would be justified in concluding that payees had negotiated it to him, and he in like manner had assigned it to some other holder, and thereby became liable only as an indorser.

Again, appellee's name appears indorsed on the note at the

place where the first indorser's name usually appears, and stands first and is above all of the other names indorsed on the note. While this is by no means conclusive, still it is strong presumptive evidence that he indorsed before the others. And appearing before the others, it would seem to indicate that it must have been placed there before the note was delivered; and that he intended to incur the liability of a guarantor; and the holder in that case had the right to fill the blank with a guaranty. *Camden* v. *McCoy*, 3 Scam. 437; *Cushman* v. *Dement*, id. 497; *Carroll* v. *Wild*, 13 Ill. 683; *Klein* v. *Currier*, 14 id. 237; *Webster* v. *Cobb*, 17 id. 459; *Rich* v. *Hathaway*, 18 id. 548; *Bogue* v. *Melick*, 25 id. 91; *Heintz* v. *Cahn*, 29 id. 308.

What appellee said to Cross, if as Haley understood it, does not afford a solution to the difficulty. His name was on the back of the note, without date, and that creates the presumption that he signed it as guarantor, but as Haley understood him, he only admitted his liability if he had signed it as maker, with his name on the face of the note. He did not say that he signed it after its delivery, and as that must have been the question before the jury he would most likely have said so if it had not been true.

The judgment of the court below is therefore reversed and the cause remanded.

Judgment reversed.

Mr. JUSTICE LAWRENCE did not hear the arguments in this case, and took no part in its decision.

GEORGE F. HARDING, impleaded with H. M. WEAD,

v.

MARY LARKIN *et al.*

1. PRACTICE — *writ of error and appeal by the parties on the same record.* Held, that, under the practice in this State, a plaintiff may prosecute a writ of error, although the defendant has appealed from the same judgment, and one

of these proceedings does not affect the other, and both may progress at the same time.

2. COVENANT *on warranty of title — damages — costs and attorneys' fees.* Where a grantee holding under a covenant of warranty is evicted, he may recover the purchase-money with interest, and the taxable costs and reasonable attorneys' fees expended in defending the suit in ejectment which resulted in the eviction; but not so in a chancery suit brought to set aside a deed in the chain of title under which the covenantor claimed, when the covenantee was not a party to that suit. The grantee can only recover such costs and reasonable attorneys' fees as accrued in the suit by which he was evicted.

3. DEPOSITIONS — *of witness taken out of his county.* It is not irregular to take the deposition of a witness residing in one county, in another county. It may be he was not bound to attend for the purpose, but having done so it is regular.

4. EVICTION — *yielding to successful title.* Where a party is sued in ejectment, and a recovery is had against him, he need not wait until actually expelled by legal process, but may yield to the superior title, purchase it, and maintain an action on the covenants in the deed of his grantor. The law does not require the performance of useless acts.

5. JUDGMENT — *in ejectment — what it establishes.* Where the grantee holding a covenant of warranty, is sued in ejectment, and his grantor has notice of the suit, or becomes, as he may, a party to it, the recovery against his grantee is conclusive upon him that the title by which his grantee was evicted was paramount, and he will not be permitted to question the fact in an action by his grantee on the covenants in his deed. But it would be otherwise if he had not received notice of the suit in ejectment, in which case the grantee must prove that the title was paramount. The appearance of the covenantor as an attorney, to defend the ejectment suit, is evidence that he had notice.

6. RECORD — *authentication of.* Where the proper clerk certifies that a transcript of a record is a true and perfect copy of the original papers in the case, as fully as the same appear on the files and records then in his office, although informal, such a certificate is substantially sufficient to authenticate the record and entitle it to be read in evidence. The papers pertaining to a cause became a matter of record by being filed in the proper office.

7. DAMAGES — *measure of in covenant of warranty.* When a grantee is evicted, and has been in the perception of rents and profits, and is not liable for *mesne* profits, he would not be entitled to recover interest on the purchase-money. It then follows, that he may recover interest for the period for which he is liable for such profits, but for the time an action would be barred for such profits he cannot recover interest; our statute having barred the recovery of such profits after five years, that is the period for which interest may be recovered in this action.

8. SAME. When the grantee is evicted, and purchases the title under which the recovery was had, and no recovery of *mesne* profits has been had,

Statement of the case.

the presumption will be indulged that they entered into and formed a part of the price paid for the superior title, and the grantee may recover interest for five years, as though *mesne* profits had been recovered.

9. EVICTION — *against a part of the heirs of the covenantee.* When a suit in ejectment has been brought against the grantee, and he dies during the pendency of the suit, and it is revived against his heirs, to whom his title descended, and it was omitted to make one of the heirs a defendant, and the suit progresses to a recovery against them, *held*, that this was such an eviction as authorized the heirs to maintain covenant on the warranty to their ancestor.

WRIT OF ERROR to the Circuit Court of Cook county; the Hon. ERASTUS S. WILLIAMS, Judge, presiding.

This was an action of covenant brought by Mary Larkin, William Larkin, Joshua Larkin, Sarah Larkin, Eveline Larkin, James Larkin, John Larkin, Berzilla Larkin and Lydia Larkin by Joshua Larkin, their next friend, in the Cook Circuit Court, against George F. Harding and Hezekiah M. Wead. The declaration counts on the breach of a covenant of warranty contained in a deed of conveyance for a quarter section of land to Curtis Warden and Albert Warden, and that their father, by conveyance, became the assignee of their title and the covenant of warranty, and they succeeded to the same rights by the death of their father.

That defendants had not kept and performed their covenants, but had broken the same by suffering plaintiffs to be evicted from the land by paramount title. Pleas were filed and issues formed. A trial was had by the court and jury, who found the issues for the plaintiffs and assessed the damages at $967. Defendants entered a motion for a new trial which was overruled, and judgment rendered on the verdict. Plaintiffs bring the case to this court on error, and the defendants by appeal, and they assign errors on their several records.

Messrs. GOUDY & CHANDLER, for plaintiffs in error.

Messrs. HARDING & WEAD *pro se.*

Mr. CHIEF JUSTICE WALKER delivered the opinion of the Court:

This was an action of covenant brought by plaintiffs in error, by their next friend, Joshua Larkin, in the Cook Circuit Court, against defendants in error, on a deed of conveyance containing covenants for title. The declaration avers, that defendants and their wives, on the 26th day of December, 1855, in consideration of six hundred dollars, by their deed of that date, sold and conveyed to Curtis Warden and Albert Warden, the south-west quarter of section thirty-three, township eight, north of the base line, in range two west of the fourth principal meridian; and covenanting thereby that they would forever warrant and defend the title to said land against all patent titles whatsoever, and none other.

That, on the 2d day of February, 1856, Albert Warden and wife, for the consideration of two hundred dollars, sold and conveyed an undivided half of the north eighty acres of the quarter to Curtis Warden; and Curtis Warden, on the same day, on a like consideration, conveyed the undivided half of the south half of the quarter to Albert Warden; Albert Warden quitclaimed the south half to John J. Warden, for the consideration of $320, and on the 21st of September, 1857, Curtis, John J. and Benjamin F. Warden, for the consideration of $3,600, quitclaimed the whole quarter to Samuel Larkin. That he died, on the 25th of October, 1859, leaving plaintiffs his sole heirs, whereby they became invested with his claim to the premises, by descent.

That defendants have not warranted and defended the title against all patent titles whatsoever; but that after the death of Samuel Larkin, one Thomas Cross, by paramount patent title, conveyed to him by Archibald Williams, who derived the patent title from Robert Searles, to whom a patent had been granted by the United States Government, entered upon, and ejected plaintiffs therefrom, by due process of law, and kept and held plaintiffs so ejected, from the possession and occupancy of the land. And that plaintiffs have been obliged to

pay the costs and charges sustained in defending the ejectment suit brought by Cross, amounting to $100, and have been compelled to pay large sums of money, amounting to $300, in endeavoring to defend the suit in ejectment.

The second breach avers, that after Samuel Larkin's death, Cross, by virtue of his paramount patent title, on the 6th of April, 1863, evicted plaintiffs and kept them out of possession, whereby they lost the land, and have been obliged to pay costs and charges sustained in defending the ejectment suit, amounting to $100, and were compelled to pay other charges, in and about the defense of the ejectment, the sum of $300.

It is averred in the third breach, that, on December 4, 1865, Williams filed a bill in chancery, in the Warren Circuit Court, against James Searles and others, to set aside the title conveyed by defendants, in favor of another patent title granted Robert Searles, and conveyed to Williams, and that at the April Term, 1859, a decree was pronounced, upon the hearing of the bill, by which it was ordered and decreed, that the deed, by which defendants claimed title, should be set aside. That, on the 27th of June, 1859, Williams conveyed the land to Cross. That, on the 12th of July following, Cross brought a suit in ejectment, in the United States Court, for the northern district of Illinois, against Samuel Larkin, the father of plaintiffs. That defendant, Harding, appeared as attorney for Larkin, and filed a plea of not guilty. That while that suit was pending, Samuel Larkin died, leaving plaintiffs his heirs, who, as such, were made parties defendant. That Cross in that suit recovered a judgment for the land. That, under advice of counsel, plaintiffs prosecuted a writ of error to the Supreme Court, in the name of the Wardens and the defendants, with the knowledge and consent of the latter, to reverse that judgment, and necessarily paid seventy-five dollars costs, and $100 for attorneys' fees. That judgment was rendered against plaintiffs in the ejectment suit for costs and damages, and they were compelled to pay costs taxed in defense of the suit, seventy-five dollars, and $100 for attorneys' fees.

That, on the 7th of September, 1862, Cross conveyed the

premises to John H. Williams; that plaintiffs, by reason of the decree in favor of Archibald Williams, and the judgment in ejectment, were in danger of losing the land, and were compelled to purchase the title, and, for the consideration of $1,600, on the 25th day of December, 1862, paid by them, the land was conveyed by John H. Williams to John W. Larkin, for their use and benefit, whereby they were evicted and the covenant broken.

In the fourth breach, it is averred, that, on the 12th of July, 1859, Cross brought ejectment against Samuel Larkin, in the United States Circuit Court, for the recovery of the land, of which defendants had notice, and defendant Harding appeared in the case as an attorney for Larkin, and filed a plea of not guilty. And that, pending that suit, defendant Larkin died, leaving plaintiffs his heirs at law, who were made defendants in that suit: that, in January, 1862, a judgment was rendered by the court against the defendants for the recovery of the land, and one cent damages, and a writ of possession was awarded to Cross for the premises; that the judgment by Cross was recovered by virtue of paramount patent title derived from the patentee; that, by reason of the judgment and decree in favor of Williams, plaintiffs were in danger of losing the land, and to avoid loss, were compelled to purchase the patent title from John Williams, to whom Cross had subsequently sold the premises, and that the conveyance was made to John W. Larkin, for their use and benefit, whereby they were evicted and the covenant broken.

On the 4th of January, 1866, defendant Harding filed three pleas to the declaration: First, a plea of performance, which avers that defendants did keep and fully perform their covenant; second, a plea of *non est factum;* and a plea of set-off of indebtedness by Samuel Larkin to defendant, for legal services as an attorney in the ejectment suit. Both defendants joined in a fourth plea, which is a plea of set-off for use and occupation of the premises. Plaintiffs filed replications to the first and second pleas, and a demurrer to the third and fourth pleas. The court sustained the demurrer to these pleas, and carried it

back and sustained it to the first, second and third breaches in plaintiffs' declaration. A judgment of *nil dicit* was thereupon rendered against defendant Wead, and a writ of inquiry awarded to assess the damages. A trial was afterward had under the issues on the first and second pleas, when the issues were found for plaintiffs, and the damages assessed against both defendants at $967. Defendants entered a motion for a new trial, which the court overruled, and rendered judgment on the verdict. To reverse that judgment, defendant Harding brings the case to this court by appeal. And plaintiffs also bring the case here on writ of error, to reverse the judgment of the court below in sustaining the demurrer to the first, second and third breaches of their declaration.

Inasmuch as both proceedings in this court are based upon the same record, and each party questions different decisions of the court below, made in the progress of the trial, for convenience, we shall consider the two cases as one. And in discussing the questions, shall first consider the errors assigned by plaintiffs in error. Before proceeding, however, to the main questions in the case, we shall first determine a question of practice involved in these records. It is objected, that, when one party prosecutes an appeal, the other is precluded from prosecuting error on the same record.

Our practice, unlike that of some other appellate jurisdictions, does not allow the assignment of cross errors on the record, in a proceeding at law. And as it may, and sometimes does occur, that, in the trial of a cause, errors may be committed against both parties, no reason is perceived why they may not have such errors corrected. The proper administration of justice requires that the parties should have such a right. The writ of error is a writ of right in all cases in which it will lie; and we are aware of no rule which holds that a party may be deprived of that right without his consent, and without any act on his part. It would be strange indeed if the acts of the opposite party, against his will and his interest, could deprive him of such a right, and that is all that the objection amounts to in this case. The writ of error is a writ of right, and lies for

either party on a final judgment; but the appeal in common law cases is purely a statutory remedy. They are concurrent in all civil cases, and may be prosecuted by either party. Or one may appeal and the other prosecute error from the same judgment, and on the same record.

The question whether the demurrer was properly sustained to the first three breaches in the declaration is the first error presenting itself on this record. It presents the question, whether a person holding land under a deed containing a covenant to warrant and defend the title, when sued for the land may defend the suit, and if unsuccessful, recover in covenant for taxable costs and attorneys' fees, necessarily paid in such defense. This question is now directly presented to this court for the first time for determination. It is however insisted, that it is settled by former decisions of this court, where it is said that the utmost extent to which the plaintiff can recover, is the purchase-money and interest. As to the increased value of the land, whether from its improvement or by a general rise in the price of lands, this is undeniably true. But those decisions were made alone with a view to that question. Such is the rule in perhaps all but the New England States, and yet in all the States, so far as we can find, where that rule prevails, and this question has arisen, except in New Jersey, taxable costs and reasonable attorneys' fees actually paid, have been recovered. See Rawle on Covenants, 95, and authorities there cited. The attorneys' fees in this suit are not, of course, recoverable as damages, but simply the costs and fees in the ejectment suit in which the eviction was had.

A person in possession yields to what he supposes to be a paramount title, at his peril. And holding a covenant from his grantor, that he will warrant and defend the title, it would seem, under the law, that the covenantee may defend for him, and, in fact, in some cases, must defend for him; and when he, in good faith, has done so, the taxable costs and attorneys' fees paid in such defense may be reasonably considered as a portion of the money paid for the title. It is paid to maintain what the grantor has affirmed by his covenant to be a perfect

title. And as the law allows plaintiffs to recover these charges, it is upon the principle, that it is a portion of the purchase-money. Plaintiffs were, therefore, entitled to recover for taxable costs and reasonable attorneys' fees, paid in defending the ejectment suit by which they were evicted.

But, as to the claim for costs and attorneys' fees in the chancery suit, brought by Williams against Lombard and defendants in error, we regard them too remote. Appellees were not parties to that suit, and not being parties to it, we do not perceive that they can be allowed to recover for costs and expenses in prosecuting it in the Supreme Court. Nor do we perceive that the consent of the appellants, that they might use their names, in so doing, can matter. We have been able to find no case that has gone the length of holding, that costs and charges of any other than the suit by which plaintiff was evicted could be recovered. The rule should be limited to the taxable costs and reasonable attorneys' fees alone in the suit. The court below, therefore, properly sustained the demurrer to the third breach, but erred in doing so to the first and second breaches.

We now come to the consideration of the errors assigned by appellants. It is insisted, that the court erred in refusing to sustain the motion to suppress the deposition of John W. Larkin, because it is alleged to have been taken before appellant was served with process. We have examined both transcripts of the record, and are unable to find any summons or return. And we do not understand that the time when a summons was served can be proved by affidavit, even upon which to base a motion. That should be proved by the return itself. Again, it is urged that as the witness resided in Warren county, his deposition could not be taken in McDonough county. If the witness voluntarily appeared before the officer at the time and place specified, no objection can exist on account of his residence in another county. If, however, he refuse to attend, we are aware of no means by which his presence could be compelled by the officer taking the deposition. We perceive no error in overruling this motion.

It is next urged, that there was not a sufficient eviction by paramount patent title proved to warrant a recovery. The ancestor of appellees was sued in the United States Circuit Court for the land, and he having died while that suit was pending, all of appellees but one were made defendants. The suit progressed to a judgment of eviction against them. They then yielded, and became the purchasers of the title by which they were evicted. It is true, that they were not actually dispossessed under process of the court. But, when the judgment was recovered, they were not required, under the law, to wait until they were turned out. The current of authorities will be found to hold, that, when the judgment has been rendered, establishing the adverse title to be paramount, the defendant may then purchase and recover on the covenant in his deed. The law never requires the performance of a useless act, and this would not only be so, but would involve unnecessary additional expense.

Then, what was the effect of the judgment in ejectment? It is the rule, that, where the covenantor is served with a proper notice of the commencement of the suit, or he has made himself a defendant in the suit, the judgment is conclusive. But, where he has not had notice, the *onus* is upon the plaintiffs in an action on the covenant to prove that the judgment was produced by an adverse paramount title. Then, does it appear in this case, that appellants had such a notice? We think it does. It appears from the transcript of the record, that appellant Harding appeared as an attorney in the case, and defended for his covenantee. This is ample evidence, that he had proper notice, or what he regarded as such. And, as Wead had permitted judgment to go against him on demurrer, the transcript of that judgment was proof of eviction by paramount patent title, when coupled with the decree in the case.

It is, however, insisted, that the transcript of the chancery record was not sufficiently authenticated to entitle it to be read in evidence. The clerk certifies, that the transcript is a true and perfect copy of the original papers in the case, as fully as the same appear from the files and records then in his office.

While this certificate is not formal, it is substantially good. The papers of a cause, when filed, under our statute, become a part of the record, as fully as if copied into the record book of the court. That act does not lend to them any additional force as parts of the record. Nor, are they generally even copied into the record book.

It is likewise objected, that the true measure of damages was not adopted, in computing interest on the purchase-money, paid by appellees' ancestor. That they being in possession of the premises, interest should not be allowed, as it should be presumed, that the use and occupancy of the land was equal to the interest on the purchase-money. This proposition is no doubt true with proper modifications. Where the purchaser is not liable for mesne profits, this has generally been regarded as the true rule. And it would then follow, that, for all of the time that an action for such profits is barred by the statute of limitations, interest could not be claimed, and should not be allowed. But when the party is liable to pay mesne profits, or has already paid them for a period for which they could have been recovered, then he should be permitted to recover interest for that period. And our statute has declared that mesne profits shall be barred after five years.

The action to recover mesne profits, is by trespass *quare clausum fregit*, and only lies after a recovery in ejectment, to recover for the damage sustained by the owner in consequence of the wrongful entry and occupancy of the land from the time the entry was made until the recovery is had. Being an action of trespass, like the same action when brought to recover for any other injury, to real or personal property, it will be barred in five years after the action accrued. It cannot therefore matter how long a person may have occupied the premises before the eviction, the statute will bar a recovery for longer than five years. And in this action the jury will allow the reasonable rents and profits; but they are not confined to these alone; as they may give such damages as they deem right. The law, therefore, in covenant on a warranty, only permits the recovery of interest for five years next preceding the eviction,

as the plaintiff is liable for the mesne profits for that period of time; it only being in conformity with the rule that the use of the land is equal to the interest on the money paid for the land.

Our ejectment law has substituted a suggestion in the nature of the action for mesne profits, as a continuation of the suit. And it is declared by the thirty-seventh section of that act, that "instead of the action of trespass for mesne profits heretofore used, the plaintiffs, seeking to recover such damages, shall, within one year after the entering of the judgment, make and file a suggestion of such claim, which shall be entered, with the proceedings thereon, upon the record of such judgment or be attached thereto, as a continuation of the same." Thus it appears that the action of trespass for mesne profits is abolished, and the damages must, if at all, be recovered by this suggestion.

But in this case no suggestions were filed within the year after the recovery was had. And it is therefore contended, that, as a recovery for mesne profits cannot be had, appellants are not liable for interest for any portion of the time prior to the recovery in ejectment. It, however, appears, appellees purchased of the plaintiff in ejectment within the year after the recovery. This being so, we must presume, that the liability of appellees entered into and formed a part of the consideration paid on that purchase. It is not to be supposed that the successful claimant of title would abandon his right to recover for mesne profits without consideration. We are therefore satisfied, that appellees under such circumstances are entitled to recover interest for five years previous to the eviction, as well as after that time until the recovery on the covenant. But in this case interest was allowed for a longer period, and the judgment was therefore to that extent erroneous.

It is also urged, that, inasmuch as there has been no recovery against Joshua Larkin in the ejectment suit, he has no right to recover in this action; that, as to him, there has been no eviction; but, he not having been made a defendant when that suit was revived, the omission to make him a defendant operated as a recovery by him in that action. We do not see how such omission could have that effect. Had he been

subsequently sued for his undivided interest, we do not understand that he could have set up the recovery against his co-tenants as a bar to such an action against him. The recovery against his co-tenants by a paramount title, to that held by him, from appellants, was such an assertion of paramount title as authorized him to yield to its pressure. Harding and Wead were parties to the suit in chancery by Williams against Lombard and others, in which the title conveyed to the ancestor of appellees was held to be void, and they were bound by the decree, and estopped from denying the title to be paramount. Hence, further resistance by Joshua would have been unavailing, and he had the right to yield and look to his father's covenantor for his portion of the purchase-money.

The judgment in the case, on the writ of error, as well as that on the appeal, must, for the reasons indicated, be reversed, and the cause remanded for further proceedings.

Judgment reversed.

JOSIAH DUNNING
v.
MARTIN BATHRICK.

1. CHANCERY—*will not participate in a transaction where both parties have acted fraudulently.* A court of chancery will not lend its aid to either party to a suit which has arisen out of an attempt on the part of both to defraud another out of his property.

2. PRACTICE IN THE SUPREME COURT—*modifying the judgment of a previous term—reopening a case for new proofs.* The Supreme Court will not modify its decree of a former term, reversing the decree of the court below in a chancery cause, and dismissing the bill, so as to remand the cause to let in additional proofs.

3. SAME—*protection of intervening rights, acquired under a decision which was subsequently recalled.* Upon bill filed respecting the title to land, which was in possession of the defendant, a decree was pronounced in the court below in favor of the complainant, and directing the defendant to yield the possession to him; and, on appeal from that decree by the defendant, it was affirmed. Subsequently, the order affirming was set aside, and a decree entered, revers-

ing the decree of the court below, and dismissing the bill. At a subsequent term, upon its being made known to the court that innocent parties had purchased the land from the complainant after the order affirming was made, and before it was set aside, the decree of reversal was modified, for the protection of those innocent parties, so as to dismiss the bill without prejudice.

4. SAME — *of restoring a party to his possession, of which he was deprived under a judgment which was afterward set aside.* Under the order affirming, the court below executed its decree by putting the complainant in possession of the land; but this court finally reversed the decree below, and dismissed the bill, because it appeared neither party had any right, and both were seeking to defraud a third party out of the land, and refused to order restitution of the premises to the defendant, or to remand the cause with directions to the court below to enter such an order.

APPEAL from the Circuit Court of De Kalb county; the Hon. T. D. MURPHY, Judge, presiding.

THIS was a suit in chancery instituted in the court below, by Martin Bathrick against Josiah Dunning and others. A decree was rendered in favor of the complainant, from which the defendant, Dunning, took this appeal.

The opinion of the court states the case.

Messrs. PLATO & SMITH and Messrs. LELAND & BLANCHARD for the appellant.

Mr. T. LYLE DICKEY, for the appellee.

Mr. JUSTICE BREESE delivered the opinion of the Court:

This was a bill in chancery in the De Kalb Circuit Court, at the November Term, 1857, by Bathrick against Dunning and others, alleging that one Fuller Darling, in March, 1850, was the owner of south-west of south-west quarter of section 24, the south-east quarter and the east half of the south-west quarter of section 25, all in town thirty-eight north, in range five, east of the third principal meridian, in De Kalb county, and then unimproved; that Darling went to California in 1850, expecting to return soon, but did not until 1857; that during his absence the defendant conspired with others to acquire the title

to these lands, and pretended that Mitchell was the agent of Darling, and authorized to control the land as such agent; that complainant had taken possession of the land in the name of Darling, and for his benefit; that in 1855 defendant instituted in Darling's name, an action of forcible entry and detainer against complainant, to recover possession of the land. Judgment was rendered against complainant, which, on appeal to the Circuit Court, was, at October Term, 1856, affirmed. That in 1853 the lands were sold for the taxes of 1852, to one James H. Beveridge, from whom complainant bought the certificate of purchase, and obtained in September, 1855, a deed therefor, and paid the taxes thereon for several years, and up to the time the sheriff sold the lands to Josiah Dunning, one of the defendants, complainant all the time believing that Darling would return and refund complainant all the money so advanced and paid out as taxes, and took receipts for the taxes, which are set out in full; that an attempt was made to redeem the lands by some person unknown, and who had no authority, but believed to be Hemenway, one of the defendants, and an entry was made on the record of sales of lands for taxes, in the name of Fuller Darling, and a certificate of redemption issued, dated September 24, 1855.

That, after the purchase of the certificate from Beveridge by complainant, and before the action of forcible entry, on 27th June, 1855, Hemenway, conspiring with Dunning to acquire the title to these lands, went to Iowa, where Mitchell lived, and got from him the patents for the lands which Darling had left with Mitchell, which Hemenway brought back with him, and also a writing, purporting to be a promissory note from Darling to Mitchell, for four hundred and eighty dollars, with a paper, purporting to be a power of attorney, accompanying it, authorizing Mitchell to sell the land and to control it. That Dunning and Hemenway then pretended they had bought the land, and applied to complainant to buy the tax certificate, etc. That Dunning, at that time, exhibited the note and power to sell, to complainant, who remarked that he thought they were not genuine, and Dunning replied, "they looked suspicious;"

that after this, complainant, for the purpose of saving himself harmless from loss by means of the moneys he had expended, and with a view of protecting the land from being taken away by means of these forged papers, took possession of one forty acre tract, and put up a shanty or small house on it, and put a tenant in it, which is the tract of land mentioned in the proceedings of forcible entry and detainer. Complainant did this under the belief that the question of the forgery of the power of attorney from Darling to Mitchell could and would be thus tested, and with the same belief took and prosecuted the appeal in the Circuit Court. Complainant charges that this promissory note and power of attorney were forgeries, neither having been executed by Darling, and that Hemenway, Mitchell and Dunning were cognizant of the fact before the action of forcible entry was instituted, and had notice thereof. Complainant charges, that neither of these defendants had any authority, written or verbal, from Darling to meddle with this land, or do any thing, during his absence, touching the possession of it, or with his business in any way, save that Darling gave to Mitchell his title deeds, with a request to get them recorded, and that defendants were well aware that Mitchell had no such agency; and that Hemenway and Dunning were so well satisfied that the power of attorney was a forgery, that they could not be induced, during the trial of the suit of forcible entry, etc., to produce the papers, although repeated efforts were made by complainant and his counsel to that end, but in place thereof procured the affidavit of Mitchell, that he was Darling's agent to prosecute the suit.

That, while the action of forcible entry was pending, which defendants professed to carry on as the agents of Darling, but which really was carried on for the fraudulent purpose of defrauding Darling, and preventing complainant from protecting Darling's interest against their fraudulent practices, while Darling was absent in California, and in ignorance of these doings, Hemenway and Dunning, conspiring with Mitchell to cheat Darling, and deprive him of these lands, instituted on the 12th of January, 1856, in the Circuit Court of De Kalb

county, a suit by attachment in the name of Mitchell, and against Darling, whose agents they professed to be in the forcible entry suit, and affidavit of Hemenway and bond being filed, a writ of attachment was issued, and returned February 2, 1856, as having been levied on this land, January 21, 1856; a declaration with a copy of the note and an account was filed March 26, 1858; that some attorney, without any authority from Darling, entered a motion to dismiss the suit, which, by leave of the court, was subsequently withdrawn. Proof of service by publication was made, and a judgment for default of plea was entered, and a writ of inquiry of damages awarded; jury assessed the damages at seven hundred and forty-one $\frac{66}{100}$ dollars, being the amount of the note and interest, and items of an account against Darling, for which judgment was rendered. A special execution issued on this judgment, April 25, 1856, and a sale made of this land to Dunning, on the 30th of May, 1856, as assignee of Mitchell, the plaintiff in the attachment suit. That Dunning paid no money, but produced to the sheriff an assignment of the judgment from Mitchell to him, dated January 16, 1856; that the sheriff executed a deed to Dunning the fifth of October, 1857, and that Hemenway and Dunning have since taken possession of the land by themselves and tenants, and still hold the same. That in August, 1857, Darling, at Sacramento, California, for the consideration of fifteen hundred dollars, to be paid when Darling should return to this State, executed a deed, through the agency of one Henry Starr, an attorney there, to complainant, and mailed it to him, but which deed was lost on the 10th of September, 1857, at the time the steamship "Central America" was lost, it being in the mail carried by that vessel.

The bill then alleges, that "on or about the 14th of October, 1857, Darling returned to this State and informed complainant of the agreement made with Starr, in California, for the sale of his land to complainant, and the conveyance thereof, and that the deed of conveyance had been mailed to complainant, and that it had probably been lost on board the Central

America. That Darling on his return to this State was in very poor health, so much so as to be unable to perform a single day's labor of any kind, indeed so feeble and prostrate had he become from long and continued poor health, that he and his friends entertained little hope of his ever so far recovering his health as to be able to perform any labor even of the lightest description, and complainant was informed, that, for a long time before his return to this State, in consequence of long continued ill health, he had been unable to earn any thing by means of his own labor, for his support and maintenance, and in consequence thereof, he was, at the time of his return as aforesaid, wholly destitute of the means of supporting himself, save only his interest in the land, and was absolutely destitute of necessary suitable and comfortable clothing for a person in his situation, and no means with which to purchase even the most trifling article of clothing, or even a meal of victuals.

Complainant further alleges, "that immediately on Darling's return to this State, and upon his informing complainant of the several matters aforesaid, complainant offered to convey to Darling all the interest which complainant had acquired in and to these lands by virtue of the tax deed, upon condition that he, Darling, would repay to your orator, or secure the repayment thereof, the moneys so advanced to his use as aforesaid; that Darling, though he acknowledged the justice of the demand of complainant to have those moneys refunded to him, and declared that he was well pleased with all complainant had done in the premises, and cheerfully and cordially assented and ratified all that complainant had done in the premises, assured complainant that he was entirely destitute of the means necessary to repay the means complainant had advanced as aforesaid, and of the means to support himself; that his health was such that he could not then, nor probably for a long time to come, take care of or cultivate the land, and that he preferred to keep and fulfill on his part, the agreement to sell the land to complainant, which he had made with Starr, as complainant's agent in California, and assured complainant that the pretended claim of Dunning, Hemenway and Mitchell

and their co-conspirators, was a fraud in fact from its inception. That complainant thereupon, upon the urgent solicitation of Darling, and for the purpose, as well of furnishing aid to him in his then destitute condition, as also of recovering the moneys so advanced by complainant, and also because of the acts of Starr, as the agent of complainant, in and about the purchase of these lands, consented and agreed to and with Darling, to keep, observe and perform on his part the contract for the purchase of the land; and Darling thereupon, on the 14th day of October, 1857, at Sycamore, in the county of De Kalb, made, executed and delivered to complainant, a deed of release and quitclaim, for all his lands in Illinois, described as follows: (The deed is made an exhibit, and are the same lands as above described in this opinion.) Complainant further alleges, that, upon receiving this deed, he executed and delivered to Darling his three promissory notes, bearing date October 14, 1857, payable as follows: One for the sum of two hundred dollars, payable October 1, 1859; one for three hundred dollars, payable October 1, 1860, and one for the sum of five hundred dollars, payable on the first day of October, 1861; making, in all, the sum of one thousand dollars; and for the remaining five hundred dollars, Darling accepted the verbal promise of complainant, to pay it to him "any time along," as Darling should need and demand it, but gave no note therefor, which sum of fifteen hundred dollars, was without deducting therefrom any thing, or any sum of money, for the moneys advanced by complainant to Darling or otherwise; and complainant avers, that it was then and there agreed, that the conveyance of these lands should be in full satisfaction of all demands for moneys advanced by complainant for Darling's use, and in full payment for the lands. Complainant insists, that all the proceedings of Dunning, and the others with him, were fraudulent and void; that when the attachment suit was commenced against Darling, he was really a resident of Illinois, though absent in California, intending to return, and therefore, the court had no jurisdiction; that Darling was not indebted to Mitchell, which Hemenway and Dunning well knew; that it was a fraudulent

transaction to acquire title; that the damages were assessed by a sheriff's jury, privately, to prevent exposure, and after they were assessed, they clandestinely took the note away, and never placed it on the files of the court, and afterward caused it to be destroyed, so that the forging thereof could not be proved; that Hemenway and Dunning, though interested in the attachment suit, were witnesses therein; that the signature to the Darling note was in the handwriting of Mitchell. An oath is waived to the answers; and the prayer of the bill is, that the note, the judgment thereon in the attachment suit, and execution issued thereon, the sheriff's sale and deed of the land, may be deemed to be null and void, and the defendants forever enjoined from setting up title to these lands, and for general relief.

The joint answer of the defendants was filed April 27, 1861, and purports to be made by Dunning, A. L. Hemenway, Wm. Hemenway and Southard and Reed, and a separate answer by Dunning alone.

The joint answer admits that Darling owned the land at the time, etc.; that he was not a resident of this State after he left it in 1850; insists that the note was genuine; Darling lived with Mitchell from 1847 to 1850, and then emigrated to California; that on the 2d of March, 1850, he settled with Mitchell, and executed his note for four hundred and eighty dollars, payable in two years, and also a writing, authorizing Mitchell to sell the land to pay this debt, when the note became due, and gave to Mitchell the patents, and authorized him to take possession and control the lands, occupy them, and pay the taxes, etc.; that Darling has never returned; has not paid the note, and has never since exercised or claimed any control over, or paid any taxes on, the land; denies all conspiracy to cheat or defraud Darling, but alleges that complainant for ten years has labored to cheat and defraud Darling out of these lands; that complainant never had any authority in the premises; that after Darling went to California, and Mitchell moved to Iowa, complainant came to this State and occupied lands adjoining Darling's land; that Darling's lands were first assessed for taxation in 1852, and complainant tried

to get a tax title on them; that in May, 1855, Mitchell, learning that the land was sold for taxes, and that complainant was endeavoring to get a tax title, appointed defendant Hemenway to take possession of the lands, redeem them from the tax sale, and take a general agency, and gave to Hemenway the patents, which Hemenway at once did; that complainant then paid the taxes on May 14, 1855, took possession and put up a shanty on part of the land; that Hemenway then commenced against complainant, the action of forcible entry, June 27, 1855, and obtained judgment, which, on appeal to the Circuit Court, was affirmed against complainant; that complainant, in that suit, made an affidavit that Darling was a non-resident of this State; that the lands were properly redeemed by Hemenway for Darling; that complainant obtained of the sheriff a tax deed for the land by falsehood, and misrepresentation, and that complainant had applied to the County Court for letters of administration on Darling's estate, while the forcible entry suit was pending; that Hemenway leased the lands to Dunning for ten years, and put him in possession, which he has ever since continued, and has made improvements of the value of two thousand dollars, and paid the taxes. Admit the pro ceedings in the attachment suit, and insist every thing was fair and regular, that Mitchell, having no advices from Darling during his absence, deemed it prudent to sue to save his debt, and no demands were presented to the jury but what were strictly just; that, in January, 1856, Dunning, at the request of Hemenway, went to Iowa to see Mitchell to get instructions, evidence and means to conduct the attachment suit, and Mitchell, being in poor health, in indigent circumstances, and unable to prosecute his suit, sold and assigned to Dunning all his demands against Darling which had been sued on, and authorized him to prosecute the same to judgment for his own use, and also made a quitclaim deed of the lands to Dunning; that Dunning then paid Mitchell in cash the amount of his demands, including the note; they deny that they refused to exhibit the note when requested by any person having any interest in it. Dunning purchased the lands on this judgment

in attachment, and the interest of the other defendants is only that of tenants of Dunning; that complainant sent his son-in-law to California to deceive Darling into some negotiation, thereby to get color of title, and, if he obtained a deed, it was by fraud and without consideration, and a conspiracy with Darling to cheat Dunning, they, knowing at the time that Dunning was in possession of the land, and had been in possession a long time; deny all fraud.

Dunning, in his separate answer, says, that, previous to the suit of forcible entry, he never knew or heard of Darling or complainant; that, being present at the trial, he became convinced of complainant's rascality; that he signed the attachment bond at the request of Hemenway, agent for Mitchell; he paid to Mitchell the amount of his demand, and took an assignment himself, which was the beginning of his interest in the matter. And he insists that the Darling who made the deed to complainant, was an impostor.

Replications were put in to the answers, and the cause was heard on the bill, answers, replications, exhibits and proofs, both documentary and oral, and are very voluminous.

We do not propose to go into the proof very minutely, but to state briefly the impression it has made on our minds. We have been particular in stating the allegations in the bill of complaint and in the answers, in order to present a full and distinct idea of the character of the controversy, which seems to us one having slight claims to the favorable consideration of a court of equity, and cannot be sustained, for complainant's benefit, on any well defined principle acknowledged in that court.

In the first place, the proof shows most clearly, when complainant came to De Kalb county, and settled on land adjoining the lands in controversy, Darling was then absent in California, and wholly unknown to complainant,—they were strangers to each other.

We see complainant, in 1853, purchasing from Beveridge a certificate of the sale of these lands for the taxes of 1852, and he produces the collector's receipt for the taxes of 1853, as paid by

Beveridge for Darling. The taxes for the subsequent years purport, by the receipts, to have been paid by complainant in his *own right*, and not as the agent or the benevolent friend of a man he never saw, then absent in California. That this was done for the purpose of getting a tax title on the land, to place him in a situation where he could show color of title in himself, there cannot be the slightest doubt, else why take the receipts for the taxes in his own name, and why obtain a deed from the sheriff under this purchase for taxes, if not to procure such color? It is so unusual for a man to pay the taxes due on the land of a stranger, merely for the benefit and accommodation of the stranger, that it may be safely asserted it has never been done, and never will be done, without some sinister and interested motive on the part of the person thus paying. It cannot be believed, for one single moment, that complainant did these acts as the kind and disinterested friend of a man he never saw, but for the plainly developed purpose of appropriating these lands to himself under a tax title. The complainant evidently sought this advantage over Darling, and no motives of friendship can be supposed to have actuated him to meddle with these lands, but his inspiration was a hope of gain. The absent Darling, and his interests, were as far from the consideration and view of complainant in this matter, as the distance of half the continent by which they were separated.

The complainant does worse. After procuring a tax deed from the sheriff, he took possession of one of the tracts, erected a shanty on it and put a tenant in it, intending to profit by the limitation act, making color of title, possession and payment of the taxes for seven successive years, a bar to any recovery in ejectment by the true owner or holder of the paramount title. And this, he says, was for the benefit of Darling, a man whom he knew not, and for whom he could have no sympathy. Away with such benevolence, that seeks, under its captivating guise, to despoil a man of his property. But the complainant was watched in all these his movements, by other parties, the defendants here, or a part of them, Dunning and Hemenway, who desired to appropriate to themselves this same property,

per fas aut nefas. They were as unscrupulous and avaricious as the complainant himself, and to balk him and get the land was their great object. Accordingly, they make an attack upon complainant's entry into the land, by the writ of forcible entry in Darling's name, and by the judgment of the magistrate who tried the cause, and by the Circuit Court which retried it on appeal, complainant was defeated; he was adjudged to have entered without authority, and was expelled from the land. A feature in this part of the case was, that the land had been redeemed in 1855, from the sale to Beveridge, under which complainant had obtained, by some means, a deed from the sheriff, and thus got possession.

This was the first act in the drama. The second opens by disclosing active operations by Hemenway and Dunning and Mitchell, ostensibly to obtain these lands for themselves, and to carry out their design. Learning that Darling, when he departed for California, had left the patents for these lands with his old friend, Mitchell, with whom he had lived for a year or more prior to his departure, Hemenway goes to Mitchell in Iowa, to which State he had removed, and returns with a note, purporting to be signed by Darling, to Mitchell, for four hundred and eighty dollars, and with a paper purporting to be a power of attorney from Darling to Mitchell, to control and sell the lands, and also with the veritable patents for the lands issued to Darling. Then Dunning gives out, and Hemenway too, that they had bought the land, and applied to complainant to buy his tax certificate, and Dunning exhibited to him the note and power of attorney, and both seemed to think they were suspicious looking papers.

Notwithstanding the bad appearance of these papers, palpable forgeries no doubt, an attachment suit was brought in the name of Mitchell, against Darling, in the Circuit Court, on this note, and an account, on the 12th January, 1856. The affidavit in the attachment was made by Hemenway, as agent of Mitchell, and the bond executed by him, with Dunning as surety. The writ of attachment was levied on these lands, a declaration filed. Publication of notice to Darling, of the pendency of

the suit was made in a county newspaper. Some attorney, it is said, without authority, appeared for Darling, and entered a motion to dismiss the suit, but afterward repented, and, by leave of the court, withdrew the motion. A default was taken against Darling, and the damages assessed by a sheriff's jury, before whom was presented the note and the account proved by these *disinterested* men, Dunning and Hemenway. It is surely no cause of complaint, that the parties engaged in this scheme did not choose to show this note to Darling's friends, though they were willing to exhibit it to any one who had any interest in the matter. It was not incumbent on them, or either of them, to take the note and exhibit it in the court yard, and call upon the bystanders to inspect it and pass their opinions upon its genuineness. This is never done. But where was this complainant all this time, while these nefarious proceedings, as he terms them, were going on against his distant friend, for whom he had bought a tax title against his land, received a sheriff's deed, took possession and sought to get a title in bar of this friend, by possession and payment of taxes? He was perfectly cognizant of all these doings, and all this wickedness, yet he makes no effort to stop the one or expose the other. His benevolence and friendship for the absent Darling, whom he had endeavored to injure, vanished, and he had not the heart to employ a lawyer to expose the swindle, and denounce the forgery, or even to suggest to the court, as *amicus curiæ*, that such they were. No, it would not have suited his purposes so to have done, and would have interfered with a plan he had then, apparently, concocted, to send to California for a deed, which he could the more easily obtain, if he could show the owner that the matter was so complicated by the sale for taxes, by this judgment, and a probable sale under it, all incumbering the lands, that he could get them for a song, and without paying any money for them.

Accordingly, we see, that, in the following year (1857), complainant sent his son-in-law, one Wesley Munger, to California, to find this friend Darling, for whom complainant, without his knowledge or request, had generously advanced so much money,

stated in the bill of complaint at about $1,000, being the moneys, and those only, which complainant had expended in buying a tax title against his friend Darling, paying the subsequent taxes in his, complainant's own name, as the tax receipts show, taking a sheriff's deed therefor, entering into possession of the land, building a shanty on it, and resisting the action of forcible entry, brought in Darling's name against him, in which complainant was mulcted in the costs, both before the magistrate and in the Circuit Court. It is incredible, that all these should amount to the sum of $1,000, or even one-tenth part of that sum, and it is the perfection of impudence, to make them a charge against his friend Darling, whom he was trying to plunder. These moneys were no claim against Darling, but the voluntary contribution by complainant to effect his *friendly* purpose of benefiting Darling by depriving him of his land, in which he was foiled by the ingenuity and contrivances of the defendants in this suit.

By the letter which complainant wrote to Starr, the California agent, and which was borne to him by Munger, complainant's son-in-law, he was instructed to say to Darling, if such a man could be found, that Mitchell had brought a suit against him after he had left this State, and had recovered a judgment, had levied upon his land, and had sold it, and that the writer, complainant, did not believe that Darling was owing Mitchell when he left, that the writer, this complainant, had paid the taxes on the lands for Darling, had had a lawsuit concerning the lands, had expended time and money to try and save the land, to the amount of nine or eleven hundred dollars, and if the writer, this complainant, could procure the title from Darling, he thought he could save himself, and something over for Darling, but as matters then stood Darling would get nothing, and he, this complainant, would lose all this money and time.

Impressed by this recital of his own wrongs, and complainant's kindness toward him, Darling, denying that he owed Mitchell one dime, but that Mitchell owed him the amount of certain notes, which he then "conveyed to complainant," and protesting that the suit brought by Mitchell was a fraudulent

transaction on Mitchell's part, Darling was willing to make the "deeds" to complainant, and did so, remarking that he did not know the value of the lands, as he had been absent for some time from this State, when the son-in-law, Munger, who was present all the time, remarked that these lands, or lands in that vicinity, were worth about five dollars per acre; Starr thinks that was the consideration expressed in the deed; that Munger was lost on his return to Illinois in the steamship "Central America," and supposes he had funds which were lost with him. Not one cent was paid to Darling for this conveyance, and not "the scratch of a pen," acknowledging any indebtedness by complainant, or his agent, for these lands. It appears also, that Starr had no personal acquaintance with Darling, who, as he says, was a man of light complexion, about five feet ten inches in height, and of spare habit, and who was, unquestionably, brought to him by the son-in-law, Munger, as the real Darling and owner of these lands, but whether he was or not, Starr did not know. Nor had Starr any personal acquaintance with complainant, the letter of August, 1857, borne by Munger, being the first knowledge he had of the existence of such a man as complainant. This Darling, Starr says, had been in California, as he himself stated, since 1849, and lived in Placer county, but had resided elsewhere in that State, and had lived in Illinois in the vicinity of his lands. Thus is seen the reason why complainant did not endeavor to expose the roguery of these defendants, in their efforts to get these lands by the attachment suit, as the proceedings under it complicated the case very much, and added to the tax title, which complainant instructed Starr to say to Darling had been obtained against the land, and the large amount of moneys complainant alleged he had expended to save the lands, all which statements were false and known to be so, enabled complainant to get the wished-for deed.

And here we may pause a single moment, to contemplate this transaction. A perfect stranger to Darling writes a letter to a lawyer he did not know, in Sacramento, California, which is borne by his son-in-law, instructing him what to say to Ful-

ler Darling, the owner of 280 acres of valuable land, in one of the most flourishing counties in this State; these statements of complainant in the letter, false as they all are, induced Darling to execute a conveyance of the land to complainant, without taking any note for the consideration money, and without any knowledge of the value of the land. Men do not often act in this manner; indeed, it may be safely said, that men who are strangers to one another never do, and never did, important business of this character in this manner, and no satisfactory reason is shown why Darling so acted on this occasion. On the contrary, the strongest possible reason is shown why he should not so have acted, he having declared his intention to return to this State in a short time, and actually returning, if the proof is to be credited, in less than two months thereafter. Now, is it not unaccountable, that the owner of so much valuable lands, about to return to the place where they are situate, should, in advance of such return, send a deed for them to a perfect stranger, without taking a note for the purchase-money, and without the payment of a dollar, and accept the valuation made by the purchaser's son-in-law as the true valuation, when he could see the land with his own eyes in a few short weeks, and determine for himself the value, and the more especially as want of money did not compel a sale? And what is stranger still, that this deed should be put in the post-office, to be sent by mail, when complainant's own embassador was present, ready to receive it and deliver it to the complainant! The whole thing is incredible, and we are not convinced of the purity of the transaction, by reason of the false statements contained in complainant's letter to Starr on which we have commented, and which, no doubt, caused Darling to execute the deed.

But there is another thing to be observed. In this trade, it was distinctly understood that Darling still retained an interest in the proceeds of these lands, if there should be a residuum after compensating complainant for his heavy outlays, amounting to nine or eleven hundred dollars, but which, in reality, amounted to a very small sum, namely: for taxes, including

those paid by Beveridge, thirty-two dollars and ten cents. This is shown by complainant's own exhibits. The charge for defending the forcible entry suit against Darling himself was a false and fraudulent claim, the offspring of those machinations through which complainant sought to deprive Darling of his land, and, if successful, by the lapse of seven years, and paying the taxes, he could have set Darling at defiance, which it is very evident it was his intention to do. Here, then, is shown falsehood, deceit and misrepresentation of the most aggravated character, out of which no good claim can arise to demand the aid of a court of equity. Equity delights not in iniquity, but repels from her embrace all who practice it.

Let us now consider what transpired on Darling's return to this State. On the 19th of August, 1857, he made the deed to complainant, under the circumstances stated by Starr. On the 14th of October of the same year, Darling returned to De Kalb county, and on that day he executed another deed to complainant. We will take the sworn statement of complainant of this transaction, by which he must stand or fall.

From this statement the first information complainant received of the California transaction was from Darling himself, on his re-appearance on the 14th of October, 1857, that a deed had been mailed to be sent on the Central America, and was probably lost on her. At this time, Darling was in very poor health, not able to perform a day's labor of any kind, and no hope that he ever would be able, and was then wholly destitute of the means of supporting himself, save only his interest in these lands, and was absolutely destitute of suitable, necessary and comfortable clothing for a person in his situation, and no means with which to purchase even the most trifling article of clothing, or even "a meal of victuals!"

Observe now the generosity, the loving kindness, philanthropy and benevolence of this good Samaritan, the complainant herein! On Darling's information, that he had made a deed to complainant, in California, complainant, on the instant, struck, no doubt, by this extraordinary mark of confidence reposed in him by Darling, offered to convey to Darling all

the interest complainant had acquired to the land by virtue of the tax deed, *upon condition*, that he, Darling, would repay to him, or secure the repayment thereof, the moneys so advanced for his use as aforesaid, referring to the "nine or eleven hundred dollars," he had falsely asserted he had paid out for Darling. Poor Darling acknowledged the justice of the demand, and was delighted with all complainant had done in the premises, and cheerfully and cordially assented to, and ratified all that complainant had done, but assured complainant that he was entirely destitute of means necessary to repay him his advances, and of the means to support himself, and his health was so bad that he preferred to keep and fulfill the agreement made in California to sell the lands. Complainant here swears that it was an agreement made in California to sell the lands, not a sale and conveyance by deed. But let that pass, and consider the kindness of complainant, and his tenderness toward poor Darling. He finds Darling in his own neighborhood, after an absence of seven years, poor in health, and so destitute of means, as not to be able "to buy an article of suitable clothing for him, or even to buy a meal of victuals." In this condition the complainant now offers to surrender to him all the interest complainant had acquired in this land, on condition that this poor, sick, penniless man, who could not buy "a meal of victuals," should repay him, or secure the payment of about one thousand dollars in cash — gold at that time, when, at the very time Darling did not owe complainant one dollar, and complainant well knew it.

But see further. Darling, persisting in his desire to carry out the California contract, this humane complainant, ever alive to the most honorable and kindest dictates, "upon the urgent solicitation of Darling, and for the purpose, as well of furnishing aid to him in his then destitute condition," as also of recovering this false and fabricated amount against Darling, and also because of the acts of his agent, Starr, consented to perform, on his part, the contract so made with Starr, whereupon Darling made the deed of October 14, 1857. And how was "aid furnished Darling in his then destitute condition," which

to furnish, was one of the causes operating with complainant to take the deed. What was his condition? He had no decent clothes to his back or limbs; he could not buy a meal of victuals; and to relieve him in his extremity, complainant executes three notes to him, *on long time.* The one for two hundred dollars and first due, having nearly two years to run, and the others three and four years respectively, or nearly so; and for the remainder, being five hundred dollars, Darling had not the "scratch of a pen," and agreed to receive it "any time along," as he might need it. Could poor humanity be in more pressing "need," than this man, Darling, was at this critical moment, with scanty clothes to his back, with nothing to eat, and no means of procuring clothing or food, and yet we do not see complainant ministering to his wants, feeding and clothing him, or giving him money enough to buy a meal of victuals, while extracting from him a deed for 280 acres of valuable land, which would have been a permanent support for Darling during his life, should he live beyond the allotted age of man. It would have been food and clothing to him forever. Such hypocrisy, baseless pretensions and mock benevolence, cannot stand the test of the most ordinary scrutiny, and they place the complainant in a situation far from enviable. He never had any just claim whatever on Darling. He sought at the outset to get a tax title on this land, in defiance of Darling.

All his acts are marked by this one over-powering desire to obtain this land; and by fraud and misrepresentation he has got a deed for it. The defendants have a deed also, and are in possession. And though the proceedings under which they claim title may be denounced as having originated in forgery, and carried on by fraud, still, in such a contest, where there is knavery on both sides, which shall this court aid?

Here was a contest, who should steál this land. The complainant approaches a court of equity, holding in his hand evidence of his attempt to get this land from Darling, by a purchase for taxes, and the deed Darling executed, for which he has never received a dollar. Here, then, is no remarkable equity on complainant's part, by his own showing.

Supplemental statement of the case.

The defendants' case seems to us to be full of fraud of the blackest dye, and can find no favor with this court. Which of these parties, both with unclean hands, should a court of equity assist? Justice, and those pure principles which are the ornament of such a court — its brightest jewels — answer, neither.

We cite no authorities in support of the conclusion we have reached. Books need not be searched for precedent. It is found inborn, innate in every bosom. Where both parties seek a right through fraudulent devices and pretenses, neither party can have the aid of a court of equity.

On a bill filed by the heirs at law of Darling, no obstacle appears to their recovery.

The court below should have dismissed this bill on the hearing, for want of such equity on the part of complainant to entitle him to the relief he seeks.

The decree is reversed and the bill dismissed.

Decree reversed.

As before stated, the decree of the court below was in favor of the complainant, Bathrick, in which, among other things, it was decreed that the possession of the premises in controversy should be surrendered by Dunning to Bathrick. On Dunning's appeal from that decree, the cause was first argued in this court at the April Term, 1864, when an order was entered, affirming the decree of the court below. Subsequently, this court ordered a re-argument of the cause, which was had at the April Term, 1865, and the case was then taken under advisement.

On the 6th of October following, this court entered judgment, setting aside the former order of affirmance, and reversing the decree of the court below and dismissing the bill; and on the same day the foregoing opinion was filed.

In the mean time, on the 8th of June, 1864, a certified copy of the order affirming the decree was filed in the office of the clerk of the court below, and on the 6th of July following, under a writ of possession issued from the Circuit Court, upon

the decree, the sheriff turned Dunning out of possession and put Bathrick in.

On the 15th of September, 1864, Bathrick, being in possession, sold and conveyed the premises — a part to M. W. Foster, another parcel to J. Foster, and a forty acre tract to H. Beacham, for prices amounting in the aggregate to $6,000, each paying part down, the cash payments amounting to $2,500, and notes were given on time for the balance, which was $3,500. These notes were assigned before their maturity, by Bathrick to one Tappan.

At the time of the re-argument of the cause in this court, at the April Term, 1865, the fact of Bathrick being put in possession of the premises, under the authority of the Circuit Court, or of his sale and conveyance to third parties, was not known to this court nor to the counsel of either party.

At the April Term, 1866, the appellant, Dunning, filed his petition in this court, setting up the order of April Term, 1864, affirming the decree below, and the subsequent action of the court below in putting Bathrick in possession, and the judgment of reversal finally entered, and stating that he had applied, upon notice given, to the court below to be re-instated in his possession, and that his application was denied, upon the ground that the case was not before that court; and he prays this court to grant him relief, and for a writ to restore him to the possession of the premises, or that the cause be remanded with directions to the Circuit Court to re-instate him in possession.

Subsequently, and during the same term, Bathrick presented his affidavit to the court, in which he states, that, since the death of Fuller Darling, he has paid to his administrator the sum of $800, part of the last $1,000 of the purchase-money for said land, which was secured by note, and at the same time took up the old note, and for the balance and interest, gave a new note, with security — the amount being $320.90 — and that the note had become due, and had been sued upon, and he expected to be compelled to pay it.

Bathrick further states, that he did not deceive Darling as

to the facts of the case, in making the purchase of him, and that he is able, if allowed to do so, to prove beyond cavil, that, at the time Darling made his deed to affiant, he had full knowledge of the facts, and was fully advised of his legal rights, and acted freely and of his own will in doing so, and that no advantage was taken of him. He therefore asks, if another hearing is ordered, that the decree of the Circuit Court be affirmed; but if not, then that the case may be remanded to the Circuit Court, with leave to take proof on that branch of the case.

Bathrick resists the motion made by Dunning for a restoration of possession, on his own behalf, and on behalf of his grantees, who are innocent purchasers.

Messrs. LELAND & BLANCHARD, for the appellant.

Mr. T. LYLE DICKEY, for the appellee.

PER CURIAM: The questions involved in the motions submitted in this case are important, and their solution not free from difficulty. It is made to appear to us by affidavits that innocent parties have become interested in this controversy, and that, too, under a decision of this court, which was subsequently recalled. We are not disposed to allow either of the motions submitted, as allowing either might become a precedent attended with much embarrassment and injurious consequences in practice. We have, however, precedent and authority for modifying the decree of the last term, dismissing the bill. To protect such interests of innocent purchasers under Bathrick, the complainant in that bill, as they may show have become vested in them, we are inclined so far to modify the decree, as to order and decree that the bill be dismissed without prejudice, and the decree of last term will be so modified. In the state of facts presented by this record, we do not feel at liberty to order a restitution of the premises in favor of Dunning, who has been deprived of the possession, or to remand the cause, with directions to the court below to enter such an order.

Decree modified.

JOSEPH STOUT *et al.*

v.

ISAAC COOK.

1. JURISDICTION IN CHANCERY, *when there is a remedy at law — at what time the objection may be taken.* If a defendant in chancery answers, and submits to the jurisdiction of the court, it is too late for him to object that the complainant has an adequate remedy at law.

2. This rule applies where the subject-matter of the bill belongs to that class over which a court of equity will always take jurisdiction when the relation of the parties to each other renders the exercise of such jurisdiction necessary.

3. So, where the bill is filed to quiet the title to a piece of land, and remove a cloud arising from a claim under a sheriff's sale, and that sale is void, the complainant, being out of possession, has his remedy at law; but the subject-matter being clearly within the cognizance of a court of equity, and the remedy at law only existing by reason of the complainant being out of possession, an objection to the jurisdiction in chancery upon that ground comes too late after answer to the bill.

4. But, where the subject-matter of the bill is wholly foreign to the jurisdiction of a court of chancery, as, for example, a claim of damages for slander, or for an assault and battery, the court may properly dismiss the cause at any stage of the proceedings.

APPEAL from the Circuit Court of Will county; the Hon. JESSE O. NORTON, Judge, presiding.

This case was originally heard at the April Term, 1865, when an opinion was delivered, which is reported in 37 Ill. 284. At the April Term, 1866, a rehearing was granted, upon grounds not presented or considered upon the former argument, and which are set forth in the opinion of the court.

Messrs. LELAND & BLANCHARD, for the appellants.

Mr. W. T. BURGESS, for the appellee.

Mr. JUSTICE LAWRENCE delivered the opinion of the Court:

The opinion on the chief point in this case was delivered at a former term, and is reported in 37 Ill. 284. A rehearing was

afterward allowed on a question not specially presented to the court at that time, nor considered in the opinion, namely, the jurisdiction of the court of chancery in a case of this character. It is urged, that, as we hold the title derived under the sheriff's sale to be void, and as the complainants were not in possession, they might have brought an action of ejectment. This is true, and if this question had been presented in the court below, by demurrer or plea, or insisted upon in the answer, it would probably have been fatal to the bill. But this objection cannot be taken for the first time in this court. This point was thus ruled in the case of *Ohling* v. *Luitjens*, 32 Ill. 28. The same rule was laid down in *Kimball* v. *Walker*, 30 Ill. 503, with the further remark, that the court might nevertheless, for its own protection, and to prevent matters being drawn into the vortex of chancery at the pleasure of the parties interested, which were purely cognizable at law, interpose this objection at any time. What was meant by this remark was, that, if the subject-matter were of such character as to be wholly foreign to the jurisdiction of a court of chancery, as for example, a claim of damages for slander, or for an assault and battery, the court might properly dismiss the cause at any stage of the proceedings.

But if the subject-matter belongs to that class over which a court of equity will always take jurisdiction when the relation of the parties to each other renders the exercise of such jurisdiction necessary, the objection, that, in the case before the court, there was a complete remedy at law, comes too late after having filed an answer without taking the exception. The authorities on this point are fully cited in a note on page 574, vol. 1, of Daniel's Ch. Prac., 3d edition. Many cases are cited, and they fully establish the rule, and the qualification of it, which are stated in the note in the following language: "If a defendant in a suit in equity answers and submits to the jurisdiction of the court, it is too late for him to object that the plaintiff has an adequate remedy at law. This objection should be taken at the earliest opportunity. The above rule should be taken with the qualification, that it is competent for

the court to grant the relief sought, and that it has jurisdiction of the subject-matter."

In the case before us, the bill was filed to quiet the title to a piece of land and remove the cloud arising from a claim under a sheriff's sale. In the former opinion the court held the sheriff's sale void for uncertainty in the description of the premises. As the complainants were out of possession, they might have brought ejectment, but while they thus had a remedy at law, the subject-matter of the suit is a common head of equity jurisdiction, and as no objection on this point was taken in the court below it is now too late. If the complainants had been in possession of the premises there is no controversy but that they might have come into a court of chancery. The subject of the suit would have been the same then as now, the only difference being in the attitude of the parties toward each other. This subject-matter being clearly within the cognizance of a court of equity, the objection that there was also a remedy at law cannot be made for the first time in this court.

The decree of the court below must be affirmed.

Decree affirmed.

BENJAMIN D. ELLETT

v.

JAHALON TYLER.

MECHANICS' LIEN — *subsequent purchasers — severing the building from the land.* A purchaser of a building from the owner, pending a proceeding to enforce a mechanics' lien created for its erection, will take the title subject to the lien which may be established in that proceeding. And if such purchaser sells the house to another, and induces him to remove it to another lot, he will hold the proceeds of the sale as a trust-fund, liable to discharge the lien.

APPEAL from the Circuit Court of Mercer county; the Hon. CHARLES B. LAWRENCE, Judge, presiding.

The opinion states the case.

Messrs. J. R. & J. N. BASSETT, for the appellant.

Mr. B. C. TALIAFERRO, for the appellee.

Mr. CHIEF JUSTICE WALKER delivered the opinion of the Court:

This was a suit in chancery, brought by appellee in the court below, against appellant. The bill alleges, that, complainant having a mechanics' lien on a house and lot in Keithsburg, in Mercer county; and having filed his petition against Coburn to enforce his lien, appellant, while that proceeding was pending, purchased the house of Coburn, and then sold it to one Shultz, and induced him to remove the house to another lot of ground. This bill is to compel appellant to account for the proceeds of that sale.

Appellant insists, that, by the purchase, he acquired the title freed from the mechanics' lien. It appears, that appellee prosecuted his suit to a final decree, when he recovered $125 and costs of suit, and a lien was decreed to exist on the property. Under that decree the lot was sold for ten dollars, and appellee became the purchaser, and the master executed a deed for the same to him.

The master reports, that the lot, at the time it was sold, was worth twenty-five dollars. Also, that the house was worth $100. On the hearing the court below decreed, that appellant pay to appellee $100, the amount he received on the sale of the house to Shultz, within ninety days, and in default of payment, that execution issue.

This presents the question, whether appellant, by purchasing the house from Coburn and selling it to Shultz, with full knowledge of the lien, became a trustee, holding the proceeds for the use of appellee; or whether he by his purchase took the property discharged of the lien. In the case of *Gaty* v. *Casey*, 15 Ill. 189, it was held by this court, that the use of the materials furnished gave the lien on the premises and building

It was also held, that the severance of the materials from the freehold would not remove or discharge the lien. Nor would their severance and sale defeat the lien. But when necessary, the court would treat the money received on such a sale as the property itself, and would follow it into the hands of the party who had converted it into money. And the court say, that it is one of the most familiar principles of equity jurisprudence, and that a court of equity will not permit rights to be thus destroyed by the wrongful act of one who substantially claimed to have converted the property of another into money which he claims as his own.

That case is decisive of this. Appellant had notice of this lien, and that appellee was proceeding to enforce it. And with this knowledge he went to the debtor and purchased the property on which the lien existed. Coburn could not sell, nor could appellant purchase, any better title than Coburn held. Appellant therefore purchased the property subject to the same lien that existed against it while it was held by Coburn, nor has he done any act to free it or the money in his hands from the lien. The money thus received became, in equity, a trust fund liable to discharge the lien.

If appellant had a similar lien he should have set it up in the proceeding which had been instituted by appellee, or by filing a bill, and thus had his rights adjudicated. If Coburn owed him for labor or materials furnished, that gave him no right to appropriate the property to his own use to the exclusion of appellee's claim. But this record fails to disclose such a lien, and we must therefore presume that none existed.

No error is perceived in this record, and the decree of the court below is therefore affirmed.

Decree affirmed.

NOTE.—LAWRENCE, J., having tried the cause in the court below, did not sit on the hearing in this court.

WILLIAM N. MESSERVEY
v.
CHARLES H. BECKWITH.

1. DEFAULT — *within what time a motion must be made to set it aside.* A motion to set aside a default comes too late at a term subsequent to that at which the judgment was obtained.

2. PROCESS — *where the summons claims too small an amount of damages.* Where an *alias* summons in assumpsit, upon which service was had, claimed a smaller amount of damages than was claimed in the præcipe the original summons and the declaration, it was regarded a clerical error which the court, from which the writ issued, would correct on motion, before or after judgment.

3. The damages laid in the declaration is the limit of the plaintiff's recovery, and where a judgment by default was rendered upon service of such *alias* summons which claimed a less sum in damages than was laid in the declaration, and the judgment exceeded the amount claimed in the summons, but was less than the sum laid in the declaration, it was *held*, there was a simple variance between the declaration and the summons, which not being taken advantage of in the court below, could not on error.

WRIT OF ERROR to the Superior Court of Chicago; the Hon. JOSEPH E. GARY, Judge, presiding.

The opinion of the court states the case.

Mr. B. F. PARKS, for the plaintiff in error.

Messrs. TYLER & HIBBARD, for the defendant in error.

Mr. JUSTICE BREESE delivered the opinion of the Court:

This was an action of assumpsit in the Superior Court of Chicago, brought by Charles H. Beckwith against William N. Messervey, impleaded with Hiram Butterworth. The præcipe was filed and a summons issued, claiming damages for one thousand dollars. The declaration also claimed one thousand dollars damages. The summons was returned not served, whereupon an *alias* writ issued to Kane county, in which the damages claimed were one hundred dollars, which was duly served on

Messervey. At the return term of the writ, Messervey not appearing or pleading, his default was entered and a judgment rendered against him for seven hundred and fifteen dollars and eight cents.

An execution having been issued on this judgment, Messervey, at the next ensuing term, entered his motion to stay execution, to set aside the default and vacate the judgment, and to allow him to plead.

This motion was founded on the affidavit of the physician of Messervey, stating that his family was so sick as to require his constant attendance at home, and that, as the writ claimed damages at one hundred dollars only, he preferred paying that sum to leaving his family; that he owed the plaintiff nothing, and that he only knew of the judgment, when the execution was issued. This motion was denied, and the case brought here by writ of error.

The errors assigned question all these proceedings.

The motion to set aside the default, having been made at a term subsequent to that at which the judgment was obtained, was properly denied, on the authority of the case of *Cook* v. *Wood et al.*, 24 Ill. 295, and cases there cited, and subsequent cases decided by this court.

It is insisted, by the plaintiff in error, that claiming in the summons but one hundred dollars damages, and obtaining a judgment for more than seven hundred dollars, was a fraud upon him, and should be set aside on motion.

It is very apparent, the præcipe, the original summons and the declaration, all claiming one thousand dollars damages, and the *alias* summons one hundred dollars, that this was a clerical error, which the court would correct on motion, before or after the judgment. Scates' Comp. ch. 5, p. 252.

A party when served with process, is necessarily put upon inquiry, and it is his duty to inform himself of the nature of the claim against him, which the plaintiff in error had abundant opportunity of doing, as the summons was served upon him in July, and no judgment rendered until in September thereafter.

The rule in such cases is laid down by this court in *Thompson et al.* v. *Turner*, 22 Ill. 389.

That was a case like this, and we held that it was a variance, simply, between the declaration and summons, of which the defendants might have availed, they having been regularly served with process. Not having done so, they cannot, on error, take advantage of it. It is well settled, that the damages laid in the declaration is the limit of plaintiff's recovery. 1 Ch. Pl. 339. In this case, the damages were laid at $1,000, and the recovery for a less sum. Perceiving no error in the record, the judgment must be affirmed.

Judgment affirmed.

ALEXANDER CAMPBELL *et al.*

v.

THE STATE OF ILLINOIS.

1. SCHOOL TAX — *what lands liable thereto.* Under the act of February 22, 1861, no tax can be levied, either for the erecting or repair of school-houses, or for the support of schools, on lands distant more than three miles from the location of the house or school, and a judgment against lands for non-payment of a tax levied in violation of that act, is erroneous.

2. JUDGMENT *against lands for non-payment of school tax — when it cannot be rendered.* A judgment cannot be rendered for taxes, a part of which are shown by the record to be illegal.

3. So where a tax is levied upon land for the support of three schools, and for the support of one of the schools the land is not liable to be taxed, unless the tax is so levied as to show to what portion the land is legally liable, an application for judgment against the land for its non-payment must be refused.

APPEAL from the Circuit Court of Livingston county; the Hon. CHARLES R. STARR, Judge, presiding.

This was an application to the County Court of Livingston county for judgment against certain lands for non-payment of school taxes. The proceeding was removed into the Circuit

Court by appeal, where judgment was rendered against the lands, from which some of the owners took this appeal.

The opinion of the court contains a sufficient statement of the case for an understanding of the questions decided.

Messrs. FLEMING, PILLSBURY & FOSDICK, for the appellants.

Messrs. BANGS & SHAW and Messrs. NEVILLE & CLARK, for the appellee.

Mr. JUSTICE LAWRENCE delivered the opinion of the Court:

This was an application for judgment against certain lands for non-payment of school taxes. It was resisted by the appellants, and judgment having been rendered for the sale of the lands, the record has been brought to this court.

It appears that the township was divided into two school-districts, by a line running north and south through the center, and there are three school-houses in the district where the lands in question are situated. The lands are more than three miles from one of the houses. The taxes were levied for the support of the three schools.

This is a plain violation of the act of February 22, 1861, entitled an act to amend the school laws, page 187, of the session acts of that year. The sole object of that law seems to have been to prevent the imposition of such taxes as were levied in the present case. It directs expressly that no tax shall be levied, either for the erecting or repair of school-houses, or for the support of schools, on lands distant more than three miles from the location of the house or school. These lands are not liable for all the taxes levied upon them.

The judgment must be reversed, and unless the taxes are so levied as to show to what portion these lands are legally liable, the application for judgment must be refused. A judgment cannot be rendered for taxes, a part of which are shown by the record to be illegal. The judgment is reversed, and the cause remanded.

Judgment reversed.

Syllabus.

WILLIAM W. O'BRIEN, *et al.*

v.

THE PEOPLE OF THE STATE OF ILLINOIS.

1. RECOGNIZANCE — EVIDENCE — *when the specific objection to evidence must be made.* In a proceeding by *scire facias* upon a recognizance, an objection that the recognizance, when offered in evidence, does not appear to have been filed or made a matter of record in the Circuit Court, cannot be availing unless that specific objection is taken; a general objection to the recognizance will not suffice for that purpose.

2. SCIRE FACIAS ON RECOGNIZANCE — *whether it should appear the principal was indicted.* In such a proceeding, where the recognizance is conditioned for the appearance of the principal at a certain term of the court, "to answer to an indictment to be preferred against him for larceny, and to do and receive what shall, by the court, be then and there enjoined upon him, and shall not depart without leave," it is not necessary to aver and prove that an indictment was ever found, in order to hold the sureties liable.

3. SAME — *variance in the name of the principal in the body of the recognizance and as signed by him — pleadings and proofs in that regard.* Where the condition of a recognizance provides for the appearance of *John* Empie, and the instrument is signed *Sylvester* Empie, it is competent, in a proceeding by *scire facias* thereon, to aver and prove that *Sylvester* Empie was the principal who executed the recognizance, and was erroneously described in the body thereof as *John* Empie.

4. FORMER DECISION. In the case of *Vincent* v. *The People*, 25 Ill. 500, the rule was inadvertently stated too broadly, in saying the only relief in such case was in equity.

5. JUDGMENT *without service — who may object.* Where a *scire facias* on a recognizance was served upon the sureties only, and not upon the principal, the objection that judgment was taken against the principal as well as the sureties, cannot be made by the latter; it is such an error as the principal alone can complain of.

6. RECOGNIZANCE — *as to the character of offense named.* The fact that the principal cognizor had been examined and committed on a charge of burglary, and the recognizance given to release him from that imprisonment provided for his appearance to answer the charge of larceny, cannot avail as a defense by the sureties. It matters not, in such case, whether the principal was examined or not, before the justice who committed him, upon one charge or another.

7. EVIDENCE *under the general issue, in sci. fa. on recognizance.* Pleas to a *scire facias* on a recognizance, that the sureties did not execute the recogni-

Statement of the case.

zance; did not sign a writing for the appearance of the party, as alleged; and did not execute the recognizance with the intention of securing the appearance of the principal who was described by another name, as alleged, only amount to the general issue, and are obnoxious to a demurrer on that ground.

Appeal from the Circuit Court of Peoria county; the Hon. M. Williamson, Judge, presiding.

This was a proceeding by *scire facias* upon a recognizance, which was entered into by Sylvester Empie, as principal, and William W. O'Brien and Thomas Cratty, as sureties. The recognizance was conditioned for the appearance of "John" Empie at the next term of the Circuit Court of Peoria county, on the first day thereof, to answer to an indictment to be preferred against him for larceny, and to do and receive what should by the court be then and there enjoined upon him, and should not depart without leave.

It is averred in the *scire facias* that Sylvester Empie, the principal in the recognizance, was described in the body of that instrument as "John" Empie, instead of Sylvester Empie, and that this misdescription was an error made by the person who drew the recognizance; and that the intent and meaning of the recognizance was to secure the appearance of Sylvester Empie.

The *scire facias* was returned served upon O'Brien and Cratty, the sureties, and not found as to Empie.

The sureties, among other pleas, filed the following:

1. Said defendants, William W. O'Brien and Thomas Cratty, in their own proper person, come and defend the wrong and injury, when, etc., and say that they did not execute the said supposed recognizance as in said *scire facias* alleged, and of this they put themselves upon the country.

2. And for further plea, say the people ought not to recover in this action against them, because they say they did not sign or execute a writing for the appearance of the said Sylvester Empie as in said *scire facias* alleged; and of this they put themselves upon the country.

3. And for further plea they say *actio non*, because they say they did not sign and execute the said supposed recognizance in said *scire facias* mentioned, with intention to sign for and to secure the attendance of said Sylvester Empie instead of John Empie, as alleged in said *scire facias;* and of this they put themselves upon the country.

4. And for further plea they say *actio non*, because they say they did not sign or execute any instrument of writing or recognizance intending to secure the appearance of any person therein named, either Sylvester or John Empie, to answer the charge of burglary instead of larceny; and of this they put themselves upon the country.

A demurrer was sustained to all these pleas. Upon other pleas issues were formed, and a trial by the court resulted in a finding and final judgment against all the defendants. The sureties, O'Brien and Cratty, bring the cause to this court by appeal.

On the trial, when the plaintiffs offered the recognizance in evidence, the sureties made a general objection thereto, only. There is nothing in the record to show that the recognizance was ever filed or became a matter of record in the Circuit Court.

The various questions arising in the case are set forth in the opinion of the court.

Messrs. O'Brien & Cratty, and Messrs. Johnson & Hopkins, for the appellants.

Messrs. McCullock & Taggart, for the appellees.

Mr. Chief Justice Walker delivered the opinion of the Court:

It is urged as a ground of reversal, that there is no evidence that the recognizance was ever filed or became a matter of record in the court below. It is true, that the bill of exceptions fails to show that it was ever filed in the Circuit Court; but no objection was taken to its introduction on that ground.

If the objection existed, as a matter of fact, we can hardly suppose that it would not have been specially made. Finding no such objection in the record, we must conclude that the clerk, in making the transcript of the record, omitted to transcribe the file mark on the original. A general objection only having been made, seems to imply that no specific one existed. The general objection was probably made to raise the question, whether this was a recognizance against Sylvester Empie. If there was no file mark on the recognizance it should have been pointed out, so as to have afforded defendants in error the opportunity of removing the objection by obtaining leave to mark it filed *nunc pro tunc*, if it had been filed in fact.

It is next urged, that it fails to appear that Empie was indicted. Under the condition of the recognizance, and the law, as it has been long, and it is believed uniformly, settled, and as is regarded the doctrine of this court, it is not necessary that it should be averred or proved, that an indictment was ever found, to render the principal and his recognizors liable on a default by the principal. *Chumasero* v. *The People*, 18 Ill. 406; *Garrison* v. *The People*, 21 id. 535. The condition of the recognizance is, that he will appear at the next term of the Circuit Court to answer an indictment for larceny, and to receive what shall be by the court, then and there enjoined upon him, and shall not depart without leave. This recognizance is not only to appear and answer the charge of larceny, but any other that might be preferred, and not to depart therefrom until discharged by the court. One of the objects of a recognizance is to compel the party to appear to answer the specific or any other charge that may be preferred.

It is again insisted, that, as the principal is described in the body of the recognizance as John Empie, and it is signed Sylvester Empie, the people must fail to recover; that the latter has not entered into a recognizance to appear, but only that John should appear, and that there is no forfeiture against him. It is likewise insisted, that it cannot be averred and proved that Sylvester was the principal who executed the recognizance. In the case of *Graves* v. *The People*, 11 Ill.

542, it was held, that a default taken against Harrison Graves did not establish a forfeiture of a recognizance entered into by William H. Graves; but if the facts warranted it, an averment might have been made in the *scire facias*, that Harrison Graves was the person who entered into the recognizance by the name of William H. Graves. In the case of *Garrison* v. *The People*, 21 Ill. 535, the same rule was recognized, and the doctrine of the former case approved.

It is, however, supposed that the case of *Vincent* v. *The People*, 25 Ill. 500, announces a different rule. In that case, the justice of the peace, after the recognizance was executed, without the consent of the recognizors, changed the name of George Vincent, in the condition of the recognizance, to that of William Vincent. This was held to be such an alteration as to render the instrument void, and to release the securities. In that case, it was said that the intent of the parties must be gathered from the instrument itself, and the court could not hear evidence of a mistake, which, if it had occurred, must be relieved in equity. As there was no averment which authorized proof that the party executed the instrument as it appeared after the alteration, but by another name, it would have been improper to receive such evidence. But the rule was inadvertently stated too broadly, in saying the only relief was in equity. We perceive no error in admitting the recognizance in evidence under the averment, to be considered with the other evidence, that Sylvester executed the recognizance and was described in the instrument by the name of John.

It is likewise objected, that the judgment is erroneous because it is against Empie, who was not served with the *scire facias*, as well as against appellants. We perceive no force in this objection, as appellants can in no event receive the least injury, and it is only such an error as Empie himself can urge.

The first, second, third and fourth pleas amount to the general issue, and were obnoxious to a demurrer for that reason. A recognizance is a matter of record, and these pleas are not an answer to the recognizance. It does not matter in

the least whether Empie was examined or not, before the justice of the peace, on one charge or another. The recognizance admits that he had been committed to jail, and it was given to procure his release from custody, and the recognizance is binding although the justice may have described a proceeding for a different crime from the one on which he had been committed.

The judgment of the court below must be affirmed.

Judgment affirmed.

Lewis McKibben *et al.*

v.

Thomas Newell.

1. Ejectment — *what relation between the parties will authorize a recovery.* A plaintiff in ejectment may recover, even though he fails to show a paramount paper title, if it appear the defendant entered under a contract of purchase from him, which had been surrendered up; and in such case the defendant cannot dispute his vendor's title without showing an outstanding paramount title in a third person.

2. And a party claiming under such vendor through a conveyance from him, may, upon the same principle, recover against a party who has entered under such prior purchaser after he had surrendered his contract to the vendor.

3. Same — *who may question the character of the verdict.* Where a verdict in ejectment in favor of the plaintiff, finds the fee to be in him, it cannot be taken advantage of on error, by the defendant, when he has no title, and pretends to none, even though the verdict may be incorrect in that respect.

4. Evidence — *necessity of showing its relation to the case, when offered.* Where a deed is offered in evidence in an action of ejectment, which, standing by itself, proves nothing material to the controversy, but the offer to read it is accompanied by a declaration that it would be followed by other evidence showing it to be a link in a chain of title, it should be admitted; but without such declaration it would not be error to reject it.

5. Erasures and interlineations in contracts, will not be regarded when they are wholly unimportant, and the contract would be as valid and intelligible without them as with them.

Appeal from the Circuit Court of Knox county; the Hon. John S. Thompson, Judge, presiding.

This was an action of ejectment brought in the court below by Thomas Newell against Lewis McKibben and John McKibben, a trial of which resulted in a finding and judgment in favor of the plaintiff. The defendants thereupon took this appeal.

The facts of the case are set forth in the opinion of the court.

Mr. A. M. Craig and Mr. J. B. Rice, for the appellants.

Mr. R. L. Hannaman and Mr. P. H. Sandford, for the appellee.

Mr. Justice Breese delivered the opinion of the Court:

The facts in this case are not disputed. They are substantially as follows: On the 1st day of February, 1859, Esther Phillips and Freemance Brontin, by Samuel Phillips, their attorney in fact, conveyed to James W. Cox the undivided half of the south-west quarter of section fourteen in town nine north, range one east lying in Knox county, in this State, and on the same day they, by their same attorney, entered into a contract with Cox reciting this deed of conveyance, and also reciting: "It is also agreed between these parties that the said parties of the first part have also and do hereby bargain and sell unto the said James W. Cox the other undivided half of said quarter section for the sum $1,375, to be paid in three equal annual payments in one, two and three years from the date, etc., and upon payment of said sum, the parties of the first part hereby agree to convey said premises with covenants of seizin, against incumbrances and warranty in the deed of conveyance unto the said party of the second part, his heirs or assigns, *provided*, that no money is to be paid on this contract until said parties of the first part procure a good and sufficient deed of conveyance for said premises, of all the right, title and interest therein, of Abigail Segree, Theresa Segree and Virtuosa Segree, children of Matthew J. Segree deceased, and before said last payment shall be made, shall place such deed on record in Knox county and have said land wholly free from all incumbrance."

In the spring of 1859, Cox entered into possession of the whole quarter section. One Francis Hill took a title bond from Cox for the north sixty acres, and entered into possession and occupied it, in 1860, and sold to Jefferson Belwood. Hill, under an arrangement with Cox and Belwood, surrended his bond to Cox, and Cox, releasing Hill, gave a new bond to Belwood, who took possession of the north sixty acres, and occupied it during 1861, 1862 and 1863. In 1864, Belwood surrendered his bond to Cox, and gave up the contract for the sixty acres, after which he sold, without right, as he testified, his possession and improvements to Joseph McKibben for $200, and appellants took possession "right away." They are the sons of Joseph McKibben, and had, at that time, attained to their majority, but were living with their father. They entered on the land while Belwood was in possession, in the spring of 1864, and sowed wheat on it, and in the same spring Belwood left the premises.

The appellee produced in evidence a deed to him from Cox, dated March 12, 1862, for the undivided half of this land, and also a deed from the Segrees, by their attorney in fact, dated October 22, 1864, for the other undivided half. Appellants took possession of the whole of the north eighty, and offered in evidence a quitclaim deed from Joseph McKibben to Lewis McKibben, one of the appellants, for the same, which, on the objection of appellee, was ruled out by the court as immaterial, to which appellants excepted. Cox had been in possession of the south eighty, and twenty acres in the south part of the north eighty, during the years 1859, 1860 and 1861. After the sale by Cox to the appellee, in the spring of 1862, of all his interest in the quarter section, appellee was in possession and cultivated these one hundred acres in 1862 and 1863.

The question is, on these facts, did appellee show such a prior possession of the north eighty, as to entitle him to recover?

He has shown no paramount paper title, and if he can recover at all, it must be on his prior possession, or that of Cox, under whom he claimed. It is insisted by appellants,

that the proof fails to show that they were in possession as appellee's tenants, or that they were in under a contract with appellee which they had failed to perform.

It is certainly clear that appellee must, by sufficient proof, connect this possession of appellants with his own, or with that of Cox, under whom he claims, and we are of opinion he has done so, by proving circumstances strong enough to justify the conclusion, that they entered under Belwood and with his permission, for he testified, that, while he was on the land, appellants sowed wheat on it, and on his leaving, they at once took possession. The inference is reasonable, that such entry was with Belwood's consent, and that it was in fraud of Cox, to whom Belwood had surrendered his contract of purchase, and of appellee, to whom Cox had sold, and the court below having so found, we do not feel warranted in disturbing the finding.

Had Belwood remained in possession, after surrendering his contract to Cox, it is certain Cox could have maintained ejectment against him, for he could not dispute the title of his vendor without showing an outstanding paramount title in a third person. Appellants are in no better position than Belwood, under whom they entered, for such is the import of the testimony.

As to the rejection of Joseph McKibben's deed, had the offer to read it been accompanied by a declaration that it would be followed by other proof showing title in some one who had conveyed the land to Joseph McKibben, the deed should have been admitted; standing by itself it proved nothing material to the controversy.

The doctrine that a plaintiff can recover of one who has received the possession from him, is well settled. Appellants are within this rule.

The objection that the verdict finds the fee to be in the plaintiff cannot be taken advantage of by appellants. It is immaterial to them what the verdict was, they having no title, and pretending to none.

As to the erasures and interlineations in the deed to Cox, they were wholly unimportant and affected in no degree the

validity of the deed. The deed would be as valid and as intelligible without them as with them.

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

Judgment affirmed.

HENRY L. DAGGETT
v.
DAVID A. GAGE.

1. PROMISSORY NOTE—*defense thereto, when given as security for the performance of some act by another.* A party being under arrest on a *ca. sa.*, in order to procure him his temporary release another gave his promissory note, merely as security that the party arrested should surrender himself to the sheriff on a certain day. The time for the surrender was extended, by agreement of parties, and on the day last agreed upon the party arrested offered himself in custody to several deputies of the sheriff, who declined to receive him, and of this he gave notice to plaintiff's attorney. This was all he was required to do, and operated to discharge the maker of the note from any further liability thereon.

2. PRACTICE—*when parol evidence offered to vary a written contract, should be objected to on the trial.* In a suit on the note, if objection was made, it may be the effect thereof would not be allowed to be thus varied by parol evidence; but parol proof being admitted without objection, it was proper to consider it as competent evidence, because, if objection had been made, the defendant, perhaps, might have produced a cotemporaneous written agreement to the same purport.

WRIT OF ERROR to the Superior Court of Chicago; the Hon. JOSEPH E. GARY, Judge, presiding.

This was an action brought by Henry L. Daggett against David A. Gage, upon a promissory note executed by the latter to Henry T. Helm, and assigned by him to the plaintiff. A trial resulted in a verdict and judgment for the defendant. The plaintiff thereupon sued out this writ of error. The facts are sufficiently stated in the opinion of the court.

Messrs. HELM, TAYLOR & PENCE, for the plaintiff in error.

Messrs. KING & SCOTT, for the defendant in error.

Syllabus.

Mr. JUSTICE LAWRENCE delivered the opinion of the Court:

This was a suit brought by Daggett against Gage, upon a promissory note. The defense is, that Daggett had caused one Reese to be arrested on a *ca. sa.*, and, in order to procure his temporary release, Gage had given the note sued on merely as security that Reese should surrender himself to the sheriff by the 8th of June; that, before that date, the time was extended by Daggett's attorney, and again extended, and, on the day last agreed on, Reese offered himself in custody to several deputies of the sheriff, who declined to receive him. If the parol evidence by which these facts were proven, had been objected to on the trial, we should doubtless hold that the effect of the written instrument could not be thus varied. But no objection was made. Had there been, we cannot say the defendant would not have produced a cotemporaneous written agreement to the same purport. This proof having been admitted without objection, the case is clear. The other facts are undisputed. Reese did surrender himself at the time agreed upon between the parties, and notified the plaintiff's attorneys. That was all he was required to do. The fact that the sheriff refused to take and hold him in custody, cannot prejudice either him or his security. The judgment must be affirmed.

Judgment affirmed.

VALENTINE POWELL
v.
SARAH RICH.

1. CROPS—*growing at sale of land.* As between landlord and tenant, debtor and creditor, and, under the statute, between the executor and heir, growing crops are personalty; but as between a wrong-doer and the owner of the soil, and the vendor and purchaser, they are real estate, and pass by a conveyance, without a reservation in writing is made. And until matured they cannot be sold by the owner of the soil under the statute of frauds, unless the transfer is evidenced by a memorandum in writing.

Statement of the case.

2. SAME—*license to remove them.* The owner of the freehold may license another to remove growing crops, which, if acted upon and they are reduced to possession before a revocation, the title in the crops will vest in the person thus licensed.

3. SAME—*parol reservation.* The court did not err in refusing to instruct the jury that the purchaser of the freehold was estopped from showing that she owned the growing crops on the land, notwithstanding a parol reservation by the vendor at the time of the sale.

APPEAL from the Circuit Court of Peoria county; the Hon. MARION WILLIAMSON, Judge, presiding.

This was an action brought by Sarah Rich before a justice of the peace of Peoria county, against Valentine Powell. A trial was had, and plaintiff recovered a judgment, from which defendant appealed to the Circuit Court. A trial was subsequently had in that court at the October Term, 1865, by the court and a jury.

It appeared on the trial that plaintiff purchased of defendant a piece of land, on which a crop of corn and some millet was growing. The conveyance of the land was made to her in August, 1864, and contains the usual covenants of warranty. The deed contains no reservation of the crops. There was evidence that it was understood before the conveyance, that the crops were not included in the sale, but reserved to the defendant. And some of the evidence tended to show that plaintiff, after the sale, stated that she did not claim them.

It appears that defendant, in the fall, after plaintiff was let into possession, gathered the corn and removed and appropriated it to his own use. The jury found for the plaintiff, and assessed the damages at $136. Defendant entered a motion for a new trial, which the court overruled, and rendered judgment on the verdict. To reverse which he prosecutes this appeal.

Mr. H. M. WEAD and Mr. H. W. WELLS, for the appellant.

Mr. J. S. STARR, for the appellee.

Mr. CHIEF JUSTICE WALKER delivered the opinion of the Court:

This was an action commenced before a justice of the peace, in Peoria county, by Sarah Rich against Valentine Powell. Plaintiff sought to recover the value of a crop of corn gathered and used by defendant. On the trial before the justice, plaintiff recovered a judgment for $177, and costs. Defendant removed the case to the Circuit Court by appeal. A trial was afterward had in the Circuit Court by a jury, which resulted in a verdict in favor of plaintiff for $136. A motion for a new trial was overruled, and a judgment rendered on the verdict. Defendant brings the case to this court by appeal.

The evidence shows that appellee, in the month of August, 1864, purchased of appellant a tract of land on which there was growing a crop of corn and some millet. That the deed from appellant contains no reservation of the grain, nor was any writing executed showing a reservation, but at the time of the sale a reservation was spoken of by the parties. And afterward, appellee said that the crops belonged to appellant and she would have nothing to do with them. On the trial, the court instructed the jury that growing crops passed by the deed, and that all prior conversation in reference to the crops merged into the deed. That a parol reservation of growing crops, as between the grantor and grantee, after the deed was executed, became thereby nugatory, and of no effect, and to have rendered the reservation effectual, it should have been in a written agreement, or in the deed. That the defendant, to entitle himself to the crops, must prove a subsequent sale or transfer of the crops after the delivery of the deed, for a valuable consideration. That the jury should not take into consideration conversations between the parties which occurred at the execution and delivery of the deed, or subsequent thereto, in reference to the crops.

For appellant, the court instructed the jury, that, under the law, growing crops, the product of annual labor, are personal property, and may be sold by parol agreement, and if they believed from the evidence, that appellee, after the purchase from appellant, repeatedly stated, that the crops in question belonged to appellant, they should take such statements into consideration in determining whether they belonged to appel-

lant, and if they so believed, they should find a verdict for him. That if appellee knew that appellant was gathering the crops in question, and stated that they belonged to him, this is evidence of a license to take such crops. The court however refused to instruct the jury that such facts would estop appellee from claiming the crops.

As between landlord and tenant, between debtor and creditor, and under our statute, as between the executor and heir, growing crops are personal property. But between a trespasser and the owner of the soil, and a vendor and vendee, they are real estate. And it has been uniformly held, that, by a conveyance of land, without a reservation in a deed, the crops and all things depending upon the soil for sustenance, belong to and pass with the land. After the crops have been matured, however, it is otherwise, but until they are matured, they constitute such an interest in real estate, as to bring them within the statute of frauds. And to pass by a sale by the owner of the soil, it must be evidenced by a written agreement; or if reserved from the operation of a conveyance, it must be in writing. A few cases may, no doubt, be found announcing a different conclusion, but they do not affect the rule. This court has held, in several cases, that the reservation must be in writing. *Smith* v. *Price*, 39 Ill. 28, *and Dixon* v. *Nichols*, id. 372.

It is true, that the owner may license a party by parol to enter and remove growing crops, and if acted upon, and they are reduced to possession and removed, the title will vest in the party acting under the license. And the court substantially so informed the jury. We do not perceive that the court erred in refusing to instruct the jury that appellee was estopped from showing that she was the owner, as an estoppel precludes a party from proving the truth of an existing fact, while in this case, appellee has done no act which would preclude her from showing that she was the owner of the grain. Had the jury found, from her declarations, that appellant had purchased the corn, we would have been better satisfied with the verdict, but it was a question of fact for the jury, and we cannot reverse,

simply because we might have arrived at a different conclusion from that which they have reached. We cannot say that the verdict is so clearly against the weight of evidence, that it should be set aside. Nor do we perceive any error in giving or refusing instructions.

The judgment of the court below must be affirmed.

Judgment affirmed.

JAMES B. THOMAS
v.
HENRY WIGGERS.

1. CONSTRUCTION OF WRITTEN CONTRACTS — *by what means the intention of the parties may be ascertained.* In giving a construction to a written contract, it is always proper, when the writing is not specific, to ascertain such extrinsic facts as the parties had in view at the time the contract was made, in order to ascertain their true meaning.

2. The rule that parol testimony is not admissible to add to or vary the terms of a written instrument, is not violated by the admission of parol testimony to show the condition of the property which is the subject of the contract, with a view to arrive at the true intent of the parties in the terms used by them.

3. So, where the owner of a building, who occupied a part of it, and in which he had a steam engine in use, leased another part of the building to a party for a purpose that required the use of steam, the lease providing that the lessee should have a certain portion of the building, "together with one-half of the steam power produced by the then present therein located steam engine, or one of equal capacity, to be kept in motion by the lessor ten hours each day," it was *held,* in an action by the tenant against his landlord, to recover damages for the destruction by the latter of the pipe by means of which the former obtained his supply of steam from the engine, that it was competent for the plaintiff to prove that he had occupied the premises mentioned in the lease for more than a year immediately preceding the execution thereof, under other leases from the defendant, oral and written, and had used the steam in a certain manner which was supplied to him by means of the pipe which the defendant had destroyed.

4. While it is true, the written contract should govern, still as the intention of the parties as to what facilities and appurtenances were to be secured

to the tenant in carrying on his business, must be reached, that could be done in no better way than by showing a previous holding by the tenant, and what he enjoyed under it, and the necessity of the facilities of which he had been deprived, for carrying on his business.

5. LANDLORD AND TENANT — *right of the latter to the "appurtenances," and what will pass thereunder.* It appeared that the tenant in this case, under previous holdings, had used the exhaust steam from the engine, which was conducted by means of a pipe connected with the exhaust pipe of the engine to a steamer used by the tenant, and which was essential to the carrying on of his business; and it was *held*, that, under the lease mentioned, giving him "one-half the steam power," he was entitled to the use of the exhaust steam, as he had previously used it, and was using it at the time this contract was made, together with all the facilities connected therewith, and that they passed to him under the term "appurtenances."

6. ACTION — *remedy of the tenant in case the landlord deprives him of the use of such facilities.* If the landlord deprives the tenant of his proper share of the steam to which he is entitled under his contract, the latter may institute his suit against the former and recover damages therefor.

7. ALLEGATIONS AND PROOFS, *in such case.* And where the tenant, in such suit, declares for the injury resulting from being deprived of the use of the exhaust steam, the question whether the exhaust steam is the same as "steam power" is not involved, as the *gravamen* of the action is not the loss of motive power, but of the exhaust steam, to which the tenant was entitled under his contract for "steam power," when read in the light of the circumstances attending his previous holdings.

WRIT OF ERROR to the Circuit Court of Cook county; the Hon. ERASTUS S. WILLIAMS, Judge, presiding.

The opinion of the court contains a statement of the case.

Mr. C. W. COLEHOUR and Messrs. BORDEN & SPAFFORD, for the plaintiff in error.

This was an action by a lessee against his lessor, to recover damages alleged to have resulted to the plaintiff by reason of being deprived by the defendant of certain facilities which the lessee had a right to enjoy as appurtenant to the premises leased.

It is contended on the part of the lessee, who is the plaintiff in error, that this lease should be read in the light of circumstances connected with a previous holding by the tenant of the same premises, from the same lessor, to ascertain the true

meaning of the parties as to what should pass as appurtenant to the premises, and these circumstances may be shown by parol. *Hadden* v. *Shoutz*, 15 Ill. 581; *U. S.* v. *Appleton*, 1 Sumn. 492; *Barrett* v. *Stow*, 15 Ill. 423; *Cook* v. *Whiting*, 16 id. 483; *Doe* v. *Burt*, 1 T. R. 704; 1 Spencer Eq. Jur. 559; *Huttermeier* v. *Albro*, 18 N. Y. 51; *Lampman* v. *Milks*, 21 id. 509; *Nicholas* v. *Chamberlain*, Cro. Jac. 121; *Atkins* v. *Bordman*, 2 Metcalf, 463.

Mr. H. H. HAAFF, for the defendant in error.

Mr. JUSTICE BREESE delivered the opinion of the Court:

This was an action brought in the Cook Circuit Court, by James B. Thomas against Henry Wiggers, for wrongfully and maliciously cutting off, tearing away and stopping certain steam power, with the appurtenances, which Thomas had leased of Wiggers.

The gist of the action can be well understood by the fourth and fifth counts of the declaration. They are as follows:

The fourth count states, that said plaintiff, before and at the time of the committing of the grievances next thereinafter mentioned, was in the use, occupation and possession of a certain steam pipe, which extended from a steam boiler and engine in the use and occupation of which plaintiff is and was interested, being located in the frame building Nos. 353 and 355 South Wells street, Chicago, in said county, in and by which steam pipe the plaintiff steamed, softened and seasoned his lumber, boards and trimmed wood, used in his business of making children's wagons, etc. Yet that defendant, well knowing the premises, but contriving and wrongfully, etc., intending to injure, prejudice, etc., said plaintiff in his right, interest and property in said goods and chattels, and to deprive him of the benefit and advantage thereof, while said plaintiff was in the use, occupation and possession thereof, to wit, on 13th of June, 1864, at Chicago, in the county aforesaid, wrongfully, maliciously and unjustly broke, damaged, cut away, removed, etc., the same; and said plaintiff thereby hath been and now is

greatly injured, prejudiced, etc., in his said right, interest and possession in and to the same, to wit, at said Chicago.

The fifth count states, that said plaintiff, before and at the time of the committing of the grievances thereinafter mentioned, was in the lawful use and occupation of a steam pipe and the steam passing through said pipe, in and about his business of manufacturing children's carriages, etc., at said Chicago, and that he used said pipe and the steam passing through it, in and about steaming, softening and bending the wood and lumber used in his business, and that the said pipe and steam passing through it were necessary to the plaintiff's said business; that the same were of the value, to wit, of $1,000, and had been before then let to hire to said plaintiff for, to wit, five years, to end May 1, 1868; that they were in the use, occupation and possession of said plaintiff, and were a part of the appurtenances of the premises and building, being the one-half of the building Nos. 353 and 355 South Wells street, Chicago, with one-half the steam power produced by the steam-engine and boiler located in the west half of said building, at the time of the grievances thereinafter mentioned, in the lawful use and occupation of plaintiff under a lease from defendant. Yet that defendant, well knowing the premises, but contriving and wrongfully, etc., intending to injure, aggrieve, etc., said plaintiff in his said leasehold estate and interest in said steam pipe and the steam passing through it, while the same were so let to and in the lawful possession and use of said plaintiff, and necessary to him in his said business, and not injuring said defendant, to wit, on the 13th of June, 1864, at said Chicago, wrongfully, unjustly and maliciously cut away, vacated, dedestroyed and removed said steam pipe and steam passing through the same, and thereby said plaintiff has been and is greatly injured, etc., in his leasehold estate and interest in said steam pipe and the said steam passing through it, to wit, at Chicago, etc.

On the trial, and before any witnesses were called, the plaintiff caused the following order to be entered on the record:

'And now comes the said plaintiff, James B. Thomas, and

this cause, in open court, and as to all the trespasses in the sixth count in said declaration, or in any other part of said declaration named, other than the said cutting off of the steam pipe in and by which he, plaintiff, steamed, seasoned and softened his wood used in and about his said business, and as to all claim for damages under said declaration, or any count thereof, other than such as have proceeded from the deprivation and withholding by said defendant from him, said plaintiff, of the steam, necessary in and about the steaming, softening and seasoning of wood used in his, said plaintiff's, business, hereby enters a *nolle prosequi.*"

A trial by jury was had, and a verdict rendered for the defendant. A motion was made for a new trial, which was denied, and exception taken, and judgment entered on the verdict against the plaintiff for the costs. To reverse this judgment this writ of error is prosecuted and the following assigned as errors:

Because the court excluded evidence offered in behalf of the plaintiff, which should have been admitted.

Because the court admitted evidence on the part of the defendant, which should have been excluded.

Because of the refusal by the court to give to the jury the instructions asked for, in behalf of the plaintiff, and each of them.

Because the court gave the instructions to the jury, which were given on the part of the court, and each of them.

Because the verdict was against the law and the evidence, and each of them.

Because of the refusal by the court to grant a new trial for the reasons alleged.

Because the court refused to grant a new trial upon the ground of newly discovered testimony.

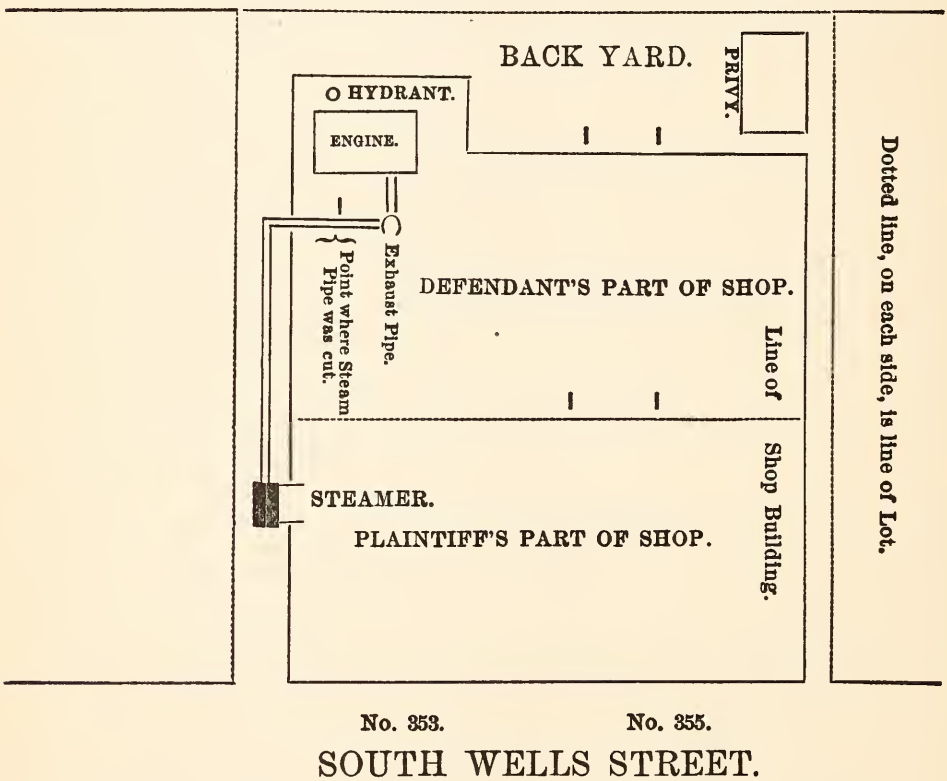
We shall dispose of such of these errors as seem to us important, and to do so, it becomes necessary to understand, clearly, the nature of the contract between these parties.

It appears from the record, that Wiggers was the owner of certain buildings on South Wells street, known as numbers 353 and 355, in one room of which he carried on the business of making mirror and picture frames. The other room he leased to the plaintiff for the term of five years from the first day of May, 1863, the lease being dated March 30, 1863, in which plaintiff carried on the manufacture of children's wagons, rocking-horses, sleighs, and such like toys. The machinery in both rooms was driven by steam power, the engine being located in the room occupied by defendant. The plaintiff was occupying the premises at the date of the lease, and had occupied them as they then were, under oral and written leases from the defendant, for months previous. The lease contained these clauses: "all the west half of the two-story frame building, known as No. 353 and No. 355, South Wells street, in the city of Chicago, together with one-half of the steam power produced by the present therein located steam-engine, or one of equal capacity, to be kept in motion by Wiggers ten hours each day, Sundays excepted, or excepting time for necessary repairs, with not to exceed seventy pounds of steam pressure; to have and to hold the said above described premises, with the appurtenances, to the plaintiff, his executors, etc., from the first day of May, 1863, until the first day of May, 1868, being the term of five years, at an annual rent of four hundred and seventy-five dollars, payable in monthly installments in advance." The plaintiff further agreed to pay, in addition to this rent, all water rents levied or charged on the premises during the continuance of his lease.

At the date of this lease, and long previous, while the premises were occupied by the plaintiff, he procured a pipe and stop-cock, which was fitted to the exhaust pipe of the engine, and was extended to a wooden box or steamer, used by the plaintiff for softening, by steam, his wood and materials to fit them for bending, and into which the exhaust steam was con-

ducted by means of this pipe. This steam box was indispensable to the plaintiff in his business. The charge was, that the defendant unlawfully cut this pipe, so that the plaintiff lost the benefit of the exhaust steam.

The diagram annexed will show the condition of the premises at the date of the lease, and when occupied by plaintiff in error prior thereto:



On the trial, the plaintiff proposed to show, that for more than a year immediately preceding the execution of this agreement, under leases from the defendant, oral and written, he had been in the uninterrupted and undisputed use and enjoyment of this steamer, and of the pipe connecting the same with the exhaust pipe of the engine, and of the necessary exhaust steam from this exhaust pipe, which the court ruled out, and to which exception was taken, and that is the first error assigned.

We are at a loss to perceive the ground of objection. While it is true, this controversy must be governed by the written contract of March 30, 1863, still, as the intention and design of the parties entering into it must be reached, we see no better mode by which that could be done, than by showing a previous holding of the premises, and what the plaintiff enjoyed under it. The fact that he had used this exhaust steam and steamer, under his former contracts, would be some evidence of the privileges he was to possess and enjoy under that of the contract then being made. Although that contract must control, still it was proper to show the inducements which must have operated with the plaintiff to make it. In all contracts, the intention of the parties is to be regarded, and this is gathered from the terms of the contract and the attendant circumstances. Now if the plaintiff occupied these premises months before, and up to the time of signing the contract in question, and they then contained the necessary facilities and appurtenances for carrying on his business, and without which he could not carry it on, they being indispensable, it is a fair presumption, it was the intention of both parties, that the facilities should be continued during the term created by the new contract, and this view does not, in any sense, trench upon the rule that a written contract cannot be explained or varied by parol. It was held by this court in the case of *Hadden* v. *Shoutz*, 15 Ill. 581, cited by plaintiff in error, that a grant will be construed by considering the condition of things in view of the parties at time the grant was made. This was a case where two parties occupied a portion of the public lands, on which a dam and mill had been erected. On the 25th of October, 1845, Hadden and wife conveyed to Shoutz, by metes and bounds, about six acres of the land, "together with all and singular the hereditaments and appurtenances thereto belonging." Before that time a mill and dam had been erected upon a stream running through the quarter section of which the premises conveyed were a part, and through the premises. The mill and dam were upon the land conveyed, and at the time of the conveyance, and for a long

time before, the dam flowed the water of the creek back upon a portion of the quarter section not conveyed, and which the grantor also owned at the time of the conveyance. The right to flow the water back above the line of the land conveyed, was necessary to the enjoyment of the mill as a mill. The court say the mill and dam did not pass as an appurtenant to the land, but as a part of the land itself, as much as the soil upon which they were situated, and the right to enjoy them, as they were *then situated and enjoyed*, passed as an appurtenance to the thing granted.

The land without the mill was but of little value. The value of the thing granted consisted principally in the mill, and the right to use and enjoy it. The grantor was there and knew this, and was well aware that the grantee expected that he was acquiring the right to use it as it was then enjoyed.

The case of *United States* v. *Appleton*, 1 Sumner, 492, is cited with approbation by the court, in which it was held, that, in the construction of grants, the courts ought to take into consideration the circumstances attendant upon the transaction, the particular situation of the parties, the state of the country, and the state *of the thing granted*, for the purpose of ascertaining the intention of the parties. In truth, every grant of a thing naturally and necessarily imports a grant of it as it actually exists, unless the contrary is provided for.

Applying the principles here maintained, to the case before us, we can see no difference. As in the case of the mill, so in this, the value of the thing granted to the plaintiff consisted in the room and steam power as a motive power, and in the use of the exhaust steam to supply his steam box or steamer.

This, the defendant, being upon the same premises, and using the same motive power, knew, and was well aware, that the plaintiff expected, when he signed the lease of March 30th, that he was acquiring the right to use the premises and facilities for his business, as they had been before, and were then enjoyed. The court, therefore, should have admitted the evidence offered, as going to show the intention of the parties. It is always proper, when a written contract is not specific, to

ascertain such extrinsic facts as the parties had in view at the time the contract was made, in order to ascertain their true meaning. *Barret* v. *Stow*, 15 Ill. 423.

And, on the point, that parol testimony is not admissible to add to or vary the terms of a written instrument, this rule is not violated by the admission of parol testimony to show the condition of the property, with a view to arrive at the true intent of the parties in the terms used by them. *Cook* v. *Whiting*, 16 Ill. 483, also cited by plaintiff in error.

So in the case of *Lampman* v. *Milks*, 21 N. Y. 509, cited by plaintiff in error, it was held, that parties are presumed to contract in reference to the condition of the property at the time of the sale, and neither has a right, by altering arrangements then openly existing, to change materially the relative value of the respective parts.

So here, "the arrangements openly existing" at the date of this agreement, in and about the premises granted, were an unobstructed passage of the exhaust steam from the exhaust pipe of the engine, through another pipe fitted with a stop-cock furnished by the plaintiff, to a steam-box in which plaintiff then, and for some months before, under oral and written leases from the defendant, had used, and was then using for steaming wood to soften it for bending, to be used in his various manufactures, and which was indispensable to him for such purpose, and this was well known to the defendant. He, therefore, had no right, after this agreement was made, to change materially the value of any of the respective parts of this property.

In *Atkins* v. *Bordman et al.*, 2 Metc. 457, Chief Justice SHAW, in delivering the opinion of the court, said: The question often arises from the ambiguity, brevity or uncertainty of the decriptive words used, what was the extent of such grant? in other words, what was the intention of the parties in making and accepting the grant? It is a rule that the language of the grant shall be construed most strongly against the grantor, and, being made for a valuable consideration, it shall be presumed the grantor intended to convey, and the grantee expected

to receive, the full benefit of it, and therefore that the grantor not only conveyed the thing specifically described, but all other things so far as it was in his power to pass them, which were necessary to the enjoyment of the thing granted. It is also competent to show, in such case, what the parties probably meant when the language is not fully clear and unambiguous, to prove the local position, the relative position of the estate granted, that of the estate reserved, and also the manner in which the grantor himself had used it when owner of the whole (p. 464).

If one grants an estate with all the privileges and appurtenances, and there be a right of way over a third person's estate, that right of way passes, and it would pass as incident, though "appurtenances" be not expressed in the grant. *Kent* v. *Waite*, 10 Pick. 138. And if an estate be granted with the ways and other easements actually used and enjoyed therewith, evidence *aliunde*, by parol or otherwise, may be given to prove that a particular way was then in use by the grantor; and then it is held to pass as parcel of the estate conveyed. *White* v. *Crawford*, 10 Mass. 183.

Testing this case by these principles, can there be any doubt that the plaintiff had the right to show the condition of these premises at the time the agreement was executed, and for the previous terms for which he had occupied them under leases from the defendant? There can be none, and the refusal to let in this proof was error.

We are well satisfied, the plaintiff was entitled, under his contract, to the use of the exhaust steam, as he had previously used it, and was using it at the time this contract was made, together with all the facilities connected therewith, and that they passed to him under the term "appurtenances." It is absurd to suppose plaintiff would have made such a contract, with the understanding that he might, in one moment, by the caprice or malice of defendant, be cut off from the means of carrying on his business and earning his daily bread. This could not have been in the mind or intention of either party. The plaintiff had a perfect right to the enjoyment of all these

facilities, as he had before enjoyed them, no matter how much their enjoyment may have incommoded the defendant, for which he was paid full value by the plaintiff in the annual rent, payable monthly, and in payment of the water rates by which steam was supplied to both.

The defendant, in his brief, makes but one point, and that is:

"Is exhaust steam, the same as steam power or an appurten ance of steam power."

We do not consider this to be the question made by the plaintiff in error, or by the pleadings as they stand. The gravamen of the action is not in cutting off, or reducing the supply of motive power — live steam power — but in cutting the pipe leading from the exhaust pipe, to the plaintiff's steam box, by which his wonted and rightful supply of exhaust steam was cut off. That is the charge, and all evidence on any other point, was wholly irrelevant, and should not have gone to tne jury. It matters not whether the engine had sufficient power to work the machinery of the plaintiff if it was all applied in that direction, that is not the question. The defendant knew when he made the contract, how much motive power he would lose, and how much plaintiff would obtain, and if plaintiff has been deprived of his proper share of that power, he can institute suit for damages. That is not this case. It is true, in the first count of the declaration, the plaintiff alleges, he applied the steam power in and about the softening, steaming and seasoning of wood and lumber in his business, and this is so, for though the steam power was not directly applied to this purpose, yet it was through and by it the plaintiff procured the steam which had exerted its power in creating motion, and being spent, for that purpose, was conducted by this pipe to the plaintiff's steam box.

But the plaintiff, at the commencement of the trial, entered a *nol. pros.* on all the counts except those depriving him of the exhaust steam to supply his "steamer." The fourth and fifth counts state the case fully. But as the cause will have to go

back for another trial, the plaintiff can make such amendments to the declaration as he deems important and necessary.

We have decided the case on the first error assigned, not deeming it necessary to go extensively into other portions of the record, or to discuss the evidence, or the instructions, as those given hereafter will, of course, adopt, or be in harmony with, the views of the case we have here presented.

The judgment is reversed and the cause remanded.

Judgment reversed.

WILLIAM JONES
v.
BARNEY NELLIS.

1. TITLE TO STOLEN PROPERTY, *in the hands of an innocent purchaser.* A purchaser of a chattel can acquire no better title than the vendor had.

2. SAME — *exceptions as to negotiable paper, etc.* But, as an exception to that rule, by the common law, the *bona fide* holder of money or negotiable paper, transferable by mere delivery and not overdue, who has taken it in the usual course of business, and for a valuable consideration, acquires a perfect title.

3. So it is *held*, where a seven-thirty government bond had been stolen, and bought in the usual course of trade by a party who had no knowledge that it had been stolen, such purchaser acquired a perfect title to the bond, even as against the former owner from whom it had been stolen.

4. EFFECT *of the sixty-second and sixty-fourth sections of our Criminal Code, upon that rule.* Those sections of the Criminal Code, the former defining what larceny is, and the latter declaring that no purchaser of "property" which has been obtained by larceny, whatever his good faith in that regard, shall acquire title as against the owner, do not affect the common law rule as above laid down, in reference to negotiable paper, as the term "property" is used in the latter section in such a restricted sense as not to embrace either money, or bonds, bills and notes.

WRIT OF ERROR to the Recorder's Court of Chicago; the Hon. EVERT VAN BUREN, Judge, presiding.

This was an action of trover brought in the court below by William Jones against Barney Nellis, to recover the value of a

seven-thirty government bond for $500, which had been stolen from the plaintiff and bought by the defendant. The facts in the case are contained in the following stipulation:

1. That the five hundred dollars seven-thirty government bond in controversy was, on the 5th day of January, 1866, the property of the plaintiff, and was on that day stolen from his safe by ——— Joslyn, who was afterward, to wit, at the March Term of this court, convicted for the larceny of the same.

2. That the said Joslyn, afterward and before convicted, sold said bond to defendant for the sum of five hundred dollars; said defendant purchasing said bond *bona fide*, for a full consideration, and in the usual course of trade, without any knowledge that the same had been stolen.

3. That said bond is the identical bond stolen from the plaintiff by said Joslyn, and is of the value of five hundred dollars.

4. That said bond is payable to bearer, and that the title to it passes by delivery in the same manner that the title to currency passes.

5. That, before the commencement of this suit, plaintiff demanded said bond from said defendant, who refused to deliver the same to him.

A trial resulted in a finding and judgment for the defendant. The plaintiff thereupon sued out this writ of error.

Messrs. MONROE, MCKINNON & TEWKESBURY, for the plaintiff in error.

Messrs. SCATES, BATES & TOWSLEE, for the defendant in error.

Mr. JUSTICE LAWRENCE delivered the opinion of the Court:

This was an action of trover, brought by Jones to recover the value of a seven-thirty government bond for $500, which had been stolen from him, and bought, in the usual course of trade, by Nellis, without knowledge that it was stolen property.

The rule is well settled, at common law, that the *bona fide* holder of money or negotiable paper, transferable by mere delivery and not overdue, who has taken it in the usual course of business, and for a valuable consideration, acquires a perfect title. The authorities are referred to and reviewed in 2 Parsons on Notes and Bills, page 265, *et seq.*, and 1 Smith L. C. 250, *Miller* v. *Race* and notes, and it is unnecessary to quote them more specifically. This exception to the common law rule, that the purchaser of a chattel can acquire no better title than the vendor had, has been adopted because, in the language of Lord KENYON, in *Lawson* v. *Weston*, 4 Esp. 56, the contrary principle "would at once paralyze the circulation of all paper in the country, and with it all its commerce." This is, perhaps, a strong mode of stating the difficulty, but there can be no doubt that it would lead to much embarrassment if it should be held that money, or negotiable paper passing by delivery, which has once been stolen, can be recovered from any person into whose hands it may afterward come.

It is urged, however, that our legislature has established a different rule. The sixty-second and sixty-fourth sections of our Criminal Code are as follows:

"SEC. 62. Larceny is the felonious stealing, taking and carrying, leading, riding, or driving away, the personal goods of another. Larceny shall embrace every theft which deprives another of his money or other personal property, or those means or muniments by which the right and title to property, real or personal, may be ascertained. Private stealing from the person of another, and from a house in the day-time, shall be deemed larceny. Larceny may be also committed by feloniously taking and carrying away any bond, bill, note, receipt, or any instrument of writing of value to the owner. Every person convicted of larceny shall be punished by confinement in the penitentiary for a term not less than one year, and not more than ten years.

"SEC. 64. All property obtained by larceny, robbery or burglary, shall be restored to the owner, and no sale, whether in

good faith on the part of the purchaser or not, shall divest the owner of his right to such property. Such owner may maintain his action, not only against the felon, but against any person in whose possession he may find the same."

It is to be remembered, that our Criminal Code was designed to be a complete system of criminal jurisprudence, and it therefore necessarily contains a great number of provisions which are simply declaratory of the common law. It is not therefore to be inferred that the sixty-second section was designed to change the common law rule, merely from the fact that there is a section relating to this subject. The question is, as to the sense in which the word "property" is used in this section. If the literal sense is to be given to the phrase "all property," then we must hold that stolen coin or stolen bank bills can be recovered. They are property as much as government bonds. But such a construction would be directly in the teeth of what all courts have held to be the necessities of a commercial people, and is not consistent with other language in the same section. For the property referred to is of such a character as to be, by the very terms of the section, the subject of sale, and the circulating medium of a country cannot, with propriety, be so regarded. It is the instrument by which sales are made, but not itself the subject of sale. It would seem, then, that a limit must be placed by construction to the most extended sense of the term "property," and in fixing that limit we can have no safer guide than the common law, unless, in following it, we are clearly doing violence to the legislative intent. This construction is, however, sustained by the language of the sixty-second section: "Money," "other personal property," and "bond, bill, note, receipt, or any instrument of writing of value to the owner," are all severally enumerated as subjects of larceny, as if they were not all comprehended under the general term "property." We do not adopt a strained construction when we hold that the term "property," in the sixty-fourth section, is used in the same restricted sense as in the sixty-second section, where it clearly is not used as comprehending either money, or bonds, bills and notes. The government bond

stolen in this case, passed, like a bank bill, by delivery merely, and at the common law could not be recovered by the former owner from this defendant. In our opinion the statute was not designed to change the rule.

Judgment affirmed.

WALKER EUBANKS

v.

THE PEOPLE OF THE STATE OF ILLINOIS.

1. CONTINUANCE — *requisites of an affidavit therefor.* Where a party who is indicted for an assault with intent to murder, desires a continuance on account of the absence of witnesses by whom he expects to prove facts connected with the alleged assault which will exculpate him, the affidavit for the continuance should show what means the witnesses had of knowing what occurred; and where the witnesses reside out of the State, it should show the grounds of his expectation of procuring their testimony at a future time.

2. INSTRUCTIONS — *evidence — jury.* It is not error for the court to refuse to instruct the jury as to the weight of evidence, as it is their province to consider it.

3. SAME. Where the indictment charged that the accused made an assault with the intent to "kill and murder," and the court instructed, that, if the jury found from the evidence that he made the assault with intent to "kill or murder," as charged in the indictment, they should convict, — *held,* that this was not error, especially when another instruction given stated it correctly.

WRIT OF ERROR to the Circuit Court of Livingston county; the Hon. CHARLES R. STARR, Judge, presiding.

This was an indictment found by the grand jury of Livingston county, and returned to the October Special Term of the Circuit Court of that county, against Walker Eubanks. It charged him with an assault with intent to murder one James M. Donaldson. He entered a plea of not guilty, after being arraigned.

Defendant entered a motion for a continuance founded on an affidavit of the absence of material witnesses. The court overruled this motion and the defendant excepted. On the day following, and at the term at which the indictment was

found, defendant was put upon his trial before the court and a jury.

After hearing the evidence, the jury found the defendant guilty, and fixed the term of his confinement in the penitentiary at eight years. He thereupon entered a motion for a new trial, which the court overruled, and rendered judgment on the verdict; and he prosecutes this writ of error to reverse that judgment.

Messrs. BANGS & SHAW and NEVILLE & CLARK, for plaintiff in error.

Mr. C. BLANCHARD, State's attorney, for the people.

Mr. CHIEF JUSTICE WALKER delivered the opinion of the Court:

It is insisted, that the court below erred, in overruling a motion for a continuance, entered by plaintiff in error. The motion was based on this affidavit: "Walker Eubanks, the defendant in the above entitled case, being duly sworn, upon his oath deposes and says, that he cannot safely proceed to the trial of the above entitled cause at the present term of court, on account of the absence of one Edward Conners, and Charles Conners, material witnesses on the part of defendant, and that said witnesses are somewhere on the road to Kansas, as affiant has just been informed and believes, and that he expects to prove by said Edward Conners and Charles Conners, that he did not make an assault on the said James M. Donaldson, and did not go there with intent to do mischief, and that the shooting was at a dog and not at James M. Donaldson, or any other person, and that he knows of no other person or persons, by whom he can prove the above stated facts; and deponent further says that he has had a subpœna issued out of the Circuit Court and returned not found; that he has not had time to procure the testimony of said Edward and Charles Conners, and that he expects to procure the testimony of said witnesses at the next term of this court, and that this application for a

continuance is not made for delay, but that justice may be done." The affidavit was properly entitled in the cause.

It will be observed, that this affidavit is very general in its statements. It does not state that these persons were present when the difficulty occurred, or any facts or circumstances by which the court could see, how they could know or prove the statements contained in the affidavit. Nor does it state when, if ever, these persons expected to return to the State, or that he had any information, or expectation on the subject. Had the witnesses been residents of the State, and amenable to the process of the court, the statement would no doubt have been sufficient, as the court could then have seen how the testimony could have been procured at the next term, but it is otherwise when a witness is beyond the limits of the State, as in such a case the party applying for a continuance should state the grounds of his expectation, so that the court may determine whether it is reasonable; and when stated, if it seems probable that the evidence can be obtained, and if material, the motion should be allowed. But if when the grounds of the expectation are disclosed, it appears there is no reasonable probability that the attendance of the witness can be had, the motion should be refused.

It is, however, insisted, that the court erred in refusing a portion of the instructions asked by plaintiff in error. Whether these instructions announced correct principles or not, they were not accurately drawn. The objection to them is, that they ask the court to inform the jury, as to the weight or value of evidence. It is for the jury and not the court to determine what evidence proves or tends to prove, and yet these instructions state that certain evidence prove or tend to prove certain facts. Had they been given they would have encroached upon the province of the jury. In refusing to give them the court committed no error.

Again, the instructions which were given for the accused seem to be fair and full, and present the law arising on the facts of the case. Under them the jury were required to consider all the facts material to his defense, and to give him the

benefit of every doubt. They could not have misled the jury and they covered the whole case.

It is again objected, that the court erred in giving the first of the people's instructions. It informs the jury, that, if defendant made an assault with a pistol with intent to "kill or murder" Donaldson, as is charged in the indictment, they should find the defendant guilty. The indictment charges that the intent was to "kill and murder," so that when the jury turned to it they necessarily saw that the offense was charged in the conjunctive, and the instruction informed them that they must believe that the act was done as charged in the indictment. We are therefore of the opinion that this instruction, although not strictly accurate, was so modified by reference to the indictment that it could not have misled the jury. Again, by the second of the people's instructions the jury are informed that if they believe the assault was made with intent to murder they should convict. We must presume that the jury considered all of the instructions given, and based their verdict on all and not a portion, when considered with the evidence, and if they did so in this case the second instruction relieved the first from difficulty, especially when they referred to the charge in the indictment.

Upon this record we perceive no error, and the judgment must be affirmed.

Judgment affirmed.

Daniel McDermaid *et al.*

v.

Lucretia A. Russell.

1. Non-resident defendants *in chancery — notice by publication — of the affidavit.* Where the affidavit of non-residence of defendants in chancery, upon which a notice by publication was based, was not sworn to before any officer, it is no affidavit, and gave no authority to the court to enter an order of publication.

2. Same — *requisites of the notice.* A notice which was published against certain defendants in chancery, alleged to be non-residents, required them to appear

at a certain time, "give bail and enter their appearance, or that judgment would be entered against them by default, and the property attached sold." This was no proper notice in such a proceeding, but might be a good notice in an attachment cause.

3. A notice in such case which requires the non-resident defendants to appear at a different time from that at which the term of the court is to commence, is void.

4. Guardian ad litem — *when properly appointed.* Where the notice by publication against infant non-resident defendants in chancery, is void, an appointment of a guardian *ad litem* for the infants is also void, for they are not in court, amenable to any of its orders.

5. Infant defendants — *how brought into court.* Infant defendants in chancery cannot be brought into court by the stipulation of attorneys.

Writ of Error to the Circuit Court of McHenry county; the Hon. T. D. Murphy, Judge, presiding.

The opinion states the case.

Mr. R. N. Botsford and Mr. S. S. Jones, for the plaintiffs in error.

Mr. A. B. Coon and Mr. S. Wilcox, for the defendant in error.

Mr. Justice Breese delivered the opinion of the Court:

The only question we can consider on this record is, as to the appearance in court of certain infant defendants.

It appears that Lucretia A. Russell, the defendant in error, filed a bill in chancery in the McHenry Circuit Court, for the purpose of having adjudged to her, the share of the lands of her deceased husband, who died intestate and childless, she claiming as statutory heir. In her bill, she made the brothers and sisters of her husband, and their descendants, defendants, as his heirs at law, and prayed process against them. Among these heirs at law were three minors, namely, Thomas Russell, James Russell and Isabella Russell, who had no other notice of the pendency of the suit than notice by publication. On proof of notice by publication, these minors were ruled to answer *instanter*, and, on failing so to do, the bill was taken as confessed against them.

At a subsequent day of the term, on motion of complainant, the default as to these infants was set aside, whereupon R. N. Botsford was appointed guardian *ad litem* for them, who filed an answer.

The objection taken to this notice of publication is, that the affidavit of non-residence does not appear to have been sworn to before any officer. For that omission, it was no affidavit, and gave no authority to the court to enter an order of publication.

Another objection is, that the summons issued on filing the bill required the defendants to appear in court on the second Monday of October, 1863, and the notice as published required them to appear on the fourth Monday of that month, "give bail and enter their appearance, or that judgment will be entered against them by default and the property attached sold." This is no proper notice in such a proceeding, but if the term was right, corresponding with the term named in the summons, it might be a good notice in an attachment cause. The record shows the term of the court commenced on the second Monday of October. The notice, then, to appear on the fourth Monday was nugatory and void, and consequently the appointment of a guardian *ad litem* for the infant was also void, for they were not in court, amenable to any of its orders.

None of the defendants being properly in court, the stipulation by the attorneys did not bring the infants into court. They could not be brought before the court in that way.

All the evidence not being in the record, we express no opinion on the other points made.

For the errors specified, the decree must be reversed and the cause remanded.

Decree reversed.

First National Bank of Chicago
v.
Pettit & Smith.

Checks—*liability of the drawee to the holder of a check.* Where a party obtains credit at the bank for a certain amount, and for a specific purpose, and the bank agrees to pay his checks to that amount, after the credit thus negotiated has been overdrawn, the bank is under no obligation to pay any more checks drawn by that party, although they may be drawn in favor of persons who have contributed to the purpose for which the drawer obtained the credit with the bank, and were drawn on that account, and the deficit in the amount to be drawn against arose from the payment by the bank of checks drawn for a purpose foreign to that for which the bank agreed to give the credit to the drawer. In such case there is no privity between the bank and the holders of the rejected checks which will in any way render it liable to them.

Appeal from the Recorder's Court of Chicago; the Hon. Evert Van Buren, Judge, presiding.

This was an action of assumpsit brought in the court below by Pettit & Smith against the First National bank of Chicago, to recover the amount of a check drawn by George M. Allen upon the bank, and in favor of the plaintiffs. A trial resulted in a finding, and judgment in favor of the plaintiffs. The defendant thereupon took this appeal.

The grounds upon which the plaintiffs sought to recover are set forth in the opinion of the court.

Mr. C. Beckwith, for the appellant.

Messrs. Scates, Bates & Towslee, for the appellees.

Mr. Justice Lawrence delivered the opinion of the Court:

On the 14th of June, 1865, George M. Allen made an arrangement with the First National bank of Chicago, by which it was to pay his checks to the value of a cargo of corn, amounting to between $8,000 and $9,000 upon the security of the bill of lading. He was to buy the corn as a broker, upon

the order of Charles J. Mann, of Buffalo, upon whom he was to draw his draft in favor of the bank for the amount of its advances, and the bank was to hold the bill of lading as security for the payment of the draft. At the close of bank hours, on the 15th of June, the bank had paid his checks to an amount exceeding ten thousand dollars. After the credit negotiated by him with the bank had been thus overdrawn, Pettit and Smith, the appellees, presented a check drawn by Allen in their favor, for corn purchased of them toward the cargo, and amounting to $998.86. The bank refused payment, and Pettit and Smith brought this suit.

It appears that among the checks paid by the bank was one in favor of Adams & Co., for $5,936.74, which bore date on the 13th of June, and was not given for corn, but which was not presented until the 14th, after the arrangement with the bank was made. Allen kept a deposit account with the bank, and, doubtless with a view of keeping his account good, and protecting his corn checks, he deposited with them, after bank hours, on the 14th of June, a check drawn in his favor by Daggett & Whiteside, on the State Savings institution, for $5,798.88, which was entered to his credit on his bank book, on the 15th. This check, on presentation, was dishonored, the drawers having failed, and, on the same day, the 15th, Allen, being informed that the check had been dishonored, drew his own check in favor of the bank for the same amount.

It is said the bank had not the right to pay the check of Adams & Co., from the payment of which the deficit arose. But the fallacy of the argument consists in the assumption that this arrangement was effected with the bank by Allen, as agent merely of Mann, and upon the credit of the latter, and that the case is to be treated as if Mann had made a special deposit, through the agency of Allen, to his own credit, to be checked out for the purchase of corn and for that only. But, in fact, there was no privity whatever between the bank and Mann. The money was not advanced upon his credit, as suggested by appellees' counsel, but on the credit of the corn itself, for which the bank was to hold the bill of lading. Mann stood to them

as a mere name, upon which a draft was to be drawn, and when it should be paid the bank would surrender the corn. Any other grain dealer in Buffalo would, no doubt, have answered the purpose of the bank quite as well. The credit established by Allen with the bank was merely a personal credit to the benefit of his general account as a depositor, and although the bank might not have been obliged to pay any check that was not drawn toward the purchase of the cargo of corn, it clearly had the right to pay any of Allen's checks drawn by him in good faith, and not with a view of defrauding others. And that there was any intent to defraud any body, either on the part of Allen or the bank, is not pretended. If other persons thought proper to sell him corn and take payment in his checks, they did it on his credit merely, and not upon any promise by the bank to pay his checks. It is not claimed that any communication took place between the appellees and the bank, until they presented their check for payment, and Allen's credit was already overdrawn. It is not pretended that the bank had ever promised them to pay Allen's checks.

Some stress is laid upon the fact, that Allen drew his check in favor of the bank, to take up the dishonored check of Daggett & Whiteside. But in our view, that transaction was wholly unimportant. It amounted, on either side, to simply nothing. The bank took the Daggett & Whiteside check for collection, and gave Allen a merely nominal credit of a few hours, and, on the dishonor of this check, Allen drew his own check to annul the nominal credit he had received, and restore the proper balance to the account. It amounted simply to giving the bank a worthless piece of paper in the morning and taking it back again in the afternoon.

The case is simply this, Allen gets a credit with the bank, upon a promise to deliver to it a cargo of corn that he proposes to buy, of $9,000. The bank pays his checks until his account, including this credit, is overdrawn, and refuses to pay further. We cannot see why it should. It receives the bill of lading for the corn according to agreement, and a draft drawn against

it, and from the proceeds re-imburses its advances. We do not see why it should not be permitted to do so, or upon what principle it should be required first to pay a debt due from Allen to persons with whom it has had no transactions, and who, if losers, are so by no fault of the bank. The debt due from Allen to it is as meritorious as that due the appellees, and there is no reason why the bank should be required to surrender its securities or their proceeds. The judgment must be reversed and the cause remanded.

Judgment reversed.

THE TOWN OF FREEPORT

v.

THE BOARD OF SUPERVISORS OF STEPHENSON COUNTY.

1. CORPORATIONS — *counties and towns.* Counties and towns, as municipal corporations, are under the legislative control, and the law governing them may be changed according to the legislative will.

2. PAUPERS — *liability of towns and counties for their support.* Under the act of the general assembly, in reference to paupers in Stephenson county, each town in the county is rendered liable for the support of their resident poor. And persons who were residents of a town and had been sent to the poor farm before the passage of that law did not thereby lose their residence or cease to have it in the town from which they were sent, or become residents of the town in which the poor-house was situated.

3. SAME — *residence.* As a general rule, persons under legal disability or restraint, persons of a non-sane memory, or persons in want of freedom, are incapable of losing or gaining a residence by acting under the control of others. Without the intent, the residence cannot be changed, and a pauper maintained at the poor farm is not an exception to the rule.

4. SAME — *division of a town.* By the division of a town, or the annexation of a portion of one to another, the pauper of the portion annexed does not lose his previous settlement or residence at the place where he had it when he became a public charge.

WRIT OF ERROR to the Circuit Court of Stephenson county; the Hon. BENJ. R. SHELDON, Judge, presiding.

This was an action of assumpsit brought by the Board of Supervisors of Stephenson county, to the April Term, 1864, of the Circuit Court, against the town of Freeport. The declaration contained a count for goods, wares and merchandise, and a count for the board and lodging of a number of persons who were poor, and a legal charge to defendant as paupers, and the usual money counts. The plea of the general issue was filed. A trial was had at the return term, by the court, by consent the intervention of a jury having been waived, on an agreement of the facts in the case which appears in the opinion of the court.

The issue was found for plaintiffs, and a motion for a new trial was entered, which the court overruled, and rendered judgment for $1,274.05, to reverse which defendants prosecute this writ of error.

Messrs. BAILEY & BRAWLEY, for the plaintiffs in error.

Messrs. BURCHARD, BARTON & BARNUM, for the defendants in error.

Mr. CHIEF JUSTICE WALKER delivered the opinion of the Court:

This was an action of assumpsit, brought by the Board of Supervisors of Stephenson county against the town of Freeport, to recover for the support of five paupers, with which, it is urged, the town is chargeable. The declaration contained the usual common counts. The general issue was filed, and the cause was submitted to the court for trial, by consent without a jury, on this agreed statement of facts:

"That an act entitled An act in relation to the poor of Stephenson county, approved February 18, 1861, was accepted by the electors of said county according to the provisions of the third section of said act, and that the next annual meeting of the board of supervisors of said county of Stephenson thereafter was held on the second Monday of September, A. D. 1861.

That Grant Ryan, John Davis, Christian Bergart, Frederick Hetty and Robert Kennedy, and each of them, were paupers in the county poor-house of said county at the time of the passage of said act, and had been at said poor-house, and supported therein by said county, for at least two years preceding the time of the passage of said act, and remained at said poor-house and were supported by said county until the said annual meeting of the board of supervisors of said county.

That, while said paupers were at said poor-house, they were supported exclusively by the county of Stephenson.

That, at the annual meeting of the board of supervisors of said Stephenson county in September, A. D. 1861, said board of supervisors, claiming that the respective towns were liable so to do under said act, passed a resolution requiring the several towns in said county to receive and support the paupers of their respective towns then in the county poor-house.

That, after the passage of said resolution, said board of supervisors caused to be served upon the overseers of the poor of said town of Freeport, and also upon the supervisors of that town, a notice requiring said town to receive and support the above named persons as paupers of the town of Freeport, or pay the expenses of the support of said paupers.

That such notice was served on or about the first day of October, A. D. 1861.

That said town of Freeport then refused to receive said poor, or pay the expenses of the support of said paupers, or either of them, and ever since has refused and still does so refuse, and that said paupers and each of them, since October 1st, 1861, to the time of the commencement of this suit, remained at the poor-house of said county, and were supported by said county of Stephenson.

That the bill for such support, attached to and filed with the declaration in this cause, is reasonable and just, if the said town of Freeport were chargeable with the support of said paupers.

That the poor-house of said county of Stephenson at the time said paupers and each of them were sent thereto, was situate in

the township of Silver Creek in said county, and outside of the limits of said town of Freeport, and ever since said paupers were so sent to said poor-house, said poor-house has remained and still is in said township of Silver Creek.

That several years before said paupers or either of them were sent to said poor-house, said Stephenson county adopted township organization, and ever since has acted under such township organization, and that said town of Freeport at the time said paupers and each of them were so sent to the poor-house was an organized town in said county of Stephenson, and ever since has so remained.

That, at the time said persons and each of them became paupers and were sent to said poor-house, they and each of them were legal residents of said town of Freeport, and were sent to said poor-house from and by the proper authority of said town, and when so sent to said poor-house were paupers properly chargeable upon said county of Stephenson.

That, if the foregoing facts establish the liability of said town of Freeport for the support of said paupers under said act, then judgment for the plaintiff is to be entered in the cause for the amount of the bill attached to declaration in this cause, in favor of the plaintiff, saving to each party the right to appeal or writ of error.

The court found the issues for the plaintiff, and assessed the damages at $1,274.05. A motion for a new trial was overruled, and judgment rendered for the amount against defendant. And the cause is brought to this court to reverse the judgment.

This action is based upon an act of the general assembly, approved on the 8th day of February, 1861; and is entitled "An act in relation to the poor of Stephenson county." It by the first section declares: "That each town in the county of Stephenson, from and after the annual meeting of the board of supervisors of said county, shall respectively pay the expenses of the support of the paupers residing in each town, and out of the treasury thereof, in the same manner and form as other town expenses."

The second section declares, that the county poor farm shall be kept in proper repair, with such improvements as may be required, at the expense of the county, under the supervision of the board of supervisors. That under such rules, regulations and contracts as they shall deem proper, the same shall be open to the reception of such poor persons as the town authorities may offer, subject to the provisions of this section. The third section declares, that the provisions of sections fourteen, fifteen and sixteen of the chapter entitled "paupers," of the Revised Statutes, shall apply to the several townships of the county, in the same manner they do between the several counties of the State. This act also amends the general law, so far as to require a residence of six months in any township in the county before such person shall become a charge on the same.

It is insisted that the agreement does not show that this act was adopted in the mode prescribed. The agreement states that: "said act was accepted by the electors of said county, according to the provisions of the third section of said act." It seems to us that this language will bear no other construction, but that the electors adopted the law as required.

The persons for whose support the county has sued, were residents of the town of Freeport, at the time they were sent to the county poor-house. And they had been in the poor-house more than two years prior to the annual meeting of the board of supervisors in September, 1861. And there is no dispute that they were, prior to the adoption of this law, a county charge, and the town of Freeport was not chargeable with their support. This then presents the question whether this law changes the liability of their support from the county to the township. The county and townships being municipal bodies, created for the purpose of aiding in maintaining the general police, and being under the legislative control, no question as to vested rights can arise, in the alteration or change of their franchises. These are under the legislative control, and may be altered, changed, abridged, enlarged or repealed, at the will of the general assembly. This being

true, the question arises as to the intention of the legislature when this law was adopted.

It seems to be manifest that it was designed, that, after the annual meeting of the board of supervisors in September, 1861, each town in the county should support its resident paupers. And this then naturally presents the question as to whether these persons are residents of Freeport. It is conceded they were residents of the county, and it is expressly agreed, that, at the time they severally became paupers, they were legal residents of the town of Freeport. Then did they, by being sent to the poor-house, lose their residence in that town, and become residents of the town of Silver Creek, in which the county poor-house was situated?

That this was not the design of those adopting the law, would seem to be manifest, otherwise they would, in terms, have declared, that the town of Silver Creek should support all paupers then in the county poor-house, and all such as should be sent there after remaining in the poor-house for six months. If by remaining there for six months, although chargeable to other towns, they acquired a residence so as to charge that town, the operation of the law would be to settle all paupers in the county on the town of Silver Creek. The various towns in the county have the right to send their paupers to the county poor-farm, and to pay the expenses of keeping them there, but, to give the construction contended for, they would only be liable for their support for six months, as after that time the town of Silver Creek would become liable. This is so manifestly unjust that such a construction will not be given to the law, unless its terms imperatively demand it, and such is not the case.

As a general rule, persons under legal disability or restraint, persons of non-sane memory, or persons in want of freedom, are incapable of losing or gaining a residence, by acts performed by them under the control of others. Thus, the residence of the wife or minor child usually follows that of the husband or parent. There must be an exercise of volition by persons, free from restraint, and capable of acting for themselves, in order

to acquire a residence. A person imprisoned under operation of law does not thereby change his residence. So of a lunatic legally confined in an asylum. As these acts are involuntary, there can be no presumption of the necessary intent to change the residence. So of *femes covert* and minors. And no reason is perceived why the maintenance of a pauper at the poor-house should form an exception to the rule. He is placed there by the officers of the law, and in pursuance of its requirements. The act cannot be said to be voluntary, but is induced from necessity. Inability for self support renders it necessary that the pauper should be supported as a public charge, and the law has designated what political division of the people shall be charged with the support, and has therefore given the body the means of controlling the acts of the pauper to the extent necessary to render it convenient for his support. So soon as he becomes a charge, and while he remains so, he ceases to be a free agent, but is in the hands, and, to a certain extent, under the control of the public officers intrusted with the execution of the poor laws. That persons acting under the legal authority of others, or not being capable of acting for themselves for the want of mind, do not lose or acquire a residence thereby, see *Payne* v. *Town of Dunham*, 29 Ill. 125; *Upton* v. *Northbridge*, 15 Mass. 547; *Reading* v. *Westport*, 19 Conn. 561; *Amherst* v. *Hollis*, 9 N. H. 107; *Winchenden* v. *Hatfield*, 4 Mass. 123; *Andover* v. *Canton*, 13 id. 547. By being removed to the county poor-house, these persons did not lose their residence in the town of Freeport, nor did they gain a settlement in the town of Silver Creek.

It has been repeatedly held, that, by a division of a town, or the annexation of a part to another town, a pauper still has his settlement in the portion of the town where he resided when he was sent to the poor-house. And, in such cases, after the division has been made, the pauper will be a charge to that town which, after the change, embraces the place of his residence or settlement at the time he became a pauper, and this, too, without reference to the place where he was afterward supported. *Oxford* v. *Bethany*, 15 Conn. 252; *Bethany* v. *Ox-*

ford, id. 550; *Brewer* v. *Eddington*, 42 Me. 541; *Yarmouth* v. *North Yarmouth*, 44 id. 352; *Southbridge* v. *Charlton*, 15 Mass. 248. These cases, in principle, fully dispose of this question.

We think, from the agreement itself, that it sufficiently appears that notice was given, after the annual meeting of the board of supervisors, to the proper authorities of the town of Freeport, to remove these paupers. This they failed to do, and the only inference which can be reasonably drawn therefrom is, that the town desired the county to support them, under the act, and for which the town intended to become liable.

The judgment of the court below must be affirmed.

Judgment affirmed.

MORTIMER NEVINS

v.

THE CITY OF PEORIA.

1. CITIES — HIGHWAYS — *how far a city is responsible for the manner of its exercise of the power to grade and drain the streets.* A city has absolute control over the grade of its streets, and can make the grade light or heavy, it can elevate or lower it at pleasure, and the owners of adjacent lots cannot call it to account for errors of judgment in these respects, or demand damages because they may incur inconvenience or expense in adjusting the level of their own premises to that of the street for the purpose of ingress and egress. A city is the owner of the streets, and is given power to grade them.

2. But a city has no more power over its streets than a private individual has over his own land, and it cannot, under the plea of public convenience, be permitted to exercise that dominion to the injury of another's property in a mode that would render a private individual responsible in damages, without being responsible itself. The same law that protects the right of property of one private individual against invasion by other individuals, must protect it from similar aggression on the part of municipal corporations.

3. A city may elevate or depress its streets as it thinks proper, but if, in so doing, it turns a stream of mud and water upon the grounds and into the cel-

lars of one of its citizens, or creates in his neighborhood a stagnant pond that brings disease upon his household, it should not be excused from paying for the injuries it has directly wrought.

4. And if it should become necessary for the interest of the public, in the process of grading or drainage of the streets, that the lot of an individual shall be rendered unfit for occupancy, either wholly or in part, the public should pay for it to the extent to which it deprives the owner of its legitimate use.

5. The constitutional provision that private property shall not be taken for public use without due compensation, applies as well to secure the payment for property partially taken for the use or convenience of a street, as when wholly taken and converted into a street. The question of the degree to which the property is taken, makes no difference in the application of the principle. Private rights are never to be sacrificed to public convenience or necessity, without full compensation.

6. ACTION — *remedy of the injured party in such case.* And it appears, that, for injuries done to the property of an individual in the process of grading and drainage of a street, by turning a stream of mud and water upon his premises, or by creating in the immediate neighborhood of his dwelling an offensive and unwholesome pond, he may have his action on the case against the city, and it must respond in damages.

7. PARTIES — *who shall be liable in such case — application of the rule of respondeat superior.* Where a city has work done by contract, and a servant of the contractor does something not authorized by the city, such as improperly leaving open a drain at night, the city would not be liable, even though, by the terms of the contract, a general supervision is retained over the work.

8. But if, on the other hand, the acts which caused the injury were done under and in consequence of the direction of the city, then the city is to be regarded as the superior, and responsible as such, although it does the work by contract.

APPEAL from the Circuit Court of Peoria county; the Hon. S. L. RICHMOND, Judge, presiding.

This was an action on the case brought in the court below, by Mortimer Nevins against The City of Peoria.

The cause was tried before the court and a jury, and a verdict returned for the defendant, and a judgment was entered accordingly. The plaintiff thereupon took this appeal.

So much of the facts of the case as is necessary to an understanding of the decision will be found in the opinion of the court.

The principal question presented arises out of instructions given to the jury on behalf of the defendant, which assume that a city is not liable for any injury done to individual property holders by grading the streets of the city, even though the injury could have been avoided by the use of proper care in the construction of culverts, gutters and other means for controlling the flow of water.

The plaintiff below, the appellant here, controverts that proposition.

Mr. H. GROVE and Messrs. COOPER & MOSS, for the appellant, presented these points:

The city of Peoria is a municipal corporation, with large powers conferred upon it for the public good, but to be exercised with due regard to private rights and property; and for negligence, unskillfulness, careless or wanton disregard of private rights and interests in the exercise of any of its powers, from which injury results to persons or property, it is liable just as individuals. *Lacour* v. *Mayor of New York*, 3 Duer, 415; *Mayor of New York* v. *Bailey*, 2 Denio, 333; *Verley* v. *City of Joliet*, 35 Ill. 58.

The city owns the streets within the corporate limits, and is responsible for the manner of their improvement; and while it may be discretionary with it when any street shall be repaired or any improvement made, or whether the same shall be done at all, yet, when any such work is undertaken and actually entered upon, the city must see to it that it is done in a reasonable, proper and skillful manner, and with due diligence carried on to completion; and if, for want of proper skill and care in the mode of doing the work, or reasonable diligence in carrying it on to completion, individuals are damaged, the city is responsible. *Lacour* v. *Mayor, etc.*, 3 Duer, 416; *Rochester White Lead Co.* v. *City of Rochester*, 3 Comst. 469; *The City of Dayton* v. *Pease*, 4 Ohio St. 80; *City of Pekin* v. *Newell*, 26 Ill. 323; *Roberts* v. *City of Chicago*, id. 251; *Allen* v. *City of Decatur*, 23 id. 334; *Ross* v. *City of Madison*, 1 Carter, 281; *McCombs*

v. *Town Council of Akron*, 15 Ohio, 474; *Rhodes* v. *Cleveland*, 10 id. 159; *Thayer* v. *City of Boston*, 19 Pick. 511; *Stetson* v. *Faxon*, id. 147; *Barron* v. *Mayor, etc., of Baltimore*, 2 Am. Jur. 203; 7 Ohio St. 459.

Municipal corporations, any more than individuals, cannot with impunity create or keep up nuisances, whereby the health of people living around is endangered. *Chicago* v. *Robbins*, 2 Black, 418; *Clark* v. *Fry*, 8 Ohio St. 359; *Ellis* v. *Sheffield Gas Consumers' Co.*, 2 Ellis & Black. 75; Eng. C. L. p. 767; *People* v. *Corp. of Albany*, 11 Wend. 543; *Storrs* v. *The City of Utica*, 19 N. Y. 105; *Stetson* v. *Faxon*, 19 Pick. 147; *Thayer* v. *City of Boston*, id. 511.

The city of Peoria had no right to interfere with and obstruct the natural and customary flow of the water from the high grounds above plaintiff's premises, without providing some safe and competent outlet for it to pass off. And when it did undertake to divert its regular and customary flow, it was bound absolutely so to control and manage it, that injury would not result to individuals; and this entirely independent of any plan for public improvement within the city which the common council might see fit in its wisdom to adopt. *Rochester White Lead Co.* v. *City of Rochester*, 3 Comst. 465; *Ross* v. *City of Madison*, 1 Carter (Ind.) 281; *Allen* v. *City of Decatur*, 23 Ill. 334; *St. Louis, Alton & Chicago Railroad Co.* v. *Dalby*, 19 id. 370.

The work in this case was done by contract, but the city, not the contractor or his servants, is liable. The contract relates to the price per yard to be paid for the work, time and mode of payment, and within which the work shall be done. Next, they provide expressly that it shall be done under the supervision and direction of the city engineer and surveyor, and reserve the right to the city to annul the contract if the work is not prosecuted to satisfaction. It would seem difficult to frame a case where the doctrine *respondeat superior* is more applicable. Besides, it is believed not to be the law that the city, in the repair of streets, or the prosecution of any public work, can surrender itself and the public and private interests

in its charge, to the tender mercies of contractors, whether responsible or irresponsible, and shirk off all responsibility for their acts. If the city has not reserved a right of direction and control, that is itself a plain breach of duty, for which it should be held all the more accountable. *Southwick* v. *Estes*, 7 Cush. 385; *Phila. & Reading Railroad Co.* v. *Derby*, 14 How. 469; *Storrs* v. *City of Utica*, 19 N. Y. 105; Angell & Ames on Corporations, 464, § 388, p. 463, § 387; see *Lesher et al.* v. *Wabash Navigation Co.*, 14 Ill. 87; *Hinds et al.* v. *Wabash Navigation Co.*, 15 id. 77.

Mr. M. WILLIAMSON, for the appellee.

The evidence shows that the work was all done by contractors, under the supervision of the city engineer. If the work was done by a contractor, then the city would not be liable for any negligence or unskillfulness in the performance of the work. This principle is too well settled to admit of controversy. The case of *Bush* v. *Steinman* holding an opposite doctrine in England was long since overruled, and in fact was never regarded as law there. *Quarnam* v. *Burnett*, 6 M. & W. 499; *Rapson* v. *Cubit*, 9 id. 710; *Milligan* v. *Wedge*, 12 A. & E. 737; *Allen* v. *Hayward*, 7 Q. B. 960; 1 E. L. and E. 447; 8 id. 479; 16 id. 442; 30 id. 167; 32 id. 366; 37 id. 495.

This rule is equally well settled in this country. *Clark* v. *Vt. & Canada R. R. Co.*, 28 Vt. 107; *Hilliard* v. *Richardson*, 3 Gray, 349; *Barry* v. *City of St. Louis*, 17 Mo. 121; *Blake* v. *Farris*, 1 Seld. 48; *Pack* v. *Mayor, N. Y.*, 4 Seld. 223; 2 Mich. 368 and 528; 2 Metc. 353; 2 E. D. Smith, 254.

The same doctrine is also held in Pennsylvania. In the case of *Painter* v. *Mayor, Aldermen and Citizens of Pittsburgh*, 46 Pa. St. 221, the court, after a thorough examination of the authorities, both English and American, say the law is well settled both in England and this country, that a municipal corporation is not liable for the negligence or unskillfulness of its contractors, and the rule is established in *Kelly* v. *The Mayor, etc., of New York*, 1 Kern. 435; *Hovey* v. *Mayo*,

43 Maine, 334; 32 N. Y. 495; *Wilson* v. *The Mayor of New York*, 1 Denio, 595; *Child* v. *City of Boston*, 4 Allen, 51.

But if the proposition, that where the work is done by a contractor, the city is not liable, is not correct, still, in this case, the city cannot be held responsible.

The city was in the exercise of its powers for a purely public purpose, for a governmental purpose, and as a part of the government, and in the exercise of such powers it enjoys the exemption of government from responsibility for its own acts and the acts of its officers deriving their authority from the sovereign power. *Vincent* v. *Sharp*, 9 La. An. 462; 17 Mo. 128; *The Mayor, etc., of Baltimore* v. *Root*, 8 Ind. 102; *Hawthorn* v. *City of St. Louis*, 11 Mo. 59; *Mills* v. *The City of Brooklyn*, 32 N. Y. 489; *Wilson* v. *The Mayor, etc., of New York*, 1 Denio, 596; *City of St. Louis* v. *Gurno*, 12 Mo. 418; *Mayor of Philadelphia* v. *Randolph*, 4 Watts & Serg. 514; *Greer* v. *The Borough of Reading*, 9 Watts, 382; *The City of Vincennes* v. *Richards*, 23 Ind. 381; *Macy* v. *The City of Indianapolis*, 17 id. 268; *Snyder* v. *The President, etc., of Rockport*, 6 id. 237; *City of Lafayette* v. *Spencer*, 14 id. 389; 16 id. 441; 4 Green (Iowa), 47; *Radcliffe's Executors* v. *The Mayor and Common Council of Brooklyn*, 4 Comst. 196.

Mr. JUSTICE LAWRENCE delivered the opinion of the Court:

In 1861, the city of Peoria caused the grade of a part of Main street, running along the bluff, to be raised, and some other work to be done, for the purpose of directing the flow of water from the west side of Main street, which was its natural channel, to the east side, and through a new channel to the river, thus improving its drainage. The appellant had, at that time, a water-cure establishment in operation on the east side of this part of Main street, and he claims that the work undertaken by the city was badly and carelessly done and never completed, and that, in consequence thereof, his house and grounds were flooded at every considerable rain with mud and water, and that a stagnant pond, covering from one to two

acres, was formed within a short distance from his house, rendering it unhealthy, and ruining his business. To precisely what extent the proof shows the plaintiff to have been injured, or on what basis his damages should be assessed, if assessed at all, are questions which have not been discussed by counsel, nor considered by the court. They are immaterial on the present record. On the trial of this cause, which was an action on the case brought against the city for these alleged injuries, the court refused all the instructions asked by the plaintiff, and gave all those asked by the defendant, and the jury found a verdict of not guilty. The plaintiff's instructions are based upon the theory, that if the city, by want of proper care, skill or diligence, has done him an injury in grading its streets, it must respond in damages. The defendant's instructions assume that the city is not liable for any injury done to individual property-holders by grading the streets, even though the injury could have been avoided by the use of proper care in the construction of culverts, gutters, and other means for controlling the flow of water. One of these instructions was as follows:

"7th. If the water, by reason of the grade of a street being raised, overflows individual premises, the city would not be liable for damages on account of such overflow, or because a pond of water was formed upon the premises."

This instruction places individual property, so far as relates to the grading or drainage of streets, at the mercy of municipal power. It embodies a doctrine not without the color of authority in adjudged cases, but one to which we can never subscribe. That a city has absolute control over the grade of its streets, that it can make the grade light or heavy, that it can elevate or lower it at pleasure, and that the owners of adjacent lots cannot call it to account for errors of judgment in these respects, or demand damages because they may incur inconvenience or expense in adjusting the level of their own premises to that of the street, for the purpose of ingress and egress, are propositions not to be denied. The city is the owner of the streets, and the legislature has given it power to

grade them. But it has no more power over them than a private individual has over his own land, and it cannot, under the specious plea of public convenience, be permitted to exercise that dominion to the injury of another's property in a mode that would render a private individual responsible in damages, without being responsible itself. Neither State nor municipal government can take private property for public use without due compensation, and this benign provision of our Constitution is to be applied by the courts whenever the property of the citizen is invaded, and without reference to the degree. We can solve more easily and safely questions of this character if we take pains to free our minds from the false notion that a municipality has some indefinable element of sovereign power which takes from the property of the citizen, as against its aggressions, the protection enjoyed against the aggressions of a natural person. Let us see then what are the rights of co-terminous land owners as against each other.

A man cannot do any thing upon his own soil, under the plea of ownership, which amounts to a nuisance and works injury to his neighbor, but within that limit he may do whatever his whim may dictate. He may excavate to any depth, or raise the surface to any height, and the neighboring owner has no right to complain, because his enjoyment of his own lot is not thereby prejudiced. Even if a building erected by me near the boundary of my lot is injured or endangered by an excavation made by my neighbor in his premises, I cannot complain, because I have no right to the use of his soil for the support of my building. Whether he has a right to excavate in such manner as to cause the soil itself to fall from my lot into his, is a question upon which the authorities are not agreed. Comyn's Dig. Action on the case for nuisance, C; 2 Rolle's Ab. Trespass I, pl. 1; *Partridge* v. *Scott*, 3 Mees. & W. 220; *Peyton* v. *Mayor, etc., of London*, 9 B. & C. 725; *Thurston* v. *Hancock*, 12 Mass. 220; *Wyatt* v. *Harrison*, 3 B. & Ad. 871; *Lasaba* v. *Holbrook*, 4 Paige, 169; *Radcliffe* v. *The Mayor, etc.*, 4 Comst. 196.

This rule arises from the principle, that one may do what he

thinks proper with his own land, and I have no right to build my house in such a situation as to require the land of my neighbor for its support.

The same rule applies to corporations. A city owns the streets for the use of the public, and has the right to grade them in any manner the representatives of the public may deem conducive to its interests. It is not liable for errors of judgment, and if in the process of grading it leaves private property many feet below or many feet above the surface of the street, it is free from all claim for damages on this account, for precisely the same reason that a private person is exempt under similar circumstances.

But suppose my neighbor, in excavating or elevating his lot, turns a stream of water which passes through his ground, so as to cause it to pass through mine. Here the law gives me an action, for, by means of this stream, he has virtually entered upon my premises and deprived me, to that extent, of their use. The difference between this and the other case is palpable. In that case my possession and enjoyment of my lot were not disturbed, except through my own folly in building my house when it would require my neighbor's soil to support it. But in this instance I am prejudiced in the enjoyment of my lot in its natural condition and without any agency of my own. This enjoyment the law secures to me. My neighbor has no more right to send a stream of water through my premises, than he has to come upon them in person and dig a ditch, or deposit upon them a mound of earth. 3 Kent's Com. p. 440. But the law goes further than this. My neighbor has not the right to excavate his soil in such manner as to create a stagnant and offensive pond, so near my premises as to be a private nuisance by rendering my house unhealthy. He cannot use his property for a purpose that will prevent my enjoyment of mine. 3 Blackst. Com. 217.

The same law that protects my right of property against invasion by private individuals, must protect it from similar aggression on the part of municipal corporations. A city may elevate or depress its streets, as it thinks proper, but if, in so

doing, it turns a stream of mud and water upon the grounds and into the cellars of one of its citizens, or creates in his neighborhood a stagnant pond that brings disease upon his household, upon what ground of reason can it be insisted, that the city should be excused from paying for the injuries it has directly wrought?

It is said that the city must grade streets and direct the flow of waters as best as it can for the interests of the public. Undoubtedly, but if the public interest requires that the lot of an individual shall be rendered unfit for occupancy, either wholly or in part, in this process of grading or drainage, why should not the public pay for it to the extent to which it deprives the owner of its legitimate use? Why does not the constitutional provision apply as well to secure the payment for property partially taken for the use or convenience of a street, as when wholly taken and converted into a street? Surely the question of the degree to which the property is taken can make no difference in the application of the principle. To the extent to which the owner is deprived of its legitimate use and as its value is impaired, to that extent he should be paid.

There is much conflict of authority upon this question, and those courts which have taken a view different from our own, rest their conclusions in part upon the doctrine of public necessity, and the importance of preserving unimpaired, for purposes of public improvement, the efficiency of municipal corporations. In our opinion, the theory that private rights are ever to be sacrificed to public convenience or necessity, without full compensation, is fraught with danger, and should find no lodgment in American jurisprudence. To prevent this was the object of some of the most important of our constitutional guaranties. The property of the majority who control the government is in no peril; it is that of a feeble minority which is in danger, and whenever that is sought to be taken in a time of peace, under pretense of public necessity or convenience, the owner must find protection in the courts, or our institutions have failed of their great purpose — the complete

security of private rights. It is undoubtedly important, as urged in the argument, that our cities should improve rapidly, and be able to carry onward large systems of drainage and grading, but, in the attainment of these ends, they cannot be permitted to sacrifice the property of the humblest citizen without compensation. Neither is it true that the rule we lay down will interfere with the growth of cities, as the expense of grading is not very largely increased by the construction of proper gutters and culverts for the flow of water.

The strongest case cited in behalf of the city is *Wilson* v. *The Mayor, etc., of New York*, 1 Denio, 597. The same question was presented by that case as by the present, and the court held the action would not lie. The ground of the decision was, that, in raising the grade, the city was only exercising a legal power given it by the legislature over the streets, and would not, therefore, be responsible for resulting damages to individuals, which would fall under that most unsatifactory of all legal phrases, *damnum absque injuria*. With great respect for that court we must be permitted to say, the reasoning seems to us very inconclusive. Undoubtedly, a city has power to grade its streets, but the mode in which the power is to be exercised, in reference to the rights of others in the enjoyment of their property, is limited in the same way, and to the same extent as the power of a private person in the use of his property, unless the city calls to its aid the right of eminent domain, and if it does that, the right is to be exercised on the making of compensation as required by the Constitution. This case in 1 Denio was quoted approvingly by the court in *Mills* v. *The City of Brooklyn*, 32 N. Y. 489, although in the latter case the question was merely as to the obligation of the city to furnish drainage for water collecting on a lot from the natural conformation of the ground — a question wholly different from the one at bar. But even in New York the courts go far to obviate the practical harshness of this principle, by requiring a city, in making its improvements, to use great care, and adopt all reasonable methods to prevent injury to private property. Thus, in the *Rochester White Lead Co.* v. *The City of*

Rochester, 3 Comst. 468, the city was held liable for injuries done by the overflow of water in consequence of the insufficient size of a culvert. The court say, quoting the language of NELSON, Ch. J., in *Furze* v. *The Mayor, etc., of New York*, 3 Hill, 612, "if we concede that the exercise of the power was in the first instance optional on the part of the corporation, yet, having elected to act under it, they must be held responsible for a complete and perfect execution." So, in *Lecour* v. *The City of New York*, 3 Duer, 417, the city, in grading Thirtieth street, turned the flow of the water from Third avenue to Second avenue, in such manner that it collected against the plaintiff's building and undermined his wall. The court held the city liable, and say, "the defendants derive no exemption from responsibility for the manner in which they have carried out the improvement or grading of Second avenue and Thirtieth street, by reason of their possessing, in respect to the improvement itself, a discretionary or judicial power; such discretion ceased to act as a shield of protection, when it reached its own limit, which was at the passage of the ordinance for the improvement; all, after that, was ministerial, and the only question is whether they have so negligently performed the latter duty as to work an injury to the plaintiff's premises."

So in the *Mayor, etc., of New York* v. *Bailey*, 2 Denio, 445, Chancellor WALWORTH, in voting in the Court of Errors to affirm the judgment of the court below, said he did so "on the ground that the dam was the property of the corporation, and that such corporation was legally bound to see that its corporate property was not used by any one so as to become noxious to the occupiers of property on the river below." The action was for injuries resulting from the breaking of a dam constructed by the city, across the Croton river.

In *Stetson* v. *Faxon*, 19 Pick. 158, a case itself turning upon a different point, the Supreme Court of Massachusetts cite in terms of marked approbation the opinion of the court in *Baron* v. *The Mayor and City Council of Baltimore*, as reported in 2 Am. Jur. 203. The plaintiff in this case owned a wharf in the

harbor of Baltimore, and the city directed a stream of water from its natural channel to a point near the wharf, which caused a deposit of sand and injured the value of the wharf by diminishing the depth of water. It was contended by the city that it was a public corporation, acting within the scope of its authority, and with care and circumspection. The Supreme Court of Massachusetts speak of the opinion of ARCHER, Ch. J., as "very clear and able," and say that it "proceeds upon the ground that it was a measure which was necessary and beneficial to the city, but it was held they should not carry it into effect without compensating the individuals whose property was thereby sacrificed. The defendants, said the chief justice, are trustees for the public interests for their own benefit, and ought to answer as an individual to the person at whose expense they are benefited.

The case of *Rhodes* v. *The City of Cleveland*, 10 Ohio, 159, was, like the case at bar, a suit brought against the city for cutting ditches in such a manner as to overflow the plaintiff's land. The ordinary defense was made, that the city was only exercising its lawful powers. The court held that the action was well brought, saying, "if an individual, exercising his lawful powers, commit an injury, the action on the case is a familiar remedy; if corporations, acting within the scope of their authority, should work wrong to another, the same principle of ethics demands of them to repair it, and no reason occurs to the court why the same remedy should not be applied to compel justice from them." In the subsequent case of *McComb* v. *The Town of Akron*, 16 Ohio, 475, the same court went still further, and held the corporation liable to the owner of a lot, for the injury to the lot, arising from lowering the grade of the street, the injury consisting merely in the fact that the lot was left too far above the grade of the street. We do not perceive how this decision can be sustained, as a private individual would not be liable for an injury of that character. There was a dissenting opinion in that case, in which the dissenting judge indorsed the case in 10th Ohio. This question again came before that court in *Crawford* v. *Village of Dela-*

ware, 7 Ohio St. 470, and it was held, that, if erections are made on a lot in accordance with an established grade, and the grade is afterward altered, and the owner of the building is thereby injured by having his property made difficult of access, he would be entitled to compensation, though a different rule would apply to unimproved lots.

Other authorities have been cited by counsel which it is not necessary to quote. It must be admitted that the rule laid down by the courts of New York has been quite generally adopted. Thus the cases divide themselves into two classes, one, and the larger class, holding that a city is only held to reasonable care and skill in grading its streets, and that if these are used, it can shield itself under its corporate powers from liability to individuals, the other holding that a city in the management of corporate property must be held to the same responsibilities that attach to individuals for injury to the property of others. We cannot doubt that the latter is the sounder rule. We are unable to see why the property of an individual should be sacrificed for the public convenience without compensation. We do not think it sufficient to call it *damnum absque injuria*. We know our Constitution was designed to prevent these wrongs. We are of opinion, that, for injuries done to the property of the appellant in the case before us, by turning a stream of mud and water upon his premises, or by creating in the immediate neighborhood of his dwelling an offensive and unwholesome pond, if the jury find these things to have been done, the city of Peoria must respond in damages.

It is also urged by the appellee that the liability, if there is any, attached to the contractor and not to the city. The rule of *respondeat superior* is simple in itself, but sometimes difficult of application, where there are intermediate contractors, from the doubt as to which person is to be considered as the master in the given case. Where a city has work done by contract, and a servant of the contractor does something not authorized by the city, such as improperly leaving open a drain at night, the city would not be liable even though by the terms of the

contract a general supervision is retained over the work. This is substantially the principle laid down in the cases cited by the appellee's counsel. But if on the other hand the acts which caused the injury were done under and in consequence of the direction of the city, then the city is to be regarded as the superior, and responsible as such, although it does the work by contract. Hence, the 8th instruction asked for the plaintiff should have been given. It was as follows:

"8. That if it appears that defendant let out the job of filling up Main street to other persons, at so much per yard, the soil to be furnished by defendant, and the grading to be done under supervision of the defendant's engineer, and if said engineer went upon the ground with such other persons, and pointed out to them where to take the soil from and where to put it, and such persons did the work as directed by such engineer, then the law is, that the relation of master and servant existed between defendant and said engineer, and other persons doing the work, and the defendant is liable in all respects, the same as if it had done the work by men employed in any other way."

The judgment must be reversed and the cause is remanded

Judgment reversed.

SARAH POLLOCK *et al.*

v.

PETER MAISON *et al.*

1. PRACTICE — *source of title in ejectment.* In an action of ejectment for the recovery of mortgaged premises against the widow and heir of the mortgagor, the plaintiff need not trace title back of the common source, and it cannot matter whether an affidavit of the loss of a deed, in the chain prior to the mortgage, is sufficient or not, as the deed itself is not material in showing a right of recovery.

2. MORTGAGE — *ejectment on, after the debt is barred.* At common law, after twenty years had elapsed from the maturity of the debt, without possession

Statement of the case.

taken, payment made, suit brought, or some other act recognizing the debt as still subsisting, a payment of the debt was presumed and a foreclosure defeated both at law and in equity. And this too, although specialty debts were not within the act of the 21st of James I, by analogy to the statute of limitations.

3. SAME — *incident to the debt.* The mortgage is an incident to the debt, and but a security, but it confers the right to reduce the premises to possession as a means of obtaining satisfaction of the debt; and, to render the right effective, ejectment may be maintained against the mortgagor at any time that a recovery may be had on the debt.

4. SAME — *entry after breach until barred.* After breach, the mortgagee may enter, until the entry is tolled by the statute of limitations, as in other cases, and equity follows the law. Limitation laws toll the entry or bar the action.

5. THE DEBT — *when barred — the effect.* The mortgage debt is barred, under our statute, in sixteen years; and when it is barred, the entry is barred, and the right to foreclose is gone. When the debt — the principal thing — is gone, the incident — the mortgage — is also gone, and then a foreclosure cannot be had in any of the various modes. If a bar of the incident operates to bar the principal, a bar of the latter must bar the former. A judgment or decree in bar of the debt, bars every mode of foreclosure. The mortgagee may resort to any of the various modes of foreclosure so long as his debt is capable of being enforced but no longer.

WRIT OF ERROR to the Circuit Court of Whitesides county; the Hon. IRA O. WILKINSON, Judge, presiding.

This was an action of ejectment, brought by Peter Maison and Augusta Maison, in the Circuit Court of Whitesides county, to the October Term, 1861, against Sarah Pollock and Peter Pollock, for the recovery of lots 25 and 26 in block 2, and lots 1 and 2 in block 5, in the town of Conie, in Whitesides county. Defendants filed a plea of not guilty, and a trial was had at the May Term, 1862, resulting in favor of plaintiffs. Defendants obtained a new trial under the statute. At the January Term, 1863, the cause was again tried by the court, a jury having been waived by the parties.

On the trial below, plaintiff introduced in evidence a copy of a patent from the United States Government to Wm. Pollock, George C. Wilson and Winfield Wilkinson, for a tract of land embracing the lots in controversy. Next, a deed from Wilkinson and Wilson to Pollock, for these premises. Two notes, executed by Wm. Pollock to Peter Maison, dated Febru-

ary 17 and 19, 1841, due in twelve months from date. A mortgage on the lots in controversy, executed by Wm. Pollock, and Sarah, his wife, to secure the payment of the notes.

Next, a deed for these premises, from Peter Maison and wife to George Campbell, and a deed from the latter to Augusta Maison, the wife of Peter Maison.

It appeared that William Pollock had died some two or three years before the suit was brought, and that Sarah Pollock was his widow and Peter his son, and that they were in possession. Defendants insisted that the note being barred by the statute of limitations a recovery under the mortgage was barred, and that plaintiff could not recover. The issue was found for the plaintiffs, and a judgment was rendered in their favor. The record of the case in the court below is brought to this court on writ of error and a reversal is asked, because the action of ejectment was barred when the suit was brought.

Messrs. JOHNSON & TELLER, for the plaintiffs in error.

Mr. E. A. STORRS and Mr. JOHN V. EUSTACE, for the defendants in error.

Mr. CHIEF JUSTICE WALKER delivered the opinion of the Court:

In this case, both parties derive title from the same source. Sarah Pollock as widow, and Peter as the only heir, of William Pollock, and the defendants in error as the assignees of a mortgage executed by William Pollock in his life-time. It was, therefore, unnecessary to a recovery that defendants in error should trace title back of William Pollock, from whom plaintiffs in error claim title. It was immaterial whether they read the patent from the general government to the original purchaser, or the deed from the patentee to Pollock for the land. When they exhibited a title derived from the common source, that was sufficient to warrant a recovery against plaintiffs in error, unless they overcame it by a better title, or by a paramount outstanding title, with which they were connected.

It is, therefore, unnecessary to inquire whether the affidavit was sufficient to authorize the introduction of the copy of the deed to Pollock from the patentee, in evidence.

The principal question in the case is, whether ejectment may be maintained by a mortgagee, after the debt to secure which it was given is barred by the statute of limitations. Under the common law as announced by the courts of Great Britain, as well as of the various States of the Union, the failure of the mortgagee to make an entry, to receive interest on the debt, or in some other mode to procure a recognition of the validity of his debt, within twenty years, a payment will be presumed, and a foreclosure defeated, both at law and in equity. Specialty debts and contracts for the payment of money were not embraced in the act of 21 James the first; and as mortgages executed in that country usually contained a covenant for the payment of the mortgage debt, the mortgage, and the bond to secure which it was given were held to be without statutory bar. But upon principle, and the analogies of the common law, the debt was presumed to have been paid or otherwise discharged, if no payment was made on the debt, or possession of the mortgage premises was not taken, or some other act done by which it appeared the parties recognized the debt as subsisting, within twenty years after its maturity. The mortgagee under such a mortgage had a right to maintain an action for the recovery of the money on the covenant in his mortgage, or to bring ejectment and be admitted to the possession of the mortgaged premises and the perception of the rents and profits until he had satisfaction of his debt.

Chief Justice KENT, in his Commentaries, vol. 4, p. 189, lays down the rule, that the mortgagee may be barred by the lapse of time; and if the mortgagor has been permitted to possess and enjoy the estate without account and payment of principal or interest, or claim for a given period, which is usually twenty years, the mortgage debt is presumed to be extinguished. He further says: "The period of twenty years is taken, by analogy to the period of limitation at law, for tolling the entry of the true owner." This doctrine runs through the British and

American adjudged cases, in both the courts of law and equity. *Hillary* v. *Wallace*, 12 Ves. 239; *Cook* v. *Lattan*, 2 Sim. & Stu. 154; *Wilson* v. *Withesley*, Bull. N. P. 110; *Hughes* v. *Edwards*, 9 Wheat. 489; *Giles* v. *Baremore*, 5 Johns. Ch. 545. Other cases announcing the same rule might be cited, but it is not deemed necessary. The cases proceed upon the principle, that, while the mortgage is an incident of the debt — only a security for the money — yet by it, a right to recover the possession of the premises, as a means of satisfaction, is conferred by the mortgage, and to enforce that right, ejectment may be maintained as long as a recovery may be had by action on the debt.

The authorities all concur in holding that the mortgagee may make entry after condition broken, and some of them even hold that he may enter on the execution of the mortgage, and before there is any breach. Also, that the right of entry is tolled by the statute of limitations, as in other cases. And courts of equity follow the law, in regard to such a bar, and hold, that, by analogy, when the right of entry under the mortgage is barred, the right to foreclose is usually also gone, upon the presumption that the debt has been discharged. And bonds and other sealed instruments for the payment of money, under the English decisions, were governed by the same presumption, after such a lapse of time after maturity. If we were then to adopt the rule, that, where the entry is tolled, the foreclosure is barred, it might be, that, under the limitation laws of 1835 and 1839, barring the entry in seven years, the foreclosure or entry would be barred in that time instead of twenty years.

The object and effect of all limitations of real actions is to toll the entry or bar the action. And this is true, whether the entry is barred in seven or in twenty years. But, under our legislation, the effect would be very different on the security for the debt. In sixteen years the debt is barred; hence, to hold, that the entry is taken away after that time, could produce no injury to the creditor; but to hold the entry was barred, and the right to foreclose was gone in seven years, would be to deprive him of the security of his debt nine years

before it would be barred. But to hold, that, when the debt is barred, then the entry is barred, and the right to foreclose is gone, is only in analogy to the British and American rule, that, when the presumption is raised, that the debt is extinguished, the entry will be tolled.

In the case of *Whitney* v. *French*, 25 Vermt. 663, the British rule was applied. It was there *held*, that, when the right of entry is gone, in fifteen years under their statute, a foreclosure by bill is also barred. The court say: "The presumption of payment of a mortgage becomes absolute, after the lapse of fifteen years, if there is no entry, or payment of interest; and is conclusive unless refuted by distinct proof." If because the entry under the mortgage as one of the modes of foreclosing or obtaining satisfaction may be held to bar the other modes of foreclosing, it is manifestly more reasonable to hold that where the debt, the principal thing, is gone, the incident, the mortgage, is gone also, and that a foreclosure in any mode cannot then be had, either by ejectment, *scire facias*, bill in equity or otherwise. If a bar of the incident should bar the principal, then much more should a bar of the debt, be a bar to its incident. A payment, release or discharge of the debt, extinguishes the mortgage. If a judgment or decree in bar of the debt, were rendered in favor of the mortgagor, no one would for one moment hesitate to say that it might be interposed as a complete bar to a foreclosure in any of the various modes which may be adopted. Then why not permit the bar that would defeat a recovery on the debt, be interposed, to defeat a foreclosure. It was so *held*, in the case of *Harris* v. *Mills*, 28 Ill. 44, and we think the rule is sustained by the analogies of the law, and is consistent with the spirit of our statutes of limitation, and is not opposed to the principles of justice. While, therefore, an action of ejectment may be maintained, or a bill exhibited, or a judgment recovered by *scire facias* on the mortgage, at any time before the statute has barred the debt, when that has occurred, we believe that the bar may be successfully interposed in either proceeding on the mortgage.

In this case the mortgage debt had been due for nineteen

years, wanting but a few days. And there is no evidence that any payment had been made, either on the principal or interest, or any promise or agreement to pay the same, within sixteen years previous to the institution of this suit; nor is there any pretense that there had been an entry by the mortgagee within that period. The notes were barred by the statute at the expiration of sixteen years after their maturity. And the bar to the debt having become complete, plaintiffs in error had a right to interpose that bar to prevent a recovery in ejectment on the mortgage. If the mortgage had contained a covenant for the payment of the debt, a different question might have been presented, but we deem it unnecessary to discuss it in this case.

The judgment of the court below is reversed and the cause remanded.

Judgment reversed.

JOHN HARBISON
v.
RICHARD HOUGHTON.

1. MORTGAGE — *what constitutes.* After a decree of foreclosure of a mortgage given to secure a loan of money, and a sale thereunder at which the mortgagee became the purchaser, the latter waived the payment of the money in redemption from the sale, and, before the time of redemption expired, under an understanding with the mortgagor to extend the time for the payment of the money, and to still hold the land as security, the mortgagee took a quitclaim deed therefor from the mortgagor, and gave him a bond for a reconveyance upon the payment at a certain time, beyond the statutory time for redemption, of a sum which was made up of the amount found due by the decree of foreclosure, with a heavy usurious interest, the bond providing that the time of payment of the money should be of the essence of that contract. *Held*, that the quitclaim deed and bond for reconveyance constituted a new mortgage, and not a sale and resale.

2. SAME — *effect of the new arrangement upon the rights of the mortgagee as a purchaser under the foreclosure* The arrangement by which the mortgagee took the quitclaim deed from the mortgagor, and gave him back his bond for a reconveyance, canceled the certificate of purchase which the former had received at the sale on the decree of foreclosure, his equitable title obtained

thereby being merged in the legal title acquired by the deed, and he had then no right to a deed from the master, under the foreclosure.

3. SAME — *right of redemption of the mortgagor.* The mortgagee having obtained a deed from the master under the sale on foreclosure, after the statutory time for redemption therefrom had expired, notwithstanding the new arrangement, he commenced his action of ejectment against the mortgagor, to recover the premises; and on bill filed by the latter to enjoin that suit, and to redeem, although the terms of payment as prescribed in the bond for reconveyance had not been complied with, it was *held*, as the new transaction was a mortgage, and the mortgagee having rescinded that agreement, the mortgagor had a right to redeem by paying what was equitably due.

4. SAME — *what amount should be paid on such redemption — of the usury.* The amount to be paid on such redemption, should be the amount of the decree on foreclosure with six per cent interest and costs, the usury which was reserved in the new arrangement being deducted.

5. INJUNCTION — *when it should be made perpetual.* When an injunction is granted to restrain the prosecution of an action of ejectment, upon the ground that the transaction out of which the plaintiff in the action derives title, was a mortgage, from which the defendant in the ejectment seeks in his bill to redeem, if the right of redemption is established, the injunction should be made perpetual, and it is error if the decree does not so direct.

WRIT OF ERROR to the Circuit Court of Tazewell county; the Hon. JAMES HARRIOTT, Judge, presiding.

A statement of the case will be found in the opinion of the court.

Mr. H. M. WEAD and Messrs. COHRS & IRELAND, for the plaintiff in error.

Mr. B. S. PRETTYMAN, for the defendant in error.

Mr. JUSTICE BREESE delivered the opinion of the Court:

Houghton brought an action of ejectment against Harbison, in the Tazewell Circuit Court, to recover the possession of certain premises then in the occupancy of Harbison, who filed a bill in chancery to enjoin proceedings in that suit, and prayed that he might be allowed to redeem the premises, and that Houghton be required to convey them to him, Harbison.

It appears from the bill and answer, proofs and exhibits, that Harbison had borrowed two sums of money of Houghton,

one of $800, and the other of $900, for which he had executed his notes on time, and also separate mortgages on the premises in dispute, which were the homestead of Harbison, who was the head of a family and residing thereon, without releasing the homestead. In the bill of complaint, it is alleged this money was loaned at usurious interest.

These moneys not being paid when due, Houghton, at the September Term, 1860, of the Tazewell Circuit Court, exhibited his bill in chancery to foreclose these mortgages, and on the tenth of that month, a decree of foreclosure, upon both mortgages, duly passed for the sum of $2,104.20, and it was decreed if this amount was not paid in ten days, the premises should be sold by the master in chancery. The ten days having elapsed, and the money not paid, the master in chancery, on the 30th of October thereafter, sold the premises to Houghton, he having bid therefor, the sum of $2,711.51, an amount in excess of the decree including costs and interest. The time of redemption would expire on the 29th of October, 1861.

Prior to this time, and on the 1st of July, 1861, Harbison informed Houghton of an arrangement he could make with one Ira Davenport, by which he could get the money with which to redeem the land, whereupon it is alleged, Houghton told Harbison he did not wish the premises redeemed, and did not wish the money, but only that the premises might remain as security for the same and interest thereon, and Harbison alleges, that Houghton proposed for that purpose that he, Harbison and wife, should execute to him a quitclaim deed for the premises, and take back an agreement for a reconveyance, which was done, no release of the homestead being made. The bond or writing for a reconveyance by Houghton, was in substance, that he, Houghton, agreed to sell Harbison the premises for $4,989.45, to be paid in installments (time and amount of installments particularly named) secured by notes for those amounts, to draw ten per cent interest per annum from maturity of each payment, payable annually, on the 30th of October of each year, on the whole sum from time to time remaining unpaid, and containing a provision that time was of the essence

of the condition, and also a provision that the bond should be forfeited upon the non-payment of any installment, and that Houghton might repossess and distrain for the amount unpaid as for rent, and that upon compliance by Harbison, Houghton and wife were to reconvey the premises to Harbison by a deed of quitclaim. This bond was dated July 1, 1861, and was executed simultaneously with the quitclaim deed from Harbison and wife to Houghton.

Harbison having suffered the time for redemption from the sale under the foreclosure decree to pass, Houghton took from the master in chancery, who sold the premises, a deed therefor, without the knowledge of Harbison, and without having paid the excess of his bid over and above the amount of the decree, and thereupon notified Harbison to leave the premises, and brought this action of ejectment to recover the possession, and refused Harbison the privilege of redeeming. Harbison alleges, that he tendered Houghton, on the 12th of November, 1863, the sum of $2,828.05, as the amount due him, with interest, on the foreclosure decree.

Houghton, in his answer, denies the tender — denies usury and denies that the quitclaim deed from Harbison to him and his bond to Harbison amounted to a mortgage — admits he refused to allow Harbison the right to redeem — alleges that the excess of his bid at the sale was paid to Harbison in his, Harbison's, notes, which were then given up to him.

Both parties were examined as witnesses in the cause. Houghton testified, that he bid off the premises at the sale, under the decree of foreclosure, for $2,711.51, and received a certificate of purchase; that the difference between his bid and the amount of the decree, with the interest and costs, was paid in notes held by him against Harbison; cannot tell the amount of the notes; never let Harbison have any moneys besides those mentioned in the two mortgages, except forty dollars, of which Harbison refunded seventeen dollars; let Harbison have some money when the quitclaim deed was made; can't tell within one hundred dollars how much; there were other transactions between them, had paid money that Harbison ought

to have paid, taxes and something else, can't tell what; thinks he paid debts due by Harbison, but can't tell amount or to whom; never let Harbison have any other money for the deed, except the loaned money secured by the two mortgages, except as stated; thinks he has paid taxes twice; paid costs of foreclosure; the consideration mentioned in the deed shows the whole amount paid, including advances; cannot tell how the interest was reckoned, the consideration in the deed shows the whole amount; when the sale was made, he let Harbison have his notes to make up the excess of his bid.

Harbison testified: At time of making quitclaim deed to Houghton, no consideration was paid; consideration was payments mentioned in the bond for deed, which were to run a number of years; never received any consideration for the deed, either before or since, except the $1,700 borrowed money secured by the two mortgages, and interest thereon, and costs of foreclosure; Houghton never paid any money for excess of bid at sale, over amount of decree and interest and costs; he had notes which I had given him for arrears of interest on the loaned money, and they were turned in for the excess; the interest on the mortgage notes was fifteen per cent, compounded every six months, and excess was paid in those notes, except one year's taxes paid by Houghton, and costs of foreclosure; can't recollect Houghton ever giving up the notes; amount specified in agreement for reconveyance was made up of amount of sale, and fifteen per cent interest upon the amount was added into the face of the notes, compounding the interest every six months at that rate, and then drawing ten per cent interest after maturity, and was so done to evade the usury laws; the interest was calculated upon that basis. Business was done at Delavan, Tazewell county, Illinois.

This being the material evidence in the cause, the Court pronounced the following decree:

That the sale made under said decree of foreclosure, and the deed made to Houghton by the master in chancery, dated January 14, 1862, under said decree, and the quitclaim deed, and the agreement for reconveyance, dated July 1, 1862, for

said premises, and the notes executed simultaneously therewith by Harbison to Houghton, be each and all set aside and held for naught; and that complainant pay to defendant the sum of $2,711.51, with interest thereon at the rate of ten per cent from October 30, 1860, and $161.07 taxes, and one-half the costs of this proceeding, within thirty days from the filing of this decree; and that in default thereof the master in chancery cause to be summoned six qualified jurors to appraise, upon oath, said premises, and if, in their opinion, the same can be divided without prejudice to the interests of the parties, they shall set off so much of said premises, including the dwelling-house, as they think shall be worth $1,000, as a homestead under the statute, and the residue of the premises, the master, after advertising, etc., shall proceed to sell, or so much as may be necessary to raise the sums aforesaid, with the interest aforesaid thereon, and the taxes aforesaid and interest thereon, and one-half the cost of this proceeding. And, should the jury report to the said master that they cannot divide said premises without injury to the interests of the parties, then defendant shall pay the plaintiff $1,000 in lieu of homestead, and the said master shall sell the whole of said premises, or so much thereof as may be necessary to raise said money, and out of the proceeds pay to said defendant said sum of $1,000, and of the residue so much as may be required to pay defendant said $2,711.51, and interest, and taxes, and one-half the costs as aforesaid — the sale to be for cash — and give certificate of purchase to the purchaser, and that defendant pay one-half the costs in this case.

From this decree Harbison prosecutes this writ of error, and assigns the following as errors:

The court erred in not granting the relief prayed for in the bill; in not deducting the illegal interest proved to have been contained in the bill; in rendering a decree for too great a sum in favor of complainant; in ordering the homestead right to be set off in the way and manner specified in the decree; in not making the injunction of the ejectment perpetual; in allowing $161.07 taxes as paid by Houghton, without proof; in render-

ing a decree for the amount bid at the former sale, instead of ordering the land to be sold to satisfy the former decree; in ordering payment of the decree in thirty days, with ten per cent interest from the day of the former sale; in ordering complainant to pay one-half the costs; in allowing usurious interest contrary to the statute and the proof; in rendering a decree for complainant.

It is not our purpose to notice all these errors in detail, but to state briefly the view we have taken of the whole case on the proofs; but, in the outset, we cannot but express our surprise that a loan of $1,700 in 1859, at ten per cent per annum interest, should amount, on the 1st of July, 1861 — being the day on which Harbison and wife executed the quitclaim deed to Houghton, and received back the bond of Houghton conditioned to reconvey on the payment of four thousand nine hundred and eighty-nine dollars and forty-five cents ($4,989 $\frac{45}{100}$) — could amount to that sum without usurious interest being exacted, and that compounded, as Harbison states in his testimony was done, and charged against him by Houghton. In no other way could the debt have increased so fast; as it is clearly proved no other money was loaned to Harbison, except the sum of $1,700 at ten per cent interest, payable annually. Houghton, in his testimony, does not give any satisfactory explanation of the matter, or seem to know, or was unwilling to state the real facts. We think there can be no other reasonable solution of it, than by holding that usurious interest was exacted, as stated by Harbison in his testimony.

We deem the fact of usury well established by Harbison's testimony, and by all the strong facts of the case. The court, in its decree, should have found the extent of the usury, and made deduction accordingly. For not doing so, the decree in this respect was erroneous. It is also erroneous in this, that the court allowed Houghton $161 for taxes, without any proof, that we can discover, that he had paid that amount, or any amount, a fact so easy of proof, that not being proved is a fair presumption that he did not pay them.

The first important consideration is, what was the effect of

the quitclaim deed of Harbison and the bond of Houghton to reconvey? Houghton insists, they do not amount to a mortgage. This court has decided they do, and that is the doctrine of this court now. *Delahay* v. *McConnell*, 4 Scam. 157; *Coates* v. *Woodworth*, 13 Ill. 654; *Miller* v. *Thomas*, 14 id. 428; *Tillson* v. *Moulton*, 23 id. 648. And once a mortgage always a mortgage. This being so, the court should have allowed Harbison to redeem by paying the amount due on the decree of September, 1860, with interest at six per cent. The arrangement by which Houghton took the quitclaim deed from Harbison, and gave him back his bond, canceled the certificate of sale under the decree, and he had no right to receive the deed from the master. His equitable title obtained by this purchase merged, in the arrangement made, in the legal title acquired by the deed from Harbison. The transaction thus amounted to a new mortgage; and, Houghton having rescinded the agreement, Harbison has a right to redeem by paying what is equitably due, and that is, the amount of the decree on foreclosure with six per cent interest and costs. If the premises are not redeemed by Harbison in twenty days from the time of filing this opinion, then the master in chancery of Tazewell county will sell the premises in pursuance of the statute.

The court further erred, in not making the injunction perpetual. For the reasons given, the decree must be reversed.

Decree reversed.

INDEX.

ABATEMENT.

PLEA IN ABATEMENT.

1. *Requisites of the affidavit in support thereof.* It is not essential that the affidavit in support of a plea in abatement should be entitled in the cause, when the plea, which is properly entitled, and the affidavit, are written upon the same piece of paper, and the paper shows upon its face to what suit it belongs. *Cook et al.* v. *Yarwood*, 115.

2. *Plea in abatement filed after another in abatement.* After defendant has filed a plea in abatement of the action, which has been disposed of by the court, it is irregular to file another plea of the same character, and it may be stricken from the files. Ibid. 115.

MISJOINDER OF PARTIES DEFENDANT.

3. *When and in what mode taken advantage of.* Advantage should be taken of a misjoinder of parties defendant in an action on the case, by plea in abatement; failing to do that, a verdict cures the defect by force of the statute of amendments and jeofails. *Town of Harlem* v. *Emmert*, 319.

NON-LIABILITY OF A PART OF DEFENDANTS.

4. *When and in what mode taken advantage of.* In an action on the case against a town and the commissioners of highways of such town, for so constructing and maintaining a bridge over a navigable stream as to obstruct the navigation thereof, it was objected, on error, that the commissioners were not liable for the acts of the town, but the objection came too late. It should have been taken by plea in abatement. Ibid. 319.

VARIANCE BETWEEN A DECLARATION AND SUMMONS.

5. *As to amount of damages.* The damages laid in the declaration is the limit of the plaintiff's recovery, and where a judgment by default was rendered upon service of an *alias* summons which claimed a less sum in damages than was laid in the declaration, and the judgment exceeded the amount claimed in the summons, but was less than the sum laid in the declaration, it was *held*, there was a simple variance between the declaration and the summons, which not being taken advantage of in the court below, could not on error. *Messervey* v. *Beckwith*, 452.

ACCESSORY.

IN ASSAULT AND FALSE IMPRISONMENT.

A person who counsels, advises or procures the false imprisonment of another is liable as a principal for the consequences of the act, although he did not participate actively in the commission of the act. *Roth* v. *Smith*, 315.

ACCOUNT RENDERED.

AND NOT OBJECTED TO.

Whether that constitutes an admission of its correctness. See EVIDENCE, 17, 18.

ACKNOWLEDGMENT OF DEEDS.

OF THE CERTIFICATE.

1. *Its requisites.* The certificate of acknowledgment of a deed purported to have been made by the clerk of the county court, and was formal in all respects except in the omission in the caption or margin, of the name of the county. The certificate concluded thus: "Given under my hand and seal of said court, this 12th day of July, A. D. 1851," with the delineation of a seal containing the words "Will County Seal." *Held*, the omission of the name of the county in the caption was a mere informality which did not vitiate the certificate, it appearing sufficiently that the acknowledgment was taken by a proper officer of Will county. *Chiniquy* v. *The Catholic Bishop of Chicago*, 148.

EFFECT OF THE CURATIVE LAW OF 1822.

2. *Where deeds not entitled to record were recorded before the passage of that act, from what time the recording to take effect.* See RECORDING ACT, 1, 2.

ACTION.

WHEN A RIGHT OF ACTION SURVIVES.

Action for crim. con., by the husband. Where a defendant has debauched the wife of the plaintiff, the right of action of the latter is complete, and a recovery by him is not defeated by her death before action brought. It is unlike a battery, slander, or other injury personal to the wife. *Yundt* v. *Hartrunft*, 9.

ASSUMPSIT.

For money had and received — when it will lie. See ASSUMPSIT, 1.

ACTION ON THE CASE.

When it will lie. See CASE, 1; CORPORATIONS, 17.

COVENANT.

When it will lie. See COVENANTS FOR TITLE, 2, 3, 4.

RESCISSION OF A SALE FOR FRAUD.

When the party selling rescinds — of his remedy. See SALES, 4.

WHEN THE SALE IS AFFIRMED.

Remedy of the seller. Same title, 5.

FAILURE TO EXECUTE WORK ACCORDING TO CONTRACT. *Rights and remedies of the parties.* See CONTRACTS, 8, 9, 10, 11, 12.

FOR INJURY BY NEGLIGENCE OF DEFENDANT.

What action will lie therefor. See CASE, 1.

CREDITOR OF AN AGENT.

Who receives property of the principal in payment of the agent's debt — liability of such creditor to the principal. See AGENCY, 5.

ACTION. *Continued.*

FOR A TORT.

Against husband and wife, jointly. See PARTIES, 3.

CORPORATION — TORT.

An action for a *tort* lies against a corporation. *Town of Harlem* v. *Emmert*, 320.

ENTRY UPON LAND BY FORCE.

When made by the owner — remedy of the party whose possession is invaded. See TRESPASS, 2 to 8.

TO RECOVER BACK PURCHASE-MONEY.

On failure of a vendor of land to convey. See VENDOR AND PURCHASER, 1.

BY TENANT AGAINST HIS LANDLORD.

Where the latter deprives the former of the use of appurtenances. See LANDLORD AND TENANT, 3.

PRIVITY OF CONTRACT.

Whether an action will lie at the suit of the holder of a check, against a bank for refusal to pay it, under an agreement with the drawer to pay his checks. See CHECKS, 1.

CITIES — HIGHWAYS.

Remedy of a party whose property is injured in consequence of the manner in which a city grades and drains it sstreets. See CORPORATIONS, 17.

ADMINISTRATION OF ESTATES.

POWERS OF AN ADMINISTRATOR.

1. *Of his power to compromise and stipulute to dismiss a suit brought to recover damages for the death of intestate caused by the negligence of defendant.* An administrator having instituted suit, under the act of 1853, to recover damages in respect to the death of the intestate, alleged to have been caused by the neglect or default of the defendant, has the legal right to control the prosecution and disposition of the suit. So he has the power to stipulate for the dismissal of the cause, upon a settlement with the defendant by which he received even less than the amount claimed in his declaration. *Henchey, Adm'x*, v. *The City of Chicago*, 136.

IN WHAT FORUM A CREDITOR MAY SUE.

2. A creditor of an estate is not compelled to present his claim to the probate court for allowance, but can choose his forum, and resort in the first instance to the Circuit Court, if that court has jurisdiction. *Rosenthal, Adm'r*, v. *Magee*, 370.

NON-RESIDENT — ADMINISTRATOR.

3. *Appointment of a non-resident — not allowable.* A non-resident cannot legally be appointed administrator, on an estate in this State, not even on the estate of a non-resident dying abroad and leaving effects in this State. *Child* v. *Gratiot*, 357.

ADMINISTRATION OF ESTATES.

NON-RESIDENT — ADMINISTRATOR. *Continued.*

4. This rule is deduced from the evident object and policy of the act of 1847, which provides for the removal of an administrator from office, in case he shall remove from the State, and neglect or refuse to make settlement of his accounts on proper notice given for that purpose. *Child* v. *Gratiot*, 357.

5. If, in such case, the administrator who has removed from the State, makes a settlement, his trust thereupon, *ipso facto*, terminates. If he does not make the settlement, he is to be removed from office. Ibid. 357.

6. *Act of* 1847, on that subject, as reprinted in 1853, and as it appears in Scates' Compilation, p. 1238, is not correctly copied from the original session laws, important words being omitted. Ibid. 357.

REVOKING LETTERS OF ADMINISTRATION.

7. *Where a non-resident is appointed.* Should a non-resident be appointed administrator of an estate in this State, it is the duty of the probate court to revoke the appointment on proper application being made Ibid. 357.

8. *By whom the application may be made.* In this case such application was made by an administrator of the same estate, appointed in another State, the domicile of the intestate, and his application was entertained. Ibid. 357.

COSTS AGAINST AN ESTATE.

When recoverable. See COSTS, 1, 2.

ADMISSIONS.

AND ACCOMPANYING EXPLANATIONS. See EVIDENCE, 14.

AFFIDAVITS.

AFFIDAVIT IN SUPPORT OF A PLEA IN ABATEMENT.

Its requisites. See ABATEMENT, 1.

AFFIDAVIT FOR CHANGE OF VENUE.

Not competent evidence on the trial of the cause. See EVIDENCE, 2, 8.

ADMISSION OF A CERTIFIED COPY OF A DEED.

Requisites of the affidavit. See EVIDENCE, 13.

AFFIDAVIT FOR A CONTINUANCE.

Its requisites. See CONTINUANCE, 1.

NON-RESIDENT DEFENDANTS IN CHANCERY.

Requisites of affidavit of non-residence. See NON-RESIDENT DEFENDANTS, 1.

How long before suit brought the affidavit may be filed. See NON-RESIDENT DEFENDANTS, 4.

AFFIDAVIT OF MERITS.

In the Cook Circuit Court. See PRACTICE IN THE COOK CIRCUIT COURT, 1.

AGENCY.

PERSONS MUST KNOW AUTHORITY OF AGENT.

1. *A party dealing with another as agent of a third person, must know his authority.* An agent of a railway company applied to the owner of a dredging and pile driving machine, for an estimate of the cost of certain work the company proposed to have done. The owner of the machine said he would send him a proposition, and did, soon after, send a proposition in writing to the agent of the company, stating the terms upon which the machine could be had. To this proposition no reply was made, but, in about two weeks thereafter, a third person came to the owner of the machine, representing, as the latter alleges, that he came on behalf of the company, and procured the machine and crew belonging thereto, to be sent to do the work spoken of. In point of fact the person who obtained the machine was not an agent of the company but a contractor who had engaged to do the work for the company. It was *held*, the company was not liable to the owner of the machine for the work done therewith; it was his fault that he did not ascertain who was to be responsible. *Chicago and Great Eastern Railway Co.* v. *Fox et al.*, 106.

INDEMNITY BY PRINCIPAL TO AGENT.

2. *Liability of principal to indemnify his agent.* Under ordinary circumstances, where an agent incurs loss in the proper prosecution of the business of his agency, the liability of the principal to indemnify him, follows, as of course. *Haskin* v. *Haskin*, 197.

3. *How far the conduct of the agent may impair his right to indemnity.* If the agent neglects his duty in reference to the matter out of which his loss arises, to the injury of his principal, such neglect will, to the extent of the injury, reduce or discharge the liability of the principal to indemnify the agent. Ibid. 197.

4. But, if such neglect does not result in injury to the principal, the rights of the agent will not be affected thereby. Ibid. 197.

PAYMENT OF AGENT'S DEBTS.

5. *With property of the principal.* A creditor who has knowledge that his debtor has property in his possession merely as the agent of another, for sale, has no right to receive such property from the agent in payment of his debt. *Trustees of Schools* v. *McCormick et al.*, 323.

RATIFICATION OF THE ACT OF THE AGENT.

6. But, if the principal ratifies such a transaction, with a full knowledge of the facts, by receiving from his agent the notes of other parties in payment for the property, he thereby waives his right to hold the creditor of the agent liable for the value of the property thus received in payment of the agent's indebtedness. Ibid. 323.

ALLEGATIONS AND PROOFS. See PLEADING AND EVIDENCE, 8 to 16; SLANDER, 5, 6.

AMENDMENTS.

AMENDMENT OF PROCESS.

When an alias summons claims too small an amount in damages. See PROCESS, 2.

APPEAL AND WRIT OF ERROR.

BOTH ALLOWABLE AT THE SAME TIME.

By the respective parties. See PRACTICE IN THE SUPREME COURT, 1.

APPURTENANCES.

AS BETWEEN LANDLORD AND TENANT. See LANDLORD AND TENANT, 1, 2.

ASSAULT AND BATTERY.

ATTEMPT TO COMMIT RAPE.

Of the circumstances that should control the rule as to damages. See RAPE, 1, 2, 3, 4.

ASSESSMENTS.

OF SPECIAL ASSESSMENTS. See SPECIAL ASSESSMENTS.

ASSESSMENT OF DAMAGES.

WHEN IT MAY BE MADE BY THE CLERK.

In a proceeding by *scire facias* to foreclose a mortgage given to secure the payment of certain bills of exchange of which the mortgagor was indorser, as well as a promissory note of which he was the maker, it is proper, as the damages rest in computation, for the court to direct the clerk to compute them. The court would instruct the clerk at what rate to compute them, both as to the interest and the legal damages for protest. *Russell* v. *Brown et al.*, 183.

ASSIGNMENT.

ASSIGNEE BEFORE MATURITY.

1. *How far protected against a want of title in his vendor.* Where the payee of a promissory note indorses the note in blank and delivers it to another person, no matter for what purpose, he thereby holds the latter out to the world as the owner, and a *bona fide* purchaser from him, before its maturity, will take a good title. *Esty* v. *Snyder*, 363.

NEW PROMISE BY ASSIGNOR.

2. *After he is discharged by laches of the holder.* Where the liability of an indorser of a note has been discharged by the failure of the holder to bring suit against the maker in due time, and the holder relies upon a new promise to pay, made by the indorser after such discharge, such new promise, to be binding, must have been made with knowledge of the facts from which the discharge arose. *Morgan et al.* v. *Peet*, 347.

3. If the indorser had knowledge of such facts, whether he knew, that, by the rules of law, they would operate to discharge him, is immaterial. Ibid. 347.

OF BLANK INDORSEMENTS.

Presumption as to the character of liability intended to be assumed. See GUARANTY, 1.

Presumption as to the time the indorsement was made. Same title, 2.

ASSIGNMENT FOR THE BENEFIT OF CREDITORS.

ASSIGNMENT BY A WAREHOUSEMAN.

Of the rights of the assignees in grain on storage for others. See WAREHOUSEMEN, 1.

And, also, of the rights of the owners of the grain. Same title, 2, 3.

ASSUMPSIT.

FOR MONEY HAD AND RECEIVED.

When it lies. The action of assumpsit for money had and received, is an equitable action, in which the plaintiff can recover from the defendant so much money as he can show the defendant, *ex equo et bono*, ought not to retain. *Watson* v. *Woolverton*, 241.

ATTORNEY AT LAW.

REQUIREMENTS AS TO HIS CONDUCT.

1. When a clear case is made out against an attorney at law, of malpractice, or of conduct unbecoming an attorney and a gentleman, the court will visit upon him the heaviest punishment they can inflict. But the case must be clear, and free from doubt, not only as to the act charged, but as to the motive. *The People* v. *Harvey and Miller*, 277.

2. Members of the legal profession cannot be too circumspect in their conduct, nor can they claim immunity for acts which, though free from moral stain, yet sully their professional honor. Ibid. 277.

ATTORNEY'S LIEN.

Whether it attaches to a claim for unliquidated damages, before judgment. See LIEN, 13, 14.

AUTHENTICATION.

OF A TRANSCRIPT OF A RECORD.

What is sufficient. Where the proper clerk certifies that a transcript of a record is a true and perfect copy of the original papers in the case, as fully as the same appear on the files and records then in his office, although informal, such a certificate is substantially sufficient to authenticate the record and entitle it to be read in evidence. The papers pertaining to a cause became a matter of record by being filed in the proper office. *Harding* v. *Larkin et al.*, 414.

AVERMENT.

WANT OF AVERMENT.

When and how taken advantage of. See PRACTICE, 3.

WHAT AVERMENTS ARE NECESSARY. See PLEADING, 1.

BANKS.

DEPOSITORS.

Right of a bank to apply deposits to the payment of a note of the depositor, which is made payable at the bank. See PROMISSORY NOTES, 6.

BILL OF PARTICULARS.
CONTINUANCE FOR THE WANT THEREOF.
When the motion should be made. See PRACTICE, 2.

BILL TO REDEEM. See MORTGAGES, 3, 4; REDEMPTION, 1, 2.

BONDS.
SURETIES ON OFFICIAL BONDS.
Liability where there have been two bonds given for different terms of office. See SURETIES, 1.

BRIDGES.
LIABILITY OF TOWNS FOR BUILDING THEM. See TOWNS, 1 to 5.

BURDEN OF PROOF. See EVIDENCE, 19, 20; WILLS, 3.

CALLS ON SUBSCRIPTION. See SUBSCRIPTION, 1, 2.

CARRIERS.
DELAY IN SHIPPING LIVE STOCK.
1. *Liability for damages by reason thereof—and herein, of the duty of the shipper.* Where a lot of cattle is placed in cars provided for them by a railroad company, for transportation, in time for the next regular cattle train, the station agent of the company at the place of shipment having knowledge of the fact, it is the duty of the company to carry the cattle by the next train, and by their neglect so to do they will be liable for whatever damage may result to the cattle by reason of the delay. *Illinois Central Railroad Co.* v. *Waters*, 73.

2. Where the train which should have taken the cattle passed the station at which they were waiting between ten and eleven o'clock at night, and the owner allowed the cattle to remain in the cars until nine o'clock the next morning before he took them out, he was not chargeable with any want of proper diligence in removing them. It was not his duty, although he did not then intend to allow the company to complete the carriage, at once, upon the passing of the train at such an hour in the night, to take the cattle out of the cars to prevent injury to them by being thus confined. Ibid. 73.

CASE.
WHEN THE REMEDY.
It seems, an action on the case is the proper remedy for the recovery of damages for injuries received by the plaintiff, on being run over by the horses of the defendant, while the same were running away through the carelessness of the latter. *Cox* v. *Brackett*, 222.

When it will lie—against a city for exercising its power to grade and drain its streets in such manner as to injure private property. See CORPORATIONS, 17.

CATHOLIC BISHOP OF CHICAGO.

AS A CORPORATION SOLE.

Requirements of the law creating such corporation. Under the law constituting the Catholic bishop of Chicago a corporation sole, his titles to real estate do not become forfeited by reason of his omission to file for record a statement of his appointment under his hand and seal and verified by his affidavit, within three months after the act became a law, nor is the performance of that requirement of the act a prerequisite to the organization of such corporation. *Chiniquy* v. *The Catholic Bishop of Chicago*, 149.

CERTIFICATES.

OF THE ACKNOWLEDGMENT OF A DEED.

Requisites of the certificate. See ACKNOWLEDGMENT OF DEEDS, 1.

AUTHENTICATION OF COPY OF RECORD.

What is sufficient. See AUTHENTICATION, 1.

CERTIFIED NOTE.

EFFECT THEREOF.

On the rights of the parties. See PROMISSORY NOTES, 7.

CHANCERY.

JURISDICTION.

1. *When there is a remedy at law — at what time the objection may be taken.* If a defendant in chancery answers, and submits to the jurisdiction of the court, it is too late for him to object that the complainant has an adequate remedy at law. *Stout et al.* v. *Cook*, 447.

2. This rule applies where the subject-matter of the bill belongs to that class over which a court of equity will always take jurisdiction when the relation of the parties to each other renders the exercise of such jurisdiction necessary. Ibid. 447.

3. So, where the bill is filed to quiet the title to a piece of land, and remove a cloud arising from a claim under a sheriff's sale, and that sale is void, the complainant, being out of possession, has his remedy at law; but the subject-matter being clearly within the cognizance of a court of equity, and the remedy at law only existing by reason of the complainant being out of possession, an objection to the jurisdiction in chancery upon that ground, comes too late after answer to the bill. Ibid. 447.

4. But, where the subject-matter of the bill is wholly foreign to the jurisdiction of a court of chancery, as, for example, a claim of damages for slander, or for an assault and battery, the court may properly dismiss the cause at any stage of the proceedings. Ibid. 447.

5. *When there was a defense at law which was not asserted — the general rule.* The general doctrine is, that, when a party has a defense to an action at law, known to him, and he fails to make it, no court can relieve him. *Mallett* v. *Butcher et al.*, 382.

6. *Exceptions as to judgments rendered on gambling contracts.* But by statute all judgments rendered on gambling contracts are void, and may be set

CHANCERY. JURISDICTION. *Continued.*

aside and vacated by any court of equity upon bill filed for that purpose, although the character of the contract could have been set up as a defense in the suit at law in which such judgment was rendered, and the party had knowledge of the defense and omitted to assert it. *Mallett* v. *Butcher et al.*, 382.

7. *Former decision.* The case of *Abrams* v. *Camp*, 3 Scam. 290, is overruled upon this question. Ibid. 382.

8. *Of concurrent jurisdiction—in chancery and at law—when it exists.* See JURISDICTION, 5.

MULTIFARIOUSNESS.

9. *What constitutes.* See this title, 18.

PRAYER FOR RELIEF.

10. *When insufficient, when and how the objection may be taken.* Where the prayer for relief in a bill is good in substance, but informal, it should be taken advantage of by demurrer, and the informality is waived by answer; otherwise, where it is substantially defective, so that it does not appear what relief is sought. *Kuchenbeiser et al.* v. *Beckert et al.*, 172.

11. *How far it controls the relief to be granted.* If the prayer is for more than the proof warrants, still, adequate and proper relief may be decreed, if consistent with the prayer, or under the prayer for general relief. *McNab* v. *Heald et al.*, 327.

SWORN ANSWERS IN CHANCERY.

12. *Degree of evidence required to overcome them.* Where the answer of a defendant in chancery is required to be under oath, so far as it is responsive to the bill, and fairly meets the allegations of the complainant, it must be received as true, unless it is disproved by evidence amounting to the testimony of two witnesses. *Marple et al.* v. *Scott et al.*, 50.

REPLICATION IN CHANCERY.

13. *Admissibility of evidence when there is no replication.* While it would be proper, in default of a replication to an answer, to set down the cause for hearing on bill and answer, taking the answer as true, and excluding all evidence, unless it may be matter of record to which the answer refers, yet, where the defendant treats the cause as at issue, joins in taking depositions, and consents to set the cause down for hearing on bill, answer, exhibits and depositions, and the cause is heard accordingly, he cannot, on error, invoke the statute in his favor, and insist the proof shall not be considered. Ibid. 50.

SALE UNDER DEED OF TRUST.

14. *Disposition of the overplus, when there is a sale before all the notes secured by the deed become due.* Where a deed of trust is given to secure several notes, payable at different times and to different persons, and authorizes a sale to be made on default in payment of any of the notes, whether a court of chancery would protect the holder of the notes which were not due at the time of a sale under the deed of trust, by staying the payment of the surplus fund to the grantor till security could be given

CHANCERY. SALE UNDER DEED OF TRUST. *Continued.*

that it would be held subject to the lien, the court do not decide; but, at all events, the trustee would not, under such a deed of trust as is mentioned, have the right to apply the surplus on debts not due, nor would a court of chancery compel him to do so. *Gardner* v. *Diederichs*, 159.

SUBJECTING PROPERTY TO SATISFY A JUDGMENT.

15. *Jurisdiction to subject equitable interests to satisfy a judgment at law.* The interest of a defendant held by himself or any other to his use, whether held by deed, bond, covenant, or otherwise, for a conveyance, or as mortgagee or mortgagor of land, in fee, for life or for years, is declared, by statute, to be subject to sale on a *fi. fa.* at law. *McNab* v. *Heald et al.*, 326.

16. The statute also declares, that, when an execution is returned unsatisfied, in whole or in part, the plaintiff in execution may file a bill against the defendant and any other person, to compel a discovery of any property or thing in action, due to or held in trust for him. Ibid. 326.

17. Independent of our statute, a court of equity, in a proper case, would subject a mere equitable estate or interest of a defendant in execution, growing out of a contract for the sale of the land, to the payment of the judgment. Before the adoption of the first section of the statute in reference to judgments and executions, rendering such interests liable to sale on a *fi. fa.*, the only means of reaching them was by bill in equity. Ibid. 326.

18. Where a judgment debtor holds a contract for the purchase of lands, and an execution has been returned no property found, and his vendor is dead, and a portion of the purchase-money remains unpaid, plaintiff in execution may file a bill against the defendant, and the executor and heirs of the vendor of defendant, for discovery, and to subject the interest of defendant to pay the judgment. And the executor and heirs are proper parties, for the purpose of ascertaining whether the contract of purchase is still in force, and the sum remaining due on the contract. Such a bill is not multifarious. Ibid. 326.

19. In such a case, it is important to the heirs, as well as the purchaser of their ancestor, that the amount remaining unpaid on the contract, be ascertained, and be paid to the heirs before they be decreed to convey to the purchaser under an execution or decree. Ibid. 326.

SPECIFIC PERFORMANCE.

20. *How far discretionary.* It is an established doctrine in chancery, that an application for a decree of specific performance is addressed to the sound legal discretion of the court, and a decree does not follow as matter of course, because a legal contract is shown to exist. *Hough* v. *Coughlan et al.*, 130.

21. *Effect of delay in asserting the right to a specific performance.* So, where a long period of time has elapsed, courts will be cautious in enforcing a specific performance. Ibid. 130.

22. And, where a bond was made in 1849, assigned to the complainant twelve years afterward, during which time the assignor repeatedly disclaimed all interest in the land, and during the last eight years of which the grantees of the person who made the bond were in actual possession,

CHANCERY. SPECIFIC PERFORMANCE. *Continued.*

cultivating it and making valuable improvements on it, all with the knowledge of both assignor and assignee, a specific performance was refused. *Hough* v. *Coughlan et al.*, 130.

23. Under such circumstances, all parties interested were bound to take notice of a possession so notorious and visible, and they must be charged with all legal and equitable claims of the occupants. Ibid. 130.

24. It is the settled doctrine that great delay of either party, unexplained, in not performing a contract, or in not prosecuting his rights under it, constitute such *laches* as to amount, for the purpose of specific performance, to an abandonment of the contract, and equity will afford no aid. Ibid. 130.

25. So, where an action for title under a bond was delayed for more than twelve years after the alleged purchase, and the delay was not accounted for, and during all that time the land was in the notorious occupancy of parties claiming title by deed of record, and who had made valuable improvements, and no claim under the bond had been asserted, a bill for specific performance was properly dismissed. Ibid. 130.

26. Where, under a title of record, a party converts wild land into a productive farm, by expending labor and money, and makes it a home, and all this with the knowledge of one holding a bond for title, who stands by in silence for twelve years, *held*, that equity would not take such property under such circumstances, from the occupants, even by a decree which required them to be re-imbursed for the improvements. Ibid. 130.

27. *Conditions must be performed.* A party cannot compel a specific performance of a contract for the conveyance of land, unless he shows he has himself performed his part of it, and he must show full performance on his part of all the stipulations to be by him performed, to entitle him to a decree. *Board of Supervisors* v. *Henneberry*, 179.

28. So, where a party purchased swamp lands from a county, the contract of sale prescribing, as conditions precedent to the conveyance, the payment of the purchase-money, the drainage of the land, and the improvement of one-half the land, it was *held*, that the purchaser could not compel a specific performance upon showing, merely, that he had offered to pay the purchase-money,—he should have shown that he had performed all the conditions on his part to be performed. Ibid. 180.

29. *Waiver of conditions, must be by one having authority.* That it was not customary for the drainage commissioner to insist upon the performance of any part of such contracts except the payment of the money, could not excuse the purchaser from the performance of the other conditions; such waiver could only be by the authority of the county, with whom the contract was made. Ibid. 180.

30. *Parol promise by a parent to his child to convey land to the latter — whether it can be enforced — statute of frauds.* A parol promise by a father to his son, to convey to him a tract of land if the latter would take possession and improve it, would undoubtedly be enforced in a court of equity if the

CHANCERY. SPECIFIC PERFORMANCE. *Continued.*
promissee, relying upon it, has entered and expended money. It would substantially, in such event, be a promise resting upon a valuable consideration. *Bright et al.* v. *Bright*, 97.

31. But, as in the case of any other parol contract for the conveyance of land, before a court of equity will decree a conveyance, such a performance must be shown as will take the case out of the statute of frauds. Ibid. 97.

REMOVING CLOUD UPON TITLE.

32. A decree rendered without jurisdiction, upon which a sale of property is made or title conveyed to complainant, creates such a cloud on the title of the owner as authorizes a court of equity to take jurisdiction for its removal, notwithstanding it could not be insisted on to defeat a recovery by the owner in an action at law. *Campbell et al.* v. *McCahan et al.*, 46.

BILL TO IMPEACH A DECREE.

33. *Rendered against a minor defendant.* Where a decree in chancery has been rendered against a minor defendant, he is entitled to his day in court, whether the right is expressly reserved in the decree or not, and he may, even during his minority, by his next friend or guardian, file an original bill to impeach the decree, either for fraud or for error appearing on its face. *Kuchenbeiser et al.* v. *Beckert et al.*, 172.

34. *Within what time such a bill must be filed.* See LIMITATIONS, 10.

CHANCERY WILL NOT AID FRAUD.

35. A court of chancery will not lend its aid to either party to a suit which has arisen out of an attempt on the part of both to defraud another out of his property. *Dunning* v. *Bathrick*, 425.

SUMMONS IN CHANCERY.

Its requisites. See PROCESS, 1.

TENDER — IN CHANCERY.

Money need not be brought into court. See TENDER, 2.

BILL TO REDEEM.

By a purchaser from a mortgagor. See REDEMPTION, 1, 2.

REFORMING MISTAKES.

Proof must be clear. See MISTAKE, 1.

IMPEACHING A WILL IN CHANCERY.

Evidence sufficient to establish the will. See WILLS, 2.

Burden of proof. Same title, 3.

MISNOMER OF PRINCIPAL IN RECOGNIZANCE.

The remedy is not exclusive in chancery. See PLEADING AND EVIDENCE, 1.

CHATTEL MORTGAGES.

POSSESSION BY THE MORTGAGOR.

1. *When it becomes fraudulent, as to creditors and purchasers.* Where a chattel mortgage provides for the possession of the mortgaged property remaining with the mortgagor until default in payment, it is fraudulent as to creditors and purchasers to permit such property to remain in the

CHATTEL MORTGAGES. POSSESSION BY THE MORTGAGOR. *Continued.*
hands of the mortgagor two days after the maturity of the mortgage debt, where the parties reside in the same town or county, and no obstacle prevents the mortgagee from reducing it to possession. *Reese* v. *Mitchell*, 365

2. *Days of grace.* Where the note secured by the mortgage was executed prior to the passage of the act of 1861, it is not entitled to days of grace, and the mortgagee cannot allow them to the mortgagor. Ibid. 365.

CHECKS.
LIABILITY OF THE DRAWEE.
To the holder of a check. Where a party obtains credit at a bank for a certain amount, and for a specific purpose, and the bank agrees to pay his checks to that amount, after the credit thus negotiated has been overdrawn, the bank is under no obligation to pay any more checks drawn by that party, although they may be drawn in favor of persons who have contributed to the purpose for which the drawer obtained the credit with the bank, and were drawn on that account, and the deficit in the amount to be drawn against arose from the payment by the bank of checks drawn for a purpose foreign to that for which the bank agreed to give the credit to the drawer. In such case there is no privity between the bank and the holders of the rejected checks which will in any way render it liable to them. *First National Bank of Chicago* v. *Pettit & Smith*, 492.

CITIES.
GRADING AND DRAINING THE STREETS.
How far a city is responsible for the manner of its exercise of the power to grade and drain the streets. See CORPORATIONS, 12 to 19.

CLERICAL ERROR.
WHAT CONSTITUTES.
1. *And where corrected—misdescription of premises in a judgment.* The judgment in a proceeding by a *scire facias* to foreclose a mortgage, in describing the land, referred to a deed by which it had been conveyed, and gave the wrong date to the deed. This was held to be a mere clerical error, which could be corrected on motion in the court below by the files in the cause, and did not afford ground for reversal. *Russell* v. *Brown et al.*, 184.

2. *Where an alias summons claims too small an amount in damages.* See PROCESS, 2.

CLOUD UPON TITLE. See CHANCERY, 32.

COMMISSIONERS OF HIGHWAYS.
MAY ACT BY A MAJORITY. See CORPORATIONS, 5 to 10

CONDITIONS.
DEPENDENT AND INDEPENDENT COVENANTS. See CONTRACTS, 13, 14, 15

CONSIDERATION.

WHAT IS SUFFICIENT.

To support a parol promise by a parent to his child to convey land to the latter. See CHANCERY, 30.

To support a contract of subscription to the stock of a company. See SUBSCRIPTIONS, 3.

OF A PROMISSORY NOTE.

Given to secure the performance of an act by a third person — the act being performed, the note is discharged. See PROMISSORY NOTES, 1.

CONSTITUTIONAL LAW.

EQUALITY OF PUBLIC BURDENS.

And taking the property of one for the use of another. See SPECIAL ASSESSMENTS, 1 to 6.

LIMITATION LAW OF 1839.

Its constitutionality re-affirmed in *Steele* v. *Gellatly*, 39.

TAKING PRIVATE PROPERTY FOR PUBLIC USE.

Must be compensation. See CORPORATIONS, 16.

CONTINUANCE.

REQUISITES OF THE AFFIDAVIT.

1. *Absence of witnesses.* Where a party who is indicted for an assault with intent to murder, desires a continuance on account of the absence of witnesses by whom he expects to prove facts connected with the alleged assault which will exculpate him, the affidavit for the continuance should show what means the witnesses had of knowing what occurred; and where the witnesses reside out of the State, it should show the grounds of his expectation of procuring their testimony at a future time. *Eubanks* v. *The People*, 486.

FOR WANT OF BILL OF PARTICULARS.

2. *When the motion must be made.* See PRACTICE, 2.

CONTRACTS.

WHAT CONSTITUTES.

1. *Of a parol promise by a parent to his child to convey land to him, on condition, the latter would take possession and improve it.* See CHANCERY, 30.

2. *Contract of subscription to the stock of a company.* See SUBSCRIPTION, 3.

CONSTRUCTION OF CONTRACTS.

3. *When extrinsic facts may be shown, to aid in giving a construction to a written contract.* See EVIDENCE, 1 to 4.

CONTRACTS CONSTRUED.

4. *Construction of a trust-deed — as to the time of the maturity of notes secured by it.* Where a deed of trust, which is given to secure several notes, payable at different times and to different persons, simply authorizes the trustee, "in case of default in the payment of said notes, or any part

CONTRACTS. CONTRACTS CONSTRUED. *Continued.*

thereof," or the interest accruing thereon, to sell the premises or any part thereof, and apply the proceeds to the payment of "the amount due on said notes," and to render the overplus, if any, to the grantor, it will not be construed as meaning, that, in the event of a sale on the falling due of the notes first maturing, all the notes shall be deemed to be due; but the notes will be held to mature in the order and at the times specified on their face, and subject to the principle that the notes first maturing have a priority of lien on the trust fund. *Gardner* v. *Diederichs*, 159.

5. *Contract to deliver a specific number of cattle "more or less."* Where a party contracts to deliver a specific lot of cattle, containing two hundred and sixty-two head, "more or less," to average a certain specified weight, it is not a sufficient performance to tender to the purchaser one hundred and seventy-eight head averaging that weight. *Tilden et al.* v. *Rosenthal et al.*, 385.

6. The words "more or less" in such contract, are used to cover such trifling deficiencies in number, as might be caused by the ordinary casualties of death or loss; subject to this modification, it was a sale of a specific lot of two hundred and sixty-two cattle, which the vendor warranted should average a certain weight. Ibid. 385.

CONTRACT BY LETTER.

7. *What constitutes.* A party ordered by letter a lot of paper to be sent to him at once. The party to whom this order was addressed, replied he he had none on hand, but offered to make it. The first party again wrote as if the other had accepted his order, which he had not, and again saying he "wanted the paper to come right along." The other replied a second time, that he could not send it at once, and advised him if he was in a hurry about it he had better order elsewhere. Here was no contract — no proposition made on one side and accepted on the other. *Cornwell & Elliott* v. *Krengel & Seiferd*, 394.

FAILURE TO EXECUTE WORK ACCORDING TO CONTRACT.

8. *Rights and remedies of the parties.* Where a party has built a water-wheel for a mill for another, the latter furnishing the materials therefor, and the builder agreed that the wheel should do certain specified work and should be satisfactory to the other party, and the builder had notice, formal or informal, but substantial, that the wheel did not do the required work, and was not satisfactory, he has no cause of action for his labor, either upon a *quantum meruit* or otherwise, his only remedy being to pay for the materials in the wheel furnished by the other party, and take it away. *Mears* v. *Nichols*, 207.

9. And in such case, the party for whom the wheel was built, and who furnished the materials, is not bound to return the wheel or permit it to be taken away, without payment for the materials, nor to incur any expense in removing the wheel. Ibid. 207.

10. The doctrine of election to return or keep the article, has no application in such a case. So, the party for whom the wheel was built would

CONTRACTS.

FAILURE TO EXECUTE WORK ACCORDING TO CONTRACT. *Continued.*

not become liable to pay the contract price for building it, by failing to return it in a reasonable time. Where there is an express warranty that an article is of a certain quality and shall answer a specified purpose, it is not necessary that the purchaser, before he can bring suit, should offer to return the property. He may bring suit for damages, or, in a suit against him for the price, he may claim such damages by way of recoupment or set-off. *Mears* v. *Nichols*, 207.

11. Without giving notice of the defect in the wheel, and without an offer to return it, he would be entitled to recoup his damages for breach of the contract in building the wheel. Ibid. 207.

12. Even a refusal to permit the builder to take away the wheel would not render him liable for the contract price. Where there is an express warranty that the article made shall do certain specified work, in a suit for the price the vendee may recover his damages by way of recoupment, and in some cases defeat a recovery by showing that the article was worthless for the purpose intended. Ibid. 207.

DEPENDENT AND INDEPENDENT COVENANTS.

13. *Of the rule to determine the character of a covenant in that regard.* Where a covenant goes only to part of the consideration on both sides and a breach of such covenant may be paid for in damages, it is an independent covenant, and an action may be maintained for a breach of the covenant on the part of the defendant without averring performance in the declaration. *Nelson* v. *Oren*, 18.

14. *Construction of assignment of a lease.* An assignment of a lease was as follows: "In consideration of fifty dollars to me in hand paid, I hereby assign, transfer and set over to O. M. Oren, his heirs or assigns, all my right, title and interest to and in the within lease, and the term therein contained, with all the privileges and conditions that I have therein, and I do hereby agree to deliver up possession of the within premises to said Oren on the 1st day of May, 1864." *Held*, that this was not one entire covenant conditioned for the delivery of possession on the day named, with a forfeiture of the fifty dollars, if it was not done, but the sum paid was the consideration for the unexpired term and the possession. Ibid. 18.

15. So, for the time the assignee was kept out of possession after the day fixed, he could recover damages against his assignor, but he could not recover back the whole consideration paid, because the agreement to deliver possession on a certain day constituted only a part of that consideration. Ibid. 18.

CONTRACT OF SALE.

16. *For future delivery — when the seller must show a readiness to deliver.* See SALES, 1, 2.

RESCISSION OF CONTRACTS.

17. *What amounts to a rescission — and its effect.* Where a seller, before the time expires for the delivery of the grain sold, notifies the purchaser, that,

CONTRACTS. RESCISSION OF CONTRACTS. *Continued.*

unless he places in his hands a deposit to cover a decline in the price of the grain, he will sell it, and afterward does sell it, and notifies the buyer of the fact, he thereby rescinds the contract, and cannot afterward renew it, without the concurrence of the purchaser. If he rescinded the contract without a sufficient cause, he released the other party, but, even if he had a sufficient cause, he could not recover more than he lost on the sale of the grain. *Lassen* v. *Mitchell*, 101.

18. *Rescission of a sale by the party selling, on the ground of fraud — of his rights and duties.* See SALES, 4, 5.

ERASURES AND INTERLINEATIONS.

19. *In contracts* will not be regarded when they are wholly unimportant, and the contract would be as valid and intelligible without them as with them. *McKibben et al.* v. *Newell*, 461.

PRIVITY OF CONTRACT.

20. *Between a bank which agrees with a party to pay his checks, and those in whose favor the checks may be drawn.* See CHECKS, 1.

CONSIDERATION OF A PROMISSORY NOTE.

21. *A note given to secure the performance of an act by another, is discharged when such act is performed.* See PROMISSORY NOTES, 1.

CONTRIBUTION.

AS BETWEEN TENANTS IN COMMON.

1. *For repairs and improvements.* One tenant in common can make another, at common law, contribute to such repairs to a house or mill as are necessary to its preservation or use. Beyond that the right to contribution has not ordinarily been carried. *Gardner* v. *Diederichs*, 159.

AS BETWEEN THE SEVERAL MAKERS OF A NOTE.

2. When one of several makers of a note pays the note, he can compel, by suit, his co-makers to contribute their proportion. *Hoyt et al.* v. *Lock*, 119.

AS BETWEEN TWO MORTGAGEES.

How improvements are compensated. See MORTGAGES, 10 to 13.

AS BETWEEN SUBSEQUENT PURCHASERS.

Of mortgaged premises. See MORTGAGES, 10.

CONVEYANCES.

DELIVERY OF A DEED.

1. *Of the presumption in that respect.* The fact that the acknowledgment of a deed bears a date subsequent to that of the execution of the deed, does not rebut the presumption that the deed was delivered on the day it bears date. *Deininger et al.* v. *McConnel*, 228.

WHAT WILL PASS ON A CONVEYANCE OF LAND.

2. *Growing crops.* By a conveyance of land, without a reservation in writing, the crops growing, and all things depending on the soil for sustenance, belong to and pass with the land. After the crops have matured, however, it is otherwise. *Powell* v. *Rich*, 469.

CONVEYANCES. *Continued.*

DESCRIPTION OF THE PREMISES.

3. The description of land in a deed was as follows: "Being part of the south half of the south half of the south-east quarter of section number four, township number twenty-nine north, range twelve west of the 2d P. M., beginning at the north-west corner, thence south twenty-six rods, thence east sixty-one and one-half rods, thence north twenty-six rods, thence west to place of beginning, containing ten acres more or less." On objection that the place of beginning was uncertain, it was *held*, the description was sufficient. *Chiniquy* v. *The Catholic Bishop of Chicago*, 148.

CONVEYANCE TO ONE FOR THE USE OF ANOTHER.

4. *Effect of naming the cestui que trust in the premises of the deed.* In the premises of a deed, the party of the second part, to whom the grant was made, was described as follows: "The Right Rev. James Oliver Vanderwald, Bishop of Chicago, and his successor and successors in office, in trust for the use and benefit of the Catholic population of the parish of St. Anne, in the county of Iroquois, State of Illinois, party of the second part." *Held*, that the naming of the *cestuis que trust* in the premises, with the bishop as the party of the second part, did not operate to make them the grantees of the title equally with the bishop. The legal title vested in the bishop for their use. Ibid. 148.

CONVEYANCE BY MARRIED WOMEN.

The husband must join — to pass a right of dower held by the wife in the lands of a former husband. See DOWER, 4.

ACKNOWLEDGMENT OF DEEDS. See that title, *ante*.

COOK CIRCUIT COURT.

PRACTICE THEREIN. See PRACTICE IN THE COOK CIRCUIT COURT.

COPY.

COPY OF A SEAL.

What is sufficient. See SEAL, 1.

CORPORATIONS.

UNDER THE GENERAL LAW.

1. *Filing the duplicate in the office of the secretary of State — whether necessary.* Where a corporation claims to have organized under the general law of 1857, authorizing "the formation of corporations for manufacturing purposes," it is not necessary to the proof of its corporate existence, under the plea of *nul tiel corporation*, that it should appear, the duplicate of the writing by which the association was constituted was filed in the office of the secretary of State, as required by the act. *Stone* v. *The Great Western Oil Co.*, 85.

2. It has been *held*, that such a requirement is directory only, and the omission to file the duplicate would not defeat the organization. Ibid. 85.

3. *In what proceeding such an omission might be availing.* It has also been *held*, that when a company had taken all the steps to be incorporated under the general law of 1849, but had omitted to file the certificate of

CORPORATIONS. UNDER THE GENERAL LAW. *Continued.*

incorporation in the office of the secretary of State, such a non-compliance with the statute might sustain a *quo warranto* on behalf of the people and oust the corporators from the exercise of their franchise, but it does not necessarily follow that it is not, as to third persons, a corporation. Ibid. 85.

4. Where an action of ejectment is brought in the name of a party, as a corporation, matters relating to the organization of such corporation cannot be inquired into in such action. In a direct proceeding by *quo warranto*, proofs relating to its organization might be required. *Chiniquy* v. *The Catholic Bishop of Chicago*, 149.

Burden of proof — in a suit by a corporation under a plea of nul tiel corporation. See EVIDENCE, 20.

A MAJORITY MAY ACT.

5. *Of commissioners of highways.* The commissioners of highways of a town are a *quasi* corporation, and all such bodies act by a vote of a majority, unless there be some provision in the law of their creation to the contrary. *Commissioners of Highways* v. *Baumgarten*, 254.

6. The law giving commissioners of highways power to act in a specified case, the authority is to them in their corporate capacity, and the decision of a majority is the decision of the body. Ibid. 254.

7. But, if they were not a corporation, then, the act by which they are appointed being silent as to how many should constitute a quorum, a majority may act. Ibid. 254.

8. *And herein, of the rule, generally.* So, where a number of persons are intrusted with powers in matters of public concern, and all of them are assembled and consulting, the majority may act and determine, if their authority is not otherwise limited and restricted. Ibid. 255.

9. And if it shall appear that a majority have acted in any given matter, it will be presumed the others composing the body were present and consulting, until the contrary is shown. Ibid. 255.

10. So a contract for building a bridge, signed by two of three commissioners of highways, is binding upon the whole body. Ibid. 255.

MUNICIPAL CORPORATIONS.

11. *Subject to legislative control.* Counties and towns, as municipal corporations, are under legislative control, and the law governing them may be changed according to the legislative will. *Town of Freeport* v. *Board of Supervisors of Stephenson County*, 495. See PAUPERS.

12. *How far a city is responsible for the manner of its exercise of the power to grade and drain the streets.* A city has absolute control over the grade of its streets, and can make the grade light or heavy, it can elevate or lower it at pleasure, and the owners of adjacent lots cannot call it to account for errors of judgment in these respects, or demand damages because they may incur inconvenience or expense in adjusting the level of their own premises to that of the street for the purpose of ingress and egress. A city is the owner of the streets, and is given power to grade them. *Nevins* v. *The City of Peoria*, 502.

CORPORATIONS. MUNICIPAL CORPORATIONS. *Continued.*

13. But a city has no more power over its streets than a private individual has over his own land, and it cannot, under the plea of public convenience, be permitted to exercise that dominion to the injury of another's property in a mode that would render a private individual responsible in damages, without being responsible itself. The same law that protects the right of property of one private individual against invasion by other individuals, must protect it from similar aggression on the part of municipal corporations. *Nevins* v. *The City of Peoria*, 502.

14. A city may elevate or depress its streets as it thinks proper, but if, in so doing, it turns a stream of mud and water upon the grounds and into the cellars of one of its citizens, or creates in his neighborhood a stagnant pond that brings disease upon his household, it should not be excused from paying for the injuries it has directly wrought. Ibid. 502.

15. And if it should become necessary for the interest of the public, in the process of grading or drainage of the streets, that the lot of an individual shall be rendered unfit for occupancy, either wholly or in part, the public should pay for it to the extent to which it deprives the owner of its legitimate use. Ibid. 502.

16. The constitutional provision that private property shall not be taken for public use without due compensation, applies as well to secure the payment for property partially taken for the use or convenience of a street, as when wholly taken and converted into a street. The question of the degree to which the property is taken, makes no difference in the application of the principle. Private rights are never to be sacrificed to public convenience or necessity, without full compensation. Ibid. 502.

17. *Remedy of the injured party in such case.* And it appears, that, for injuries done to the property of an individual in the process of grading and drainage of a street, by turning a stream of mud and water upon his premises, or by creating in the immediate neighborhood of his dwelling an offensive and unwholesome pond, he may have his action on the case against the city, and it must respond in damages. Ibid. 502.

18. *Parties who shall be liable in such case — application of the rule of respondeat superior.* Where a city has work done by contract, and a servant of the contractor does something not authorized by the city, such as improperly leaving open a drain at night, the city would not be liable, even though, by the terms of the contract, a general supervision is retained over the work. Ibid. 502

19. But if, on the other hand, the acts which caused the injury were done under and in consequence of the direction of the city, then the city is to be regarded as the superior, and responsible as such, although it does the work by contract. Ibid. 502.

CATHOLIC BISHOP OF CHICAGO.

As a corporation sole — requirements of the law creating such corporation. See CATHOLIC BISHOP OF CHICAGO.

CORPORATIONS. *Continued.*

ACTION FOR A TORT.

Lies against a corporation. Town of Harlem v. *Emmert*, 320.

COSTS.

COSTS AGAINST AN ESTATE.

1. *When recoverable — construction of the statute of "Wills" in that regard.* It is not essential that a creditor of an estate should present his claim to the probate court at the term appointed by the administrator for that purpose, under section 95 of the statute of "Wills," to entitle him to recover costs in a suit subsequently brought against the administrator. That section, in providing, that, if claims are not presented at such term, the estate shall not be liable for the costs on any claim presented thereafter, has reference alone to claims presented to the probate court. *Rosenthal, Adm'r*, v. *Magee*, 370.

2. So the creditor, without having presented his claim to the probate court, may sue the administrator in the Circuit Court, after the term thus appointed for prosecuting claims to the probate court, upon the expiration of a year from the taking out of letters of administration, as provided in section 101 of the same statute, and recover his costs in such suit, if he prove a demand before the commencement thereof. Ibid. 370.

COVENANTS.

DEPENDENT AND INDEPENDENT COVENANTS. See CONTRCTS, 13, 14, 15.

COVENANTS FOR TITLE.

MEASURE OF DAMAGES.

1. *For a breach thereof.* See MEASURE OF DAMAGES.

EVICTION — YIELDING TO SUCCESSFUL TITLE.

2. Where a party is sued in ejectment, and a recovery is had against him, he need not wait until actually expelled by legal process, but may yield to the superior title, purchase it, and maintain an action on the covenants in the deed of his grantor. The law does not require the performance of useless acts. *Harding* v. *Larkin et al.*, 414.

OF NOTICE TO THE COVENANTOR.

3. *Of a suit to evict the covenantee.* Where the grantee holding a covenant of warranty, is sued in ejectment, and his grantor has notice of the suit, or becomes, as he may, a party to it, the recovery against his grantee is conclusive upon him that the title by which his grantee was evicted was paramount, and he will not be permitted to question the fact in an action by his grantee on the covenants in his deed. But it would be otherwise if he had not received notice of the suit in ejectment, in which case the grantee must prove that the title was paramount. The appearance of the covenantor as an attorney, to defend the ejectment suit, is evidence that he had notice. Ibid. 414.

EVICTION OF PART OF HEIRS OF COVENANTEE.

4. Where a suit in ejectment has been brought against the grantee, and he dies during the pendency of the suit, and it is revived against his heirs, to whom his title descended, and it was omitted to make one of the heirs a

COVENANTS FOR TITLE.

EVICTION OF PART OF HEIRS OF COVENANTEE. *Continued.*

defendant, and the suit progresses to a recovery against them, *held*, that this was such an eviction as authorized the heirs to maintain covenant on the warranty to their ancestor. Ibid. 414.

CREDITORS.

CREDITOR OF AN ESTATE.

In what forum he may have his remedy. See ADMINISTRATION OF ESTATES, 2.

CREDITOR OF AN AGENT.

Who receives property of the principal in payment of the agent's debt — liability of such creditor to the principal. See AGENCY, 5.

CRIMINAL CONVERSATION.

OF THE GROUNDS OF RECOVERY.

1. *In an action by the husband.* While the loss of service of the wife or daughter is the alleged ground of recovery, the injury to the family in its reputation, the mental anguish and distress which necessarily attend the transaction are the real causes for the recovery. The law does not limit the recovery to the precise amount of pecuniary loss sustained, but allows a recovery for injury to family reputation. Although absent from home, the husband does not cease to be entitled to his wife's services, in the nurture of his children, as well as to a virtuous example to them by her. *Yundt* v. *Hartrunft*, 9.

OF THE DAMAGES.

2. *Of the ground for exemplary damages.* An instruction which informs the jury, that, if plaintiff placed his business in the hands of the defendant before he left, and defendant took advantage of the position thus given him to seduce plaintiff's wife, and did so, then they might give exemplary damages, is not erroneous in a case of this character, when damages may be recovered beyond the actual loss in money or service. Ibid. 9.

3. *Allegation in aggravation of damages must be proved.* In an action of this character, where loss of service of the wife is alleged in aggravation of damages, there should be no recovery on that ground unless such loss of service is proved. Ibid. 9.

DEATH OF THE WIFE.

4. *Does not affect the husband's right of action.* See ACTION, 1.

DAMAGES.

ASSESSMENT BY THE CLERK.

When allowable. See ASSESSMENT OF DAMAGES, 1.

WHEN THEY MAY BE RECOUPED.

Damages arising from breach of contract for work — when they may be recouped in an action for the price. See CONTRACTS, 10, 11, 12.

RAPE — ASSAULT AND BATTERY.

Of the rule as to damages in trespass for an assault and battery, with attempt to commit a rape — what circumstances should control them. See RAPE, 1 to 4.

DAMAGES. *Continued.*

MEASURE OF DAMAGES. See that title, *post.*

EXEMPLARY DAMAGES. See MEASURE OF DAMAGES, 8, 12, 16. CRIMINAL CONVERSATION, 2, 3.

MITIGATION OF DAMAGES. See MEASURE OF DAMAGES, 8, 13.

DAYS OF GRACE.

PROMISSORY NOTES.

1. *Whether entitled to days of grace.* Prior to the passage of the act of 1861, allowing days of grace upon a certain class of promissory notes, that character of paper was not entitled to days of grace, in this State. *Reese* v. *Mitchell*, 365.

2. *The usage in that regard.* The custom of giving days of grace by a portion of the business community did not change the law, nor was any one bound by such a usage. Ibid. 365.

3. *Act of* 1861 — *construction.* The act of 1861 does not apply to or govern notes executed prior to its passage, but only controls those subsequently executed. Ibid. 365.

DEATH.

ITS EFFECT UPON A RIGHT OF ACTION.

Action by the husband for crim. con. with his wife — death of the latter does not affect it. See ACTION, 1.

DEBTOR AND CREDITOR.

BECOMING THE VOLUNTARY DEBTOR OF ANOTHER.

Where an agent sold the grain of his principal on time, and, before the money was paid, the agent and the purchaser became partners, and this debt was taken into account by them, the principal would not thereby have an action against the firm; and an arrangement between the partners, on dissolution, that the agent should pay for the grain, would not make him the debtor of his principal, or prevent the latter from recovering against the purchaser. *Ingersoll* v. *Banister*, 388.

DECREE.

RETURN OF "NOT FOUND."

Proof thereof by recital in decree. See PROCESS, 7.

MODIFYING A DECREE OF A PREVIOUS TERM. See PRACTICE IN THE SUPREME COURT, 12, 13.

DEEDS. See CONVEYANCES.

DEFAULT.

SETTING ASIDE DEFAULT.

1. *It is discretionary* in a court to set aside a default, and an appellate court rarely reviews the exercise of the discretion, and then only to prevent gross injustice. *Bowman* v. *Wood*, 203.

2. *Of the grounds for setting aside a default.* Where the ground relied upon for setting aside a default is, that the defendant has a cross action against the plaintiff, it simply appeals to the circuit judge to exercise a discretion,

DEFAULT. SETTING ASIDE DEFAULT. *Continued.*

and, as the defendant may still sue and recover judgment on his demand against the plaintiff, the refusal to let such a defense in cannot work injustice. Ibid. 203.

MOTION TO SET ASIDE DEFAULT.

Within what time it must be made. See PRACTICE, 4.

DELIVERY.

ON SALES, FOR FUTURE DELIVERY.

The seller must show a readiness — an ability to deliver — or he cannot recover damages on an allegation that the buyer refused to receive and pay for the property. See SALES, 1, 2.

DELIVERY OF A DEED.

Presumption as to time of delivery. See CONVEYANCES, 1.

DEMAND.

PURCHASER OF LAND.

When he should demand a deed, to entitle him to sue for the purchase-money back. See VENDOR AND PURCHASER, 1.

DEMURRER.

WANT OF PROPER AVERMENT.

When it must be presented by demurrer. See JEOFAILS, 1.

DEMURRER IN CHANCERY.

What objections must be taken by demurrer. See CHANCERY, 10.

DEPENDENT AND INDEPENDENT COVENANTS. See CONTRACTS, 13, 14, 15.

DEPOSITIONS.

OF RESIDENT WITNESSES.

In what county they may be taken. It is not irregular to take the deposition of a witness residing in one county, in another county. It may be he was not bound to attend for the purpose, but having done so it is regular. *Harding* v. *Larkin et al.*, 414.

DESCRIPTION.

OF PREMISES IN A DEED. See CONVEYANCES, 3.

DESCRIPTION OF PREMISES.

In a judgment of foreclosure by scire facias — must correspond with the description in the mortgage. See MORTGAGES, 20, 21.

REFORMING THE DESCRIPTION IN A MORTGAGE.

In what proceeding it may be done. See MORTGAGES, 22.

DISCRETIONARY.

WHAT MATTERS ARE DISCRETIONARY.

Setting aside default — how far discretionary. See DEFAULT, 1, 2.

Decreeing a specific performance. See CHANCERY, 20.

DOWER.

WHAT ESTATE SUBJECT TO DOWER.

1. *Of trust estates.* The wife of one who holds lands in trust for another, is not entitled to dower in such lands. *Bailey* v. *West*, 290.

DOWER. *Continued.*

OF THE RENTS AND PROFITS.

2. *On the second marriage of the widow.* The husband of a woman, by a second marriage, is entitled to the rents and profits of her dower estate which she holds in the lands of a former husband. Ibid. 290.

TRANSFER OF DOWER RIGHT.

3. *Before it is assigned.* A right of dower, before it is assigned, cannot be conveyed to any person but the owner in fee. *Bailey* v. *West*, 290.

4. *By separate deed, after second marriage.* The separate deed of a married woman will not operate to pass her right of dower in the lands of a former husband. Her husband should join in the deed, or no title will pass. Ibid. 290.

WHEN BARRED BY LIMITATION.

Under act of 1839, *when the statute begins to run.* See LIMITATIONS, 2, 3, 4.

DRAINAGE COMMISSIONER.

OF HIS POWERS. See CHANCERY, 29.

DURESS.

MONEY PAID UNDER DURESS. See PAYMENT, 1.

EJECTMENT.

AGAINST WHOM THE ACTION WILL LIE.

1. *Who is an occupant within the meaning of the ejectment law.* Persons who are in possession of land merely as the servants or employees of the party claiming title adversely, are not occupants of the land, within the meaning of the ejectment law, and an action of ejectment cannot be maintained against them. *Chiniquy* v. *The Catholic Bishop of Chicago*, 149.

2. So, a clergyman who preaches on Sunday, or any other day of the week, in a church edifice, under the direction and employment of a religious corporation, is not liable to an action of ejectment, and to be mulcted in costs, at the suit of a person claiming the title against the corporation. Ibid. 149.

WHERE THE DEFENDANT ENTERED AS PURCHASER.

3. *What relation between the parties will authorize a recovery.* A plaintiff in ejectment may recover, even though he fails to show a paramount paper title, if it appear the defendant entered under a contract of purchase from him, which had been surrendered up; and in such case the defendant cannot dispute his vendor's title without showing an outstanding paramount title in a third person. *McKibben et al.* v. *Newell*, 461.

4. And a party claiming under such vendor through a conveyance from him, may, upon the same principle, recover against a party who has entered under such prior purchaser after he had surrendered his contract to the vendor. Ibid. 461.

EVIDENCE IN EJECTMENT.

5. *The legal title must prevail.* It is not competent, in an action of ejectment, to show who paid the consideration money on the conveyance of the premises to the plaintiff, with the view to establish a trust. In this action the legal title must prevail against every equity. *Chiniquy* v. *The Catholic Bishop of Chicago*, 148.

EJECTMENT. EVIDENCE IN EJECTMENT. *Continued.*

6. *Questioning organization of a corporation.* Where an action of ejectment is brought in the name of a party, as a corporation, matters relating to the organization of such corporation cannot be inquired into in such action. In a direct proceeding by *quo warranto*, proofs relating to its organization might be required. *Chiniquy* v. *Catholic Bishop of Chicago*, 149.

WHERE BOTH PARTIES CLAIM FROM A COMMON SOURCE.

7. *Of the necessary proof in such case.* In an action of ejectment for the recovery of mortgaged premises against the widow and heir of the mortgagor, the plaintiff need not trace title back of the common source, and it cannot matter whether an affidavit of the loss of a deed, in the chain prior to the mortgage, is sufficient or not, as the deed itself is not material in showing a right of recovery. *Pollock et al.* v. *Maison et al.*, 516.

EJECTMENT BY A MORTGAGEE.

When barred by limitation. See LIMITATIONS, 6 to 9.

WHO MAY QUESTION THE VERDICT. See PRACTICE IN THE SUPREME COURT, 5.

ELECTION.

FAILURE TO EXECUTE WORK ACCORDING TO CONTRACT.

Of the right to elect to keep or return the article — in what cases the doctrine applies. See CONTRACTS, 8, 9, 10.

ERROR.

WILL NOT ALWAYS REVERSE. See PRACTICE IN THE SUPREME COURT, 7, 8, 9.

WHAT CHARACTER OF ERROR WILL REVERSE.

It is only judicial errors of which the appellate court will take cognizance. See same title, 10.

CLERICAL ERRORS.

What constitutes — and where corrected. See CLERICAL ERROR, 1. PROCESS, 2.

ESTOPPEL.

1. Effect of a lease taken by a judgment debtor upon his own land, as an estoppel to the judgment creditor or a purchaser under the judgment, from disputing the title of the lessor. See LIEN, 3, 4.

2. *When a party who has subscribed to the stock of a company is estopped from questioning the regularity of a call made upon him for payment.* See SUBSCRIPTION, 2.

EVICTION.

YIELDING TO SUCCESSFUL TITLE. See COVENANTS FOR TITLE, 2.

EVICTION OF PART OF HEIRS OF COVENANTEE. Same title, 4.

EVIDENCE.

PAROL EVIDENCE.

1. *When extrinsic facts may be shown, to aid in giving a construction to a contract.* In giving a construction to a written contract, it is always proper,

EVIDENCE. PAROL EVIDENCE. *Continued.*

when the writing is not specific, to ascertain such extrinsic facts as the parties had in view at the time the contract was made, in order to ascertain their true meaning. *Thomas* v. *Wiggers*, 470.

2. The rule that parol testimony is not admissible to add to or vary the terms of a written instrument, is not violated by the admission of parol testimony to show the condition of the property which is the subject of the contract, with a view to arrive at the true intent of the parties in the terms used by them. Ibid. 470.

3. So, where the owner of a building, who occupied a part of it, and in which he had a steam-engine in use, leased another part of the building to a party for a purpose that required the use of steam, the lease providing that the lessee should have a certain portion of the building, "together with one-half of the steam power produced by the then present therein located steam-engine, or one of equal capacity, to be kept in motion by the lessor ten hours each day," it was *held*, in an action by the tenant against his landlord, to recover damages for the destruction by the latter of the pipe by means of which the former obtained his supply of steam from the engine, that it was competent for the plaintiff to prove that he had occupied the premises mentioned in the lease for more than a year immediately preceding the execution thereof, under other leases from the defendant, oral and written, and had used the steam in a certain manner which was supplied to him by means of the pipe which the defendant had destroyed. Ibid. 470.

4. While it is true, the written contract should govern, still, as the intention of the parties, as to what facilities and appurtenances were to be secured to the tenant in carrying on his business, must be reached, that could be done in no better way than by showing a previous holding by the tenant, and what he enjoyed under it, and the necessity of the facilities of which he had been deprived, for carrying on his business. Ibid. 470.

5. *Parol reservation of growing crops, on a conveyance of land — cannot be proved.* Where a party has conveyed land on which there were growing crops, unless there is a reservation in writing, they will pass with the land, and a parol reservation cannot be shown. *Powell* v. *Rich*, 466.

6. *Parol license to remove growing crops.* But a parol license to remove growing crops may be given by the owner of the land, and if the license is acted upon, and the crops are reduced to possession and removed, the title will vest in the person so licensed. Ibid. 466.

7. *Contradicting the record of a judgment.* The date of a judgment is as material as any other portion of it, and can no more be contradicted by parol evidence than the amount or character of the judgment. *Wiley et al.* v. *Southerland*, 25.

8. So, where a party against whom a judgment has been rendered by a justice of the peace, on a garnishee process, sought to enjoin the collection of the judgment, upon the alleged ground, that, while upon its face it

EVIDENCE. PAROL EVIDENCE. *Continued.*

purported to have been rendered on the same day the defendant therein answered, yet in fact it was not entered until long afterward, whereby he lost his opportunity of appeal, and by such delay the justice had lost his jurisdiction,—it was *held*, the record must be taken as speaking the absolute truth as to the date of the entry, and could not be contradicted by parol in that regard. *Wiley et al.* v. *Southerland*, 25.

9. *To show what was litigated in a former suit.* If the record of a suit on a replevin bond shows that a recovery was had for damages for the detention of the property under the writ of replevin, the record cannot be controverted, and a pleading in another action which alleges to the contrary is bad on demurrer. *Sheppard* v. *Butterfield et al.*, 77.

10. But, it not appearing by the record whether the question of damages for the detention was litigated in that case, or whether the recovery was only for the value of the property, the parties can show in a subsequent suit, by parol evidence, what causes of action were in fact litigated. Ibid. 77.

11. *To change the terms of an insurance policy.* A policy of insurance must be taken as embodying the contract of the parties, and its terms cannot be changed by parol proof. *Schmidt et al.* v. *Peoria Marine and Fire Ins. Co.*, 296.

12. *To explain for what purpose a note was given.* It is probable, if objection were made, that, in a suit upon a promissory note, parol proof would not be received to show, that the note was given as a security that a person under arrest on a *ca. sa.* would surrender himself at a future day, and that he had done so. But the objection should be made on the trial. *Daggett* v. *Gage*, 465.

CERTIFIED COPY OF A DEED.

13. *When admissible in evidence.* Where an affidavit states that the original deed was not, or ever had been, in the possession of the party offering the copy, or in his power or control, or that of his agent or attorney, *Held*, this was a compliance with the statute and authorized the reading of the certified copy in evidence. *Deininger et al.* v. *Mc Connel*, 228.

ADMISSIONS.

14. *And the accompanying explanations.* The admissions of a party and the accompanying explanations relating to the subject-matter of the admission, should be considered together by the jury, and given such weight, respectively, as they are entitled to in view of all the circumstances of the case. *Yundt* v. *Hartrunft*, 9.

15. *Admission of a partnership by one of several partners, does not affect the others.* Where three persons are sued as partners, and two of them file a plea in abatement denying the partnership with the other, and admitting it as between themselves, and the third files the general issue, he thereby admits the partnership, but the admission does not affect the issue presented by the other two. *Degan et al.* v. *Singer*, 28.

16. The admissions of the defendant who filed the plea of general issue are binding upon himself, but not upon the other defendants. They can

EVIDENCE. ADMISSIONS. *Continued.*

only be bound by their own acts and declarations. Such declarations of the defendant, who had admitted the partnership, are not evidence against the others, whether supported or not by other evidence; and it is error to instruct that they are. Had the statement been made in the presence of the others, and they had not contradicted it, it would then have been for the jury to determine whether it bound the others. *Degan et al.* v. *Singer*, 28.

17. *Account rendered, and not objected to.* The rule among merchants, dealing with each other, seems to be, if an account rendered is not objected to in a reasonable time after it is presented, the account is regarded as allowed. *Miller et al.* v. *Bruns et al.*, 293.

18. In a case of that character the court below refused to instruct the jury for the plaintiff, that the defendant having retained the account rendered to him by the plaintiff for a certain time without objection to the correctness thereof, amounted to an admission of its correctness, but instructed the jury that such fact was a circumstance to be considered, in determining whether or not the defendant had admitted the correctness of the account. This submitted the question of admission fairly to the jury. Ibid. 293.

BURDEN OF PROOF.

19. *On an issue out of chancery, on a bill to impeach a will.* On the trial of such an issue, the burden of proof is on the party affirming the execution and validity of the will. *Potter et al.* v. *Potter et al.*, 84.

20. *In suit by a corporation — under plea of nul tiel corporation.* In a suit by a corporation upon a call on a subscription to the capital stock of the company, under the issue on the plea of *nul tiel corporation*, the *onus* is upon the plaintiff to prove its corporate existence. *Stone* v. *The Great Western Oil Co.*, 85.

BOOKS OF ACCOUNT.

21. *When admissible as evidence.* Where an agent sold the grain of his principal to a merchant on time, and, before it was paid, the agent and merchant became partners, and this debt was taken into account by them the principal would not thereby have an action against the firm, and an arrangement on the dissolution of the partnership that the agent should pay for the grain, did not render him the debtor of his principal, or prevent him from recovering for the grain of the purchaser. And it was error to admit the firm books in a suit by the owner of the grain against the purchaser, to prove that it was agreed the agent should pay him. They were not evidence to bind the owner of the grain. Account books are not admissible as evidence until it is proved that they are the books of original entry, that persons had settled by and found them correct, that some of the items charged had been delivered, and that the trader had no clerk when the entry was made. *Ingersoll* v. *Banister*, 388.

SHOWING RELEVANCY OF TESTIMONY.

22. *Necessity of showing its relation to the case, when offered.* Where a deed is offered in evidence in an action of ejectment, which, standing by itself,

EVIDENCE. SHOWING RELEVANCY OF TESTIMONY. *Continued.*

proves nothing material to the controversy, but the offer to read it is accompanied by a declaration that it would be followed by other evidence showing it to be a link in a chain of title, it should be admitted; but without such declaration it would not be error to reject it. *McKibben et al.* v. *Newell*, 461.

IN ACTION ON REPLEVIN BOND.

23. *Of a former assessment of damages.* Where, upon a nonsuit being entered in an action of replevin, the court ordered a return of the property and assessed damages for its detention, evidence of such assessment cannot be given in a subsequent action on the replevin bond. The bond does not require the payment of such an assessment. *Shepard* v. *Butterfield et al.*, 76.

24. While, under the general breach assigned upon the bond, evidence of damages suffered by the detention prior to the order of *retorno habendo*, would be admissible, yet it must be evidence of what the damages in fact were, without any reference to the former assessment. Ibid. 76.

25. The plaintiff in the action on the bond is at liberty to go into the question of damages for the detention, but he is not obliged to do so. He may abide by the first assessment, and take a verdict in the pending suit merely for the value of the property. Ibid. 76.

26. *Effect of recovery of damages for detention, on the former assessment.* If the plaintiff in the action on the bond does in fact offer evidence upon the damages for the detention of the property, the verdict and judgment in that case, when paid, will be a bar to the collection of damages under the former assessment. Ibid. 76.

LEADING QUESTIONS.

27. *What constitutes.* In an action of trover, one of the questions of fact in controversy was, whether plaintiff, in making a demand of the property from the defendant, demanded the entire property or only a half interest which he owned, and the plaintiff asked his own witness, who was present when the demand was made, "What was said, if any thing, at that time, about his interest in the machine?" The question was *held*, not to be leading, but merely directed the witness' attention to the particular point in controversy. *Swartwout* v. *Evans*, 376.

ATTACKING JUDICIAL PROCEEDINGS COLLATERALLY.

28. *Want of jurisdiction of the person.* A decree in chancery rendered against a defendant of whose person the court had not obtained jurisdiction, is void, and may be questioned in either a direct or collateral proceeding. *Campbell et al.* v. *McCahan*, 45.

AFFIDAVIT FOR CHANGE OF VENUE.

29. *Not admissible.* An affidavit for a change of venue, because of the prejudice of the judge or the inhabitants of a county against a defendant, is not evidence to prove any issue in the case in which it is made, and should not be read in evidence to the jury. *Yundt* v. *Hartrunft*, 9.

TESTIMONY OF EXPERTS.

30. *Insurance agents.* Insurance agents cannot be called as experts to prove, what, in their opinion, would or would not be an increase of risk in

EVIDENCE. DELIVERY OF GOODS TO SERVANTS OF BUYER. *Continued.*
what goods he had delivered to the buyer's men, leaving it to the jury under instructions, to say whether they were delivered in such manner as to make him liable. *Schneider* v. *Seely*, 257.

PROOF OF HANDWRITING.

22. *In what manner it may be made.* Proof of the signature of a party cannot be made by comparison with other signatures, but the handwriting must be proven by witnesses who have seen the party write, and are familiar with his signature, or who have seen letters or other documents which the party has, in the course of business, recognized or admitted to be his own handwriting. *Putnam* v. *Wadley*, 346.

23. It is not enough that the witness may have seen the signature of the party to other instruments than that, the execution of which is sought to be established, unless such other instruments are shown to have been recognized by the party as having been signed by him. Ibid. 346.

PROOF OF EXECUTION OF AN INSTRUMENT.

24. *Where an instrument sued on is signed by the initial letter of the christian name — under what state of pleading it is admissible in evidence.* See PLEADING AND EVIDENCE, 11.

25. *What is sufficient.* Where a party whose name appears signed to an instrument performs the acts which are required by it, that will be regarded as such a recognition of its validity as will estop him from denying its execution. *Boggs et al.* v. *Olcott*, 303.

26. So, where a person's name appears to a subscription to stock of a banking association, and he has paid calls as a shareholder on the number of shares set opposite his name, after his name was placed there, this will be taken as an admission that his signature and subscription were authorized and binding. Ibid. 303.

PROOF OF MEMBERSHIP OF AN ASSOCIATION.

27. *What is sufficient.* Where the party has paid in his stock, accepted a directorship in the association, and advised and consulted with other directors in reference to the business of the association, he thereby admits that he was a member, and such acts are sufficient to render him liable for the debts of the concern. Ibid. 303.

PROOF OF POSSESSION OF LAND.

28. *Of the manner thereof.* Possession may be proven by inclosure, when it is co-extensive with the inclosure; or by showing paramount title, which draws to it the possession, in contemplation of law, to the boundary lines of the tract, if it is unoccupied by another. Or, it may be shown by proving actual occupancy of a portion of the tract, with a deed under which the possession is held, and in such case, the deed proves or explains the possession as extending to the lines called for by the deed. *Winkler* v. *Meister et al.* 349.

29. But a party by merely showing that he is in the actual possession of a portion of a legal division or subdivision of land, does not thereby

EVIDENCE. PROOF OF POSSESSION OF LAND. *Continued.*

prove possession of the whole of such division or subdivision; and it matters not whether the claim is for the entire tract or only a portion of it. *Winkler* v. *Meister et al.* 349.

PROOF OF SERVICE OF PROCESS.

30. *Recital thereof in judgment or decree—the rule in collateral proceedings.* See PROCESS, 1 to 4.

ADMISSIBILITY, GENERALLY.

31. Where the owner of property, the warehouse receipts for which had been transferred without authority, brought replevin against the warehouseman, a receipt given to the plaintiff for those warehouse receipts by the party to whom they were delivered, stating the purpose for which they were delivered, was *prima facie* admissible in evidence on behalf of the owner. *Burton* v. *Curyea*, 321.

MOTION TO EXCLUDE EVIDENCE.

32. *On a specific ground.* If, upon testimony given after such receipt was admitted in evidence, a question should arise as to its admissibility by reason of its being alleged to bear date subsequent to the wrongful transfer of the warehouse receipts, it seems a motion should be made to exclude the receipt upon that ground, so as to afford an opportunity for an explanation of the question of dates. Ibid. 321.

UNSTAMPED INSTRUMENTS.

33. *For what purposes of evidence they are admissible.* See STAMP ACT, 2, 3.

INADEQUATELY STAMPED INSTRUMENTS.

34. *Who shall object.* See STAMP ACT, 1.

Admissible under common counts. Same title, 4.

IN CRIMINAL CASES.

35. *The offense must be shown to have been committed in the proper county.* See NEW TRIALS, 13.

36. *Where a convict is charged with the murder of a prison officer.* Where a party is on trial upon a charge of murder, committed while he was confined in the penitentiary as a convict, upon one of the officers of the prison, who was charged with its police, but at a time when the latter was not exercising or attempting to exercise prison discipline, the question of the legality of the conviction of the prisoner under which he was at the time in prison, is not involved. The issue in such a case is, not as to the legality of such conviction, but did he do the homicide charged, and under what circumstances? These circumstances, even as to the fact that the party on trial was occupying a cell in the penitentiary as a convict, are open to the usual parol proof. *Chase* v. *The People*, 352.

37. It is undoubtedly true, that if his conviction had been in question, it could not be established by parol. Ibid. 352.

38. *What is admissible in evidence under an indictment for selling lottery tickets.* A party was indicted for selling lottery tickets, the offense consisting in the sale of an envelope which contained a card or ticket pur-

FRAUD. *Continued.*

RESCISSION OF SALE BY THE SELLER.

2. *On the ground of fraud — must restore the amount paid.* See SALES, 4, 5.

FRAUD ON THE PART OF THE BUYER.

3. *Authorizes the seller to affirm or rescind the sale.* Same title, 5.

CHANCERY.

4. A court of chancery will not lend its aid to either party to a suit which has arisen out of an attempt on the part of both to defraud another out of his property. *Dunning* v. *Bathrick*, 425.

FRAUDS, STATUTE OF. See STATUTE OF FRAUDS.

FREEPORT, CITY OF.

LIABILITY FOR BUILDING BRIDGES.

And herein, of the liability of the adjacent towns. See TOWNS, 3, 4, 5.

GAMBLING CONTRACTS.

JURISDICTION IN CHANCERY.

To set aside judgments rendered thereon. See CHANCERY, 6.

GROWING CROPS.

WHEN REAL AND WHEN PERSONAL PROPERTY.

1. *Whether they pass on a conveyance of the land.* As between landlord and tenant, debtor and creditor, and, under the statute, between the executor and heir, growing crops are personalty; but, as between a wrong-doer and the owner of the soil, and the vendor and purchaser, they are real estate, and pass by a conveyance, without a reservation in writing is made. *Powell* v. *Rich*, 466.

2. After the crops have matured, however, it is otherwise. Ibid. 466.

STATUTE OF FRAUDS.

3. And until matured they cannot be sold by the owner of the soil under the statute of frauds, unless the transfer is evidenced by a memorandum in writing. Ibid. 466.

PAROL RESERVATION.

4. Where a party conveys land upon which crops are growing, he will not be allowed to prove a parol reservation of the crops, at the time of the sale. Ibid. 466.

LICENSE BY PAROL.

5. The owner of the freehold may license another to remove growing crops, and, if acted upon and they are reduced to possession before a revocation, the title in the crops will vest in the person thus licensed. Ibid. 466.

GUARANTY.

OF BLANK INDORSEMENTS.

1. *Presumption as to the character of liability intended to be assumed.* Where a party indorses his name on a note before it is delivered to the payee, the presumption will be indulged that he intended to guarantee its payment.

GUARANTY. OF BLANK INDORSEMENTS. *Continued.*

If indorsed afterward, then it will be presumed, in the absence of proof, that he intended to become only an assignor of the note. When indorsed after its delivery, it would devolve on the holder to prove that he was authorized to fill up the guaranty, and that it was supported by a sufficient consideration. If an assignment only was intended, and the holder fills it up with a guaranty, the true agreement of the parties may be shown and defeat a recovery on the guaranty. *White et al.* v. *Weaver*, 410.

2. *Presumption as to the time the indorsement was made.* Where an indorsement is made without date, the presumption is that it was of the date of the note, and the presumption will prevail unless rebutted. When shown to have been made after the delivery of the note, it will be presumed that it was as a holder and to assign the instrument. Ibid. 410.

GUARDIAN AD LITEM.

WHEN NOT PROPERLY APPOINTED. See INFANTS, 1.

GUARDIAN AND WARD.

POWER OF THE GUARDIAN.

1. *To mortgage the real estate of his ward.* The 134th section of the statute of "wills" provides, that real estate may be mortgaged by a guardian, *provided*, the mortgage shall not be for a longer term than until the heir entitled to such real estate shall attain the age of twenty-one years, if a male, or eighteen years if a female. *Merritt* v. *Simpson et al.*, 391.

2. So a mortgage in fee executed by a guardian upon the ward's land, being wholly unauthorized by the statute, is nugatory and void, so far as the interests of the ward are involved. Ibid. 391.

HIGHWAYS.

LOCATION NEAR TOWN LINE.

Whether the joint action of commissioners of highways of both towns is necessary. Held, that the location of a highway by road commissioners, near to a town line, but wholly within the town, and not on the line and partly within both towns, is authorized to be done by the commissioners of the town in which the road is located. That in such case it does not require the joint action of the highway commissioners of both towns; otherwise, when it is located on the town line, and partly in each, as then it becomes a road common to both bodies, and under the joint control of the two, and it must be located and maintained under the provisions of the 85th section of the township organization law of 1861. *Mack* v. *Commissioners of Highways*, 378.

CITIES — GRADING AND DRAINING OF STREETS.

How far a city is responsible to owners of property, for the manner of its exercise of the power to grade and drain the streets. See CORPORATIONS, 13 to 19.

COMMISSIONERS OF HIGHWAYS.

A majority may act. See CORPORATIONS, 5 to 10.

BRIDGES — TOWNS.

Liability for building bridges. See TOWNS, 1 to 5

EXCEPTIONS AND BILLS OF EXCEPTIONS.

TIME FOR FILING BILL OF EXCEPTIONS. *Continued.*

14. *Presumption as to time of presentation to the judge.* Where the judge has signed the bill of exceptions, nothing appearing to the contrary, it will be presumed he would not have done so unless it had been presented to him in proper time. *Underwood* v. *Hossack*, 98.

15. *Rebutting such presumption.* The mere fact that the bill of exceptions was not *filed* within the time prescribed, does not rebut that presumption; though it may be rebutted by proof. Ibid. 98.

BILL OF EXCEPTIONS IS PART OF THE RECORD.

16. A bill of exceptions in a suit at law, or a certificate of evidence in a chancery cause, when properly filed, becomes a part of the record in that cause. *Wallahan* v. *The People*, 102.

AMENDING BILLS OF EXCEPTIONS. See PRACTICE IN THE SUPREME COURT, 65, 66, 68, 69, 70, 75.

COMPELLING A JUDGE TO SIGN.

Remedy by mandamus. See MANDAMUS, 1.

EXECUTION.

LEVY UPON GROWING CROPS.

When sufficient. See LEVY, 1.

FENCING RAILROADS. See RAILROADS, 1, 2.

FICTITIOUS CASES.

HOW DISPOSED OF.

Where a case has the appearance of being a fictitious case, an affidavit will be required showing it not to be so, and on failure to comply with a rule in that regard, the cause will be dismissed. *The People ex rel.* v. *Leland*, 118.

FORCIBLE ENTRY AND DETAINER.

OF THE COMPLAINT.

1. *Its requisites — averment as to possession.* It is necessary to show distinctly, in the complaint in an action of forcible entry and detainer, that the defendant entered upon the possession of the plaintiff; and in reference to an allegation in respect thereto, the pleading is to be construed most strongly against the pleader. *Spurck* v. *Forsyth*, 438.

2. So the averment in the complaint, that on a certain day the plaintiff was in possession of the premises, and that, on the day following, the defendant entered into possession, is not a sufficient averment that the plaintiff was in possession at the time of the alleged unlawful entry. Ibid. 438.

3. Nor is the complaint aided in that regard by an averment that the plaintiff was, on the day he was alleged to have been in possession, and still is, the owner of the premises. That is not an averment that he was the owner during all the intervening time; and, if it was, it would be immaterial, as this action has nothing to do with ownership. Ibid. 438.

FORCIBLE ENTRY AND DETAINER. OF THE COMPLAINT. *Continued.*

4. If the possession of the one and the entry of the other had been averred as being on the same day, it would be tantamount to an averment that the defendant entered on the possession of the plaintiff; because, for ordinary purposes, and unless necessary to determine conflicting rights, the law does not note the divisions of a day, and an averment that two things occurred on the same day is, in most cases, to aver that they occurred simultaneously. *Spurck* v. *Forsyth*, 438.

5. *Whether the precise day of the entry must be averred and proved.* The precise day of the entry is immaterial, nor is it necessary to prove the entry to have been made on the day named in the complaint. Ibid. 438.

6. *Averment of ownership — the action is possessory.* An averment of ownership in the plaintiff is immaterial. The action lies for a forcible entry upon an actual possession, and lies as well against the owner as against any other person. Ibid. 438.

CHARACTER OF POSSESSION REQUIRED.

7. The possession need not be by residence, but it must be actual as distinguished from constructive; that is to say, the premises must furnish visible tokens of occupancy, such as fences, buildings or cultivation. Ibid. 438.

AMENDMENT OF THE COMPLAINT.

8. *Discretionary.* Whether an amendment of the affidavit in this action shall be allowed, is in the discretion of the Circuit Court. Ibid. 438.

FORMER DECISIONS.

GUYKOWSKI'S CASE, 1 Scam. 476; GREENUP v. STOKER, 3 Gilm. 202, and *Davis' case*, 19 Ill. 74, on the subject of the statutory disqualifications of jurors, reviewed and to some extent modified, in *Chase* v. *The People*, 352. See JURY, 8.

HOPPS v. THE PEOPLE, 31 Ill. 385, in regard to the burden of proof where insanity is interposed as a defense in criminal cases, explained in *Chase* v. *The People*, 353. See EVIDENCE, 39.

COUNTY COM'RS OF RANDOLPH COUNTY v. JONES, Breese, 237, in respect to the power of public authorities to accept a contract of subscription for public purposes, considered in *Thompson* v. *Supervisors of Mercer County*, 379. See SUBSCRIPTION, 2.

RITCHEY v. WEST, 23 Ill. 385, in regard to liability of a physician for malpractice, explained in *McNevins* v. *Lowe*, 209. See PHYSICIAN, 3.

UNKNOWN HEIRS OF LANGWORTHY v. BAKER, ADMR., 23 Ill. 487, in reference to suing out a writ of error to a County Court, reviewed and explained in *Hobson et al.* v. *Paine*, 25.

INSURANCE. WARRANTY — AFFIRMATION. *Continued.*

upon a tannery contained these words: "No fire in or about said building, except one under kettle, securely imbedded in masonry (used for heating water), and made perfectly secure against accidents." These words do not constitute a warranty on the part of the assured that there shall be no fire in the building during the continuance of the policy except the one under the kettle, but merely affirm what the condition of the property was at the time the policy issued. *Schmidt et al.* v. *Peoria Marine and Fire Ins. Co.*, 295.

2. So the use of other fires in the building during the term of insurance, will not, under such a clause, avoid the policy. Ibid. 295.

PROVISION AGAINST INCREASE OF RISK.

3. *Effect of an express provision against an increase of risk subsequent to the issuing of the policy.* Where it is provided in a policy of insurance, that, "If, after insurance is effected, the risk be increased by any means, or occupied in any way so as to render the risk more hazardous than at the time of insuring, such insurance shall be void and of none effect," these words are construed to mean that the policy shall become inoperative only while the increased risk shall be in existence, and, when it terminates, the liability of the company will re-commence. Ibid. 295.

4. *What is the real question in case of loss, under such a clause.* Where a loss has occurred, and the insurer invokes such a clause for his protection, alleging an increase of risk, as in the use of more fires in the building, it is not competent to prove that the risk is increased by the increase of the number of fires in a building; but the real question is, was the risk to the particular building, at the time it was burned, greater in consequence of the presence therein of stoves, in which fires had been used at a time more or less remote from the time of the loss, and which were not in the building at the time the policy was issued, placed as the stoves were and used in the manner shown by the proof. Ibid. 295.

INTEREST.

WHEN RECOVERABLE.

In an action for breach of covenants for title. See MEASURE OF DAMAGES, 2, 3.

Where one person has converted the property of another to his own use. See WAREHOUSEMEN, 3.

JEOFAILS.

WANT OF AVERMENT CURED AFTER VERDICT.

Where it is urged that the declaration fails to contain an averment that it was necessary to have fenced the track of the railroad at the place where an accident occurred, it is not error for the court to refuse on the trial to instruct the jury that such an averment was necessary; if material, it should have been presented by demurrer. The evidence on the trial showing that a fence was necessary cured the want of the averment and sustained the verdict. *Toledo, Peoria and Warsaw Railroad Co* v *McClannon*, 238.

JEOFAILS. *Continued.*

MISJOINDER OF PARTIES DEFENDANT.

Cured after verdict. See ABATEMENT, 3.

JUDGMENTS.

JUDGMENT WITHOUT SERVICE.

1. *Judgment against all, with service only upon part—who may object.* See PRACTICE IN THE SUPREME COURT, 6.

JUDGMENT AGAINST PART OF SEVERAL DEFENDANTS.

2. *In tort and assumpsit.* The rule in assumpsit that final judgment against part of the defendants without disposing of the case as to the others, is error, has no application to actions of tort, there being no contribution among wrong-doers. Hence, a judgment in trover against part of the defendants, amounts to a dismissal, as to the residue, and is not error. *Davis et al.* v. *Taylor*, 405.

MODIFYING JUDGMENT OF A PREVIOUS TERM.

3. *In the Supreme Court.* See PRACTICE IN THE SUPREME COURT, 12, 13.

JUDGMENT ON FORECLOSURE BY SCIRE FACIAS.

4. *Against husband and wife—its form.* See MORTGAGES, 19.

Description of the premises in such judgment.. See same title, 20, 21.

CANNOT BE CONTRADICTED BY PAROL. See EVIDENCE, 9

JUDGMENT CREDITOR.

SUBSEQUENT ACTION OF THE DEBTOR.

Cannot impair the creditor's lien. See LIEN, 1 to 4.

JUDGMENT LIEN. See LIEN, 1 to 4.

JURISDICTION.

JURISDICTION ESSENTIAL TO A VALID DECREE.

1. *Of the person, as well as the subject-matter.* A judicial sentence to be binding must be based on jurisdiction of the person and of the subject-matter. If either is wanting the whole proceeding is *coram non judice*, and may be questioned in either a direct or collateral proceeding; the decree in such a case being void, all acts performed under it are void, and all rights flowing from it are of the same character. *Campbell et al.* v. *McCahan et al.*, 46.

2. Where the court, without jurisdiction of the person of the defendant, decrees the conveyance of property from the defendant in that proceeding to complainant, and he receives the deed, he thereby acquires no title, nor can he confer any on a grantee, as he is chargeable with notice of the want of jurisdiction. Ibid. 46.

JURISDICTION OF JUSTICES OF THE PEACE.

3. *In trespass by cattle illegally running at large.* Justices of the peace have jurisdiction under the general law, of the action of trespass to real estate, and would therefore have jurisdiction of an action brought to recover damages for injuries done by cattle illegally at large. *Ames et al.* v. *Carlton*, 261

INJUNCTIONS. WHETHER AN INJUNCTION WILL LIE. *Continued.*

their legal corporate capacity, where the levy was made without authority of law. *Drake et al.* v. *Phillips et al.* 388.

2. So where a town as a corporate body, having legal authority to levy a tax for a specific purpose, proceeds to impose a tax which the law has not authorized, or to levy it for fraudulent or unauthorized purposes, a court of equity will interpose to afford preventive relief, by restraining the exercise of powers perverted to fraudulent or oppressive purposes. Ibid. 388.

3. *To prevent the establishment of a private way.* The simple act of presenting a petition to the commissioners of highways for a private road, and an expressed determination on their part to act upon it and grant it, by ordering a survey of the road, afford no ground for an application to a court of chancery to restrain the one or the other. If the commissioners allow the petition, then there is a remedy at law by appeal. *Winkler* v. *Winkler et al.* 179.

TO PREVENT A NUISANCE.

4. *In what cases an injunction will be granted.* See NUISANCE, 1 to 6.

ASSESSING DAMAGES ON DISSOLUTION.

5. *Suggestions in writing essential.* A court of chancery cannot properly assess damages upon the dissolution of an injunction under the act of 1861 without suggestions in writing being first filed, setting forth the nature and amount of the damages claimed. *Winkler* v. *Winkler et al.* 179.

6. The suggestions in writing required by that act, in such case, were designed to take the place of a declaration on the bond, and should be so framed as to give the opposite party information of the nature and amount of the damages claimed, so that he may be prepared to resist the claim. Ibid. 179.

7. Filing the suggestions after the damages are assessed will not cure the error; they must be filed before any action can be taken in that regard. Ibid. 179.

PENALTY OF THE BOND.

On granting a temporary injunction. See BONDS, 1, 2.

RELEASE OF ERRORS.

By reason of enjoining a judgment at law. See PRACTICE IN THE SUPREME COURT, 131, 132.

INSANITY.

AS A DEFENSE IN CRIMINAL CASES.

And of the burden of proof as to sanity—the rule in the Hopt *case explained.* See EVIDENCE, 39.

INSTRUCTIONS.

OF THEIR GENERAL QUALITIES.

1. *Must apply to the case.* It is proper to refuse instructions which have no application to the case. *Paullin* v. *Hale*, 274.

INSTRUCTIONS. OF THEIR GENERAL QUALITIES. *Continued.*

2. *Instructions need not be repeated.* It is not error to refuse an instruction, even if it correctly states the law, where the court draws and gives an instruction embodying the law applicable to the case, and also embodying substantially the instruction asked. *O'Reily* v. *Fitzgerald*, 310.

3. When two instructions are asked for, both of which contain the same principle of law, the court may give the one and refuse the other, and may refuse to repeat a principle of law which has previously been fairly stated to the jury. *Kennedy* v. *The People*, 489.

INSTRUCTIONS IN A CAPITAL CASE.

4. *Of their sufficiency as embodying the idea of malice.* An indictment charged a party with having committed a homicide, unlawfully, feloniously, willfully and with malice aforethought. Instructions given for the prosecution required the jury to believe, before they could convict, that the deceased "was unlawfully killed with malice aforethought, in manner and form as charged in the indictment," and that he "was killed in manner and form as charged in the indictment." Both of these forms of expression were held to sufficiently embrace the idea of malice aforethought required by the law to constitute the criminal intent, the former, in express language, and the latter substantially, by reference to the indictment which charged the killing to have been done unlawfully, feloniously, willfully and with malice aforethought. *Kennedy* v. *The People*, 488.

5. *As to the mode of expressing the requisite participation of a party in the commission of an alleged crime.* One of several parties charged with having committed a murder, being upon trial, asked the court to instruct the jury that he could not be found guilty unless they believed he "was previously aware of the purpose to commit such murder, or participated therein," to which the court added the words "or aided, or abetted, or assisted in the perpetration thereof." The modification was not improper. The offense charged was thereby brought within the terms and language of the Criminal Code. It is not improper, in an instruction, for the court to use the language of the Code instead of a phrase or word that may, perhaps, have the same meaning. Ibid. 488.

6. The same party also asked the court to instruct the jury, that if they believed the fatal shot was fired by one of the several persons charged, but from the evidence it was uncertain by which of them it was fired, then they should decide the case as if it were proved the shot was fired by one of the other persons charged, and *they ought to acquit the defendant of firing such shot.* These latter words, "they ought to acquit the defendant of firing such shot," were stricken out by the court, and properly so, as the jury might have understood them to mean that if the defendant was not guilty of actually firing the fatal shot, he was not guilty of murder. The modification left the case on the true and legal ground. The jury were told they should consider and decide the case as if it had been proved the shot was fired by either one of the other parties charged. Ibid. 488.

LEASE.

WHO BOUND THEREBY.

Effect of a lease taken by a judgment debtor upon his own land, as to the judgment creditor or a purchaser under the judgment. See LIEN, 3, 4.

LEVY.

LEVY UPON PERSONAL PROPERTY.

Duty of the officer where there are several executions in his hands. See LIEN, 9, 10.

LIEN.

JUDGMENT LIEN.

1. *Not affected by subsequent action of the judgment debtor.* A person who gives another a valid lien upon land, or against whom the law has created a lien, is unable, by any act of his, short of discharging it, to impair or affect it. *Tinney* v. *Wolston et al.*, 215.

2. So a judgment creditor, who has obtained a lien upon the land of his debtor, has a right to enforce his lien precisely in the condition he obtained it, and sell the property as the debtor held it at the time the lien was created. Ibid. 215.

3. *Effect of the lease taken by the judgment debtor upon his own land, as to a purchaser under the judgment.* The taking of a lease by a judgment debtor upon his own land, from one who has no title, after the lien of the judgment has attached, and thereby acknowledging the lessor to have the superior title, will not estop the judgment creditor, or those acquiring their rights by purchasing under the judgment, from disputing the title of such lessor. Ibid. 215.

4. So a purchaser under such judgment would not be liable to pay the rent which might be reserved in the lease given under such circumstances, and agreed to be paid by the judgment debtor. Ibid. 215.

MECHANICS' LIEN.

5. *Requisites of the contract, as to the time of its completion.* Under the act of 1845, creating a lien for labor and materials furnished for the erection of a building, it is necessary, to create a lien, that a time should be specified within which, under the contract, they should be furnished. An agreement to furnish them within a reasonable time does not cure the omission to name a specific time, and does not create a lien. *Coburn* v. *Tyler*, 354.

6. *Under act of* 1861. Had the contract been entered into and the materials furnished since the adoption of the act of 1861, it might probably have been otherwise. Ibid. 354.

7. *Subsequent purchasers — severing the building from the land.* A purchaser of a building from the owner, pending a proceeding to enforce a mechanics' lien created for its erection, will take the title subject to the lien which may be established in that proceeding. And if such purchaser sells the house to another, and induces him to remove it to another lot,

LIEN. MECHANICS' LIEN. *Continued.*

he will hold the proceeds of the sale as a trust fund, liable to discharge the lien. *Elliot* v. *Tyler*, 449.

EXECUTION LIEN ON PERSONAL PROPERTY.

8. *Of several executions — order in which the liens attach.* The rule is unquestionable, that executions placed in the hands of a sheriff become liens on the personal property of the defendant in the county, in the order in which they were received, and these liens are perfected by a levy on such property; other parties could not, under junior executions and liens, by obtaining possession of the property from the custody of the sheriff by fraud, force or otherwise, obtain a priority of right to have their executions satisfied. *Leach* v. *Pine et al.*, 65.

9. *Tacking a junior to a prior execution — effect upon intervening liens.* Where a sheriff has a number of executions in his hands becoming a lien at different times, and the holder of one of the junior executions purchases two executions, being the first lien on the property, he has no right to tack his junior execution to the oldest execution, and have both satisfied to the exclusion of executions which are intermediate liens; but all should be satisfied in the order in which they became liens. Ibid. 65.

10. *Effect of a levy under the elder execution — duty of the officer as to the junior executions.* Where a sheriff has in his hands an execution, and levies upon personal property and reduces it to possession, it is then in the custody of the law, and it is not essential to the lien of other executions in his hands, or subsequently received, that they should be formally levied. The payment of the execution under which the levy was made, would not affect the liens of the other executions; nor would another officer be authorized to take the property out of the hands of the sheriff to satisfy an execution in his hands. It would be the duty of the sheriff in such a case to retain and sell the property to satisfy such liens. The execution first coming to hand authorizes the seizure of the property, which creates the levy, and while it remains in his possession he is unable to seize it again. Ibid. 65.

11. *Where the property is taken from the sheriff by another officer.* Where a sheriff has levied an execution and reduced the property to his possession, and the custodian into whose hands he has placed it, by collusion with another officer, surrenders it to him without the authority of the sheriff or plaintiffs in the executions in his hands, the liens of the executions in the hands of the sheriff would not be affected thereby. Ibid. 65.

12. *Decree — satisfaction of junior liens to the exclusion of prior ones.* It is error to decree a satisfaction of a junior execution, out of a fund produced by a sale of property upon which elder executions were prior liens, and to leave those prior liens unsatisfied. Ibid. 65.

ATTORNEY'S LIEN.

13. *Upon a claim for unliquidated damages before judgment — control of the client over his own case.* An attorney's lien for his fees does not attach to a claim for unliquidated damages prior to the judgment. *Henchey, Admx.*, v. *City of Chicago*, 136.

JURY. PETIT JURORS. *Continued.*

6. *Of statutory disqualifications, necessity of challenging for cause.* Alienage in a juror is not a positive disqualification; it simply enables him to excuse himself, if he chooses to claim the exemption, or it is ground of challenge, and nothing more. *Chase* v. *The People*, 352.

7. And the fact that an alien was accepted as a juror without the parties having a knowledge of his alienage, even in a capital case, will not vitiate the verdict; parties should ascertain, by proper examination, the competency of jurors, and if they neglect to do so, the verdict will not be disturbed on account of an alleged incompetency of the character mentioned. Ibid. 352.

8. *Former decisions—and herein, whether any different rule applies to the various statutory grounds or challenge.* In *Guykowski's* case, 1 Scam. 476, which was a capital case, it was *held*, that alienage in a juror was a positive disqualification, not a mere ground of exemption or of challenge. In *Greenup* v. *Stoker*, 3 Gilm. 202, that rule is limited to capital cases. In *Davis'* case, 19 Ill. 74, it was *held*, over age in a juror was not a disqualification, but an exemption. It is now considered that age and alienage are in the same category—that neither is a disqualification, but merely a ground of exemption or of challenge, and this rule applies even in a capital case. Ibid. 352.

SWEARING A JURY IN A CRIMINAL CASE.

9. *Swearing part of a jury in a criminal case, before plea entered—when the objection must be made.* It is too late, on error, to object that a part of the jurors were impaneled and sworn in a criminal case, before the plea of the defendant was entered; such an objection, if not made at the time, will be regarded as waived. *Vezain* v. *The People*, 397.

10. *Effect of not re-swearing the jurors, upon objection in apt time.* Should the defendant, in such a case, ask to have the jurors re-sworn after his plea was entered, or in any mode object to the irregularity, a refusal by the court to have the jurors re-sworn would probably be ground for reversal, should the judgment be against the defendant. Ibid. 397.

LANDLORD AND TENANT.

LEASE, CONSTRUCTION.

1. *Liability of lessee for improvements made by his lessor.* A lease of store rooms, which were in an unfinished condition, provided, that the lessees were to take them without any other finish than certain specified work which the lessor was to have done, and "all other work that may be needed or desired in and about said stores is to be made and done by" the lessees "at their own expense." The meaning of this latter clause is, that the lessees were to have done whatever work might be needed or desired *by them*, at their own expense. It did not mean that whatever work upon the stores the landlord might consider needful or desirable, was to be done at the cost of the tenants. *Wicker* v. *Lewis et al.* 251.

RIGHT OF LANDLORD TO ENTER.

2. *When he may enter upon the possession of his tenant, with and without a provision in the lease to that effect.* See TRESPASS, 1, 2, 3.

LARCENY.

LARCENY OF HORSES.

When committed prior to act of 1865, *under what law punished.* See CRIMINAL LAW, 5, 6, 7.

LEASE, LESSOR, LESSEE. See LANDLORD AND TENANT.

LEVY.

LEVY UPON GROWING CROPS.

When sufficient. A levy upon growing crops was indorsed upon an execution, as follows: "By virtue of the annexed execution and a fee bill, I did, on the 24th May, 1860, levy on about one hundred and thirty-six acres of wheat, about forty-two acres of oats, and about forty-four acres of corn, growing upon the farm occupied by Henry Roche and Edward Brennan, in the town of Mayfield," and after giving notice, etc., proceeded to sell, etc. This was held to be such a levy as the nature of the property admitted. *Pierce* v. *Roche*, 292.

LIEN.

MONEY DEPOSITED AS AN INDEMNITY.

1. *Whether there is a lien thereon.* A party employed another to purchase a quantity of grain for him, and to advance the money for the purpose, and to sell the same as directed, the former depositing with the latter a sum of money to secure him against loss in advancing the means to make the purchase, in case the price of the grain should decline before it was sold. But the party making the purchase having disobeyed instructions in making the sale, he thereby lost his lien upon the money deposited with him as an indemnity against loss. Had he sold as directed, and a loss had resulted, then he would have had the right to appropriate the money deposited to reimburse him in his money advanced to make the purchase. *Jones et al.* v. *Marks*, 313.

BY CONSIGNEE UPON GOODS IN TRANSITU. See CONSIGNOR, CONSIGNEE, 1, 2.

JUDGMENT LIEN.

2. *To what it will attach.* A judgment lien attaches to whatever interest in real estate the records disclose in the judgment debtor, in the absence of actual notice from other sources, and is not necessarily restricted to such interest as the debtor may actually have, so as not to take precedence of a prior purchaser claiming under an unrecorded deed. *Massey* v. *Westcott et al.* 160.

LIMITATIONS.

SEVEN YEARS LIMITATION — ACT OF 1839.

1. *Whether the act may be invoked to recover possession temporarily abandoned.* While it is true that the second section of the limitation act of 1839 cannot be used as a sword, unaccompanied by possession, yet when the benefit of the bar, under the statute, has once been acquired, the right of possession thereby attaches to the occupant and remains with him,

LIMITATIONS. *Continued.*

SPECIFIC PERFORMANCE.

11. *Effect of delay in asserting the right thereto.* See CHANCERY, 21 to 26.

WRIT OF ERROR.

12. *Effect of delay in prosecuting, not amounting to a bar.* See PRACTICE IN THE SUPREME COURT, 2.

MAJORITY.

WHEN A MAJORITY OF A BODY OF PERSONS MAY ACT. See CORPORATIONS, 5 to 10.

MALICE.

MALICE IN SLANDER.

When implied. See SLANDER, 4.

MARRIED WOMEN.

CONVEYANCES BY MARRIED WOMEN.

The husband must join — to pass a right of dower held in lands of a former husband. See DOWER, 4.

MEASURE OF DAMAGES.

IN ACTION FOR BREACH OF COVENANT FOR TITLE.

1. Where a grantee holding under a covenant of warranty is evicted, he may recover the purchase money with interest, and the taxable costs and reasonable attorney's fees expended in defending the suit in ejectment which resulted in the eviction; but not so in a chancery suit brought to set aside a deed in the chain of title under which the covenantor claimed, when the covenantee was not a party to that suit. The grantee can only recover such costs and reasonable attorney's fees as accrued in the suit by which he was evicted. *Harding* v. *Larkin et al.*, 414.

2. When a grantee is evicted, and has been in the perception of rents and profits, and is not liable for *mesne* profits, he would not be entitled to recover interest on the purchase money. It then follows, that he may recover interest for the period for which he is liable for such profits, but for the time an action would be barred for such profits he cannot recover interest; our statute having barred the recovery of such profits after five years, that is the period for which interest may be recovered in this action. Ibid. 414.

3. When the grantee is evicted, and purchases the title under which the recovery was had, and no recovery of *mesne* profits had been had, the presumption will be indulged that they entered into and formed a part of the price paid for the superior title, and the grantee may recover interest for five years, as though *mesne* profits had been recovered. Ibid. 414.

IN ACTION TO RECOVER BACK PURCHASE MONEY.

4. *On failure of title to land.* Where a purchaser of land, who holds the obligation of his vendor to make him "a good and sufficient warranty" deed for the premises, has been actually evicted therefrom under an outstanding paramount title, and lost the property, the measure of damages

MEASURE OF DAMAGES.

IN ACTION TO RECOVER BACK PURCHASE MONEY. *Continued.*

in an action to recover back the purchase money, is the price paid for the property and six per cent interest thereon. *Watson* v. *Woolverton*, 241.

5. But if there was only a failure of title as to the land, and the purchaser has purchased in the outstanding title from the true owner, and has never been disturbed in his possession of the premises, the measure of damages would be the value of the title he had to purchase in order to protect himself in the enjoyment and possession of the property which he had purchased from the defendant, and to prevent an actual eviction, and any costs and expenses he may have been compelled to lay out in so purchasing title and protecting his possession. Ibid. 241.

IN TRESPASS FOR A FORCIBLE ENTRY.

6. *In trespass against the owner of land for a forcible entry thereon.* Although the occupant of land may maintain trespass against the owner for a forcible entry, yet he can only recover such damages as have directly accrued to him from injuries done to his person or property, through the wrongful invasion of his possession, and such exemplary damages as the jury may think proper to give. He cannot recover for any damages to the real estate. *Reeder et al.* v. *Purdy et ux.*, 280.

7. And, for the mere entry of the landlord upon the possession of his tenant, holding over, unaccompanied by any trespass upon either the person or the personal property of the occupant, only nominal damages can be recovered, because the plaintiff has no legal right to the possession. Ibid. 280.

8. *Mitigation of damages in such case.* In trespass, by the occupant of land against the owner, for a forcible entry on the premises, the fact that the defendant was the owner, and entitled to the possession, cannot be regarded in mitigation of the *actual* damage suffered by the plaintiff, but may be considered in mitigation of exemplary damages. Ibid. 280.

IN SUIT AGAINST A BUYER.

9. *Where the seller has rescinded the contract.* Where the seller of a quantity of grain, which was to be delivered at a future time, rescinds the contract, by selling the grain to another party, and there are sufficient grounds for the rescission, the measure of damages he can recover, in an action against the buyer for refusing to receive the grain and pay for it, is the amount of loss incurred on the second sale. But if the seller rescinded without sufficient cause, he can recover nothing. *Lassen* v. *Mitchell*, 105.

IN A SUIT AGAINST A RAILROAD.

10. *For killing stock.* In a suit against a railroad company for killing the cattle of the plaintiff, where it appears the weather was warm and the cattle when found were swollen and unfit for beef, the plaintiff is entitled to a verdict for their full value. *Toledo, Peoria and Warsaw Railway Co.* v. *Sweeney*, 226.

IN SUIT AGAINST A CARRIER.

11. *For neglecting to transport live stock in proper time.* In an action against a railroad company to recover damages for neglecting to transport

MEASURE OF DAMAGES. IN SUIT AGAINST A CARRIER. *Continued.*

a lot of cattle which had been placed in cars for shipment, the damages resulting to the cattle from being confined in the cars an improper length of time, are matter, in a great degree, of opinion. The fact that the cattle were without food, under circumstances where the owner could not properly be expected to provide it, is a proper element to enter into the calculation of damages. *Illinois Central Railroad Co.* v. *Waters*, 73.

OF EXEMPLARY DAMAGES.

12. *Where there are two suits, in different rights for the same trespass.* Where there are two actions of trespass brought for injuries to the person of a *feme covert*, one in the names of the husband and wife jointly, and the other in the name of the husband alone, and the circumstances and acts out of which the question of punitive damages arises, are the same in both cases, it being one and the same transaction, if on the trial of the former suit those circumstances of aggravation were submitted to the jury, while, in strict law, exemplary damages are recoverable in both cases, because the suits are in different rights, yet, on the trial of the second case, the jury in considering the same circumstances of aggravation with the view to punitive damages, should also consider that they had been submitted on the former trial. *Reeder et al.* v. *Purdy et ux.*, 280.

13. *Evidence admissible to avoid vindictive damages.* A defendant in an action of trespass *vi et armis* may show that he was persuaded by others to make an affidavit upon which an illegal arrest was made, to show the *animus* with which he acted, and to avoid vindictive damages. Evidence may be admissible for such a purpose, when it does not tend to establish a bar to the action; and the plaintiff may, when it is admitted, have the jury so instructed that it shall be limited to its legitimate purpose. *Roth* v. *Smith*, 314.

14. *In an action by the husband for crim. con. with his wife.* See CRIM. CON., 2, 3.

MITIGATION OF DAMAGES.

15. *In an action of trespass for assault and battery and false imprisonment.* While words spoken do not constitute a defense for an assault or an imprisonment, nor even a ground for mitigating or reducing the damages actually sustained by the defendant, and it is error to so instruct the jury, still they may be considered for the purpose of mitigating exemplary damages, together with all of the surrounding circumstances. *Donnelly* v. *Harris et al.*, 126.

16. Where the evidence shows malice on the part of defendant, and his conduct is wanton and atrocious, the law authorizes a jury to assess punitive damages as a punishment. And the provoking language must be direct and apply to the defendant, before he can insist that it shall mitigate punitive damages, and even then he must not have acted beyond reason and simply relied upon the provocation as an excuse for atrocious and outrageous injury to plaintiff. Ibid. 126.

IN AN ACTION FOR SLANDER. See SLANDER, 3.

MEASURE OF DAMAGES. *Continued.*

ASSAULT AND BATTERY — RAPE.

Of the rule as to damages in trespass for an assault and battery, with attempt to commit a rape — what circumstances should control them. See RAPE, 1 to 4.

MECHANICS' LIEN. See LIEN, 5, 6, 7.

MERGER.

WHERE A MORTGAGEE PURCHASES.

Under a decree of foreclosure, before all the notes become due. See MORTGAGES, 15.

MISJOINDER OF PARTIES DEFENDANT.

MUST BE PLEADED IN ABATEMENT. See ABATEMENT, 3.

MISNOMER.

WHEN WAIVED BY PLEADING.

1. Where the defendant pleads the general issue in the right name, describing herself in the plea as sued by another name, she cannot raise the question of misnomer after verdict. *Davis et al.* v. *Taylor*, 405.

2. So, where the summons and declaration were against Mrs. John C. Davis, who pleaded the general issue under the name of Christina Davis, describing herself as sued by the former name, she was not allowed, after verdict, to assign misnomer for error. Ibid. 405.

3. Under such circumstances it was clearly proper to render judgment against said defendant under the name by which she had been brought into court, and described in the declaration. Ibid. 405.

OF PRINCIPAL IN A RECOGNIZANCE.

4. *Of the remedy, whether in chancery, or by pleading and proofs in proceeding by sci. fa.* See PLEADING AND EVIDENCE, 1, 2.

MISTAKE.

DEGREE OF PROOF REQUIRED

A court of chancery will not reform a written instrument except upon clear and satisfactory proof of a mistake. *Cleary* v. *Babcock*, 271; *Kuchenbeiser et al.* v. *Beckert et al.*, 172.

MONEY HAD AND RECEIVED.

WHEN ASSUMPSIT LIES THEREFOR. See ASSUMPSIT, 1.

"MORE OR LESS."

MEANING OF THESE WORDS.

In a contract for the sale of so many cattle, "more or less." See CONTRACTS, 5, 6.

MORTGAGES.

WHAT CONSTITUTES A MORTGAGE.

1. After a degree of foreclosure of a mortgage given to secure a loan of money, and a sale thereunder at which the mortgagee became the pur-

MORTGAGES. WHAT CONSTITUTES A MORTGAGE. *Continued.*

chaser, the latter waived the payment of the money in redemption for the sale, and, before the time of redemption expired, under an understanding with the mortgagor to extend the time for the payment of the money, and to still hold the land as security, the mortgagee took a quit-claim deed therefor from the mortgagor, and gave him a bond for a reconveyance upon the payment at a certain time, beyond the statutory time for redemption, of a sum which was made up of the amount found due by the decree of foreclosure, with a heavy usurious interest, the bond providing that the time of payment of the money should be of the essence of that contract, *held*, that the quit-claim deed and bond for reconveyance constituted a new mortgage, and not a sale and resale. *Harbison* v. *Houghton*, 522.

EFFECT OF NEW MORTGAGE ON FORMER FORECLOSURE.

2. *Effect of the new arrangement upon the rights of the mortgagee as a purchaser under the foreclosure.* The arrangement by which the mortgagee took the quit-claim deed from the mortgagor, and gave him back his bond for a reconveyance, canceled the certificate of purchase which the former had received at the sale on the decree of foreclosure, his equitable title obtained thereby being merged in the legal title acquired by the deed, and he had then no right to a deed from the master, under the foreclosure. Ibid. 522.

REDEMPTION BY MORTGAGOR.

3. *Where the right exists.* The mortgagee having obtained a deed from the master under the sale on foreclosure, after the statutory time for redemption therefrom had expired, notwithstanding the new arrangement, he commenced his action of ejectment against the mortgagor, to recover the premises; and on bill filed by the latter to enjoin that suit, and to redeem, although the terms of payment as prescribed in the bond for reconveyance had not been complied with, it was *held*, as the new transaction was a mortgage, and the mortgagee having rescinded that agreement, the mortgagor had a right to redeem by paying what was equitably due. Ibid. 522.

4. *What amount should be paid on such redemption — of the usury.* The amount to be paid on such redemption should be the amount of the decree on foreclosure with six per cent interest and costs, the usury which was reserved in the new arrangement being deducted. Ibid. 522.

SUBSEQUENT PURCHASERS FROM MORTGAGOR.

5. *Subrogation.* Where a mortgagee obtains a judgment of foreclosure by *scire facias*, and one of several subsequent purchasers from the mortgagor pays the judgment, equity will thereupon work a subrogation of such purchaser to the rights of the mortgagee, so far as may be necessary to enable the former to compel contribution from persons liable thereto, and this right of subrogation will accrue immediately upon payment of the judgment, independently of any assignment thereof. *Matteson* v *Thomas et al.*, 110.

MORTGAGES. SUBSEQUENT PURCHASERS FROM MORTGAGOR. *Continued.*

6. *Of the right of the subsequent purchaser to demand an assignment.* The subsequent purchaser, in proposing to pay the judgment of foreclosure, has no right to demand an assignment of the judgment by the mortgagee to him; and if he makes a tender of the money upon condition that an assignment shall be made, his tender will not avail him in taking away the right of the mortgagee to proceed to a sale under his judgment. *Matteson* v. *Thomas et al.*, 110.

7. *Prior mortgagee and subsequent purchasers — rights of the parties where the premises are held by different purchasers.* The rule, that, where there are several subsequent purchasers of premises which have been previously mortgaged, the different parcels shall be made liable to the prior lien in the inverse order of their alienation, is never applied to the injury of an innocent mortgagee. Ibid. 110.

8. *Of the application of the recording act as to a prior incumbrancer.* Before a prior mortgagee can be required to shape his action in the collection of his debt, in reference to the subsequent order of alienation, he must have actual notice of what that order is, and not merely the constructive notice derived from the registry of the deeds made by the mortgagor subsequent to the mortgage. The prior mortgagee is not within the purview of the registry laws, and such registry is not even constructive notice to him, and cannot affect his prior lien. Ibid. 110.

9. *At what time the notice should be given to the prior mortgagee.* One of several subsequent purchasers desiring the prior mortgagee to act with reference to the subsequent order of alienation, should give him notice of the facts in proper time, and request him to sell accordingly. If he is not a party to the proceedings for foreclosure, and is given no opportunity there to present his equities, he may file a bill against the mortgagee and the other subsequent purchasers, staying the sale until the respective equities can be adjusted. But he cannot remain passive until the sale has been made and then assert his rights against the mortgagee in view of facts of which the latter had no knowledge. Ibid. 110.

10. *Right of contribution — as between different subsequent purchasers.* Where a mortgagor sells the mortgaged premises in parcels to different persons subsequent to the mortgage, the rule, that the several parcels are liable to the mortgage debt in the inverse order of their alienation, will apply to the several purchasers where there is nothing to the contrary in their contracts of purchase; and, if the mortgagee subjects them to the satisfaction of his debt in a different order, a right to contribution exists as between the subsequent purchasers, according to the rule of their liability. Ibid. 110.

11. *Whether such right to contribution is affected by releases given by the mortgagee after the debt is paid.* Should some of the subsequent purchasers pay in *pro rata* proportions a part of the mortgage debt, and, after a sale under foreclosure of other parcels of the premises in satisfaction of the balance due, the mortgagee gives releases to those purchasers who had paid, such releases cannot affect any right of contribution that grew out of the sale. Ibid. 110.

MORTGAGES. *Continued.*

IMPROVEMENTS BY ONE OF TWO MORTGAGEES.

12. *How compensated — as between two mortgagees, or tenants in common.* The owner in fee of one-half of a mill property, executed a deed of trust thereon to secure debts owing to two persons, severally, one of the creditors being the owner of the other half, who, after the execution of the deed of trust, went into possession and run the mill and made valuable improvements thereon and paid taxes. On a bill filed by the other creditor to foreclose the deed of trust, it was held, that, while the party thus making the improvements might not be able to maintain a bill for contribution against the other *cestui que trust* for more than the repairs necessary to preserve the property, yet, as the estate of the grantor in the deed of trust was to be sold, it was but equitable, that, so far as the price which it might bring at the sale should be enhanced by the improvements, the party making them should be refunded, and he should also be allowed for taxes. *Gardner* v. *Diederichs*, 159.

13. *Priority of the claim for improvements.* The amount found due for improvements would be first paid out of the proceeds of the sale under the foreclosure of the deed of trust, and then the notes secured thereby, in their proper order. Ibid. 159.

RENTS AND PROFITS.

14. *As between the same.* And, as against the sums so allowed for improvements and taxes, he should be charged reasonable rents and profits upon one-half the mill, independently of his improvements. Ibid. 159.

FORECLOSURE — BEFORE MATURITY OF ALL THE NOTES.

15. *When the mortgagee becomes the purchaser — effect upon the notes not due.* A decree of foreclosure to satisfy a part of the mortgage debt, found the sum due and ordered the sale of the mortgaged premises, subject to a lien on the land to secure the portion of the debt not then due; a sale was thus made; the land was not redeemed, and the purchaser acquired a deed for the premises. An action at law was subsequently brought on the notes not due when the decree was rendered, by the payee, who had purchased the mortgaged premises at the master's sale. *Held*, that, under such a decree, the purchase of the mortgaged premises by the mortgagee operated as a satisfaction of the entire debt, as well the portion not due as that which was. In such a case, the purchaser virtually becomes a mortgagor to the extent of the balance of the mortgage debt not due. *Miner* v. *Moore*, 273.

DISPOSITION OF THE OVERPLUS.

16. *When there is a sale under a deed of trust before all the notes secured thereby become due.* See CHANCERY, 14.

PURCHASER UNDER FORECLOSURE.

17 *When entitled to possession.* A purchaser at a sale, under a decree of foreclosure, is not entitled to possession, under our statute allowing redemption from such a sale, until a deed has been executed to him by the officer selling; and a decree of foreclosure which provides for

MORTGAGES. PURCHASER UNDER FORECLOSURE. *Continued.*
putting the purchaser in possession before that time is erroneous. *Bennett et al.* v. *Matson*, 333.

FORECLOSURE BY SCIRE FACIAS.

18. *In what cases allowable.* A mortgage which is given to secure the payment of money may be foreclosed by *scire facias*, although the mortgagor was primarily liable for only a part of the debt thus secured, as to the residue his liability being merely secondary, and could only accrue in the event of non-payment by other parties and notice. *Russell* v. *Brown et al.*, 183.

JUDGMENT ON FORECLOSURE BY SCIRE FACIAS.

19. *Against husband and wife — its form.* The judgment in a proceeding by *scire facias* to foreclose a mortgage against husband and wife, directed, first, that the plaintiff have and recover a certain sum from defendants, and then directed how they were to recover it, that is by the sale of the premises. The entire judgment, taken in connection with the record, was held to be merely a judgment *in rem*, and not a judgment *in personam*. Ibid. 183.

20. *Description of the premises.* A mortgagee has a right to an order of court for the sale of the mortgaged premises as they are described in the mortgage, unless the court can see that the description is of a character which cannot be rendered certain or definite. Ibid. 184.

21. A mortgage which was sought to be foreclosed by *scire facias*, described the premises mortgaged as "all that certain lot or parcel of land situated in the county of Cook, and State of Illinios, and being part of the northeast quarter" of a certain designated section, township and range, "being the same premises that were conveyed to" this mortgagor by the mortgagee, by deed bearing a certain date, "saving and excepting out of the same such lots as may appear to have been conveyed by" the mortgagor on the record of deeds previous to a certain date. The judgment of foreclosure gave the same description, and, on error, it was held sufficient. Whether the calls of description could be satisfied, was not a question arising on the writ of error, but could only arise when those claiming under the judgment should be called on to defend their title. Ibid. 184.

22. *The court cannot reform the description of the land.* In this proceeding the court has no power to change the description of the mortgaged premises, if it appear not to be as definite in the mortgage as desired, as might be done on bill in chancery to foreclose, but the judgment must follow the description in the mortgage. Ibid. 184.

LIMITATIONS OF REMEDIES THEREON. See LIMITATIONS, 6 to 9.

REDEMPTION.

Under foreclosure by scire facias. See REDEMPTION, 1, 2.

MORTGAGE BY A GUARDIAN.

Of the ward's land — power of the guardian. See GUARDIAN AND WARD, 1, 2.

MORTGAGEE'S INTEREST IN LAND.

Sale thereof under execution — what will pass by the sale. See SALES, 8.

CHATTEL MORTGAGES. See that title, *ante*.

MUNICIPAL CORPORATIONS. See CORPORATIONS, 11 to 19.

NAMES.

WHETHER A VARIANCE THEREIN.

1. In making out his chain of title in ejectment, the plaintiff gave in evidence a deed to *Mitchell Allen* and a deed from *Micheal Allaine*, insisting, the names represented the same person. It was *held*, there was no variance. The names were French names, and the difference in spelling *Mitchell* and *Micheal* would result from giving the name the English or the French pronunciation. The names *Allen* and *Allaine* are *idem sonans*. *Chiniquy* v. *The Catholic Bishop of Chicago*, 148.

2. In the same chain of title there was a deed to *Otaine Allaine* and a deed from *Antoine Allain*, claimed to be to and from the same person, and it was held, there was not a fatal variance. These names were also French, and it was presumed there was proof below that *Antoine* took by a misnomer and conveyed by his right name. Ibid. 148.

OF THE USE OF FOREIGN NAMES.

3. In the use of foreign names in this country, courts should be slow to pronounce that a variance, unless it is palpable, which may only be a misspelling or a mispronunciation by persons ignorant of the language in which the name is written. Ibid. 148.

OF MISNOMER. See that title, *ante*.

NAVIGABLE STREAMS.

BRIDGES — OBSTRUCTION.

Liability of towns. It being the duty of a town to build a bridge over a stream within its limits, the town must be responsible, if they make such a structure as will obstruct the free navigation of the stream. *Town of Harlem* v. *Emmert*, 320.

NEGOTIABLE INSTRUMENTS.

TITLE THERETO, WHEN STOLEN.

1. *In the hands of an innocent purchaser.* A purchaser of a chattel can acquire no better title than the vendor had. *Jones* v. *Nellis*, 482.

2. But, as an exception to that rule, by the common law, the *bona fide* holder of money or negotiable paper, transferable by mere delivery and not overdue, who has taken it in the usual course of business, and for a valuable consideration, acquires a perfect title. Ibid. 482.

3. So it is *held*, where a seven-thirty government bond had been stolen, and bought in the usual course of trade by a party who had no knowledge that it had been stolen, such purchaser acquired a perfect title to the bond, even as against the former owner from whom it had been stolen. Ibid. 482.

4. *Effect of the sixty-second and sixty-fourth sections of our Criminal Code, upon that rule.* Those sections of the Criminal Code, the former defining what larceny is, and the latter declaring that no purchaser of "property" which has been obtained by larceny, whatever his good faith

NEGOTIABLE INSTRUMENTS. TITLE THERETO, WHEN STOLEN. *Continued.*
in that regard, shall acquire title as against the owner, do not affect the common law rule as above laid down, in reference to negotiable paper, as the term "property" is used in the latter section in such a restricted sense as not to embrace either money, or bonds, bills and notes. *Jones* v. *Nellis*, 482.

ASSIGNMENT THEREOF, GENERALLY. See ASSIGNMENT.

NEW PROMISE.

BY THE ASSIGNOR OF A NOTE.

After he is discharged by laches of the holder. See ASSIGNMENT, 2, 3.

NEW TRIALS.

VERDICT CONTRARY TO THE EVIDENCE.

1. In some cases, after verdict, it will be intended the necessary proof was made, even though the proper averment is omitted, but when the averment is made, and the evidence is preserved in the record, and it appears the fact was not proved, the verdict cannot be sustained, and the judgment will be reversed. *Lassen* v. *Mitchell*, 104.

2. When there is no evidence to support a verdict, a new trial will be granted. *Chicago and Great Eastern Railway Co.* v. *Fox et al.*, 106.

3. A verdict will not be set aside where there is a contrariety of evidence on both sides, and the facts and circumstances, by a fair and reasonable intendment, will warrant the inference of the jury, notwithstanding it may appear to be against the strength and weight of the testimony. *Chicago and Rock Island Railroad Co.* v. *Crandall*, 234.

4. Upon a slight preponderance of evidence against a verdict, the court will not disturb it. Ibid. 234.

5. Where the evidence has been fairly presented to the jury, and they have passed upon it, although it may not be entirely free from doubt, their verdict will not be disturbed unless it is clearly against the weight of evidence. Ibid. 234.

6. A verdict will not be disturbed unless it is *clearly* wrong. Ibid. 234.

7. In an action against a railroad company for injury to stock, which was alleged to have got upon the track for want of a proper fence, the questions whether the road was bound to fence; whether it had been in use six months; whether plaintiff was the owner of the stock killed, and the amount of damages sustained, were questions for the jury, to be determined from the weight of the evidence, and, unless the finding is manifestly against the evidence, the verdict will not be disturbed. *Toledo, Peoria and Warsaw Railway Co.* v. *McClannon*, 238.

8. A verdict will not be set aside because it is contrary to the evidence, unless it is so strongly against the evidence as to be unsupported by it. *Harbison* v. *Shook*, 142.

9. Before a plaintiff is authorized to recover a verdict, the evidence must preponderate in his favor. If equally balanced, or the testimony preponderates in favor of the defendant, the plaintiff fails to establish a right of

NEW TRIALS. VERDICT CONTRARY TO THE EVIDENCE. *Continued.*

recovery. And a verdict unsustained by the proof, should be set aside and a new trial granted. *McCarthy* v. *Mooney*, 300.

10. Where the weight of evidence is clearly against the finding of the jury, their verdict should be set aside and a new trial granted, and it is error in the court below to refuse it, on a proper motion for the purpose. *Roth* v. *Smith*, 315.

11. It is error in the Circuit Court to refuse to set aside a verdict not sustained by the evidence on the trial. *Kime* v. *Kime*, 397.

NON-RESIDENT.

CANNOT BE APPOINTED ADMINISTRATOR. See ADMINISTRATION OF ESTATES, 3, 4, 5.

NON-RESIDENT DEFENDANTS.

IN CHANCERY.

1. *Notice by publication — of the affidavit.* Where the affidavit of non-residence of defendants in chancery, upon which a notice by publication was based, was not sworn to before any officer, it is no affidavit, and gave no authority to the court to enter an order of publication. *McDermaid et al.* v. *Russell*, 489.

2. *Requisites of the notice.* A notice which was published against certain defendants in chancery, alleged to be non-residents, required them to appear at a certain time, "give bail and enter their appearance, or that judgment would be entered against them by default, and the property attached sold." This was no proper notice in such a proceeding, but might be a good notice in an attachment cause. Ibid. 489.

3. A notice in such case which requires the non-resident defendants to appear at a different time from that at which the term of the court is to commence, is void. Ibid. 490.

NOTICE BY PUBLICATION.

4. *Affidavit of non-residence — when it must be filed.* An affidavit of the non-residence of defendants to a bill in equity, made twenty days before the bill is filed, is not made in a reasonable time before the suit is brought, where the complainant resides and makes the affidavit in an adjoining county, and fails to confer jurisdiction. Where a complainant resides in the county in which a suit is brought, he will be allowed less time than where he lives in another or distant county or in another State; but, while a reasonable time will be allowed for the purpose, there should be no unnecessary delay. *Campbell et al.* v. *McCahan et al.*, 45.

NOTICE.

WHO CHARGEABLE WITH NOTICE.

1. *Of irregularities in sale on execution.* Where the purchaser under a sale on execution is the plaintiff in the execution, he is chargeable with notice of an irregularity in the sale which consists in its being made on a day prior to that fixed in the notice thereof. *King* v. *Cushman et al.*, 31

NOTICE. WHO CHARGEABLE WITH NOTICE. *Continued.*

2. *Subsequent purchaser under a void decree.* Where a complainant in a suit in chancery obtains a conveyance of land under a decree which is void for want of jurisdiction in the court of the person of the defendant, a purchaser from such complainant will be chargeable with notice of the want of jurisdiction, and will take no title. *Campbell et al.* v. *McCahan et al.*, 46.

PUTTING A PERSON ON INQUIRY.

3. *What circumstances will put one upon inquiry as to another's equities.* A purchaser of a decree of foreclosure from a prior mortgagee, in whose favor it was rendered, is put upon inquiry as to the nature and extent of a junior mortgagee's equities arising out of a parol agreement previously made between the two mortgagees, by the fact, that such junior mortgagee was a party to the decree. *Bennett et al.* v. *Matson*, 332.

COVENANT FOR TITLE.

Of notice to the covenantor of a suit to evict the covenantee. See COVENANTS FOR TITLE, 3.

RECORDING OF DEEDS NOT ENTITLED TO RECORD.

Effect thereof as notice — the act on that subject is not retrospective in its operation. See RECORDING ACT, 1 to 5.

PRIOR MORTGAGEE — SUBSEQUENT PURCHASERS.

Of the character of notice required to be given to a prior mortgagee, of subsequent conveyances by the mortgagor. See MORTGAGES, 8.

And of the time when the notice should be given, to be operative. Same title, 9.

NON-RESIDENT DEFENDANTS IN CHANCERY.

Notice by publication — its requisites. See NON-RESIDENT DEFENDANTS, 2, 3.

NOTICE BY PUBLICATION.

Against non-resident defendants — affidavit of non-residence — when it must be filed. See NON-RESIDENT DEFENDANTS, 4.

PURCHASERS WITH NOTICE. See PURCHASERS, 1.

OCCUPANT.

WHO IS AN OCCUPANT.

Within the meaning of the ejectment law. See EJECTMENT, 1, 2.

OFFICIAL BONDS.

LIABILITY OF SURETIES.

Where there have been two bonds given for different terms of office. See SURETIES, 1.

PARENT AND CHILD.

PAROL PROMISE TO CONVEY LAND.

By a parent to his child — when such a promise can be enforced. See CHANCERY, 30, 31.

PARTIES.

IN CHANCERY.

1. *In a suit to subject the equitable interest of a purchaser of land to the satisfaction of a judgment at law.* In a suit for such purpose, where the vendor of the land has died, his executor and heirs are proper parties, for the purpose of ascertaining whether the contract of purchase is still in force, and the sum remaining due on the contract. *McNab* v. *Healâ et al.*, 326.

2. *In suit to establish a trust.* Where a person holds lands in trust for another, the wife of the trustee is not entitled to dower in such premises But until the establishment of the trust the widow is *prima facie* entitled to dower, and in a suit to establish the trust, the widow of the trustee and her husband by a second marriage, are necessary parties. Her separate deed after her second marriage and during coverture could not operate to relinquish her dower in the premises. Nor could she convey her right of dower before it was assigned, to any person but the owner of the fee. The husband of the widow by the second marriage, if she had dower in the premises, was entitled to the rents and profits, and should have been made a party that he might contest the establishment of the trust, and could not be barred from asserting the right except he was a party to the decree. *Bailey* v. *West*, 290.

PARTIES IN TROVER.

3. *Trover will lie against husband and wife, jointly.* A wife is liable jointly with her husband for a tort. Hence trover lies against both for a joint conversion. And this was the old rule at common law. *Davis et al.* v. *Taylor*, 405.

PARTIES IN EJECTMENT.

Against whom the action will lie. See EJECTMENT, 1, 2.

RESPONDEAT SUPERIOR.

Who is liable, when a city, through a contractor, grades and drains its streets in such manner as to injure private property. See CORPORATIONS, 18, 19.

MISJOINDER OF PARTIES DEFENDANT.

Must be pleaded in abatement. See ABATEMENT, 3.

PARTNERSHIP.

PROOF OF PARTNERSHIP.

Effect of admissions by one of the partners. See EVIDENCE, 15, 16.

PARTNERS AS WITNESSES AGAINST EACH OTHER. See WITNESSES, 2 to 7.

PAUPERS.

OF THEIR SUPPORT IN STEPHENSON COUNTY.

1. *Liability of towns for their support.* Under the act of the general assembly, in reference to paupers in Stephenson county, each town in the county is rendered liable for the support of their resident poor. *Town of Freeport* v. *Board of Supervisors*, 495.

PAUPERS. *Continued.*

RESIDENCE OF PAUPERS.

2. *How gained or lost.* And persons who were residents of a town and had been sent to the poor farm before the passage of that law did not thereby lose their residence or cease to have it in the town from which they were sent, or become residents of the town in which the poor-house was situated. *Town of Freeport* v. *Board of Supervisors*, 495.

3. As a general rule, persons under legal disability or restraint, persons of a non-sane memory, or persons in want of freedom are incapable of losing or gaining a residence by acting under the control of others. Without the intent the residence cannot be changed, and a pauper maintained at the poor farm is not an exception to the rule. Ibid. 495.

4. By the division of a town, or the annexation of a portion of one to another, the pauper of the portion annexed does not lose his previous settlement or residence at the place where he had it when he became a public charge. Ibid. 495.

PAYMENT.

PAYMENT UNDER DURESS.

In order to enable a defendant to recoup money which he alleges was paid to the plaintiff under duress, it must be shown to have been paid under some kind of legal duress. *Haskin* v. *Haskin*, 197.

PLEADING.

OF THE DECLARATION.

Action for injury caused by negligence of defendant — whether averment of proper care on the part of the plaintiff is necessary. In an action on the case to recover damages for injuries received by the plaintiff by the running away of the horses of the defendant, through the carelessness and mismanagement of the latter, an averment in the declaration of the exercise of ordinary care on the part of the plaintiff is not necessary. *Cox* v. *Brackett*, 222.

SCIRE FACIAS ON RECOGNIZANCE.

What should be averred. See RECOGNIZANCE, 3, 4.

WHEN A PARTY MUST PLEAD.

The granting of oyer does not extend time to plead. See PRACTICE, 1.

MISNOMER.

When waived by pleading. See MISNOMER, 1, 2, 3.

LOST PLEA.

Motion to supply it — when it should be made. See PRACTICE, 5

OF PLEAS IN ABATEMENT. See ABATEMENT.

PLEADING AND EVIDENCE.

MISNOMER OF PRINCIPAL IN A RECOGNIZANCE.

1. *Variance in the name of the principal, in the body of the recognizance and as signed by him — pleadings and proofs in that regard.* Where the condition of a recognizance provides for the appearance of *John*

PLEADING AND EVIDENCE.

MISNOMER OF PRINCIPAL IN A RECOGNIZANCE. *Continued.*

Empie, and the instrument is signed *Sylvester* Empie, it is competent, in a proceeding by *scire facias* thereon, to aver and prove that *Sylvester* Empie was the principal who executed the recognizance, and was erroneously described in the body thereof as *John* Empie. *O'Brien et al.* v. *The People*, 456.

2. *Former decision.* In the case of *Vincent* v. *The People*, 25 Ill. 500, the rule was inadvertently stated too broadly, in saying the only relief in such case was in equity. Ibid. 456.

EVIDENCE UNDER THE GENERAL ISSUE.

3. *In sci. fa. on recognizance.* Pleas to a *scire facias* on a recognizance, that the sureties did not execute the recognizance; did not sign a writing for the appearance of the party, as alleged; and did not execute the recognizance with the intention of securing the appearance of the principal who was described by another name, as alleged, only amount to the general issue, and are obnoxious to a demurrer on that ground. Ibid. 456.

4. *In assumpsit*, almost any defense, showing the satisfaction or discharge of the debt, may be shown under the general issue. *Miner* v. *Moore*, 276.

5. So, in an action upon a promissory note, it may be shown, under the general issue, that it was one of several secured by a mortgage, and that the mortgage was foreclosed before this note was due, a lien being reserved to secure the same, and that the mortgagee purchased under the foreclosure, thereby discharging the note sued upon. Ibid. 276.

6. *In an action against several makers of a note.* In an action by one of several makers of a note, who claims to have paid the note, against his co-makers for contribution, a special plea setting up, that, after the note was given, it was agreed between the owner of the note and the makers that a part of the makers should pay one-half the note, and the others the remaining half, and the party thus paying his share to be discharged from further liability, and that the note was paid according to such agreement, was held bad as amounting only to the general issue. *Hoyt et al.* v *Lock*, 119.

IN TRESPASS, BY HUSBAND AND WIFE.

7. *For injuries to the wife.* In an action of trespass by husband and wife for personal injuries to the latter, evidence of injury to the property of the husband at the same time, is inadmissible, except so far as may be necessary to explain the assault on the person of the wife. *Reeder et al.* v. *Purdy et ux*, 280.

ALLEGATIONS AND PROOFS.

8. *Must correspond.* The allegations and proofs in a cause must correspond. Every material averment in the declaration must be proved, or a recovery cannot be had. As a general rule, if the declaration contains a material averment, the omission of which would render it obnoxious to a general demurrer, such averment must be proved. *Lassen* v. *Mitchell*, 104

PLEADING AND EVIDENCE. ALLEGATIONS AND PROOFS. *Continued.*

9. In some cases, it is true, after verdict, it will be intended the necessary proof was made, although the averment was omitted, but where the averment is made, and the evidence is preserved in the record, it must appear that the fact was proved, or the verdict cannot be sustained. *Lassen* v. *Mitchell*, 104.

10. So in an action by the vendor of a quantity of oats, against his vendee, for the neglect of the latter to receive the oats and pay for them, the plaintiff alleged that he was ready and willing to perform his part of the agreement, and there being no proof of such averment, a judgment in favor of the plaintiff was reversed. Ibid. 104.

11. In an action by a tenant against his landlord, where the landlord deprived the tenant of the use of exhaust steam from the engine of the landlord, under a lease giving the tenant the use of "steam power," where the plaintiff declares for injury resulting from being deprived of the use of the exhaust steam, which it was shown from the situation of the property under previous holdings he was entitled to, the *gravamen* of the action is the loss of the exhaust steam, not of motive power. *Thomas* v. *Wiggers*, 471.

12. *Of an original and a collateral promise.* In an action for goods alleged to have been sold and delivered by the plaintiff to the defendant, if it appears the goods were sold upon the personal promise of the defendant to pay for them, and the credit was given to him, he will be liable, but if the goods were sold to another, then the defendant will not, in such action, be liable, even though he had agreed to be responsible for the payment. *Tinney* v. *Wolston et al.*, 215.

13. *The rule where the matter is alleged in an inducement.* Every allegation in an inducement in a declaration, which is material, and not impertinent and foreign to the cause, and which cannot be rejected as surplusage, must be proved as laid. *Boynton* v. *Robb et al.*, 349.

14. So, in a declaration in debt on an injunction bond, the judgment which had been enjoined was alleged in the inducement to have been rendered for $259.75, and the record of the judgment given in evidence was for $249.75. *Nul tiel record* being pleaded, the variance was fatal. The recital of the judgment in the declaration was both pertinent and germane to the cause, and could not be rejected as surplusage. Ibid. 349.

15. *Proof of the day alleged, when not necessary.* In an action against a railroad company for injury to stock, the plaintiff is not held to proof that the injury was committed on the day laid in the declaration, but may prove it to have been done at any time within the statute of limitations. *Toledo, Peoria and Warsaw Railway Co.* v. *McClannon*, 238.

16. *Waiver by stipulation.* A variance between the allegations and proofs may be waived by stipulation. *Harbison* v. *Shook*, 142.

17. *Want of averment, when the evidence is sufficient, cured after verdict.* See JEOFAILS, 1.

18. *Allegations and proofs in an action for slander.* See SLANDER, 5, 6.

POSSESSION.

RIGHT OF POSSESSION — ENTRY BY FORCE.

Right of the owner of land in fee, who is entitled to possession, to enter by force. See TRESPASS, 2 to 8.

OF RESTORING POSSESSION.

Of which a party was deprived under a decree which was afterward set aside. See PRACTICE IN THE SUPREME COURT, 14.

PURCHASER UNDER FORECLOSURE.

When entitled to possession. See MORTGAGES, 17.

POWERS.

LEGISLATIVE POWERS. See SPECIAL ASSESSMENTS, 4.

POWERS OF TOWNS.

To prohibit cattle running at large. See TOWNS, 6.

POWERS OF A MAJORITY.

When a majority of a body of persons may act. See CORPORATIONS, 5 to 10.

PRACTICE.

WHEN A PARTY MUST PLEAD.

1. *Oyer granted does not extend time to plead.* When a defendant has been duly served with process, he must plead, or obtain further time, on the return of the writ. And when oyer is granted, it does not extend the time to plead; if further time is necessary, defendant should apply to the court and obtain it, or he will be in default. *Bowman* v. *Wood*, 203.

TIME AND MANNER OF MAKING CERTAIN OBJECTIONS.

2. *Motion to continue, for want of bill of particulars.* A motion for a continuance for the want of a bill of particulars under the declaration, comes too late after filing a plea in bar. To be availing, the motion must be made at the earliest practicable moment. If not sufficient, the court will rule the plaintiff to file a full and sufficient bill of particulars on a motion by the defendant. *McCarthey* v. *Mooney*, 300.

3. *Want of proper averments in a declaration.* In an action against a railroad company for killing stock, the objection that the declaration contains no averment of the necessity for the road being fenced at the place of the accident, should be presented by demurrer; the court is not required to instruct the jury, on the trial, that such an averment is necessary; and if the evidence shows a fence was necessary, the want of the averment will be cured after verdict. *Toledo, Peoria and Warsaw Railroad Co.* v. *McClannon*, 238.

4. *Motion to set aside default.* A motion to set aside a default should be made at the term, before final judgment is entered up; such a motion cannot be entertained at all, at a subsequent term after final judgment. *Cox* v. *Brackett*, 222; *Messervey* v. *Beckwith*, 452.

5. *Motion to supply a lost plea.* A motion to supply a plea alleged to have been lost from the files in a cause, comes too late at a term subsequent to that at which final judgment was rendered. *Cox* v. *Brackett*, 222.

PRACTICE.

TIME AND MANNER OF MAKING CERTAIN OBJECTIONS. *Continued.*

6. *Objection to parol evidence.* In a suit upon a note, if objection be made, it is probable the effect thereof would not be allowed to be so varied by parol proof as to show that a third party being under arrest on a *ca. sa.* the note was given merely as a security, that, if he were released, he should surrender himself at a future time, which he had done; but parol proof being admitted without objection, it was proper to consider it as competent evidence, because, if objection had been made, the defendant, perhaps, might have produced a cotemporaneous written agreement to the same purport. *Daggett* v. *Gage*, 465.

7. *Mis-joinder of parties defendant — must be pleaded in abatement.* See ABATEMENT, 3.

Non-liability of a part of the defendants, in an action on the case. See ABATEMENT, 4.

8. *Variance between a declaration and summons, as to amount of damages — time to object therefor.* See ABATEMENT, 5.

9. *At what time an objection may be taken to the jurisdiction in chancery, because there is a remedy at law.* See CHANCERY, 1 to 4.

10. *Of a defective prayer for relief in a bill in chancery — when and how taken advantage of.* See CHANCERY, 10.

WHEN THE SPECIFIC OBJECTION SHOULD BE MADE.

11. *To the admission of evidence.* If an objection to evidence which can be obviated by further proof, be not specifically made on the trial, it will not avail as a ground for reversing the judgment. *Stone* v. *The Great Western Oil Co.*, 86.

12. So, in a suit by a corporation, under a plea of *nul tiel corporation*, the plaintiff offered in evidence a paper purporting to be a license, such as is required by the general law under which the plaintiff claimed to have become incorporated, but such paper was without signature or seal, it being agreed by the parties that the proper clerk, whose testimony was waived, would swear that a license issued in the form of the copy thus offered. The defendant made no specific objection, but a general one only, to the paper. It was *held*, the specific objection should have been made, as the original might have been produced or its absence accounted for. Ibid. 86.

13. In a proceeding by *scire facias* upon a recognizance, an objection that the recognizance, when offered in evidence, does not appear to have been filed or made a matter of record in the Circuit Court, cannot be availing unless that specific objection is taken; a general objection to the recognizance will not suffice for that purpose. *O'Brien et al.* v. *The People*, 456.

14. *That an original paper was given in evidence, instead of a copy.* On the trial of an issue out of chancery, on a bill to impeach a will, the objection that the original affidavit of the proof of the execution of the will, on file in the County Court, was given in evidence, instead of a certified copy thereof, cannot be made for the first time on error. It should be made on

PRACTICE.

WHEN THE SPECIFIC OBJECTION SHOULD BE MADE. *Continued.*

the trial, and the objection should be specifically made, in order that the party may have the opportunity to remove it, if necessary. *Potter et al.* v. *Potter et al.*, 83.

DISMISSING A SUIT UPON STIPULATION.

15. *In the absence of the opposing counsel.* The better practice is, not to dismiss a suit in the Circuit Court in the absence of the plaintiff's counsel, upon motion of defendant's counsel based upon a stipulation to that effect, signed by the plaintiff in person; yet the appellate court will not set aside the action of the court below allowing such motion, merely for that reason, and in the absence of proof, that the stipulation was fraudulently or improperly obtained. *Henchey, Admx.*, v. *The City of Chicago*, 136.

BILL OF PARTICULARS.

16. *Motion to continue for want thereof.* See this title, 2.

PRACTICE IN THE COOK CIRCUIT COURT.

AFFIDAVIT OF MERITS.

Its requisites. On an appeal of a case of forcible detainer, in the Cook Circuit Court, *held*, that an affidavit of merits, which in substance conforms to the practice act applicable to the courts in Cook county, is sufficient, although it fails to give the title of the court or the term. Being properly entitled in the case, and regularly filed, it is readily seen to what cause the affidavit belongs, and, if required by the statute, will suffice. The statute requiring the affidavit, intended to prevent delay, and thereby promote justice, but not to cut off meritorious defenses to actions. It is held to be error to dismiss such an appeal on such an affidavit. *Wilborn* v. *Blackstone et al.*, 264.

PRACTICE IN THE SUPREME COURT.

WRIT OF ERROR AND APPEAL, ON THE SAME RECORD.

1. *Writ of error by one party and appeal by the other.* Under the practice in this State, a plaintiff may prosecute a writ of error, although the defendant has appealed from the same judgment, and one of these proceedings does not affect the other, and both may progress at the same time. *Harding* v. *Larkin et al.*, 414.

DELAY IN PROSECUTING A WRIT OF ERROR.

2. *Effect thereof, when the delay does not amount to a bar.* Where the wife of a mortgagor, who had joined in the mortgage and was a party to a judgment of foreclosure thereof, after her husband's death, and after a lapse of more than twenty years from the time of rendering the judgment, sues out a writ of error to reverse such judgment, the property in the mean time having frequently changed hands and risen in value, the case will not receive any indulgence at the hands of the court, beyond what is required by the strict rules of law. *Russell* v. *Brown et al.*, 183.

RIGHTS OF A DEFENDANT IN ERROR.

3. *Who may object to the character of the remedy resorted to.* Where a party sued out a writ of error to reverse a judgment in his favor, the

PRACTICE IN THE SUPREME COURT.

RIGHTS OF A DEFENDANT IN ERROR. *Continued.*

defendant objected that the action brought was not the proper remedy, but, as he made no such objection in the court below, and did not prosecute the writ of error, it was deemed unnecessary to decide whether the action was the proper one on the facts. *Watson* v. *Woolverton*, 241.

WHAT MAY BE ASSIGNED AS ERROR.

4. *Of a variance between a declaration and summons, as to amount of damages.* See ABATEMENT.

WHO MAY ASSIGN ERROR.

5. *Who may question the character of a verdict in ejectment.* Where a verdict in ejectment in favor of the plaintiff finds the fee to be in him, it cannot be taken advantage of on error, by the defendant, when he has no title, and pretends to none, even though the verdict may be incorrect in that respect. *McKibben et al.* v. *Newell*, 461.

6. *Judgment without service — who may object.* Where a *scire facias* on a recognizance was served upon the sureties only, and not upon the principal, the objection that judgment was taken against the principal as well as the sureties, cannot be made by the latter; it is such an error as the principal alone can complain of. *O'Brien et al. v. The People*, 456.

ERROR WILL NOT ALWAYS REVERSE.

7. *Of erroneous instructions.* The giving of an erroneous instruction will not be ground for reversal, if the verdict of the jury was just and proper. *Watson* v. *Woolverton*, 242.

8. Unless it can be seen that a party was, or may have been, injured by an erroneous instruction, the judgment will not be reversed for that cause. *Potter et al.* v. *Potter et al.*, 84.

9. Although an instruction may be erroneous, yet, if other instructions given so explain it that it could not mislead the jury, the judgment will not be reversed because it was given. *Yundt* v. *Hartrunft*, 9.

WHAT CHARACTER OF ERROR WILL REVERSE.

10. *Only judicial error.* It is judicial errors of which an appellate court takes cognizance. Clerical errors are left for correction to the court where the error occurs. So an appellate court will not reverse a judgment merely for a clerical error which it sees by the record can be amended, and from which no injury can arise to the plaintiff in error. *Russell* v. *Brown et al.*, 184.

OF CLERICAL ERRORS.

11. *What constitutes.* See CLERICAL ERRORS, 1; PROCESS, 2.

MODIFYING JUDGMENT OF A PREVIOUS TERM.

12. *Re-opening a case for new proofs.* The Supreme Court will not modify its decree of a former term, reversing the decree of the court below in a chancery cause, and dismissing the bill, so as to remand the cause to let in additional proofs. *Dunning* v. *Bathrick*, 425.

13. *Protection of intervening rights, acquired under a decision which was subsequently recalled.* Upon bill filed respecting the title to land, which was in possession of the defendant, a decree, was pronounced in the court

PRACTICE IN THE SUPREME COURT.

MODIFYING JUDGMENT OF A PREVIOUS TERM. *Continued.*

below in favor of the complainant, and directing the defendant to yield the possession to him; and, on appeal from that decree by the defendant, it was affirmed. Subsequently, the order affirming was set aside, and a decree entered, reversing the decree of the court below, and dismissing the bill. At a subsequent term, upon its being made known to the court that innocent parties had purchased the land from the complainant after the order affirming was made, and before it was set aside, the decree of reversal was modified, for the protection of those innocent parties, so as to dismiss the bill without prejudice. *Dunning* v. *Bathrick*, 425.

RESTITUTION OF POSSESSION.

14. *Of restoring a party to his possession, of which he was deprived under a judgment which was afterward set aside.* Under the order affirming, the court below executed its decree by putting the complainant in possession of the land; but this court finally reversed the decree below, and dismissed the bill, because it appeared neither party had any right, and both were seeking to defraud a third party out of the land, and refused to order restitution of the premises to the defendant, or to remand the cause with directions to the court below to enter such an order. Ibid. 426.

PRESUMPTIONS.

PRESUMPTIONS OF LAW AND FACT.

Presumption in support of a verdict. Where a declaration in trover alleges the property converted to have been personalty, and there was a verdict and judgment for plaintiff, and no bill of exceptions, *held*, that, in support of the verdict, the Supreme Court must presume the proof showed it was personalty. *Davis et al.* v. *Taylor*, 405.

Where a scroll is used to represent the seal, in a copy of a sealed instrument, presumption that the original was properly sealed. See SEALS, 1.

Indorsement of a note in blank — presumption as to the character of liability intended to be assumed. See GUARANTY, 1.

Presumption as to the time a blank indorsement was made. Same title, 2.

PROCESS.

SUMMONS IN CHANCERY.

1. *Its requisites.* A summons in chancery should correctly describe the parties to the suit. Describing the suit as being brought by two, only, when the bill was filed by those two and another, is not sufficient. *Richardson et al.* v. *Thompson et al.*, 202.

AMENDING A SUMMONS.

2 [illegible] *an amount of damages.* Where an *alias* summons in assumpsit, upon which service was [illegible] claimed a smaller amount of damages than was claimed in the *præcipe*, the original summons and the declaration, it was regarded a clerical error, which the court, from which the writ issued, would correct on motion, before or after judgment. *Messervey* v. *Beckwith*, 452.

PROCESS. *Continued.*

SERVICE OF PROCESS.

3. *What is sufficient.* It is sufficient service of a *scire facias* to foreclose a mortgage, where the defendants, husband and wife, indorse upon it their written acknowledgment of service of the writ, and pray the court to enter their appearance accordingly. *Russell* v. *Brown et al.*, 183.

4. *Proof thereof.* And the recital in the judgment, that it appeared to the court that the defendants had been duly served with process, is satisfactory proof that the defendants did make the indorsement. Ibid. 183.

5. *When the time is sufficient.* Where there are ten days, after excluding the day on which service is made, before the first day of the term to which a summons is returnable, *held*, that the service was in time and will support a judgment by default. *Bowman* v. *Wood*, 203.

The rule for computing time. See TIME.

RETURN UPON PROCESS.

6. *Its requisites.* A return upon a summons issued against two persons, of service "on the within named defendant," in the singular number, not giving the name of the defendant served, is insufficient, as it is impossible to tell which of the two defendants had been served. *Richardson et al.* v. *Thompson et al.*, 202.

RETURN OF "NOT FOUND."

7. *Recital in decree.* It is sufficient evidence that a summons was returned "not found," if it appears to have been so found in the decree; and that establishes the jurisdiction of the court over non-residents if the notice and publication are regular, and conform to the statute. *Campbell et al.* v. *McCahan et al.*, 45.

JUDGMENT WITHOUT SERVICE.

8. *Judgment against all, with service only upon part — who may object.* See PRACTICE IN THE SUPREME COURT, 6.

PROMISSORY NOTES.

NOTE GIVEN AS SECURITY.

1. *Defense to a note given as security for the performance of some act by another.* A party being under arrest on a *ca. sa.*, in order to procure him his temporary release another gave his promissory note, merely as security that the party arrested should surrender himself to the sheriff on a certain day. The time for the surrender was extended, by agreement of parties, and on the day last agreed upon the party arrested offered himself in custody to several deputies of the sheriff, who declined to receive him, and of this he gave notice to plaintiff's attorney. This was all he was required to do, and operated to discharge the maker of the note from any further liability thereon. *Daggett* v. *Gage*, 465.

WHEN PAYABLE AT A PARTICULAR PLACE.

2. *Rights and duties of the parties.* The holder of a promissory note which is payable at a particular place, is under no obligation to present the note for payment, where payable. *Wood & Co.* v. *Merchants' Saving, Loan and Trust Co.*, 267.

PROMISSORY NOTES.

WHEN PAYABLE AT A PARTICULAR PLACE. *Continued.*

3. The maker, in an action against him on such note, may, however, plead in bar of damages and costs, a readiness to pay at the time and place. *Wood & Co.* v. *Merchants' Saving, Loan and Trust Co.*, 267.

4. If the holder of the note is present at the time and place of payment, and the maker is there, and tenders the amount, and the holder refuses to receive it, this will be no bar to a recovery by suit, and unless the tender is kept good, by bringing the money into court, it will not even bar a recovery for damages and costs. Ibid. 267.

5. The making of a note payable at a particular place, as a bank, does not amount to an agreement, that the maker may make a deposit at such bank, of the amount of the note, and thus discharge his obligation, and the money so deposited to be at the risk of the holder of the note. Ibid. 267.

6. Nor would the bank at which such a note was made payable, have the right to pay it, or apply the money deposited in the bank by the maker, to its payment, except by the special direction of the maker and depositor, either verbally, or by check or draft or some other writing. Ibid. 267.

7. So, if the holder of such a note presents it at the bank where it is made payable, at the time it is due, and the maker then has money on deposit in the bank sufficient to pay the note, but the teller only certifies on the face of the note that it is "good," and the holder takes away the note without the money, this will not change the liability of the parties in any way, nor will the maker be released from his liability even though he should lose his deposits by the failure of the bank on the next day. Ibid. 267.

WHEN ENTITLED TO DAYS OF GRACE.

Under act of 1861. See DAYS OF GRACE.

"PROPERTY."

WHAT THE TERM INCLUDES.

As used in the sixty-second and sixty-fourth sections of the Criminal Code. See NEGOTIABLE INSTRUMENTS, 4.

PUBLICATION OF NOTICE.

AS TO NON-RESIDENT DEFENDANTS.

How long before suit brought, the affidavit of non-residence may be filed. See NON-RESIDENT DEFENDANTS, 4.

PURCHASERS.

PURCHASERS WITH NOTICE.

Sales on execution. Where land is sold on execution, on a day prior to that specified in the notice of the sale, no title will pass to the purchaser at the sale, or to any subsequent grantee, if they have notice of the irregularity. *King* v. *Cushman et al.*, 31.

PURCHASERS. *Continued.*

PURCHASER UNDER A JUDGMENT.

Not affected by a lease taken by the judgment debtor upon his own land, from one having no title, after the lien of the judgment attached. See LIEN, 3, 4.

PURCHASERS FROM A MORTGAGOR.

Subsequent to the mortgage — of their rights in respect to the mortgagee — and with each other. See MORTGAGES, 5 to 11.

PURCHASER OF STOLEN PROPERTY.

Of his title. See SALES, 6; NEGOTIABLE INSTRUMENTS, 1 to 4.

PURCHASER UNDER FORECLOSURE.

When entitled to possession. See MORTGAGES, 17.

PURCHASER SUBJECT TO MECHANICS' LIEN.

Liability to the holder of the lien. See LIEN, 7.

PURCHASE-MONEY.

WHEN IT MAY BE RECOVERED BACK.

On failure of the vendor of land to convey. See VENDOR AND PURCHASER, 1.

RAILROADS.

FENCING RAILROADS.

1. *Whether the necessity is obviated by an embankment.* The necessity of fencing a railroad at a given point is not obviated by there being an embankment at that place from twelve to twenty feet in height, it not appearing that the embankment was sufficient to prevent stock from getting upon the track. *Toledo, Peoria and Warsaw Railway Co.* v. *Sweeney*, 226.

2. And the necessity for a fence in such a case would be shown by proof that cattle had got upon the road. Ibid. 226.

RAPE.

OF THE RULE AS TO DAMAGES.

1. *In an action for an assault and battery, coupled with an attempt to commit rape.* Although a woman may suspect that the advances of a man are prompted by improper motives, and still willingly accompanies him, and refuses to yield to his wishes only from mercenary motives, these facts do not justify him in resorting to violence and threats to induce her consent. *Dickey* v. *McDonnell*, 62.

2. Neither could the previous violence be justified on the ground of ultimate assent to sexual intercourse. Ibid. 62.

3. If such ultimate assent should be freely given, and not induced by any previous violence, or threats, or fear, then such intercourse should not be made the basis of damages, but the right of action for the previous violence would remain. Ibid. 62.

4. If, however, the ultimate assent should not be freely given, but yielded only as a consequence of the preceding violence or force, then such sexual intercourse should be regarded as a part of the assault, and a ground of exemplary damages. Ibid. 62.

RECOGNIZANCE.

AT WHAT "TERM" THE PRINCIPAL SHOULD APPEAR.

1. Where a recognizance is conditioned for the appearance of the principal cognizor at the "next term" of the court, it must be understood to mean the next term at which criminal business can be transacted, and does not refer to a term which may happen to intervene, and which by law must be devoted exclusively to civil business. *The People* v. *O'Brien et al.*, 303.

AS TO THE CHARACTER OF OFFENSE NAMED.

2. The fact that the principal cognizor had been examined and committed on a charge of burglary, and the recognizance given to release him from that imprisonment provided for his appearance to answer the charge of larceny, cannot avail as a defense by the sureties. It matters not, in such case, whether the principal was examined or not, before the justice who committed him, upon one charge or another. *O'Brien et al.* v. *The People*, 456.

SCIRE FACIAS THEREON.

3. *What should be averred.* In such a proceeding, where the recognizance is conditioned for the appearance of the principal at a certain term of the court, "to answer to an indictment to be preferred against him for larceny, and to do and receive what shall, by the court, be then and there enjoined upon him, and shall not depart without leave," it is not necessary to aver and prove that an indictment was ever found, in order to hold the sureties liable. Ibid. 456.

4. It is not necessary that it should be alleged in a *scire facias* on a recognizance, that the principal cognizor was indicted by the grand jury, at the term of the court named in the recognizance. *The People* v. *O'Brien et al.*, 303.

PLEADING AND EVIDENCE.

Of the pleadings and proofs where there is a variance in the name of the principal, in the body of the recognizance and as signed by him. See PLEADING AND EVIDENCE, 1, 2.

Evidence under the general issue, in sci. fa. on recognizance. See same title, 3.

RECORD.

RECORD OF A JUDGMENT.

Cannot be contradicted by parol. See EVIDENCE, 7, 8, 9.

RECORDING ACT.

CURATIVE LAW OF 1822.

1. *Its effect upon deeds recorded prior to its passage, but not entitled to record.* Where two deeds made by a patentee to different persons, for the same piece of land, in October, 1818, and acknowledged in the State of New York, the first before a commissioner, on the 13th of March, 1819, and recorded at Edwardsville, the 3d of January, 1820, the latter in date acknowledged before a notary public, on the 14th day of October, 1818,

RECORDING ACT. CURATIVE LAW OF 1822. *Continued.*

the date of the deed, and again on the 29th of that month, before a commissioner, and was recorded on the 19th of January, 1819, both executed and acknowledged and recorded before the adoption of the curative act of December 30, 1822. *Held*, that, as neither deed was so acknowledged as to entitle it to record, the effect of that act was to record both at the same instant of time, and left the operation of the deeds, as at common law, and that the first executed passed the title to the land described in it, which was an undivided half of the tract. *Deininger et al.* v *McConnel*, 227.

RECORD OF DEEDS NOT ENTITLED TO RECORD.

2. *As notice — the act not retrospective.* A law not retrospective in terms, cannot be held to operate on previous transactions; so an act which declares that deeds not proved or acknowledged so as to entitle them to record, when spread on the record shall be notice to subsequent purchasers, was only intended to apply to deeds thereafter made; but had it been intended to operate on deeds previously made, the legislature have no power to alter the rights of grantees, or to transfer one man's land to another. A plaintiff in ejectment claiming in his declaration to be "sole seized," cannot recover an undivided half of the land. *Deininger et al.* v. *McConnel*, 227.

FROM WHAT TIME A DEED TAKES EFFECT, AS NOTICE.

3. *Whether a deed takes effect as notice from the time of filing for record — effect of misdescription in recording.* Under the recording act of 1833, a deed took effect as notice to subsequent purchasers and incumbrancers, from the time of filing it for record, and the grantee in the deed is none the less protected because of a recording of the deed with a misdescription of the premises. *Nattinger* v. *Ware*, 245.

4. *Whether that rule was changed by the act of* 1837. Nor was the act of 1833 repealed or changed in that regard by the act of July 31, 1837, so as to make the deed notice only from the date of its actual record. The object of the latter act was simply to authorize the recording of all instruments in writing relating to real estate, although not acknowledged or proven in conformity with the laws of the State, and to make such instruments as effectual, in the way of notice to subsequent purchasers, as if they had been properly acknowledged. Ibid. 246.

5. *Construction of the act of* 1837. Nor, it seems, is the act of 1837 to be given such a construction as to make the class of instruments therein provided for, effectual in the way of notice only from the time of their actual record. When that law was passed a deed was considered as legally recorded at the moment it was filed for record, and there is no doubt the term "recording" was used in this act in that sense. Ibid. 246.

ITS APPLICATION TO A PRIOR MORTGAGEE.

Whether the recording of subsequent conveyances from a mortgagor will operate as notice to a prior mortgagee. See MORTGAGES, 8.

RECOUPMENT.

MONEY PAID UNDER DURESS. See PAYMENT, 1.

RECOUPMENT. *Continued.*

IN AN ACTION FOR THE PRICE OF WORK.

When the defendant may recoup damages for breach of contract in doing the work. See CONTRACTS, 10, 11, 12.

REDEMPTION.

UNDER FORECLOSURE BY SCIRE FACIAS.

1. *What right of redemption exists.* A foreclosure by *scire facias* cuts off the right of redemption from the mortgage on the part of subsequent purchasers or incumbrancers. *Matteson* v. *Thomas et al.*, 111.

2. In such cases there is, after the sheriff's sale, only the statutory right of redemption, as in other sheriff's sales. Ibid. 111.

REDEMPTION BY A MORTGAGOR.

When the right exists. See MORTGAGES, 3.

REMEDY.

MISNOMER OF PRINCIPAL IN RECOGNIZANCE.

Of the remedy therefor. See PLEADING AND EVIDENCE, 1, 2.

REFORMING AN INSTRUMENT.

In what proceeding it may be done. See MORTGAGES, 22.

FAILURE TO EXECUTE WORK ACCORDING TO CONTRACT.

Rights and remedies of the parties. See CONTRACTS, 8 to 12.

FOR INJURY FROM NEGLIGENCE OF DEFENDANT.

What action will lie therefor. See CASE, 1.

CITIES — GRADING AND DRAINING STREETS.

Remedy of a party whose property is injured in consequence of the manner in which a city grades and drains its streets. See CORPORATIONS, 17.

ENTRY UPON LAND BY FORCE.

Of the remedy therefor. See TRESPASS, 2 to 8.

ORGANIZATION OF A CORPORATION.

In what form of proceeding it may be questioned. See CORPORATIONS, 3, 4.

RENT.

WHO LIABLE TO PAY.

Effect of a leave taken by a judgment debtor on his own land, as to a purchaser under the judgment. See LIEN, 3, 4.

RENTS AND PROFITS.

IN DOWER ESTATE.

The second husband entitled to them. See DOWER, 2.

MORTGAGEE IN POSSESSION.

How adjusted as between two mortgagees. See MORTGAGES, 14.

REPLEVIN.

ACTION ON THE BOND.

What damages may be recovered, and herein, of an assessment of damages in the action of replevin. See EVIDENCE, 23 to 26.

RESCISSION OF CONTRACTS. See CONTRACTS, 17. SALES, 1, 2.

RESIDENCE.

HOW GAINED OR LOST. See PAUPERS.

RESPONDEAT SUPERIOR.

WORK DONE BY CONTRACT FOR A CITY.

Application of the principle. See CORPORATIONS, 18, 19.

RETURN UPON PROCESS. See PROCESS, 6, 7.

SALES.

SALES, FOR FUTURE DELIVERY.

1. *The seller must be ready to deliver.* On a sale of grain, to be delivered on any day within a specified time that the same might be requested, and to be paid for on delivery, the seller is as much bound to deliver the grain as the purchaser is to pay for it when delivered. And in an action by the seller against the buyer, for the alleged neglect and refusal of the latter to receive and pay for the grain, the plaintiff must show a readiness to deliver. No kind of an offer to deliver can dispense with a readiness to perform. *Lassen* v. *Mitchell*, 104, 105.

2. If it appear that the seller owns the grain, a willingness to deliver it may be inferred, unless the contrary is shown. But the mere expression of a willingness to perform does not prove he was able to do so; and unless it appear the seller owned the grain he cannot recover. Ibid. 105.

QUANTITY TO BE ASCERTAINED.

3. *When necessary to complete the sale and pass the title.* Where a party sold a quantity of oats, and delivered them, to be weighed and then paid for, no time being fixed when they were to be weighed, the facts showing that a credit was to be given, the sale became complete upon such delivery, it not being essential to pass the title, that the oats should first be weighed to ascertain the quantity. *Bell* v. *Farrar*, 400.

WHEN THE SELLER RESCINDS FOR FRAUD.

4. *He must restore the purchaser to his former condition.* Where a seller elects to rescind a sale of goods on account of fraud on the part of the buyer, the seller must restore, or offer to restore, the purchaser what he has paid on the goods at the time of the purchase. So, on a sale where fraud has been practiced by the purchaser, entitling the seller to rescind, and a note has been given for the price of the goods, the seller must offer to return the note before he can rescind and recover the goods. *Bowen et al.* v. *Schuler*, 193.

SELLER MAY ELECT TO AFFIRM OR RESCIND.

5. In such a case, the seller has the option to elect to affirm the sale, and might, no doubt, retain the money paid on the purchase and sue and recover damage for the deceit, or sue on the contract, or he may rescind and recover back the property, but must first place the purchaser in *statu quo*, or at least make the offer. If rescinded, it must be of the whole contract and not of a part. To authorize it would be to permit the vendor to make a new contract. Ibid. 193.

SALES. *Continued.*

SALE OF STOLEN PROPERTY.

6. *Title thereto in the hands of an innocent purchaser.* A purchaser of a chattel can acquire no better title than the vendor had. *Jones* v. *Nellis*, 482.

7. *Exception as to money and negotiable paper.* See NEGOTIABLE INSTRUMENTS.

EXECUTION SALES.

8. *Sale of a mortgagee's interest in land, under execution—what will pass thereby.* Under the statute which declares that all interest of a judgment debtor, as mortgagee or mortgagor of land, shall be subject to sale on execution, no lien attaches to the notes secured by the mortgage held by such mortgagee, nor will the notes pass to the purchaser under a sale of the mortgagee's interest in the premises on execution. *King* v. *Cushman et al.*, 31.

9. *Whether title passes by a sale on a day different from that fixed in the notice.* Where land is sold on execution, on a day prior to that specified in the notice of the sale, no title will pass to the purchaser at the sale, or to any subsequent grantee, if they have notice of the irregularity. Ibid. 31.

10. *Execution liens, when there are several executions—order of the liens on personal property, and duty of the sheriff in that regard.* See LIENS, 8 to 12.

SALE OF GROWING CROPS.

When within the statute of frauds. See STATUTE OF FRAUDS, 2.

OF FRAUD ON THE PART OF THE BUYER.

What constitutes. See FRAUD, 1.

SCHOOL TAXES.

WHAT LANDS SUBJECT THERETO. See TAXES, 1.

SCIRE FACIAS.

FORECLOSURE BY SCIRE FACIAS. See MORTGAGES, 18 to 22.

SCIRE FACIAS ON RECOGNIZANCE.

Its requisites. See RECOGNIZANCE, 3, 4.

SEALS.

COPY OF A SEAL.

What is sufficient. Where a certified copy of a deed is produced as evidence and the word "seal," surrounded by a scroll, is found where a seal is usually placed, as the recorder in making a copy never attaches a seal of wafer or wax, the presumption will be indulged, that the original was properly sealed. *Deininger et al.* v. *McConnel*, 228.

SERVICE OF PROCESS. See PROCESS, 3, 4, 5.

SHIPPER.

OF HIS DUTY TOWARD THE CARRIER.

How soon a shipper should remove live stock from a railroad car, after the carrier has omitted to take them. See CARRIERS, 1, 2.

SLANDER.

CHARGE OF PERJURY AND FALSE SWEARING.

1. *What will support an action therefor.* At the common law it was necessary, to sustain an action for slander for being charged with perjury, that the oath to which the charge related should have been material to some issue in a judicial proceeding, and must have been false, but under our statute it is made slander to untruly charge another with swearing falsely, or having sworn falsely, and it is unnecessary to aver or prove that the oath charged to be false was material, or that it was in a judicial proceeding. *Harbison* v. *Shook*, 141.

EVIDENCE OF GOOD CHARACTER.

2. *When admissible.* Until the character of plaintiff, in action for the defamation, is attacked, he has no right to introduce evidence of his good character. But, when defendant files a plea of justification, and attempts to establish its truth, that is such an attack upon plaintiff's character as authorizes him to introduce evidence of good character. Ibid. 141.

MATTERS IN JUSTIFICATION OR MITIGATION.

3. It matters not, in this action, whether the defendant commenced the conversation in which he used the slanderous words, or that he was angry at the time, unless it was produced by the act of the plaintiff; these acts cannot be considered as a justification, or in mitigation. Ibid. 141.

MALICE IS IMPLIED.

4. Express malice need not be proved, as the law implies malice, unless the charge is true. Ibid. 141.

ALLEGATIONS AND PROOFS.

5. *On the part of the plaintiff.* When the averment in the language was that "Old Dykeman Shook swore, etc.," and the evidence was that defendant said that "Old man Shook" swore, etc., — *held*, not to be a variance, as the substance of the charge was proved. Ibid. 141.

6. *On the part of the defendant — under a plea of justification.* Under a plea of justification, that defendant did wickedly, willfully and corruptly swear fasely in a matter in a certain suit named, and thus committed perjury, defendant must sustain his plea, by proof, that plaintiff did commit perjury, as alleged in the plea, and this, too, although the action be under the statute. The proof must be as broad as the allegation in the plea. Ibid. 141.

DAMAGES — HOW ESTIMATED.

7. In this action, exemplary damages may be given; and in fixing the damages the jury may take into consideration the pecuniary circumstances and standing of the defendant, as well as the character of the plaintiff, when it has been attacked; and they may also consider the fact that the slander was reiterated at different times and to different persons, and that the defendant endeavored to have the plaintiff indicted. Ibid. 141.

8. *Plea of justification — when an aggravation.* Where a party files a plea of justification, when he he has no intention or expectation of proving its truth, it amounts to a republication of the slander, and is an aggravation which the jury may consider in forming their verdict. Ibid. 141.

SPECIAL ASSESSMENTS.

STREET RAILWAYS.

1. *Benefits must be assessed upon all who are directly benefited — principle of the Larned case applied.* The rule adopted in the case of the *City of Chicago* v. *Larned*, 34 Ill. 267, that the constitutional provision, requiring equality of taxation, applied as well to special assessments for public improvements, as to any other form of taxation, extends to the mode of distributing the burden among those who are to be benefited; so, that, when the burden is to be thus imposed, it must be imposed upon all who are directly benefited by the proposed improvement, in the ratio of benefits, since it would be a violation of the equality sought to be secured by the Constitution to exempt a portion of those benefited, and thereby increase the burden upon the remainder. *City of Chicago* v. *Baer et al.*, 306.

2. Or, referring the right to make these special assessments, rather to the right of eminent domain than to the taxing power, as was done in the *Larned case*, and permitting the just compensation required by the Constitution to be made in benefits, still the assessments must be made in the *ratio* of advantages or benefits, that is, they should be imposed equally upon all property equally benefited, or they will be unlawful. Ibid. 306.

3. A city ordinance which seeks to exempt a portion of the property to be benefited from paying for its portion of street improvements is not only in violation of the constitutional provision securing equality of taxation, but also of that other principle of constitutional law, that the property of one person cannot be taken for the use of another, either with or without compensation. Ibid. 306.

4. Nor can the legislature confer upon a city the power to make a valid contract with the owner of any interest in property which should contribute toward the expense of such improvements, which shall have the effect to exempt him from his portion of the burden. Ibid. 306.

5. An assessment for the improvement of a street must be laid upon all property that is substantially and directly benefited. This necessarily excludes all personal property of a movable character. But every estate, in land, adjacent to the street, whether in fee, for life or for a term of years, may be increased in value by the improvement, and would be subject to the assessment. Ibid. 306.

6. A street railway company occupying a portion of a street with their track and in the use thereof, under a charter, and a contract with the city authorities, have a franchise and right of occupancy which is a property of a character to be substantially benefited by the paving of such street; and in proportion as it is thus benefited it should contribute its share to the cost of the improvement, in common with the other property upon the street. Ibid. 306.

SPECIFIC PERFORMANCE. See CHANCERY, 20 to 31.

STATE'S ATTORNEY.

CONVICTION FEES. See FEES, 1.

STATUTES.

STATUTES CONSTRUED.

1. *The act of* 1861, *allowing parties to be called as witnesses,* construed in *Brown* v. *Hurd,* 121. See WITNESS, 6, 7.

2. *Act of* 1837, *providing for the recording of deeds not entitled to record as to the time from which such deeds will operate as notice.* Construed in *Nattinger* v. *Ware,* 246. See RECORDING ACT, 5.

3. *The act of* 1822, *making the record of deeds not entitled to record, effective as notice, is not to have a retrospective operation.* Construed in *Deininger et al.* v. *McConnel,* 228. See RECORDING ACT, 1, 2.

4. *Sixty-second and sixty-fourth sections of the Criminal Code, as to the title to negotiable paper which has been stolen, but is in the hands of a bona fide holder,* construed in *Jones* v. *Nellis,* 482. See NEGOTIABLE INSTRUMENTS, 4.

5. *Statute of "Wills," as to the recovery of costs against an estate,* construed in *Rosenthal, Admr.,* v. *Magee,* 370. See COSTS, 1, 2.

6. *Act of* 1861, *in regard to the liability of towns for building bridges.* Construed in *Commissioners of Highways* v. *Baumgarten,* 255. See TOWNS, 2, 3, 4.

7. *Act of* 1861, *allowing days of grace upon promissory notes,* construed in *Reese* v. *Mitchell,* 365. See DAYS OF GRACE, 3.

STATUTE OF FRAUDS.

PERFORMANCE WITHIN A YEAR.

1. *What constitutes such performance.* At the time of a sale under a decree of foreclosure obtained by a prior mortgagee, of two parcels of land, such mortgagee and a junior mortgagee of the same premises, who was a party to the proceeding for foreclosure, made a parol agreement that the prior mortgagee should bid the amount then due him on one of the parcels of land, and, if the sale should not be redeemed from, the junior mortgagee was to have the other parcel discharged from the lien which had been reserved in the decree in favor of the prior mortgagee for a portion of his debt which was not yet due, the junior mortgagee to pay the costs of the suit for foreclosure, and one-half of the solicitor's fee therein. Within a year from the time this agreement was made, the sale took place, the prior mortgagee bidding the whole amount due him upon one parcel, as agreed, and the junior mortgagee becoming the purchaser of the other parcel for the costs. It was *held,* as between the parties, this was a consummation of the agreement within a year, and therefore it was not within the statute of frauds, notwithstanding it might be defeated by a redemption thereafter to be had. *Bennett et al.* v. *Matson,* 332.

SALE OF GROWING CROPS.

2. *When within the statute.* Growing crops, until matured, constitute such an interest in real estate, as to bring them within the statute of frauds, and they will not pass by a sale by the owner of the soil, unless it is evidenced by a memorandum in writing. *Powell* v. *Rich,* 466.

STATUTE OF FRAUDS. *Continued.*
PAROL PROMISE TO CONVEY LAND.
3. *By a parent to his child — what will take it out of the statute.* See CHANCERY, 30, 31.

STEPHENSON COUNTY.
SUPPORT OF PAUPERS THEREIN.
Liability of the towns. See PAUPERS, 1.

STOCK RUNNING AT LARGE.
TOWNS MAY PROHIBIT. See TOWNS, 6.
TRESPASS BY CATTLE RUNNING AT LARGE. See TRESPASS, 1.

STOLEN PROPERTY.
IN THE HANDS OF AN INNOCENT PURCHASER.
Of the title thereto. See SALES, 6; NEGOTIABLE INSTRUMENTS, 1 to 4.

STREET RAILWAYS.
LIABLE TO SPECIAL ASSESSMENTS. See SPECIAL ASSESSMENTS, 6.

SUBROGATION.
PURCHASER FROM A MORTGAGOR.
When subrogated to the rights of the mortgagee. See MORTGAGES, 5.

SUBSCRIPTION.
SUBSCRIPTION TO STOCK.
1. *Calls thereon — when legally made.* Where the contract of subscription to the stock of a company which is to be incorporated under the general law, provides for the payment of calls thereon "in conformity with the general incorporating law of the State, and the by-laws of the company made under the same," the amount for which a call may be made will not necessarily be controlled by the general law, if the by-laws prescribe a different rule in that regard. *Stone* v. *The Great Western Oil Co.*, 86.

2. *When the party upon whom a call is made is estopped from questioning its regularity.* Even where a call on such a subscription is improperly made for the whole amount, the party upon whom the call is made ought to be estopped from objecting to the irregularity by the fact that he was a director in the company, and co-operated with the other directors in making the order, and also participated in a prior meeting of the stockholders at which the directors were instructed to make the order for such call. Ibid. 86.

3. *Of the consideration, and whether there is a promise.* A subscription to the stock of a company in contemplation of its becoming incorporated, to accomplish any legitimate object, is a valid contract between the parties, supported by a sufficient consideration. Ibid. 86.

SURETIES.

ON OFFICIAL BONDS.

Liability where there have been two bonds given for different terms of office. An execution was delivered to a constable, but before he had taken any steps for its collection his term of office expired. He was re-elected and gave different securities on his new official bond, from those on his first bond. During his second term of office he made a levy of the execution and collected the money. Failing to pay it over, the securities on the first bond were held liable — not those upon the second bond. *McCormick* v. *Moss et al.*, 352.

SWORN ANSWERS IN CHANCERY. See CHANCERY, 12.

TAXES.

SCHOOL TAX.

1. *What lands liable thereto.* Under the act of February 22, 1861, no tax can be levied, either for the erecting or repair of school-houses, or for the support of schools, on lands distant more than three miles from the location of the house or school, and a judgment against lands for non-payment of a tax levied in violation of that act, is erroneous. *Campbell et al.* v. *The State*, 454.

JUDGMENT FOR TAXES.

2. *When it cannot be rendered.* A judgment cannot be rendered for taxes, a part of which are shown by the record to be illegal. Ibid. 454.

3. So, where a tax is levied upon land for the support of three schools, and for the support of one of the schools the land is not liable to be taxed, unless the tax is so levied as to show to what portion the land is legally liable, an application for judgment against the land for its non-payment must be refused. Ibid. 454.

TENDER.

WHEN IT MUST BE KEPT GOOD.

1. A tender of money by a party who has broken his covenant, to avail him in an action brought for such breach, must be kept good by bringing the money into court. *Nelson* v. *Oren*, 19.

IN CHANCERY.

2. *Money need not be brought into court.* In chancery it is not required that a tender shall be kept good by bringing the money into court. *Board of Supervisors* v. *Henneberry*, 180.

TIME.

SOMPUTATION OF TIME.

The rule for computing time is, where an act is to be performed within a specified period, after a day named, to exclude that day, and to include the day named for the performance. In cases of service, the day it was made should be excluded, and the return day may be included. *Bowman* v. *Wood*, 203.

TITLE.

TITLE TO STOLEN PROPERTY.

In the hands of an innocent purchaser. See SALES, 1.

Application of the rule in case of money or negotiable paper. See NEGOTIABLE INSTRUMENTS, 1 to 4.

TOWNS.

LIABILITY TO BUILD BRIDGES.

1. Under the township organization law, it is the duty of a town to build bridges over streams within its limits. *Town of Harlem* v. *Emmert*, 320.

2. *Application of the act of* 1861. Section 18 of the 17th article of the act of 1861, concerning township organization, prescribing a mode by which the liability of towns for building bridges may be enforced, did not design to create a liability in that regard where none existed before its passage. *Commissioners of Highways* v. *Baumgarten*, 255.

3. Before the passage of that act, as to adjoining towns, there was a mutual liability for the building of bridges over streams dividing such towns, or on the line dividing them, and to such towns the 18th section cited applies, when it declares that the bridges shall be built at the equal expense of said towns without reference to the town lines. Ibid. 255.

4. But, where one of two adjoining towns had been relieved of the burden of building bridges, by reason of that subject being committed to other authorities, the other town, which would otherwise have been liable, was also thereby exempted from liability, and to such towns and bridges the act of 1861 does not apply. Ibid. 255.

5. *Exclusive liability of the city of Freeport for building bridges within its limits.* The charter of the city of Freeport gave to the city authorities exclusive jurisdiction over the subject of bridges within its limits, and thereby relieved the town in which the city is located, from that burden; and a bridge being built over the Pecatonica river, at a point where the whole course and width of the river was within the chartered limits of the city, it was *held*, that the adjoining town on the opposite side of the stream, the boundary line of which was the bank of the river on that side, was also exempted from liability to contribute toward the expense of the bridge; and being thus exempted when the act of 1861 was passed, it was not embraced in its provisions. Ibid. 255.

PROHIBITING CATTLE RUNNING AT LARGE.

6. *Power of towns to prohibit cattle running at large.* The statute authorizes every town to prohibit the running at large of cattle, horses, etc. *Ames et al.* v. *Carlton*, 261.

OBSTRUCTING NAVIGABLE STREAMS.

By improper construction of bridges — liability of towns therefor. See NAVIGABLE STREAMS, 1.

TRESPASS.

BY CATTLE RUNNING AT LARGE.

1. *Liability therefor.* Under the operation of a town ordinance prohibiting cattle from running at large, the entry of cattle running at large upon the premises of a stranger is a trespass, as at common law. *Ames et al.* v. *Carlton*, 261.

ENTRY UPON LAND BY FORCE.

2. *Right of owner in fee of land, who is entitled to possession, to enter by force.* The owner of real estate has a right to enter upon and enjoy his own property, if he can do so without a forcible disturbance of the possession of another. *Reeder et al.* v. *Purdy et ux.*, 279.

3. But, though the owner in fee be wrongfully kept out of possession, he cannot, in this State, be permitted to enter against the will of the occupant. The common law right to enter, and to use all necessary force to obtain possession from him who may wrongfully withhold it, has been taken away by our statute of forcible entry and detainer. Ibid. 279.

4. That statute, not in terms, but by necessary construction, forbids a forcible entry, even by the owner, upon the actual possession of another. Ibid. 279.

5. Nor is the remedy afforded by the statute — an action for the recovery of the possession — the only remedy given to the party upon whom a forcible entry may be made by the owner. Under the statute, such an entry is unlawful; and being unlawful it is a trespass, and an action for the trespass will lie. Ibid. 279.

6. Such an entry being forbidden by the statute, which has taken away the common law right of forcible entry by the owner, it must be held illegal in all forms of action. Ibid. 279.

7. And any entry is forcible within the meaning of this law, that is made against the will of the occupant. Ibid. 279.

8. A landlord, however, has the right to enter upon the possession of his tenant for certain purposes, as to demand rent, or to make necessary repairs, and the action of trespass *quare clausum* by the tenant against the landlord, even for the recovery of nominal damages, is confined to those cases where an action of forcible entry and detainer will lie under our statute. Ibid. 279.

TROVER.

FOR WHAT CHARACTER OF PROPERTY IT WILL LIE.

For a house. Where a house, as between the parties, was personal property, trover will lie for its wrongful conversion. As, where it was so erected as to be personalty, or where the defendant is estopped by his own acts from denying that it is such. *Davis et al.* v. *Taylor*, 405.

TRUSTS AND TRUSTEES.

BUYING IN AN OUTSTANDING TITLE.

By a trustee. A court of equity, independent of any agreement, will consider money advanced by a trustee, to purchase in an outstanding title,

TRUSTS AND TRUSTEES.

BUYING IN AN OUTSTANDING TITLE. *Continued.*

as an advance for the benefit of his *cestui que trust*, and not for his own use, giving him a lien on the property, until he is re-imbursed the advancement. *King* v. *Cushman et al.*, 31.

CONVEYANCES IN TRUST.

Effect of naming the cestui que trust in the premises of the deed, together with the trustee, in passing the legal title to land. See CONVEYANCES, 4.

CONSTRUCTION OF A TRUST-DEED.

As to the time of the maturity of notes secured by it. See CONTRACTS, 4.

WHEN A TRUST IS CREATED. See LIEN, 7.

OF DOWER IN A TRUST ESTATE. See DOWER, 1.

USAGE.

GIVING DAYS OF GRACE.

Upon promissory notes — not binding. See DAYS OF GRACE, 2

USURY.

WHEN AVAILING AS A DEFENSE.

Where a party loans money to another at a usurious rate of interest, for the purpose of enabling the borrower to pay another debt which he owes, and for greater security to the lender, the note and mortgage given to secure the prior debt are transferred to him, he cannot evade the effect of the usury laws upon the contract of loan which is tainted with usury, although the securities which were thus transferred to him were free from such taint. *King* v. *Cushman et al.*, 31.

VARIANCE.

BETWEEN DECLARATION AND SUMMONS.

As to amount of damages — when and where taken advantage of. See ABATEMENT, 5.

ALLEGATIONS AND PROOFS. See PLEADING AND EVIDENCE, 8 to 16; SLANDER, 5, 6.

VARIANCE IN NAMES. See NAMES, 1, 2.

VENDOR AND PURCHASER.

RECOVERY OF PURCHASE-MONEY BACK.

On failure of the vendor to convey. Where a party receives the purchase-money for land, and agrees to convey it to the purchaser, but no time is specified, he is entitled to a reasonable time within which to make the conveyance, and the purchaser in such a case should demand a deed, and the vendor should refuse or neglect to comply with the demand, before the purchaser can recover back the purchase-money paid by him as the consideration for the conveyance. *Kime* v. *Kime*, 397.

VERDICT.

PRESUMPTION IN SUPPORT THEREOF. See PRESUMPTIONS, 1.

VERDICT. *Continued.*

WANT OF AVERMENT CURED AFTER VERDICT. **See JEOFAILS, 1.**

MISJOINDER OF PARTIES DEFENDANT.

Cured after verdict. See ABATEMENT, 3.

VOID.

WANT OF JURISDICTION OF THE PERSON.

Decree void. A decree in chancery rendered against a defendant, of whose person the court had not obtained jurisdiction, is void, and all acts performed under it are void, and all rights claimed under it are of the same character. *Campbell et al.* v. *McCahan et al.*, 46.

WAIVER.

ALLEGATIONS AND PROOFS.

A variance between the allegations and proofs may be waived by stipulation. *Harbison* v. *Shook*, 142.

MISNOMER.

When waived by pleading. See MISNOMER, 1.

WAIVER OF PERFORMANCE OF CONTRACT.

Authority of drainage commissioner to waive the performance of a contract with the county, in respect to swamp lands. See CHANCERY, 29.

WAREHOUSEMEN.

ASSIGNMENT BY A WAREHOUSEMAN.

1. *Rights of the assignees in respect to the grain on storage.* Where warehousemen, in failing circumstances, made an assignment for the benefit of creditors, and there was a large amount of grain on storage, the assignees take only the interest of the assignors. Having been informed by the assignor that the corn was on storage, and the assignees having agreed to deliver the corn to the several owners, when they should present their receipts, the assignees can have no pretense of a claim to any portion of such grain. *Dole et al.* v. *Olmstead et al.*, 344.

LOSS IN THE GRAIN ON STORAGE.

2. *How apportioned among the owners.* Where in such a case, the grain when measured out, falls short, when stored by the consent of the owners, in one common mass, the court should average the loss *pro rata* among all of the owners. And when the assignees had sold the corn, each owner should be compensated in money in due proportion to the amount which he placed in store, and a decree against the assignees in favor of each owner for their several sums due them is proper. Ibid. 344.

CONVERSION OF THE GRAIN STORED.

3. *Liability of warehousemen.* When assignees become warehousemen, and convert grain in store with them, received of their assignors who were warehousemen, and appropriate the money to their own use, they are at least liable to account to the owners for the amount received, with interest from the date of the sale. Ibid. 344.

WARRANTY.

In an insurance policy.

Whether certain words constitute a warranty as to future use of the property insured, or a mere affirmation of its present condition. See INSURANCE, 1, 2.

WILLS.

Impeaching a will in chancery.

1. *Evidence admissible on the trial of an issue out of chancery.* On the trial of an issue of fact under a bill to impeach a will, it is not error to permit defendant to read the original affidavit filed on the proof of the will in the probate court. And an objection that the original and not a copy of the affidavit was read to the jury comes too late when made for the first time in this court. *Potter et al.* v. *Potter et al.*, 80

2. *Evidence sufficient to establish a will.* Where the evidence shows that a will was reduced to writing under the dictation of the testator, was signed by him as written at his request, and he made his mark, and is attested by two witnesses as required by the statute, by signing their names in his presence, and they swear that they believe he was of sound mind and memory at the time, and that the will was read to testator before it was executed, *held*, that it is a compliance with the statute, and sustains the verdict of a jury finding in favor of the validity of the will. Ibid. 80.

3. *Burden of proof.* On the trial of an issue in such a case, the burden of proof is on the party affirming the execution and validity of the will. Ibid. 84.

WITNESS.

Competency.

1. *Interest.* Where one who claims to have purchased goods, sold them to another, in a suit involving the question of title between the first vendor and the last purchaser, the former claiming title upon the ground that his sale had not been consummated so as to pass the title, the intervening purchaser is a competent witness on behalf of his vendee. His interest is equally balanced between the parties. *Bell* v. *Farrar*, 400.

2. *Whether one partner may testify against a copartner.* Where a member of a firm has taken, by agreement with his copartners, all the partnership debts, and assumed all the partnership liabilities, he is a competent witness in behalf of a creditor of the firm in a suit against himself and other persons sued as his copartners, to prove, under an issue involving that question, that his co-defendants were liable with him. This rule was laid down in *Bell* v. *Thompson*, 34 Ill. 529, it being considered that his ultimate liability for the entire debt, relieved the witness of any disqualifying interest in the result of the suit *Brown* v. *Hurd et al.*, 121.

3. But, if the effect of his testimony is to transfer a portion of his own admitted liability to his co-defendants against whom he is called to testify,

WITNESS. COMPETENCY. *Continued.*

and against whom no liability is shown except by the aid of his testimony, then he would be incompetent, because he would be swearing in his own interest. *Brown* v. *Hurd et al.*, 121.

4. The interest of the witness thus situated, to fix the liability of his co-defendants to contribution, is not balanced by the consideration, that, by testifying in their favor, he might defeat a recovery in the present action, under the rule, that, in a suit against several, a recovery must be had against all or none; because, his own liability being admitted, should he go clear of the present action upon the ground his co-defendants were not liable, it would be with the certainty that the entire debt would fall upon him. Ibid. 121.

5. *Former decisions.* The cases of *Crook* v. *Taylor*, 12 Ill. 355, and *Hurd* v. *Brown*, 25 id. 616, are in conflict as regards the rule on this subject. But the rule laid down in the latter case is considered the better rule, and is in harmony with *Bell* v. *Thompson, supra.* Ibid. 121.

6. *Effect of the act of* 1861, *allowing parties to be called as witnesses.* Nor is the rule above announced, as to competency, at all affected by the act of 1861, allowing parties to be called as witnesses. The object of that act was to remove the common law disqualification arising from being a party to the record, and to authorize one party to call the other to testify against his own interest. Ibid. 121.

7. But it was never intended to remove the common law disqualification arising from the interest of the witness in the result of the suit, when called to testify in behalf of that interest and without the consent of the person against whom he might be called. Ibid. 121.

CREDIBILITY OF A WITNESS.

8. *Where he has sworn falsely as to some particulars.* When a witness has knowingly and corruptly testified falsely to a material fact, the jury are at liberty to disregard all of his evidence, unless it is sustained by corroborating testimony; but they are not authorized to reject such portions as are thus corroborated, because the witness may have testified falsely in reference to other facts. *Yundt* v. *Hartrunft*, 9.

9. The mere fact that a witness has sworn falsely on a material point, will not authorize a jury to reject his entire testimony. It is not only necessary that a witness should swear falsely, but his testimony must be knowingly or corruptly false, before a jury are at liberty to disregard it as a matter of law. *Chittenden* v. *Evans*, 251.

10. Or, a witness may even corruptly swear falsely as to a material fact; yet, if other portions of his evidence are properly corroborated, by circumstances indicating the truth of such portions, it would not necessarily follow that all of his testimony should be disregarded. Ibid. 251.

WORDS.

"MORE OR LESS."

Their meaning, in a contract to deliver so many cattle, "more or less." See CONTRACTS, 56.

WORDS. *Continued.*

"PROPERTY."

Meaning of the term, as used in the sixty-second and sixty-fourth sections of the Criminal Code — whether it embraces negotiable paper. See NEGOTIABLE INSTRUMENTS, 4.

WRIT OF ERROR.

DELAY IN PROSECUTING.

Effect thereof, when it does not amount to a bar. See PRACTICE IN THE SUPREME COURT, 2.

WRIT OF ERROR AND APPEAL.

BOTH ALLOWABLE AT THE SAME TIME.

By the respective parties. See PRACTICE IN THE SUPREME COURT, 1.